

RNM ALERT

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U.N. Marwah

Dear Readers,

I hope all our readers had a colorful and fun filled Holi celebration.

The past month had a whole flurry of government notifications and amendments, with the general elections in India being round the corner. Good governance becoming such a big issue in corporate circles post- Satyam, I am hopeful that the political establishment would also become more aware of the need for transparent and responsive governance leading to greater development and growth in India. Burning issues of infrastructure, healthcare and education need to be addressed urgently and without governmental support they will continue to bog down growth.

The income tax advance tax due date of March 15 for the current quarter has just gone by and hopefully all the readers have deposited the dues well in time. Analysis on the fiscal year gone by will surely yield a mix bag for various players, but overall the upbeat mood of last year is not present. The words '*recession proof*' is on everybody's tongue, however, I am of the firm belief that India and China will be the drivers of the Asian century in a post crisis world. The latest inflation numbers which are at historic lows, lead to concerns of deflation, but in a country like India with robust demand from the middle class, all out efforts by the RBI to increase credit and increase in money supply associated with the elections, it may be a short lived spell

The change in the FDI regulations is something that will impact a lot of investment structures in the future and the way indirect FDI funding is done. Combined with the relaxed ECB environment, the government is trying to relax the earlier restrictions and bring about a more liberalized regime for FDI with an objective of continuing India's growth momentum.

We wish everyone all the best for the coming Baisakhi festival next month.

U.N. Marwah

Managing Partner

On behalf of the **RNM Alert** Editorial Team

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DIRECT TAX

➤ Case Law

Depreciation

Depreciation cannot be claimed on goodwill being an intangible asset

The assessee purchased the running business from the firm and made payment for goodwill and claimed the depreciation on such amount. Assessing officer rejected the claim.

The law specified the item of intangible assets eligible for depreciation for 'Know how, Patent, copyright, Trade marks, Licences and Franchises.

Hence it can be concluded that since goodwill is not in the ambit of intangible assets hence the contention of AO is correct. [R.G. Keswani v. Asst CIT [2009] 116 ITD 133 (Mum)]

Deduction

Even a Contractor is a "Developer" for purposes of s. 80-IA(4)

Where the assessee entered into an agreement with the Vidharbha Irrigation department for supply, erection and installation of dam gates and the question arose whether it was "developing an infrastructural facility" so as to

be eligible for deduction u/s 80-IA(4) or it was a mere contractor, HELD:

(i) Though the Explanation to s. 80IA (4) inserted by the FA 2007 w.r.e.f 1.4.2000 provides that s. 80-IA shall not apply to a person executing a works contract, the assessee was not a mere "contractor". The term "developer" means a person who makes things happen and as the assessee was mobilizing and



synthesizing people, plans, technical expertise, supervision, co-ordination and control etc, it could be regarded as the developer. The term “contractor” is not essentially contradictory to the term “developer”.

(ii) The Explanation to s. 80IA does not apply to a works contract entered into by the Government and the enterprise. It only applies to a work contract entered into between the enterprise and other party’s “sub-contractor”. The amendment merely aims at denying deduction to the sub-contractor who executes a works contract with the enterprise;

(iii) It is not required that the developer should also “operate and maintain” the infrastructure facilities so as to be eligible for deduction. **Section 80-IA Om Metal Infraproject vs.CIT [2009] ITA no.722 & 723(ITAT Jaipur)**

Relief u/s 80-IA does not mandate that first year of 10 consecutive AY should be always first year of set up of enterprise

Section 80-IA (2) gives an option to assessee w.e.f 01.04.2000 to claim relief u/s 80-IA for any consecutive AY out of 15 years beginning from year

ending in which undertaking or enterprises develops or begins to operate any infrastructure facility etc, and it does not mandate that first year of 10 consecutive AY should be always first year of set up of enterprise.

