Tax & Corporate News Bulletin

VAISH ASSOCIATES ADVOCATES
Corporate, Tax and Business Advisory Law Firm

Vaish Associates extends Greetings to you for a Happy and Prosperous New Year 2006

CONTENTS

DIRECT TAX
- The Taxation Laws (Amendment) Act, 2005
- National Tax Tribunal
- Extension of due date for filing of Quarterly Return

INDIRECT TAX
- Instructions regarding administrative control over EOUs, EHTPs & STPs
- Simplified procedure for EOUs, EHTPs & STPs
- Compounding of Offences under Central Excise Act
- Compounding of Offences under Customs Act

CORPORATE LAWS
- Validity of Pre-emptive Rights
- Amendment to Clause 49
- SEBI/NSE Circulars
- Amendment to FCCB Guidelines
- Foreign Collaboration
- New Policy on Electricity

FOREIGN TRADE/EXIM/FDI
- SAFTA becomes operational
- WTO Hongkong Conference
- FDI in Township, Housing, Infrastructure and Construction Development Projects
- FDI in uplinking of TV channels
- FDI in Private Sector Banks

BANKING LAWS
- Draft Guidelines on outsourcing of Financial Services by Banks
- Liberalization of GR approval for exports

LABOUR LAWS
- Haryana Labour Policy 2006

COMPLIANCE CHECKLIST
- Your dates with Regulator(s)

DIRECT TAX

The Taxation Laws (Amendment) Act, 2005
Major Amendments

Recently, certain amendments have been made in section 28 and section 80HHC of the Income-tax Act, 1961 (the "Act") by the Taxation Laws (Amendment) Act, 2005, which received the assent of the President on 28th December 2005. The amendments made in Sections 28 and 80-HHC of the Act have wide implications, particularly for the exporters' community.

In the recent past, two major legal issues with regard to allowability of deduction of export profits under section 80-HHC of the Act had been subject matter of long drawn litigation between the taxpayers and the Income Tax Department.

The first issue was with regard to allowability of deduction under section 80-HHC of the Act on the profits received on transfer of credit allowed under the Duty Entitlement Passbook Scheme ('DEPB'). The provisions of section 80-HHC contain the formula for determining the amount of export profits, which are eligible for tax deduction under that section. As per the formula/ scheme contained in that section, the profits of the business are first reduced by 90% of the export incentives as defined in clauses (iiia), (iiib) and (iiic) of section 28 of the Act. Thereafter, under sub-section (3) of section 80-HHC of the Act, the profit of the business so computed is apportioned in the ratio of export turnover to total turnover of the business. The profits so computed are further increased by 90% of the export incentives that were initially reduced from the profits of the business in terms of the proviso to section 80HHC of the Act to determine the profits derived from exports which are eligible for deduction under that section.

The Department had been taking the stand that profit on transfer of DEPB credit was not eligible for deduction under section 80HHC of the Act. The Department was of the view that profit on transfer of DEPB credit was not covered under the clauses (iiia), (iiib) and (iiic) of section 28 of the Act. The eligible profits as determined under sub-section (3) of section 80-HHC of the Act were thus not further increased by profit on transfer of DEPB, thereby denying deduction under that section on the DEPB profits.

In order to allow deduction under section 80-HHC of the Act in respect of DEPB credit to a certain category of exporters, retrospective amendments have been made in sections 28 and 80-HHC of the Act, w.e.f., 1st April, 1998. Section 28 has been amended to insert two new clauses (iiid) and (iiie) therein, to cover profit on transfer of DEPB credit and Duty Free Replenishment Certificate (DFRC) credit, respectively. Simultaneous amendments have been made in section 80-HHC by inserting three more provisos after first proviso to sub-section (3) of section 80-HHC of the Act.

After the aforesaid amendment, the full amount of DEPB credit and DFRC profits would qualify for deduction under section 80HHC of the Act in respect of the exporters whose export turnover do not exceed INR 100 Mn. However, for exporters having export turnover exceeding INR 100 Mn., DEPB/DFRC profits will be eligible for deduction under section 80HHC of the Act, if the following two conditions are satisfied by the exporter:

(a) the exporter had an option to choose either the duty draw back or credit under DEPB/DFRC Scheme; and

(b) the rate of credit of duty draw back was higher than the rate of credit allowable under DEPB/DFRC Scheme.

On an analysis of the aforesaid amendments, it is patently clear that the amendment will bring cheer only to a very small category of exporters whose export turnover does not exceed INR 100 Mn. Large exporters, who make substantial contribution to the exchequer by earning higher foreign exchange, will not be entitled to claim deduction on the profits on transfer of DEPB/DFRC credit. The reasoning seems to be that where the exporter has availed higher export incentive under DEPB/ DFRC scheme then he should not be further allowed deduction of such higher incentives under section 80-HHC of the Act, which does not look to be fair and equitable.

The other major amendment made in section 80-HHC of the Act seeks to put to rest the controversy regarding allowability of deduction under that section in case of exporters having, what is commonly known as, `negative profits'. The brief background of the legal controversy is as under:

As per the scheme of allowance of deduction under section 80-HHC of the Act, the profits of the business are first reduced by 90% of the incentives and thereafter the apportioned profits of the business are increased by 90% of the export incentives as per the proviso to sub-section (3) of that section. In certain cases, either consequent to reduction of 90% of the export incentives or even otherwise, the profits of the business would work out to be a negative figure. In such a situation it was contended by the assessee(s) that the losses ('negative profits') of the business (determined after excluding the export incentives) should be ignored and deduction should be allowed independently with reference to export incentives under section 80HHC of the Act under the proviso below sub-section (3). On the other hand, the Department's contention was that no deduction was allowable to the assessee(s) since after exclusion of export incentives there were losses in the export business.

