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RBI – Foreign Exchange Management Act

Third party payments for export / import transactions

With a view to further liberalising the procedure relating to payments for exports/imports and taking into account evolving international trade practices, it has been decided as under:

i. Export Transactions

AD banks may allow payments for export of goods / software to be received from a third party (a party other than the buyer) subject to certain conditions as given in the relevant circular.

ii. Import Transactions

AD banks are allowed to make payments to a third party for import of goods, subject to the condition that the amount of an import transaction eligible for third party payment should not exceed USD 100,000 and other conditions as given in the relevant circular.

These instructions will come into force with immediate effect.

(Circular No 70/RBI, Dated: November 8, 2013)

COMPANY LAW

Relaxation of last date and additional fee in filing of e-Form 23C for Appointment of Cost Auditor

Ministry of Corporate affairs, Cost Audit Branch has decided to extend the last date of filing and to relax the additional fee applicable on e-form 23C up to 30th November, 2013. Hence, e-form 23C can be filed for appointment of cost auditor with normal applicable fee, up to 30th November, 2013 or within 30 days of the commencement of the company's financial year to which the appointment relates, whichever is later.

Applicability of provision of Section 372A of the Companies Act, 1956

Section 186 of the Companies Act, 2013 which is corresponding to Section 372A of the Companies Act, 1956 is yet to be notified. It is clarified by Ministry of Corporate affairs that Section 372A of the Companies Act, 1956 dealing with inter-corporate loans continue to remain in force till section 186 of the Companies Act, 2013 is notified.

SEBI

Annual System Audit of Stock Brokers / Trading Member

SEBI has revised System audit guidelines. As per amended guidelines Stock Exchanges are advised to keep track of findings of system audits of all brokers on quarterly basis and ensure that all major audit findings, specifically in critical areas, are rectified / complied in a time bound manner failing which follow up inspection of such brokers may be taken up for necessary corrective steps / actions thereafter, if any. Stock Exchange are required to

report all major non-compliances / observations of system auditors, broker wise, on a quarterly basis to SEBI.
For the current year (F.Y.2013-14), in case the stock brokers have commenced their annual system audit before 6th November 2013, may follow existing annual system audit framework prescribed by exchanges. However, stock brokers who are yet to commence annual system audit should carry out their annual system audit as per amended guidelines.

CENTRAL EXCISE DUTY & SERVICE TAX

Reduction in Threshold Limit for Mandatory E-Payment of Central Excise Duty and Service Tax.

It has now been decided to reduce the threshold limit of mandatory e-payment from rupees ten lakhs to rupees **one lakh** for both Central Excise and Service Tax payment with effect from 1st of January, 2014. Thus, from 1st of January, 2014, a manufacturer or a Service Tax payer who has paid a duty or tax of more than rupees one lakh including the amount paid by utilization of CENVAT credit in the previous financial year shall be required to pay duty or tax through internet banking.

Services received by SEZ unit & developer of SEZ

As per notification issued by Government of India Ministry of Finance (Department of Revenue), SEZ Unit or the Developer of SEZ are required to furnish to the jurisdictional Superintendent of Central Excise a quarterly statement from the period 1st July 2013, in Form A-3, furnishing the details of specified services received by it without payment of service tax, by 30th of the month following the particular quarter. For the quarter of July, 2013 to September, 2013, the said statement shall be furnished by the 15th of December, 2013.

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	High Court - Madras	Sec 32. of the Income Tax Act	Where there was a tacit agreement in form of offer and acceptance for sale of assets and existence of such assets could not be doubted, said sale and its lease back could not be rejected for purpose of allowing depreciation	*First Leasing Co. Of India Ltd. Vs ACIT (2013)*
2	High Court- Delhi	Sec. 37(1) of the Income Tax Act	Expenditure on acquiring master copy of software subject to obsolescence is deductible as revenue expenditure	*Oracle India Pvt. Ltd Vs CIT*
3	ITAT- Hyderabad	Sec. 50B of the Income Tax Act	Where no monetary consideration was involved in transfer of manufacturing division along with all its assets and liabilities under amalgamation scheme, same could not be considered as slump sale under section 50B	*ITO Vs Zinger Investments (P.) Ltd (2013)*
4	High Court- Gujarat	Sec. 54EC / 50 of the Income Tax Act	Where capital gain arose out of long-term capital asset and was invested in specified assets, exemption under section 54EC could not be denied due to deeming fiction created under section 50	*CIT Vs Aditya Medisales Ltd (2013)*

Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
5	ITAT- Mumbai	Sec. 73 of the Income Tax Act	Loss on foreign exchange in forward contracts is incidental to the exports business and not a "speculation loss". However, if the contract is prematurely cancelled, the assessee has to justify the loss	*London Star Diamond Company (I) P. Ltd Vs DCIT*
6	High Court – Delhi	Sec 90 of the Income Tax Act	Amount received by the assessee under the license agreement for allowing the use of the software would not be royalty under the DTAA	*DIT Vs Infrasoft Ltd. (2013)*
7	High Court - Punjab & Haryana	Sec. 143(2) of the Income Tax Act	In a case where the Revenue has dispatched a notice under section 143(2), and the same was not received back by the Revenue it shall be presumed to be served.	*Shahbad Cooperative Sugar Mills Ltd. Vs DY.CIT (2013)*
8	ITAT- Cochin	Sec. 194A / 40(a)(ia) / section 201 of the Income Tax Act	Assessee is liable to deduct tax at source on interest payments, even if it has not claimed same as deduction while computing its total income	*Agreenco Fibre Foam (P.) Ltd Vs ITO(TDS) (2013)*
9	ITAT- Mumbai	Sec. 194-I of the Income Tax Act	Lease premium paid for acquiring leasehold land for a period of 60 years did not fall within meaning of 'rent' under section 194-I and, therefore, assessee was not liable to deduct tax at source while making said payment	*ITO(TDS) Vs Navi Mumbai SEZ (P.) Ltd (2013)*
10	High Court - Allahabad	Sec 195 of the Income Tax Act	Where circular effective at relevant time exonerates an assessee from TDS obligation on payment to non-resident, subsequent circular would not create such an obligation retrospectively	*CIT Vs Model Exims Kanpur (2013)*

1) Where there was a tacit agreement in form of offer and acceptance for sale of assets and existence of such assets could not be doubted, said sale and its lease back could not be rejected for purpose of allowing depreciation

First Leasing Co. Of India Ltd. Vs. ACIT (2013) (Madras)

In the instant case assessee, a leasing company entered into a sale and leaseback (SLB) agreement in respect of certain assets with Tamil Nadu Electricity Board (Electricity Board). It purchased certain assets from Electricity Board and leased them back to Board. The Assessing Officer, however, disallowed depreciation on such assets to assessee treating those SLB transactions as loan transactions.

On appeal, the CIT (A) allowed the depreciation on such assets. Further, the Tribunal held that it was purely a finance transaction and, therefore, no depreciation could be allowed. Aggrieved-assessee filed the instant appeal.

The High Court held as follows:

i. Merely because terms of SLB agreement provided for deduction of lease installments from current consumption charges by way of priority, same could not form basis to hold that transaction was not an SLB but a mere loan transaction;

ii. The provision for repayment of the lease amount by way of installments from the current consumption charges was one mode of repayment in order to ensure that there was no default in paying the installments. There was no flaw in such a provision made in the agreement for repayment;

iii. Merely because the assets were all eligible for 100 per cent depreciation, it could not be held that the entire transaction would become doubtful. So long as the sale-cum-lease back agreement was real as between the parties and the transaction was carried out in accordance with law, in the absence of any flaw in the said agreement, one could not doubt the whole transaction;

iv. The fact that sale was accepted as between assessee and Electricity Board and after settlement of lease amount, assessee would continue to retain its ownership in no uncertain terms stipulated in agreement, and when such a transaction was not against law, there was no reason to doubt such transaction;

v. As far as the conduct of the parties was concerned, there were no clandestine dealings involved. Every correspondence between the parties was disclosed and placed before the Assessing Officer. Therefore,

depreciation claimed by assessee was to be allowed.

Observations:

In case of Genuine Sale and Lease Back Transactions depreciation has to be allowed.

