

HARBINGERTM

Updates on regulatory changes affecting your business

November 2018



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RESERVE BANK OF INDIA



RBI to inject Rs. 80 billion liquidity on 22nd November, 2018

The Reserve Bank of India (RBI) said on Monday 19th November, 2018 that it will inject Rs. 80 billion into the system through purchase of government securities on 22nd November, 2018.

As part of the Open Market Operations (OMO), the RBI will purchase government securities maturing in 2021 bearing interest rate of 7.8 per cent, 2024 (8.4 per cent), 2026 (8.33 per cent), 2028 (8.6 per cent) and 2032 (8.28 per cent). The RBI said it has the right to decide on the quantum of purchase of individual securities and can also accept offers for less than Rs. 80 billion.

MINISTRY OF CORPORATE AFFAIRS



1. Listed entities need to disclose risk management activities in their annual report

The Securities & Exchange Board of India (SEBI) issued a circular on 15th November, 2018 specifying disclosures regarding commodity risks by listed entities.

The SEBI has accepted the recommendations of Corporate Governance Committee formed under the Chairmanship of Shri Uday Kotak on 28th March, 2018 & implemented the same through this circular. The recommendations are as follows:-

- a. The listed entities should disclose their risk management activities during the year, including their commodity hedging positions in a more transparent, detailed and uniform manner for easy understanding and appreciation by the shareholders.

- b. For the consistent implementation of the requirements of the SEBI LODR Regulations regarding disclosure of commodity risks and other hedging activities across listed companies, a detailed format along with the periodicity of the disclosures may be outlined by SEBI which would depict the commodity risks they face, how these are managed and also the policy for hedging commodity risk, etc. followed by the company for the purpose of disclosures in the annual report.

Accordingly, all listed entities shall make the disclosures as part of the Corporate Governance Report in the Annual Report.

2. Central Government notifies NFRA with effect from 1st October, 2018

The Central Government has notified the constitution of the National financial Reporting Authority (NFRA), a new regulatory for the auditors in the country.

As per a notification issued by the Ministry of Corporate Affairs (MCA) on 3rd October, 2018, the Government appointed the 1st October, 2018 as the date of constitution of National Financial Reporting Authority.

The Central Government has said that the provisions of sub-sections (1) and (12) of Section 132 of the Companies Act, 2013 shall come into force with effect from 1st October, 2018.

As per section 132(1) of the Act, the Central Government may, by notification, constitute a National Financial Reporting Authority to provide for matters relating to accounting and auditing standards under this Act.

Under section 132 (2) of the Act, the Central Government may appoint a secretary and such other employees as it may consider necessary for the efficient performance of functions by the National Financial Reporting Authority under this Act and the terms and conditions of service of the secretary and employees shall be such as may be prescribed.

ECONOMICS



Government may cut its expenditure by at least Rs 70,000 crore to meet budgeted fiscal deficit of 3.3%.

Current Account Deficit may narrow to 2.6% of GDP in FY 2018-19 due to falling crude oil prices

Following decline in oil prices, the country's current account deficit (CAD) is expected to touch 2.6 % of GDP in the current fiscal against an earlier expectation of 2.8 %, SBI Research report said.

Fiscal deficit in first half of FY2018-19 has already reached 95.3 % of full-year budget estimates (BE).

The report noted that for the second year in succession, direct tax collections are likely to be higher than the budgeted targets by at least around Rs 20,000 crore.

In addition to this, the government is expected to add another Rs 20,000 crore from evaded taxes.

