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From the Editor...

Dear Reader,

With the objective of enhancing share of manufacturing sector in India's GDP to 25% and creating 100 million jobs by 2022, the Government announced National Manufacturing Policy on October 25, 2011. The policy envisages large integrated industrial townships by creating world class National Investment and Manufacturing Zones (NIMZs), lesser regulatory and compliance burden, faster clearances and fiscal incentives. Minimum land area for an NIMZ would be 5,000 hectares. The State Government will be responsible for selection of land suitable for development of the NIMZ including land acquisition, if necessary.

Moving on, the Government has also announced Industrial Policy 2011 which focuses on (i) deregulating Indian industry; (ii) allowing the industry freedom and flexibility in responding to market forces; and (iii) providing a policy regime that facilitates and fosters growth of Indian industry.

In yet another initiative, to envision affordable, reliable and secure telecommunication and broadband services across the country, the Government announced Draft National Telecom Policy (NTP) 2011 on October 10, 2011. By formulating a clear policy regime, NTP-2011 endeavors to create an investor friendly environment for attracting additional investments in the sector apart from generating manifold employment opportunities in various segments of the sector. The key takeaways from this policy *inter alia* include –free roaming with one-nation one license; one-nation free roaming; delinking of spectrum from licenses and its price to be arrived through market related mechanisms; to enact a 'Spectrum Act'; creation of Telecom Finance Corporation to channelize investments in telecom sector; review of TRAI Act to address regulatory inadequacies; review of Indian Telegraph Act and other allied legislations to make them consistent with and in furtherance of the underlying objectives of NTP-2011, etc.

The test for the Government would be to ensure an effective 'implementation mechanism' for the success of these ambitious policies.

Yours truly,

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INCOME TAX

Installation project cannot result in PE if the duration test is not met

The Uttarakhand High Court in the case of *CIT v. BKI/HAM: ITA no. 34 of 2007* held that Permanent Establishment (PE) under installation project clause can be constituted only if the duration test specified therein is satisfied.

The taxpayer was a partnership firm, consisting of M/s Boskalis International B.V. and Hollansche Anneming Maatschappjj BV (BKI/HAM), incorporated in Netherlands. The taxpayer entered into a sub-contract for dredging and back-filling works with Hyundai Heavy Industries. The contracts comprised of dredging a trench for laying the pipeline and back filling of the trench after the pipeline had been laid. The total duration of activities in India was less than six months. The taxpayer, it may be noted, also had an office in Bombay in relation to the above project.

As per Article 5(2) of the Double Taxation Avoidance Agreement (DTAA) between India and Netherlands, PE includes a place of management, an office, a branch, a factory, a workshop, a mine, etc. Under Article 5(3), a building site or construction, installation or assembly project constitutes a PE only where such site or project continues for a period of more than six months.

The question before the Court was whether, under the DTAA, the office of the taxpayer at Bombay, could constitute a PE under Article 5(2), even though the construction/ installation activity was carried on for a period of less than six months, and therefore did not meet the test laid down in Article 5(3).

The Court held that the installation site or project should continue for a period of six months in order to constitute a PE under Article 5(3) and the same being a specific provision would prevail over the general provision of the Article 5(2). Therefore, no PE was constituted in case of the taxpayer in the years under question under Article 5(2), since the duration test prescribed in Article 5(3) was not met.

Comments: In this ruling, the Court has affirmed the principle that specific provision should override the general provision and since duration test is prescribed for an installation project, etc., and PE cannot be constituted merely because a project/ site office which is a fixed place, is maintained in India for the purpose. This ruling is consistent with the approach of the OECD and reaffirms the principle laid down by the AAR earlier in the cases of *Cal Dive Marine Construction (Mauritius) Ltd. 315 ITR 334* and *Hyosung Corporation: 314 ITR 343*.

Payment for license of software is royalty

The AAR has, in the case of *Millenium IT Software: AAR 835 of 2009*, held that payment for right to use software would be in the nature of royalty and liable to tax in India.

The applicant, a tax resident of Sri Lanka, entered into a Software License and Maintenance Agreement (SLMA) with Indian Commodity and Exchange Limited (ICEL). Under the agreement, the applicant allowed ICEL to use the software product called 'Licensed Programme' owned by it. The Licensed Programme was to be developed and installed into the computers designated by ICEL as envisaged in the agreement. In addition to the software, the applicant was also required to provide training to ICEL and after installation, was to provide maintenance and support services. The license to use the software was for a period of 4 years and thereafter, it had to be renewed as per agreement between parties. The main issue before the AAR was whether such payment for implementation and maintenance of software would be taxable as royalty in India, particularly in view of the provisions of the DTAA between India and Sri Lanka.

The AAR while holding that the payment for purchase of software was payment for use of intellectual property and not for the purchase of goods, observed as follows:

- All or any rights in respect of the copyright whether under the DTAA or the Income Tax Act should be held to include the grant of license; relying on the decision of the Delhi Tribunal in the case of *Gracemac and Microsoft,* it could be said that even grant of one right in respect of a copyright or work would amount to transfer or the use of copyright;
- It is not relevant to determine what rights the customer will enjoy after having paid for the computer program; the customer did get the right to use the copyright; if the customer had used the computer program without paying for it, he would have been sued for copyright infringement;
- The earlier decision of AAR in the case of *Dassault Systems,* that if the grant of license is non- exclusive and confined to the use purely for in-house internal purpose, the use of software will amount to the use of copyrighted article and not the use of copyright in the article, was not correct. Further, in that case, the fact pattern was different since there it was found that the applicant was marketing licensed software products through distribution channels and no rights in relation to copyright had been transferred nor any right of using the copyright as such had been conferred on the licensee.