The Special Bench of the Tribunal in the case of Lalsons Enterprises: 89 ITD 25 took a view in favour of the assessee(s). Subsequently, based on the decision of the Supreme Court in IPCA Laboratories, a larger Special Bench (constituting of five members), however, ruled in favour of the Department. As a result thereof, the assessing officers were denying deduction under section 80-HHC of the Act to the exporters where the business profits turned negative after excluding export incentives.

In order to resolve the aforesaid issue, the fifth proviso has been inserted below sub-section (3) of section 80-HHC of the Act with retrospective effect from 1st April 1998. After the amendment, losses determined under sub-section (3) of section 80-HHC of the Act shall be adjusted/set off against 90% of the export incentives apportioned in the ratio of export turnover to total turnover and deduction shall be allowed on the net amount.

The aforesaid amendment is a positive one and will put an end to a large number of matters under litigation.

National Tax Tribunal

Establishment

The Central Government, in exercise of its powers under section of the National Tax Tribunal Act 2005, established the National Tax Tribunal. The Tribunal would be functional with immediate effect.

(Direct Tax Notification No. SO 25(E) dated 6 January 2006)

Extension of due date for filing of Quarterly Return of Payment of Interest to Residents without TDS

In exercise of the powers conferred by clause (a) of sub-section (2) of section 119 of the Income-tax Act, 1961, the Central Board of Direct Taxes has extended the due date for filing of quarterly returns under sub-section (1) of section 206A of the Income-tax Act, 1961 for the quarters ending 30th June 2005 and 30th September 2005 to 31st of January 2006.

(F.No.385/35 /2005-IT(B), dated 29 December 2005)

INDIRECT TAX

Instructions regarding administrative control over Export Oriented Units (EOUs), Electronic Hardware Technology Parks (EHTPs) and Software Technology Parks (STPs)

The Central Board of Excise and Customs (CBEC) has notified that in accordance with existing instructions, the administrative control over EOUs, EHTPs and STPs in port cities would be with the Commissioner of Customs, and at other places such control would be with the Commissioner of Central Excise. However, the Commissioner of Customs, Bangalore would have administrative control over all EOUs, EHTPs and STPs within his territorial jurisdiction

(Customs Notification No. 3 dated 10 January 2006)

Simplified Procedure for Registration of EOUs/ EHTPs/ STPs for clearance of Import Goods

Representations have been received in the Central Board of Excise & Customs (the "Board") that for clearance of import consignments without payment of duty, EOU/EHTP/STP units are required to get themselves registered at the port of import with the Customs Authorities repeatedly when imports are made through different ports. This practice of repeated registration was causing delay in clearance of imported consignments.

- In order to obviate the problems of EOU/EHTP/STP, the Board has considered to put in place a simplified procedure for registration. The EOU/EHTP/STP units after setting up of EOU/EHTP/STP units, may get themselves registered at the port of Import (ICD/Airport/CFS etc) where from the unit excepts to import goods duty free.
- Every unit would be required to furnish the prescribed documents alongwith the application for registration with the Assistant Commissioner/ Deputy Commissioner incharge of the port of import:
- The application for registration may be made on plain paper in the form of letter to the Assistant Commissioner of Customs/ Deputy Commissioner of Customs incharge of the port of import enclosing the above stated documents.
- On receipt of the prescribed documents alongwith the application for registration, the Customs Authorities shall grant registration to the EOU/EHTP/STP units within 5 working days of the receipt of application for registration, subject however to necessary verification. The Assistant Commissioner/ Deputy Commissioner of Port of Import would issue the unit a certificate stating that the unit has been registered.
- Once an EOU/EHTP/STP unit is registered at one port of import, it would not be required to get itself registered subsequently in any other port of import for clearance of goods duty free. The import consignments would be allowed clearance on the basis of registration issued at any port of Import. However, the authenticity of the registration certificate shall be verified by the concerned Custom House from port of registration.
- All the existing procedure for clearance of imported goods duty free from the port of Import, as prescribed by the Board from time to time in respect of EOU/EHTP/STP unit would apply.

[Circular No. 51/2005-Cus, dated 9 December 2005 F. No. 305/EOU/01/2005-DGEP]

Compounding of Offences under Central Excise Act

The Central Government has enacted the Central Excise (Compounding of Offences) Rules, 2005 ("Excise Rules"). The summary of the Excise Rules is provided as under:

1. **Application for compounding of offences**

   Rule 3 of the Excise Rules states that an applicant may, either before or after the institution of prosecution proceedings, make an application under sub-section 2 of section 9A in the prescribed form, to the Compounding Authority for compounding of an offence.

2. **Procedure on receipt of compounding applications**

   Rule 4 provides for the procedure on receipt of a compounding application (made under Rule 3). The compounding authority calls for a report from the reporting authority with reference to the particulars furnished in the compounding application.

   The reporting authority, then, has to furnish such report within a period of one month from the date of receipt of communication.

   The compounding authority, after taking into account the contents of the application, may, by order, either allow the application and grant the applicant immunity from prosecution, or reject the application. The compounding application cannot be rejected unless an opportunity has been given to the applicant of being heard and the grounds of such rejection must be mentioned in the order.

   A copy of every order must be sent to the applicant.

   The applicant must pay the compounding amount, as ordered to be paid by the compounding authority within a period of thirty days from the date of receipt of the order. Also, the proof of such payment must be furnished to the compounding authority by the applicant.

3. **Fixation of the Compounding amount**

   Rule 5 provides the parameters for fixation of the Compounding amount as under:

S. No.	Offence	Compounding amount
1	Offence specified under section 9(1)(a) of the Act	INR 50,000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
2	Offence specified under section 9(1)(b) of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.
3	Offence specified under section 9(1)(bb) of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.
4	Offence specified under section 9(1)(bbb) of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.
5	Offence specified under section 9(1)(bbbb) of the Act	Upto hundred per cent of such credit.
6	Offence specified under section 9(1)(c) of the Act	INR 50,000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
7	Offence specified under section 9(1)(d) of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.