SUMMARY OF IMPORTANT TAX JUDGEMENTS

Unless otherwise stated, the sections mentioned hereunder relate to the Income Tax Act, 1961

Sr No.	Tribunal/Court	Section/Code	Nature	Case Law
1	Bombay High Court	Section 2(22)(e)	Deemed Dividend: Law explained on whether only a proportionate addition of deemed dividend can be made taking into consideration the percentage of the shareholding in the borrowing company in cases where (a) there is only one shareholder that has a shareholding in the lending company as well as in the borrowing company & (b) two or more shareholders are shareholders of the same lending company and the same borrowing company.	Sahir Sami Khatib vs. ITO
2	Bombay High Court	Section 2(47)	Transfer for Capital Gains: The fact that an agreement for sale of property is registered does not make it a conveyance. The sale or transfer is not complete on the date of the execution of the agreement if there are obligations to be fulfilled by both parties.	PCIT vs. Talwalkars Fitness Club
3	ITAT Delhi	Section 23(1)(b), 50C	Law explained on (i) whether notional interest on interest-free security deposit can be added while computing annual value u/s 23(1)(b) & (ii) whether the interest-free security deposit can be treated as 'full value of consideration' u/s 50C as it was included in 'assessable value' by the Stamp Duty Valuation Authority.	DCIT vs. Moni Kumar Subba
4	ITAT Mumbai	Section 68	Bogus share capital: The ITAT is an adjudicator and not an investigator. It has to rely upon the investigation / enquiry conducted by the AO. The Dept cannot fault the ITAT's order and seek a recall on the ground that an order of SEBI, though available, was not produced before the ITAT at the hearing. The negligence or laches lies with the Dept and for such negligence or laches, the order of the ITAT cannot be termed as erroneous u/s 254(2)	ITO vs. Iraisaa Hotels Pvt. Ltd.
5	ITAT Mumbai	Section 68	Bogus share capital: If (a) the assessee has furnished the Name, Address, PAN no and Share Application Form to prove that the shares were allotted to the applicants and (b) the bank statement show that money was received through banking channels and there were no immediate withdrawals to suggest that the share application amounts have been returned back to these parties in cash, it means the assessee has discharged the primary onus cast upon it to prove the identity, capacity and genuineness of transactions.	Sunshine Metals & Alloys vs. ITO

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6	ITAT Mumbai	Section 68	Bogus share premium: The AO cannot assess the share premium as income on the ground that it is "excessive". The share premium worked out in the Valuation Certificate is the minimum amount that can be collected by the assessee under RBI regulations. There is no bar on collecting higher amount as share premium. There are several factors that are taken into consideration while issuing the equity shares to shareholders/investors, such as Venture capital funds and Private Equity funds. The premium is determined between the parties on the basis of commercial considerations and cannot be questioned by the tax authorities. The AO is not entitled to sit on the arm chair of a businessman and regulate the manner of conducting business (All judgements considered).	DCIT vs. Varsity Education Management Pvt. Ltd.
7	Gujrat High Court	Section 192, 205	If the deductor has deducted TDS and issued Form 16A, the deductee has to be given credit even if the deductor has defaulted in his obligation to deposit the TDS with the Government revenue.	Devarsh Pravinbhai Patel vs. ACIT
8	ITAT Mumbai	Section 250, 254	If a decision is challenged by the assessee both on the issue of jurisdiction as well as on merits, the appellate authority has to decide both issues. He cannot decline to decide one of the issues on the basis that the decision on the other issue renders it academic. This approach leads to multiplication of proceedings and leads to delay.	ITO vs. Mohanraj Trading & Exchange

Discussion on Judgments – Income Tax



1. **Deemed Dividend: Law explained on whether only a proportionate addition of deemed dividend can be made taking into consideration the percentage of the shareholding in the borrowing company in cases where (a) there is only one shareholder that has a shareholding in the lending company as well as in the borrowing company & (b) two or more shareholders are shareholders of the same lending company and the same borrowing company.**

[Sahir Sami Khatib vs. ITO]

