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Updates on regulatory changes affecting your business

JULY 2014



B D Jokhakar & Co.

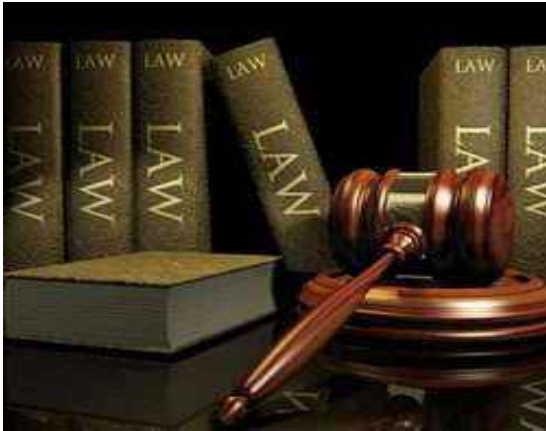
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COMPANY LAW



Clarifications on matters relating to appointment and qualifications of directors and independent directors (IDs):

In response to queries received, the MCA has issued clarifications on following matters relating to appointment and qualifications of directors and Independent directors.

- Pecuniary interest in certain transactions
- Appointment of IDs
- Appointment of IDs for less than 5 years
- Appointment of IDs through letter of appointment.

Clarification on applicability of requirement for resident director under section 149(3) of the Companies Act, 2013 (Act):

- It requires every company to have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year. It is clarified that the residency

requirement would be reckoned from the date of commencement of section 149 of the Act i.e. 1st April, 2014. The first, previous calendar year, for compliance with these provisions would, therefore, be Calendar year 2014. The period to be taken into account for compliance with these provisions will be the remaining period of calendar year 2014 i.e. 1st April to 31st December. Therefore, on a proportionate basis, the number of days for which the director(s) would need to be resident in India during Calendar year 2014, shall exceed 136 days.

Clarification with regard to holding of shares in a fiduciary capacity by associate company under section 2(6) of the Companies Act, 2013:

In continuation of the General circular No. 20/2013 dated 27/12/2013, it is clarified that the shares held by a company in another company in a 'fiduciary capacity' shall not be counted for the purpose of determining the relationship of 'associate company' under section 2(6) of the Companies Act, 2013.

Clarification relating to incorporation of a company i.e. company Incorporated outside India:

The matter has been examined by the Ministry in the light of various sections of the Companies Act, 2013 as applicable and it is clarified that there is no bar in the new Act for a company incorporated outside India to incorporate a subsidiary either as a public company or a private company.

An existing company, being a subsidiary of a company incorporated outside India, registered under the Companies Act, 1956, either as private company or a public company by virtue of section 4(7) of that Act, will continue as a private company or public company as the case may be, without any change in the incorporation status of such company.

Clarification for filing of Form INC-27 for conversion of a company from Public to Private under the Provisions of Companies Act, 2013:

The relevant provisions of the Companies Act 2013 regarding conversion of Public company to a Private company have not been notified. In view of this the corresponding provisions of Companies Act, 1956(Proviso to sub-section (1) and sub-section (2A) of section 31) shall remain in force till corresponding provisions of Companies Act, 2013 are notified. Application for such conversions, therefore, has to be filed and disposed as per the earlier provisions.

Clarification with regard to format of annual return applicable for Financial Year 2013-14 and fees to be charged by companies for allowing inspection of records:

It is clarified that Form MGT-7 shall not apply to annual returns in respect of companies whose financial year ended on or before 1st April, 2014 and for annual returns pertaining to earlier years. These companies may file their returns in the relevant Form applicable under the Companies Act, 1956.

INCOME TAX



New inclusion in places of worship in Section 80G:

“Sivasuriyaperuman Temple, Suriyanarkoil, Thriuvaidaimarudur Taluk, Thanjavur District, Tamil Nadu”, is added to the list of place of public worship for claiming deduction under section 80G of Income Tax Act, 1961.

Cost index inflation:

The cost index inflation has increased from 939 in F.Y. 2013-14 to 1024 in F.Y. 2014-15.

Forms for Wealth tax and manner of filing the same:

a. Forms for various Assessments Years:

Sr. No	Assessment Year	Form No.
1	AY 2013-14 and earlier years	Form No. BA
2	AY 2014-15 and subsequent years	Form No. BB

b. For AY 2014-15, the Net Wealth Tax Return shall be furnished electronically by individual, HUF and Companies. However for an individual or HUF to whom tax audit is not applicable may submit in paper form (manually).

