Tax & Corporate News Bulletin

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CONTENTS

INCOME TAX

Aircraft overhaul expenses continue to be "Fees for technical services" but not taxable absent source in India

In *DIT vs. M/s. Lufthansa Cargo India: TS-299-HC-2015,* the Delhi High Court held that payment made by assessee (an Indian company) to German company for carrying out overhaul repairs to aircrafts was fees for technical services (**"FTS"**) under section 9(1)(vii) of the Income Tax Act, 1961 (**"the IT Act"**) but was not taxable in India as it did not have its source in India in view of clause (b) thereto.

In this case, the assessee, engaged in the business of wet-leasing of aircrafts, had acquired four old Boeing aircrafts from a non-resident company outside India. The assessee was granted the license by the DGCA to operate these aircrafts on international routes only and was obliged to keep the aircraft in flying condition. The assessee's Boeing aircrafts were not used by any other airline in India and there were no facilities in India for their overhaul repairs. According to DGCA directives, various components and the aircraft itself had to undergo periodic overhaul repairs before the expiry of the number of flying hours prescribed for such individual components. Such overhaul repairs were permissible only in workshops authorized for the purpose by the manufacturer as well as duly approved by the DGCA, therefore, assessee's all four aircrafts were wet-leased to a foreign company, Lufthansa Cargo AG, Germany (hereafter **"LCAG"**).

The assessee maintained a base at Sharjah where the aircrafts were normally kept and where its crew and engineering personnel were also stationed. The assessee's engineering department tracked the flying hours of every component; and before the expiry of flying hours, the component needing overhaul/repairs or needing replacement was dismantled by the assessee's engineers and flown to Lufthansa Technik's (a German company, hereafter **"Technik"**) workshops in Germany. The parts were supplied by Technik under separate agreement of sale, loan or exchange. In due course, the overhauled component was dispatched by Technik along with airway bill for which the freight was paid by the assessee. The overhauled component were fitted into aircrafts by the assessee's own personnel. Technik carried out maintenance repairs without providing technical assistance by way of advisory or managerial services.

For further details, please contact...

Bomi F. Daruwala	**Vinay Vaish**	**Hitender Mehta (Editor)**
bomi@vaishlaw.com	vinay@vaishlaw.com	hitender@vaishlaw.com

LCAG utilized the aircrafts wet-leased to it for transporting cargo.

The assessing officer held that payments were in the nature of "Fees for technical services" as defined in Explanation 2 to Section 9(1) (vii) (b) of the IT Act, and were, therefore, chargeable to tax on which tax should have been deducted at source under Section 195(1) of the IT Act. The assessing officer further rejected the assessee's plea that the business of aircraft leasing was carried on outside India and the payments made to residents of USA, UK, Israel, Netherlands, Singapore and Thailand could be taxed as business profits only and not as fees for technical services keeping in view the relevant provisions of the Double Taxation Avoidance Agreements (**"DTAAs"**) with those countries.

On appeal, the CIT (A) rejected the assessee's contention that the payments made to the various non-residents for carrying out overhaul repairs were not chargeable to tax. The payments made to Technik were treated as the model for considering the question of taxability of payments made to all other foreign companies. CIT (A) held that such repairs required knowledge of sophisticated technology and trained engineers which were employed by the non-residents for carrying out the overhaul repairs and therefore, constituted "fees for technical services", liable to TDS. With reference to payments made to residents of UK and USA, the CIT (A) held that they were not in the nature of "fees for technical or included services? under Article 12 of the

DTAA read with the Memorandum of Understanding with USA which equally applied to the UK Treaty, but business profits not chargeable to tax in the absence of any PE in India. The Revenue went in appeal against the order of the CIT (A) on that point; the assessee appealed against other findings adverse to it, to the Tribunal.

Upon consideration of the wet leasing activity of the assessee and the agreements it entered into with foreign companies, the Tribunal noted that:

(a) The assessee had to maintain the crew and keep the aircrafts in airworthy state.

(b) The assessee company earned rental income on block-hours basis.

(c) The assessee could not wet-lease the aircrafts to a third party without a written permission from the LCAG

(d) In case of non-utilisation of aircrafts by the LCAG, it had to pay minimum guaranteed rental 240 block-hours per month in accordance with the terms of the contract

(e) The amount of leasing revenues depended on the number of flying hours utilised by LCAG and not on the value of freight earned by the LCAG

(f) The assessee was also assured of minimum rental income in the event LCAG does not actually use the aircrafts.

Considering the aforesaid facts, the Tribunal concluded that the sources from which the assessee had earned income was outside India as the income earning activity was situated outside India. Since it was towards the income earning activity that the payments for repairs were made outside India, such payments therefore fell within the purview of the exclusionary clause of Section 9(1) (vii) (b) of the IT Act.The Tribunal thus held that even assuming that the payments for such maintenance repairs were in the nature of "fees for technical services", the same were not chargeable to tax.

