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AT INDIA
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Dear Reader,

It gives me immense pleasure to bring to you Volume I - 2015 Series of our in house newsletter **"AT INDIA"**. We have in this April 2015 edition of **"AT INDIA"** thrown light on the revamped Regulations governing Employee Stock Options and put together the legal snippets to give you a bird's eye view of the recent legal developments.

We trust you will find **"AT INDIA"** useful and informative. Please feel free to revert back to us with any queries or feedback to enable us to serve you better.

We look forward to hear from you.

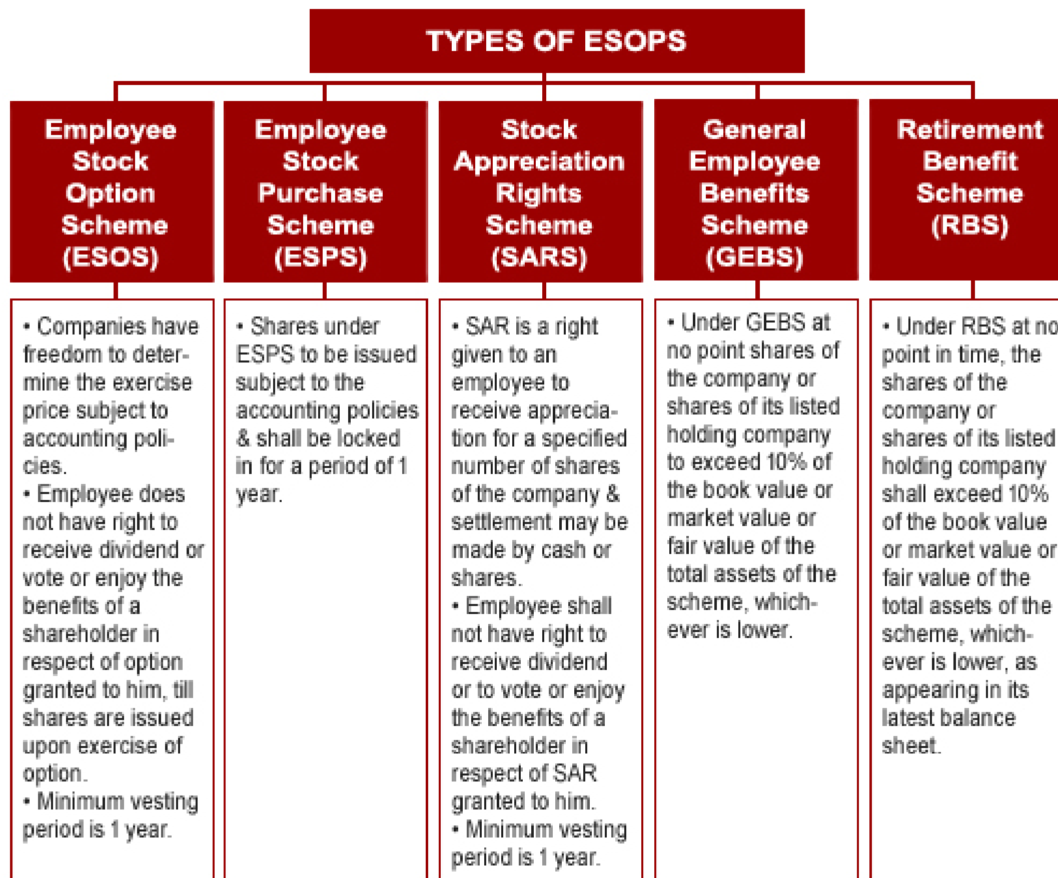
Best regards,

Ashu Thakur
Editor in chief

Share Based Employee Benefits – The Revamped Regulations

Employee Stock Options is that lucrative chunk of the Company's profitability which gathers maximum attention in most Merger & Acquisitions, Private Equity & Angle funding transactions. Whilst Small & Medium size start ups use flexible Employee Stock options as an incentive to hoard talent, the listed company's use it as a means to recompense its loyal employees and senior management. To enable listed companies to recompense their employees by framing stock option and stock purchase schemes within the regulated framework, the capital markets regulator the Securities and Exchange Board of India ("SEBI") has on 28th October 2014 replaced the erstwhile SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme), Guidelines, 1999 with the SEBI (Share Based Employee Benefits) Regulations, 2014 hereinafter referred to as " Regulations".