Provision of section 80-IA (5), treating eligible undertaking as a separate sole source of income, is applicable only when assessee choose to claim deduction under section 80-IA and same cannot be applied to a year prior to year in which assessee opted to claim relief u/s 80-IA for first time (Chennai) [Asst Mohan Breweries & Distilleries Ltd. v Asst CIT [2009] 116 ITD 241 (Chennai.)]

Search & Seizure

Effect of retraction of statement of confession

Where during FERA search proceedings the accused-appellant allegedly confessed to violations of the law and later filed an affidavit retracting his confession and the Tribunal and the High Court rejected the retraction on the basis that the onus was on the accused to show that the confession was obtained from him by threat, coercion or force, HELD reversing the lower authorities that:

(i) It is trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon;

(ii) The initial burden to prove that the confession was voluntary in nature would be on the Department. The special or peculiar knowledge of the person proceeded against would not relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It may only alleviate that burden to discharge and very slight evidence may suffice;

(iii) A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction.

(iv) With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such. **Vinod Solanki Vs.UOI [2009](Civil Appeal no.7407 of 2008) (S C)**

Business Expenditure

Applicability of section 40(a)(i) of IT Act qua payment made by way of reimbursement of salary or expenses payable outside India

The payment by way of reimbursement of salary and expenses payable outside India or to a non-resident is chargeable under the head “salaries”, and the same is not covered by section 40(a)(i) but is covered by section 40(a)(iii) and in respect of which, tax is deductible at source under

section 192 and not under section 195 - **Dolphin Drilling Ltd. v. ACIT [ITA No. 1572/Del/2007]**

Nature of expenditure by way license fee incurred by assessee for acquiring certain license from DOT

No doubt the licence was granted for a period of 10 years but the licence fee is payable annually; therefore, the benefit available under the licence by making the payment of annual licence fee will last for that year only and does not extend to subsequent year; therefore, the expenditure, being specific to the year of payment, cannot be considered as capital expenditure or an expenditure giving an enduring benefit - **Comsat Max Ltd. v. DCIT [ITA Nos. 728 & 701/Del/2005]**

Website Address can be treated as revenue expense

The assessee company was engaged in travelling business. The company incurred the expenses on website and charged as revenue expenditure however the AO had contention that the expense should be capitalized.

The Tribunal reaffirmed the contention of assessee company

concluded that the expenditure was of revenue nature.

The website can be treated as intangible assets since prima facie indicator are satisfied but the carrying amount of the asset can't be derived and to determine the future economic benefit differential cash flow is to be calculated which is not possible. **[CIT v. India Visit.com (P.) Ltd. [2009] 176 Taxman 164 (Delhi)-IV]**

House Property

Even non-owner can be “owner” under the Act

Though it is the settled position under the common law that the term “owner” means a person who has valid title legally conveyed to him after complying with the requirements of law such as Transfer of Property Act, Registration Act, etc, a different view has to be taken in the context of S. 22 of the Act having regard to the ground realities and the object of the Act, namely, “to tax the income”. Accordingly, the term “owner” means a person who is entitled to receive income from the property in his own right.” There is no requirement

that there has to be a registered Deed of conveyance for a person to be treated as an owner for purposes of S. 22. **Section 22 Pallonji Ministry vs. CIT [2009] (Bombay High Court)**

should be in existence the relationship of principal and agent in order to bring the discount in the ambit of commission or brokerage. **Idea Cellular v. DCIT [ITA No. 3031/Delhi/2005]**

hit by embargoes laid down by section 245R of IT Act

Once the conclusion is reached that the application for advance ruling filed under section 245Q is hit by one or all of the embargoes laid down in the proviso to section 245R(2), the Authority has no option but to reject the application in limine; it is not open to the Authority to ignore the legal bar created by the proviso notwithstanding the discretion conferred on the Authority in apparently wide terms under the main provision i.e., sub-section (2) - **Microsoft Operations Pvt. Ltd., In re [AAR No. 781 of 2008]**



