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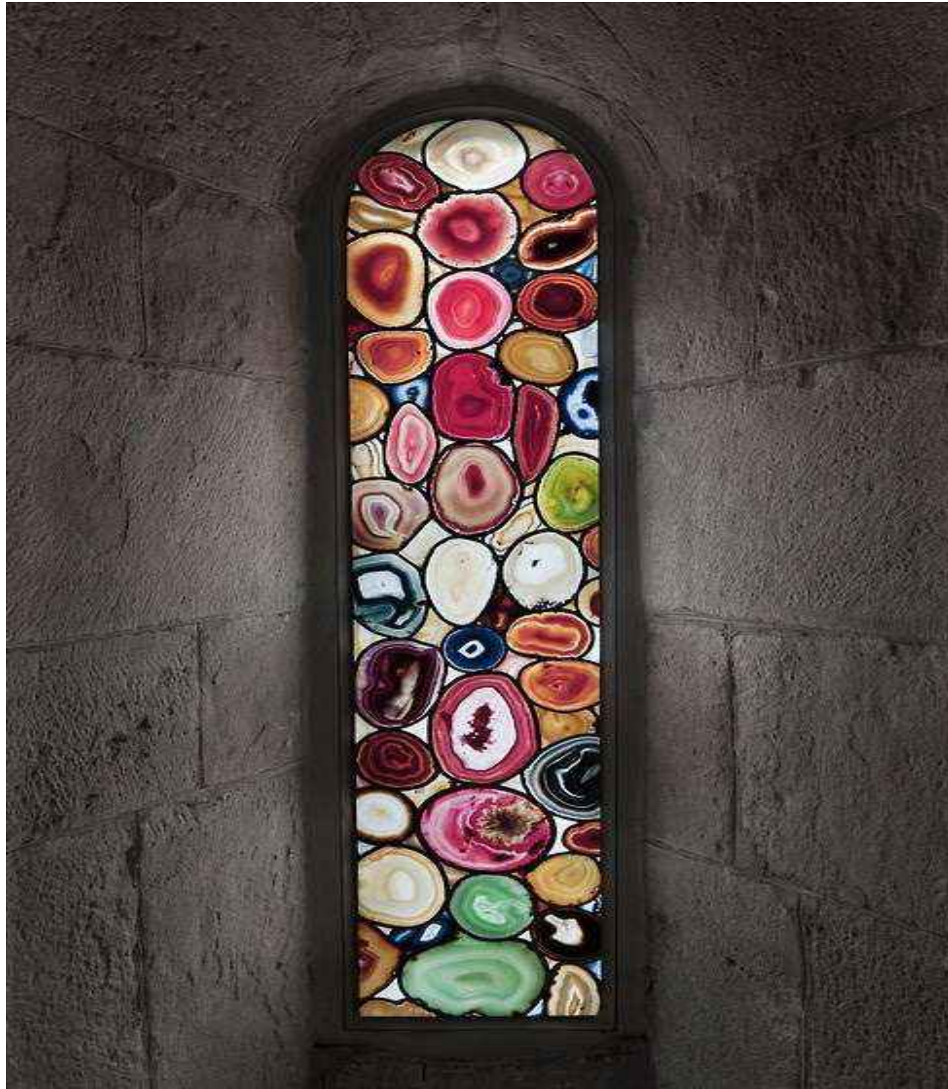
MAY 2014



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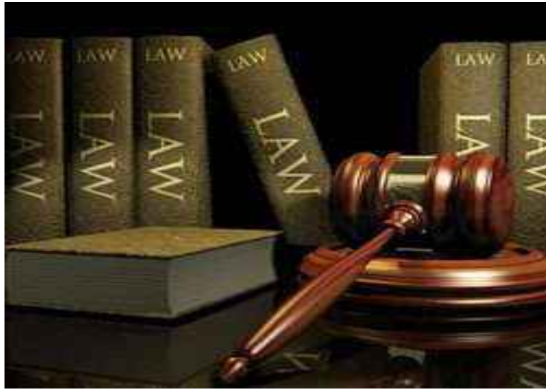
COMPANY LAW



Applicability of the Companies Act, 2013 to Auditor's Report to FY 2014-15 and Onwards:

The Ministry of Corporate Affairs, on 26th March 2014 notified a majority of the remaining sections of the Companies Act, 2013, including sections 139 to 148, relating to audits and auditors. Provisions of Schedule II (Useful lives to compute depreciation) and Schedule III (Format of financial statements) have also been brought into force from that date. The relevant Rules pertaining to these provisions have also been notified, placed on the website of the Ministry and have come into force from the same date. The Act was stated to be effective from 1st April, 2014.

