CORPORATE CATALYST INDIA
(In joint venture with SCS Global)

technical update

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The key amendments introduced in statutes, policies and procedures in respect of Direct Tax, Indirect Tax, Corporate Laws & Accounting Standards, Foreign Exchange Management Act/ Export Import Policy & Securities and Exchange Board of India related matters are summarized hereunder.

CONTENTS AT A GLANCE

DIRECT TAX

1. Taxability on buy back of shares

The CBDT has clarified that any amount of distributed income by a company on buyback of unlisted shares shall be charged to tax and the company so distributing its income shall be liable to pay additional tax at the rate of 20 per cent of the distributed income.

In the hands of the shareholder, any amount received by a shareholder prior to June 01, 2013 as per the provisions of section 46A read with section 2(22)(iv) of the Act, the income shall be taxed as capital gains and not as dividend.

No fresh notice for assessment/ reassessment/ non-deduction of TDS at source shall be issued where buy back of shares had taken place prior to June 01, 2013. In case any proceedings are pending, tax authorities shall complete the assessment keeping in view of the above legal position.

Source: Circular No. 3/2016, dated February 29, 2016

2. TDS applicability on payments by broadcasters/ TV channels to production houses for production of content or programmes for telecasting

The issue that was required to be addressed is whether such payments are payments under a work contract or a contract for technical and professional services. This would be relevant to determine as to whether these would suffer tax deduction under Section 194C or Section 194J of the Act. The circular clarifies that where the content is produced as per the specifications of the broadcaster or telecaster, it would be covered under the term 'work' defined in Explanation to Section 194C and hence would suffer TDS accordingly. However, where the telecaster/ broadcaster acquires only telecasting rights of the content already produced by the production house, there is no contract for work as envisaged by the section. Hence, Section 194C is not applicable. TDS applicability under the other provisions of Chapter XVIIB would need to be determined.

Source: Circular No. 4/2016, dated February 29, 2016

3. Clarification with respect to the issue of taxability of surplus on sale of shares and securities shall be treated as capital gain or business income

The CBDT has instructed the AO while holding whether the surplus generated from sale of listed shares or other securities would be treated as capital gain or business income, shall take into account the following:

a. Where the taxpayer himself has decided to treat the shares as stock-in-trade, the profit arising on sale of shares/ securities would be treated as income from business.
b. In case of securities held for more than 12 months, if the assessee chooses to treat the profit as capital gain, the AO shall not dispute it. However, the stand once taken by the Assessee cannot be reversed. The Assessee may not be able to take a contrary or different stand in the subsequent years.

In all other cases, the nature of transaction shall be determined based on the circulars issued previously in this regard.

Source: Circular No. 6/2016, dated 29 February 29, 2016

4. Taxability of Consortium members in EPC Contracts

The departmental view has been that the consortium of contractors formed to implement large infrastructure projects (EPC) constitutes AOP for tax purposes. This was a subject matter of litigation and courts have held contrary rulings in this regard. CBDT has clarified that a consortium arrangement for expecting EPC/ turnkey contracts having following features will not be treated as AOP.

a. There is a clear demarcation on the scope of work and cost between consortium members inter-se and each member incurs cost with respect to its specified work area contract.
b. Profit or loss is earned strictly based on performance in the defined scope of work. The contract price may however be shared for sake of convenience in billing.
c. Resources used for each area of work should be under risk and control of respective members.
d. Diversified management and control for execution purposes and common control for coordination between consortium members and for administration convenience.

The above are basic principles and other factors would depend on specific facts of the case.