  Further the definition of royalty, including use of copyright, was also not dealt with specifically in that case. It was observed that, the enjoyment or some of all rights, which copyright owner has, is necessary to trigger the royalty definition.
- The ruling of the Supreme Court in the case of *Tata Consultancy Services* could not help the case of the applicant since mere fact that the customs law or sales tax law deems it to be goods does not change the inherent character of the

software, so as to consider licensing of software as purchase of goods for income-tax purpose as well.

- Under the Copyright Act 1957, the license granted by the applicant is recognized and is a known mode of exploitation of copyright. The applicant has not parted with its title over the copyright in the software. It has conveyed to another, right to use the software over which it has a copyright. The right of the use of software, thus given, involves the right to use the copyright. The user of the software created, over which copyright is acquired cannot be divorced from the use of the copyright itself. When that right of the user is given, the right to use the copyright is also given.
- Under the Income Tax Act read with the Copyright Act, there is no distinction between copyright and copyrighted article. The rights granted for use of a copyrighted article for a consideration would also be license by the owner of the copyright though limited in nature, and limited to the use of other contracting party alone, without entitling the grantee to further exploit the copyright.

Comments: The AAR, while holding that payment for use of software is royalty, seem to have equated 'copyright' with an 'article' in respect of which there is a copyright. It has proceeded on the premise that consideration for all or any rights whatsoever in an article in which a copyright exists, must be considered as consideration for rights in relation to the copyright. If that were to be the case, then purchase of a music CD should also result in payment of royalty by the buyer, because the buyer only is granted the limited right to listen to the CD and is prohibited to make copies of it for commercial use. The position in law as laid down by the Special Bench in the case of *Motorola: 95 ITD 269* appears to have been unsettled by this ruling, which is also contrary to the OECD's position on the issue. What is even more unfortunate is that the AAR decided not to follow its earlier ruling in Dassault's case and took a different view of the matter. We shall have to wait for decision of a higher forum to have some certainty on this issue.

Taxability of broadcasting and advertising revenues of foreign company

The Delhi Bench of the Tribunal, in the case of *Nimbus Sport International PTE Ltd. v DIT: 2011-TII-178-ITAT-DEL-INTL,* has ruled on the taxability of income derived by a foreign company from live broadcast of matches and advertisement revenues earned from Indian companies.

The taxpayer, a company incorporated in Singapore, was a joint-venture between two independent unrelated foreign companies. It entered into a contract with Prasar Bharti for telecast of live cricket matches. The taxpayer was to produce for broadcasting, live television signals of international quality, meeting the contract specifications. Thus, the primary activity of the taxpayer was to provide the feed to Prasar Bharti for relaying it further.

The contention of the taxpayer was that it did not have a Permanent Establishment (PE) in India since it did not carry out any activities from any fixed place of business in India. Further, the income received by the taxpayer was not in the nature of "fee for technical services" under the India Singapore Treaty since it did not 'make available' any technology to Prasar Bharti.

The taxpayer also derived income from Indian companies who issued advertisements during the course of India-Sri Lanka cricket matches, which were played in Sri Lanka.

The issue before the Tribunal was in relation to taxation in India of the aforesaid broadcasting as well as advertisement incomes derived by the taxpayer.

On taxability of broadcasting revenues, the Tribunal held as follows:

- Services of production and generation of live television signal rendered by the taxpayer, were in the nature of technical services. The taxpayer made available to Prasar Bharti, the services which are based on technical knowledge, experience, skill know-how and processes which also consisted of development and transfer to Prasar Bharti of technical plan, and design relating to production of and generation of live television signal. Therefore, consideration received by the taxpayer was fee for technical services, both under the Income Tax Act as well as under the relevant DTAA.
- Regarding the issue of PE, the Tribunal held as follows:
  - The contract was signed by the taxpayer at Singapore and activities relating to this contract were carried out from Singapore.
  - There is no evidence on record that the management and control of the affairs of the taxpayer company were not situated in Singapore. The holding of one board meeting in India, will not lead to the conclusion that, during the years under consideration, the control and management of the affairs of the taxpayers was situated only in India.
  - The residence of two non-resident directors in India will also not make the company a resident in India.
  - Regarding constitution of service PE, the taxpayer had put on record evidence to establish the fact that the TV crew and the technical personnel travelling to India did not stay in India for a period of more than 90 days. Therefore, the taxpayer did not have a service PE in India.

Regarding the issue of taxability of advertising revenue, it was held as follows:

- Income from advertising did not accrue or arise in India since the taxpayer did not have a PE in India, the matches were not played in India and the telecast of matches was not in India.

- Any indirect benefit that may have been derived by some of the Indian viewers cannot be held to be incremental value for Indian companies on assumption.
- The dominant object of payment by Indian companies to taxpayer was to advertise their products in foreign territory in foreign cricket matches and the dominant object emerges to be advertisement in foreign territories. Therefore, the advertising revenue was not attributable to India and in the absence of any PE, this revenue could not be taxed in India.