First report of Tax Administration Reform Commission (TARC):

The first report is an incisive assessment of the existing tax policy, particularly its functioning and the key behavioural aspects with reference to the ‘risk averse’ approach of the administration. Besides recommending a slew of bold reform measures to align the tax policy with contemporary best international practices, the report has been critical of the current practices and how their evolution over the past decade has not kept pace with reforms in other segments of the economy. The commission was exclusively mandated to review application of tax policies and laws in the context of global tax practices and recommend measures to enhance efficiency and effectiveness of tax services. The detailed report is available on the following link: http://www.finmin.nic.in/the_ministry/dept_revenue/Executive_Summary.pdf

RBI & FEMA



Export and Import of Currency; Enhanced facilities for residents and non-residents:

Any person resident in India:

i) may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees twenty five thousand only); and

ii) who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees twenty five thousand only).

2. Any person resident outside India, not being a citizen of Pakistan and Bangladesh and also not a traveller coming from and going to Pakistan and Bangladesh, and visiting India:

i) may take outside India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25,000 (Rupees twenty five thousand only) while exiting only through an airport.

ii) may bring into India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25,000 (Rupees twenty five thousand only) while entering only through an airport.

Pledge of shares for business purposes in favour of NBFCs:

Any person being a non-resident investor of a company registered in India and listed on a recognised stock exchange/s in India (resident investee company), may pledge the shares of that company, in favour of a Non-Banking Financial Company in India, to secure the credit facilities being extended to that resident investee company for *bona fide* business purposes, subject to the AD bank satisfying itself of the compliance of the conditions stipulated by the Reserve Bank, from time to time, in this regard.

Under the extant exchange control laws, no person resident outside India is permitted to transfer any shares except by way of a gift or sale since, the term 'transfer' is defined to include sale, purchase, exchange, mortgage, pledge, gift, loan; and exception was provided

only for 'gift' or 'sale', other forms of transfer such as pledge were deemed as not being permitted without prior RBI approval. This circular is aimed to reduce the delay and difficulty caused with the requirement of obtaining RBI approval for pledging non-residents shares to an NBFC.

Liberalised Remittance Scheme (LRS) for resident individuals-Increase in the limit from USD 75,000 to USD 125,000:

In terms of A.P. (DIR Series) Circular No. 138 dated June 3, 2014, it has now been decided to enhance the existing limit of USD 75,000 per financial year (April-March) to USD 125,000 with immediate effect.

Accordingly, AD Category -I banks may now allow remittances up to USD 125,000 per financial year, under the Scheme, for any permitted current or capital account transaction or a combination of both.

The Scheme should not be used for making remittances for any prohibited or illegal activities such as margin trading, lottery, etc.

Prior approval of RBI is required for transferring assets of Liaison Office (LO)/Branch Office (BO) to their subsidiaries or other LO/BO or to any other entity subject to compliance with some stipulations:

- a. Submission of Annual Activity Certificates (AACs) (up to the current

financial year) at regular annual intervals with copies endorsed to DGIT (International Taxation) and obtained PAN from IT Authorities and have got registered with ROC under Companies Act 1956. Similarly, proposals from POs should conform to the guidelines issued in AP DIR Circular No.44 dated May 17, 2005 with regard to initial reporting requirements and submission of CA certified annual report indicating project status

- b. A certificate is to be submitted from the Statutory Auditor furnishing details of assets to be transferred indicating their date of acquisition, original price, depreciation till date, present book value or WDV value and sale consideration to be obtained. Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. The sale consideration should not be more than the book value in each case.
- c. The assets should have been acquired by the LO/BO/Project Office from inward remittances and no intangible assets such as good will, pre-operative expenses should be included. AD bank should scrutinize and ensure that no revenue expenses such as lease hold improvements incurred by LO/BOs are capitalized and transferred to Joint Venture/Wholly Owned Subsidiary.

(Foreign Exchange Management (Establishment in India of Branch or Office or Other Place of Business) Regulations, 2000 Notification No. FEMA 22/2000-RB dated May 03, 2000 have been issued vide Notification No.FEMA.295/2014-RB dated February 24, 2014)

INTERNATIONAL TAX

No TP additions if more commission is paid to AE for doing additional work than done by independent distributor

Where in transfer pricing proceedings, TPO made addition to assessee's ALP on account of higher rate of commission paid to its subsidiaries located abroad, in view of fact that said subsidiaries were performing customization work also which was not being done by independent distributors, payment of commission at higher rate was justified and, thus, impugned addition was to be deleted

No TDS on sales commission paid to a non-resident for services rendered outside India:

Agency/sales commission payment to non-resident agents for services outside India is not tax deductible at source and outside the

purview of section 40(a)(i)
(www.taxmann.com)

ECONOMICS AND THE GLOBE

India - Most Confident Nation Economically

Formation of "business-friendly" government led by Narendra Modi has made India the most optimistic country economically, looking ahead six months, says a report.

