COMPANY LAW

RULES FOR CANCELLATION OR DEACTIVATION OF DIRECTOR IDENTIFICATION NUMBER (DIN)

If an application is received from any person seeking cancellation or deactivation of DIN, the concerned authority, shall deactivate the DIN only in cases where –

i) the DIN is found to be duplicate;
ii) the DIN was obtained by wrongful manner or fraudulent means; (however, an opportunity of being heard shall be given to the concerned individual in this case)
iii) of the death of the concerned individual;
iv) the concerned individual has been declared as lunatic by the competent Court;
v) if the concerned individual has been adjudicated an insolvent.

[Amendment to Companies (Directors Identification Number) Rules, 2006]

CLARIFICATION UNDER SECTION 372A(3) OF THE COMPANIES ACT, 1955

The Ministry of Corporate Affairs (MCA) has clarified that **in cases where the coupon rate on tax free bonds lower than the prevailing bank rate, there is no violation of Section 372A (3) of Companies Act, 1956**.

The section is read as under:
"No loan to any Body corporate shall be made at a rate of interest lower than the prevailing bank rate. "

Budget 2013-14 authorizes Union Govt. to raise Rs. 50,000 crores (Tax Free Bonds) carrying a lower rate of interest and the response had been poor so far due to restrictions under Section 372A(3) of the Companies Act, 1956.

[General Circular No. 06 /2013 dated 14.03.2013]

RBI

PUBLIC PROVIDENT FUND SCHEME, 1968 (PPF, 1968) AND SENIOR CITIZENS SAVINGS SCHEME, 2004 (SCSS, 2004) - REVISION OF INTEREST RATES

The rates of interest on PPF, 1968 and SCSS, 2004 for the financial year 2013-14 on the basis of the interest compounding / payment built in the schemes, will be as under:

Scheme	Before	w.e.f. 01.04.2013
SCSS, 2004	9.3% p.a.	9.2% p.a.
PPF, 1968	8.8% p.a.	8.7% p.a.

SERVICE TAX

CBEC extends the date of e-filing of the new Service Tax Return (ST-3) for the period from 1st July 2012 to 30th September 2012, from 25th March, 2013 to 15th April, 2013.

Service Tax Return (ST-3) for the period 1st July-30th September, 2012 is now available in a modified format for e-filing in ACES.

DIRECT TAX

E-COURT

A new system of hearing through Video Conferencing has been introduced referred to as 'E-Court'. **The appeals and applications fixed before the Income Tax Appellate Tribunal [ITAT], Allahabad Bench will be heard through Video Conferencing** by the Members of the ITAT. For the purposes of E-Court, detailed Regulations along with Do's, Don'ts and Forms for use under these Regulations are framed and put up on the Income tax website.

CLARIFICATIONS RELATING TO TRANSFER PRICING ISSUES OF DEVELOPMENT CENTERS ENGAGED IN PROVIDING R&D SERVICES

1) At times development centers engaged in providing R&D services and carrying insignificant risk, are treated by the TPO as full or significant risk-bearing entities and transfer pricing adjustments are made accordingly. The CBDT has clarified that **to identify these centers with insignificant risk for the purposes of transfer pricing audit certain conditions are to be met**. These conditions can be referred to in the circular.

[Circular No. 3/2013 dated 26.3.2013]

2) In international transactions involving transfer of unique intangibles, Profit Split Method (PSM) may be applied for transfer pricing purposes [Rule 10B(1)(d)]. PSM is generally applied where associated enterprise transactions are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction.

The CBDT clarifies that **TPO may consider TNMM or CUP method as most appropriate method instead of PSM in case he finds that information and reliable data is not available for application of the method**. The TPO must also record reasons for non-applicability of PSM.

[Circular No. 2/2013 dated 26.3.2013]

SEVEN MANDAMUSES (GUIDELINES) OF DELHI HC TO DEAL WITH ASSESSEE'S GRIEVANCES ON COMPUTERIZED PROCESSING OF RETURN BY CPU

1) **Misplacement of rectification applications:**

The Board has issued instructions that the AO should dispose off rectification applications under Section 154 within 4 to 6 months. A register for receipt of rectification applications should also be maintained.