Comments: Under the India Singapore DTAA, technical services are defined, *inter alia,* to mean services which 'make available' the technology to the recipient. The Tribunal, while holding that production and broadcasting of live cricket matches, would be in the nature technical services under the India Singapore DTAA, seems to have not appreciated the distinction between making available the technology to the recipient and using technology to provide a service to the recipient. The ratio laid down in this ruling is also contrary to a number of other rulings of Courts, AARs and Tribunals, on the concept of 'making available' the technology, wherein it has been consistently held that technology can be considered as made available only where it enables the recipient to independently apply the technology *de hors* the service provider.

Taxability of income from installation project

In the the case of *Joint Stock Company Zangas: 2011-TII-176-ITAT-Ahm-Intl,* before the Ahmedabad Bench of the Tribunal, the taxpayer was a Russian company which had expertise in laying and installation of the Liquid pipelines. GAIL had awarded a contract for PDPL project to a consortium led by one KPTL and the taxpayer. The taxpayer, in its revised return, took the position that the receipts from the said project were taxable in India as "fee for technical services" @ 10% as per the provisions of Article 12 of the India Russia DTAA. The Revenue treated the receipts as income from business attributable to PE of the taxpayer in India and taxed the same @ 40%.

The Tribunal held as follows:

- From the perusal of the scope of work of the taxpayer, it could be seen that the activities included were regarding design and engineering of various aspects that is civil, electrical, structural, cathodic protection, equipment design engineering, pipeline crossing and instrumentation. The taxpayer is required to provide technical services and is also required to depute expert for site review of implementation by KPTL. Based on these facts, it could not be said that the taxpayer is doing construction work or the consideration received by the taxpayer is on account of construction activity and hence the aforesaid services did not fall within the exclusion provided in Explanation 2 to Section 9(1)(vii) of the Income Tax Act, 1961 which defined "fee for technical services".
- Regarding the applicability of Section 115A, the only exception was regarding income which is referred to in sub-section (1) of Section 44DA. Section 44DA is applicable where the contract in respect of which technical service fee paid the taxpayer is "effectively connected" with a PE, through which such foreign company was carrying on its business in India. In the present case, the receipts in question were in relation to PDPL project and it cannot be said to be effectively with a PE which existed in relation to another project of the taxpayer.

Comments: The Tribunal, based on the scope of work of the taxpayer, concluded that the same could not be treated as a construction project and had to be treated as 'technical services'. It is pertinent to note that Article 7 of the India Russia DTAA does not have a force of attraction clause and income derived by a foreign company, from another State, in which it has a PE, shall not be attributed to that PE unless the PE has played any role in earning of that income. The ruling reaffirms the principle that unless the income, in the nature of technical services fee or royalty, is effectively connected with a PE, such income cannot be taxed on net basis. The same principle should hold true even where the treaty provides for a force of attraction clause.

CUSTOMS/ CENTRAL EXCISE/ SERVICE TAX

Procedure for electronic filing/ payment of Central Excise and Service tax returns

A comprehensive instructions outlining the procedure for electronic filing of Central Excise duty and Service Tax returns and electronic payment of taxes under Automation of Central Excise and Service Tax Return. The said instructions outline the registration process for new assessees, existing assessees, non–assessees and for Large Taxpayers Unit assessees, steps for preparing and filing of return, use of XML Scheme for filing dealer's return, procedure for obtaining acknowledgment of e-filed return, procedure for e-payment etc.

(Source: Notification no. F. No. 201/10/2011-CX 6 dated September 28, 2011)

Power of adjudication of Central Excise Officers

The monetary limits for adjudicating cases (both extended period and others) under Section 11A and 33 of Central Excise Act, 1944 has been revised and a uniform monetary limit for both Additional commissioners and Joint Commissioners has been prescribed. The cases involving amount of duty shall be above ₹ 5 Lacs and up to ₹ 50 Lacs shall now be heard by Additional commissioners/ Joint Commissioners.

(Source: Notification no. F. No. 208/25/2011-CX-6 dated October 25, 2011)

Implementation of 'On Site Post Clearance Audit'

The Central Board of Excise & Customs has introduced the scheme of 'On Site Post Clearance Audit' (OSPCA) at premises of importers and exporters to complement the legislative change resulting in self-assessment of import/ export duties *vide* the Finance Act, 2011.

OSPCA allows verification of self assessment on periodic basis by scrutiny of relevant business records at the importers or exporters premise.

It has been introduced in order to dispense with Post Clearance Compliance Verification (PCCV) which is a transaction based check and does not provide the opportunity to certify or scrutinize the correctness of declarations. Therefore, importers or exporters can now benefit from reduced clearance time and the Customs can also do a comprehensive check to ensure that imports or exports conform to the declarations.

To begin with, the Board has operationalized OSPCA, w.e.f. October 1, 2011 only for importers registered under the Accredited Client Programme (ACP) on an annual basis for which the ACP importers have been segregated as –

(i) Those registered with LTU Commissionerates –to be audited by the audit wing of LTU concerned;

(ii) Multi Location Units- to be audited by the Central Excise Commissionerates with the nodal Commissionerate being the one having jurisdiction over the registered/ head office of the ACP importer; and

(iii) Other ACP importers- to be audited by the Central Excise Commissionerate having jurisdiction over the head office/ registered office of the ACP importer.

In order to avoid duplication of exercise and reduce interface, OSPCA will be done simultaneously with Central Excise and Service Tax and for ACP importers to be audited under this scheme, PCCV or PCA at the Customs Houses will be dispensed with.

