

HARBINGERTM

Updates on regulatory changes affecting your business

October 2014



B D Jokhakar & Co.

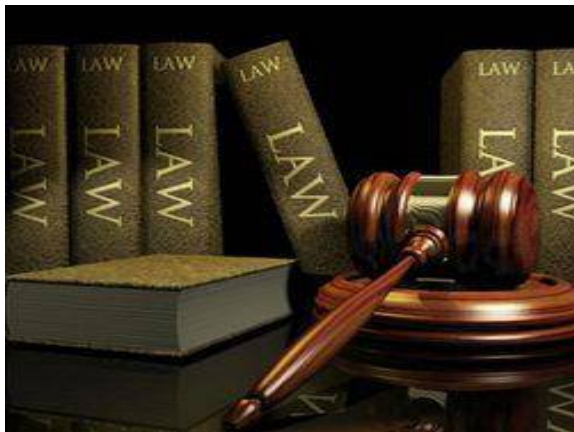
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COMPANY LAW



COMPANIES (REMOVAL OF DIFFICULTIES) SEVENTH ORDER, 2014:

The subsection (5) and (7) of the section 139 provides for power of the Comptroller and Auditor-General of India to appoint the auditor for the government company as well as the companies 'owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments';

Whereas the section 143(5) of the Companies Act, 2013 provided for power of the Comptroller and Auditor-General of India to conduct supplementary audit included the words only "Government companies".

Therefore the difficulties have arisen in implementation of this two sections, as for

the purpose of supplementary audit section 143(5) did not specifically specified companies 'owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments';

Therefore, central government passed the removal of difficulties order 7, to remove this difficulty. As per the said order, for the purpose of supplementary audit under section 143(5) along with government companies words "any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the Comptroller and Auditor-General of India shall appoint the auditor under sub-section (5) or sub-section (7) of Section 139 and direct such auditor the manner in which the accounts of the company are required to be audited were added".

CORPORATE SOCIAL RESPONSIBILITY POLICY RULES 2014:

The rule 4 of Corporate Social Responsibility Policy Rules, 2014, deals with the CSR activities which can be undertaken by the companies. The Sub-rule (6) of the said rule read as under; "Companies may build CSR capacities of their own personnel as well as those of

their Implementing agencies through Institutions with established track records of at least three financial years but such expenditure shall not exceed five percent of total CSR expenditure of the company in one financial year”.

With exercise of the powers conferred under Section 135 and sub-sections (1) and (2) of Section 469 of the Companies Act, 2013, the Central Government has amended the said rule to include the expenditure on administrative overhead incurred for CSR purpose,

Accordingly in the amended rule, after the words “**but such expenditure**” the words “**including expenditure on administrative overheads,**” shall be inserted.

(Refer General Circular No.36/2014)

FORM ADT-1 AND FORM 23AC-23ACA:

Due date for filing Form ADT-1 (Intimation of Appointment of Auditors by the company to the ROC) for the accounting year 2014-15 is within 15 days from the Date of AGM.

Due date for filing Form 23AC (Balance Sheet) and Form 23 ACA (Profit & Loss Account) for accounting year 2013-14 is within 30 days from the date of AGM.

FORM 66 - SUBMISSION OF COMPLIANCE CERTIFICATE TO THE REGISTRAR:

Form 66 is to be filed by Companies having paid up capital of Rs.10 lakh to Rs. 5 crore pursuant to section 383A of the Companies Act, 1956, and rule 3(2) of the Companies (Compliance Certificate) Rules, 2001. Due date for filing Form 66 is within 30 days from the date of AGM.

RESERVE BANK OF INDIA



HEDGING UNDER PAST PERFORMANCE ROUTE:

Under the extant guidelines relating to hedging of currency risk of probable exposures based on past performance, resident importers are allowed to book contracts up to 50 per cent of the eligible limit. The eligible limit is computed as the average of the previous three financial years' import turnover or the previous

year's actual import turnover, whichever is higher.

On a review of the evolving market conditions and with a view to bringing at par both exporters and importers for hedging of currency risk of probable exposures based on past performance, it has been decided to allow importers to book forward contracts, under the past performance route, up to 100 per cent of the eligible limit Importers who have already booked contracts up to previous limit of 50 per cent in the current financial year, shall be eligible for difference arising out of the enhanced limits.

