



# NEWSLETTER

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## 1 Executive Summary

### ■ Accounting and Auditing

- Expert Advisory Opinion on treatment of tax expense on Deemed Income under section 56(2)(viiia) of the Income-tax Act, 1961 arising on purchase of investments below fair price.
  - As per the opinion, the tax expense incurred under the above section of the Income-tax Act will not be considered as the cost of Investment.
  - Such payment of tax will be treated as normal tax expense and will be shown in profit and loss account in the year in which it is incurred.

### ■ Company Law

- Amendment made to Schedule XIV to The Companies Act, 1956 to specify depreciation rates for assets used by Mineral oil concerns and Rigs
- Rules for issues of preferential allotment of shares by Unlisted Public Companies have been amended to include hybrid instruments and also to restrict issue of convertible instrument to 49 persons
- The foreign exchange difference (including due to mark to market) on Long Term Foreign Currency Monetary item can be either adjusted to the fixed asset and depreciated over the balance life of the asset or amortized over the period of the Long Term Foreign Currency Monetary items. This treatment is permitted in respect of exchange difference generated till 31<sup>st</sup> March 2020.
- New Cost Accounting Records Rules announced for certain industries.
- Time limit for filing of DIN -4 extended up to 29<sup>th</sup> February 2012
- Company Law Settlement Scheme, 2011 extended up to 15<sup>th</sup> January, 2012
- It has now been clarified that video conferencing and e-voting will be optional earlier it was mandatory from second year.

### ■ Service Tax

- Documents to be submitted for application of registration for paying service tax have now been prescribed
- Deferment of applicability of Service Tax on Railway freight up to April 2012 for certain specified goods
- Extension of the date of submission of half yearly returns for Service Tax till 20<sup>th</sup> January 2012.
- The Central Government has notified to exclude 18 taxable services, specified in clause (105) of section 65 of the Finance Act, received by an

exporter of goods and used for export of goods, from the whole of the service tax

- Clarification on levy of service tax on distributors/sub-distributors of films & exhibitors of movie
- Government has proposed to introduce a simplified scheme for electronic refund of service tax to exporters, on the lines of duty drawback.

■ **FEMA**

- Delegation of power of compounding the contravention of specified matters/ values to the Regional offices of Reserve Bank of India and standardization of information to be submitted alongwith application.
- Foreign Direct Investment in pharmaceutical sector amended.
- Amendment in the conditions on Issue of Equity / Preference Shares by conversion of payables of imports of capital goods and pre-incorporation expenses.
- Non-resident lenders permitted to hedge their currency risk in respect of ECBs denominated in INR, with authorised dealers in India.
- Keeping in view the developments in the foreign exchange market, amendments have been made to conditions for booking/ cancellation of forward contracts to hedge currency risk.

■ **SEBI**

- In respect of public issues of debt securities, no persons connected with the issue shall offer any incentive to any person for making an application for allotment of the specified securities.

■ **NBFC**

- Introduction of new category of NBFC- Micro finance Institutions.
- NBFC's can enter into credit default swaps only as users.

■ **Income Tax**

- Case Laws
  - Capital gain arising on sale of shares in an Indian company by a Mauritius company would not be taxable in India in view of India-Mauritius Tax Treaty [Ardex Investments Mauritius Ltd. (AAR Ruling)]
  - Payment of Non-compete fees is to be treated as capital expenditure as the payment was made to eliminate competition in the business which

the assessee had acquired [Pitney Bowes India Pvt. Ltd. vs Commissioner of Income Tax ( ITA no 784 of 2011)].

- Payment made for use of an asset without having control over the asset is not liable to TDS u/s. 194I. [Chattisgarh State Electricity Board vs. ITO (ITAT Mumbai) (ITA Nos. 20 TO 23/BLPR/2010)]
- Mere opinion of the Revenue Audit party cannot form the basis for reopening the assessment especially when the AO had categorically come to the conclusion that the objection of the audit party was not valid [Cadila Healthcare Ltd vs. ACIT (Gujarat High Court) (Special Civil Application no. 15566 of 2011)]
- Non gratuitous loan or advance given to a substantial shareholder by the company in return to an advantage conferred upon the company by the share holder does not come within the purview of s. 2(22)(e). [ Pradip Kumar Malhotra v/s. CIT (Calcutta High Court) ( ITA no 219 of 2003) ]

▪ **OTHERS**

- Enhancement in the PPF subscription limit and increase in the interest rate on loan availed against PPF.
- Guarantee henceforth will be issued by the mortgage company for housing loan if the loan to value ratio is not more than 80% in case loans above 20 lakhs and 90% in case of loans below 20 lakhs.
- Deregulation of interest rates on non-resident (external) rupee (NRE) deposits and ordinary non-resident (NRO) accounts.
- Credit under dairy segment of agriculture and allied activities to be treated as indirect finance to agriculture.
- Cap on the mobile transaction of Rs.50,000/- per customer per day for transfer and purchase has been removed.