The circular is not applicable where consortium members are Associated Enterprises as per Section 92A of the Act.
Source: Circular No. 7/2016 dated March 7, 2016

5. Applicability of Section 195 on transactions between non-residents

Facts:
The assessee, a non-resident company incorporated in France, entered into an agreement with Reliance Petroleum Limited for providing technical and engineering services in the premises of Reliance Petroleum Limited in relation to Coker Unit. Further, for providing such services, the assessee-company has entered into another agreement with Foster Wheeler, USA, an associate of the assessee-company. The assessee paid amounts of INR 3.34 crores and INR 14.95 crores for the assessment year 2008-09 and assessment year 2009-10 respectively with regard to services rendered by Foster Wheeler, USA. Since not tax was deducted, the amount was disallowed under section 40(a)(i) of the Act. The matter was referred to the DRP.

Ruling:
The Chennai Bench of the ITAT vide its recent decision dated February 05, 2016 has held that the amount paid by Foster Wheeler France (non-resident) to Foster Wheeler USA (non-resident) towards review of execution plans; emphasis on key milestones; provision of best practices in the form of written procedures and specifications and details constitutes FTS as the foreign company constitutes making available its technical knowledge, expertise and know-how in execution of the contract by the Assessee. Unless and until the specifications, technical standards and quality management are made available to the assessee, it cannot execute the project entered into with Reliance Petroleum Limited.
Source: Foster Wheeler France S.A. vs Deputy Director of Income Tax (DDIT)- ITA No.641/Mds/2015 & ITA No.774/Mds/2014

6. Inclusion of subsidies for inclusion in profits eligible for deduction under section 80IB or 80IC

Facts:
Assessee was engaged in the business of manufacture of steel and ferro-silicon in the State of Meghalaya and was claiming deduction under section 80IB. During the period under reference, Assessee received transport and power subsidy from Government and the same was included as eligible profit for computation of the claim. AO as well as Commissioner of Income Tax (Appeals) disallowed the claim with respect to the subsidies. ITAT ruled in tax payer's favour and Guwahati High Court confirmed the order of ITAT. Tax Department preferred an appeal against the High Court order.

Ruling:
Subsidies in the present case were revenue receipts which were reimbursed in respect of elements of cost relating to manufacture or sale of products, there was certainly a direct nexus between profits and gains of the industrial undertaking or business, and reimbursement of the subsidies; therefore, such subsidies qualified for deduction under sections 80-IB and 80-IC of the Act. In order to evaluate applicability of sections 80-IB and 80-IC, it is required to determine whether the profits and gains were derived from the business. So long as profits and gains emanated directly from the business itself, the fact that the immediate source of the subsidies was from the Government would make no difference, as it could not be disputed that the said subsidies were only in order to reimburse, wholly or partially, costs actually incurred by the taxpayer in the manufacture and sale of its products. The Court also held that since subsidies went to reimburse costs of production of goods in a business, they would have to be included under the head 'profits and gains of business or profession', and not under the head 'income from other sources' which is only a residuary head.
Source: TS-124-SC-2016

Legends

Act – Income Tax Act, 1961
AO – Assessing Officer
CBDT – Central Board of Direct Taxes
DRP – Dispute Resolution Panel
ITAT – Income Tax Appellate Tribunal

INDIRECT TAX

1. Service Tax - Point of taxation ('POT') under reverse charge mechanism

Where there is change or extent of liability of service tax, payable by the recipient of service, POT will be the date of issuance of invoice by the service provider. However, service must have been provided and invoice issued before date of change.
Source: Notification No. 21/2016 – Service Tax dated March 30, 2016

2. Customs - Concessional rate of duty on specified goods

Effective April 01, 2016, Central Government will provide enhanced tariff concessions with respect to specified goods imported under the India-Japan Comprehensive Economic Partnership Agreement.
Source: Notification No. 28/2016 – Custom dated March 31, 2016

CORPORATE LAWS

1. Amendment to Companies (Accounting Standards), 2006

The Ministry of Corporate Affairs ('MCA') has notified the new amendment rules called Companies (Accounting Standards) Amendment Rules, 2016. This amendment rules provides for:

a. Definitions have been inserted for Accounting Standards, reference to Companies Act 2013, Financial Statements, etc

b. Few existing Accounting Standards like 2, 4, 10, 13, 14, 21 and 29 have been substituted with certain modifications and Accounting Standard 6 has been omitted.
Source: MCA Notification dated March 30, 2016