   NOTE: The term "Act" refers to the Central Excise Act, 1944.

4. **Power of compounding authority to grant immunity from prosecution**

   In terms of Rule 6, if the compounding authority is satisfied that any person who has made the application for compounding of offence has made full and true disclosure of facts relating to the case, it may grant him immunity from prosecution for any compoundable offence under the Central Excise Act, 1944.

5. **Withdrawal of Immunity from Prosecution in certain conditions**

   Rule 7 of the Excise Rules states that an immunity granted to a person under Rule 6 shall stand withdrawn if such person fails to pay any sum specified in the order of compounding passed by the compounding authority, within the time specified in such order or fails to comply with any other condition.

   An immunity granted to a person can also be withdrawn by the compounding authority if it is satisfied that such person had concealed any material particulars, or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted. *[Notification No. 37 / 2005 – C. E. (NT) Dated 30th December 2005]*

Compounding of Offences under Customs Act

The Central Government has enacted the Customs (Compounding of Offences) Rules, 2005 ("Customs Rules"). The summary of the Customs Rules is provided as under:

1. **Application for compounding of offences**

   Rule 3 of the Customs Rules states that an applicant may, either before or after the institution of prosecution proceedings, make an application under sub-section 3 of section 137 in the prescribed form, to the compounding authority for compounding of an offence.

2. **Procedure on receipt of compounding applications**

   Rule 4 provides for the procedure on receipt of a compounding application (made under Rule 3). The Compounding Authority calls for a report from the reporting authority with reference to the particulars furnished in the compounding application.

   The reporting authority, then, has to furnish such report within a period of one month from the date of receipt of communication.

   The compounding authority, after taking into account the contents of the application, may, by order, either allow the application and grant the applicant immunity from prosecution, or reject the application. The compounding application cannot be rejected unless an opportunity has been given to the applicant of being heard and the grounds of such rejection must be mentioned in the order.

   A copy of every order must be sent to the applicant.

   The applicant must pay the compounding amount, as ordered to be paid by the compounding authority within a period of thirty days from the date of receipt of the order. Also, the proof of such payment must be furnished to the compounding authority by the applicant.

3. **Fixation of the Compounding amount**

   Rule 5 provides the parameters for fixation of the Compounding amount as under:

S. No.	Offence	Compounding amount
1	Offence specified under section 132 of the Act	INR 50,000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
2	Offence specified under section 133 of the Act	INR 50,000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
3	Offence specified under section 134 of the Act	INR 50,000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
4	Offence specified under section 135(1)(a) of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.
5	Offence specified under section 135(1)(b) of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.
6	Offence specified under section 135(1)(c) of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.
7	Offence specified under section 135A of the Act	Upto twenty per cent of market value of goods or INR 1,000,000 whichever is higher.

NOTE: *The term "Act" refers to the Customs Act, 1962.*

4. Power of compounding authority to grant immunity from prosecution

In terms of Rule 6, if the compounding authority is satisfied that any person who has made the application for compounding of offence has made full and true disclosure of facts relating to the case, it may grant him immunity from prosecution for any compoundable offence, subject to such conditions as he may think fit to impose, under the Customs Act, 1962.

5. Withdrawal of Immunity from Prosecution in certain conditions

Rule 7 of the Customs Rules states that an immunity granted to a person under rule 6 shall stand withdrawn if such person fails to pay any sum specified in the order of compounding passed by the compounding authority under sub-Rule (3) of rule 4, within the time specified in such order or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of the Customs Act, 1962 shall apply as if no such immunity had been granted.

An immunity granted to a person under sub-rule (1) can, at any time, also be withdrawn by the Compounding Authority if it is satisfied that such person had, in the course of the compounding proceedings, concealed any material particulars, or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence that appears to have been committed by him in connection with the compounding proceedings and thereupon the provisions of the Customs Act, 1962 shall apply as if no such immunity had been granted. *[Notification No. 114/ 2005 – Cus. (NT) dated 30th December 2005]*

CORPORATE LAWS

Validity of pre-emptive right in respect of transfer of shares in the case of public companies

In the case of *Pushpa Katoch vs. Manu Maharani Hotels Ltd.* (2005) 69 CLA 151 (Del), four sisters promoted the company and their intention was to make the family property as a hotel and run the same. In the Board meeting held on 16th March 1994 and the Memorandum of Family Agreement it was recorded that any promoter wanting to sell the shares would first offer the same to other promoters. However, at the same time, while incorporating this company, the promoters decided to have a public company limited by shares rather than a private company. The Articles of the public company did not contain any provision about pre-emptive rights in respect of transfer of shares. A petition for oppression and mismanagement under section 397 and 398 of the Companies Act was filed on the ground that transfer of shareholding without offering the same to the petitioner by the other promoters of the company was not valid. On appeal, the Delhi High Court held that the allegation of oppression was rightly rejected by Company Law Board. While so holding, the Delhi High Court also decided on the validity of pre-emptive right in respect of transfer of shares in case of public companies and the relevant observations of the Delhi High Court are as under:

"Since the respondent No. 1 company is a public limited company, the CLB rightly opined that there could be no fetters on the right of a shareholder to transfer his/her shares. We have already noted that there is no such provision giving pre-emptory right to other promoters in the Article of Association. Even if there was such a provision in the Article of Association, it would have been ultra vires the provisions of the Act, as no company can provide in the Article of Association any matter which offends the specific provision of an Act (See Re. Denver Hotel Co., 1893 (1) Chancery Division 495)."

Often in the shareholders agreement among shareholders of a public company, there are provisions giving pre-emptive right to the shareholders in case of transfer of shares and the same are also incorporated in the articles of association. This judgment has created a doubt in respect of the validity of such provisions.