Accordingly, queries are being raised by a number of members as to whether any auditor's report of a company being signed on or after 01st April, 2014 would be in accordance with the requirements of section 143 of the Companies Act, 2013.

In this context, it may be noted that the Ministry of Corporate Affairs (MCA) has, on 04th April 2014, vide its General Circular No. 08/2014, clarified that the financial statements (and documents required to be attached thereto), auditor's report and Board's report in respect of financial years that commenced earlier than 01st April, 2014 shall be governed by the relevant provisions/Schedules/rules of the Companies Act 1956.

Therefore, it is clear from MCA's aforesaid General Circular that the auditor's report of a company pertaining to any financial year commencing on or before 31st march 2014, would be in accordance with the requirements of the Companies Act, 1956 even if that financial year ends after 01st April 2014.

As a corollary to MCA's General Circular, it appears that the provisions of the 2013 Act would apply only to the financial years commencing on or after 01st April 2014.

(Refer General Circular No.08/2014 dated 04.04.2014)

Availability of 46 MCA eForms operational from 28th April, 2014:

46 e-forms including 3 general e-forms will be available for filing by the stakeholders. The 3 General e-Forms will be used for filing 17 forms which are not available as e-forms as on date, Details of these 17 forms and corresponding 3 e-Forms with which these will be filed as attachments are given in Table "A" of the circular.

(Refer General Circular 09/2014 dated 25th April, 2014)

INCOME TAX

Important CBDT Circular on Depreciation/ Amortisation of Intangible Assets

The CBDT has issued Circular No. 09/2014 dated 23.04.2014 in which it has dealt with the important issue of treatment of expenditure incurred for development of roads & highways in Build-Own-Transfer (BOT) agreements.

The CBDT has held, following the law laid down in Madras Industrial Investment Corp 225 ITR 802 (SC), that the entire cost of construction and development of the infrastructure facility has to be amortized evenly over the period of the concessionaire agreement and allowed as business expenditure u/s 37(1) of the Act.

The CBDT has expressed the view that as the assessee does not hold any rights in the project except recovery of toll fee to recoup the expenditure incurred, the assessee cannot be treated as the "*owner*" of the property and cannot be allowed depreciation u/s 32(1)(ii) of the Act.

Section 10(2A): CBDT issues Important Circular on Taxability of Firms and Partners

The CBDT has issued Circular No. 08/2014 dated 30.03.2014 to deal with the controversial topic as to whether, if the income of the firm is Nil on account of an exemption under Chapter III or deduction under Chapter VI-A of the Act, the partners will also be entitled to claim exemption u/s 10(2A) of the Act with respect to their share in the profits of the firm.

The CBDT has clarified that the term "total income" in s. 10(2A) includes income which is exempt or deductible under various provisions of the Act.

It is stated that the income of a firm is taxable only in the hands of the firm and can under no circumstances be taxed in the hands of the partner.

The CBDT has made it clear that the entire income credited to the partners' account in the firm would be exempt from tax in the hands of the partners, even if the firm is also not chargeable to tax on account of an exemption or deduction.

Rule 12 of Income Tax Rules wef 01.04.2014 related to Filing of Audit Reports & ITR

CBDT has amended Rule 12 of Income Tax Rules 1962 vide its Notification No. 24/2014, dated April 1, 2014 and made amendments in respect of filing of ITR by Trusts, Partnership firms and furnishing of Audit Report under

section 11(2)(a) by trusts for accumulation of Income.

ITR4/ITR5

All assessees liable to tax audit are now required to furnish Return electronically under digital signature. Whereas Non-tax audit returns can be furnished electronically without digital signature.