## 2 Accounting and Auditing

### 1. Expert Advisory Opinion.

Treatment of tax expense on Deemed Income under section 56(2)(viiia) of the Income-tax Act, 1961 arising on purchase of investments

#### Facts of the case:

- a. Company A is holding 15% of the equity shares of another unlisted company, C limited. During the financial year 2010-11, Company A has acquired balance 85% equity shares of C Limited from other not related shareholders. The acquisitions were at a price lower than the fair value of the said shares.
- b. As per provisions of section 56(2)(viiia) of the Income Tax Act, 1961, where shares of a company in which the public is not substantially interested are acquired for a consideration which is less than the aggregate fair value of the shares by amount exceeding Rs. 50,000, the excess of the aggregate fair value over the consideration paid is an income under the head 'Income from Other Sources'.
- c. Company has paid the tax arising under the said section of the Income Tax Act, 1961. In addition to the above, the company has also incurred expenses on account of stamp duty, franking and bank charges in connection with the said acquisition.
- d. The querist has stated that in view of Para 38 of Ind AS 27 'Consolidated and Separate Financial Statements', Para 43 and Para 9 of Ind AS 39 'Financial Instruments: Recognition and Measurement', this tax on notional deemed income is a transaction cost of the investment, which otherwise would not have been incurred and should be treated as acquisition cost of the investment, hence should be capitalised.

#### Query

- a. Whether the payment of tax under section 56 (2)(viiia) would qualify to be treated as part of the cost of investment in the balance sheet of the company.
- b. If the answer to the above is no, what is the correct accounting treatment of such tax expenses.

### **Points Considered by Committee**

- a. The committee has pointed out that the effective date for applicability of Ind AS has not yet been notified by the Ministry. Accordingly, the committee is of the view that the existing AS will be considered for the opinion.
- b. Committee is of the view that as per AS 13 the cost of acquisition should include only those direct charges which if not incurred the transaction could not have taken place.
- c. The committee notes that the tax paid on account of section 56 (2)(viiia) is not on the acquisition of the shares but on the deemed income arising due to acquisition of shares below the fair market value. Thus such tax is not a means of acquiring such investments; rather it is a result of such acquisition and accordingly should not be considered as the cost of investment.
- d. The committee is further of the view that such tax should be treated as normal tax expense in the year in which it is incurred.
- e. The committee has also considered para 38 of Ind AS 27, Para 43 of Ind AS 39, para 9 of Ind AS 39 and para AG 13 of Appendix A, Application Guidance to Ind AS 39 relating and concluded that even on considering the provisions of the proposed Ind AS 39, the tax expense incurred under Section 56(2)(viiia) will not be capitalised as cost of investment.

### **Opinion**

- a. The payment of tax under section 56(2)(viiia) will not qualify for capitalisation to cost of investment in the balance sheet of the company.
- b. Tax paid under the above section should be treated as normal tax and charged off to profit and loss account of the year in which it is incurred.

### 3 Company Law

#### 1. Amendment in schedule XIV to The Companies Act, 1956

The Central Government has made alterations in the Schedule XIV of the Companies Act, 1956, depreciation rates have been specified for the following items:

- a. Portable boilers, drilling tools, well-head tanks, etc. used in Mineral Oil concerns field operations (above ground)
- b. Rigs.

#### 2. Amendment to Rules for Preferential Issue by Unlisted Public Companies

The rule for preferential allotment by Unlisted Public Companies has been amended and the following key amendments have been made:

- a. The definition of “preferential allotment” has been amended to include any other instrument convertible into shares including hybrid instruments convertible into shares on preferential basis
- b. Persons to whom preferential allotment is proposed should be restricted to forty-nine.
- c. The Rule 4 of the said Rules has also been revised to incorporate the above changes.
- d. An additional Rule 8 has been introduced pertaining to ‘Invitation and allotment of securities’ which amongst other things (a) prohibits fresh offer or invitation unless earlier offers have been completed (b) subscription money should not be received in cash (c) allotment to be completed within 60 days and if allotment is not done within specified period, money to be refunded within 15 days and on such failure, money to be refunded alongwith interest @ 12% and (d) such money to be kept in separate bank account and to be utilized only for allotment/ refund of application money..

#### 3. Extension in the date of applicability of the notification on AS11

Accounting Standard 11 has been further amended to allow foreign exchange difference (including arising out of mark to market) on Long Term Foreign Currency Monetary item used for acquiring fixed asset to be adjusted to the carrying cost of fixed asset and depreciated over the balance useful life of the fixed asset and in other cases the foreign exchange difference can be amortized

over the period of Long Term Foreign Currency Monetary item. Such accounting treatment is permitted for exchange difference generated till 31<sup>st</sup> March 2020. This option is also applicable to companies which earlier did not select the option to capitalise (and depreciate over the balance life of asset) or amortise over the period of Long Term Foreign Currency Monetary item,

**4. New Cost Accounting Records Rules for Certain Industries**

The Central Government has introduced rules for Manufacturers of Fertilizers, Electricity Industry, Petroleum Industry, Bulk Drugs, Sugar, Industrial Alcohol and Telecommunications. These rules will override the existing rules applicable to the said industries.

**5. Extension in the time limit of filing form DIN-4**

The time for filing form DIN-4 by DIN holders for furnishing PAN and to update PAN details has been extended up to 29<sup>th</sup> February, 2012.

