Tax & Corporate News Bulletin

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From the Editor's Desk...

Dear Reader,

The New Year has just not brought new hopes for Corporate India, but has also started unfolding obscurities of a great magnitude.

The Satyam fiasco has raised serious questions on the effectiveness of legal framework on Corporate Governance and enforcement thereof. In fact, the astonishing revelations continue to baffle the regulators and the professional experts. While the former Chairman of Satyam Computers and his accomplices admit fraud, there appears to be a lapse on the part of independent directors, management, statutory auditors, internal auditors, bankers and so on.

Corporate India needs to recognise the importance of better corporate governance, failing which handful of wrongdoers would continue to betray the trust of the stakeholders and pose serious threats to India's image as a favourite investment destination. The cascading implications of such scams could be far more serious. It needs to be understood that more scams would call for more regulations.

Perceptibly, the Government is mulling to introduce exemplary penal provisions and also pondering upon to ensure effective enforcement mechanism, as it is evident that the present statutory framework no longer acts as sufficient deterrent for the wrongdoers. At the same time, it becomes imperative for shareholders to know that their own activism and alertness is crucial for good corporate governance to take root. In corporate democracy, it is up to the shareholders to play their role and get the governance they want.

Nevertheless, such instances are isolated instances and should not be taken to represent the Corporate India as a whole. India continues to be a law compliant and progressive nation.

Yours truly,

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For Private Circulation

Inside...

INCOME TAX

- Recent significant judgments
  - International Taxation
  - Permanent Establishment (PE)
  - Attribution of income to PE
  - Royalty and fees for technical services

EXCISE & SERVICE TAX

- Eight taxable services provided to a GTA exempted from service tax
- Procedure for refund of service tax paid on services used for export of goods
- New formula for calculating CENVAT Credit

SPECIAL ECONOMIC ZONES

- CENVAT Credit to DTA Units supplying goods to SEZ Developers

SEBI & CORPORATE LAWS

- Framework for SMEs Stock Exchanges
- SEBI amends Insider Trading Regulations
- SEBI amends DIP Guidelines
- Appointment of Company Secretary
- Apostillisation of documents as per Hague Convention
- MCA issues/ substitutes company forms
- Concept LLP Rules for public comments
- LLP (Concept) Rules & Forms, 2008

FEMA / RBI

- ECB Policy Liberalization
- Amendment to the FCCBs regulations
- Guidelines for prepayment/ buyback of FCCBs

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INCOME TAX

Recent significant judgments

International Taxation:

(i) Vodafone International Holdings BV v. Union of India, (2008) 175 Taxmann 399 (Bom. HC)

Hutchison Essar Ltd. ("Hutch India"), a company incorporated in India, was a joint venture of the Hong Kong-based Hutchison Telecommunications International Ltd ("Hutch Hong Kong") and the India-based Essar Group. Hutch India was in the business of providing telecommunication service in India. Hutch Hong Kong held 67% of the shares of Hutch India through CGP Investments Holdings Ltd ("the Cayman Islands SPV"), an SPV registered in Cayman Islands, and some other shareholders.

The stake of Hutch Hong Kong in the Cayman Islands SPV was acquired by Vodafone, a UK-based mobile phone group, through a Netherlands based SPV, viz. Vodafone International Holdings BV ("Vodafone") for a total consideration of $10.7billions. The Indian Foreign Investment Promotion Board approved the said transaction on the condition that Vodafone would comply with all Indian municipal laws. Pursuant to the consent of Essar Group, a new joint venture called the Vodafone Essar Ltd. (the new name of Hutch Essar Ltd.) came into existence.

STOP PRESS!

The Supreme Court on January 23, 2009 has dismissed the Special leave Petition filed by Vodafone against the aforesaid decision of the Bombay High Court. However, the Supreme Court has directed the revenue authorities to answer jurisdictional fact and preliminary issues on constitutionality of the provisions raised by Vodafone and has granted liberty to Vodafone to move directly to HC, in case the revenue authorities answers jurisdictional facts negatively.

As a result of this sale, capital gains, estimated at $2billions, accrued to the Cayman Islands SPV. Considered from the point of view of jurisdictions, it is clear that the sale transaction took place between the Dutch SPV (owned by a UK group) and the Cayman Islands SPV (owned by a Hong Kong company). The ultimate effect however was the transfer of controlling shares of an Indian company.

The Indian Revenue, being of the view that the transaction would give rise to capital gains chargeable to tax in India and that Vodafone was, in terms of section 195 of the Income tax Act, 1961 (the "Act"), under an obligation to withhold tax at source while making the aforesaid payment of sale consideration, issued a notice to Vodafone show cause why it should not be treated as an assessee-in-default for not withholding the Indian capital gains tax on the payment of the sale consideration.

Section 9 of the Act treats any income derived, inter alia, from the transfer of a capital asset in India as income arising in India. The Revenue's case, briefly stated, was that the sale consideration received by Hutch Hong Kong was earned towards the transfer of its business/ economic interests as a group in India and that the subject-matter of the transaction was transfer of tangible and intangible interests of Hutch Hong Kong in the Indian company and not an innocuous acquisition of shares of the Cayman Islands SPV.