Listing Agreement
Revised Clause 49 w.e.f. 1st January 2006

The revised clause 49 of the Listing Agreement has come into effect from 1st January 2006. SEBI has inserted following amendments in the revised clause 49, which are as under:

1. The maximum time gap for two Board meetings has been increased from 3 months to 4 months.

2. Sitting fees paid to non-executive directors as authorized by the Companies Act would not require the previous approval of the shareholders
3. Certification of internal controls and internal control system by CEO/CFO would be for the purpose for financial reporting.

[Notification No. SEBI/CFD/DIL/CG/1/2006/13 dated 13 January 2006]

SEBI Guidelines for Depositories

Securities & Exchange Board of India (SEBI) has recently issued Circular no. SEBI/MRD/DEP/Cir-2/06 dated 19th January 2006 whereby it has directed National Securities Depository Limited (NSDL) and Central Depository Services Limited (CDSL) to activate the International Securities Identification Number (ISINs) only on the day of listing of the new initial public offering (IPO). Understandably, the decision comes in the wake of recent developments in the primary market where select few allottees got allotment in huge number in the retail category in the IPOs of Yes Bank and IDFC and subsequently unloaded them in the market immediately on listing thereof.

NSE Guidelines for trading members

National Stock Exchange (NSE) has issued Circular no. NSE/INSP/2005/42 dated 9th December 2005 referring to financing of securities transactions, transfer of securities and funds. Certain arrangements have come to the notice of the NSE by which, the securities and funds of a client are received/ transferred by trading members routinely from/ to the accounts of different entities or the joint accounts of the client with the financier or its agents, or the trading member operates the client's bank account and / or depository account, under a financing arrangement with a general authorisation by the clients. In view of the aforesaid observations, NSDL has laid down the following norms for its trading members:

- Trading members shall not be a party to any agreement or arrangement, directly or indirectly, entered into between their clients and any persons including their subsidiary/holding company or group company, to fund the transactions executed by the trading members on behalf of their clients, or recognize or act in accordance with any such agreements or arrangement entered into by the clients with any person.
- Trading members shall not entertain, any instructions to trade in securities or transfer fund or securities, from any, entity other than the clients, by prior arrangements or otherwise to facilitate financing clients' transactions.
- Trading members shall not obtain any authorization or power of attorney, for operating the depository and/or bank accounts of clients who avail financing facility for securities trading, conferring right for operation of such accounts exclusively by the trading members.
- Trading members shall not also otherwise finance or act as a conduit or indirectly except in accordance with the regulatory provisions of Margin Trading Facility and Securities Lending and Borrowing.

Amendment to FCCB Guildelines

The Government had notified a scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme on 12th November 1993. Revisions/modifications in the operative guidelines of the Scheme have been made from time to time.

In order to bring the ADR/GDR guidelines in alignment with SEBI's guidelines on domestic capital issues, amendment to the "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993" was made recently on 31st August 2005.

In order to remove hardship, due to the amendment of 31st August 2005, to Indian companies that have taken verifiable "effective steps" before 31st August 2005 and incurred costs for overseas issues, the Government made further amendment to the "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993" on 14th September 2005.

Representations from Industry were received for exemption from pricing guidelines to the companies which are going for simultaneous or immediate sequential offering of GDRs/ADRs and domestic equity shares wherein GDRs/ADRs are priced at or above the domestic price.

The above request has been examined in Government and it has been decided that the companies going in for an offering in the domestic market and a simultaneous or immediate follow on offering (within 30 days of domestic issue) through ADR/GDR issues wherein GDRs/ADRs are priced at or above the domestic price, would be exempt from the requirement of the revised pricing guidelines. Companies going for such simultaneous or immediate follow on offering in the ADR/GDR market will have to take SEBI's approval for such issue, which will specify the percentage to be offered in the domestic and ADR/GDR markets.

It is also clarified that in terms of amendment to the "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993" dated 31st August 2005, unlisted companies, which have already issued Global Depositary Receipts/Foreign Currency Convertible Bonds in the international market, and are to list in the domestic market, would be required to do so by 31st March 2006.

However all other conditions contained in the amendment dated 31st August 2005 including that for (i) eligibility of issuer and (ii) eligibility of subscriber would continue to be applicable to all companies.

Foreign Collaboration

Ministry of Commerce and Industry has advised the investors that the automatic route has to be accessed if foreign direct investment proposals were eligible to the automatic route. If prior approval from the Government was sought for activities or royalty payments eligible to the automatic route, investors had to indicate the reasons for seeking such approval when submitting their proposals.

(Industrial Policy Press Release dt.23 December 2005)

New Tariff Policy on Electricity

A new tariff policy on electricity has been formulated and approved in consultation with State Governments, Central Electricity Regulatory Commission and various stakeholders. The objective of the policy is to make electricity available to consumers at reasonable and competitive rates, to attract more investments and to attain consistency and predictability in the regulatory approach.

(PIB Press Release dated 10 January 2006)

FOREIGN TRADE/EXIM/FDI

SAFTA becomes operational with effect from January 1, 2006

South Asia Free Trade Area (SAFTA) Agreement has come into effect from 1st January 2006 and provides for free trade in goods amongst SAARC countries from 1st January 2006.

The objective of SAFTA, which will become fully operational by 2016, is to reduce existing tariffs to less than 5% within the stipulated time frame among the member countries of SAARC, namely, Bangladesh, Sri Lanka, Nepal, Pakistan, Bhutan, Maldives and India. At the same time, the sensitive tariff lines relating to agro commodities have been kept in India's Sensitive List (Negative List) under SAFTA. On items under Negative List, Trade Liberalization Program under SAFTA would not be applicable.