The Regulations apply to listed companies in India which have a scheme for direct or indirect benefit of employees which involves dealing in or subscribing to or purchasing securities of the company either directly or indirectly and satisfying certain other conditions. The Regulations have formally recognized the concept of Stock Appreciation Rights (SAR) Scheme and also sought to embrace the General Employee Benefit and Retirement Benefit Schemes in addition to Employee Stock Option and Purchase Schemes, allowing secondary shares acquisition for the implementation of such Schemes with adequate safeguards and in turn stipulates 5 types of schemes i.e.



Implementation of the Schemes:

A company may implement the scheme either directly or by an irrevocable trust. If the scheme involves secondary acquisition and / or gift, then it is mandatory for the company to implement such scheme through a trust and such an implementation has to be decided upfront at the time of taking shareholders' approval for setting up the scheme. A company may implement several schemes, as permitted under the New Regulations, through a single trust, provided it maintains proper books of accounts for each scheme to give a true and fair view of the state of affairs of each scheme. SEBI may specify the minimum provisions to be included in the trust deed and any modifications shall mandatorily be required to be filed with the stock exchange in India where the shares of the company are listed.

Restrictions on Constitution of the Trust:

SEBI has placed certain restrictions on who can't be appointed as trustee(s) i.e.

i. A director, key managerial personnel or promoter of the company or its holding, subsidiary or associate company or any relative of such director, key managerial personnel or promoter; or
ii. A person who beneficially holds 10% or more of the paid-up share capital of the company.

Separately, a corporate entity can be appointed as a sole trustee, whereas, there has to be minimum of 2 trustees where an individual or 'one person company' is appointed as a trustee. Further, the trust needs to ensure that the appropriate approval has been obtained from the shareholders of the company to enable the trust to implement the scheme and undertake secondary acquisition for the purposes of the scheme.

Transition from 1999 Regulations to 2014:

Further to ensure smooth transition for complying with the new regulatory framework, all listed companies which have existing employee benefit schemes to which New ESOP Regulations apply

have been provided with a time period of one year from the date of these regulations coming into effect, to comply with the regulations.

A longer transition period of 5 years has been provided for the following:

i. Re-classifying shareholding of existing employee benefit schemes separately from 'promoter' and 'public' category.
ii. Bringing down its holding in shares to permissible limits by the trusts for the purpose of implementing employee benefits scheme which are acquired from secondary market.
iii. Bringing down its holding in shares to permissible limits by the trusts for the purpose of implementing GEBS or RBS.

The prohibition on acquiring securities from secondary market as laid down earlier shall continue till the existing schemes are aligned with the New ESOP Regulations.

CONCLUSION

The Regulations provide detailed guidelines for employee share based benefits schemes and also permits listed companies to use trust route to implement schemes through secondary market acquisitions, without diluting their existing share capital, which is viewed favorably by the Industry and is a welcome step. Further, in order to address concerns of fraudulent and unfair trade practices, SEBI has provided strict regulatory framework on set up and administration of such trusts which makes it now essential for the listed companies to revisit their ESOP and other equity-linked schemes and ensure that they are in line with the New Regulations, within the transition period.

Written by :

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AT INDIA - LEGAL SNAPSHOTS

Undisclosed Foreign Income And Assets (Imposition Of Tax) Bill, 2015

The Union Cabinet on 20th March, 2015 approved the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 to deal with cases relating to black money. The Bill provides for separate taxation of any undisclosed income in relation to foreign income and assets. The Act will apply to all persons resident in India & shall apply to both undisclosed foreign income and assets (including financial interest in any entity). The undisclosed foreign income or assets shall be taxed at the flat rate of 30% & no exemption, deduction or set off of any carried forward losses which may be admissible under the existing Income-Tax Act, 1961, shall be allowed. Further, a penalty for non-disclosure of income or an asset located outside India will be equal to 3 times the amount of tax payable thereon, i.e., 90% of the undisclosed income or the value of the undisclosed asset. The Bill also proposes to amend Prevention of Money Laundering Act (PMLA), 2002 to include offence of tax evasion.