ITR7

Political parties under section 139(4B) are required to furnish the return of income electronically with digital signature. All other assessee referred to in section 139 (4A), (4C) and (4D) shall furnish the return of income.

The Notification has also Notified SAHAJ (ITR-1), ITR-2, SUGAM (ITR-4S), ITR-V for Assessment Year 2014-15.

(Refer Notification No. 24/2014 dated 1st April, 2014)

RBI

RBI allows FDI to LLPs subject to conditions

It has now been decided that Limited Liability Partnership (LLP) formed and registered under the Limited Liability Partnership Act, 2008 shall be eligible to accept Foreign Direct Investment (FDI) subject to the conditions given in Annex I to A.P. (DIR Series) Circular No. 123 issued by RBI dated 16th April, 2014. The Annexure provides with the details of who is Eligible Investor, Eligibility of LLP for accepting Foreign Investment, Eligible Investment etc.

(Refer A.P. (DIR Series) Circular No. 123 issued by RBI dated 16th April, 2014)

FDI in Pharmaceuticals sector – Clarification

The extant FDI policy for pharmaceutical sector has since been reviewed and it has now been decided with immediate effect that the existing policy would continue i.e. Foreign Direct Investment (FDI) up to 100 per cent is permitted under automatic route for greenfield investments and FDI up to 100 per cent is permitted under Government approval route for brownfield investments (i.e. investments in existing companies) in pharmaceuticals sector, with the condition that 'non-compete' clause would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board (FIPB) of the Government of India.

(Refer A.P. (DIR Series) Circular No.124 dated 21st April, 2014)

ECONOMY

INDIAN ECONOMY TO RISE

For many years, India was No. 5, then it became No. 4, and now the OECD tells us that India is the world's third-largest economy in purchasing-power-parity (PPP) terms. It also tells us that some of the younger readers may even see India surpass the US in their lifetimes and then India will be No. 2.

PPP is an economic theory that estimates the amount of adjustment needed on the exchange rate between countries in order for the exchange to be equivalent to each currency's purchasing power.

The researchers at the OECD did something that has become quite fashionable these days. Take a computer, install Microsoft Excel, and feed input growth rate and purchasing power-parity assumptions on to a new sheet. Then simply drag the cells down, assumptions and all. And presto, you get a QDE - or quick and dirty estimate - of a country's economy for however long.

Such an exercise shows that by 2060, the Indian economy would be even larger than that of the US, and currently it has beaten Japan. If you drag it to 2100, it will become bigger still. If only the real world functioned so mechanically.

(The Economic Times 29th April, 2014)

BLOCK BUSTER PHARMA DEAL:

US drug maker Pfizer Inc. wants to buy AstraZeneca Plc in a deal that could value its smaller British rival at more than $100 billion, creating a new giant on the global pharmaceuticals scene.

Pfizer confirmed on Monday it made a bid approach to AstraZeneca in January and said it had contacted its British rival again on 26 April seeking discussions about a takeover. AstraZeneca shares jumped 15% in early trade.

The takeover, if it happens, would be one of the largest ever pharmaceuticals deals. The renewed approach comes amid a wave of mergers and acquisitions in the sector.

(Live Mint – Wall Street Journal 29th April, 2014)

INTERNATIONAL TAX

France Issues New Transfer Pricing Rules For 2014

This requirement is to disclose foreign rulings is applicable only to companies that fall under Article L.13 AA of the LPF; that is those companies whose assets or yearly turnover exceed EUR 400m. As regards the other new disclosure requirements, lower thresholds apply.

These thresholds are EUR 400m for assets, a turnover threshold of EUR 152.4m for sellers of goods, and a turnover threshold of EUR 76.2m for all other businesses.

The disclosure requirements are triggered when a business exceeds any of these thresholds.

Two additional measures had been adopted by lawmakers, but were deemed to be unconstitutional before coming into force. These included a new penalty for transfer pricing-related deficiencies, at 0.5 percent of gross turnover (instead of the current 5 percent of underpaid tax,) and a shift in the burden of proof onto the taxpayer in cases of major business restructuring.