On further appeal at the instance of the Revenue, the High Court observed that since the level of technical expertise and ability required in aircraft maintenance and repairs was specific in nature, so much so that the aircraft supplied by manufacturer had to be serviced and its components maintained, serviced or overhauled by designated centres to ensure safe and airworthy aircrafts, therefore, such exclusive nature of services would be regarded as "technical services" falling within the purview of Section 9(1)(vii) of the IT Act.

In respect of the issue regarding taxability in India of payments made by the assessee (i.e., the payments made) towards its activities outside India, the High Court affirmed the view of the Tribunal that since the overwhelming or predominant nature of the assessee's activity was to wet-lease the aircraft to LCAG, i.e., to earn income from operations abroad, the said payment did not have its source in India and was hence not taxable in India for that reason and no TDS was required therefrom.

Liaison and/ or soliciting business services does not fall within the ambit of "Consultancy services"

In the case of *CIT vs. M/s Group ISM P. Ltd. : ITA No. 325/2014 (Del),* the assessee had made payments to two UAE based companies, namely, CGS International, UAE (**"CGS"**) and M/s Marble Arts & Crafts LLC, UAE (**"MAC"**), without any deduction of tax at source. The assessing officer disallowed the said expenditure under section 40(a) (i) of the IT Act as the assessee failed to deduct tax at source. On appeal before CIT (A), it was noted that assessee was awarded project management consultancy by the Works

Department of the Emirate of Abu Dhabi pursuant to which assessee was required to act as consultant for project management of marble works for Shaekh Zayed Bin Sultan Al Nahyan mosque at Abu Dhabi. The contract required the assesse to organize procurement of marble from India and supervise the processing at Abu Dhabi.

On analysis of the agreements, the CIT(A) noted that MAC received consideration for assistance in documentation, guidance and liaison with various departments towards assisting assessee in its work in UAE and thus were in nature of "liaison services in Abu Dhabi", while payments to CGS International were made to procure clients and market assessee's services as "agent in UAE work" and thus, held that the payments made by assessee to the two UAE entities would not fall within the purview of "technical services", as defined in Explanation 2 to Section 9(1)(vii). The CIT(A) agreed with assessee's contention that Article 14 of DTAA with UAE relating to Independent Personal Services was applicable and that the benefit available under the said treaty cannot be denied on the sole premise that the two UAE entities were companies. The CIT(A) further held that since such remittances to non-resident entities was liable to be taxed in UAE, therefore, no TDS was required therefrom.

On appeal by the Revenue, the Tribunal upheld CIT(A)'s order. Aggrieved by the order of Tribunal, Revenue preferred an appeal before the High Court. Before the High Court, the primary issue raised for consideration was regarding interpretation of the phrase "fees for technical services" as defined in Explanation 2 to Section 9(1) (vii) which defined the same as managerial, technical or consultancy services and whether the so called "consultancy services" rendered by CGS and MAC would fall under the ambit of the said phrase or not. The High Court noted that CGS and MAC, being UAE entities, were not having PE in India, and accordingly, the payments to said entities could only be taxed under section 9 of the Act. The High Court further observed that actual nature of services rendered by CGS and MAC needs to be examined for determination of the requirement of withholding tax. The High Court held that since CGS and MAC acted as agents of assessee for liaison services and/or soliciting business for assessee, such services cannot be said to be included within the meaning of "consultancy services", as that would amount to unduly expanding the scope of the term "consultancy"".

In so far as the applicability of Article 14 of DTAA with UAE relating to Independent personal Services was concerned, the High Court noted that the said Article applied to resident of a contracting state and that "resident of a contracting state" as per UAE Treaty is any person under the laws of that state who is liable to tax therein. It was noted that Article 3(e) of the India–UAE Treaty included a company and that the payee companies were liable to tax under Article 14 or Article 22 of the DTAA in respect of amounts paid by the assessee. It was thus held that Article 14 of the DTAA was applicable.

Arranger fee –neither "interest" nor "fee for technical services" so as to attract TDS

In the case of *Idea Cellular Limited vs. ADIT: ITA No. 1619/Mum/2011, order dated June 10, 2012 (Mum),* the assessee had entered into a term loan agreement with the lender, Finnish Export Credit Limited. The Hong Kong Banking Corporation Limited, Hong Kong (HSBC) had arranged for the loan and the HSBC Bank PLC had acted as facility agent. The role of the arranger (HSBC) was to liaise with the lender and to procure the loan for the borrower as well as to negotiate the terms and conditions of the facility with the lender on behalf of the borrower. For the said service, HSBC was paid arranger fee by the assessee. The issue arose with respect to the nature of the said arranger fee, viz., whether such payment would be regarded as "interest" within the meaning of section 2(28A) of the Act or "fees for technical services for service" within the meaning of section 9(1) (vii) of the Act and would accordingly be subject to tax withholding or not. The Tribunal, after examining the facts of the case, position of law and judicial precedents, held that the assessee was not liable to deduct tax on such arranger fee as the same neither fell within the ambit of the definition of "interest" nor "fee for technical services", specifically considering the following–

(a) The arranger was not the lender of money and in absence of any debt being incurred by the assessee in favour of the arranger vis-a-vis the money borrowed, any fee paid to the arranger cannot be said to be in respect of the money borrowed.