As many as 60 per cent Indians surveyed have predicted that domestic economy would be stronger in the next six months, placing it at the top of the 25 nation-list compiled by global research firm Ipsos.

"India's economic confidence has got a major boost primarily due to a landslide victory of the business-friendly government led by Narendra Modi, who has vowed to boost growth and control inflation.

(Link:<http://economictimes.indiatimes.com/news/economy/indicators/india-most-confident-nation-economically-report/articleshow/37184488.cms>)

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- Hyderabad	Section 2(47)(v)	Despite handing over possession & receiving advance, development agreement is not a “transfer” for capital gains purposes if developer has not performed his part of the contract	<i>Binjusaria Properties Pvt Ltd. Vs ACIT</i>
2	High Court - P&H	Section 14A	Disallowance cannot be made if the assessee has no tax-free income in the year	<i>CIT Vs Lakhani Marketing</i>
3	High Court - Calcutta	Section 73	Speculation loss on transactions in derivatives can be set off against the gains of delivery shares	<i>CIT Vs Baljeet Securities Pvt. Ltd.</i>
4	High Court - Bombay	Section 254	If a legal issue is raised (even for the first time) ITAT has the duty to deal with it and cannot remand it to lower authorities.	<i>Kansai Nerolac Paints Ltd Vs DCIT</i>
5	High Court - Allahabad	Section 271(1)(c)/ 271(1B)	If, in the assessment order, AO directs initiation of penalty on specific issues but not on others, he is not entitled to levy penalty on the other issues.	<i>CIT Vs Triveni Engineering & Industries Ltd.</i>



1) Section 2(47)(v): Despite handing over possession & receiving advance, development agreement is not a “transfer” for capital gains purposes if developer has not performed his part of the contract

Binjusaria Properties Pvt Ltd. vs. ACIT (ITAT Hyderabad)

- i. A transaction is deemed to be a “transfer” u/s 2(47)(v) of the Act if the conditions of section 53A of the Transfer of Property Act (TOPA) are satisfied.
- ii. For section 53A, ‘willingness to perform’ of the transferee is something more than a statement of intent; it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations. Unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of section

53A of the TOPA will come into play.

- iii. On facts, a reading of the ‘Development Agreement-cum-General Power of Attorney’ indicates that what was handed over by the assessee to the developer is only ‘permissive possession’. The agreement specifically provides that the assessee has permitted the developer to develop the land and that the consideration receivable by the assessee from the developer is ‘38% of the residential part of the developed area’. That being so, it is only upon receipt of such consideration in the form of developed area by the assessee in terms of the development agreement, the capital gains becomes assessable in the hands of the assessee.
- iv. Further, the facts show that even as on date, there was no developmental activity on the land. The process of construction has not been even initiated and no approval for the construction of the building is obtained. This is due to lapse on the part of the transferee. While the assessee has fulfilled its part of the obligation under the development agreement, the developer has not done anything to discharge the obligations cast on it under the development agreement.

- v. Mere receipt of refundable deposit cannot be termed as receipt of consideration. Consequently, section 53A does not apply. As a result, there is no “transfer” u/s 2(47)(v) of the Act.

CIT vs Baljeet Securities Pvt. Ltd.
(High Court – Calcutta)

In AY 2005-06, the assessee, a share broker, entered into derivatives in which it suffered losses. The said losses constituted “speculation loss” (prior to the exclusion of derivatives from the ambit of speculative transactions under clause (d) of section 43 (5) w.e.f. AY 2006-07). The assessee claimed that the said speculation loss was eligible to be set-off against the income arising out of purchase and sale of shares. The Tribunal upheld the claim of the assessee.

2) Section 14A disallowance cannot be made if the assessee has no tax-free income in the year

CIT vs. Lakhani Marketing (P&H High Court)

From the reading of section 14A of the Act, it is clear that before making any disallowance the following conditions are to exist:-

- a) That there must be income taxable under the Act, and
- b) That this income must not form part of the total income under the Act, and
- c) That there must be an expenditure incurred by the assessee, and
- d) That the expenditure must have a relation to the income which does not form part of the total income under the Act.