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2) Expenditure on acquiring master copy of software subject to obsolescence is deductible as revenue expenditure

Oracle India Pvt. Ltd Vs. CIT (Delhi High Court)

In instant case the assessee entered into a license agreement with Oracle Corp under which it acquired a non-exclusive & non-assignable right to duplicate software products which were owned by Oracle Corp and to sub-license the same to parties in India. The assessee paid recurring royalty of 30% for the said right. In addition to the royalty, the assessee periodically paid an amount towards "expenditure on import of software master copy". The said master copy was used to replicate the software. The assessee claimed that the said master copies were versions of Oracle's new product offerings which had very accelerated obsolescence and that at any point of time it was not possible to say whether the version will be current for one day or one month. The AO allowed a deduction for the recurring royalty but held that the expenditure for acquiring the software master copy was capital expenditure. On appeal, the CIT(A) reversed the AO on the ground that owing to obsolescence, there was no enduring benefit as there were frequent corrections and up-gradation of the software. On appeal by the department, the Tribunal reversed the CIT(A) and held that the expenditure was capital in nature on the ground that the master copy was an asset of enduring benefit.

The High Court held as follows:

i. The assessee's claim that the master copies had high accelerated obsolescence and that even at the point of time of import it was difficult to say whether the version would be replaced by a new or updated version after one day or a month had not been disproved.

ii. Also the facts showed that there were periodical imports of the master copies and that the average price per copy was minimal. This was not a case where the master copies contained operating or system software, which normally did not require frequent up-gradation or changes. It is also not the case of an assessee which is the end user of software. It is a case where the assessee is required to repeatedly pay for the master copy media in view of frequent newer or updated versions of the application software from time to time. Once newer or better version of the application software is available, the earlier

version is not saleable and does not have any market value for the seller i.e. the assessee.

iii. Also, as per the "matching concept" in accountancy, while determining whether expenditure is capital or revenue in nature, the question whether the expenditure would create an asset which is of value in further assessment periods and should be amortised (i.e. depreciated) as long as it has value (subject to the statutory provisions) requires to be considered. If the expenditure does lead to creation of an asset but of a limited or short life, it has to be treated as a liability and not as a fixed asset. The said expenditure cannot be valued for price for future financial years.

Observations:

Assets (in the normal parlance) but having shorter shelf life can be treated as revenue items depending upon peculiar facts of the case.

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3) Where no monetary consideration was involved in transfer of manufacturing division along with all its assets and liabilities under amalgamation scheme, same could not be considered as slump sale under section 50B

ITO Vs. Zinger Investments (P.) Ltd (2013) (Hyderabad - Trib.)

The assessee transferred its manufacturing division to Novapan Industries Ltd. (NIL) under a scheme of amalgamation as per which all the assets and liabilities of the assessee were vested in NIL. The assessee in return received certain investments held by NIL besides allotment of equity shares to the shareholders of the assessee. The Assessing Officer held that the transfer of the manufacturing division to NIL would tantamount to a 'slump sale' attracting liability of capital gains under section 50B. On appeal, the CIT(A) deleted the order of Assessing Officer. The aggrieved revenue filed the instant appeal.

The Tribunal held as follows:

i. To qualify as slump sale two conditions have to be satisfied, viz., (A) there must be transfer of one or more undertakings as a result of sale, and (B) the sale should be for a lump sum consideration without values being assigned to the individual assets and liabilities;

ii. In the instant case it was not disputed that there was no monetary consideration involved for transfer of the assets and liabilities of the manufacturing division to NIL, though there might have been transfer of an undertaking;

iii. Since there was no monetary consideration involved in transferring the manufacturing division under scheme of

amalgamation approved by the High Court, it couldn't be considered to be a slump sale so as to attract the liability of the capital gain under section 50B

Observations:

A scheme of Amalgamation cannot be treated as Slump Sale especially when there is no monetary consideration for transfer of assets.