(Tax News – 4th March, 2014)

SUMMARY OF IMPORTANT TAX JUDGEMENTS:

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

Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
1	ITAT – Mumbai	Section 14A of the Income Tax Act	No section 14A/ Rule 8D disallowance for investment in shares of subsidiaries & Joint Ventures	*JM Financial Limited Vs ACIT*
2	High Court – Delhi	Section 40(a)(i) and section 201 of the Income Tax Act	If it is held by the dept that no income arose to the recipient then notices to payer for TDS default u/s 201 & section 40(a)(i) disallowance are bad.	*Samsung India Electronics Pvt. Ltd Vs DDIT*
3	High Court – Gujarat	Section 40A(3) of the Income Tax Act	There is a difference between "crossed cheque" and "account payee cheque". Payment by crossed cheque attracts section 40A(3) disallowance	*Rajmoti Industries Vs ACIT*
4	ITAT-Ahmedabad (Special Bench)	Section 54E, 54EA, 54EB and 54EC of the Income Tax Act	The term "month" in section 54E, 54EA, 54EB & 54EC does not mean "30 days" but the "calendar month". So, the expression "within a month" means "before the end of the calendar month"	*Alkaben B. Patel Vs ITO*
5	High Court – Bombay	Section 194H of the Income Tax Act	TDS does not apply to all sales promotional expenditure if relationship is not that of principal & agent	*CIT Vs Intervet India Pvt.Ltd*
6	High Court – Bombay	Section 234E of the Income Tax Act	High Court grants ad-interim stay against operation of notices levying fee for failure to file	*Rashmikant Kundalia Vs UOI*

			TDS statement	
7	High Court – Delhi		Not keeping separate books together with frequent transactions means that gains from shares have to be assessed as business profits instead of as STCG	*CIT Vs M/s D&M Components Ltd*

1) No section 14A/ Rule 8D disallowance for investment in shares of subsidiaries & Joint Ventures

JM Financial Limited Vs ACIT (ITAT Mumbai)

i. In AY 2009-10, the assessee has specifically raised a point before the AO that 97.82% of the investment is in subsidiary companies and joint venture companies and, therefore, no expenditure was incurred for maintaining the portfolio on these investments or for holding the same.

ii. The assessee has also pointed out that these investments are long term investment and no decision is required in making the investment or disinvestment on regular basis because these investments are strategic in nature in the subsidiary companies on long term basis and, therefore, no direct or indirect expenditure is incurred.

iii. The department has not disputed this fact that out of the total investment about 98% of the investments are in subsidiary companies of the assessee and, therefore, the purpose of investment is not for earning the dividend income but having control and business purpose and consideration.

Therefore, prima facie the assessee has made out a case to show that no expenditure has been incurred for maintaining these long term investment in subsidiary companies. The AO has not brought out any contrary fact or material to show that the assessee has incurred any expenditure for maintaining these investments or portfolio of these investments.

Observations:

The above judgment is in line with Godrej & Boyce Mfg. Co where it was held that section 14A(2) does not *ifso facto* empower the AO to apply the method prescribed by Rule 8D straightaway without considering whether the claim made by the assessee is correct. Also, in Garware Wall Ropes it was held that a disallowance u/s 14A cannot be made if the primary object of investment is holding controlling stake in the group concern and not earning any income out of investment. Similarly, in Oriental Structural Engineers (approved by the Delhi High Court) it has been held that section 14A disallowance cannot be made for investment in subsidiaries and SPVs out of commercial expediency.

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2) If it is held by the dept that no income arose to the recipient then notices to payer for TDS default u/s 201 & section 40(a)(i) disallowance are bad

Samsung India Electronics Pvt. Ltd Vs DDIT (Delhi High Court)

i. The key to the decision is the answer to the question whether any income arose or accrued to Samsung Electronics Ltd, Korea ("SEC") through its PE in India in respect of the sales made in India. If the answer is in the affirmative, both the notices would be good notices; if the answer is in the negative, both the notices would be bad.

ii. The answer in our opinion should be in the negative, because even as per the revenue, as reflected in the order passed by the DRP in the reassessment proceedings of SEC, no income accrued to SEC in India.

iii. In this regard, the DRP rejected the specific request made by that assessing officer in his remand report that the petitioner be treated as the permanent establishment (PE) of SEC and the income of SEC be computed on that basis.