Facts:-

There cannot be any proportionate addition of deemed dividend taking into consideration the percentage of the shareholding in the borrowing company. Section 2(22)(e) of the I. T. Act, 1961 does not postulate any such situation. This is especially as there is only one shareholder that has a shareholding in the lending company as well as in the borrowing company. Different considerations may arise if two or

more shareholders are shareholders of the same lending company and the same borrowing company. In such a factual position it could possibly be argued that the addition ought to be made on a proportionate basis

2. **Transfer for Capital Gains: The fact that an agreement for sale of property is registered does not make it a conveyance. The sale or transfer is not complete on the date of the execution of the agreement if there are obligations to be fulfilled by both parties.**

[PCIT vs. Talwalkars Fitness Club]

Facts:-

The sale or transfer was not complete on the date of the execution of the agreement as is now urged and erroneously understood by the Assessing Officer and the Commissioner. The Tribunal was right in its conclusion that on facts, the agreement executed on 14th February, 2011 is an agreement for sale of immovable property. The law then prevailing required such an agreement to be registered. In any event merely because it is registered, that does not partake the character of a conveyance or a sale deed automatically. Thus, the possession also was not handed over but was to be handed over on compliance with certain obligations by the Vendor.

3. **Law explained on (i) whether notional interest on interest-free**

security deposit can be added while computing annual value u/s 23(1)(b) & (ii) whether the interest-free security deposit can be treated as 'full value of consideration' u/s 50C as it was included in 'assessable value' by the Stamp Duty Valuation Authority

[DCIT vs. Moni Kumar Subba]

Facts:-

The object of Section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of" takes colour from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be for enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, through title may not be transferred in law, there is, in substance, a transfer of title in fact

- 4. Bogus share capital: The ITAT is an adjudicator and not an investigator. It has to rely upon the investigation / enquiry conducted by the AO. The Dept cannot fault the ITAT's order and seek a recall on the ground that an order of SEBI, though available, was not produced before the ITAT at the hearing. The negligence or laches lies with the Department and for such negligence or laches, the order of the ITAT cannot be termed as erroneous u/s 254(2)**

[ITO vs. Iraisaa Hotels Pvt. Ltd.]

Facts:-

After the passing of the order of the Tribunal the Department has come forward with the final order of the SEBI by stating that, though, it was available at the time of hearing of appeal but it could not be brought to the notice of the Tribunal. Thus, as could be seen whatever negligence or laches for not bringing the final order of SEBI to the notice of the Tribunal lies with the Department and for such negligence or laches of the Department, the appeal order passed by the Tribunal cannot be termed as erroneous to bring it within the ambit of section 254(2) of the Act.

- 5. Bogus share capital: If (a) the assessee has furnished the Name, Address, PAN no and Share Application Form to prove that the shares were allotted to the applicants and (b) the bank statement shows that money was received through banking channels and there were no immediate withdrawals to suggest that the share application amounts have been returned to these parties in cash, it means the assessee has discharged the primary onus cast upon it to prove the identity, capacity and genuineness of transactions.**

[Sunshine Metals & Alloys vs. ITO]

Facts:-

The assessee has furnished the Name, Address, PAN no and Share Application Form to prove that the

shares were allotted to the applicants. The assessee has also furnished its bank statement to show that the money was received through banking channels and there were no immediate withdrawals from the banks which shows that the share application amounts have not been returned to these parties in cash. Thus, the assessee has discharged the primary onus cast upon it to prove the identity, capacity and genuineness of transactions. We also find that the CIT(A) provided opportunity to assessee to cross examine Shri Mukesh Choksi by sending the matter to AO for remand report. During remand proceeding, the AO provided opportunity to assessee to cross examine Shri Mukesh Choksi and who in turn during cross examination admitted having invested in assessee company by these two concerns.