**6. Extension in the applicability of Company Law Settlement Scheme, 2011**

The scheme has been extended up to 15th January, 2012. It is further stated that this Scheme will not be extended beyond 15 January 2012.

**7. Clarification regarding use of video conferencing facility**

All listed companies had to arrange for video conferencing facility in their meetings which was optional for the first year and mandatory there after. The recent circular clarifies that the same will be optional in subsequent years. For agencies which are providing e-voting related services, needs to obtain certificate from Standardization testing and quality certification directorate.

#### 4 Service Tax

##### 1. Notification

###### a. Documents to be submitted for application of registration for paying service tax

The following documents are required to be submitted alongwith an application for registration:

- i Copy of Permanent Account Number (PAN)
- ii Proof of Residence
- iii Constitution of the Applicant.
- iv Power of Attorney in respect of authorised person(s).

It is further stated that the above documents must be submitted to the concerned authority within a period of 15 days from the date of filing of the application for registration. Failure to do so would lead to rejection of the registration application.

It is also clarified that the time limit of seven days from date of receipt of application or intimation under Rule 4(5A), within which the registration is to be granted by the Superintendent of Central Excise or Service Tax, as referred to in Rule 4(5) shall be reckoned from the date the application for registration is complete in all respects.

###### b. Deferral of applicability of Service Tax on Railway freight

The applicability of service tax on Railway freight in respect of certain specified goods has been deferred from January 2012 to April 2012.

###### c. Extension of the date of submission of half yearly returns for Service Tax

The Central Board of Excise and Customs hereby extends the date of submission of half yearly return for the period April 2011 to September 2011, from 26th December 2011 to 20<sup>th</sup> January 2012 since the assesses are facing problems in electronic filing of returns due to various reasons.

###### d. Exemption of Service Tax on certain services

The Central Government has notified to exclude 18 taxable services, specified in clause (105) of section 65 of the Finance Act, received by an exporter of goods and used for export of goods, from the whole of the service tax leviable thereon

under section 66 and section 66A of the said Act, subject to the conditions specified in the Notification. This notification shall come into effect on the 3rd day of January, 2012.

**2. Circulars**

**a. Clarification on levy of service tax on distributors/sub-distributors of films & exhibitors of movie**

Representations were received requesting clarification on taxability of consideration earned by the distributors/sub-distributors/area distributors of Indian & Foreign films in the form of 'revenue share' from the exhibitors of the movie, and on revenue retained as percentage by the exhibitors of the movie from the sale of tickets.

The normal business practice in the industry is that the producer of the film, who owns the intellectual property rights of the film, temporarily transfers the rights to a person [normally distributor or any other person] who directly or indirectly enters into an agreement with the exhibitor [normally theater owner] for screening of the film.

The arrangements entered into by the distributors/sub-distributors/area distributors and the exhibitor/theatre owner etc in exhibiting the film produced by the producer, the original copyright holder, the arrangements and their respective service tax classification is tabulated as under:

Type of Arrangement	Movie exhibited on whose account	Service Tax Implication
Principal-to-Principal Basis	Movie being exhibited by theatre owner or exhibitor on his account – i.e. The copyrights are temporarily transferred	Service tax under copyright service to be provided by distributor or sub-distributor or area distributor or producer etc, as the case may be
	Movie being exhibited on behalf of Distributor or Sub-Distributor or Area Distributor or Producer etc – i.e. no copyrights are temporarily transferred	Service Tax under Business Support Service / Renting of Immovable Property Service, as the case may be, to be provided by Theatre Owner or Exhibitor

Arrangement under unincorporated partnership/ joint/ collaboration basis	Service provided by each of the person i.e. the 'new entity'/ Theater Owner or Exhibitor / Distributor or Sub-Distributor or Area Distributor or Producer etc, as the case may be, is liable to Service Tax under applicable service head
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The arrangements mentioned in this Circular will apply to similar situations across all the services taxable under the Finance Act.

**b. Service Tax Refund to exporters through the Indian Customs EDI System (ICES)**

Government has proposed to introduce a simplified scheme for electronic refund of service tax to exporters, on the lines of duty drawback. With the introduction of this new scheme, exporters now have a choice: either they can opt for electronic refund through ICES system, which is based on the 'schedule of rates' or they can opt for refund on the basis of documents, by approaching the Central Excise/Service Tax formations.

## 5 FEMA

### 1. Compounding of contravention under FEMA, 1999

In order to facilitate the operational convenience and as a measure of customer service, powers has been delegated to the Regional Offices of the Reserve Bank of India, to compound the contraventions of FEMA involving:

- a. delay in reporting of inward remittance,
- b. delay in filing of form FC-GPR after allotment of shares and
- c. delay in issue of shares beyond 180 days

The powers of the regional offices for the compounding the contravention of FEMA as listed above are as follows:

- a. Bhopal, Bhubaneshwar, Chandigarh, Guwahati Jaipur, Jammu, Kanpur, Kochi, Patna and Panaji for a contravention amount below Rs. One Crores (Rs. 1,00,00,000)
- b. Ahmedabad, Bengaluru, Chennai, Hyderabad, Kolkata, Mumbai and New Delhi for a contravention amount without any limit.