2. Amendment to Companies (Share Capital and Debentures) Rules, 2014

As per earlier Rule, in case of Buy-back of shares or other securities, the audited accounts of not more than six month old from the date of offer document was required on the basis of which calculation with reference to buy back was done. The same has now been amended to incorporate that where the audited accounts are more than six months old, the calculations with reference to buy back shall be on the basis of un-audited accounts not older than six months from the date of offer document which are subjected to limited review by the auditors of the Company.
Source: MCA Notification [F. No. 01/04/2013 CL-V (part-II] dated March 10, 2016

FEMA & OTHER LAWS

1. Liberalisation in FDI norms for Insurance and Pension Sectors

Department of Industrial Policy and Promotion ('DIPP') under Ministry of Commerce and Industry, Government of India has liberalized its Foreign Direct Investment ('FDI') policy on Insurance and Pension Sector. The revised guidelines are effective from March 23, 2016.

S. No	Sector	Previous Foreign Investment Cap	Entry Route	Previous Foreign Investment Cap	Entry Route
1.	Insurance (i) Insurance Company (ii) Insurance Brokers (iii) Third Party Administrators (iv) Surveyors and Loss Assessors (v) Other Insurance Intermediaries appointed under the provisions of Insurance Regulatory & Development Authority Act, 1999	49 per cent	Automatic up to 26 per cent Government route beyond 26 per cent and up to 49 per cent	49 per cent	Automatic

2.	Pension Sector	49 per cent	Automatic up to 26 per cent Government route beyond 26 per cent and up to 49 per cent	49 per cent	Automatic

Source: D/o IPP F. No. 4/24/2014-FC.I dated March 23, 2016
D/o IPP F. No. 5/6/2014-FC.I dated March 23, 2016

2. Liberalisation in FDI norms for E-Commerce Sector

DIPP, in order to provide clarity, has formulated guidelines for FDI on E-commerce sector effective from March 29, 2016.

The new guidelines provides that 100 per cent FDI is allowed under automatic route in Marketplace Based model of E-Commerce and prohibit FDI in Inventory Based model of E-Commerce subject to certain Conditions.

The following have also been defined:

a) E-commerce – means buying and selling of goods and services including digital products over digital and electronic network.

b) E-commerce entity – means a company incorporated under the Companies Act, 1956 or 2013 or a foreign company covered under section 2(42) of Companies Act, 2013 or an office, branch or agency in India as provided in section 2(v)(iii) of FEMA, 1999, owned or controlled by a person resident outside India and conducting e-commerce business.

c) Inventory based model of e-commerce - means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

d) Marketplace based model of e-commerce - means providing of an information technology platform by an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller.

Further sale of Service through e-commerce will be under Automatic Route subject to the conditions of FDI Policy and other applicable laws.
Source: D/o IPP F. No. 5/3/2015-FC.I dated March 29, 2016

CORPORATE CATALYST INDIA PVT LTD
(in Joint Venture with SCS Global)
www.cci.in

Head Office
Times Square, Fourth Floor, Block B Sushant Lok 1, Gurgaon 122 002 INDIA Tel : +91 124 4333 100
Fax: +91 124 4333 101

National Offices: Ahmedabad, Bengaluru, Chennai, Gurgaon, Hyderabad, Kochi, Mumbai, New Delhi
National Affiliates: Chandigarh, Jaipur, Jammu, Kolkata, Lucknow, Ludhiana and Pune
International Affiliates: Australia, Austria, Belgium, Canada, China, Denmark, Egypt, France, Finland, Germany, Hongkong, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Luxembourg, Malaysia, Mauritius, Myanmar, Netherlands, Norway, Philippines, Poland, Portugal, Russia, South Korea, Singapore, Slovenia,

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