FOREIGN DIRECT INVESTMENT (FDI) IN INDIA - ISSUE OF EQUITY SHARES UNDER THE FDI SCHEME AGAINST LEGITIMATE DUES:

In terms of paragraph 2(4) of the Schedule 1 of the Notification, *ibid*, an Indian company under the automatic route may issue shares/convertible debentures to a person resident outside India against lump-sum technical know-how fee, royalty, External Commercial Borrowings (ECBs) (other than import dues deemed as ECB or Trade Credit as per RBI guidelines) and import payables of capital goods by units in Special Economic Zones subject to certain conditions like entry route, sectoral cap, pricing guidelines and compliance with the applicable tax laws.

It has been decided to permit issue of equity shares against any other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India.

CLARIFICATION ON INOPERATIVE ACCOUNTS:

A savings as well as current account shall be treated as inoperative/dormant if there are no transactions in the account for over a period of two years. Further, for the purpose of classifying an account as inoperative, both the types of transactions i.e. debit as well as credit transactions induced at the instance of customers as well as third party should be considered.

If dividend on shares is credited to Savings Bank accounts as per the mandate of the customer, the same should be treated as a customer induced transaction. As such, the account should be treated as operative account as long as the dividend is credited to the Savings Bank account. The Savings Bank account can be treated as inoperative account only after two years from the date of the last credit entry of the dividend, provided there is no other customer induced transaction.

INCOME TAX

EXTENSION IN FILING OF TAX AUDIT REPORT U/S 44AB:

In exercise of power conferred by section 119 of the Income-tax Act ('the Act'), the Central Board of Direct Taxes (CBDT) hereby extends the due date for obtaining and furnishing of the report of audit under section 44AB of the Act for Assessment Year 2014-15 in case of assessee's who are not required to furnish report under section 92E of the Act from 30th day of September, 2014 to 30th November, 2014.

EXTENSION IN DUE DATE OF FILING OF INCOME TAX RETURN:

In compliance to the judgment of High Court of Gujarat and after considering the representations made for extension of due date for furnishing of return of income in compliance with the directions of the other High Courts, the Board, in exercise of power conferred by section 119 of the Act, hereby extends, subject to para 7 below, the `due-date for furnishing return of income from 30th September, 2014 to 30th November, 2014 for the assessment year 2014-15 for all purposes of the Act, in case of an assessee, who is required to file his return of income by 30th September, 2014 as per clause (a) of Explanation 2 to sub-section (1) of section 139 of the Income-tax Act, 1961; and is also required to get his accounts audited under section 44AB of

the Act or is a working partner of a firm whose accounts are required to be audited under section 44AB of the Act.

There shall be no extension of the "due date" for the purposes of Explanation 1 to section 234A (Interest for defaults in furnishing return) of the Act and the assessee's shall remain liable for payment of interest as per the provisions of section 234A of the Act.

For removal of doubt, it is clarified that for an assessee (other than working partner of a firm which is required to obtain and furnish tax audit report), who is required to file its return of income by 30th September, 2014 but not required to obtain and furnish tax audit report under section 44AB, the due date for furnishing of return of income for assessment year 2014-15 remains as 30th September, 2014.

EXTENSION OF THE DUE DATE OF DEPOSIT OF TAX DEDUCTED AT SOURCE/TAX COLLECTED AT SOURCE DURING THE MONTH OF SEPTEMBER, 2014:

Considering the consecutive holidays owing to the festive season and weekend during the first week in the month of October, 2014, the Central Board of Direct Taxes has issued an order to extend the last date of deposit of tax deducted at source/tax collected at source during the

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month of September, 2014 from 7th October, 2014 to 10th October, 2014 without entailing any consequential interest.

However, the due date for filing of TDS/TCS statements for the 2nd Quarter of the F.Y. 2014-15 shall remain the same.

SERVICE TAX

SERVICE TAX IN CASE OF JOINT VENTURE:

Certain doubts have been raised regarding the levy of service tax on taxable services provided (i) by the members of the Joint Venture (JV) to the JV and vice versa; and (ii) inter se between the members of the JV. In addition, doubts have also been raised regarding taxation of cash calls or capital contribution made by the members to the JV and also administrative services provided by a member to the JV.

According to Explanation 3(a) of the definition of service, “an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons”. In accordance with the above explanation, JV and the members of the JV are treated as distinct persons and therefore, taxable services provided for consideration, by the JV to its members or vice versa and between the members of the JV are taxable.

In the context of a JV project, cash calls are capital contributions made by the members of JV to the JV. If cash calls are merely a transaction in money, they are excluded from the definition of service provided in section 65B (44) of the Finance Act, 1994.

