NANUBHAI DESAI & CO.

April 2012

the RECKONER

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Contents

INCOME TAX

DOMESTIC TAXATION

Circulars

Clarification on issuance of TDS Certificates in Form No. 16A downloaded from TIN website

With a view to further strengthen the administration of the issue of TDS and for proper administration of the Act, the CBDT, in exercise of powers under section 119 of the Act, decided the following:-

Issue of TDS Certificate in Form No. 16A

- For deduction of tax at source made on or after 01.04.2012: All deductors (including government deductors who deposit TDS in the Central Government Account through book entry) shall Issue TDS certificate in Form No. 16A generated through TIN central system and which is downloaded from the TIN website with a unique TDS certificate number in respect of all sums deducted on or after the 1st day of April, 2012 under any of the provisions of Chapter-XVII-B other than section 192.

  In other words, the issuance of duly verified TDS certificate in Form No. 16A, by the deductor of any category shall henceforth be only through TIN Central System. The deductor shall therefore, download such certificate from the TIN Central System, verify the correctness of the contents mentioned therein and authenticate the correctness of the contents before issue of the said certificate.

- For deduction of tax at source made between 01.04.2011 to 31.03.2012: The stipulation prescribed in para 4.1 of the Circular No. 3/2011 dated 13.05.2011 shall continue to apply.

Authentication of TDS Certificate in Form No. 16A

- The deductor, issuing the TDS certificate in Form No.16A by downloading from the TIN website shall authenticate such TDS certificate by either using digital signature or manual signature.

- Where the deduction has been done between 1st April, 2011 and 31st March, 2012 and the deductor being other than a company/bank or banking Institution/a cooperative society engaged in carrying the business of banking and who do not issue the TDS Certificate in Form No.16A by downloading from the TIN website shall authenticate such TDS certificate in Form No.16A by manual signature only.

New 49A Form for PAN Application, Changes in PAN Data w.e.f. 8th April 2012

Income Tax Department has released a new form for Fresh PAN Card Application and /or Changes or correction in existing PAN Data. The new form is simple then earlier form 49A and easy to fill. The form also has column to fill AADHAAR number for the applicants who already own UID.

With effect from April 8, 2012, PAN applications are required to be furnished in the new form. Indian citizens will have to submit their 'Application for allotment of new PAN' in revised Form 49A only.

Case laws

Catholic Syrian Bank Ltd vs. CIT (SC)

SECTION 36(1)(vii)/36(1)(viia) BAD DEBTS: BANKS ARE ENTITLED TO BOTH DEDUCTIONS

In the case of Catholic Syrian Bank Ltd vs. CIT, the Supreme Court on the issue whether a bank was eligible to claim a deduction for bad debts u/s 36(1)(vii) in respect of its (rural & urban) advances and also claim a provision for bad and doubtful debts u/s 36(1)(viia) in respect of its rural advances in view of the Proviso to Section 36(1)(vii) which provides that only the excess over the credit balance in the provision for bad and doubtful debts account made u/s 36(1)(viia) can be claimed, it held as under:

Per Court:

- The clear legislative intent of s. 36(1)(vii) & 36(1)(viia) together with the circulars issued by the CBDT demonstrate that the deduction on account of provision for bad and doubtful debts u/s 36(1)(viia) is distinct and independent of s. 36(1)(vii) relating to allowance of bad debts. The legislative intent was to encourage rural advances and the making of provisions for bad debts in relation to

such rural branches. The functioning of such banks is such that the rural branches were practically treated as a distinct business, though ultimately these advances would form part of the books of accounts of the head office.

- An interpretation which serves the legislative object and intent is to be preferred rather than one which subverts the same. The deduction u/s 36(1)(vii) cannot be negated by reading into it the limitations of s. 36(1)(viia) as it would frustrate the object of granting such deductions. The Revenue's argument that this would lead to double deduction is not correct in view of the Proviso to s. 36(1)(vii) which provides that in respect of rural advances, the deduction on account of the actual write off of bad debts would be limited to excess of the amount written off over the amount of the provision which had already been allowed u/s 36(1) (viia) (Southern Technologies (320 ITR 577 (SC)) &Vijaya Bank (323 ITR 166 (SC)) referred)