Tax Deducted At Sources

Relationship of principal and agent pre-requisite for commission or brokerage

The explanation (1) of section 194H is not wide that I would include any payment receivable, directly or indirectly for services in the course of buying & selling; hence discount allowed on transaction resulting in outright purchase cannot be treated as brokerage or commission; there

Supply of outsourced manufactured goods by the contract manufacturer constitute an outright sale

The supply of outsourced manufactured goods by the contract manufacturer constitute an outright sale and cannot be treated as contract of work within the scope of section 194C and, consequently, the assessee is not liable to deduct tax at source from purchase price of the goods paid by the assessee to the contract manufacturer or the supplier. **Tuareg Marketing (P.) Ltd. v Asst CIT [ITA No. 2974/ Delhi / 2008]**

International Taxation

AAR on admissibility of an application when same is

Taxability of an American Company having no PE in India for providing services to various Indian hotels under respective agreements

Where the service rendered by the non-resident assessee to its client- hotels was advertisement, publicity and sale promotion keeping in mind their mutual interest, the payments received by the assessee were neither in the nature of royalty under section 9(1)(vi) of the Income-tax Act read with Explanation 2 nor in the nature of fee for technical

services under section 9(1)(vii) read with Explanation 2 nor taxable under Article 12 of the Indo-American DTAA; the payments received were in the nature of business income and since the assessee did not have a PE under Article 7 of the DTAA, “business income” received by the assessee could not be brought to tax in India. [Director of Income-tax v. Sheraton International [ITA Nos. 921,922 & 924 etc. of 2007]]

➤ Latest Notification/ News



Jurisdiction of Valuation Officers for Wealth Tax amended

By way of Wealth Tax (Second Amendment) Rules, 2009, Rule 3A of the Wealth Tax Rules, 1957 which deals with the jurisdiction of the valuation officers have been amended to bring the functions of the Valuation Officers more in line with current value of assets.

So in sub rule (3) the following amendments have been introduced:-

- (i) For the words in clause (i), for the letters, figures and word “Rs 50 lakhs”, the letters, figures and word “Rs 300 lakhs” shall be substituted;
- (ii) in clause (ii), for the letters, figures and words “Rs 10 lakhs” and “Rs 50 lakhs”, the letters, figures and words “Rs 40 lakhs” and “Rs 300 lakhs” shall respectively be substituted;
- (iii) in clause (iii), for the letters, figures and word “Rs 10 lakhs”, the letters, figures and word “Rs 40 lakhs” shall be substituted;

Further, for sub-rule (4), the following sub-rule shall be substituted, namely:-

“(4) Where the valuation of any asset, being building or land or any right in any building or land,

referred to the District Valuation Officer, the Valuation Officer or the Assistant Valuation Officer, as the case may be, is pending with him on the 13th February, 2009, being the date of commencement of the Wealth-tax (Second Amendment) Rules, 2009,—

(i) The District Valuation Officer shall transfer the reference to the Valuation Officer, if the value of the asset as declared in the return made by the assessee under section 14 or section 15 does not exceed Rs. 300 lakhs ;

(ii) The Valuation Officer shall transfer the reference to the Assistant Valuation Officer, if the value of the asset as declared in the return made by the assessee under section 14 or section 15 does not exceed Rs. 40 lakhs.” [CBDT Notification No. 16/2009/F.No.149/159/2008-TPL dated 13th February 2009]

Scale of fees to be charged by a registered valuer

As per Notification No.15/2009/F.No.149/144/20008 -TPL,subject to the provisions of sub-rules (2) & (3),the fees to be charged by a registered valuer for valuation of any asset shall not exceed the amount calculated at the following rates,namely :

- (a) On the first Rs.500,000 of the asset as valued - 50 percent of the value
- (b) On the next Rs.10 lakhs of the asset as valued - 20 percent of the value
- (c) On the next Rs.40 lakhs of the asset as valued - 10 percent of the value
- (d) On the balance of the asset as valued - 5 percent of the value

(2) Where two or more assets are required to be valued by a registered valuer at the instance of an assessee, all such assets shall be deemed to constitute a single asset for the purpose of calculating the fees payable to a registered valuer.

