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. Notifying an institution for the purposes of Section 35(1)(ii)

Central Power Research Institute Bengaluru has been approved by the Central Govt. for the purpose of Section 35(1)(ii) in the category of 'Scientific Research Association' subject to following conditions:

(i) Sole objective of the institution is to carry out 'scientific research' by itself
(ii) Separate books should be maintained which should be tax-audited and should be furnished to the Commissioner of Income Tax or the Director of Income Tax having jurisdiction over the case by the due date of filing return of income.
(iii) Separate statement of donations to be maintained showing receipt and application of funds and furnish the same along with the above mentioned tax audit report

If the conditions are violated, the approval will be withdrawn.
Source: Notification 27/2016 dated April 7, 2016

2. Remedial Action for objections raised by the Revenue Audit Party ('RAP')

Instruction no. 9/2006 deals with the detailed procedure to be followed in relation to Revenue Audit Objections ('RAO'). The Circular modifies the previous instruction in as much as it relates to remedial action to be taken and second appeal in cases involving RAOs. Following points are relevant:

(a) Remedial action to be initiated: The previous instruction mandated that even if the RAO is not accepted by CIT, remedial action should be initiated as a precautionary measure excepting in cases where the interpretation of law / facts is in conflict with a binding SC decision or a jurisdictional HC decision which squarely applies to the case at hand or where the findings are factually incorrect or where the AO has acted in conformity with a Board Circular. This had lead to entertaining objections on frivolous grounds as well. The Circular provides that where CIT / Principal CIT didn't accept the audit objection, he may record the reasons and inform the AG within 2 months of receipt of the Report and no remedial action needs to be taken in such cases.

(b) Second appeal to: Where assessment has been framed based on audit objections and subsequently adverse order has been passed by CIT (A), the earlier position was that normally second appeal to ITAT should be filed and if not, reasons should be recorded by CIT. The Circular mandates that where the appellate order is justified either in law or on facts, no appeal needs to be filed and reasons may be recorded by the CIT or Principal CIT.

Comments: These are certain administrative measures in the right direction and are aimed towards diluting the importance of RAP and the objections raised by them in the assessment process. It should be understood that audit should play a positive role in increasing the quality of assessments and be a bottleneck in disposal of cases leading to piling up of appeals without strong grounds.
Source: Circular no.8/2016 dated March 17, 2016

3. Payment of interest on refund on excess TDS deducted and deposited in respect of payments to non-residents

Under the Indian tax regime, if a refund is due to an assessee, interest thereon also has to be paid till the date of payment of interest in the prescribed manner. A long standing issue in this context was the eligibility for interest on refund of excess TDS to a resident on payment to a non-resident ('NR'). A Circular issued in 2007 laid down the procedure for refund of TDS to the tax deductors in genuine cases of remittance to NR where tax is not accrued in India or where the income is taxable at a lower rate. However, it was clarified that no interest is due on such refund since the excess amount deposited loses the character of being a 'tax'. However, in 2014, Supreme Court ruled in the case of Tata Chemicals (43 Taxmann.com 240) that refund due and payable to the tax payer is 'debt owed' and payable by the GoI.

CBDT has issued a circular referring to the Supreme Court decision clarifying that if a resident deductor is entitled to refund of tax deposited on payment made to NR, the excess tax deposited has to be refunded along with interest. CBDT has also advised not to litigate matters concerning this issue.

Comments: Circular 11 directs the Indian Tax Authority to grant interest on refund of excess TDS deposited and not to press litigation on this issue. It is welcome move and shows the commitment of the present Govt. to bring in certainty in the tax regime and curtail litigation. The administrative Circular will be binding on the Department.
Source: Circular no. 11/2016 dated April 26, 2016

4. Constitutionality of Section 94A and notification blacklisting Cyprus challenged.

Facts of the case

A tripartite agreement was drafted between a Cyprus company (say, S), an Indian company, (K) and three individuals – the petitioners (collectively, P). Vide the agreement, S sold equity shares and CCDs of K to P. While remitting the amount to S, P did not deduct any taxes. Therefore SCN was issued by the Department as to why proceedings u/s 201(1) and 201(1A) should not be initiated treating the petitioners as 'assessee in default'. AO did not accept their contention that since no income arose, obligation to deduct tax did not arise. Orders were passed u/s 201(1)/ 201(1A) directing the assessee to pay tax and interest thereon. Although appeal was preferred against the order, it was felt that unless the constitutional validity of Section 94A was challenged, the case would be weak on merits. Hence, it was decided to quash the order by obtaining a writ in their favour.