Also, the information to be submitted alongwith application for compounding has been standardized where the compounding relates to: Foreign Direct Investment in India, External Commercial Borrowing, Overseas Investment, Branch/Liaison Office in India.

### 2. Amendment in FDI in Pharmaceutical sector

The following amendments have been made for FDI in the pharmaceuticals sector

Type of Investment in Pharmaceutical sector	Existing Provisions	Revised Provisions
FDI upto 100% in the Green Field Investment.	Allowed under the Automatic route	No Change
FDI upto 100% in the Brown Field Investment (i.e. Investments in existing companies)	Allowed under the Automatic route	Allowed under the Government Approval Route

### 3. RBI Notification

In line with the Consolidated FDI Policy October, 2011 RBI has also made amendments to conditions of issue of equity/ FDI compliant instruments under Approval Route against conversion of payables of import of capital goods / machineries / equipments (including second-hand machineries) and pre-operative / pre-incorporation expenses (including payments of rent, etc) have been made:

Particulars	Existing Conditions	Revised Conditions
Conversion of payables of import of capital goods / machineries / equipments (including second-hand machineries) into equity/preference shares.	Conversion should be completed within 180 days from the date of shipment of goods.	Application for conversion in all respects should be completed within 180 days from the date of shipment of goods.
Issuing shares against pre-operative/pre-incorporation expenses (including payments of rent, etc.) made by the overseas promoters.	Capitalization should be completed within the stipulated period of 180 days permitted for retention of advance against equity under the extant FDI policy.	Application for capitalization should be completed in all respects within the period of 180 days from the date of incorporation of the company.

#### 4. ECBs denominated in INR – hedging facilities for non-resident entities

RBI has allowed eligible non-resident lenders to hedge their currency risk in respect of ECBs denominated in INR, with authorised dealer banks in India. The Non-resident lenders may use the following products for hedging purposes subject to compliance of the operational guidelines:

- a. Forward foreign exchange contracts with INR as one of the currencies;
- b. Foreign currency - INR options; or
- c. Foreign currency - INR swaps

Operational guidelines:

The non-resident lenders approach the AD bank in India with appropriate documentation, on a pre-deal basis along with the following undertakings:

- a. That the same underlying exposure has not been hedged with any other AD Category- I bank/s in India.
- b. If the underlying exposure is cancelled, the customer will cancel the hedge contract immediately.

Further, the following terms and conditions are also required to be complied with:

- a. The amount and tenor of the hedge should not exceed that of the underlying transaction and should be in consonance with the extant regulations regarding tenor of payment / realization of the proceeds.
- b. On due date, settlement is to be done through the correspondent bank's Vostro or the AD bank's Nostro accounts. AD banks in India may release funds to the beneficiaries only after sighting funds in Nostro / Vostro accounts.
- c. The contracts, once cancelled, cannot be rebooked.
- d. The contracts may, however, be rolled over on or before maturity subject to maturity of the underlying exposure.
- e. On cancellation of the contracts, gains may be passed on to the customer subject to the customer providing a declaration that he is not going to rebook the contract or that the contract has been cancelled on account of cancellation of the underlying exposure.

#### 5. Amendment Foreign Exchange Derivative Contracts Regulations 2000:

The amendments to the (Foreign Exchange Derivative Contracts) Regulations 2000 are tabulated below:

Particulars	Existing Provisions	Revised Provisions
Forward contracts booked by residents	Forward contracts involving Rupee as one of the currencies, booked by residents to hedge current account transactions, regardless of the tenor and to hedge capital account transactions, falling due within one year were allowed to be cancelled and rebooked.	Forward contracts booked by residents once cancelled cannot be rebooked.
Probable Exposure based on the past performance	1. Residents were allowed to hedge currency risk up to the average of the	1. For Importers the facility stands reduced to 25

	<p>previous three financial years' (April to March) actual import/export turnover or the previous year's actual import/export turnover, whichever is higher.</p> <p>2. Contracts booked in excess of 75 per cent of the eligible limit were to be on deliverable basis and could not be cancelled.</p>	<p>percent of the earlier limit, i.e., 25 percent of the average of the previous three financial years' (April to March) actual import/export turnover or the previous year's actual import/export turnover, whichever is higher.</p> <p>2. Importers who have already utilized in excess of the revised / reduced limit, no further bookings may be allowed under this facility.</p> <p>3. All forward contracts booked under this facility by both exporters and importers hence forth will be on fully deliverable basis. In case of cancellations, exchange gain, if any would not be passed on to the customer.</p>
Forward Contract booked by FIIs	<p>FIIs were permitted to rebook contracts once cancelled to the extent of 10% of the market value of the portfolio at the beginning of the year.</p>	<p>Henceforth, forward contracts booked by FIIs once cancelled cannot be rebooked. The forward contracts may however be rolled over on or before maturity as permitted earlier.</p>
Limits for various Treasury functions.	<p>1. The Board of Directors of Authorised Dealers are allowed to fix suitable limits for</p>	<p>1. Net Overnight Open Position Limit (NOOPL) of Authorised Dealers</p>

	<p>various Treasury functions;</p> <p>2. Net overnight open exchange position (NOOPL) and aggregate gap limits was required to be approved by the Reserve Bank of India.</p>	<p>would be reduced across the board. Revised limits in respect of individual banks are being advised to the Authorised Dealers separately.</p> <p>2. Intra-day open position / daylight limit of Authorised Dealers should not exceed the existing NOOPL approved by the Reserve Bank.</p>
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**6 SEBI**

**1. Prohibition on payment of incentives in Public issue of Debt Securities:**

In respect of public issue of debt securities, those connected with the issue shall not offer any incentive, in any manner whatsoever, to any person for making an application for allotment of specified securities.