WTO Hongkong Ministerial Conference (13th-18th December 2005)

After six days of intensive negotiations in Hong Kong, on 18th December 2005 Ministers from the WTO's 149 member governments approved a declaration that many described as significant progress both since the "July 2004 package".

Hongkong's Commerce, Industry and Technology Secretary John Tsang, who chaired the conference, outlined the achievements in the declaration:

- We have secured an end date for all export subsidies in agriculture, even if it is not in a form to everybody's liking.
- We have an agreement on cotton.
- We have a very solid duty-free, quota-free access for the 32 least-developed country members.
- In agriculture and non-agricultural market access, we have fleshed out a significant framework for full modalities.
- In services, we now have an agreed text that points positively to the way forward.

With the 44-page document now agreed, members face intense pressure in the new year to complete "full modalities" in agriculture and non-agricultural market access by the new deadline they have set themselves 30th April 2006.

Compared to the draft forwarded to Hong Kong from Geneva, a number of issues have been settled or partly settled. The most straightforward is the agreement to end export subsidies in agriculture by 2013 but this was only agreed at the last minute.

The declaration makes clear that the agreed date is conditional. Loopholes have to be plugged to avoid hidden export subsidies in credit, food aid and the sales of exporting state enterprises.

For cotton the elimination is accelerated to the end of 2006. In addition, cotton exports from least-developed countries will be allowed into developed countries without duty or quotas from the start of the period for implementing the new agriculture agreement. Ministers have also agreed to aim to cut trade-distorting domestic subsidies on cotton by more than would normally apply under the new agreement, and to do so more quickly.

A number of other details have been agreed in agriculture, non-agricultural market access and services.

FDI in Township, Housing, Built-up Infrastructure, and Construction Development Projects

Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India vide Press Note No.2 (2005 Series) dated 16th January 2006 has clarified that the restrictive conditions stipulated in Press Note 2 (2005 Series) for foreign direct investment in the real estate sector shall not apply to Foreign Direct Investment (FDI) in (a) the establishment of Special Economic Zones, which is governed by the Special Economic Zones Act, 2005 or (b) establishment and operation of hotels and hospitals which is governed by Press Note 4 (2001 Series] and Press Note 2 [2000 Series] respectively.

FDI in Uplinking of TV channels

The Department of Industry Policy and Promotion, Ministry of Commerce and Industry, Government of India has revised the 'guidelines for Uplinking of TV channels' notified on 2nd December 2005 vide Press Note No.1 (2006 Series) dated 13th January 2006. Government has allowed FDI in Up-linking of the TV channels, which are as under:

FDI up to 49% is permitted with prior approval of the Government for setting up up-linking HUB/ Teleports;

FDI up to 100% is allowed with prior approval of the Government for up-linking a Non-news and current affairs TV channel;

FDI (including investment by FIIs) up to 26% is permitted with prior approval of the Government for up-linking a News and current affairs TV channel subject to the condition that the portfolio investment in the form of FII/NRI deposits shall not be "persons acting in concert" with FDI investors. The Company Secretary shall certify continued compliance of this requirement at the end of each financial year.

FDI in Private Sector Banks

The Foreign Exchange Department of the Reserve Bank of India ("**RBI**") has issued a notification bearing No. FEMA-141/2005-RB dated 30th November 2005 amending the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

By virtue of the amendment, the foreign investment cap for private sector banking as specified in Schedule 1, Annexure B, Item No.1, has been increased from 49% to 74% as under:

No.	Sector	Investment Cap	Conditions
1	Private Sector Banking	74%	Subject to directions/ guidelines issued by RBI under the Banking Regulation Act, 1949 from time to time.

BANKING LAWS

DRAFT GUIDELINES ON OUTSOURCING OF FINANCIAL SERVICES BY BANKS

The concept of outsourcing by banks to third parties, who may be unrelated or member of the group/conglomerate is increasingly being adopted as a means for reducing cost, accessing specialist expertise, not available internally and for achieving strategic aims. Outsourcing may be defined as *a bank's use of a third party (either an affiliated entity within a corporate group or an entity that is external to the corporate group) to perform activities on a continuing basis that would normally be undertaken by the bank itself, now or in the future.* However, outsourcing brings in its wake, several risks like strategic risk, compliance risk, operational risk and other related risks. Hence, it is imperative for the bank outsourcing its activities to ensure an effective management of these risks. Bearing this in mind, the Reserve Bank of India ("RBI") has issued a circular DBOD. NO. BP. 50/21.04.158/ 2005-06 dated 6th December 2005 laying down draft guidelines on outsourcing of financial services by banks enabling them to adopt sound and responsive risk management practices for effective oversight, due diligence and management of risks arising from such outsourcing activities. These draft guidelines are applicable to outsourcing arrangements entered into by a bank with a service provider located in India or elsewhere.

It must be noted that prior approval of RBI shall have to be obtained if the service provider is located outside India. With regard to outsourced services relating to credit cards, RBI's detailed instructions issued by RBI in its circular RBI/2005-06 /211 DBOD .FSD. BC. 49 /24.01.011/2005-06 dated 21st November 2005 would be applicable. In other cases, the banks will however have to keep RBI informed of all the financial services outsourced by them.

These draft guidelines touch various issues, a few of which have been enumerated herein below:

Activities that should not be outsourced

Activities involving core management functions like corporate planning, organization, management and control and decision making functions including compliance relating to know your customer (KYC) norms cannot be outsourced by banks.

Legal obligations, regulatory and supervisory requirements

Banks shall be responsible for the actions of their service provider and the confidentiality of information pertaining to the customers that is available with the service provider.

- Banks to consider, while outsourcing, all the relevant laws, regulations and conditions of approval, licensing or registration.
- Banks should reveal to their customers in the product brochures/ agreements etc. the role of the service provider and their obligation towards the customers. The right of the customer against the bank, including the right to obtain redress should not get affected by the outsourcing arrangement.
- Irrespective of the fact whether the service provider is located in India or abroad, it should not impede or interfere with the ability of the bank to manage its activities or impede RBI in carrying out its supervision.
- Banks should have a robust grievance redressal mechanism.