(3) Where the amount of fees calculated in accordance with sub-rules (1) and (2) is less than Rs.500, the registered valuer may charge Rs.500 as his fees.



INDIRECT TAX

➤ Central Excise & Service Tax



➤ Case Laws

Providing Taxable Services is taxable event

The Ahmedabad High Court in the instant matter considered "Whether or not, in Service Tax, the taxable event is realization of payment for taxable services rendered and not the time of rendering of the taxable service".

The services were received by respondent between November 2001 and March 2002 while the

invoice has been raised and settled in September 2003. Further, that at the point of time when the services were rendered by the service provider and received by the respondent the liability was not cast on the recipient of the services. The liability to pay Service Tax has been cast on the recipient of the service only w.e.f. 16.08.2002.

The taxable event is providing taxable services which has been defined. Similarly, the Service Tax Rules, define a person liable for paying the service tax under Rule 2(1)(d)(iv), in relation to any taxable services provided by a person who is a non-resident or is from outside India, does not have any office in India, the person receiving taxable service in India. The taxable event in relation to Service Tax is admittedly the rendering of taxable service. The said taxable services was received by the Respondent between November 2001 and March 2002. In the circumstances, merely because the invoice is raised and payment made after 16.05.2002 the liability cannot be fastened on the recipient of the services as the taxable event had already occurred past and raising of invoices and/or making of payment cannot be considered to be a taxable event. Nor is it

possible to hold that the provision of Rule 2(1)(d)(iv) of the Rules is retrospectively applicable to services rendered prior to 16.08.2002. Thus, neither the Section nor the Rule even suggests that the taxable event is the raising of an invoice for making of payment. [The Commissioner of Central Excise and Customs, Vadodara-II Vs Schott Glass India Pvt Ltd, 2009-TIOL-82-HC-AHM-ST]

Declaration by GTA on letterhead sufficient to get abatement

In this matter the Tribunal upheld the findings of the Commissioner (Appeal) which was that declaration made by the Goods Transport Agency (GTA) on their letter heads were sufficient to meet the requirement of the notification. In Notification No.32/2004-St dt. 3.12.2004, abatement of 75% has been provided to M/s Unimark Remedies Ltd subject to the condition that GTA has not availed credit on inputs and Capital goods used for providing taxable service and has also not availed the benefit of Notification No.12/2003-ST dt. 20.6.2003. No procedure or manner has been

prescribed in the notification to see whether the said conditions are being complied with or not, however the board has clarified vide its circular No.B1/6/2005-TRU dt. 27.7.2005 (Para 31) that a declaration by the GTA on the body of the consignment note may suffice in this regard. The Tribunal found that Board's above circular is only clarificatory in nature and does not prescribe anything not even the procedure/requirement for availing the said credit. It does not mean that the said declaration cannot be given by other means. From the show cause notice itself I find that the unit had the copies of separate declaration on the letter head of GTAs and the same were produced to the Audit party. Thus M/S Unimark Remedies Ltd can be said to have sufficiently met with the Board's above said clarification. [CCE,VAPI Vs M/s Unimark Remedies Ltd,2009-TIOL-363-CESTAT-AHM]

Input Credit allowed even where ST Regn. No. not written on Invoice

In this matter the Commissioner allowed the benefit of Cenvat credit of service tax rejected by the original adjudicating authority on the ground that the

input service distributor, which is the head-office of the company, had not taken the service tax registration and because of this reason, the registration number was not mentioned on the invoices based on which the appellants availed the credit. He has allowed the Cenvat credit in view of the proviso to sub-rule 2 of Rule 9 of Cenvat Credit Rules. He has observed that there is no dispute about the receipt of the services by the appellant.