- U/s 119, the CBDT is entitled to issue Circulars to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the income tax authorities, though they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored. A circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act (UCO Bank vs. CIT (237 ITR 889 (SC)) followed)

Per S. H. KAPADIA, CJI (concurring):

- S. 36(1)(vii) & 36(1)(viia) are distinct and independent items of deduction and operate in their respective fields. S. 36(1)(vii) allows a deduction for bad debts in respect of urban and rural debts. However, by virtue of the Proviso to s. 36(1)(vii), the deduction in respect of rural debts is limited to the extent of difference between the debt or part thereof written off in the previous year and the credit balance in the provision for bad and doubtful debts account made under s. 36(1)(viia). The proviso prevents benefit of double deduction with reference to rural loans. This is in consonance with the CBDT's interpretation in the Circulars.

CIT vs. Vandana Properties (Bombay High Court)

SECTION 80-IB(10): MUTIPLE HOUSING PROJECT ON 1 ACRE LAND ARE ELIGIBLE FOR DEDUCTION

In case of CIT vs. Vandana Properties, Bombay High Court held as follows:

- Construction of even one building with several residential units of the size not exceeding 1000 square feet would constitute a 'housing project' u/s 80IB (10);

- The additional building is an independent housing project and not an extension of the housing project already existing on the plot because when the earlier plans were approved; additional building was not even contemplated and came into existence much later. The fact that the approval was granted on the same terms as that granted to the other buildings does not make it an "extension;

- S. 80IB (10)(b) specifies the size of the plot of land but not the size of the housing project. While the plot must have a minimum area of one acre, it need not be a vacant plot. The object of s. 80IB (10) is to boost the stock of houses. There can be multiple housing projects on a plot of land having minimum area of one acre;

- On facts, as there was no merger of flats and no application was made to the local authority seeking merger of two flats, there was no violation.

Killick Nixon Ltd. vs. DCIT (Bombay High Court)

TRANSACTION WITHIN FOUR CORNERS OF LAW CAN BE TREATED AS "SHAM" & "COLOURABLE DEVICE" BY LOOKING AT "HUMAN PROBABILITIES"

In the case of Killick Nixon Ltd. vs. DCIT, the assessee borrowed from the G. K. Rathi group and used that to buy shares @ Rs. 150 per share in three 100% subsidiary companies though the fair value of the shares was Rs. 24. The amount received by the said subsidiary companies was transferred back to another company of the G.K. Rathi group. Thereafter, the said shares were sold for Rs. 5 each and a short-term capital loss was claimed and this was set-off against other long-term capital gains. The Bombay High court affirmed that on the facts the purchase and sale of shares was found to be a sham, the loss cannot

be allowed. It observed that whenever there are reasons to believe that the apparent is not real; then the taxing authorities are entitled to look into surrounding circumstances to find out the reality and apply the test of human probabilities.

The judgement of the Supreme Court in Vodafone International vs. UOI makes it clear that a colourable device cannot be a part of tax planning. Where a transaction is sham and not genuine, it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. It was clarified that there is no conflict between McDowell (154 ITR 148 (SC)), Azadi Bachao Andolan (263 ITR 706 (SC)) & Mathuram Agarwal.

Areva T&D India Limited vs. Dy. CIT (Delhi High Court)

SECTION 32(1)(ii) – DEPRECIATION ALLOWABLE ON BUSINESS CLAIMS; BUSINESS INFORMATION; BUSINESS RECORDS, BEING "INTANGIBLE ASSETS"

In case of Areva T&D India Limited vs. Dy. CIT, the assessee acquired a going concern business for a lump sum consideration of Rs. 44.7 Crores. The net tangible assets were valued at Rs.28.11 crores and the balance Rs. 16.58 crores was allocated by the transferee towards acquisition of bundle of "business and commercial rights" being business information; business records; contracts; employees etc, compendiously termed as "goodwill" and claimed depreciation u/s 32(1)(ii).

Delhi High Court observed that "The fact that after the specified intangible assets [in Sec 32(1)(ii)] the words 'business or commercial rights of similar nature' have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate."

HC relied upon SC ruling in Techno Shares and Stocks Ltd v. CIT (327 ITR 323). SC had held that intangible assets owned by the assessee and used for the business purpose, which enables the assessee to access the market and has an economic and money value, is a "license" or "akin to a license", which is one of the items eligible for depreciation u/s 32(1)(ii) of the Act. HC observed that "The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business."