(b) The arranger was merely a facilitator bringing the lender and borrower together for facilitating the

loan/credit facility, therefore, the said fee would not fall under the second limb of the definition of "interest" provided under section 2(28) of the Act, whereby interest encompasses service fee or other charge and such fee in respect of the money borrowed or any debt incurred or, for utilisation of credit facility. Such service fee or other charge does not bring within its ambit any payment made to third party or intermediary who has not given any money/ loan or credit facility but merely acted as a middleman.

(c) The element of relationship between the borrower and lender, which is a key factor to bring the payment within the ambit of definition of "interest" under section 2(28A) was absent between the borrower and arranger, notwithstanding that the arranger fee was inextricably linked with the loan utilisation or loan facility.

(d) The arranging of loan cannot be equated with lending of "managerial service", since the arranger was not involved in providing control, guidance or administration of the credit facility.

(e) The arranger did not provide any advisory or counselling services, and accordingly, the transaction of arranging of loan cannot be regarded as rendering of "consultancy services".

Registration under Section 12AA of the IT Act – Proviso to Section 2(15) has no bearing on the grant or denial of registration

In the case of *Kapurthala Improvement Trust vs. CIT: ITA. No. 732 of 2013 (Amritsar) dated June 11, 2015*, the issue before the Tribunal was whether registration under Section 12 AA of the IT Act can be withdrawn by invoking provisions of Section 2(15) of the IT Act.

In that case, the assessee trust, incorporated under Punjab Town Improvement Act, 1922, filed application seeking registration under Section 12AA of the Act, which was rejected by CIT. On appeal before the Tribunal, it held that the assessee was entitled to the benefit of registration. The Revenue challenged the order of Tribunal before the High Court but did not succeed. Subsequently, the CIT, in view of amendment in Section 2(15) of the IT Act and relying on the decision of the Amritsar Bench of Tribunal in the case of Improvement Trust Phagwara in ITA No. 274 (Asr) /2013, order dated 23.07.2013, cancelled the registration of the assessee trust granted under Section 12AAby holding that assessee was engaged in commercial activities. On appeal before the Tribunal, the Tribunal while allowing the appeal of the assessee, held thatthe scope of powers of Commissioner under Section 12AA (3) for cancellation of registration already granted is limited in scope, inasmuch as it can only be invoked only when –

(a) The activities of the trust are not genuine, and

(b) The activities of the trust or the institution are not being carried out in accordance with the objects of the trust or the institution.

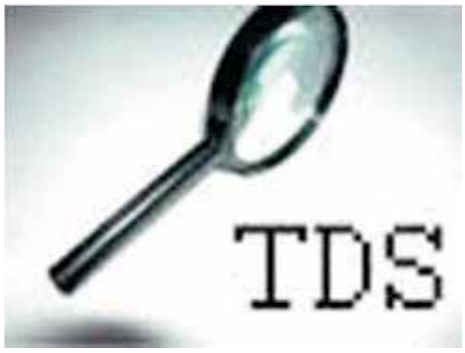
In the absence of fulfilment of any of the aforesaid conditions in the facts of the assessee trust, withdrawal of registration was unwarranted.

The Tribunal, on further examination of the provisions of proviso to Section 2(15) of the IT Act, observed that rider set out under first proviso to Section 2(15) can only come into play on year to year basis and not in absolute terms since it is not only the nature of the activity but also the level of activity which, taken together, determines whether the disabling clause can come into play. The safeguard against the objects of the trust being vitiated insofar as their character of "charitable activities" is concerned is inbuilt in the provisions of Section 13(8) of the IT Act. The impact of the proviso to Section 2(15) will be that the assessee will not be eligible for exemption under Section 11 of the IT Act in respect of income falling within the purview of the former.

Comments: In view of the aforesaid decision, it may be said that once the registration under Section 12AA of the IT Act is granted to the assessee and the activities of the trust are genuine and as per the objects of the assessee, CIT or any other authority is not empowered to cancel registration on ground of involvement of trust in any activity which may not be for charitable purpose.

Levy of TDS on quarterly expense provision booked through suspense account

The Bangalore Bench of Tribunal in the case of *IBM India Private Ltd. vs ITO: ITA No. 749 to 752/Bang/2012 & 1588 to 1591/Bang/2012 (Bang)* held that the assessee was liable to deduct tax at



source on provision for expenses made in the books of account on quarterly basis on the ground that statutory provisions dealing with collection and recovery of tax envisage collection, irrespective of charge under Section 4(1) of the IT Act.