JV being an unincorporated temporary association constituted for the limited purpose of carrying out a specified project within a time frame, a comprehensive examination of the various JV agreements (at times, there could be number of inter se agreements between members of the JV) holds the key to understanding of the taxation of transactions involving taxable services between the JV and its members or inter-se between the members of a JV. Therefore one needs to examine the leviability of service tax with reference to the specific terms/clauses of each JV agreement.

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	Delhi- High Court	Section 5	Fee to allow use of technology for 3 yrs without supply of know-how during that period was taxable in year of receipt	<i>New Holland Tractors (India) (P)Limited Vs Commissioner of Income tax, Delhi V</i>
2	Karnataka- High Court	Section 9	Sum paid to Singaporean-Co. for logistic services wasn't 'FTS' as it didn't satisfy make available clause of DTAA	<i>Director of Income-tax (International Taxation), Bangalore Vs Sun Microsystems India (P.) Ltd</i>
3	ITAT - Hyderabad	Section 37	When TPO disallows payment of management fees, it cannot be considered for purpose of computation of operating margin; otherwise, it will amount to double addition.	<i>The ITAT Hyderabad Bench 'A' tns India (P.) Ltd. Vs Additional Commissioner of Income-tax, Range-12, Hyderabad</i>
4	Allahabad- High Court	Section 40(a)(i)	Disallowance under section 40(a)(i) for year 2008-09 be deleted since circular No. 786 was applicable which obliged assessee not to deduct TDS	<i>Commissioner of Income Tax- I Vs Allied Exims</i>
5	ITAT - Mumbai	Section 44C	Expenditure met out by head office with regard to business operation of assessee branch in India allowable under section 44C	<i>ADIT (International taxation)4(1), Mumbai Vs Mizuho Corporate Bank Limited</i>

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Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
6	ITAT- Bangalore	Section 143	Sum paid for importing service manuals which contained instructions for usage of equipment wasn't royalty	<i>Income Tax Officer, ward - 11, Bangalore Vs Antrax Technologies (P.) Limited</i>



1. Fee to allow use of technology for 3 yrs without supply of know-how during that period was taxable in year of receipt

(New Holland Tractors (India) (P) Limited V. Commissioner of Income tax, Delhi V)

i) Section 5(i) of the Act on the scope of total income of a resident state that it includes income of any previous year of a person, from all sources derived;

(a) Received or deemed to be received in India,

(b) Accrues or arises or is due to accrue or arise to the person in India, and

(c) Accrues or arises to him outside India during such year.

ii) In Dinesh Kumar Goel (supra) it was observed that when an assessee was following mercantile system of accountancy, receipt of a particular amount in the relevant year would be relevant at the time of accrual or arisal for the purpose of taxation. This would make the income chargeable to tax in

the particular year, and not mere receipt of the amount.

iii) Thus, when income accrues or arises, actual receipt of amount may not be there and it would be chargeable to tax in the said year and equally receipt or right to receive a particular sum under an agreement would not be sufficient, unless the right had accrued by rendering of services and not by promising for services. In the latter cases, the income would accrue on rendering of services.

2. Sum paid to Singaporean-Co. for logistic services wasn't 'FTS' as it didn't satisfy make available clause of DTAA

(HIGH COURT OF KARNATAKA Director of Income-tax (International Taxation), Bangalore V. Sun Microsystems India (P.) Ltd)

i) Section 9 of the Income-tax Act, 1961, read with article 12 of the Double Taxation Avoidance Agreement between India and Singapore - Income - Deemed to accrue or arise in India (Royalties/Fees for technical services)

ii) 'S' Singapore was not having any place of business or permanent establishment in India - Entire services were rendered by 'S' Singapore from outside India

iii) Material on record did not disclose that 'S' Singapore had made available to assessee its technical knowledge, experience or skill - Tribunal held that, as 'S' Singapore was not having any permanent establishment and that 'S' Singapore had not made available technical knowledge, experience or skill, thus, payments made by assessee to 'S' Singapore were not taxable - Whether since factually it had been held that technical services had not been made available, there was no liability to deduct tax at source

3. When TPO disallows payment of management fees, it cannot be considered for purpose of computation of operating margin; otherwise, it will amount to double addition.

(The ITAT Hyderabad Bench 'A' tns India (P.) Ltd .V. Additional Commissioner of Income-tax, Range- 12, Hyderabad)

i) Management fees cannot be considered for computing the operating margin as the amount available for the Operating margin payable will increase.