iv. The DRP however held that as regards attribution of income to the "fixed place PE", a rough and ready basis would be to 10% of the salary paid to the expat-employees of the petitioner as the mark-up, as was done by the assessing officer in the draft assessment order. The remuneration cost in respect of such employees seconded to the petitioner amounted to Rs. 10,72,24,310; this was taken as the base and a mark-up of 10% had been applied by the assessing officer and the income was taken as Rs.1,07,22,431/-. This was approved by the DRP in its order dated 29-9-2012; the other claims made by the assessing officer in the remand report were rejected;

v. Thus the basis of both the notices (section 148 and 201) has been knocked out of existence by the DRP's order in the reassessment proceedings of SEC for the same assessment year. On the date on which notices were issued to the petitioner under Sections 148 and 201(1)/(1A), there was an uncontested finding by the revenue authorities (i.e., the DRP) in the case of SEC that SEC cannot be taxed in respect of the sales made in India through the petitioner on the footing that the petitioner is its PE.

vi. If no income arose to SEC on account of sales in India since the petitioner cannot be held to be its PE in India, two consequences follow:
   (a) the payments made by the petitioner to SEC for the goods are not tax deductible under section 195(2) and hence they were rightly allowed as deduction in the original assessment of the petitioner and
   (b) the assessee cannot be treated as one in default under section 201(1) and no interest can be charged under section 201(1A). It needs mention here that the notice under section 201 is a verbatim reproduction of the remand report of the assessing officer in SEC's case filed before the DRP.

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3) Section 40A(3): There is a difference between "crossed cheque" and "account payee cheque". Payment by crossed cheque attracts section 40A(3) disallowance:

Rajmoti Industries Vs ACIT (Gujarat High Court)

i. The expression earlier used in section 40A(3)(a) was a "crossed cheque or a crossed bank draft". This was amended by the legislature to be replaced by the expression "an account payee cheque or account payee bank draft".
ii. This was done in the background of the experience that even crossed cheques were being endorsed in favour of a person other than the drawee making it difficult to trace the constituent of the money. To plug this possible loophole the requirement of section 40A(3) was made more stringent.
iii. If we accept the contention of counsel for the assessee that there was no distinction between a crossed cheque and an account payee cheque, we would be obliterating this amendment brought in the statute with specific purpose in mind.

Accordingly, payment by a crossed cheque is subject to disallowance u/s 40A(3) (Anupam Tele Services vs. ITO distinguished)

4) The term "month" in section 54E, 54EA, 54EB & 54EC does not mean "30 days" but the "calendar month". So, the expression "within a month" means "before the end of the calendar month"

Alkaben B. Patel Vs ITO (ITAT Ahmedabad) (Special Bench)

i. Sections 54E, 54EA, 54EB & 54EC require the investment to be made "*within a period of six months after the date of such transfer*". The subtle question is that whether the word "month" refers in this section a period of 30 days or it refers to the month only.
ii. The term 'month' is not defined in the Income-tax Act. Therefore, its meaning has to be understood as per the General Clauses Act, 1897 which defines the word "month" to mean a month reckoned according to the British calendar.
iii. In Munnalal Shri Kishan Mainpuri 167 ITR 415 (All) it was held in the context of limitation u/s 256(2) that the word 'month' refers to a period of 30 days and, therefore, the reference to "six months" in section 256(2) is to "six calendar months" and not "180 days". On some occasions, the Legislature had not used the term "Month" but has used the number of days to prescribe a specific period. For example, the First Proviso to section 254(2A) provides that the Tribunal may pass an order granting stay but for a period not exceeding 180 days.

This is an important distinction made in the statute while subscribing the limitation/ period. This distinction thus resolves the present controversy by itself.

Observations:

In the given case, assessee had sold capital asset on 10.06.2008 and investment was made on 17.12.2008. In view of the judgment referred to below and the rationale propounded, the investment was permissible by 31.12.2008.