In that case, the assessee, wholly owned subsidiary of US Company, followed mercantile system of accounting and made provision for certain expenses in its books of accounts in view of the global group accounting policy where under each of the entity of IBM group worldwide had to quantify its expenses every quarter.

In respect of expenses where service/ work had been provided/ performed by the vendors, but invoices had not been received or in respect of which the payments had not fallen due for payment to the vendors, provision for such expenses was made on the basis of reliable estimates in the books of account recognizing the liability that was incurred. The expenses were debited to the profit and loss account and the provisions credited to a provision account. In the subsequent financial year, the provision entries were reversed and on receipt of invoices in respect of the respective expenses, the same were recorded as liabilities due to the respective parties, at which point in time taxes were withheld at source and paid to the Government in the due course. At the time of creation of provision it was not possible for the assessee to identify parties or if parties were identified, to arrive at the exact sum on which TDS was to be withheld.

According to the assessing officer, in respect of the provision so created by the assessee in the books of accounts, TDS was deductible in terms of Chapter XVII-B of the IT Act and accordingly he treated the assessee as assessee in default in respect of TDS not deducted on the provision created in the books of account. On appeal, the CIT (A) in principle upheld the order of the assessing officer. On further appeal, the Tribunal, after examining the statutory provisions of the IT Act, held as under:

(a) The Tribunal, rejecting the argument of the assessee that in the absence of there being any accrual of expenditure in accordance with the mercantile system of account, the TDS obligations did not get triggered, held that the liability to deduct TDS exists when the amount in question is credited to a "suspense account" or any other account by whatever name called, which will also include a "provision" created in the books of accounts.

(b) The Tribunal further observed that various Sections 194C, 194J, 194H, 194I, etc., as applicable to the case, did not use the expression "income", and instead used the expression "sum" and tax deduction is required on the "sum so paid". The said section do not use the expression "chargeable to tax", unlike Section 195 applicable on payment of sum to non-residents. Since the assessee was the person responsible for making payment to residents, it was the duty of the assessee to deduct tax at source.

(c) With regard to the argument of the assessee that in the absence of there being no charge under section 4 (1) of the IT Act in the hands of the payee, TDS provisions are not triggered, the Tribunal referring to the provisions of section 190 and Chapter XVII of the IT Act dealing with collection and recovery of tax, held that the statutory provisions envisage collection at source de hors the charge under section 4(1) of the IT Act. The sum collected by way of tax collection at source is appropriated as tax paid by the payee only on assessment in the hands of the payee.

Comments: While it may be argued that the Tribunal failed to appreciate that provisions of Sections 194C, 194J, 194H, 194I, etc., provides for tax deduction from income of nature referred to in the respective sections and it cannot be said that TDS provisions apply de-hors chargeability of income in the hands of the recipient and that the identity of the payee is necessary to apply the anti-abuse provisions relating to tax deduction at source from income credited to suspense account or any other account, as such crediting is deemed to be credit to the account of the payee, the aforesaid decision would result in severe practical difficulties and disputes with service providers, not to mention the problems that may arise in claiming credit of tax by recipient of incomes on account of mismatch between amount credited and actually paid.

Offshore sale of equipment and supply of designs/drawings held not taxable in India

Kolkata Bench of Tribunal in the case of *Outotec GmbH v. DDIT : ITA No. 431 & 432 of 2014 & 283 of 2015 (Kol)* dealt with the issue as to whether the sale of equipment, designs and drawings would be taxable under the provisions of the India-Germany DTAA and the IT Act.

In that case, the assessee, a tax resident of Germany, was engaged in the business of providing innovative and environmentally sound solutions to

customers in metals and minerals processing industries. The assessing officer framed draft proposed assessment order under Section 143(3) read with Section 144C of the Act proposing to assess the income from sale of equipment as taxable in India on the ground that sale of equipment to Indian companies was concluded in India and accordingly, attributed 10% profits from sale of equipment to assessee's supervisory PE in India. The assessing officer also held that income earned by the assessee from sale of designs and drawings was taxable as "royalty" under Article 12(3) of the DTAA read with the provisions of Section 9(1)(vi) of the IT Act and was not in the nature of sale of product. Aggrieved assessee carried the matter to DRP. DRP upheld the order of the assessing officer.

The assessee filed an appeal before the Tribunal. The Tribunal, after examining the facts of the case and judicial precedents held that no portion of receipts from sale of equipment can be taxed in India either under the provisions of the Act or DTAA since – (i) all the activities relating to designing, fabrication and manufacturing took place outside India, (ii) the sale of equipment also took place outside India on principal to principal basis, (iii) Indian customers were independent parties who made purchases on their own account and hence, the transaction was at arm's length,(iv) the consideration was also received outside India in foreign currency

out of Letter of Credit guaranteed by bank upon FOB delivery; (v) the contract provided for delivery of equipment on FOB Foreign Port of Shipment through irrevocable letter of credit which makes it clear that even if the ship does not sail or deliver the goods to the destination; (vi) even the customer's inspection for equipment took place outside India, and (vii) the assessee entered into either separate contracts each with its own scope of supply or service with separate consideration or single contract with separate scope of supply and services as well as separate consideration.