In a writ petition filed before the High Court of Bombay (the "Court"), Vodafone challenged the aforesaid show cause notice on the ground that the same was without jurisdiction. Vodafone argued that the aforesaid transaction was a transfer of share capital of a non-resident company (the Cayman Islands SPV) and was not a transfer of capital asset situated in India and that such transfer took place in Cayman Islands, being the registered office of the Cayman Islands SPV. Vodafone further argued that the controlling interest in a company was not an asset separate and distinct from the shares but was an incidence arising from the holding from a particular number of shares. Since by virtue of the acquisition of shares of the Cayman Islands SPV, Vodafone acquired the controlling interest only indirectly, there was no direct transfer of a capital asset situated in India so as to give rise to the alleged tax liability. It was Vodafone's case that the section 9 of the Act was not attracted on the facts of the case, and consequently, the show cause notice was without jurisdiction. Vodafone also contended that the procedural provisions of section 195 of the Act relating to withholding tax cannot be applied since section 195 does not have extra-territorial jurisdiction.

The Court dismissed the writ petition filed by Vodafone terming it as premature. The court, however, made certain pertinent observations pertaining to tax implications of transactions in India, which have far reaching implications. On the question whether the conditions under section 9(1)(i) were satisfied, the Court observed that income had been earned towards sale consideration of the business and economic interests of Hutch India in India since the subject matter of transfer was not the shares of the Cayman Islands SPV simpliciter, which the Court held was a shell company, but rather the interests, tangible and intangible, in the India. The Court particularly viewed the transfer of telecommunication licence as robust.

The Court further observed that Hutch Hong Kong could not have transferred its controlling interest in Hutch India without extinguishing its rights in the shares of Hutch India. The transaction resulted in acquisition of the assets in the form of interest in the joint venture of Hutch India so as to fall within the ambit of term "transfer" as defined in section 2(47) of the Act, qua Hutch Hong

Kong. The Court also observed that shares can either be assets in themselves or, in some cases, a mode of transferring some other assets. Since very purpose of the transaction was to enable Vodafone to successfully pierce into the Indian mobile market so as to enlarge its global presence, the transaction amounted to a transfer of capital asset and Vodafone became a successor in interest in the JV as well as a co-licensee to operate mobile telephony in India.

The Court further stated that any profit or gain which arose from the transfer of a group company in India has to be regarded as profit or gain of the entity which actually control it. The Court noted that the income arising out of the sale accrued not to the Cayman Islands SPV but to Hutch Hong Kong and was treated as profit of Hutch Hong Kong and distributed to the shareholders of Hutch Hong Kong. In arriving at the conclusion that the jurisdiction of the Revenue could not be said to be wanting, the Court also cited (with approval) the American principle of the "Effects Doctrine" which recognizes the right of a State to impose liabilities upon persons not within its allegiance, for conduct outside its borders that has consequences within the borders of such State. Applying the effects doctrine, the Court held that since very purpose of the transaction was acquisition by Vodafone of the controlling interest held by Hutch Hong Kong in Hutch India, the transaction would certainly be subject to the municipal laws of India.

The show cause notice also required Vodafone to produce certain documents, including the original agreement between Vodafone and Hutch Hong Kong. On failure of Vodafone to produce the said agreement even before the High Court, the High Court held that adverse inference could be drawn against Vodafone notwithstanding that the onus of proving the document was not on Vodafone.

The Court held that a matter involving disputed questions of fact can not be gone into in a writ petition. The Court further held that the questions of chargeability of tax and of the obligation to deduct tax at source, as revealed by the show-cause notice and the chronological list of dates, could be answered only after investigation into voluminous facts and perusal of numerous complicated agreements. On the issue of validity of the show cause notice, the Court held that the notice issued by the Revenue could not be said to be extraneous, irrelevant or erroneous on its face or not based on any material at all.

The judgment is being seen as having serious and far reaching implications on the cross-border mergers and acquisitions, wherein business being transferred between non-residents abroad includes operations in India. The Revenue, as per the newspaper reports, has issued show cause notices (to about 400 companies) in various cases involving transactions similar to that of Vodafone. What kind of impact the aforesaid decision would have on the investment climate in India is yet to be seen, however, the tremor can certainly be felt. However, we have not heard the last on the issue as Vodafone would go in appeal against the aforesaid decision to the Supreme Court, the ultimate arbiter in India.

The potential investors would need to be therefore extra careful while structuring their cross-border mergers and acquisitions transactions lest they are slapped with unwarranted and unexpected tax liability from strange quarters which they have not factored in their negotiations and to minimize the chances of litigation.

(ii) Clifford Chance v. Dy. CIT, (2009) 221 CTR 1 (Bom. HC)

Clifford Chance ("CC"), a prominent international firm of solicitors based in the UK and a tax resident of the UK, was appointed by Indian and foreign clients in relation to four power projects in India, being executed by such clients.