(Source: Circular no. 47/2011- Customs dated October 21, 2011)

Regarding mandatory e-filing of Central Excise Returns in ACES

It has been made mandatory for the assessees to submit the prescribed Central Excise Returns electronically w.e.f. 1st day of October, 2011. In this regard, the Central Excise (Fourth Amendment) Rules, 2011 has been issued *vide* Notification No. 21/2011-CE (NT) dated September 14, 2011, amending Rule 12 and Rule 17 of the Central Excise Rules, 2002. Similarly, the CENVAT Credit (Fourth Amendment) Rules, 2011 has been issued *vide* Notification No.22/2011-CE (NT) dated September, 14, 2011, amending Rule 9A of the CENVAT Credit Rules, 2004. The above mentioned changes will come into effect on October 1, 2011.

(Source: Notification No. F. No. 201/10/2011-CX.6 dated September 15, 2011)

RBI/ FEMA

Foreign Direct Investment in pharmaceuticals sector

Till date Foreign Direct Investment (FDI), up to 100%, was permitted in the pharmaceuticals sector under the automatic route. The Government of India has reviewed the extant policy on FDI and has decided as under:

- ✧ FDI, up to 100%, under the automatic route, would continue to be permitted for greenfield investments in the pharmaceuticals sector.
- ✧ FDI, up to 100%, would be permitted for brownfield investments (i.e. investments in existing companies), in the pharmaceuticals sector, under the Government approval route.

(Source: Press Note 3 of 2011 series dated November 8, 2011)

Payment of Cheques/ Drafts/ Pay Orders/ Banker's Cheques

It has been brought to the notice of Reserve Bank by Government of India that some persons are taking undue advantage of the practice of banks of making payment of cheques/ drafts/ pay orders/ banker's cheques presented within a period of six months from the date of the instrument as these instruments are being circulated in the market like cash for six months.

Reserve Bank is satisfied that in public interest and in the interest of banking policy it is necessary to reduce the period within which cheques/ drafts/ pay orders/ banker's cheques are presented for payment from six months to three months from the date of such instrument.

Banks are to ensure strict compliance of these directions and notify the holders of such instruments of the change in practice by printing or stamping on the cheque leaves, drafts, pay orders and banker's cheques issued on or after April 1, 2012, by issuing suitable instruction for presentment within the period of three months from the date of the instrument.

(Source: RBI circular No. DBOD.AML BC.No.47/14.01.001/2011-12 dated November 4, 2011)

Issue of Demand Drafts for ₹ 20,000/- and above

Instruments with account payee crossing are required to be credited to the payee's account and not paid in cash over the counter. However, some unscrupulous elements use demand drafts without any crossing for transfer of money as an alternative to settlement through cash.

In order to address the regulatory concerns that have arisen in this context, banks have been advised to ensure that demand drafts of ₹ 20,000/- and above are issued invariably with account payee crossing.

(Source: RBI circular No. DBOD.BP.BC. No. 49/21.01.001/2011-12 dated November 4, 2011)

Foreign Direct Investment – Transfer of Shares

As a measure to further liberalize and rationalize the procedures and policies governing FDI in India, it has now been decided to allow the following without the prior approval of the Reserve Bank of India:

A. Transfer of shares from a Non Resident to Resident under the FDI scheme where the pricing guidelines under FEMA, 1999 are not met provided that :-

i. The original and resultant investment are in line with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation, etc.;

ii. The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations / guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/ substantial acquisition / SEBI SAST, buy back); and

iii. Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations / guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

B. Transfer of shares from Resident to Non Resident:

i) where the transfer of shares requires the prior approval of the FIPB as per the extant FDI policy provided that:

a) the requisite approval of the FIPB has been obtained; and

b) the transfer of share adheres with the pricing guidelines and documentation requirements as specified by the Reserve Bank of India from time to time.

ii) where SEBI (SAST) guidelines are attracted subject to the adherence with the pricing guidelines and documentation requirements as specified by Reserve Bank of India from time to time.

iii) where the pricing guidelines under the Foreign Exchange Management Act, 1999 (FEMA) are not met provided that:-

a) The resultant FDI is in compliance with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation, etc.;

b) The pricing for the transaction is compliant with the specific/ explicit, extant and relevant SEBI regulations/ guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/ substantial acquisition/ SEBI SAST); and

c) Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/ guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

iv) where the investee company is in the financial sector provided that:

a) NOCs are obtained from the respective financial sector regulators/ regulators of the investee company as well as transferor and transferee entities and such NOCs are filed along with the form FC-TRS with the AD bank; and

b) The FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc., are complied with.

3. Necessary amendments to the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2000 notified *vide* Notification No. FEMA 20/2000-RB dated May 3, 2000 are being notified separately.

(Source: RBI A.P. (DIR Series) Circular No. 43 dated November 4, 2011)

Foreign investment in India by SEBI registered FIIs in other securities

On a review of A.P. (DIR Series) Circular no. 55 dated April 29, 2011 and A.P. (DIR Series) Circular no. 8 dated August 9, 2011 it has been decided as under:

i) FIIs would also be allowed to invest in non-convertible debentures / bonds issued by Non-Banking Financial Companies categorized as 'Infrastructure Finance Companies'(IFCs) by the Reserve Bank of India within the overall limit of USD 25 billion.

ii) The lock-in-period of three years for FII investment stands reduced to one year up to an amount of USD 5 billion within the overall limit of USD 25 billion. This lock-in-period shall be computed from the time of first purchase by FIIs.

iii) The residual maturity of five years and above stipulated would now onwards refer to the original maturity of the instrument at the time of first purchase by an FII.

iv) The above changes at (i) and (iii) above would also apply for QFI investment in units of Mutual Fund debt schemes within the limit of USD three billion.