Notifying RBI

A bank should notify RBI of any outsourcing arrangements that it has entered or is planning to enter.

Risk management practices for outsourced financial services

Outsourcing Policy: A bank intending to outsource any of its financial activity, must place a comprehensive outsourcing policy, approved by its board, which incorporates criteria for selection of such activities as well as service provider, delegation of authority depending on risks and materiality.

Role of the Board: The board of the bank should be responsible for approving a framework to evaluate the risks and materiality of outsourcing, laying down approval authorities for outsourcing, undertaking regular review of outsourcing strategies and making arrangements for their continued safety and further deciding on business activities of a material nature to be outsourced.

Responsibility of Senior Management: The responsibility of the senior management would extend for purposes like evaluating risks and materiality of the existing and prospective outsourcing, developing sound and prudent policies, reviewing periodically the effectiveness of these policies, communicating information pertaining to the outsourcing to the board. The senior management should further ensure that contingency plans are in place and tested, that there has been an independent review and audit conducted for compliance with set policies and also periodically review outsourcing arrangements for identifying new material outsourcing risks as they arise.

Evaluation of the risks: The key risks that need to be looked into are:

- Strategic risks, due to service provider conducting business inconsistent with the goals of the bank.
- Reputation risk, due to poor service from the service provider.
- Compliance risk, due to privacy, consumer and prudential laws, not complied with.
- Operational risk, due to technology failure, inadequate financial capacity to fulfill obligation.
- Exit strategy risk, due to over reliance placed on one firm.
- Counter party risk, due to inappropriate underwriting.
- Country risk, due to political, social climate.
- Contractual risk, due to inability of the bank to enforce the contract
- Concentration and systematic risk, due to lack of control of individual risks over a service provider.

Evaluating the capability of the service provider

While considering renewing of an outsourcing arrangement, it is imperative that the bank conducts a thorough due diligence to assess the service providers capability like his past experience and competence to implement the proposed activity financial soundness, business reputation and culture, security and internal control, audit coverage, business continuity management and external factors like political, social and legal environment of the jurisdiction in which he operates and further ensuring that the service provider performs a due diligence of its employees. The bank must, where possible obtain independent reviews and market feed back on the service provider.

Outsourcing agreement

The contract should clearly define the activity intended to be outsourced, should enable the bank to access all books, records, provide for continuous monitoring and assessment by the bank of the service provider, provide for a termination clause and minimum periods to execute a termination provision. The agreement should also provide for controls to ensure customer data confidentiality and contingency plans. The agreement should also provide for the approval by the bank of the use of sub-contractors by the service provider. Further, the bank should have the right to conduct audits on the service provider. Outsourcing agreements should include clauses allowing RBI or persons authorized by it to access the bank's documents and other necessary information given to, stored or processed by the service provider within a reasonable time and further recognize the right of RBI to inspect the service provider's books and accounts.

Confidentiality and security

The bank shall be responsible for ensuring the preservation and protection of security and confidentiality of customer information in the custody of the service provider. Further, the bank shall ensure that access to customer information by the staff of the service provider is limited to areas where information is required to perform the outsourced function, that the service provider is able to isolate and identify the bank's customer information and a review of the security practices of the service provider is conducted on a regular basis. The bank should immediately notify RBI if any breach of security takes place in this regard.

Code of conduct for direct sales agents (DSA)/direct marketing agents (DMA)/ Recovery agents

Code of conduct for DSA's formulated by Indian Bank Association (IBA) could be used in formulating the codes by Banks for DSAs/ DMAs and recovery agents. Banks should ensure that the DSAs/ DMAs/ recovery agents are trained to handle their responsibilities efficiently. The recovery agents should adhere to extant instructions on Fair Practices Code for lending as also their own code for collection of dues or in the absence of such a code at the minimum adopt the Indian Bank Association's code for collection of dues and repossession of security. The bank and the agents should not resort to harassment of any kind against any person in their debt collection efforts.

Business continuity and management of disaster recovery plan

A bank should ensure that its service provider should establish a robust framework for documenting and testing business continuity and recovery procedures. To mitigate the risk of unexpected termination of the outsourcing agreement, banks should retain an appropriate level of control over their outsourcing and a right to intervene to continue its business operations in such cases without incurring prohibitive expenses. While framing contingencies plans, bank should also consider the availability of alternative service providers.

Monitoring and control of outsourced activities

The bank should have in place a management structure to monitor and control its outsourcing activities. Further, a central record of all material outsourcing, readily accessible for review by board and senior management, should be maintained and the same should be updated promptly. There should be regular audits conducted to assess the adequacy of risk management practices. Banks should atleast on an annual basis conduct a review of the financial and operational condition of the service provider to assess its ability to continue to meet its outsourcing obligations.

Redressal of grievances related to outsourced services

Banks should constitute Grievance Redressal Machinery within the bank and give vide publicity through electronic and print media. The name and contact number of the designated officer must be made known. The grievance redressal procedure of the bank and the time frame fixed for responding to the complaint should be placed on the bank's website.

Off-shore outsourcing of financial services

Outsourcing outside India requires RBI's prior approval. Off-shore outsourcing exposes a bank to country risk. To manage the country risk involved, the bank should closely monitor government policies and political and social conditions in countries where the service provider is based, during the risk assessment process and on a continuous basis, and establish sound procedures for dealing with country risk problems like having appropriate contingency and exit strategies. The governing law of the outsourcing arrangement should be clearly specified. Specifically, a bank should not outsource to jurisdictions where unfettered access to information by RBI and the auditors of the bank, may be impeded by legal restrictions. RBI may directly communicate with the host regulator of the bank or the service provider, as the case may be, to seek confirmation relating to these matters. Outsourcing by a bank in a country outside India, where the bank does not have its branch is not permitted. A bank should notify RBI if any overseas authority seeks access to its customer information.