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4) Where capital gain arose out of long-term capital asset and was invested in specified assets, exemption under section 54EC could not be denied due to deeming fiction created under section 50

CIT Vs. Aditya Medisales Ltd (2013) (Gujarat High Court)

The High Court held as follows:

i. There is nothing in Section 50 to suggest that the fiction created in it is not only restricted to Sections 48 and 49 but also applies to other provisions;

ii. Section 50 makes it explicitly clear that the deemed fiction created in sub-sections (1) and (2) of Section 50 is restricted only to the mode of computation of capital gains contained in Sections 48 and 49;

iii. It is well-established, in law that a fiction created by the Legislature has to be confined to the purpose for which it is created. The fiction created under Section 50 is confined to the computation of capital gains only and cannot be extended beyond that;

iv. Legal fiction created under section 50 is restricted to computation of capital gains; such deeming fiction cannot restrict application of section 54EC which allows exemption of capital gains, if assessee makes investment in the specified asset;

v. Exemption provided under section 54EC couldn't be denied to the assessee due to deeming fiction created under section 50. Thus, the assessee couldn't be charged to capital gains when short-term gains of long-term capital assets were invested in the areas specified under the law

Observations:

Since Exemption u/s 54EC is qua asset, even depreciated asset is eligible for this exemption even though such gains are deemed as STCG u/s 50. However this is litigation prone, as, in 'block of assets' concept, individual asset test gets lost.

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5) Loss on foreign exchange forward contracts is incidental to the exports business and not a "speculation loss". However, if the contract is prematurely

cancelled, the assessee has to justify the loss

London Star Diamond Company (I) P. Ltd Vs. DCIT (ITAT Mumbai)

The assessee, an exporter of diamonds, entered into forward contracts with Banks to hedge the exchange loss, if any, in respect of the outstanding receivable in foreign currency. The assessee suffered a loss of Rs. 4.69 crores on account of the maturity & premature cancellation of the said forward contracts. The AO & CIT(A) held that the forward contracts constituted a "speculative transaction" u/s 43(5) and that the loss suffered thereon was a "speculation loss" which could not be set-off against the other income.

The Tribunal held as follows:

i. Though a forward contract for purchase or sale of foreign currency falls in the definition of "speculation transaction" u/s 43(5) as it is settled otherwise than by the actual delivery or transfer of the commodity, it cannot be regarded as constituting a "speculation business" under Explanation 2 to s. 28. A forward contract, entered into with banks for hedging losses due to foreign exchange fluctuations on the export proceeds, is in the nature of a "hedging contract" and is integral or incidental to the export activity of the assessee and cannot be considered as an independent business activity. Therefore, the losses or gains constitute business loss or gains and do not arise from speculation activities. The fact that there is a premature cancellation of the forward contract does not alter the nature of the transaction. There is also no requirement in the law that there should be a 1 to 1 correlation between the forward contracts and the export invoices. So long as the total value of the forward contracts does not exceed the value of the invoices, the loss has to be treated as a business loss.

ii. On facts, the loss arising on cancellation of matured forward contracts is allowable as it is attributable to the genuine failure of the trade debtors to comply with the credit terms and conditions. As regards the loss arising on account of premature cancellation of the forward contracts, the assessee requires to explain the reason for the premature cancellation. The explanation that the maturity of date of some of such premature cancelled forward contracts fell during the week-end and therefore they were cancelled three days prior to the due date is acceptable and the loss is allowable. The explanation that some other forward contracts were prematurely cancelled due to business reasons and to avoid higher loss requires to be examined by the AO. The

correspondence with the banks and the RBI guidelines on the issue as well as the accounting treatment by the banks also requires to be examined. The assessee's alternative argument that the said loss is "damages" payable to the banks for breach of contracts or settlement of the contracts also requires examination by the AO.

Observations:

Forward Contract Losses are to be treated as business losses only if conditions stipulated herein above are complied with failing which assessee runs the risk of treating such losses as "Speculation Losses".

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6) The Delhi High Court upheld the order of the Tribunal that amount received by the assessee under the license agreement for allowing the use of the software would not be royalty under the DTAA.