The only ground on the basis of which the credit has been denied is that the registration number was not available. The respondent explained the reason for this that by the time instructions were issued by the Government, the Head office had already issued the invoice and therefore, procedural requirement could not be fulfilled. The Tribunal found that there were very valid grounds for omission. Further omission took place when rules relevant to input service distributor were being implemented. Therefore, the benefit of Cenvat credit of service tax is allowable. [CCE,VAPI Vs M/s Jindal Photo Ltd,2009-TIOL-359-CESTAT-AHM]

➤ Latest Notification



Rate cut on service tax

The Central Government hereby exempts all the taxable services from so much of service tax leviable there on as is in excess of the rate of ten per cent of the value of taxable services. Thus, from this date rate of service tax would be ten percent, Education Cess two percent & Higher and Secondary Education Cess one percent. [Notification No. 8 /2009 – Service Tax, dated the 24th February, 2009]

Service Tax on movie theatres

The Central Government has looked into some matter related to screening of movies in theatres. It has been contemplated whether the activity of screening of film supplied by a film distributor would fall under any of the taxable services and accordingly, whether the theatre owners are required to pay service tax on amount received by them from distributors. Different types of arrangements under which a movie is screened has been examined. Typical types of arrangements normally entered into between a theater owner and a distributor are as under:-

1. Under one type of arrangement, the distributor leases out the hall for screening of the movie. Here, the theater owner gets a fixed rent from the distributor. The profit or loss from exhibiting the film is borne by the distributor.

In such a case, the theatre owner provides the taxable service of 'Renting of immovable property for furtherance of business or commerce' and is

accordingly liable to pay service tax.

2. Another type of arrangement is where the contract between the theatre owner and the distributor is on revenue sharing basis i.e. a fixed and pre-determined portion i.e. percentage of revenue earned from selling the tickets goes to the theater owner and the balance goes to the distributor.

In this case, the two contracting parties act on principal-to-principal basis and one does not provide service to another. Hence, in such an arrangement the activities are not covered under service tax.

3. In yet another type of arrangement, the theater

owner buys the print/CD of the film on payment of a fixed price and thereafter screens it in his theater.

Above transaction is also not subject to service tax being in the nature of sale of goods.

4. The arrangement most commonly entered into between a theater owner and a distributor is that the theater owner screens the movie for fixed number of days under a contract. The proceeds earned through sale of tickets go to the distributor but the theatre owner receives a fixed sum depending upon the number of days of screening. In this arrangement, the advertisement and display of posters etc. is done by the distributor. Under this arrangement, the fixed amount contracted is given to the theater owner by the distributor



irrespective of the fact whether the movie runs well or not. However, there is no rental arrangement between the theater owner and the distributor.

After examining the matter the board found that the theatre owner screens/exhibits a movie that has been provided by the distributor. Such an exhibition is not a support or assistance activity but is an activity on its own accord. That being the case such an activity cannot fall under 'Business Support Service'. Thus, it is clarified that screening of a movie is not a taxable service except where the distributor leases out the theater and the theater owner get a fixed rent. In such case, the service provided by the theater owner would be categorized as 'Renting of immovable property for furtherance of business or commerce' and the theater owner would be liable to pay tax on the rent received from the distributor. [Circular No. 109/03/2009 dated, 23rd February, 2009]

Service tax on repair/ renovation/ widening of roads

A clarification has been made with regard to levy of service tax on maintenance and repair of

roads. It may be recalled that commercial or industrial construction service specifically excludes construction or repairs of roads. However, management, maintenance or repair provided under a contract or an agreement in relation to properties, whether immovable or not, is leviable to service tax. Hence construction of road is not a taxable service but management, maintenance or repair of roads are taxable



services.