“Person connected with the issue” includes a person connected with the distribution of issue.

However, such prohibition shall not apply to fees or commission payable for the services rendered in relation to the issue.

## 7 NBFC

### 1. Non Banking Financial Company - Micro Finance Institution

Based on the recommendations of the Malegam Committee Report, Reserve Bank of India has decided to introduce new category of NBFCs - Non Banking Financial Company-Micro Finance Institutions (seventh category).

#### Definition of NBFC-MFI:

NBFC-MFI is defined as a non-deposit taking NBFC (other than a company licensed under Section 25 of the Indian Companies Act, 1956) that fulfils the following conditions:

- a. Minimum Net Owned Funds of Rs.5 crore. (For NBFC-MFIs registered in the North Eastern Region of the country, the minimum NOF requirement shall stand at Rs.2 crore).
- b. Not less than 85% of its net assets are in the nature of “qualifying assets.”

“Qualifying asset” shall mean a loan which satisfies the following criteria:-

- a. loan disbursed by an NBFC-MFI to a borrower with a rural household annual income not exceeding Rs. 60,000 or urban and semi-urban household income not exceeding Rs. 1,20,000;
- b. loan amount does not exceed Rs. 35,000 in the first cycle and Rs. 50,000 in subsequent cycles;
- c. total indebtedness of the borrower does not exceed Rs. 50,000;
- d. tenure of the loan not to be less than 24 months for loan amount in excess of Rs. 15,000 with prepayment without penalty;
- e. loan to be extended without collateral;
- f. aggregate amount of loans, given for income generation, is not less than 75 per cent of the total loans given by the MFIs;
- g. loan is repayable on weekly, fortnightly or monthly installments at the choice of the borrower

Further the income NBFC-MFI derives from the remaining 15 percent of assets shall be in accordance with the regulations specified in that behalf.

NBFC which does not qualify as an NBFC-MFI shall not extend loans to micro finance sector, which in aggregate exceed 10% of its total assets.

The existing NBFCs to be classified as NBFC-MFIs will be required to comply with this norm w.e.f April 01, 2012.

The following are the broad regulatory framework of NBFC - MFIs

**Prudential Norms**

a. Capital Requirements

All new NBFC-MFIs shall maintain a capital adequacy ratio consisting of Tier I and Tier II Capital which shall not be less than 15 percent of its aggregate risk weighted assets.

The total of Tier II Capital at any point of time shall not exceed 100 percent of Tier I Capital.

The risk weights for on-balance sheet assets and the credit conversion factor for off-balance sheet items will be as provided in para 16 of the Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve bank) Directions 2007.

**Asset Classification and Provisioning Norms:**

With effect from April 01, 2012 all NBFC-MFIs shall adopt the following norms(till then they shall follow the asset classification and provisioning norms as given in the Non-Banking Financial (Non-Deposit accepting or holding) Companies Prudential Norms (Reserve Bank) Directions, 2007).

a. Asset Classification Norms:

- v Standard asset means the asset in respect of which, no default in repayment of principal or payment of interest is perceived and which does not disclose any problem nor carry more than normal risk attached to the business;
- vi Nonperforming asset means an asset for which, interest/principal payment has remained overdue for a period of 90 days or more.

b. Provisioning Norms:

The aggregate loan provision to be maintained by NBFC-MFIs at any point of time shall not be less than the higher of

- i 1% of the outstanding loan portfolio or
- ii 50% of the aggregate loan installments which are overdue for more than 90 days and less than 180 days and 100% of the aggregate loan installments which are overdue for 180 days or more.

All other provisions of the Non-Banking Financial (Non-Deposit accepting or holding) Companies Prudential Norms (Reserve Bank) Directions, 2007 will be applicable to NBFC-MFIs except as mentioned above.

**Pricing of Credit:**

- a. All NBFC-MFIs shall maintain an aggregate margin cap of not more than 12%. The interest cost will be calculated on average fortnightly balances of outstanding borrowings and interest income is to be calculated on average fortnightly balances of outstanding loan portfolio of qualifying assets.
- b. Interest on individual loans will not exceed 26% per annum and calculated on a reducing balance basis.
- c. Processing charges shall not be more than 1 % of gross loan amount. Processing charges need not be included in the margin cap or the interest cap.
- d. NBFC-MFIs shall recover only the actual cost of insurance for group, or livestock, life, health for borrower and spouse. Administrative charges where recovered, shall be as per IRDA guidelines.