4. Disallowance under section 40(a)(i) for year 2008-09 be deleted since circular No. 786 was applicable

which obliged assessee not to deduct TDS

(HIGH COURT OF ALLAHABAD Commissioner of Income Tax- I V. Allied Exims)

i) Section 9, read with section 195 and section 40(a)(i), of the Income-tax Act, 1961 and article 12 of Model OECD Convention - Income - Deemed to accrue or arise in India (Royalty) - Assessment year 2008-09 - A certain sum was disallowed under section 40(a)(i) for non-deduction of TDS on payments made to non-resident as per Circular No. 7, dated 22-10-2009 - Assessee submitted that when return was filed, earlier circular No. 786, was applicable as per which assessee was not obliged to deduct TDS - Whether since earlier circular created a vested right in taxpayer and subsequent circular sought to withdraw said right, subsequent circular will not have retrospective effect and disallowance was to be deleted.

5. Expenditure met out by head office with regard to business operation of assessee branch in India allowable under section 44C

(ADIT (International taxation) 4(1), Mumbai V Mizuho Corporate Bank Limited)

i) The assessee company was incorporated in Japan, having business operation in India from 1996 through a branch office in Mumbai. During assessment, the Assessing Officer disallowed head office expenditure of Rs.47.65 lakhs which was claimed by the assessee under section 44C on the plea that expenditure had not been actually incurred by the assessee branch office in India.

ii) It was found that assessee's bank is incorporated in Japan and is having business operation in India through branch office in Mumbai. In the statement of income filed along with the return of income, the assessee has claimed deduction of actual expenditure incurred by the head office which are attributable to India branch on account of salary paid to the expatriate staff who are working in India but part of their salary have been paid by the head office in Japan. It was found that the expatriates are paying full tax on their global salary in India. The expenses incurred by the Head Office are expenses of the branch as the expatriates working in India are rendering services to the branch in India. The Assessing Officer's objection to the effect that expenditure was not debited in the books of account of India branch is not relevant in accordance with the law laid down by the Hon'ble

Supreme Court in the case of *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363.

iii) Thus, there is no requirement for raising debit note or voucher by the head office on the branch for claiming deduction under section 44C.

iv) Hence Expenditure met out by head office with regard to business operation of assessee branch in India allowable under section 44C

6. Sum paid for importing service manuals which contained instructions for usage of equipment wasn't royalty

(Income Tax Officer, ward - 11, Bangalore V. Antrax Technologies (P.) Limited)

i) The brief facts of the case are that the assessee is a company which filed its return of income for the assessment year 2007-08 declaring a total income of Rs.2,27,730/-.

ii) During the assessment proceedings u/s 143(3), the AO observed from the profit and loss account of the assessee that it has debited expenditure of Rs.24,83,438/- towards service manuals. The assessee was asked to furnish the details about the same.

iii) The assessee vide letter dated 3/11/2009 submitted that the assessee is engaged in the business of importing and selling of Visual and Information Technology equipments like projectors, LCD cables, projector lamps etc. within India and incidental to these imports, it also imported manuals and software which contains operating and servicing instructions for the use of these equipments.

iv) It was submitted that these manuals and software are copyrighted products and the payment made by the company is for the use and sale of copyrighted product and not for acquiring any copyright. It was thus submitted that the payment for the service manuals is not in the nature of 'fees for technical services' or 'royalty' requiring deduction of tax at source.

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

Date	Particulars
5th	Service Tax payment for the previous month (6th if paid electronically)
6th	Payment of Excise Duty for all assesses for the previous month (except SSI Units)
10th	TDS remittance for the previous month
10th	Monthly Excise return by all assesses (except SSI Units) coming under CEA in Form ER
10th	Monthly Excise return by specified class of assesses regarding principal inputs coming under CEA in Form ER 6
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 100% EOU assesses in Form ER-2
15th	TDS/ TCS Quarterly Statements (other than Government deductor) - July to September
20th	Payment of contribution under Employee EPF & MP Act, 1952 (including 5 days of grace)
20th	Payment and returns of Monthly MVAT under MVAT Act, 2002
20th	Quarterly Excise Return (Annexure 75) by units availing area based exemptions
21st	Payment of contribution under Employees State Insurance Act, 1948
21st	MVAT Monthly return of July
25th	Service Tax Return for April to September for all assesseees
30th	Issue of Income Tax TDS Certificate (Form 16A) by Non- Government deductor for Q2
30th	Limited Liability Partnership to file Form 8 (Statement of Account & Solvency)
31st	Payment of Profession Tax for the employees

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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.