HC thus ruled that specified intangible assets acquired under slump sale agreement, were in the nature of "business or commercial rights of similar nature" specified in Sec 32(1)(ii) of the Act and eligible for depreciation.

CIT vs. M/s Virgin Creations (Calcutta High Court)

SECTION 40(a)(ia): TDS AMENDMENT TO GIVE EXTENDED TIME FOR PAYMENT IS RETROSPECTIVE

In the case of CIT vs. M/s Virgin Creations, the assessee deposited TDS after the end of the financial year but before the due date of filing of the return of income. The Calcutta High Court on the issue whether the amendment to s. 40(a)(ia) by the Finance Act 2010 w.e.f. 1.4.2010 to provide that the TDS has to be paid on or before the due date for filing the ROI was prospective or retrospective, dismissed the department's appeal in view of the authoritative pronouncement of the Supreme Court in case of Allied Motors (224 ITR 677) & Alom Extrusions (319 ITR 306), in which the Supreme Court held that the amendments to the aforesaid provision (s. 43B) have retrospective application. Further, the Supreme Court in R.B. Jodha Mal Kuthiala (82 ITR 57), held that a provision which was inserted the remedy to make a provision workable requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well.

Basu Distributor Pvt Ltd vs. ACIT (Delhi High Court)

SECTION 40A(3): FINANCIAL CRISES MAY BE "EXCEPTIONAL OR UNAVOIDABLE CIRCUMSTANCE" FOR CASH PAYMENT

In case of Basu Distributor Pvt Ltd vs. ACIT, the assessee made payments exceeding Rs. 10,000 in cash and claimed that a disallowance u/s 40A(3) read with Rule 6DD(j) & Circular No.220 dated 31.05.1997 could not be made as a payment by cheque etc was not possible due to "exceptional or unavoidable circumstances". The Delhi High Court observed as under:

- S. 40A (3) & Rule 6 DD (j) have been incorporated in the Act to check the incurring of bogus and fictitious expenses to non existing parties. In the present case, there is no dispute on the identity of the payee and genuineness of the transaction but the assessee had to establish the "exceptional or unavoidable circumstances" due to which the payment was made in cash.
- The assessee was not doing well in its business and was facing liquidity and financial crunch. The assessee's explanation that payments were made in cash as preparation of a bank draft or issue

of cheque would have resulted in a missed opportunity or failure of a good business deal with third parties is acceptable as there were earlier cases of bounced cheques and when a party is facing liquidity problem, it can get difficult as third parties are reluctant to accept cheques and insist on cash payments.

- Arranging funds is also a problem and not easy. Also, the cash was obtained from a known party and the AO had not made any addition on that score. Accordingly, disallowance u/s 40A(3) was not justified.

RST, In Re (AAR)

NO EXEMPTION U/S 47(iv) ON CAPITAL GAINS FROM SHARE BUY-BACK

In case of RST, In Re, the Authority for Advance Ruling (AAR), deciding on the taxability of share buy-back by the India subsidiary of the foreign parent company, observed that shares held by nominees cannot be considered as shared held by foreign parent. Section 47 of the Act is an exemption provision. It exempts certain transfers from within the purview of section 45 of the Act. Being an exemption section, it has to be strictly construed. Further, the words "nothing contained in Sec 45 shall apply to the following transfers" contained in Section 47 would mean two things. One, it does not override Sec 46A and two, by virtue of Sec 47, a transfer is not deemed to be not a transfer. The words of Sec 46A are plain and clear. It is only subjected to Sec 48 of the Act.

It was held that Section 46A of the Act would be applicable in the case of a buyback of shares and Section 46A is not subjected to Section 47 which at best only overrides Section 45. Therefore, in the case of a buyback of shares, section 46A of the Act will be attracted and resort to Section 45 is not warranted.