Therefore, unless and until, there is receipt of exempted income for the concerned assessment years (dividend from shares), section 14A of the Act cannot be invoked.

On appeal by the department to the Tribunal HELD dismissing the appeal:

- i. Under the Explanation to section 73 where any part of the business of a company consists in the purchase and sale of shares of other companies, such company shall, for the purposes of the section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.
- ii. Therefore, the entire transaction carried out by the assessee was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the income arising out of buying and selling of shares.

3) Explanation to section 73: Speculation loss on transactions in derivatives can be set off against the gains of delivery shares

4) Section 254: If a legal issue is raised (even for the first time) ITAT has the

duty to deal with it and cannot remand it to lower authorities

Kansai Nerolac Paints Ltd vs. DCIT (Bombay High Court)

- i. The Tribunal should have answered the legal issue itself. The Tribunal was not prevented in any manner and in law from considering a purely legal issue for the first time, more so, if this legal issue goes to the root of the matter.
- ii. The issue was an impact and legal effect of an order of amalgamation and winding up of the assessee thereto on the penalty proceedings have been initiated and were continuing. If they were initiated prior to the order of the winding up passed or the scheme of amalgamation being sanctioned, then, whether the subsequent act of a order sanctioning the scheme would permit continuation of the proceedings against an entity or company which is wound up and in terms of the provisions contained in the Act was, thus, a clear legal issue. It should have been answered by the Tribunal, particularly when it had admitted the question or ground and also the additional evidence filed by the assessee.

- iii. The only two documents which required to be looked into were the scheme of amalgamation and the order passed in pursuance thereof by this Court. If that was the admitted factual position and based on which the legal issue was raised, then, the Tribunal was obliged to answer the legal question. Its omission to answer it, therefore, is vitiated in law. The Tribunal is a last fact finding Court and equally if it could have been approached by the assessee both on law and fact, then, in the given circumstances, the Tribunal should have answered this issue and its failure to do so can safely be termed as not performing its duty in law. The direction to remit and to remand it to the AO is not justified and in the peculiar facts and circumstances noted above.

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- 5) Section 271(1)(c)/ 271(1B): If, in the assessment Order, AO directs initiation of penalty on specific issues but not on others, he is not entitled to levy penalty on the other issues.**

CIT vs. Triveni Engineering & Industries Ltd. (High Court - Allahabad)

- i. Undoubtedly, as held in Mak Data 358 ITR 593 (SC), the AO has to satisfy himself whether penalty proceedings should be initiated or not during the course of assessment proceedings and he is not required to record his satisfaction in a particular manner or reduce it into writing.
- ii. However, in the present case there is no direction whatsoever by the AO in respect of the specific head of interest on the SDF loan, on which the penalty was deleted by the Tribunal. This omission in the case of the SDF loan stands in sharp contrast to those items where the AO has specifically directed the initiation of penalty proceedings u/s 271(1)(c).
- iii. Consequently, the Tribunal was justified in deleting the penalty u/s 271(1)(c) in respect of the SDF loan

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

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

Date	Particulars
5 th	Service Tax payment for the previous month (6 th if paid electronically)
6 th	Payment of Excise Duty for all assesses (including SSI Units) for the previous month
7 th	TDS remittance for the previous month
10 th	Monthly Excise return by all assesses (except SSI Units) coming under CEA in Form ER1
10 th	Quarterly Excise return by EOU assesses coming under CEA in Form ER 2
10 th	Quarterly Excise return by SSI units availing small scale exemption under CEA in Form ER 3
10 th	Monthly Excise return by specified class of assesses regarding principal inputs coming under CEA in Form ER 6
10 th	Quarterly Excise return by units paying 2% duty under CEA in Form ER 8
15 th	Filing quarterly return (Annexure 13B) by the registered dealers.
15 th	TDS/TCS quarterly Statements (Other than Government deductor) for the period April - June
20 th	Quarterly return (Annexure 75) by units availing area-based exemptions.
20 th	Payment of contribution under Employee EPF & MP Act, 1952 (including 5 days of grace)
21 st	Payment of contribution under Employees State Insurance Act, 1948
21 st	Payment of Monthly MVAT under MVAT Act, 2002
21 st	Quarterly return of MVAT for period April to June under MVAT Act, 2002
30 th	Issue of TDS certificate (Form 16A) by non government deductor for Q1
30 th	Payment of Profession Tax for the employees
31 st	Filing of Return of Income and Wealth for non corporate assessee.

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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.