(Source: RBI A.P. (DIR Series) Circular No. 42 dated November 3, 2011)

Export of Goods and Software - Realisation and Repatriation of export proceeds – Liberalisation

As per A.P. (DIR Series) Circular No. 47 dated March 31, 2011 enhancing the period of realization and repatriation to India of the amount representing the full export value of goods or software exported, from six months to twelve months from the date of

export. This relaxation was available up to September 30, 2011 which has now been extended till September 30, 2012.

The provisions in regard to period of realization and repatriation to India of the full export value of goods or software exported by a unit situated in a Special Economic Zone (SEZ) as well as exports made to warehouses established outside India remain unchanged.

(Source: RBI A.P. (DIR Series) Circular No. 40 dated November 3, 2011)

Implementation of Green Initiative of the Government

As part of the 'Green Initiative' of the Government, NBFCs are requested to take proactive steps by increasing the use of electronic payment systems, elimination of post-dated cheques and gradual phase-out of cheques in their day to day business transactions. These will result in more cost-effective transactions and faster and accurate settlements.

(Source: RBI Circular No. DNBS(PD).CC. No 248/October 3, 01 /2011-12 dated October 28, 2011)

CORPORATE LAWS/ SEBI

ICAI issues guidelines for conversion of CA firms into LLPs

Institute of Chartered Accountants of India (ICAI) has laid down the guidelines for conversion of Chartered Accountants (CA) firms into Limited Liability Partnership (LLP) and constitution of separate LLPs by the practicing CAs have been finalized which are applicable for conversion of CA firms into LLPs or formation of new LLPs by the members in practice of the Institute subject to the provisions of the LLP Act, 2008 and Rules & Regulations framed there under.

Further, for the purpose of registration of LLP with ICAI under Regulation 190 of the Chartered Accountants Regulations, 1988, the partners of the firm shall apply in ICAI Form No. '117' and the ICAI Form No. '18' along with copy of name registration received from the Registrar of LLP and submit the same with the concerned Regional office of the ICAI. These Forms shall contain all details of the officers and other particulars as called for together with the signatures of all partners or authorized partner of the proposed LLP.

Subject to the clarification from Ministry of Corporate Affairs (MCA), wherever the existing partnership firm have been appointed as statutory auditor of any company after following the due procedure under the Companies Act, 1956 and the said firm with the same partners is converted/ formed into LLP, then the same FRN will continue and the Board of Directors of the Company may take on record the conversion/formation of the CA firms into LLP and the new LLP shall be deemed to be an Auditor of the said company for the said financial year in terms of Section 58(4) of the LLP Act, 2008.

These Guidelines have come into force w.e.f. November 4, 2011

(Source: ICAI Guidelines No. 1-CA (7)/03/2011, dated November 4, 2011)

Companies (Filing of documents and forms in Extensible Business Reporting Language) Rules, 2011

MCA has notified the rules pertaining to filing of documents and forms in extensible business reporting language (XBRL), which have come into effect from October 6, 2011.

(Source: F. No. 5/18/2005-CL-V dated October 5, 2011)

Registration of Companies or LLP having one of their objectives to do business of architects

As per Sections 36 and 37 of the Architects Act, 1972 as well as rules and regulations framed thereunder only an architect registered with the Council of Architecture or a firm of architects (a partnership firm under the Partnership Act, 1932, comprising of all registered architects) can represent itself as an architect or use the title and style of architect of practicing the profession of an architect in India with the exception of landscape architect and naval architect. The matter is under examination in consultation with the Department of Legal affairs. Hence, Company/ LLP having one of the objectives of to carry on business of the architects cannot be incorporated.

(Source: MCA General Circular No. 17/165/2011-CL-V (Pt.) dated October 10, 2011)

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and consequential amendments to Clause 35 of the Equity Listing Agreement

In exercise of the powers conferred by Section 30 of the Act, the Securities and Exchange Board of India (SEBI) has framed the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("the SAST Regulations 2011"), which have been notified on September 23, 2011.

Consequential amendments have been carried out in Clause 35 of the Listing Agreement, pursuant to SAST Regulations 2011, whereby the listed companies are required to file with exchange the shareholding pattern, separately for each class of equity shares/ security in the formats specified in this clause, in compliance with the following timelines, namely :

a. One day prior to listing of its securities on the stock exchanges.

b. On a quarterly basis, within 21 days from the end of each quarter.

c. Within 10 days of any capital restructuring of the company resulting in a change exceeding +/-2% of the total paid-up share capital.

(Source: SEBI Circular No. SEBI/CFD/DCR/SAST/ 1/2011/09/23 dated September 23, 2011)

Filing Offer Documents with SEBI under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

As a green initiative and considering the availability of the soft copies of the offer documents on the website of SEBI, it has been decided to reduce the number of copies of draft/ final offer documents being submitted to SEBI and the concerned merchant bankers on or after September 28, 2011. SEBI has prescribed that three copies of the draft offer document shall be submitted to the relevant office of SEBI and one copy of the offer document shall be filed with the relevant office of SEBI.

(Source: SEBI Circular No. CIR/CFD/DIL/6/2011 dated September 28, 2011)

Guidelines for Issue and Listing of Structured Products/ Market Linked Debentures

SEBI has noticed a variety of hybrid securities that combine features of plain vanilla debt securities and exchange traded derivatives are being issued through private placements and listed on stock exchanges.