2) **Adjustment by CPU, Bengaluru of refund against existing demand without compliance with Section 245:**

When a return of income is processed under section 143(1) at the Central Processing Unit (CPU) at Bengaluru, the computer itself adjusts the refund due against the existing demand.

It is directed that department should follow the procedure prescribed under section 245 before making any such adjustments. The assessees must be given an opportunity to file a reply with the AO who will examine the same before any adjustment is made.

3) **Existing cases where Section 245 not followed by CPU before adjusting refunds:**

Where refunds have been fully or partly adjusted against the past arrears by the CPC while passing the order under section 143(1) of the Act, without following the procedure under section 245 of the Act, it is directed that all such cases will be transferred to the AO. The AO will issue notice to the assessee which will be served as per the procedure prescribed under the Act.

4) **No denial of interest where assessee isn't at fault**

An assessee can be certainly denied interest if delay is attributable to him in terms of Section 244A(2). However, when the delay is not attributable to the assessee but due to the fault of the Revenue, then interest should be paid under the said section.

5) **No enforcement of demand where there is no communication of the order/intimation to assessee under section 143(1)**

Where claims of tax credit have been rejected on ground of technicalities, the AO cannot enforce the demand on the assessee if no order/intimation under section 143(1) has been communicated as the assessee will not know that the claims of TDS or tax paid have been rejected.

6) **Unmatched Challans of TDS deductor for which credit not reflected in Form 26-AS**

"Unmatched Challans" relate to challans reported by the deductor in the TDS

statement and are not found available in the OLTAS data base (Online Tax Accounting System). The respondents will fix a time limit after considering the due date of filing of the return and processing of the return by the Assessing Officer, within which they shall verify and correct all unmatched challans.

An assessee as a deductee should not suffer because of fault made by deductor or inability of the Revenue to ask the deductor to rectify and correct.

7) **Seventh Mandamus - Assessee can approach AO with TDS certificate where mismatch is there and AO has to issue necessary notice to deductor to resolve matters. (Self Explanatory)**

SUMMARY OF IMPORTANT JUDGEMENTS:

Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
1	Delhi - Tribunal	Section 9 and DTAA	Royalty paid by an NR to other NR can't be taxed in India if it arises from patent exploited outside India	Qualcomm Incorporated vs. ADIT
2	ITAT Kolkata	Section 14A	Rule 8D(2)(ii) & (iii) do not apply to shares held as stock-in-trade	DCIT vs. Gulshan Investment Co Ltd
3	Mumbai - Trib.	Section 9(1)(vii)	Testing services through machines are technical services, still not taxable as FTS as human intervention is missing	Siemens Ltd. vs. CIT
4	Andhra Pradesh	Section 2(47) and DTAA	Even retro amendment can't tax indirect transfer as it doesn't override tax treaties	Sanofi Pasteur Holding SA vs. Department of Revenue, Ministry of Finance
5	Mumbai - Trib.	Section 92C	No embargo on TPO to search for any number of comparables as long as he selects only relevant one	Willis Processing Services (I) (P.) Ltd. vs. Dy.CIT
6	Bombay High Court	Section 37(1)	No disallowance for compensatory payments	CIT vs. Regalia Apparels Pvt. Ltd

1) **Royalty paid by an NR to other NR can't be taxed in India if it arises from patent exploited outside India** *(Qualcomm Incorporated vs. ADIT-Delhi – Tribunal)*

The appellant was a company incorporated in the USA and was engaged in development and licensing of CDMA technology. The appellant granted license to 'use and sell CDMA technology' to the unrelated Original Equipment Manufacturers ('the OEMs'), who were non-resident and were located outside India, in consideration for royalty. The licenses granted by the appellant to the OEMs were used for manufacturing of handsets and network equipments, which, in turn were sold to various parties located outside India and in India. In respect of taxability of its income in India, the appellant contended that the royalty income earned by it from the OEMs of CDMA mobile handsets and network equipments sold in India was not taxable in India either under Section 9(1)(vi)(c) of the Act or under Article 12(7)(b) of the India-USA DTAA.