Dy. CIT vs. Summit Securities Limited (ITAT Mumbai)

SECTION 50B: NEGATIVE NET WORTH TO BE ADDED FOR THE PURPOSES OF COMPUTING CAPITAL GAINS ON SLUMP SALE OF BUSINESS

In case of Dy. CIT vs. Summit Securities Limited, there was slump sale of the undertaking having negative net worth. For the purpose of capital gains u/s 50B, the assessee considered net worth as nil and the entire sales consideration for the undertaking was offered to tax as long term capital gains. The Special Bench Mumbai ITAT held that in the case of a slump sale, one lump sum value of the undertaking is arrived at, derived by adding all assets and reducing all the

liabilities. This is the "full value of the consideration". If one adds the liabilities to this value, one is arriving at the consideration for the "assets" but not the consideration for the "undertaking". Also, once the sale consideration has been approved by the High Court, the "full value of the consideration" has to be restricted only to the actual amount received or accruing to the assessee.

The Special Bench held that to contend that the cost or net worth can never be in negative, is too wide a proposition to be accepted in case of the capital asset in the nature of Undertaking. The Special Bench further held that if the book value of all the liabilities is more than the book value/written down value of all the assets, it is quite natural that the capital gain on the transfer of undertaking will be more than the full value of consideration because of the reason that the value of liabilities undertaken by the transferee stands embedded in and has the effect of reducing the full value of consideration.

The Special Bench concluded that though, in ordinary parlance, the terms "cost" & "net worth" may not have a negative value, in the context of s. 50B, if the liabilities exceed the assets, there would be a negative net worth. The said negative net worth has to be "deducted from" (i.e. "added to") the full value of consideration. Consequently, the chargeable capital gain is Rs. 300 crores (Rs. 143 crores + Rs. 157 crores) (*Zuari Industries 105 ITD 569 (Mum) & Paper Base Co 19 SOT 163 (Del) reversed*)

IndusInd Bank Limited vs. ACIT (ITAT Mumbai)

LESSOR NOT ENTITLED TO DEPRECIATION IN CASE OF A 'FINANCE LEASE'

In case of IndusInd Bank Limited vs. ACIT, Mumbai ITAT Special Bench observed that the distinction between a "Finance lease" and an "operating lease" is set out in the Guidance Note on Accounting for Leases and Accounting Standard (AS) 19. It is also set out in the judgement of the Supreme Court in Asea Brown Boveri vs. IFCI [154 Taxman 512 (SC)] & Association of Leasing & Financial Services Companies v. UOI [2010-(SC2)-GJX-0838-SC]. In the finance lease, the lessee uses the asset for its entire economic life & all risks and rewards incidental to ownership are transferred to the lessee. It is for a fixed period & non-cancellable and in substance, it is a loan from the lessor to the lessee. Whereas, in an operating lease, the lessor bears the risk of loss, the period is cancellable and lease rentals are not synchronized with the economic life of the asset.
It was held that, having regard to the nature of a 'finance lease' in which the lessor is merely a 'de jure' owner of the asset with only a symbolic right of ownership and the lessee being 'de facto' owner of the asset entitled to all risks and rewards of ownership of the asset, the lessor is not entitled to depreciation

allowance. It is the lessee which is entitled to depreciation allowance. Further, a 'sale and leaseback' transaction is distinguishable from 'finance lease'.

In the present case, the assets were acquired much prior to the date of the lease agreement and the assessee had lent substantial amount as short term loan to the lessee which, as per the assessee's own admission, was later converted into lease. It was clear that the parties had attempted to disguise a loan transaction as a lease transaction. Thus, the agreement was consequently a "sham".

It was concluded that the lease transaction was not a genuine lease transaction – much less a 'finance lease' and, hence, the assessee was not entitled to depreciation allowance.

ITO vs. Anant Shelters Pvt. Ltd (ITAT Mumbai)

CONDITIONS TO INVOKE SECTION 68

In case of ITO vs. Anant Shelters Pvt. Ltd, Mumbai ITAT enumerated the following three conditions to invoke Section 68 -

(a) when there is credit of amounts in the books maintained by the assessee (b) such credit has to be a sum of money during the previous year (c) either the assessee offers no explanation about the nature and source of such credits found in the books or the explanation offered by the assessee, in the opinion of the AO, is not satisfactory. It is only then that the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

In respect of above conditions, ITAT also clarified as follows:

- The opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on the record.
- The opinion of the AO is required to be formed objectively with reference to the material on record file. The evidence produced by the assessee cannot be brushed aside in a causal manner. Assessee cannot be asked to prove impossible. Explanation about 'source of source' or 'origins of the origin' cannot and should not be called for while making inquiry under section.
- In the matters related to section 68, burden of proof cannot be discharged to the hilt -such matters are decided on the particular facts of the case as well as on the basis of preponderance of probabilities. Credibility of the explanation, not the materiality of evidences, is the basis for deciding the cases falling under Section 68.