DIT Vs. Infrasoft Ltd. (2013) (Delhi High Court)

The High Court held as follows:

i. What was transferred was neither the copyright in the software nor the use of the copyright in the software, but what was transferred was the right to use the copyrighted material or article which was distinguishable from the rights in a copyright;

ii. It further held that the right that was transferred was not a right to use the copyright but was only limited to the right to use the copyrighted material and the same would not give rise to any royalty income and would be business income;

iii. The Delhi High Court expressed its disagreement with the decision of the Karnataka High Court in the case of CIT v. Samsung Electronics Co. Ltd. (2011) 203 Taxman 477 (Kar.) that right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup would amount to copyright work.

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7) In a case where the Revenue has dispatched a notice under section 143(2), and the same was not received back by the Revenue it shall be presumed to be served.

Shahbad Cooperative Sugar Mills Ltd. Vs. DY.CIT (2013) (Punjab & Haryana High Court)

In the instant case Notice under section 143(2) was claimed to have been issued by revenue under section 143(2). The assessee raised an objection that notice was not served within 12 months from

end of month in which return was furnished and, thus, it was null and void. Despite this objection, revenue proceeded to finalize assessment. Thus, the dispute, in the present case, revolves around the issuance and service of notices issued under Section 143(2) of the Act.

The High Court held as under:

i. The averments in the reply, duly supported by copy of the notice and the fact that notice was not received back raised a presumption of service under Section 27 of the General Clauses Act, 1897;

ii. The onus to rebut the presumption of service of notice sent by post, lies upon the petitioner

iii. The petitioner has failed to discharge this onus. Mere denial by the petitioner that notice was never received, was insufficient, to record a finding in favour of the petitioner;

iv. Thus, the instant petition was dismissed as there was no error in the impugned order or proceeding

Observations:

Section 292BB is applicable to assessment year 2008-09 and subsequent years and the assessee is precluded from taking any objection regarding invalidity of assessment/re-assessment on the ground of improper/invalid issuance/service of a notice for and from assessment year 2008-09.

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8) Assessee is liable to deduct tax at source on interest payments, even if it has not claimed same as deduction while computing its total income

Agreenco Fibre Foam (P.) Ltd Vs. ITO(TDS) (2013) (Cochin - Trib.)

In the instant case assessee-company credited interest to its sister concern's account without deducting tax under section 194A. The Assessing Officer treated assessee as an 'assessee-in-default' and levied interest on it under section 201(1A).
On appeal before the CIT (A), the assessee contended that it could not be treated as an 'assessee-in-default', when it had not claimed interest amount as expenditure. The CIT (A) dismissed the assessee's appeal. Aggrieved assessee filed the instant appeal.

The Tribunal held as follows:

i. Provisions of section 194A(1) provide that the person responsible to pay the interest is liable to deduct tax at source at the time of credit or payment, whichever is earlier. Since the section uses the term 'any income by way of interest', it should be viewed from the angle of the

payee and not from the angle of the person making the payment;

ii. The accounting or tax treatment given by the payer in respect of interest paid by him may not be relevant at all for the purposes of section 194A. So long as the interest amount constitutes "income" in the hands of recipient, the payer shall be liable to deduct tax at source on the interest amount so paid;

iii. Thus, even if the payer had disallowed the expenditure under section 40(a)(ia) or did not claim the same as expenditure at all, he would still be liable to deduct tax at source under section 194A on the interest amount so paid, if the said payment was liable to TDS;

iv. Further, the provisions of section 40(a)(ia) do not override the provisions of section 201. It provides only for deferment of the allowance and does not provide for absolute disallowance. Its objective appears to be to compel the assessee to deduct tax at source in order to claim the relevant expenditure as deduction;

v. Section 201 provides for treating an assessee as an assessee-in-default who has failed to deduct or pay the TDS amount. Its objective is only to compensate the Government for the failure of an assessee to deduct or pay the TDS amount;

vi. Thus, the provisions of section 40(a)(ia) and section 201 operate on different objectives. Accordingly, the assessee was liable to deduct tax at source on interest payments, even if it had not claimed the same as deduction while computing its total income. The revenue was entitled to initiate proceedings under section 201 for such failure. Thus, the order of CIT(A) was to be upheld.

Observations:

Provisions of Tax Deduction and disallowance are independent provisions for the purposes of default.