In view of the fact that such securities are different in their nature and their risk return relationship, SEBI has specified additional disclosures and other requirements in offer documents for issue of structured products/ market linked debentures that seek listing on stock exchanges. The conditions prescribed, inter alia, are that the issuer should have a minimum networth of ₹100 crores, minimum subscription should not be less than ₹ 10 lakhs, credit rating by a registered credit rating agency, etc.

(Source: SEBI Circular No. Cir. /IMD/DF/17/2011dated September 28, 2011)

Clarification on 100% promoter holding in demat form

In furtherance to SEBI circular SEBI/Cir/ISD/3/2011 dated June 17, 2011 regarding 100% promoter holding in demat form. SEBI has extended the current deadline by one quarter i.e. quarter ending December 2011.

(Source: SEBI Circular No. SEBI/Cir/ISD/05/2011 dated September 30, 2011)

Revisions in FII Investments norms in long term infrastructure bonds

Government of India *vide* its press release dated September 12, 2011 modified the long term infrastructure limits as specified in SEBI circular IMD/FII&C/5/2011 dated March 31, 2011 and SEBI circular IMD/DF/14/2011 dated August 9, 2011 and has prescribed the following bifurcation of the infrastructure limits of USD 22 billion:

1. **One year lock in and one year residual maturity**

   USD 5 billion is earmarked for FII investments in those bonds that have an initial maturity of 5 years or more at the time of issue and a residual maturity of 1 year at the time of first purchase by an FII. These investments are subject to a lock in period of 1 year wherein FIIs can trade amongst themselves but cannot sell to domestic investors during lock in period.

2. **Three year lock in and three year residual maturity**

   The remaining USD 17 billion limits available to FIIs can be invested in long term infra bonds which have an initial maturity of 5 years or more at the time of issue and residual maturity of 3 years at the time of first purchase by an FII. These investments are subject to a lock in period of 3 years wherein FIIs can trade amongst themselves but cannot sell to domestic investors during the lock in period.

(Source: SEBI Circular No. CIR/IMD/FIIC/18/2011 dated September 30, 2011)

Amendments to the Equity, IDR and SME Listing Agreements

With the objective to enhance the quality of disclosures made by listed entities, certain amendments have been carried out to the Equity Listing Agreement, Model Listing Agreement for Indian Depository Receipts and Model SME Equity Listing Agreement.

Some of the amendments are as under:

(a) Amendments to Clause 41 - Disclosure of quarterly financial results

   i) In order to give a better comparative picture of the quarterly financial results, listed entities shall disclose figures in respect of immediately preceding quarter as well in addition to the existing requirements.

   ii) Listed entities shall also submit the last quarter results along with the audited annual results.

(b) Amendments to Clause 41 - Submission of financial results

   Submission of unaudited results shall be accompanied by the limited review report of the auditors.

(c) Amendments to Clause 32 – Mode of Supplying Annual Reports to Shareholders

As per the modification of SEBI Circular no. SEBI/CFD/DIL/LA/2/2007/26/4 dated April 26, 2007 and in line with the green initiative of MCA *vide* their circular dated April 29, 2011, it has been decided that instead of supplying complete and full annual reports to all the shareholders, listed entities shall supply:

   i) soft copies of full annual reports to all those shareholders who have registered their email addresses for the purpose;

   ii) hard copy of abridged annual reports to others and

   iii) hard copies of full annual reports to those shareholders, who request for the same.

(d) Insertion of Clause 35A - Disclosure of voting results by listed entities

Listed entities shall disclose their voting results in the prescribed format, to the exchanges and also place the same on their websites, within 48 hours from the conclusion of the concerned shareholders' meeting. To begin with, this requirement shall be applicable to top 500 listed entities based on market capitalization computed as on the date of this circular.

The above provisions listed in (a), (b) and (c) shall be applicable with effect from the quarter/financial year ending on December 31, 2011. Provisions of Para (d) shall be applicable for all the shareholders' meetings, for which notices are issued on or after January 01, 2012.

(Source: SEBI Circular No. SEBI/Cir/CFD/ DIL/7 /2011 dated October 5, 2011)

Uniform Know Your Client (KYC) Requirements for the Securities Markets

With a view to bringing about uniformity in the securities markets, SEBI has decided that the same KYC form and supporting documents shall also be used by all SEBI registered intermediaries. The format of the KYC form which has to be filled by an investor at the stage of opening the account while dealing with any of these intermediaries has been appended to this circular.

(Source: SEBI Circular no. MIRSD/SE/Cir-21/2011 dated October 5, 2011)

VAISH NEWS

Vaish advises acquisition by Briggs & Stratton International Holding B.V.

Premier Power Equipments and Products Private Limited ("Premier") is in designing, manufacturing and marketing of tillers, weeders, harvesters, transplanters, pumps and portable generators used primarily in agricultural applications throughout India.

Briggs & Stratton Corporation ("Briggs") headquartered in Milwaukee, Wisconsin, is the world's largest producer of gasoline engines for outdoor power equipment. Its wholly owned subsidiary Briggs & Stratton Power Products Group, LLC is North America's number one manufacturer of portable generators and pressure washers, and is a leading designer, manufacturer and marketer of lawn and garden and turf care through its Simplicity®, Snapper®, Ferris® , Murray® and Victa® brands. Briggs & Stratton products are designed, manufactured, marketed and serviced in over 100 countries on six continents. Currently, Premier uses Briggs & Stratton engines on its products and distributes Briggs & Stratton engines in India.