CC billed the clients for services rendered by multiplying the hourly billing rate by the time spent as appearing in the detailed timesheets, separately showing the time spent for doing work in India and outside India. Where a project had an India-resident participant, the aforesaid amount was apportioned among different participants in proportion of their respective shares and bills were accordingly raised upon such participants. The bills so raised were paid to CC outside India.

During the assessment year 1997-98, the number of days CC's partners were present in India exceeded 90. CC filed return of income declaring income as was attributable to its operations in India. The assessing officer and the appellate authorities held that the whole of the income received by CC in relation to the aforesaid four projects was taxable in India.

In appeal, before the High Court of Bombay (the "Court"), it was argued by CC that in case of legal professionals rendering advisory services, such services are only rendered at a place where the professional is personally present relying on Article 15 of the Double Taxation Treaty between India and UK ("DTAA"), the appellant argued that income derived by the appellant may be taxed in India only if professional services are performed in India for a period exceeding 90 days and only to the extent of income attributable to the services rendered in India. It was further argued that once the limit of 90 days is crossed, the provisions of section 9(1)(i) of the Act get triggered and in terms of Explanation 1 thereto, only such income as is "reasonably attributable to operations carried out in India" is taxable in India.

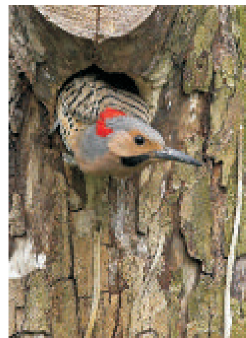
Dealing with the question of the chargeability of income of the appellant to tax in India, the Court held that Article 15 of the DTAA, which generally provides for the residence rule, also contains an exception in favour of taxability by another Contracting State where the individual is present in such Contracting State for a period exceeding 90 days in aggregate. In the case of a partnership, this period of 90 days is calculated taking into account aggregately the presence of all the members of the partnership, who are so present and perform professional services. The Court held that once the threshold limit of 90 days is crossed, the taxability of income is determined in accordance with section 9(1) of the Act. Section 9(1) deems income arising to a non-resident from a "business connection" in India to accrue or arise in India.

On the question of the quantum of income liable to tax in India, the Court, emphasizing on the principle of territorial nexus and in light of the provisions of the DTAA, held that the expression "income deemed to accrue or arise in India" appearing in section 9(1) of the Act cannot be given an extended meaning. The Court further held that that any amount payable by a resident to a non-resident as fees for services is not liable to tax in India, unless such payment has a direct link with the services rendered in India. Thus, services, which are the source of income sought to be taxed in India must be: a) utilized in India; and, b) rendered in India.

Accordingly, the Court held that CC was liable to be taxed in India only in respect of so much of its income as was shown in its timesheets as attributable to India. In other words, fee charged by CC from the aforesaid clients for rendering services outside India, even though such services were utilized in respect of the project, being executed by them in India, was held to be not taxable in India.

Permanent Establishment

Ansaldo Energia SPA v. ADIT (2008) 305 ITR 310 (AT)



The Chennai Bench of the Income-tax Appellate Tribunal (ITAT), in *Ansaldo Energia SPA* case, held that where Erection, Procurement and Commissioning contract (EPC contract) is to be executed on turnkey basis by a foreign contractor and the contract is split between the foreign contractor and the entities incorporated in India by the foreign contractor, the corporate veil may be lifted to determine the existence of the PE of the foreign contractor in India.

Having regard to the aforesaid decision, foreign companies executing EPC contracts in India would have to be careful regarding the manner in which they structure the whole arrangement. The various factors considered by the Tribunal for holding the several contracts as a composite one need to be taken note of and should be avoided while structuring the manner of execution of EPC contracts by a foreign entity.

Attribution of income to Permanent Establishment

SET Satellite Singapore Pvt. Ltd. vs. DCIT (2008) [173 Taxmann 475] (Bom. HC)

The Bombay High Court, in *SET Satellite Singapore* case, held that if the agent of a foreign company in India was remunerated at arms length price then no further profit could be taxed in India as accruing to the foreign company through the agent by considering the agent to be a "deemed" PE under the provisions of India-Singapore Double Taxation Avoidance Agreement ("DTAA").

Royalty and fees for technical services

ISRO Satellite Centre, In re [2008-TIOL-17-ARA-IT]

The Authority for Advance ("AAR") Ruling in *ISRO Satellite Centre,* case, ruled that the fees paid to a UK company for use of its satellite would not be taxable as "fees for technical services" or "royalties" under Article 13 of the India-UK DTAA.