In relation to the issue as to why attribution of profits from sale of equipment should not be made, the Tribunal observed that since the clauses of acceptance tests and liquidated damages are part of normal commercial arrangements generally agreed in common trade parlance and partake the character of trade warranties, the same cannot be construed to mean that the acceptance of goods by the customer has taken place in India and any portion from sale of equipment can be taxed in India.

The Tribunal also observed that majority of the projects of the assessee did not have a supervisory PE in India under Article 5(2) (i) of the DTAA since the said work had been awarded by the customer to Outotec (India) Private Limited and in some projects the supervisory services had not commenced. Since there was no supervisory PE in India for the said projects, the question of any attribution being made for supply of equipment to the supervisory PE did not arise.

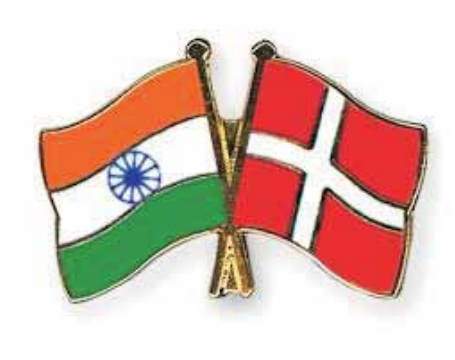
With regard to the issue regarding taxation of income earned from supply of designs and drawings in India, the Tribunal on perusal of the clauses of contract and the sample copies of airway bill noticed that the entire work relating to designs and drawings was done outside the territory of India; sale was affected outside India and the consideration was also received outside India in foreign currency. In view thereof and the reasoning mentioned above with regard to income from sale of equipment, the Tribunal held that the business income earned by the assessee from the sale of designs and drawings was also not liable to tax in India both under the provisions of the Act and DTAA

Comments: The Tribunal ruling has reiterated that when the title in an equipment is transferred outside India the sale of equipment cannot be taxed in India merely because acceptance tests post installation of equipment was carried out in India. The decision also provides guidance as to taxability of designs in line with the judicial precedents, like, *Ishikawajma–Harima Heavy Industries Ltd. vs DIT (2007) 288 ITR 408 (SC) and CIT and Anr vs. Hyundai Heavy Industries Co. Ltd. (2007) 291 ITR 482(SC).*

Scope of Exchange of information widened under India-Denmark DTAA

A Protocol to Double Taxation Avoidance Agreement between India and Denmark that has entered into force on February 1, 2015, has been notified by *Notification No. 45/2015/F No. 503/02/1998-FDI-I,* to expand the scope of Exchange of Information (EOI) clause under Article 26 by substituting the same with a new Article 26.

In terms of newly substituted Article 26, the said clause has been liberalized to allow exchange of information as is foreseeably relevant for, *inter alia,* administration, or enforcement of domestic laws. Clauses 4 and 5 have been newly inserted to – (a) debar the contracting states from declining to supply information requested solely on the ground of "no domestic interest" in such information and makes it obligatory



for the contracting states to provide information requested by other states even when the other state may not need the information for its own tax purpose and (b) prohibits contracting states from denying information solely "because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person".

Permissible "Business Relationship" between Chartered Accountant and client notified

Section 288 of the IT Act regulates the appearance by "authorized representatives" before any income-tax authority or the Appellate Tribunal. Sub-clause (viii) of the Explanation below Section 288(2), as amended by the Finance Act 2015, provides that a chartered accountant is eligible to be an "authorized representative" provided he is not "a person who, whether directly or indirectly, has business relationship with the assessee of such nature as may be prescribed".

The CBDT has by Notification dated June 24, 2015 inserted Rule 51A, to define the nature of "business relationship" which is covered by sub-clause (viii) of Explanation below sub-section (2) of Section 288 of the Act. The expression "business relationship" has been construed as any transaction entered into for a commercial purpose, excluding –

(a) Commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm; and

(b) Commercial transactions which are in the ordinary course of business of the company and at arm's length price.

Relevant dates for compliance window under Black Money Act notified

The Government has by *Press Release dated July 1, 2015* notified the date for compliance under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (**"Black Money Act"**) as September 30, 2015. It is further stated that the tax and penalty in respect of the undisclosed assets declared is to be paid by December 31, 2015.

Further, the CBDT by *Notification No. 56/2015 dated July 1, 2015,* has also issued clarification that for giving effect to the provisions of Section 59 (relating to declaration of undisclosed foreign asset) and Section 60 (providing for charging of tax on undisclosed foreign asset declared u/s 59), the Act shall come into force on July 1, 2015 and not April 1, 2016.