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5) Section 194-H TDS does not apply to all sales promotional expenditure if relationship is not that of principal & agent

CIT Vs Intervet India Pvt.Ltd (Bombay High Court)

i. The assessee had undertaken sales promotional scheme viz. Product discount scheme and Product campaign under which it offered an incentive on case to case basis to its stockists / dealers / agents.An amount of Rs.70 lakhs was claimed as a deduction towards expenditure incurred under the said sales promotional scheme.

ii. The relationship between the assessee and the distributor / stockists was that of principal to principal and in fact the distributors were the customers of the assessee to whom the sales were effected either directly or through the consignment agent. As the distributor / stockists were the persons to whom the product was sold, no services were offered by the assessee and what was offered by the distributor was a discount under the product distribution scheme or product campaign scheme to buy the assessee's product.

iii. The distributors / stockists were not acting on behalf of the assessee and that most of the credit was by way of goods on meeting of sales target, and hence, it could not be said to be a commission payment within the meaning of Explanation (i) to Section 194H of the Income-tax Act, 1961.

iv. The contention of the Revenue in regard to the application of Explanation (i) below Section 194H being applicable to all categories of sales expenditure cannot be accepted. Such reading of Explanation (i) below Section 194H would amount to reading the said provision in abstract. The application of the provision is required to be considered to the relevant facts of every case.

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6) Section 234E: High Court grants ad-interim stay against operation of notices levying fee for failure to file TDS statement

Rashmikant Kundalia Vs UOI (Bombay High Court)

i. Section 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of Rs. 200/- for each day's delay in filing the statement of Tax Deducted at Source (TDS) or Tax Collected at Source (TCS).

ii. A Writ Petition to challenge the validity of section 234E has been filed in the Bombay High Court.

iii. The Petition claims that assessees who are deducting tax at source are discharging an administrative function of the department and that they are a "*honorary agent*" of the department. It is stated that this obligation is onerous in nature and that there are already numerous penalties prescribed for a default. It is stated that the fee now levied by section 234E is "*exponentially harsh and burdensome*" and also "*deceitful, atrocious and obnoxious*". It is also claimed that Parliament does not have the jurisdiction or competence to impose such a levy on tax-payers.

The Bombay High Court has, vide order dated 28.04.2014, granted ad-interim stay in terms of prayer clause (d) i.e. stayed the operation of the impugned notices levying the fee.

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7) Not keeping separate books together with frequent transactions means that gains from shares have to be assessed as business profits instead of as STCG

CIT Vs M/s D&M Components Ltd (Delhi High Court)

i. The AO and CIT(A) held that separate books were not used. Amounts were freely transferred from the profits gained to business and vice-versa.

ii. However, perhaps the single-most telling circumstance is the volume, frequency, duration (of holding) of the transactions. Apart from the above significant aspect, the AO and the CIT (A) observed that the assessee had been purchasing and selling a large number of shares of a few companies.

iii. It was also held that the transactions involved large or substantial sums of money. Whenever any share is purchased with the intention of investment, it cannot be sold off within a very short span of time, since the share market is always fluctuating.

iv. Since in the present case, very frequent purchase and sale of shares have been done it indicates that the main intention of the assessee was to earn income out of these shares which have been claimed to be under the head of short term capital gains.

v. Having regard to the short duration of holding of the shares, and the lack of clarity in the account books, this Tribunal was wrong in assessing the gains as STCG instead of as business profits.

NOTE: The Judgments should not be followed without studying the complete Facts of the case law.

DUE DATES CHART FOR THE MONTH OF MAY 2014 (Various Acts):

Date	Particulars
6th	Payment of Excise Duty for the previous month (other than SSI units)
6th	Service Tax Payment by Companies for April
7th	TDS remittance for the previous month
10th	Monthly Excise return by all assessees (except SSIs & EOUs) coming under CEA in Form ER-1
10th	Manufacturers who are 100% EOUs(Export Oriented Units) and are removing goods into the domestic tariff area
10th	Monthly Excise Return by specified class of Assessees regarding principal units in Form ER-6
15th	Income Tax – TDS/TCS quarterly statements (other than Government deductor) January to March
20th	Payment of contribution under Employee EPF & MP Act, 1952 (including 5 days of grace)
21st	Payment of contribution under Employees State Insurance Act, 1948
21st	Payment and filing of Monthly MVAT return under MVAT Act, 2002
30th	Payment of Profession Tax for the employees
30th	Audited results of the Listed Companies for the year ended 31.03.2013

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