EXCISE & SERVICE TAX

Eight taxable services being provided to a GTA exempted from service tax

Central Board of Excise & Customs (CBEC) has fully exempted the following eight taxable services provided to a Goods Transport Agency (GTA) by their sub-contactors from payment of service tax, subject to the condition that the invoice issued by such service provider, providing services should mention the name and address of the goods transport agency and also the name and date of the consignment note, by whatever name called, issued in his behalf-

(i) clearing and forwarding agent service [section 65 (105) (j)];

(ii) manpower recruitment or supply services [section 65 (105) (k];

(iii) cargo handling service [section 65 (105) (zr];

(iv) storage and warehousing service [section 65 (105) (zza)];

(v) business auxiliary services [section 65 (105) (zzb)];

(vi) packaging activity services [section 65 (105) (zzzf)];
(vii) business support services [section 65 (105) (zzzq)];
(viii) supply of tangible goods service [section 65 (105) (zzzzj)].

[Source: Notification No. 1/2009 dated January 5, 2009 – ST]

Procedure for refund of service tax on services used for export of goods - Clarification

Based on issues arising out of its previous notifications on the procedure for refund of service tax paid on specified services used for export of goods, CBEC has issued following clarifications:-

- The procedure for availing refund, under the aforesaid notification, by a manufacturer exporter not registered with the Central Excise has been prescribed.
- It has been clarified that the invoices/ challans/ bills issued by supplier of taxable service, in conformity with rule 4A of the Service Tax Rules, 1994, are reasonable evidence that the services on which refund is being sought are taxable service.
- Refund claim cannot be allowed on the basis of invoices not having complete details as required verification cannot be carried out by the department on the basis of incomplete invoices.
- The CBEC has further decided that simplified procedure for refund, as prescribed by the CBEC vide circular No. 828/5/2006-CX dated 20.4.2006 for sanction of refund/ rebate of unutilized CENVAT credit under rule 5 of the CENVAT Credit Rules, 2004 would mutatis mutandis apply to refund claims for Service Tax mentioned above.

[Source: Circular No. 106 /9 /2008-ST, CBEC dated December 11, 2008]

Amendments in the procedure for Refund of Service tax on taxable service attributable to export of goods

CBEC has vide Notification No. 41/ 2007 dated October 6, 2007 and other subsequent notifications, notified eighteen taxable services providing refund of service tax paid. Subsequently, the following amendments have been made vide Notification No. 32/ 2008 dated November 18, 2008:

(i) the time period for claiming refund by the exporter has been extended from "sixty days" to "six months" from the end of the relevant quarter to which such a refund pertains;

(ii) to allow refund on testing service [section 65(105)(zzh)], without any copy of agreement with the buyer of goods, of such testing and analysis is statutorily stipulated by domestic rules and regulations.

Further, vide Notification No. 33/ 2008 dated December 7, 2008 the following amendments have been made:

(i) the refund of service tax has now been extended to "services provided by a clearing and forwarding agent in relation to export goods exported by the exporter [section 65 (105) (j)]";

(ii) the condition, that the refund will be available subject to the condition that *"the said goods have been exported without availing drawback of service tax paid on the specified services under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995"*, has been omitted;

(iii) an amendment has been made in the conditions to Serial 15, i.e., for refund of service tax in case of "services provided by a commission agent, located outside India, and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him [section 65 (105) (zzb)]", by substituting the words "two percent" by "ten percent".

[Source: Notification No. 32 and 33/ 2008-ST, CBEC dated November 18, 2008 and December 7, 2008 respectively]

Formula for calculating CENVAT Credit amended

The Central Government has amended the Cenvat Credit Rules, 2004 and introduced the CENVAT Credit (Second Amendment) Rules, 2008. The formula for calculating the Cenvat Credit in respect of inputs and capital goods cleared on or after March 1, 2006 from an Export Oriented Undertaking (EOU) or by a unit in Electronic Hardware Technology Park (EHTP) or in a Software Technology Park (STP) on which such unit pays excise duty under section 3 of the Central Excise Act, 1944 read with serial number 2 of the Notification No. 23/ 2003- Central Excise, dated March 31, 2003, has been amended.

[Source: Notification No. 48/ 2008-CX (NT), CBEC dated December 5, 2008]

Special Economic Zones

Availability of CENVAT Credit to DTA Units supplying goods to SEZ Developers

The Central Government has issued the CENVAT Credit (Third Amendment) Rules, 2008 whereby an amendment has been made to Rule 6(6)(i) of the CENVAT Credit Rules, 2004. Accordingly, the CENVAT Credit will be available on inputs used by the DTA units, who are supplying excisable goods to SEZ Developers. Earlier this was allowed to SEZ units only. The Rules are effective from December 31, 2008.

[Source: Notification No. 50/2008-CX (N.T.), CBEC dated December 31, 2008]

SEBI/ CORPORATE LAWS

SEBI issues framework for SMEs stock exchanges

Securities and Exchange board of India (SEBI) has issued a framework for recognition and supervision of stock exchanges/ platforms of stock exchanges for Small and Medium Enterprises (SMEs). The framework provides eligibility criteria for setting up of new stock exchange/ platform of an existing stock exchange for the SME sector.