- Assessee has to establish identity and creditworthiness of the creditor as well as the genuineness of the transaction.
- All the three ingredients are cumulative and not exclusive.

Makemytrip (India) Pvt. Ltd vs. Dy. CIT (ITAT Delhi)

SECTION 32(1)(ii) - WEBSITE BEING AN INTANGIBLE ASSET WOULD BE ELIGIBLE FOR DEPRECIATION AT RATE OF 25 PER CENT

In case of Makemytrip (India) Pvt. Ltd vs. Dy. CIT, Delhi ITAT held that the assessee was doing its business of tour and travel, through its website and, therefore, the website development cost represents business asset falling under the block of intangible assets and would be eligible for depreciation at the rate of 25%.

Sharma Kajaria & Co. Vs. Dy. CIT (ITAT Kolkata)

SECTION 40(a)(ia): NO DISALLOWANCE IN RESPECT OF REIMBURSEMENT WHICH ARE NOT ROUTED THROUGH PROFIT AND LOSS ACCOUNT TO BE CLAIMED AS DEDUCTION

In case of Sharma Kajaria & Co. Vs. Dy. CIT, Kolkata ITAT observed that a plain look at the section 40(a)(ia) makes it clear that this provision seeks to restrict the deductions which are otherwise permissible under sections 30 to 38. In other words, as a result of this section, a disallowance can be made only in respect of an amount which is sought to be deducted under these sections i.e. if claimed as a deduction in computation of business income. In case of reimbursements simplicitor, being profit neutral, are not routed through the profit and loss account to be claimed as deduction.

ITAT further explained that when the expenses are being reimbursed by the clients, these expenses cease to be expenses of the assessee, and, therefore, there is no question of deduction in respect of the same. However, when assessee has raised composite bills for professional services, on gross basis and without giving details of payouts to outside lawyers on behalf of his clients, the payments to outside lawyers will be in the nature of deduction to be claimed by the assessee.

ACIT vs. Devang Kamdar (ITAT Mumbai)

A SUB-BROKER IS NOT AGENT OF MAIN BROKER

In case of ACIT vs. Devang Kamdar, assessee was a sub-broker with Sharekhan. He sold his business to Sharekhan and consideration received for transfer of goodwill was treated as long term capital gains. Mumbai ITAT observed the agreement between the assessee and Sharekhan was not that of agency but was on 'principal-to-principal' basis since the Sharekhan (main broker) would charge brokerage to the assessee and assessee was free to charge any amount of commission from his clients. Also binding of the principal is main ingredient for constitution an agency which is not there in the agreement of sub-brokership. Thus, provisions of Section 28(ii)(c) are not applicable.

On the argument by the Revenue that due to change in the SEBI regulations, the assessee could not have continued the business and there was no question of transfer of goodwill, ITAT held that despite the change in the SEBI Regulations, the assessee could still act as a 'remisier' and still remained entitled to his commission which was to be shared by the main broker.

ITAT held that when the assessee has sold the whole of the business, the compensation received on sale of such business cannot be called compensation for termination of the agency. The net worth of 1800 clients along with trained men power and research report etc. would constitute intangible assets which have been sold by the assessee.

CIT vs. Shreyas S. Mokharia (ITAT Mumbai)

IN CASE OF SHAREBROKER UNREALISED VALUE OF SHARES FROM CLIENTS ARE DEDUCTIBLE UNDER SECTION 36(1)(vii) IF BROKERAGE IS TAKEN TO PROFIT AND LOSS ACCOUNT

In case of CIT vs. Shreyas S. Mokharia, the Mumbai ITAT observed that the requirement which has been imposed by Parliament in section 36(2)(i) is that a deduction on account of a bad debt can be allowed only where such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of the debt is written off. The brokerage having been credited to the profit and loss account of the assessee, it is evident that a part of the debt is taken into account in computing the income of the assessee. The brokerage as well as the value of the shares constitute part of the debt due to the assessee since both arise out of the same transaction. Thus, requirement of Section 36(2)(i) are duly fulfilled since a part of debt has been taken into account in computing the income of the assessee.