Vaish associates acted as legal adviser to Briggs and assisted the Company in acquiring 100% of the equity share capital of Premier from Car & General (Kenya) Limited and VAPA Limited @ $3 million approx. by conducting due diligence of Premier and drafting and negotiating related share purchase agreement and other transactional documents.

The Vaish team comprised of Hemant Puthran, Partner and Yatin Narang, Senior Associate.

Intellectual Property Rights

M/s Sohan Lal Nem Chand Jain v. Trident Group & Ors.

(Date of Judgment: October 3, 2011)

Sohan Lal Nem Chand Jain, a Partnership firm ('Plaintiff') is into the manufacturing of paper and stationery industry for its superior quality of paper and stationery under its well known trade mark 'LOTUS' since past 62 years.

The Trident Group and one of its group companies Trident Limited (formerly known as M/s Abhishek Industries Limited) ('Defendants') launched their copier paper under an identical trade mark 'LOTUS' in the year 2010.

The Plaintiff filed a civil suit against the Defendants before the Hon'ble Delhi High Court praying to restrain the infringement, passing off and dilution of its trade mark 'LOTUS' by the Defendants and also for payment of damages on account of the same.

While issuing summons in the suit and notice in the application for interim injunction filed by the Plaintiff the Hon'ble Court granted an ex-parte ad-interim injunction on April 27, 2010 in favour of the Plaintiff and against the Defendants from manufacturing, selling, distributing the photocopier or stationery items under the brand name 'LOTUS' or any other deceptively similar trademark separately or in any other form.

The Hon'ble High Court of Delhi confirmed the order dated April 27, 2010 and made it absolute on the following grounds:

- Plaintiff is a prior user of the trade mark 'LOTUS' with respect to stationery items mentioned in Class 16 much prior in time than the defendants;
- The trade mark 'LOTUS' of the Plaintiff has acquired unique goodwill and reputation and it has become a ***well known*** trade mark within the meaning of Section 2(zg) of the Trade Marks Act, 1999, and thus the same is entitled to protection under Section 29(4) of the Trade Marks Act, 1999;
- nature of goods are such and the trade channel through which the goods of the Plaintiff as well as that of the Defendants would be sold and marketed would be identical;
- Merely because defendants have a large network and have obtained various export orders the defendants cannot be permitted to dilute the trade mark of the Plaintiff;
- Copier paper and paper falls in Class 16 of the Fourth Schedule of the Trade Marks Rules, 2002 and that copier paper falls in the category of allied or cognate goods;

Vijay Pal Dalmia, Partner along with Associates Vikas Mishra and Pavit Singh Katoch from our chamber represented the plaintiff.

Competition Law

Vaish represents Modi Tyres before CCI

The Competition Commission of India (CCI) has removed the name of Modi Tyres from the inquiry proceedings in a complaint filed by the All India Tyre Dealers Federation against the major tyre manufacturers for creating a cartel.

M. M. Sharma, Head -Competition Laws Practice along with Associate Vaibhav Choukse from our chamber represented Modi Tyres.

VAISH ACCOLADES

- **Ajay Vohra** and **Rupesh Jain** attended the IFA Congress in Paris from September 11-16, 2011.
- **Ajay Vohra** moderated the panel discussion on October 15, 2011 at the International Tax Conference organized by ASSOCHAM on the subject *"Panel discussion on recent judicial trends"*. **Rupesh Jain** was panelist at the said session.
- **Bomi F. Daruwala** and **Hitender Mehta** represented the firm at–
  - the World Law Group Fall Conference held at Istanbul, Turkey from October 27 to 30, 2011.
  - ***Turkiye World Trade Bridge*** organized by the Confederations of Businessmen and Industrialists of Turkiye (TUSKON) from October 24-30, 2011 at Istanbul, Turkey.

Seen in picture (L to R) : Bomi Daruwala, Mehmet Ali Seker, Vice President, Indo Turkish Business Association and Hitender Mehta

- **Gautam Chopra,** Principal Associate (Tax Group) contributed an article titled *"INDIAN GAAR – Need To Adopt Best Practices - Tax - India"* published in the backgrounder of ASSOCHAM's 8th International Tax Conference held at New Delhi on October 14-15, 2011.
- **Hitender Mehta** was invited to address –
  - On the topic *"SMEs Compliance Management"* at Punjab State Conference organized by NIRC of ICSI at Ludhiana on November 5, 2011.
  - On the topic *"SEZ Units' Operational Issues"* at a meeting organized by Mahindra World City SEZ, Jaipur on September 29, 2011.
  - On the topic *"Opportunities in SEZs"* at a seminar organized jointly by ASSOCHAM & Export Promotion Council for EOUs and SEZs (EPCES) at Vishakhapatnam on September 22, 2011.
- **Pratyush Khurana,** Associate (Gurgaon Corporate Group) contributed an article titled *"Letter of Comfort –Is it a mere expression of goodwill?"* published in the "Corporate Professionals Today", a Taxmann publication [2nd edition, October 2011]
- **Puneeta Kundra,** Principal Associate (Tax Group) contributed an article titled *"Controlled Foreign Corporation Rules –Threat or Opportunity for M&A Deals"* published in the backgrounder of ASSOCHAM's 8th International Tax Conference held at New Delhi on October 14- 15, 2011.
- **Rupesh Jain** was invited to address at the two day Law Asia Conference on October 10-11, 2011 in Seoul, South Korea on the subject *"Indian Income-tax issues"*.
- **Satwinder Singh** was invited to address –
  - On the topic *"Practical Aspects of Changes in FDI Policy and ECB Guidelines"* at the West Delhi Study Group of NIRC of ICSI on October 22, 2011.
  - On the topic *"Legal and Tax Issues including Drafting Considerations"* at a Conference on "Private Equity: Structuring PE/VC Deals" organised by PHDCCI at New Delhi on November 4, 2011.
  - On the topic *"Critical Aspects/ Compliance Issues of Corporate Restructuring"* at Punjab State Conference of NIRC of ICSI at Ludhiana on November 5, 2011.