[Source: SEBI Press Release No. 245/2008 dated November 5, 2008]

SEBI amends Insider Trading Regulations

SEBI has amended SEBI (Prohibition of Insider Trading) Regulations, 1992 by issuing a the SEBI (Prohibition of Insider Trading) (Amendment) Regulations, 2008. The key amendments are highlighted as under:

1. **Definition of 'insider':** The definition of insider has been broadened to include any person who holds or has access to unpublished price sensitive information (UPSI), no matter he is or was or is deemed to be connected with the company.

2. **Restriction on trading:** No director, officer and designated employee of a listed company would be allowed to enter opposite transaction i.e., sell or buy any number of shares during the next six months following the prior transaction. There is also an absolute prohibition on such persons from taking positions in derivative transactions in the shares of the company at any time.

3. **Action in the event of default:** Any violation of the provisions of the Insider Regulations can be processed directly under the provisions of section 24 of the SEBI Act, which includes criminal prosecution.

4. **Adherence to the Model Code of Conduct:** The amended regulations provide that the clauses of the Model Code of Conduct for listed companies shall not be diluted in any manner.

[Source: Notification No. LAD-NRO/GN/2008/29/4480 dated November 18, 2008]

SEBI amends Disclosure and Investor Protection (DIP) Guidelines

SEBI has put in place a framework whereby a listed company can make a combined offering of Non-Convertible Debentures (NCDs) with warrants to Qualified Institutional Buyers (QIBs), under the Qualified Institutions Placement mechanism. QIBs can subscribe to the combined offering of NCDs with warrants or to the individual instruments, i.e., either NCDs or warrants, where separate books are run for NCDs/ warrants.

[Source: Press Release No.293/2008 dated December 8, 2008]

Appointment of Company Secretary must for companies having paid up capital of Rs. 5 Crores or more

[Companies (Appointment and Qualifications of Secretary) Amendment Rules, 2009]

The Ministry of Corporate Affairs (MCA) has amended the Companies (Appointment and Qualifications of Secretary) Rules, 1988 and issued the Companies (Appointment and Qualifications of Secretary) Amendment Rules, 2009 which comes into force from March 15, 2009.

The requirement for companies having paid up share capital of Rs. 2 crore and above to have a full time Company Secretary has been amended and now only a company having a paid up share capital of Rs. 5 crore and above are required to have a full a Company Secretary.

A company having a paid up share capital of Rs. 2 crore or more but less than Rs. 5 crore may appoint any individual who possesses the membership of the Institute of Company Secretaries of India (ICSI) constituted under the Company Secretaries Act, 1980, as a whole-time Company Secretary to perform the duties of a secretary under the Companies Act, 1956.

However, where a company has appointed a whole-time Company Secretary, possessing the membership of ICSI, such a company is not required to obtain a compliance certificate from a Company Secretary in whole-time practice under rule 3 of the Companies (Compliance Certificate) Rules, 2001.

[Source: Notification no. G.S.R. 11 (e), dated January 5, 2009]

Apostillisation of documents in accordance with Hague Apostille Convention, 1961

MCA has issued a notification in respect of documents that may now be accepted after apostillisation in accordance with Hague Apostille Convention, 1961 ("The Hague Convention"). Due to this notification, now onwards, requirement of consularization of documents (for filings with MCA) is done away with and instead, MCA shall accept documents apostillised in accordance with The Hague Convention. This is a major amendment in the Companies (Central Government's) General Rules and Forms, 1956 and shall bring great relief to the foreign companies in non-commonwealth countries who are party to The Hague Convention and have operations in India by way of Joint Venture, Wholly Owned Subsidiary or Liaison Office.

[Source: GSR 835(E) MCA dated December 4, 2008]

MCA introduces Form for filing addendum for rectification of defects or incompleteness

MCA has issued the Companies (Central Government's) General Rules and Forms (Seventh Amendment) Rules, 2008 and introduced new Form 67 for filing addendum for rectification of defects or incompleteness. The rules shall come into effect form February 15, 2009.

[Source: G.S.R. 876 (E) dated December 24, 2008]

MCA substitutes certain existing Forms

(I) **Form 21-** For notice of the court or the Company Law Board order or any other competent authority w.e.f. February 15, 2009.

[Source: Notification No. G.S.R. 872 (E) dated December 23, 2008]

(ii) **Form 1-** Application for incorporation and declaration of a company, w.e.f. January 11, 2009.

[Source: Notification No. G.S.R. 868 (E) dated December 22, 2008]

(iii) **Form 23B-** Information by Auditor to Registrar, w.e.f. January 11, 2009.

[Source: Notification No. G.S.R. 868 (E) dated November 28, 2008]

Forms under Companies General Rules and Forms, 1956 substituted

Companies (Central Government's) General Rules and Forms (Second Amendment) Rules, 2008 ('Rules') have amended the Companies (Central Government's) General Rules and Forms Rules, 1956 by substituting the following forms:

- Form 1B – Application to the Central Government for change of name or conversion of public company to a private company.
- Form 4 – Statement of rate percent of the commission in respect of shares and debentures and number of shares and debentures for an underwriting agreement.
- Form 4C – Return in respect of buyback of securities.
- Form 18 – Notice of situation or change of registered office.
- Form 22 - Statutory Report.
- Form 32 – Particulars of appointment of Managing Director, managers, secretaries, changes among them and consent of candidate to act in that capacity and taking of qualification shares.