SEBI amends Delisting, Buyback & Takeover regulations

The Securities & Exchange Board of India **"SEBI"** has with effect from 24th March, 2015 amended 3 of its important Regulations i.e.

i. SEBI (Delisting of Equity Shares) Regulations, 2009
ii. SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 2011 &
iii. SEBI (Buy Back of Securities) Regulation, 1998.

SEBI has revamped the norms that reduce the time taken for completing the process, & has also introduced a new concept of Delisting Offers into the SAST Regulations, 2011, which aims to provide a new opportunity to the Acquirer to even go in for delisting, by giving a Takeover Open Offer. A major common amendment by the Board in all the 3 Regulations is that a Stock Exchange mechanism will be provided for facilitating the tendering of shares by the shareholders and settlement of the same by the Stock Exchanges having Nationwide Trading Terminal which would relieve the shareholders from the levy of heavy Capital Gains Tax as compared to a nominal Securities Transaction Tax.

New SEBI Insider Trading Regulations notified

In an attempt to deal with the insider trading menace the Securities & Exchange Board of India **"SEBI"** has on 15th January, 2015 notified the SEBI (Prohibition of Insider Trading) Regulations, 2015 which replaces the erstwhile SEBI (Prohibition of Insider Trading) Regulations 1992. The regulations are aligned with the best international practices and have strengthened the definition of an **"insider"** while expanding the scope of **"connected persons"**. As per the regulations, a **"connected person"** has been defined as one who is associated with the company in a contractual, fiduciary or employment relationship & who has direct or indirect access to unpublished price-sensitive information.

SEBI amends FPI norms for Government bonds

In order to increase fund flows from overseas investors, the Capital markets regulator on 6th February, 2015 permitted Foreign Portfolio Investors **"FPIs"** to invest their coupons received on investments in government securities back into such bonds. A coupon on a bond is a periodic interest payment that an investor receives during the life of the security. These investments would be allowed even after the FPIs having fully utilized the applicable limits of USD 30 billion and for the purpose of investment of coupons, the FPIs shall have an investment period of 5 working days from the date of receipt of the coupon. All other existing conditions for investment by FPIs in the government securities market remain unchanged.

FDI in Insurance raised to 49%

On 2nd March, 2015 the Department of Industrial Policy & Promotion **"DIPP"** issued a Press Note implementing the Government's decision to raise FDI cap in the insurance sector to 49%. The hike in limit was allowed through an ordinance issued last year-end and the FDI now up to 26% in insurance will be through the Automatic route, while levels above 26% and up to 49% will have to come through the Government route. The 49% cap includes foreign investment in the forms of Foreign Portfolio Investors, Foreign Institutional Investors, Qualified Foreign Investors, Foreign Venture Capital Investor and non-resident Indians. The cap will also apply to insurance brokers, third party administrators, surveyors and loss assessors and other insurance intermediaries. Additionally in order to effectively implement the same the Government finally got a green signal for the Insurance Bill, 2015, from the Rajya Sabha (Upper House) on 12th March, 2015.

FDI Limit in Pension Sector increased to 49%

The Government on 27th April, 2015 has raised the limit of foreign direct investment in pension sector to 49% in line with the FDI cap in the insurance sector. The FDI cap in the sector has been hiked to 49% and that includes foreign investment in the forms of Foreign Portfolio Investors, Foreign Institutional Investors, Qualified Foreign Investors, Foreign Venture Capital Investor, NRI and DR. As per the Press Note, no Government approval is required till 26%, but FIPB nod would be needed for investment beyond 26% and up to the cap of 49%. All investments in the pension sector, however, will have to abide by the Pension Sector Regulator Pension Fund Regulatory and Development Authority.