Deliberating on the issue, the Tribunal held in favour of assessee as under:

i. The license to manufacture products by using the patented intellectual property of the appellant had not been used in India as the products were manufactured outside India and when such products were sold to parties in India it couldn't be said that OEMs had done business in India;

ii. Sale in India without any operations being carried out in India would amount to business with India and ***not business in India;***

iii. No patents of the appellant had been used for customization of handsets;

iv. The role of appellant ended when it licensed its CDMA technology for manufacturing handsets and when it collected royalty from OEMs on these products;

v. There was no finding that the OEMs had carried on business in India or a part of the sale consideration was attributable to any sale or licensing of software carried out in India. When OEM's itself were not brought to tax, to hold that the appellant was taxable was not correct;

vi. The source of royalty was the place where patent was exploited, viz

where the manufacturing activity took place, which was outside India. Hence, the Indian parties would not constitute source of income for the OEMs; and

vii. The software was only used with the hardware and was not independent of the equipment or the chipset. Since no separate consideration was paid by Indian parties for licensing of the software and the consideration was paid only for the equipment which had numerous patented technologies, the sale couldn't be bifurcated or broken down into different components.

Thus, the royalty earned by the appellant couldn't be brought to tax in India under Section 9 of the Act or Article 12 of the India-USA DTAA.

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2) Computation provision provided in Rule 8D(2)(ii) and (iii) can only be applied in the situations in which shares are held as investments. However, Rule 8D (i) to apply whether shares are held as stock-in-trade or investments *(DCIT vs. Gulshan Investment Co Ltd – ITAT Kolkata)*

Rule 8D(2)(ii) and (iii) will not have any application when the shares are held as stock in trade. It is so for the elementary reason that the one of the variables on the basis of which disallowance under Rules 8D(2)(ii) and (iii) is to be computed is the value of "investments, income from which does not or shall not form part of total income". When there are no such investments, the rule cannot have any application.

When no amount can be computed in the light of the formula given in Rule 8D(ii) and (iii), no disallowance can be made under Rule 8D(2)(ii) and (iii) either.

As held by Hon'ble Supreme Court in the case of CIT v. B C Srinivas Shetty (128 ITR 294), **when computation provisions fail, the charging provisions cannot be applied.**

By the same logic, when the computation provisions under Rule 8D(2)(ii) and (iii) fail, disallowance under the said provisions cannot be made as the said provision is rendered unworkable.

However, that does not exclude the application of Rule 8D(2)(i) which refers to the "amount of expenditure directly relating to income which does not form part of total income".

Where shares are held as stock in trade and not as investments, the disallowance even under Rule 8D is

restricted to the expenditure directly relatable to earning of exempt income. Consequently, while Section 14A will still apply in the cases whether shares are held as stock in trade or as investments.

The provisions of Section 14A are indeed attracted whether or not the shares are held as stock in trade or as investments, even though the provisions of Rule 8D(2)(ii) and (iii) cannot be invoked in such a case , and even though the provisions of rule 8D(2)(i) are much narrower in scope than the scope of Section 14A simplicitor.

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3) Testing services through machines are technical services, still not taxable as FTS as human intervention is missing *(SIEMENS LTD. v. CIT - (Mumbai - Trib)*

Merely because certificates have been provided by the humans after a test is carried out in a laboratory by automatic machines, it can't be held that the services have been provided through the human skills. Such service is not "Fees for Technical Services".

In the instant case, the moot question that came up before the Tribunal was:

"Whether the payment made purely for standard facility provided by the Laboratory which is done automatically by the machines without any human intervention can be covered under the ambit of Fee for Technical Services"?