**Fair Practices in Lending:**

- a. There shall be only three components in the pricing of the loan viz., the interest charge, the processing charge and the insurance premium (which includes the administrative charges in respect there of).
- b. There will be no penalty charged on delayed payment.
- c. NBFC-MFIs shall not collect any Security Deposit/ Margin from the borrower.
- d. NBFC-MFIs can lend to individual borrowers who are not member of Joint Liability Group (JLG)/Self Help Group (SHG) or to borrowers that are members of JLG/SHG. However a borrower cannot be a member of more than one SHG/JLG and not more than two NBFC-MFIs should lend to the same borrower.
- e. There must be a minimum period of moratorium between the grant of the loan and the due date of the repayment of the first instalment, shall not be less than the frequency of the loan.
- f. Recovery of loan given in violation of the regulations should be deferred till all prior existing loans are fully repaid.

Further there are regulations pertaining to Multiple- lending, Over Borrowing, Ghost borrowers, Non coercive methods of recovery etc.

Existing NBFCs that satisfy the above conditions may approach the Regional Office in the jurisdiction of which their Registered Office is located, along with the original Certificate of Registration (CoR) issued by the Bank for change in their classification as NBFC-MFIs. Their request must be supported by their Statutory Auditor's certificate indicating the asset (loan) pattern as on March 31, 2011.

## 2. Credit default swaps – NBFCs as users

Under the credit default swap (CDS) facility;

- a. It has been also been decided that NBFCs shall only participate in the CDS market as users. As users, they would be permitted to buy credit protection only to hedge their credit risk on corporate bonds they hold, but it cannot trade in it.
- b. As users, Non-Banking Financial Companies (NBFCs) are not permitted to sell protection and hence can't enter into short positions in the CDS contracts, it added.
- c. However, NBFCs are permitted to exit their bought CDS positions by unwinding them with the original counter-party or by assigning them in favour of buyer of the underlying bonds."

CDS is a risk management product which helps entities guard against the possibility of defaults in repayment of corporate bonds.

## 8 Income Tax

### 1. Case Laws

#### a. Capital gain arising on the sale of shares in an Indian company by a Mauritius company would not be taxable in India in view of India-Mauritius Tax Treaty

##### Ardex Investments Mauritius Ltd. (AAR Ruling)

###### Facts:

- i Ardex Investments Mauritius Ltd. (the applicant) is a wholly owned subsidiary of Ardex Holding U.K. Ltd. (holding company). The applicant is incorporated under the law of Mauritius and has the Tax Residency Certificate of Mauritius.
- ii The applicant holds 50% of the equity share capital of Ardex Endura (India) Pvt. Ltd. (Ardex India).
- iii The applicant proposed to sell its entire stake of share capital of Ardex India to another non-resident group company i.e. Ardex Beteiligungs GmbH, Germany (Ardex Beteiligungs) at the fair market value prevailing at the time of the proposed sale.

###### Issue:

- i Whether the proposed sale of shares by the applicant is taxable in India?
- ii Whether the applicant would be entitled to receive the sale proceeds of shares of Ardex India without deduction of income-tax at source?
- iii Whether the applicant would be required to file return of income in India?

###### Held:

Authority for Advance Rulings held as follows:

- i The funds for acquisition of shares in the Indian company were provided by the holding company. It was the applicant company that had made the investment in Ardex India and the investment was not made by the holding company. The applicant was a separate legal entity and the beneficial owner of the shares of Ardex India. The shares in the Ardex India were first acquired in the year 2000 and subsequently in 2001, 2002 & 2009. The first shares were purchased almost 10 years before the application and the shareholding was steadily increased. This arrangement did not come all of a sudden. Thus, the holding company cannot be considered as beneficial owner of shares held in Ardex India.

At worst it could be said to be case of treaty shopping. But, that by itself cannot be viewed or characterized as objectionable.

- ii Relying on the decision of Supreme Court in case of Azadi Bachao Andolan and in view of Article 13.4 of India-Mauritius Tax Treaty, capital gain on the proposed sale of shares by applicant is not chargeable to tax in India and the applicant would be entitled to receive the sale proceeds without deduction of tax at source.
- iii Shares to be transferred are shares of Indian company which would otherwise have been taxable under the provisions of the Income Tax Act, 1961. Thus, relying on the decision in the case of VNU International B.V., AAR 871 of 2010, the applicant is bound to file a return of income in India in respect of the income from the proposed transfer of shares.

**b. Amount paid for non-compete rights while acquiring business is capital expenditure**

**Pitney Bowes India Pvt. Ltd. vs Commissioner of Income Tax**

**Facts:**

The assessee is a wholly owned subsidiary of Pitney Bowes Inc., USA. (Pitney). M/s. Kilburn Office Automation Limited (KOAL) has been acting as a distributor of Pitney Bowes products in India and Nepal. In the year under consideration, the Pitney had decided to enter in the Indian market directly and consequently has caused the incorporation of the assessee company as its wholly owned subsidiary. The assessee is engaged in the business of wholesale trading, selling and marketing of hi-tech documents and providing maintenance and after sales service of its products. The assessee acquired the mailing business from KOAL as a going concern on a slump sale basis pursuant to a Business Transfer Agreement. The consideration for the transfer was Rs. 18.92 crores which included Rs. 5.94 crores by way of non-compete fee for a period of 5 years. The assessee claimed deduction on non-compete fees as revenue expenditure. The Assessing Officer (AO) disallowed the claim of assessee on the ground that the payment was a capital expenditure and not allowable u/s. 37 of the Act.