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9) Lease premium paid for acquiring leasehold land for a period of 60 years did not fall within meaning of 'rent' under section 194-I and, therefore, assessee was not liable to deduct tax at source while making said payment

ITO(TDS) Vs. Navi Mumbai SEZ (P.) Ltd (2013) (Mumbai - Trib.)

The assessee entered into lease agreements for a period of 60 years with CIDCO for acquisition of leasehold rights in the land to develop and operate a SEZ. It paid lease premium to CIDCO. The Assessing Officer held that

lease premium amounted to payment of rent within meaning of section 194-I and, since, assessee did not deduct tax at source while making said payment, it was to be treated as assessee in default. On appeal, the CIT (A) set aside the order of AO. Aggrieved revenue filed the instant appeal.

The Tribunal held as follows:

i. When the interest of the lessor is parted with for a price, the price paid is called lease premium or salami. But the periodical payments made for the continuous enjoyment of the benefit under the lease are in the nature of rent;

ii. In the instant case, there was transfer of substantive interest of lessor for the leasehold land in favour of the assessee. There is a conferment of right on the lessee by acquiring leasehold land and the premium has been paid in lieu thereof and not for the purpose of use of land;

iii. Therefore, the lease premium paid by the assessee for acquiring leasehold land with a right to develop a SEZ thereon couldn't be deemed as advance payment of rent;

iv. Accordingly, premium paid by the assessee for acquiring leasehold land does not fall within the ambit of rent under section 194-I. Thus, the CIT (A) had rightly held that the provisions of section 194-I were not attracted in respect of lease premium paid by the assessee. Thus, revenue's appeal was to be dismissed.

Observations:

Periodical Payments are rent and are post acquisition. Premium is a part of acquisition cost and as such not liable as Rent.

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10) Where circular effective at relevant time exonerates an assessee from TDS obligation on payment to non-resident, subsequent circular would not create such an obligation retrospectively

CIT Vs. Model Exims Kanpur (2013) (Allahabad High Court)

In the instant case the assessee had paid commission to foreign agents on which it did not deduct tax in view of Circular Nos. 23 of 1969, 163 of 1975 and 786 of 2000. The revenue made disallowance of expenditure under section 40(a)(i) holding that it was mandatory for assessee to deduct tax as Circular No. 7 of 2009 had superseded earlier circulars.

The High Court held as follows:

i. The assessee's assessment would be governed by Circular, which was operative at the relevant time (i.e., assessment year 2007-

08) and which did not oblige the assessee to deduct tax at source;

ii. The assessee was not entitled to deduct TDS. The department could not have taken different stand in subsequent years or assessment year 2007-08, when the circulars were operative and were not withdrawn;

iii. Circular No. 7 of 2009, dated 22-10-2009 withdrawing earlier circulars became operative only from 22-10-2009;

iv. The circulars in the relevant year were binding upon the department and assessee could challenge the affect of the Circular but that the Assessing Officer did not have any right to ignore the circulars and to disallow non-deduction of tax at source under sections 195 and 40(a)(i);

v. Thus, as assessment was governed by that circular which was operative at relevant time assessee was under no obligation to deduct tax at source

DUE DATES CHART FOR THE MONTH DECEMBER 2013 (Various Acts):

Date	Particulars
5th	Service Tax payment for the previous month (6th if paid electronically)
6th	Payment of Excise Duty for the previous month for all Assessees(other than SSI units)
7th	TDS remittance for the previous month
10th	Monthly Excise return by all assessees (except SSIs & EOUs) coming under CEA in Form ER1
10th	Monthly Excise return by EOU assessees coming under CEA in Form ER 2
15th	Payment of Advance Tax for CORPORATES (not less than 75% of the estimated tax)
15th	Payment of Advance Tax for Non Corporate (not less than 60% of the estimated tax)
20th	Payment of contribution under EPF & MP Act, 1952 (including 5 days of grace)
20th	Payment of Monthly MVAT under MVAT Act, 2002*
21st	Payment of contribution under Employees State Insurance Act, 1948
31st	Payment of Profession Tax for the employees

*If payment of MVAT is made as per time prescribed, additional 10 days are given for uploading e-return.

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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.