The Tribunal held in favour of assessee as under:

i. The expression "fees for technical services" has been defined as consideration for rendering managerial, technical or consultancy services. The word "technical" as appearing in the Explanation 2 to section 9(1)(vii) is preceded by the word "managerial" and succeeded by the word "consultancy". It can't be read in isolation as it takes colour from the word "managerial and consultancy" between which it is sandwiched;

ii. Managerial and consultancy services have to be rendered by human only and not by any means or equipment;

iii. Where simply an equipment or sophisticated machine or standard facility is provided albeit developed or manufactured with the usage of technology, such a user can't be characterized as providing technical services; and

iv. One has to see whether any kind of human interface or human

involvement is there for providing technical services. Merely because certificates have been provided by the humans after a test is carried out in a laboratory automatically by the machines, it can't be held that services have been provided through the human skills.

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4) Even retro amendment can't tax indirect transfer as it doesn't override tax treaties; HC follows Vodafone

(Sanofi Pasteur Holding SA v. Department of Revenue, Ministry of Finance - Andhra Pradesh)

Where a French company acting as an Investment vehicle transferred its interest in Indian concern to another French company, the transferor was not liable to any tax in India as per India-France DTAA.

The facts of the case were as under:

a) L, Hyderabad was an Indian company and 80 per cent of its shares were held by French company S;

b) Company S was a JV between two French companies G and M. G and M sold their shares in S to another French company Sanofi;

c) G and M had applied for Advance Rulings to AAR regarding the taxability of capital gains in India arising out of sale of shares in S to Sanofi in terms of Article 14(5) of Indo-France DTAA;

d) AAR held that such deal was chargeable to tax in India. Hence, G and M filed separate writ petitions before the High Court challenging the ruling of AAR;

e) Sanofi was held as 'assessee in default' for non-deduction of TDS under section 195 from payment made to G and M. Hence, present writ petition was filed by Sanofi before the High Court.

The High court held in favour of assessee as under:

i. S is an independent corporate entity registered and resident in France and FDI in SBL is its commercial substance and purpose;

ii. S was established as a Special Purpose Vehicle to facilitate FDI and to cushion potential investment risks of M and G on direct investment in L;

iii. Uncontested assertion by petitioners that a higher rate of tax on capital gains (in comparison to what would have been chargeable in India) is

payable in France and has been remitted to Revenue in France lends further support to the inference that S was not conceived, pursued and persisted with to serve as an Indian tax avoidant device;

iv. Since Revenue failed to establish its case that genesis or continuance of S establishes it to be an entity of no commercial substance and/or that S was interposed only as a tax avoidant device, no case made out for piercing or lifting of the corporate veil;

v. Subsequent to the transaction in issue and currently as well, S continues in existence as a registered French resident corporate entity and as the legal and beneficial owner of L shares;

vi. The transaction in issue clearly and exclusively is one of transfer of the entire shareholding in S by M/G in favour of Sanofi. Transfer of L shares in favour of S is neither the intent nor the effect of the transaction;

vii. The Revenue's contentions that retrospective amendments by Finance Act,2012 would over-ride DTAA provisions deserves to be rejected for the following reasons:

The Finance Act, 2012 introduced GAAR provisions (sections 95 to 102) which override treaties in case of abuse of treaty provisions was proposed to be operationalised w.e.f 1-4-2016. Section 90(2A) inserted by Finance Act, 2012 enables application of GAAR even if same is not beneficial to assessee;

In contra-distinction, retrospective amendments relied upon by Revenue-Explanation 2 to section 2(47) and Explanations 4 and 5 to section 9 are not fortified by a non-obstante clause to override tax treaties.

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5) No embargo on TPO to search for any number of comparables as long as he selects only relevant one

(Willis Processing Services (I) (P) Ltd. v. Dy.CIT – Mumbai Tribunal)

The assessee was providing Information Technology Enabled Services (ITES) to the Associated Enterprises. TPO accepted 8 out of the 11 comparables of assessee. However, he felt that the number of comparables were insufficient. Consequently, he conducted a fresh search and added 22 comparables to the list of 8 and made TP adjustment. Assessee contended that TPO having accepted 8 comparables selected by assessee, he cannot search for fresh comparables.