The following activities are Maintenance or repair activities: I. resurfacing, II. renovation, III. Strengthening, IV. Relaying, V. filling of potholes, while construction activities are I. laying of a new road II. widening of narrow road to broader road (such as conversion of a two lane road to a four lane road) & III. changing road surface (graveled road to metalled road/ metalled

road to blacktopped/ blacktopped to concrete etc) [CBEC Circular No. 110/4/2009-ST. dated 23rd February, 2009]

Situation when services are used outside India

In order to put some confusions to rest regarding services used outside India the CBEC examined certain situations in which question was whether services were "used outside

India"

- (i) Call centres engaged by foreign companies who attend to calls from customers or prospective customers from all around the world including from India;
- (ii) Medical transcription where the case history of a patient as dictated by the doctor abroad is typed out in India and forwarded back to him;
- (iii) Indian agents who undertake marketing in India of



goods of a foreign seller. In this case, the agent undertakes all activities within India and receives commission for his services from foreign seller in convertible foreign exchange;

(iv) Foreign financial institution desiring transfer of remittances to India, engaging an Indian organization to dispatch such remittances to the receiver in India. For this, the foreign financial institution pays commission to the Indian organization in foreign exchange for the entire activity being undertaken in India.

Under the Export of Services Rule, all services have been categorized into three categories.

The meaning of the term 'used outside India' has to be understood by giving two examples. 1) under Architect

service, even if an Indian architect prepares a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India.(for category one) 2) if an Indian event manager arranges a seminar for an Indian company in U.K. the service has to be treated to have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employees serving the company in India(for category two). For the services that fall under Category III, the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to

be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services, it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India.

The board regarding all the illustrations mentioned in the opening paragraph, clarified that what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Further clarified that similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well. [CBEC Circular No.111/05/2009-ST, dated the 24th February, 2009]

COMPANY LAW

➤ Latest News

Amendments to Sebi (Disclosure And Investor Protection) Guidelines, 2000

Reduction in timelines for completion of bonus issues

At present, in terms of the SEBI (DIP) Guidelines, a listed company is required to complete a bonus issue within a maximum period of six months from the date of approval of the issue by the board of directors of the company.

The DIP Guidelines have been amended to reduce the timeline for completion of bonus issues. Accordingly, where no shareholders' approval is required as per the Articles of Association of the issuer, the bonus issue shall be completed within fifteen days from the date of the approval by the board of directors of the issuer in this regard.

However, where shareholders' approval is required for capitalisation of profits or reserves as per the Articles of Association of the issuer, the bonus issue shall be completed within sixty days from the date of the meeting of board of directors where-in bonus was announced subject to shareholders' approval.

Announcement of price band

At present, the floor price or price band in an initial public offer through the book building process is required to be disclosed in the Red Herring Prospectus registered with the Registrar of Companies, before the issue opening date.

The amended DIP Guidelines permit the issuer making an initial public offer to announce the floor price or price band after the date of registration of the Red Herring Prospectus with the Registrar of Companies, at least two working days before the issue opening date, ensuring wide dissemination of the floor price or price band through various

means, including newspaper advertisement.

While announcing the floor price or price band, the issuer shall also disclose details of the relevant financial ratios used for justification of the floor price or price band. In case of a price band, such financial ratios shall be calculated for both upper and lower end of the price band.

Preferential allotment of warrants

At present, the SEBI (DIP) Guidelines provide that warrants can be allotted on preferential basis, subject to the allottees paying upfront, an amount equivalent to at least 10% of the price fixed, at the time of allotment of warrants. It has now been decided to enhance the upfront amount payable from 10% to 25%.

Policy on relaxation from strict enforcement of rule 19(2)(b) of the Securities Contracts (Regulation) Rules, 1957 (SCRR).

At present the SEBI (DIP) Guidelines provides for the



policy regarding considering the requests for relaxation of the strict enforcement of requirements of rule 19(2)(b) of the SCRR where an unlisted company intends to list its shares issued to the shareholders of a listed company pursuant to a scheme of arrangement approved by a High Court, without making an initial public offer.