RBI/ FEMA/ FDI POLICY

Consolidated Master Circulars

The regulatory framework and instructions issued by the RBI are compiled in the Master Circulars. The Master Circulars are being updated from time to time as and when the fresh instructions are issued. The date up to which the Master Circular has been updated is indicated therein. The Master Circulars may be referred to for general guidance.

On July 1, 2015, the Reserve Bank of India (**RBI**) has issued consolidated **Master Circulars** on various topics, including the following –

(a) Foreign investment in India

(b) External commercial borrowings

(c) Export of goods and services

(d) Import of goods and services

(e) Direct investment by residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) abroad

(f) Establishment of Liaison/ Branch/ Project offices in India by foreign entities, etc.

Master Circulars can be viewed at: https://www.rbi.org.in/Scripts/BS_ViewMasterCirculardetails.aspx

External Commercial Borrowings (ECB) for civil aviation sector

RBI has extended the scheme of raising ECB for working capital for civil aviation (subject to conditions stipulated), till March 31, 2016. Earlier RBI *vide A.P. (DIR Series) Circular No. 113 dated April 24, 2012* has mentioned that subject to the conditions stipulated in the said Circular, ECB can be raised by airline companies for working capital as a permissible end-use, under the approval route. The scheme was extended initially till December 31, 2013 and thereafter till March 31, 2015.

Link: - *https://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=9782*

[Source: A.P. (DIR Series) Circular No.109 dated June 11, 2015]

Rationalization under Liberalized Remittance Scheme (LRS) for Current and Capital Account Transactions

RBI has made changes for liberalization and rationalization of LRS for resident individuals and existing guidelines issued under the Foreign Exchange Management (Current Account Transactions) Rules, 2000. The changes are as follows:-

(a) Authorized dealer Banks may allow remittances by a resident individual up to USD 250,000 per financial year for any permitted current or capital account transaction or a combination of both. If an individual has already remitted any amount under the LRS, then the applicable limit for such an individual would be reduced from the present limit of USD 250,000 for the financial year by the amount already remitted.

(b) To facilitate ease of transactions, all the facilities (including private/ business visits) for release of exchange/ remittances for current account transactions available to resident individuals under Para 1 of Schedule III to the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time, shall now be subsumed under the overall limit of USD 250,000.

(c) However for the purpose of emigration, expenses in connection with medical treatment abroad and studies abroad, individuals may avail of exchange facility for any amount in excess of the overall limit prescribed under the LRS, if it is so required by a country of emigration, medical institute offering treatment or the university respectively.

(d) Gift in Indian Rupees by resident individuals to NRI relatives as defined in the Companies Act, 2013 shall also be subsumed under the LRS limit.

(e) The scheme cannot be made use for making remittances for any prohibited or illegal activities such as margin trading, lottery, etc.

(f) Persons other than individuals can make remittances for:-

(i) Donations for educational institutions

(ii) Commissions to agents abroad for sale of residential flats/ commercial plots in India

(iii) Remittances for consultancy services and

(iv) Remittances for reimbursement of pre-incorporation expenses.

Details of the said circular can be viewed at *https://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=9756*

[Source: A.P. (DIR Series) Circular No.106 dated June 01, 2015]

Composite caps on foreign investment

The Government has notified by *Press Note No. 8 (2015) Series Dated July 30, 2015* the composite caps for simplification of Foreign Direct Investment (FDI) policy to attract foreign investments. All sectors other than banking and defence sectors can now get up to 49 per cent foreign institutional investment through the automatic route. In sectors under government approval route, any transfer of ownership due to foreign investment will require government approval.

As per the new norms, all direct and indirect overseas investments, whether portfolio or FDI, will be subject to a composite foreign investment cap for that particular sector. An FII/FPI/QFI (Schedule 2, 2A and 8 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations, as the case may be) may invest in the capital of an Indian company under the Portfolio Investment Scheme which limits the individual holding of an FII/FPI/QFI below 10 percent of the capital of the company and the aggregate limit for FII/FPI/QFI investment to 24 percent of the capital of the company. This aggregate limit of 24 percent can be increased to the sectoral cap/statutory ceiling, as applicable, by the Indian company concerned through a resolution by its Board of Directors followed by a special resolution of the shareholders and subject to prior intimation to RBI. The aggregate FII/FPI/QFI investment, individually or in conjunction with other kinds of foreign investment will not exceed sectoral/statutory cap.

It is also clarified that total foreign investment shall include all types of foreign investments, direct and indirect, regardless of whether the said investments have been made under Schedules 1 (FDI), 2 (FII), 2A (FPI), 3 (NRI), 6 (FVCI), 8 (QFI), 9 (LLPs) and 10 (DRs) of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations.

Foreign Currency Convertible Bonds and Depository Receipts, having underlying of instruments which can be issued under Schedule 5, being in the nature of debt, shall not be treated as foreign investment. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment.