Self assessment of existing/proposed outsourcing arrangements

Banks may conduct a self-assessment of their existing/ proposed outsourcing arrangements, viewed in light of these guidelines and rectify short comings, if any, observed in this regard.

Liberalization of GR approval for exports

The RBI liberalized facilities to exporters and simplified export procedures. Authorized banks were allowed to grant GRs for goods that were exported and re-imported after repairs, maintenance, testing, calibration, etc., subject to the condition that exporters produced a Bill of Entry within a month of the re-import of the exported items. If the exported goods were destroyed during testing, the bank could obtain a certificate from the testing agency in lieu of the Bill of Entry for the re-import.

(RBI A. P. (DIR Series) Circular No. 21 dated 10 January 2006)

LABOUR LAWS

HARYANA GOVERNMENT ISSUED FIRST LABOUR POLICY IN INDIA

The aim of Labour Policy is to help in evolving a mutually and increasing beneficial partnership between employers and workers to help create condition in which workers can make their maximum contributions towards increasing productivity while their rights are protected and their exploitation is prevented. The policy is also aimed to ensure welfare of workers alongwith the economic progress and stability; to help the employers and workers to co-operate continuously and resolve their differences amicably through social dialogue. The labour policy also aims to foster peaceful and in-house settlement of disputes, by progressively narrowing down the areas of conflict and maintain industrial peace in the State, so that there are no strikes or lock-outs.

Following is the chart explaining the jurisdiction of Labour officers with statutory time frame for disposals of the disputes:

LABOUR OFFICER-CUM-CONCILIATION OFFICERS

S. No	Subject Matter	Officer/Official	Time schedule
1.	Cases under section 2-A of the Industrial Disputes Act, 1947 & Rules regarding termination/retrenchment/discharge/dismissal	Labour Officer-cum-Conciliation Officer	Not more than three months.
2.	Quasi Judicial Claim cases under the Workmen's Compensation Act, Payment of Wages Act, Minimum Wages Act, Payment of Gratuity Act and Equal Remuneration Act and the rules made under the respective enactment	Labour Officer-cum-Conciliation Officer-cum-Specified Authority under the relevant Act	Not more than one year.
3.	Implementation of awards/settlement under the Industrial Dispute Act, 1947 & rules	Labour Officer-cum-Conciliation officer	Not more than one month
4.	Disposal of complaints under various labour enactments i.e. Payment of Wages Act, Minimum Wages Act, National and Festival Holidays Act, Payment of Gratuity Act, Payment of Bonus Act, shop and Commercial Establishment Act, Equal Remuneration Act, Contract Labour (R&A) Act and the rules made thereunder.	Labour Officer-cum-Conciliation officer	Not more than two months.

DEPUTY LABOUR COMMISSIONERS

S. No	Subject Matter	Officer in-charge	Time Schedule
1	Cases under section 2(K) of the Industrial Disputes Act & Rules-disputes of collective nature containing various demands pertaining to conditions of employment	Deputy Labour	Not more than six months extendable by another 3 months on the request of both the parties.
2.	Publication of awards received from the Industrial Tribunal/Labour Court	Deputy Labour Commissioner	Not more than two weeks.
3.	Disposal of quasi judicial cases under the Payment of Gratuity Act and Rules	Deputy Labour Commissioner-cum-Appellate Authority	Not more than six months.

ASSISTANT DIRECTOR, INDUSTRIAL SAFETY & HEALTH IN THEIR RESPECTIVE JURISIDICTION

	Maternity Benefit Act and Rules	Assistant Director, Industrial Safety & Health	Not more than 3 months.

SENIOR ASSISTANT DIRECTOR, INDUSTRIAL SAFETY & HEALTH IN THEIR RESPECTIVE JURISDICTION

	Implementation of the provisions of the Factories Act and the Rules framed there under/complaints received relating to the Act/Rules/complaints under the Maternity Benefit Act.	Sr. Assistant Director, Industrial Safety & Health	Not more than two months.

MEDICAL OFFICERS INDUSTRIAL SAFETY & HEALTH IN THEIR RESPECTIVE JURISIDICTION

	Implementation of the provisions of the Factories Act and the Rules framed there under/complaints received relating to the Act/Rules/relating to industrial health complaints under the Maternity Benefit Act.	Assistant Director, Industrial Safety & Health	Not more than 3 months

CERTIFYING SURGEONS IN THEIR RESPECTIVE JURISDICTION

	Implementation of the provisions of the Factories Act and the Rules framed there under/complaints received relating to the Act/Rules/relating to industrial health complaints under the Maternity Benefit Act	Sr. Assistant Director, Industrial Safety & Health	Not more than two months.

AT THE HEADQUARTERS

S. No	Subject matter	Offices to be contacted in case of grievances	Maximum period of redressal of grievance
1.	INDUSTRIAL DISPUTES ACT 1947 & RULES i) Demand notice under section 2A-disputes regarding discharge/termination/retrenchment/dismissal	Additional Labour Commissioner	Not more than 60 days from the date of receipt of report from the field officers.
	ii) Demand notice under section 2(K)-disputes of collective nature containing various demands relating to terms and conditions of employment	Additional/Joint Labour Commissioner	Not more than three months from the date of receipt of report from the field officers.
	iii) Complaints regarding unfair labour practice & other miscellaneous matters under Section 25-T of the above Act & Rules.	Additional/Joint Labour Commissioner	
2.	Complaints/cases under E.S.I. Act & Rules/EPF Act & Rules/Workmen's Compensation Act & Rules/Payment of Gratuity Act & Rules regarding non-payment of Gratuity Act & Rules regarding non-payment of compensation etc.	Additional/Joint Labour Commissioner	Not more than 30 days
3	Industrial Employment (Standing Orders) Act and rules-Certification of Standing orders in respect of industrial workers	Additional/Joint Labour Commissioner-cum-Additional Registrar, Trade Unions/registrar Trade Unions	Not more than four months
4	Trade Unions Act and Rules-registration of trade unions	Additional/Joint Labour Commissioner-cum-Additional Registrar, Trade Unions/Registrar Trade Unions	Not more than four months
5	Contract Labour (R&A)Act and rules-issuing of registration certificate/license/amendment in registration certificate and renewal of license	Additional/Joint Labour Commissioner	Not more than two months