On appeal, the Tribunal held as under:

i. Under the TP regulations, there is no embargo on the powers of the TPO in carrying out fresh search for gathering more relevant information, documents etc., while determining the ALP in relation to international transactions;

ii. Assessee's contention that TPO cannot search for fresh comparables can't be accepted as the sufficient number of comparables depends upon the facts and circumstances of the each case. There cannot be a fixed criteria or parameter for number of comparables, which can be universally applied to each and every case for determination of the ALP;

iii. To get an adequate result and better representation, the size of sample must be large enough. The same rule is applicable in the case of number of comparables selected for representing the true and correct ALP in relation to the international transaction;

iv. Under the Transfer Pricing Regulations, the number of comparables may be one or more than one, but there is no upper limit prescribed under section 92C of the IT Act;

v. However, the first proviso to section 92(2) indicates that more than one price can be considered for determination of ALP and in such a case, the ALP shall be taken to be arithmetic mean of such price. Therefore, the size of number of comparables has not been prescribed under TP Regulations provided under the IT Act; and

vi. Where the number of comparables available is large, then it is always better to consider as many as possible number of comparables which can give an adequate and proper representation of the price prevailing in open market in the said industry, business, trade etc., to which the comparables and international transactions belong.

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6) Explanation to S. 37(1): No disallowance for compensatory payments

(*CIT vs. Regalia Apparels Pvt. Ltd Bombay High Court)*

The assessee, a manufacturer of garments, was granted an entitlement by the Apparel Export Promotion Council (APEC) for export of garments and knit wares. In consideration for the export entitlement the assessee furnished a

bank guarantee in support of its commitment that it shall abide by the terms and conditions and produce proof of shipment. It was also provided that failure to fulfill the export obligation would render the bank guarantee to being forfeited/encashed. The assessee did not utilize the export entitlement which led APEC to encash the bank guarantee. The assessee recorded the said payment as penalty in its books of account and claimed deduction u/s 37(1).

The AO rejected the claim on the ground that as the payment was by way of "penalty" it could not be allowed under the Explanation to s. 37(1). However, the CIT (A) and ITAT allowed the claim.

On appeal by the department to the High Court, HELD dismissing the appeal:

The assessee took a business decision not to honour its commitment of fulfilling the export entitlement in view of loss being suffered by it. The genuineness of the claim of expenditure being for business purpose is not disputed. The assessee has not contravened any provision of law and the forfeiture of the bank guarantee is compensatory in nature and does not attract the Explanation to s. 37(1).

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

DUE DATES CHART FOR THE MONTH (Various Acts):

Date	Particulars
6th	Payment of Excise Duty for the previous month (other than SSI units)
10th	Monthly Excise return by all assessees (except SSIs & EOUs) coming under CEA in Form ER-1
10th	Quarterly Excise return by EOU assessees coming under CEA in Form ER-2
10th	Quarterly Excise return by SSI Units availing small scale exemption in Form ER-3
10th	Quarterly Excise return by Units paying 2% duty in Form ER-8
10th	Monthly Excise Return by specified class of Assessees regarding principal units in Form ER-6
15th	Provident fund payment for March
20th	Filing quarterly Central Excise return (Annexure 75) by units availing area-based exemptions
20th	TDS payment of March
21st	Payment of contribution under Employees State Insurance Act, 1948
21st	Payment and filing of Monthly MVAT return under MVAT Act, 2002
21st	Payment and filing of Quarterly MVAT return under MVAT Act, 2002
25th	Service Tax Return for October to March – all assessees
30th	Payment of Profession Tax for the employees
30th	Filing Annual Information on Principal inputs (ER-5) by the specified Assessees
30th	Filing Annual Production Capacity Statement (ER-7) by specified Assessees
30th	Six monthly MVAT payment till March
30th	Six Monthly return till March for VAT audit dealers

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