Portfolio investment, up to aggregate foreign investment level of 49% or sectoral/statutory cap, whichever is lower, will not be subject to either government approval or compliance of sectoral conditions, provided such investment does not result in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities.

Source:http://pib.nic.in/newsite/PrintRelease.aspx?relid=123320

CORPORATE LAWS/ SEBI

Companies Act, 2013

Exemption/ Relaxations to Private Companies

The Government has notified several changes and relaxations in the applicability of the provisions of the Companies Act, 2013 ('the Act') to private companies vide notification dated June 5, 2015. The key changes are highlighted below:

(a) Related Party Transactions

Definition of related party under Section 2(76)(viii) for the purpose of Section 188 has been relaxed to exclude a private company in respect of compliance of related party contracts with its holding, subsidiary or an associate company under Section 188 of the Companies Act, 2013.

In addition, Section 188 of the Companies Act imposes some restrictions on shareholders considered to be related parties. Related parties cannot vote at general shareholders' meetings regarding a resolution to approve any contract or arrangement between the company and the related party.

Pursuant to the notification, this restriction will not apply to private companies.

(b) Kinds of Share Capital and Voting Rights

Private companies have now been exempted from application of Section 43 and Section 47 of the Act, which deals with kinds of share capital and voting rights, respectively, if memorandum or articles of the Company so provide. This means that private companies can now issue shares with differential rights with full flexibility to structuring their securities even without voting rights.

(c) Rights issue

Section 62(1)(a)(i) of the Companies Act provides that time period for rights offer shall not be less than 15 days and not more 30 days. Private company can now reduce the time period of rights offer than that prescribed under Section 62(1)(a)(i), if the 90 (ninety) percent of the members of a private company have given their consent in writing or in electronic mode. Furthermore, the requirement of sending the notice 3 days prior to opening of the issue, by way of specified means, under rights issue is now exempted for private companies.

Section 62(1)(b) of the Companies Act provides that where a company intends to increase its share capital by the issue of further shares can do so by offering shares to employees under a scheme of employees' stock option (ESOP). Before the amendment, such further issue of shares by a company was to be done by passing a special resolution. Now, private companies can make further issues of shares under ESOP scheme only by passing of ordinary resolution.

(d) Restrictions on purchase by company of its shares

Under Section67(1) of the Companies Act, a company was not allowed to buy its own shares unless it results in consequent reduction of share capital of the company. With the notification now exempting private companies from the application of Section 67, private companies can now buy its own shares without consequent reduction in share capital provided:

(i) no other body corporate has invested money in share capital of such private company;

(ii) the borrowings of such private company from banks or financial institutions or anybody corporate is not equal to or more than twice its paid up share capital or fifty crore rupees, whichever is lower; and

(iii) such private company is not in default in repayment of such borrowings subsisting at the time of making transactions under Section 67 of the Act.

However, there is ambiguity as to whether a private company can buy its own shares as there is no similar exemption provided to private companies under Section 66 (Reduction of Capital) and Section 68 (Buyback of Shares). In our view, the only objective achieved by this amendment is provision of financial assistance by a private company to purchase its own shares.

(e) Acceptance of deposits from member

Section 73(2) allows acceptance of deposits by a company from its members with approval by way of ordinary resolution and subject to fulfilment of certain conditions prescribed under clauses (a) to (e) like issuance of circular including a statement showing financial position of the company, creation of a deposit repayment reserve account, obtaining deposit insurance, obtaining a certificate from the directors that the company has not defaulted in repayment of deposits accepted, etc.

Private companies have now been exempted from the conditions in clauses (a) to (e) of Section 73(2) in relation to deposits taken from members provided that the amount of deposit accepted by the private company does not exceed 100% of aggregate of paid-up capital and free reserves of such private company and the relevant filings with the Registrar of Companies has been made.

(f) Management and Administration

Private companies have now been provided with an option to exclude the applicability of Sections 101 to 107 and Section 109 by providing for exclusions in its Articles of Association. Section 101 to

107 and Section 109 deals with procedure of conducting of general meetings by the companies, which are length of service of notice of meeting, explanatory statement, quorum, chairperson of the meetings, proxies, restriction on voting rights, voting by show of hands and demand for poll.

A private company was allowed to lay down its own procedure in respect of conduct of its general meetings under the Companies Act, 1956. Now the same position has been restored under the Companies Act, 2013.

(g) Filing of board resolutions

All companies are required to file copies of board resolution under Section 117(3)(g) of the Act passed in relation to matters prescribed under section 179(3) of the Act. These matters were:

a. calls on shareholders in respect of money unpaid on their shares;

b. buy-back of securities;

c. issuance of securities, including debentures, whether in or outside India;

d. borrowing of monies;

e. investment of funds of the company;

f. granting of loans or giving guarantee or providing security in respect of loans;

g. approval of financial statement and the Board's report;

h. diversification of business of the company;

i. amalgamation, merger or reconstruction;

j. Takeover of a company or acquiring a controlling or substantial stake in another company;

k. Additional matters as may be prescribed.