Legal position and High Court ruling

As per section 94A, the Central Government may, having regard to the lack of effective exchange of information with any country or territory outside India, specify the said country or territory as a 'notified jurisdictional area' in relation to transactions entered into by any assessee. In terms of the Treaty, both the Contracting States under this agreement have a legal obligation to exchange such information as is necessary for carrying out the provisions of the agreement or of domestic laws of the Contracting States, in particular for the prevention of fraud or evasion of taxes. Since Cyprus has not been providing the information requested by the Indian tax authorities under the exchange of information provisions of the Agreement, it was decided to notify Cyprus as a notified jurisdictional area ('NJA') under Section 94A of the Income-tax Act, 1961.

The Madras High Court issued an order dismissing petitions challenging the constitutionality of Section 94-A (1), of the Income Tax Act and against notifying Cyprus as a jurisdictional area. The Madras High Court said that Section 94A is the need of the hour and there was nothing unconstitutional about it. According to market sources, between 2000 and 2014 Cyprus accounted for INR 383 billion of inflows in India and in Indian stock markets. As per the Court, Section 94A was the need of the hour and we do not find the same to suffer from unconstitutionality.
Source: T. Rajkumar & others TS-197-HC-2016(Mad)

5. Tax treatment of principal amount of loan waived

Facts of the case

The Assessee had availed of a loan from Indian Bank and the bank mooted a proposal for one-time settlement. The taxpayer treated the waiver of both principal and interest as capital receipt and excluded the same while computing taxable income. The AO treated the interest waived as deemed profit u/s 41(1) (i.e. remission or cessation of trading liability) and the principal portion as income u/s 28(iv) of the Act (i.e. perquisite earned in the course of carrying on of business). The CIT (A) allowed the appeal with respect to the taxation of the principal portion relying on the Coordinate Bench decision in the case of Iskraemeco Regent Limited (196 Taxmann 103). ITAT also confirmed the order of the CIT(A) noting that the loan was utilised for capital purposes.
Ruling

The High Court rejected the reliance of the Tribunal on the Coordinate Bench ruling which had held that Section 28(iv) only dealt with benefit or perquisite in kind and not pecuniary benefits. Differing from the Coordinate Bench ruling, the Court held that since accounting entries would remain the same whether loan waived has been availed for capital or revenue purposes, the tax treatment would not be different. Hence, the Court ruled that even the principal portion of the loan would be taxable u/s 28(iv) of the Act.

Comments: Madras High Court has interpreted a settled law differently. The principle will need to be settled by Supreme Court since the decision in the case of Iskraemeco Regent Limited is sub judice before the Supreme Court.
Source: Ramaniyam Homes Pvt. Ltd. Tax Case (Appeal) No. 278 of 2014

6. Taxability of deferred consideration on transfer of shares in the absence of accrual

Facts of the case

The Assessee (say, S) along with her family member, were shareholders of a closely held company. S entered into an agreement to transfer all of the shares held for an initial consideration upon execution of agreement and a deferred consideration payable in 4 years which was dependent on the performance of the Company with an upper cap of INR 200 million in aggregate. In the tax year 2005-06, S offered for capital gains on such transfer in the year of entering of agreement and receipt of initial consideration and offered the deferred consideration on receipt basis. However, the Tax Authority assessed INR 200 million to be the total consideration in the year of execution of agreement. The CIT (A) decided in favour of the Assessee on the basis that deferred consideration was contingent. It was also noted that S did not receive such amount as the profitability

criterion was not met in the next year. On appeal by the Department, Income Tax Appellate Tribunal dismissed the appeal and decided in favour of the assessee. The Tax Authority filed an appeal before the High Court.

High Court Ruling

The High Court rejected the Tax Authority's appeal on the basis that income can be said to be accrued only when a taxpayer gets a right to receive it. The consideration of INR 200 million states the maximum or the upper cap on the amount of consideration to be received. The deferred consideration is contingent upon uncertain events i.e. based upon the profitability of the company. The HC noted that the Assessee had offered the deferred compensation in the respective year of accrual of income and had not received any part of deferred consideration during AY 2005-06 so as to trigger taxation. The HC rejected the Department's contention that the mode of offering capital gains on receipt basis in various assessment year is contrary to the provisions of Income Tax Act.
Source: CIT v Hemal Raju Shete (ITA No 2348 of 2013)

Legends

Act	–	Income Tax Act, 1961
AO	–	Assessing Officer
AY	–	Assessment Year
CBDT	–	Central Board of Direct Taxes
CIT	–	Commissioner of Income Tax
CIT (A)	–	Commissioner of Income Tax (Appeals)
GoI	–	Government of India
HC	–	High Court
ITAT	–	Income Tax Appellate Tribunal
SC	–	Supreme Court
SCS	–	Show Cause Notice
U/S	–	Under Section