On appeal, the CIT (A) held that the expenditure incurred on non-compete fee by the assessee needs to be allowed on deferred revenue basis, i.e., in five years as the period of non-compete fee agreement is for five years. As such, the CIT (A) allowed Rs.1,18,89,458/- being 1/5th of the total amount of Rs. 5,94,47,290/- paid to KOAL by the assessee as non-compete fee.

On appeal by department, the ITAT held that non-compete fee paid by the assessee is capital in nature and disallowed the claim of the assessee.

**Issue:**

Whether the amount paid for non-compete fees for acquiring business is capital expenditure?

**Held:**

The H'ble High Court held that:

- i The assessee itself treated the expenditure as capital in the books of accounts. However, at the same time, it was maintained that since it was paid for loss of business that KOAL would suffer the same was treated as revenue in nature. Likewise, in Schedule 2 to the balance sheet disclosing "fixed assets", payment of non-compete fee is treated as "intangible assets". This also shows that the assessee treats this as asset acquired, which is intangible in nature.
- ii Referring to the decision of Special Bench in case of M/s Tecumesh India Pvt. Ltd. Vs. Addl. CIT, 132 TTJ 129., the H'ble Court treated the non-compete fees paid to KOAL as capital expenditure as the payment was made to eliminate competition in the business which the assessee had acquired.

**c. S. 194-I TDS: To be "Rent", payee must have "control" over asset**

**Chattisgarh State Electricity Board vs. ITO (ITAT Mumbai)**

**Facts:**

The assessee entered into an agreement with Power Grid Corporation of India Ltd (PGCIL) for transmission of the power from the power generating company to assessee company's delivery point. The Assessing Officer (AO) held that payments made by the assessee to PGCIL for the purpose of such power transmission can be said to be payments in the nature of rent as the payments were made for transmission charges for use of transmission system. The AO also noted that there is dedicated machinery and equipment identified and allowed to be used in the hands of the assessee. Accordingly, the AO held that tax is to be deducted u/s 194 I of the Act. On further appeal this was confirmed by the CIT(A).

**Issue:**

Whether payments made for use of an asset without having control over the asset is liable for deduction of tax u/s 194I of the Act?

**Held:**

The H'ble ITAT held that the payments made by the assessee were not liable to TDS u/s 194I for the following reasons:

- i S. 194-I defines "rent" to include any payment, by whatever name called, under any lease, agreement or arrangement for the use of any machinery or plant. For a payment to be construed as "rent", it is a condition precedent that the payer should have some control over the asset.
- ii As per the agreement entered by the assessee and PGCIL the transmission lines were under the possession & control of PGCIL in legal terms. The payments have been made for the services of transmission of electricity and not the use of transmission wires/systems. These transmission lines are not only being used for transmission of electricity to the assessee but also for transmission of electricity to various other entities.
- iii The assessee had no control over the operations of the transmission lines and as per the arrangement it only had the permission to draw the electrical power purchased from PGCIL's transmission lines in an agreed manner.
- iv Thus, when the payment is made only for the purpose of specific act even though the asset is used in the said process, the payment cannot be said to be for the use of an asset and no TDS is to be deducted u/s. 194I.

**d. An audit objection cannot be considered as "reason to believe" for reopening the assessment proceedings**

**Cadila Healthcare Ltd vs. ACIT (Gujarat High Court)**

**Facts:**

For the assessment year 2004-05, the assessee filed its return of income along with necessary documents including Auditors Reports in prescribed forms. The return was selected in scrutiny assessment u/s. 143(3) of the Act. The said assessment was sought to be reopened by notice dated 28.10.09 on the ground that book profit under section 115JB of the Act was not computed correctly and further that excess deduction under section 80HHC was allowed. The assessee approached this Court by filing Special Civil Application which was allowed by this Court quashing the notice of reopening dated 28.10.2009.

The Revenue Audit raised an objection that the assessee had made remittances to foreign parties without deduction of TDS u/s 195 and that the expenditure ought to have been disallowed u/s 40(a)(i). The AO then in

charge held correspondence with the assessee and replied to Audit Objection that the amounts remitted to the foreign parties were not chargeable to tax in India, the assessee was under no obligation to deduct tax u/s 195 and that the expenditure was not disallowable u/s 40(a)(i).

However, the Assessing Officer (AO) once again issued a fresh notice dated 18.3.2011 seeking to reopen the assessment on the basis of audit objection. The AO reopened the assessment on the ground that the assessee on payment of Rs. 51,94,204/- for product registration services availed from associated enterprises had not deducted TDS u/s. 195 and the said expenses ought to be disallowed u/s. 40(a)(i).

The assessee filed a Writ Petition with the High Court to challenge the reopening of assessment.

**Issue:**

Whether the AO can reopen assessment on mere opinion of the audit party?

**Held:**

The Honorable High Court held that it is only the AO's opinion with respect to the income escaping assessment which is relevant for the purpose of reopening an assessment u/s 147. The Audit Objection may be a valid basis for reopening of assessment only, if the audit party brings certain aspects to the notice of the AO and thereupon the AO forms his own belief. But mere opinion of the Audit Party cannot form the basis for the AO to reopen an assessment.