Now, Section 117(3)(g) of the Act will not apply to private companies, hence, a private company will not be required to file copies of board resolution in relation to all of the matters mentioned above with the Registrar of Companies.

(h) Number of company audits

For the purpose of limit on number of companies of which audits can be taken at a time by the auditor under Section 141(3)(g) of the Companies Act, which is 20, all one person companies, dormant companies, small companies, and private companies having a paid up share capital of less than INR 100 crores will be excluded.

(I) Appointment of directors to be voted individually

Provisions of Section 162 which provided for the manner of appointing of two or more were to be voted individually will now not apply to private companies.

(j) Restrictions on powers of Board

Section 180(1) of the Act which provided that board may exercise its power in relation to the following matters, only with the consent of members by way of special resolution:

(i) Sale, lease or disposal of the whole or substantially whole of the undertaking of the company;

(ii) Investment of the amount of compensation received by the company as a result of merger or amalgamation in trust securities;

(iii) Borrowing money exceeding the aggregate of the company's paid-up share capital and free reserves; and

(iv) Remittance or granting time for the repayment of, any debt due from a director

Now, there is no need for a private company to pass special/ ordinary resolution for exercising powers under Section 180 of the Companies Act.

(k) Interested Directors

Section 184(2) provided that directors of a company will refrain from participating in a board meeting for matters in which they are interested. Interested director in a private company can now participate in board meetings after disclosure of his interest.

(l) Loans by private companies

A partial exemption from Section 185 has now been given to private companies giving a loan, providing a guarantee or offering a security in connection with a loan taken by director(s) or by any persons/ entities in which the director(s) have an interest.

There are 3 cumulative conditions for availing the exemption:

(i) There is no body corporate shareholder in the lending/ guaranteeing company;

(ii) The lending company's aggregate borrowings from other bodies corporate or banks or financial institutions is limited to two times the paid-up share capital of the company or INR 50 crores whichever is lower;

(iii) No default in repayment of such borrowings is pending by the lending company.

(m) Appointment of managerial persons

Section 196(4) and (5) of the Act prescribes the procedure and approval

requirements for appointment of managing director, manager or whole-time director and requires companies to comply with the provisions of Section 197 and Schedule V with respect to remuneration payable to such personnel. The provision requires board approval followed by approval of members in the next general meeting for appointment of such personnel and filing of return of appointment of such personnel within 60 days from the date of such appointment.

Private companies are now exempted from the above requirements.

Link: - *http://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf*

[Source: Notification no. G.S.R 464(E) dated June 5, 2015]

Similarly, the MCA has issued following exemption/ relaxation notifications:

* For Government companies, the MCA has issued Notification no G.S.R 463(E) dated June 5, 2015
* For Nidhi companies, the MCA has issued Notification no G.S.R 465(E) dated June 5, 2015
* For Not-for-Profit companies (also known as Section 8 companies), the MCA has issued *Notification no. G.S.R 466(E) dated June 5, 2015.*

Review of Offer for Sale (OFS) of Shares through stock exchange mechanism

Securities and Exchange Board of India (SEBI) has taken steps to encourage retail investors to participate in the OFS process and to simplify the bidding process for retail investors. It has been decided that:

(a) OFS notice shall continue to be given latest by 5 pm on T-2 days. However T-2 days shall be reckoned from banking day instead of trading day.

(b) It would be mandatory for sellers to provide the option to retail investors to place their bids at cut off price in addition to placing price bids.

All other conditions remaining unchanged

Link: - *http://www.sebi.gov.in/cms/sebi_data/attachdocs/1435312461669.pdf*

[Source: Notification No. CIR/MRD/DP/12/2015 dated June 26, 2015]

Contact Details :

www.vaishlaw.com

DELHI
1st & 11th Floor
Mohan Dev Building
13, Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-2332 0484
delhi@vaishlaw.com

MUMBAI
106, Peninsula Centre
Dr. S. S. Rao Road
Parel
Mumbai - 400012, India
Phone: +91-22-4213 4101
Fax: +91-22-4213 4102
mumbai@vaishlaw.com

GURGAON
803, Tower A
Signature Towers
South City-I, NH-8
Gurgaon - 122001, India
Phone: +91-124-454 1000
Fax: +91-124-454 1010
gurgaon@vaishlaw.com

BENGALURU
Unit # 305
Prestige Meridian-II
Building No. 30, M. G. Road
Bengaluru - 560001, India
Phone: +91-80-40903581/ 88 /89
Fax: +91-80-40903584
bangalore@vaishlaw.com

Editor : Hitender Mehta
Editorial Team : Rupesh Jain, Hemant Puthran, Puneeta Kundra, Rakshanda Niyazi, Puneet Chugh, Abhishek Jain