- 6. Bogus share premium: The AO cannot assess the share premium as income on the ground that it is "excessive". The share premium worked out in the Valuation Certificate is the minimum amount that can be collected by the assessee under RBI regulations. There is no bar on collecting higher amount as share premium. There are several factors that are taken into consideration while issuing the equity shares to shareholders/investors, such as Venture capital funds and Private Equity funds. The premium is determined between the parties on the basis of commercial considerations and cannot be questioned by the tax authorities.**

The AO is not entitled to sit on the arm chair of a businessman and regulate the manner of conducting business (All judgements considered)

[DCIT vs. Varsity Education Management Pvt. Ltd.]

Facts:-

Once the AO was satisfied with the identity and credit worthiness of the investor and genuineness of transactions, the assessee can be said to have proved the "nature and source" of the cash credits. The amounts received as Share premium are in the nature of capital receipts as per the decision rendered by Hon'ble Bombay High Court in the case of Vodafone India Services P Ltd (supra) and the assessee has also discharged the onus placed upon it u/s 68 of the Act. In fact, the AO himself accepted the share premium to the extent of Rs.672/- per share as Capital receipt. Hence the "nature" of alleged excess share premium amount cannot be considered as receipt of income nature.

- 7. If the deductor has deducted TDS and issued Form 16A, the deductee has to be given credit even if the deductor has defaulted in his obligation to deposit the TDS with the Government revenue.**

[Devarsh Pravinbhai Patel vs. ACIT]

Facts:-

In case of the petitioner the employer for the assessment year 2012-13 while paying salary had deducted tax at source to the tune of Rs.2,68,498/ but had not deposited such tax with the Government revenue. The short question is under such circumstances can the Department seek to recover such amount from the petitioner or whether the petitioner is correct in contending that he had already suffered the deduction of tax, the mere fact that the deductee did not deposit such tax with the Government revenue could not permit the Income tax Department to recover such amount from the petitioner.

It is held that the petitioner assessee deductee is entitled to credit of the tax deducted at source with respect to amount of TDS for which Form No.16A issued by the employer deductor has been produced and consequently department is directed to give credit of tax deducted at source to the petitioner assessee – deductee to the extent Form no.16 A issued by the deductor. However, it is clarified and observed that if the department is of the opinion that the deductor has not deposited the said amount of tax deducted at source, it will always been open for the department to recover the same from the deductor. Rule is made absolute to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.

jurisdiction as well as on merits, the appellate authority has to decide both issues. He cannot decline to decide one of the issues on the basis that the decision on the other issue renders it academic. This approach leads to multiplication of proceedings and leads to delay.

[ITO vs. Mohanraj Trading & Exchange]

Facts:-

Examining the present case on the touchstone of above said case law, we find that the order of the Id. CIT(A) here directly falls under the ambit of Hon'ble High Court's order as above. The Id. CIT(A) has decided one issue and has left undecided another issues duly raised before him. Hence, we are of the considered opinion that these issues relating to validity of reopening were duly raised, which have been left undecided by the Id. CIT(A) and need to be remitted to the file of the Id. CIT(A). The Id. CIT(A) is directed to complete his appellate order by deciding on these issues regarding the validity of reopening which were duly raised before him by the assessee.

Note: The judgments should not be followed without studying the complete facts of the case Law.

- 8. If a decision is challenged by the assessee both on the issue of**

DATE CHART FOR THE MONTH OF NOVEMBER, 2018

November 2018

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
				1	2	3
4	5	6	7 Monthly TDS Payment	8	9	10
11 GSTR-1 (T/O>1.5 Crores)	12	13	14	15 1)Provident Fund Payment 2)ESIC Payments	16	17
18	19	20 GSTR-3B	21	22	23	24
25	26	27	28	29	30 1) Form 3CA-3CD (Tax Audit Report for companies applicable to Transfer Pricing. 2) Form 3CEB & Form 3CEAA (Reports furnished U/s 92E of Income Tax Act-Transfer Pricing). 3) Income Tax Returns of Companies liable to Transfer Pricing.	

This communication is intended to provide general information, guidance on various professional subject matters and should not be regarded as a basis for taking decisions on specific matters. In such instances, separate advice should be taken.