6	Motor Transport workers Act & rules-issuance of registration certificate	Additional/Joint Labour Commissioner	Not more than one month
7	Cases under the Minimum wages Act, Payment of Wages Act, Equal Remuneration Act, Payment of Bonus Act and rules made under respective enactments in respect of non payment of wages, non payment of minimum rates of wages, delayed wages, non payment of equal wages for equal work and non payment of bonus	Additional./Joint Labour Commissioner	Not more than one month
8	Implementation of Awards-Issuance of recovery certificate & prosecution cases under the Industrial Disputes Act and Rules/Orders/Settlement	Deputy Labour Commissioner	Not more than three months
9.	Child Labour (P&R) Act and Rules-Cases/Complaints and other action pertaining to children	Deputy Labour Commissioner	Not more than two months
10	Bonded Labour System (Abolition) Act and Rules-Constitution of vigilance Committees/holding of meeting of the State Level Steering Committee on Bonded Labour/Miscellaneous matters pertaining to bonded labour	Deputy Labour Commissioner	Not more than one month.
11	Punjab Shops & Commercial Establishments Act, 1958 and Rules-cases regarding exemptions/fixation of opening and closing day/complaints	Deputy Labour Commissioner	Not more than two months.
12	Complaints under the Punjab Industrial Establishments (National and Festival Holidays, Casual and Sick Leave) Act, 1965 and Rules	Deputy Labour Commissioner	Not more than one month.
13	Punjab Labour Welfare Fund Act and Rules-disposal of applications received under the welfare schemes	Senior Accounts Officer	Not more than two months.

COMPLIANCE CHECKLIST

YOUR DATES WITH REGULATOR (S)

FEBRUARY 2006

Sr. No	Activities	Sections/ Rules/ Clauses, etc.	Acts / Regulations, etc.	Compliance Due Date	To whom to be submitted
1	Pay Service Tax in Form TR-6 collected during the previous month	Rule 6	Service Tax Rules, 1994	5th February	Service Tax Authorities
2	TDS from Salaries for the previous month[1]	Section 192	Income-tax Act, 1961	7th February	Income-tax Authorities
3	TDS on Contractor's Bill/ Advertising/ Professional service Bill – TDS collected in the previous month	Section 194C Section 194J	Income-tax Act, 1961	7th February	Income-tax Authorities
4	TDS on Rent	Section 194I	Income-tax Act, 1961	7th February	Income-tax Authorities
5	Submission of Cenvat Return	Rule 9(7)	CENVAT Rules, 2004	10th February	Excise Authorities
6	Monthly payment of Provident Fund dues	Paragraph 38 of Employees' Provident Funds Scheme, 1952	Employees' Provident Funds and Misc. Provisions Act, 1952	15th February	Provident Fund Authorities
7	Filing of declaration in Form 2 and monthly return in Form 5 for qualifying employees joining during the previous month	Paragraph 36(2)(a) of Employees' Provident Funds Scheme, 1952	Employees' Provident Funds and Misc. Provisions Act, 1952	15th February	Provident Fund Commissioner
8	Submission of contribution card of the employee who left the organisation along with a statement in Form 6	Paragraph 43	Employees' Provident Funds and Misc. Provisions Act, 1952	20th February	Provident Find Commissioner
9	Payment of ESI contribution for the previous month (Form S-III cash challans & S-IV cheque challans)	Regulation 31	Employees' State Insurance Act, 1948 Employees' State Insurance (Gen) Regulations, 1950	21st February	ESIC Authorities

[1] For amount credited as on the date up to which accounts are made, the payment can be made within two months following such date.

10	Abstract of the amount recovered from employees and the details of the employer's contribution for the preceding month in Form 12. A Nil return is required when no amount is recovered from the employee in the last month.	Paragraph 38(2) of The Employees' Provident Funds Scheme, 1952	The Employees' Provident Funds Scheme, 1952 and the Employees' Pension Scheme 1995 and The Employees' Deposit Linked Insurance Scheme, 1976.	25th February	Provident Find Commissioner
11	Submit Return Form 3 in duplicate along with the declaration Form1.	Regulation 14 Regulation 15-A	Employees' State Insurance Act, 1948 Employees' State Insurance (Gen) Regulations, 1950	Within 10 days from the date of receiving the relevant papers	ESIC Authorities
12	Return of contributions Form. 6 in quadruplicate along with challans of deposit of contribution. Nil return in case no employees in contribution period.	Regulation 26	Employees' State Insurance Act, 1948 Employees' State Insurance (Gen) Regulations, 1950	Within 42 days of termination of the contribution period	ESIC Authorities
13	Certificate of contribution payable		Employees' State Insurance Act, 1948 Employees' State Insurance (Gen) Regulations, 1950	Within 42 days from the expiry of the contribution period or within 7 days from the receipt of the requisition from the regional/ local office.	ESIC Authorities
14	Notice for payment of gratuity in Form L/Notice for inadmissible claim in Form M	Section 8	Payment of Gratuity Act, 1972	Within 15 days of receipt of application	Applicant employee, nominee or legal heir

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