CSR INITIATIVES

Health Camp

Dr. Meera Malhautra, Physician made a routine visit on October 18, 2011 organized at Tarang Balwadi – Pahadi Sambhav Camp and Rampat Farm, Mehrauli, Delhi. Over 103 children were examined. Medicines were given to sick children. Women were also examined at Tarang Farm centre.

Sports Day for adolescent girls at Azad Sports Complex, Jaunapur, Mehrauli, by Lady Irwin College, Delhi University

A Sports function for adolescent girls at Azad Sports Complex, Jaunapur, Mehrauli, was organized by Lady Irwin College, Delhi University. The event was a culmination of 8 field visits by students of Masters in Development Communication & Extension, Lady Irwin College. As a part of their curriculum college girls are exposed to social work in slums and villages of metro. Young passionate Irwinites discussed various reproductive and child health subjects with the adolescent girls of the slums.

Around 200 girls from Pahadi Sambhav camp, Shanti camp, Bhimbasti and Jaunapur participated in the event. Various sports events like – obstacle race, flat relay race, lemon race, ball relay race, clap race, 3 leg race, musical chair, P.T., etc. were organized.

Mr. Govardhan, Supervisor, Azad sports, helped in conducting the games with rules and regulations. Mrs. Chaman Ambawata, Municipal Counselor, Block Jaunapur, Mr. Ramesh Ambawata, Dr. Anjali Kapila, Dr. Archana from Lady Irwin College and Mrs. Manju Vaish, encouraged the girls to come forward to pursue sports.

Vaish Trust Film Screening

Trust Films completed this year, were screened at Vaish Associates' office at Mohandev Building, Tolstoy Marg, Delhi, on October 15, 2011. The two films – "Ek Pehal' and "Chetna Ki Lehar" are based on the various projects undertaken by the trust. Mr. M. M. Sharma announced to financially support trust project Dalia and Scholarship program.

IMPORTANT DATES WITH REGULATOR (S)

COMPLIANCE CHECKLIST

November-December, 2011

Sr. No	PARTICULARS	Sections/ Rules Clauses, etc	Acts/ Regulations, etc.	Compliance Due Date	To whom to be submitted
A.	**INCOME TAX**				
1	Deposit TDS from Salaries paid for November, 2011	Section 192	Income Tax Act, 1961	December 7, 2011	Income Tax Authorities
2	Deposit TDS from Contractors Bill, Payment of Commission or Brokerage, Professional/Technical Services Bills/ Royalty made in November, 2011	Section 194-H Section 194-I Section 194-C Section 194-J	Income Tax Act, 1961	December 7, 2011	Income Tax Authorities
3	Payment of advance tax in case of corporate assesses –Up to 75% of advance tax payable	Section 208	Income Tax Act, 1961	December 15, 2011	Income Tax Authorities
B.	**CENTRAL EXCISE & SERVICE TAX**				
4	Pay Service Tax in Form TR-6, collected during November, 2011 by persons other than individuals, proprietors and partnership firms	Rule 6	Service Tax Rules, 1994	December 5, 2011 (December 6, 2011 in case of e-payments)	Service Tax Authorities
5	Pay Central Excise duty on the goods removed from the factory or the warehouse during November, 2011	Rule 8	Central Excise Rules, 2002	December 5, 2011 (December 6, 2011 in case of e-payments)	Excise Authorities
6	Submission of CENVAT Return for November, 2011	Rule 9(7)	CENVAT Credit Rules, 2004	December 10, 2011	Excise Authorities
C.	**LABOUR LAWS**				
7	Payment of monthly Employees' Provident Fund (EPF) dues	Para 38	EPF Scheme, 1952	Within 15 days from close of every month	Provident Fund Authorities
8	Monthly return of Provident Fund for the previous month w.r.t. international workers	Para 36	EPF Scheme, 1952	Within 15 days from close of every month	Provident Fund Authorities
9	Monthly return of Provident Fund for the previous month (other than international workers)	Para 38	EPF Scheme, 1952	Within 25 days from close of every month	Provident Fund Authorities

Seminar on Opportunities in SEZs (September 22, 2011) at Vizag: Seen (L to R)–Hitender Mehta, Pola Bhaskar, Dy. Commissioner–Commercial Taxes; Vinay Sharma, Co-Chairman, ASSOCHAM SEZ Council and M. S. Rao, Zonal DC, VIZAG SEZ (lighting the lamp)

EPCES Training Program for ITS Probationers (November 9, 2011) at New Delhi: Hitender Mehta addressing the Indian Trade Services Probationers. Seen (L to R) O. P. Kapoor, Dy. Director General EPCES, Sukhbeer Singh, Chairman, Regional Governing Council EPCES (NSEZ), Ajay Nijhawan, Convenor, EPCES Developers' Panel.

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