The DIP Guidelines have now been amended to provide for the policy for considering relaxation from strict enforcement of requirements of rule 19(2)(b) of SCRR in case of proposal for listing of following securities by a listed issuer :-

- (i) Equity shares with differential rights as to dividend, voting or otherwise, offered through rights or bonus issue.
- (ii) Warrants issued along with Non Convertible Debentures through Qualified Institutions Placement.

(Sebi Notification No. SEBI/CFD/DIL/DIP/ 34/2009/24/09 Dated February 24, 2009)

Review of Annual Issuers' charges

With reference to SEBI Circular No.MRD/DoP/SE/Dep/Cir-4/2005 dated January 28, 2005 in which Depositories were allowed/permitted to levy and collect the charges towards custody from the issuer. it has been decided to revise the said Annual Issuers' charges with effect from April 01, 2009.

Accordingly, the Depositories may levy and collect the charges towards custody from the Issuers, on a per folio (ISIN position) basis as at the end of the financial year, as per the details given below:

Issuers to pay @ Rs.8.00 (*) per folio (ISIN position) in the respective depositories, subject to a minimum as mentioned below:

Nominal value of admitted securities (Rs.)	Annual Custodial Fee payable by a Depository (Rs.) (*)
Upto 5 crore	6,000
Above 5 crore	15,000

and upto 10 crore	
Above 10 crore and upto 20 crore	30,000
Above 20 crore	50,000

* Plus service tax as applicable

The issuers would be required to pay custody charges to the Depository with whom they have established connectivity based on the total number of folios (ISIN positions) as on 31st March of the previous financial year or the minimum amount, as the case may be, by 30th April of each financial year failing which Depositories may charge penal interest subject to a maximum of 12% p.a. (Sebi Circular MRD/DoP/SE/Dep/Cir-2/2009 dated February 10, 2009)

Disclosure of Pledged Shares

Clause 35 and Clause 41 of Listing Agreement being amended to include details of pledged shares of promoters and promoters group. [SEBI Circular no. SEBI/CFD/DIL/LA/2009/3/2 dated February 3,2009]

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2009

As per Newly inserted Reg. 8A of SEBI (Substantial Acquisition of Shares and Takeover) (Amendment) Regulation, 1999 A promoter or every person forming part of the promoter group of any company shall, disclose to the Company within seven working days from the date of creation/ invocation of pledge on shares and The company shall disclose the information to all the stock exchanges, on which the shares of company are listed, within 7 working days of the receipt thereof, if, during any quarter ending March, June, September and December of any year,:

(a) aggregate number of pledged shares of a promoter or every person forming part of

promoter group taken together with shares already pledged during that quarter by such promoter or persons exceeds twenty five thousand;

quarter by such promoter or persons exceeds one per cent. of total shareholding or voting rights of the company, whichever is lower. [Sebi Notification no. LAD-



or

(b) aggregate of total pledged shares of the promoter or every person forming part of promoter group alongwith the shares already pledged during that

NRO/GN/2008-2009/33/15022 dated 28.01.2009]

FOREIGN EXCHANGE MANAGEMENT ACT

➤ Latest Notification/ News

Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in Indian companies

Counting the Direct Foreign Investment:

All investment directly by a **non-resident entity** into the Indian company would be counted towards foreign investment.

Counting of indirect foreign Investment:

The foreign investment through the **investing Indian company** would not be considered for calculation of the indirect foreign investment in case of Indian companies which are 'owned and

controlled' by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens.

However, if the investing company is owned or controlled by 'non resident entities', the entire investment by the investing company into the subject Indian Company would be considered as indirect foreign investment.

Provided that, as an **EXCEPTION**, the indirect foreign investment in only the 100% owned subsidiaries of operating-cum-investing/ investing companies, will be limited to the foreign investment in the operating-cum-investing/ investing company. For the purposes of explanation, it is clarified that this exception is being made since the downstream investment of a 100% owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company.