In the present case, the AO had categorically come to the conclusion that the objection of the audit party was not valid and the assessee's explanation with respect to non-requirement of collection of TDS was required to be accepted. Mere opinion of the Audit Party cannot form the basis for the Assessing Officer to reopen the closed assessment that too beyond four years from the end of relevant assessment year. Thus, the AO could have no "reason to believe" that income had escaped assessment and so the s. 148 notice is cancelled.

- e. **S.2(22)(e) does not apply to "non-gratuitous" advances to substantial shareholder**

**Pradip Kumar Malhotra v/s. CIT (Calcutta High Court)**

**Facts:**

The assessee, a substantial shareholder in a closely held company (company), let out his property to the company on rent and also permitted the company to place flat on mortgage with a bank. In consideration, the company passed a resolution authorizing the assessee to receive an interest-free deposit up to Rs. 50 lakhs. Later, the assessee was permitted to draw interest free deposit upto Rs. 50,00,000/- from the company. During A.Y. 1999-2000 the assessee obtained Rs. 20,75,000/- by way of security deposit. The AO added the said amount as deemed dividend u/s. 2(22)(e). The CIT(A) deleted the addition by the following the order of AY 1998-99. However, the H'ble ITAT confirmed the addition made by the AO.

**Issue:**

On the facts of the case, whether the interest free advance given to assessee was loan/advance/dividend within the meaning of Sec.2 (22)(e) of the Act?

**Held:**

The Hon'ble High Court reversed the Tribunal's order on following ground:

- i The phrase "by way of advance or loan" u/s. 2(22)(e) must be construed to mean those advances or loans which a shareholder enjoys simply on account of being a person who is the beneficial owner of shares. If such loan or advance is given to the share holder as a consequence of any further consideration received from the shareholder, then such advance or loan cannot be said to be "deemed dividend" u/s 2(22)(e). Thus, gratuitous loan or advance given by a company to a substantial shareholder comes within the purview of s. 2(22)(e) and when the loan or advance is given in return to an advantage conferred upon the company by the share holder does not come within the purview of s. 2(22)(e).
- ii In the present case, the assessee permitted the company to mortgage the property with bank to enable the company to secure loan. Thus, decision to give advance to assessee is not to give gratuitous advance to its shareholder but to protect the business interest of the company.

The Hon'ble High Court followed the decisions in case of Creative Dyeing (318 ITR 476 (Del)) and Nagindas Kapadia (177 ITR 393 (Bom)) and held that the advance given by the company does not fall within the purview of s. 2(22)(e) i.e. deemed dividend.

## 9 Others

### 1. Amendment to PPF Scheme, 1968

The amendments to the Public Provident Fund Scheme, 1968 are tabulated below:

Particulars	Existing Provisions	Revised Provisions
Limit of Subscription for an individual on his own behalf or on behalf of a minor of whom he is the guardian.	The Maximum limit of Subscription per year is Rs. 70,000/-.	The Maximum limit of Subscription per year has been increased to Rs. 1,00,000/-.
Interest Rate on loan taken against credit balance in PPF A/c	One percent per annum	Increased to Two percent per annum

### 2. Amendment to Mortgage Company (Reserve Bank) Guidelines, 2008

Mortgage Guarantee Companies shall not provide guarantee for a housing loan above Rs.20 Lakhs where the loan to value ratio exceeds 80% (earlier 90%).

For small value housing loans i.e. housing loans up to Rs.20 Lakhs (which get categorized as priority sector advances), loan to value ratio shall not exceed 90%.

### 3. Deregulation of Interest rates

With a view to provide greater flexibility to banks in mobilizing non-resident deposits and also in view of the prevailing market conditions, banks are now free to determine their interest rates on both savings deposits and term deposits of maturity of one year and above under Non-Resident (External) Rupee (NRE) Deposit accounts and savings deposits under Ordinary Non-Resident (NRO) Accounts with immediate effect. However, interest rates offered by banks on NRE and NRO saving deposits cannot be higher than those offered by them on comparable domestic rupee deposits and uniform rate have to be offered across all branches.

The revised deposit rates will apply to fresh deposits and on renewal of maturing deposits.

#### **4. Credit under dairy segment to be treated as indirect finance to agriculture**

As per the earlier provisions, bank loans to entities other than individual farmers engaged in food and agro based processing under Agriculture and allied activities are treated as indirect finance to agriculture.

As a clarification, it has been decided to treat financial activities which promote dairy development (including procurement, storage, processing, collection, transportation, etc.) primarily benefiting small/marginal farmers and tiny units, to be treated as indirect finance to agriculture under priority sector. However, due care may be exercised by banks to ensure that the ultimate beneficiaries are farmers engaged in dairy farming, who will benefit from such investment.

#### **5. Mobile banking transaction in India**

Ceiling on the transaction limit of Rs.50,000/- per customer per day for both funds transfer and transactions involving purchase of goods/services using mobile banking facilities has been removed. However, banks may place per transaction limits based on their own risk perception with the approval of its Board.

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