INDIRECT TAX

1. Service Tax - Interest on delayed payment for services to be included in value of service

Interest payable for delayed payment to the Government or Local Authority for services rendered by it, will form part of taxable services and service tax will be applicable
Source: Notification No. 23/2016 – Service Tax dated April 13, 2016

2. Service Tax - Services provided by Government or Local Authority to a business entity

Point of Taxation will be earlier of the two:

(a) due date of payment as per invoice/bill/challan or
(b) date of payment for the service
Source: Notification No. 24/2016 – Service Tax dated April 13, 2016

3. Excise Duty - Amendment in Cenvat Credit Rules, 2004

Where separate books of accounts are not maintained, a manufacturer manufacturing both taxable and exempted goods, or a service provider providing both exempted and taxable services can pay an amount equal to six per cent of the value of exempted goods and seven per cent of the value of exempted services subject to maximum of:

(a) Opening balance of credit of input and input services available at the beginning of the period to which the payment relates
(b) Credit of input and input services availed during the period
Source: Notification 23/2016 – Central Excise dated April 1, 2016

CORPORATE LAWS

1. Amendment to Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2015

The Ministry of Corporate Affairs through notification dated April 4, 2016 has amended Rule 3 of the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015.

Before the amendment, the proviso to rule 3 of the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015, read as follows:

"Provided that the companies in Banking, Insurance, Power Sector and Non-Banking Financial companies are exempted from XBRL filing."

With this notification, the aforesaid proviso is substituted with the following:

"Provided that the companies in banking, insurance, power sector, nonbanking financial companies and housing finance companies need not file financial statements under this rule."

With this amendment, housing finance companies are also not required to file financial statements under Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015.
Source: MCA Rules dated April 04, 2016

2. Amendment to Schedule III of Companies Act 2013

The Ministry of Corporate Affairs ('MCA') has amended the Schedule III of the Companies Act 2013 with respect to "General Instructions for preparation of balance sheet and Statement of Profit and Loss of a company".
Source: MCA Notification dated April 06, 2016

3. Clarification with regard to Companies (Accounting Standards) Amendment Rules, 2016

MCA vide General Circular No. 4/2016 dated April 27, 2016 has clarified that Companies (Accounting Standards) Amendment Rules, 2016 would be applicable for the accounting period commencing on or after the date of publication in the Official Gazette.
Source: MCA Circular No. 4 dated April 27, 2016

FEMA & OTHER LAWS

1. Clarification on acceptance of deposits by Indian companies from a person resident outside India for nomination as Director

As per the provisions of section 160 of Companies Act, 2013, a person who intends to nominate himself or any other person as a director in an Indian company, is required to place a deposit with the said company.

In this regard, Reserve Bank of India ('RBI') has issued a clarification that keeping such deposits with the Indian company by persons resident outside India is a current account (payment) transaction and, as such, does not require any approval from RBI. All refunds of such deposits, arising in the event of selection of the person as director or getting more than twenty five percent votes, shall be treated similarly.
Source: RBI/2015-16/371 A.P. (DIR Series) Circular No. 59 dated April 13, 2016

2. Overseas Direct Investment – Submission of APR

RBI has clarified that while submission of Annual Performance Report ('APR') by an Indian Party ('IP') / Resident Individual ('RI') which has made an Overseas Direct Investment ('ODI'), certification of APRs by the Statutory Auditor or Chartered Accountant is not mandatory. Self-certification would be sufficient.

It has also been clarified that an IP / RI, which has set up / acquired a JV / WOS overseas, shall submit, to the AD bank every year, an APR in Form ODI Part II in respect of each JV / WOS outside India and other reports or documents by December 31 each year or as may be specified by the Reserve Bank from time to time. The APR, so required to be submitted, shall be based on the latest audited annual accounts of the JV / WOS unless specifically exempted by RBI.
Source: RBI//2015-16/373 A.P. (DIR Series) Circular No.61 dated April 13, 2016

3. Overseas Direct Investment ('ODI') – Rationalization and reporting of ODI Forms

RBI has revised the reporting system for overseas investment (or financial commitment) in order to capture all data pertaining to the Indian Party undertaking ODI as well as the related transaction. Part II of form ODI has been subsumed within Part I and the form will now have five sections instead of six.

Further, a new reporting format has also been introduced for Venture Capital Fund ('VCF') / Alternate Investment Fund ('AIF'), Portfolio Investment and overseas investment by Mutual Funds.
Source: RBI//2015-16/374 A.P. (DIR Series) Circular No. 62 dated April 13, 2016

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