These Rules come into effect from December 7, 2008.

[Source: G.S.R. No. 788 (E) MCA dated November 14, 2008]

Concept LLP Rules in relation to establishment of place of business in India by Foreign LLPs

The Concept Rules in respect of provisions of the Limited Liability Partnership (LLP) Bill, 2008 relating to establishment of a place of business in India by Foreign LLPs have been prepared and placed on the MCA website for public comments. Suggestions/comments on these concept rules alongwith the justification in brief may be addressed/sent to MCA. The suggestions/ comments may also be sent through email at bn.harish@mca.gov.in or narendra.dua@mca.gov.in

Concept LLP (Winding up and Dissolution) Rules

The MCA has notified its draft Rules for winding up of an LLP providing the procedure for both voluntary winding up and by the Tribunal. The Tribunal under these rules would be the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) to be constituted under the Companies Act, 1956 and till the time of such constitution, the reference to Tribunal would mean the "High Court." The draft rules have 310 rules divided into five parts, namely –(i) Modes of Winding; (ii) Voluntary Winding up; (iii) Winding up by Tribunal; (iv) Provisions applicable to both types of winding up; and (v) Proceedings and Procedures.

The Concept LLP (Winding up and Dissolution) Rules have been placed on MCA website at www.mca.gov.in

LLP [Concept] Rules and Forms, 2008

MCA has put up the Concept Rules (the "Rules") and forms for LLP in India on its website. The Rules have been drafted to govern procedures for:

- Incorporation including procedures for obtaining the DPIN (Designated Partner Identification Number) and that it will be interchangeable with an existing DIN (Director Identification Number);
- Filing the details of the LLP Agreement with regard to partners and their relations, Contribution of quantified tangible and intangible assets;
- Maintaining books of account and having them audited unless the annual turnover does not exceed forty lakhs or the contribution does not exceed twenty five lakhs;
- Destruction of Old records:
- Investigations:
- Conversion to LLP;
- Compromise, Arrangement and Reconstruction of LLP;
- Electronic filing of documents; and
- Striking off name of defunct LLP.

[Source: www.mca.gov.in]

FEMA/ RBI

ECB Policy Liberalization

Some of the aspects of the existing External Commercial Borrowing (ECB) Policy have been reviewed and modified as under:

(I) According ECB Policy, the all-in-cost ceilings for ECBs, in respect of both Automatic as well as Approval routes are as under:

Average Maturity Period	All-in-Cost ceilings over 6 months LIBOR*
3 years and up to 5 years	300 bps
More than 5 years	500 bps

* for the respective currency of borrowing or applicable benchmark.

It has now been decided to dispense with the requirement of all-in-cost ceilings on ECB until June 30, 2009. Accordingly, eligible borrowers, proposing to avail of ECB beyond the permissible all-in-cost ceilings specified above may approach the Reserve Bank of India (RBI) under the Approval Route. This relaxation in all-in-cost ceiling will be reviewed in June 2009.

(ii) In May, 2007, RBI had withdrawn the exemption accorded to the 'development of integrated township' as a permissible end-use of ECB. It has now been decided to permit corporates, engaged in the development of integrated township, as defined in Press Note 3 (2002 Series) dated January 4, 2002, issued by DIPP, Ministry of Commerce & Industry, Government of India to avail of ECB under the Approval Route. The minimum area to be developed should be 100 acres for which norms and standards are to be followed as per local bye-laws/ rules. In the absence of such bye-laws/ rules, a minimum of two thousand dwelling units for about ten thousand population will need to be developed. The Policy will be reviewed in June 2009.

(iii) As per the extant ECB policy, Non-Banking Financial Companies (NBFCs) are permitted to avail of ECB for a minimum average maturity period of five years to finance import of infrastructure equipments for leasing to infrastructure projects in India. It has now been decided to

allow NBFCs, which are exclusively involved in financing of the infrastructure sector, to avail of ECBs from multilateral/ regional financial institutions and Government owned development financial institutions for on-lending to the borrowers in the infrastructure sector under the Approval route. While considering the applications, Reserve Bank will take into account the aggregate commitment of these lenders directly to infrastructure projects in India. The direct lending portfolio of the above lenders vis-à-vis their total ECB lending to NBFCs, at any point of time should not be less than 3:1. AD Category-I banks should obtain a certificate from the eligible lenders to this effect. This facility will be reviewed in June 2009.

(iv) At present, entities in the services sector viz. Hotels, Hospitals and Software sector are allowed to avail of ECB up to USD 100 million per financial year for import of capital goods, under the Approval route. It has now been decided to permit the corporates in the Hotels, Hospitals and Software sectors to avail of ECB up to USD 100 million per financial year, under the Automatic Route, for foreign currency and / or Rupee capital expenditure for permissible end-use. The proceeds of the ECBs should not be used for acquisition of land.