ITAT held that the assessee is entitled to deduction by way of bad debts under section 36(1)(vii) read with section 36(2) in respect of the amount which could not be recovered by him from his clients in respect of transactions effected by him on behalf of his clients apart from the brokerage earned by him.

ITO vs. Sri Balaji Sago and Starch Products (ITAT Chennai)

RECTIFICATION OF DEPRECIATION CLAIM WITHOUT FILING REVISED RETURN ALLOWED

In case of ITO vs. Sri Balaji Sago and Starch Products, the assessee claimed depreciation on windmill @ 15% in the return, which later filed an application to rectify depreciation rate to 80%.

Chennai ITAT observed that there is a genetic difference in the concept of deduction by way of statutory allowance and deduction by way of other expenditure. The assessee has not made any fresh claim, as far as depreciation is concerned. It has already made a claim for statutory allowance of depreciation, subject to the mistake occurred in choosing the correct rate. The ratio of the decision of the Supreme Court in the case of Goetze (India) Ltd. v. CIT (284 ITR 323) needs to be carefully applied in the matters of statutory allowances available to an assessee.

ITAT observed that since depreciation was a mandatory allowance, the AO was bound to apply the correct rate of depreciation allow the same.

Gillete Group India Pvt. Ltd vs. ACIT (ITAT Delhi)

SECTION 14A: SECTION 14A & RULE 8D DISALLOWANCE CANNOT EXCEED TOTAL EXPENDITURE

In the case of Gillete Group India Pvt. Ltd vs. ACIT, Delhi ITAT ruled that disallowance u/s 14A read with Rule 8D can be made for the expenditure incurred for earning of exempt income. The disallowance u/s 14A & Rule 8D cannot exceed the expenditure actually claimed by the assessee.

INTERNATIONAL TAXATION

Circulars

Treaty between India and Tanzania enters into force

On 12 December 2011, the India - Tanzania Income Tax Treaty (2011) entered into force. The treaty will be in force from 1 January 2012 for Tanzania and from 1 April 2012 for India. From these dates, the new treaty will replace the India - Tanzania Income Tax Treaty (1979), as amended by the 1980 exchange of notes.

Exchange of information agreement between India and Argentina signed

On 21 November 2011, India and Argentina signed the Argentina - India Exchange of Information Agreement (2011), in Buenos Aires.

REGULATIONS GOVERNING INVESTMENTS

RBI

Important Recent Developments in Inbound Investments Policies

FDI AND FII RELATED DEVELOPMENTS

FDI Policy:

The fifth edition of the Consolidated FDI Policy vide Circular 1 of 2012 was issued on 10.04.2012. The significant changes made in the FDI Policy by this circular are summarized below:

- FDI in Commodity Exchange which was previously allowed under the approval route within a composite cap of 49%, (FII's under PIS upto 23% and upto 26% as FDI) have now been liberalized to allow investments via PIS under the automatic route.

- It has been clarified that for the purpose of "leasing and finance" as a permitted NBFC activity covers only "Financial Leases" and not "Operating Leases".

- It has now been decided that for the purpose of conversion to equity against import of capital goods/machinery/ equipment, second-hand machinery will be not be covered under this provision.

- It has been clarified that for the purpose of increasing the aggregate limit of 24% of FII investment to the sectoral cap/ statutory ceiling by the Indian company, subject to prior intimation to RBI, a resolution by its Board of Directors followed by a special resolution in its general meeting will be required.

- It has been decided to henceforth issue the Consolidated FDI Policy on yearly basis and the next version will be released on 29.03.2013

Transfer or Issue of Security by a Person Resident outside India

- FVCIs are now allowed to invest in the eligible securities by way of private arrangement / purchase from a third party. They are also allowed to invest in securities on a recognized stock exchange subject to the provisions of the SEBI (FVCI) Regulations, 2000.