To illustrate, if the indirect foreign investment is being calculated for **Company A** which has investment through an investing **company B** having foreign investment, the following would be the method of calculation:

- (i) where **Company B** has foreign investment less than 50%- **Company A** would not be taken as having any indirect foreign investment through **Company B**.
- (ii) where **Company B** has foreign investment of say 75% and:
 - a. invests 26% in **Company A**, the entire 26% investment by **Company B** would be treated as indirect foreign investment in **Company A**;
 - b. Invests 80% in **Company A**, the indirect foreign investment in **Company A** would be taken as 80%

c. where **Company A** is a wholly owned subsidiary of **Company B** (i.e. Company B owns 100% shares of **Company A**), then only 75% would be treated as indirect foreign equity and the balance 25% would be treated as resident held equity. The indirect foreign equity in Company A would be computed in the ratio of 75: 25 in the total investment of **Company B** in **Company A**.

The above methodology of calculation would apply at every stage of investment in Indian Companies and thus to each and every Indian Company in all sectors, excepting in sectors where it is governed specifically under any statutes or rules there under. Thus, for the present purposes this methodology will not be applicable in the Insurance Sector where it will continue to be governed by the relevant Regulation.

Additional conditions:

- The full details about the foreign investment including

ownership details etc. in Indian company(s) and information about the control of the company(s) would be furnished by the Company(s) to the Government of India at the time of seeking approval.

- In any sector/activity, where Government approval is required for foreign investment and in cases where there are any inter-se agreements between/amongst share-holders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any incidental matter thereof, such agreements will have to be informed to the approving authority. The approving authority will consider for determining ownership and control such inter-se agreements when considering the case for granting approval for foreign investment.
- In all sectors attracting sectoral caps, the balance equity i.e. beyond the sectoral foreign investment cap, would specifically be beneficially owned by/held

with/in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.

- In the I& B and Defense sectors where the sectoral cap is less than 49%, the company would need to be 'owned and controlled' by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens.
- If a declaration is made by persons as per section 187C of the Indian Companies Act about a beneficial interest being held by a non resident entity, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.

[Issued by the Department of industrial Policy & Promotion, Press Note No. 2 (2009 Series) dated 13.02.2009]

Guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities

In sectors with caps, including interalia defence production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites, Government approval/FIPB approval would be required in all cases where:

- (i) An Indian company is being established with foreign investment and is owned by a non-resident entity or
- (ii) An Indian company is being established with foreign investment and is controlled by a non-resident entity or
- (iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by

resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares to non-resident entities through amalgamation, merger, acquisition etc. or

- (iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares to non-resident entities through amalgamation, merger, acquisition etc.

These guidelines will not apply for sectors/activities where there are no foreign investment caps, that is, 100% foreign investment is permitted under the automatic route.

[Issued by the Department of industrial Policy & Promotion, Press Note No. 3 (2009 Series) dated 13.02.2009]

Lending under Consortium Arrangement / Multiple Banking Arrangements

The RBI vide its circular no RBI/2008-09/183/DBOD.No.BP. BC. 46 /08.12.001/2008-09 dated September 19, 2008 advised all scheduled commercial bank (excluding RRB's and LABs) to obtain regular certification (DILIGENCE REPORT) by a professional preferably Company Secretary, regarding compliance of various statutory prescriptions that are in vogue, as per specimen given to the above-said notification. RBI subsequently vide circular no. RBI/2008-09/183/DBOD.No.36/13.05.000/ 2008-09 dated December 08, 2008 revised and streamlined the formats.

Subsequently, RBI vide DBOD. No.UBP.PCBNo.36/13.05.000/20 08-09 dated January 21, 2009 advised all primary Urban co-operative Banks to also obtain Diligence Report. The formats have been further revised vide RBI circular no. DBOD.No. BP.BC.110/08.12.001/2008-09 dated February 10, 2009

[Issued by RBI, vide DBOD.No. BP.BC.110/08.12.001/2008-09 dated February 10, 2009]

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