The modifications to the ECB guidelines will come into force with immediate effect.

[Source: RBI/A.P. (DIR Series) Circular No. 46 dated January 2, 2009]

Amendment to the Issue of FCCBs and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993

The Government of India has amended the pricing norms for Foreign Currency Convertible Bonds (FCCBs) as under:

Listed Companies– The pricing should not be less than the average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the two weeks preceding the relevant date;

The “relevant date” means date of the meeting in which the Board of the company or the Committee of Directors duly authorized by the Board of the company decides to open the proposed issue.

[Source: Ministry of Finance Press Release F.No.9/8/2006-ECB New Delhi, dated November 27, 2008]

Guidelines for prepayment/ buyback of FCCBs issues by the Indian Companies

It has been decided by the Government to liberalize the procedure and consider applications for buyback of FCCBs by Indian Companies, both under automatic and approval routes, subject to the following:

A. Automatic Route:

Premature buyback of FCCBs shall be allowed, subject to the following:

i) the buyback value of the FCCB shall be at a minimum discount of 15 per cent on the book value;

ii) the funds used for the buyback shall be out of existing foreign currency funds held either in India (including funds held in EEFC account) or abroad and / or out of fresh ECB raised in conformity with the current ECB norms; and

iii) where the fresh ECB is co-terminus with the outstanding maturity of the original FCCB and is for less than three years, the all-in-cost ceiling should not exceed 6 months Libor plus 200 bps, as applicable to short term borrowings. In other cases, the all-in-cost for the relevant maturity of the ECB, as laid down in A. P. (DIR Series) No.26 dated October 22, 2008 shall apply.

B. Approval Route:

i) the buyback value of the FCCB shall be at a minimum discount of 25 per cent on the book value;

ii) the funds used for the buyback shall be out of internal accruals, to be evidenced by Statutory Auditor and designated AD Category – I bank's certificate; and

iii) the total amount of buyback shall not exceed USD 50 million of the redemption value, per company.

C. General Conditions

In addition to the conditions set out above, the following additional conditions shall be applicable for the proposals both under the automatic and approval routes:

(i) the FCCB should have been issued in compliance with the extant guidelines;

(ii) the FCCB should have been registered with the Reserve Bank; the LRN number obtained and ECB 2 returns submitted up to date;

(iii) No proceedings for contravention of FEMA are pending against the company;

(iv) The right for buyback is vested with the issuer of FCCBs. However, the actual buyback is subject to the consent of the bond holders;

(v) The FCCBs bought back / repurchased from the holders must be cancelled and should not be re-issued or re-sold;

(vi) The buyback will not have any effect on the bond holders not opting for the buyback or on the non-participating bond holders of companies opting for the buyback;

(vii) The Indian company shall open an escrow account with the branch or subsidiary of an Indian bank overseas or an international bank for buying back the FCCBs to ensure that the funds are used only for the buyback.

This facility will come into force with immediate effect and the entire procedure of buyback should be completed by March 31, 2009.

[Source: RBI/2008-09/317, A.P. (DIR Series) Circular No. 39 dated December 08, 2008]

VAISH ACCOLADES

Vaish acts as Knowledge Partner at the ASSOCHAM National Summit on "Special Economic Zones: Resolving Policy and Tax Issues" at Chennai

Vaish Associates, Advocates acted as Knowledge Partner in the ASSOCHAM National Summit on **"Special Economic Zones: Resolving Policy and Tax Issues"** held on December 2, 2008 at Chennai.

- **Rupesh Jain** was invited to address the Summit on "*Income-tax Issues*"
- **Hitender Mehta** was invited to address the Summit on "*Legal and Operational Issues*". Besides, he acted as Moderator in the Panel Discussion held at the Summit.

The following Articles were contributed by the Chamber for the Summit Backgrounder:

- Article titled "*Special Economic Zones –A Swift Excursion*" authored by **Hitender Mehta**
- Article titled "*Special Economic Zones –Income-tax Issues*" co-authored by **Rupesh Jain** & **Hitender Mehta**
- Article titled "*Special Economic Zones –Service Tax Issues*" co-authored by **Hitender Mehta** & **Deepti Rustagi**

ASSOCHAM's SEZ Council Meeting on the eve of VIBRANT GUJARAT 2009

Hitender Mehta was invited to be a Panelist at the ASSOCHAM's SEZ Council Meeting held on 11th January 2009 on the eve of "Vibrant Gujarat" at Ahmedabad.

ICSI Seminar on LLP Bill, 2008 at Jalandhar

Sushma Mathur was invited to address on the topic *"Concept and Formation of LLP"* in a Seminar organized by the Jalandhar Chapter of the ICSI on January 17, 2009 at Jalandhar, Punjab.

ICAI Seminar on LLP Bill, 2008 at Gurgaon

Hitender Mehta was invited to address a Seminar on *"Limited Liability Partnership Bill, 2008"* organized by the Gurgaon Branch of the ICAI on December 28, 2008 at Gurgaon, Haryana.