RBI Increases Forex Remittance Limit to $250,000 per annum

The Reserve Bank of India **“RBI”** on 4th Feb, 2015 increased the amount Indians can invest or spend abroad in Foreign Exchange without seeking its permission. Individuals can now buy property abroad, hold shares or debt instruments, or any other assets or purchase up to limit of $250,000 (INR 1.5 crore) per person per year. Earlier the limit under the Liberalized Remittance Scheme was $125,000 (INR 75lakh). Under this scheme, individuals can also open, maintain and hold foreign currency accounts with banks outside India for carrying out transactions, without permission of RBI.

100% FDI in Medical devices

The Department of Industrial Policy & Promotion **“DIPP”** issued a Press Note dated 6th January, 2015 permitting 100% FDI in medical devices both in the Greenfield and Brownfield projects as long as it's restricted for manufacturing & not for trading. In view of which foreign investors will not have to seek the permission of the Government to acquire an existing company or set up a new manufacturing unit in the medical devices sector. Earlier Companies had to go through the Government route as medical devices came under the drug category. In a bid to encourage the domestic production of medical devices like pacemakers, nebulizers and cardiovascular stents, the government de-linked it from pharmaceuticals and allowed 100% foreign equity under the automatic route.

Resident Taxpayer can approach the AAR for transactions above INR 100 Crores

A resident taxpayer can now approach the Authority for Advance Rulings (AAR) for determination of their tax liabilities arising out of one or more transactions valuing Rs. 100 crore or more in total which has been undertaken or proposed to be undertaken. This privilege was earlier available only to Non-residents, resident taxpayers undertaking or proposing to undertake a transaction with a non-resident to determine the tax-liability of non-resident in respect of such transaction, a notified public sector company and any person to determine whether an arrangement proposed to be undertaken is an impermissible avoidance arrangements and may be subjected to GAAR or not.

Government clips wings of Tax Officials

The Central Board of Excise & Customs **“CBEC”** issued a circular dated 20th January, 2015 ordering its tax officials not to summon senior management of large companies i.e. chief executives, heads of finance, general managers and so on for evidence or to enforce recoveries. The **CBEC** clarified that top management needs to be summoned only when there are indications of their involvement in a decision making process that might have led to revenue loss for the Government. Further, summons are to be issued only by officers of the rank of superintendent after obtaining prior written permission of an officer not below the rank of an Assistant Commissioner after recording reasons.

Parking Of ECB Proceeds

The Reserve Bank of India “RBI” has vide its circular dated 21st November, 2014 released revised guidelines to allow ECB borrowers to park ECB proceeds in banks for a maximum period of 6 months pending utilization for permitted end uses. Earlier, eligible ECB borrowers were required to bring ECB proceeds, meant for Rupee expenditure in India for permitted end uses immediately for credit to their Rupee accounts with AD Category - I banks in India. The facility is however subject to the following conditions:

i. Guidelines on eligible borrower, recognized lender, average maturity period, all-in-cost, permitted end uses, etc. must be complied with,
ii. The term deposits to be kept unencumbered,
iii. Term deposits to be exclusively in the name of the borrower &
iv. Term deposits can be liquidated as and when required.

Merger of PIO cardholders with the OCI cardholders

The Ministry of Law and Justice vide its Ordinance, the Citizenship (Amendment) Ordinance, 2015 dated January 6, 2015, promulgated an order to amend the Citizenship Act, 1955. In view of which the Government has merged the provisions of Person of Indian Origin **"PIO"** scheme with the Overseas Citizens of India **"OCI"**. At present, all the existing PIO cardholders shall be deemed to be OCI cardholders. The OCI cardholder enjoys the benefits of Lifelong visa, exemption from registration with the local police authority (FRRO) for any length of stay in India unlike PIO. The Government has also relaxed the eligibility criteria of a person's continuous stay in India for 1 to apply for a Citizenship subject to existence of special circumstances.

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