- Indian company raising the aggregate FII investment limit of 24 per cent to the sectoral cap/ statutory limit or raising the aggregate NRI investment limit of 10 per cent to 24 per cent under the PIS Scheme, will have to immediately intimate the same to the RBI along with a compliance certificate from a Com

Liberalization of Overseas Investments by Indian Parties:

- It has been decided to grant general permission to resident individuals in respect of the following:

    - An application may be made under the approval route to the RBI for creation of charge in the form of pledge / mortgage / hypothecation on the immovable / movable property and other financial assets of the Indian Party and their group companies within the overall limit fixed (presently 400%) for financial commitment subject to submission of a 'No Objection' by the Indian Party and their Group companies from their Indian lenders.

    - The bank guarantee issued by a resident bank on behalf of an overseas JV / WOS of the Indian party, which is backed by a counter guarantee / collateral by the Indian party, shall now be reckoned for computation of the financial commitment of the Indian Party.

    - The general permission of issuance of personal guarantee by the promoters of the Indian Party has now also been extended to the indirect promoters of the Indian Party being resident individual.

    - Application can now be made under the approval route to the RBI by Indian parties for undertaking financial commitment in JV/WOS even without equity contribution in such JV / WOS.

    - In cases where, under the laws of the host country, the JV/WOS is not required to undergo an audit of their books of accounts, the Indian parties may submit the Annual Performance Report

(APR) based on the unaudited annual accounts of the JV / WOS along with a certificate from their Statutory Auditors.

- For the purposes of overseas investment also, CCPSs which were previously treated as loan, are now treated at par with equity shares.

- It has been decided to grant general permission to resident individuals in respect of the following:

  - Resident individuals can now acquire qualification shares for holding the post of a Director in the overseas company to the extent prescribed as per the law of the country where the company is located as against the previous cap of 1 percent.

  - General permission has been granted to the resident individuals to acquire shares of a foreign entity in part / full consideration of professional services rendered to the foreign company or in lieu of director's remuneration within the overall ceiling prescribed under the LRS Scheme.

  - Resident employees or directors are permitted to accept shares offered under an ESOP Scheme globally, on uniform basis, in a foreign company irrespective of the percentage of the direct or indirect equity stake of the foreign company in the Indian company as against the previous limit of 51% equity stake of the foreign company in the Indian company.

Trade Credits and External Commercial Borrowings Policy:

- The following all-in-cost ceiling had been enhanced with effect from November, 2011. It has been decided to extend this ceiling for a further period of six moths, i.e. upto 30th September 2012:

  - For ECBs with an average maturity of three and up to five years - 6 months LIBOR + 350 bps.

  - For trade credit - 6 months Libor + 350 bps.

- It is now permitted to repay loans taken by a resident individual form his close relatives outside India by credit to NRE / FCNR(B) account of the lender subject to the condition that the loan was extended by way of inward remittance in foreign exchange or by debit to the NRE / FCNR(B) account of the lender.

Branch Offices (BO) / Liaison Offices (LO)

It has been clarified that assets of Liaison / Branch Office can be transferred to subsidiaries or other LO / BO or any other entity only after obtaining a specific permission of the RBI.

Liberalized Remittance Scheme:

The following clarification with respect to LRS Scheme has been made:

- The LRS facility is available to all resident individuals including minors;
- Remittances under the LRS facility can be consolidated in respect of family members;
- Remittances under the scheme can be used for purchasing objects of art.

Discontinuation of supplying GR forms by RBI.

With effect from July 1, 2012, it has been decided to discontinue supplying/selling of GR Form by the RBI and the same will only be available online on the RBIs website.

Companies Act

Recent Developments

Listed Companies provided a breather in respect of submission of Annual Audited Results for the Financial Year 2011-12:

With reference to the amendments made to Cl 41 of the Listing Agreement, vide SEBI Circular dated 5th October 2011, the Capital Markets Regulator, SEBI has vide its letter dated 11th April 2012 issued to BSE & NSE, restored the extant option for the quarter ended FY 2011-12 and in respect of annual audited results for FY 2011-12, to either:

- Submit limited reviewed Q4 results within 45 days from end of the quarter and thereafter submit annual audited results as soon as they are approved by the Board;

(or)

- Submit annual audited results within 60 days from the end of fourth quarter along with Q4 results which would be a balancing figure

The above relaxation for the FY 2011-12 has been provided keeping in view the representations received from the listed companies on the Q4 results and revised Schedule VI, being notified by MCA. The situation will be reviewed later on.

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