Workshop on "Equity Term sheets, Financing Term sheets, ECB Guidelines & Key issues in Negotiation"

Sandhya Iyer conducted a full day workshop on October 17, 2008 for the M&A team of Essar Group on *Equity term sheets, financing term sheets, ECB guidelines and Key issues in Negotiation.* This program was organized by CRISIL Ltd.

Program on "Management of NPAs and Recovery Strategies"

Sandhya Iyer conducted a session on November 25, 2008 on *"Legal aspects of lending with special reference to DRT and SARFAESI"* in the program on the theme *"Management of NPAs and Recovery Strategies"* organised by the National Institute of Bank Management for banks and NBFCs at Pune.

Seminar on "Child Mortality" at 17th Rotary India Award

As a curtain raiser on the Rotary India Award 2008, ***The Rotary Awards for Service to Humanity (India) Trust*** under the chairmanship of **Mr. O.P. Vaish,** Senior Advocate conducted a Seminar on "***Child Mortality***" (the theme of the 17th Rotary India Award), at the ASSOCHAM House, New Delhi, on December 17, 2008. **Vaish Associates Public Welfare Trust** also took active part in this event. The objective of the Seminar was to spread awareness, generate interest and provoke a healthy discussion on the increasing deaths of children under five year of age. Participants included Rotary leaders, Club Presidents, Inner Wheel District Chairmen, representatives of different NGOs, the social activists and representatives from the Ministry of Health and Family Welfare.

IMPORTANT DATES WITH REGULATOR (S)

COMPLIANCE CHECKLIST

January - February, 2009

Sr. No	PARTICULARS	Sections/ Rules Clauses, etc	Acts/Regulations, etc.	Compliance Due Date	To whom to be submitted
A.	**INCOME TAX**				
1	TDS from Salaries for the previous month	Section 192	Income-tax Act, 1961	February 7, 2009	Income-tax Authorities
2	TDS on to Contractors/ Advertising/ Professional service Bill/ Rent/Commission or Brokerage in the previous month	Section 194C Section 194I Section 194J Section 194H	Income-tax Act, 1961	February 7, 2009	Income-tax Authorities
B.	**CENTRAL EXCISE & SERVICE TAX**				
3	Pay service tax in Form TR-6, collected during the previous month by persons other than individuals, proprietors and partnership firms	Rule 6	Service Tax Rules, 1994	February 5, 2009	Service Tax Authorities
4	Pay excise duty on the goods removed from the factory or the warehouse during the previous month	Rule 8(1)	Central Excise Rules, 2002	February 5, 2009	Excise Authorities
5	Submission of monthly CENVAT Return	Rule 9(7)	CENVAT Credit Rules, 2004	February 10, 2009	Excise Authorities
C.	**SEBI & CORPORATE LAWS**				
6	Submission of audited/un-audited, quarterly financial results	Clause 41	Listing Agreement	January 31, 2009	Stock Exchange
7	Submission of Limited Review Report (in case of un-audited financial results above)	Clause 41	Listing Agreement	February 28, 2009	Stock Exchange
D.	**LABOUR LAWS**				
8	Payment of monthly Provident Fund dues	Paragraph 38 of Employees Provident Funds Scheme, 1952	Employees' Provident Funds and Miscellaneous Provisions Act, 1952	February 15, 2009	Provident Fund Authorities
9	Monthly return of Provident Fund for the previous month for international workers	Paragraph 36 of Employees Provident Funds Scheme, 1952	Employees' Provident Funds and Miscellaneous Provisions Act, 1952	February 15, 2009	Provident Fund Authorities
10	Monthly return of Provident Fund for the previous month for employees (other than international workers)	Paragraph 38 of Employees Provident Funds Scheme, 1952	Employees' Provident Funds and Miscellaneous Provisions Act, 1952	February 25, 2009	Provident Fund Authorities
11	Payment of ESI contribution for the previous month	Regulation 31	ESI Act, 1948 read with the ESI (General) Regulations, 1950	February 25, 2009	ESIC Authorities

[**Note:** Unless otherwise stated, previous month indicates January, 2009]

Seminar on "***Child Mortality***" at the ASSOCHAM House, New Delhi, on December 17, 2008. Seen on the dais (L-R) Mr. Sudarshan Agarwal, former Governor, State of Uttarakhand & Sikkim, Mr. O. P. Vaish, Chairman, Rotary Awards for Service to Humanity (India) Trust, Mr. R. K. Saboo, Past President, Rotary International, Dr. Sangeeta Yadav, Ex-IAP President, Ms. Indu Capoor, Director, Chetna (NGO)

Mr. Rupesh Jain & Mr. Hitender Mehta addressing the ASSOCHAM National Summit on **"Special Economic Zones: Resolving Policy and Tax Issues"** held on December 2, 2008 at Chennai.

Disclaimer:

While every care has been taken in the preparation of this News Bulletin to ensure its accuracy at the time of publication, Vaish Associates assumes no responsibility for any errors which despite all precautions, may be found therein. Neither this bulletin nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/substitute professional advice that may be required before acting on any matter.

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