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INDIA NEWSLETTER

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TAX AND REGULATORY UPDATES

SERVICE TAX

Exemption to business facilitator or a business correspondent to a banking company w.r.t accounts in rural branch

Sl. No. 29(g) of Notification No. 25/2012-ST provided exemption as follows- "services provided by business facilitator or a business correspondent to a banking company w.r.t Basic Savings Bank Deposit A/c covered by Pradhan Mantri Jan Dhan Yojana in the banking company's rural area branch, by way of account opening, cash deposit, cash withdrawals, obtaining e-life certificate, Aadhar seeding;"

Now, the said clause has been substituted to cover an wide ambit - "services provided by business facilitator or a business correspondent to a banking company w.r.t accounts in its rural branch"

[Notification No. 01/2017 - Service Tax dated 12.01.2017]

Amendment to aggregator definition in Service Tax Rules, 1994

A proviso is inserted to the definition of aggregator stating that aggregator shall not include such person who enables a potential customer to connect with persons providing services by way of renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes subject to following conditions, namely:

- the person providing services by way of renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes has a service tax registration under provision of Service Tax Rules; and
- whole of the consideration for services provided by such service provider is received directly by such service provider and no amount, which forms part of the consideration of services of such service provider, is received by the aggregator directly from either recipient of the service or his representative.

[Notification No. 02/2017 - Service Tax dated 12.01.2017]

CONTENTS

Service tax under RCM in case of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India w.e.f 22nd January 2017

Rule 2(1)(d) is amended to incorporate that in case of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the person in India who complies with Section 29, 30 or 38 read with Section 148 of the Customs Act, 1962 with respect to the such goods is the person who is liable to pay tax.

[Notification No. 02/2017 - Service Tax dated 12.01.2017]

Liability under RCM is 100% on the persons specified above, in respect of services provided or agreed to be provided by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.

[Notification No. 03/2017 - Service Tax dated 12.01.2017]

CASE LAW HIGHLIGHTS

SERVICE TAX

Distributors subscription towards representational & selling rights is affirmed to be 'franchise services'.

CESTAT upheld service tax demanded on subscription received towards representational rights granted to various distributors to sell company products under 'franchise service category'. Amyway India Enterprises Pvt. Ltd. appealed against the said CESTAT order.

The Apex court noted that CESTAT examined company's Business Starter Guide and Terms & Conditions, as also Rules of Conduct and had noted that a distributor must inter alia be truthful and accurate in offering business opportunity or selling products, and must strictly adhere to guidelines, systems, procedures and policies mentioned therein. Also, refusing to consider the meaning of word 'franchise' in other countries in light of definition u/s 65(47) of Finance Act, CESTAT had observed that said sources were useful for interpretational purposes only in case of ambiguity in statute.

Accordingly, CESTAT had held that distributor was not merely granted right to sell company's products, but also had representational rights, falling under 'franchise service' category.

Hon'ble Supreme Court found no merit in assessee's appeal against confirmation of service tax on subscription received towards representational rights granted to various distributors to sell company products, under 'franchise service' category.

[AMYWAY INDIA ENTERPRISES PVT LTD v. COMMISSIONER OF SERVICE TAX, NEW DELHI - TS-511-SC-2016-ST, SUPREME COURT]

CENVAT credit is allowed on broadcasting fee reimbursed to advertising agency

Zapak Digital Entertainment Ltd. provides service of sale of space and time for advertisement and is also engaged in promoting its business by placing advertisement in various forms of media through advertisement agency. The said advertisement agency acted as a facilitator between the broadcaster and the advertiser.

CESTAT noted that invoices raised by broadcaster clearly indicated that they had been issued in favour of the company alongwith the name of advertising agency as an agent and assessee merely reimbursed the amount paid by advertising agency on its behalf.

It was held that advertising agency merely acted as conduit for transfer of money from assessee to broadcaster. CESTAT allowed CENVAT credit of service tax paid on invoices raised by broadcaster towards placing advertisement of assessee through advertising agency.

[ZAPAK DIGITAL ENTERTAINMENT LTD. v. COMMISSIONER OF ST, MUMBAI II - TS-535-CESTAT-2016-ST, MUMBAI CESTAT]

CENTRAL EXCISE

Excise duty refund pursuant to post clearance turnover discounts offered by manufacturer to dealers by way of credit notes is available subject to unjust enrichment

TVS Electronics Ltd. is engaged in the manufacture of keyboards, printers and other parts. It follows the regular modus operandi, wherein clearances are effected from factory to branch office at a declared price. However, the pricing at the time of actual sale from branch office could vary from that of factory price, and hence, provisional assessment is made at the time of clearance from factory. The price variations arise due to two factors, a subsequent return of various market exigencies and due to distributors discount on the basis of performance. The discount is issued by way of credit note and the actual price of sale can thus, be determined only at the time when sales are effected from the branches to the distributors.

Adjudicating Authority computed the excess payment of excise duty by the assessee and thus, no dispute that the assessee had, in fact, remitted excess duty which has been duly quantified and determined to be refundable. However, the claim of refund was rejected on the ground of possible unjust enrichment. Accordingly, it was ordered that the refund be paid over to the Consumer Welfare Fund insofar as the assessee was not entitled to the same. The adjudication was confirmed both by Commissioner (Appeals) and CESTAT and thus, assessee approached High Court.

High Court noted that assessee paid higher amount of excise duty on provisional basis at the time of clearance of goods to dealers / distributors and consequent to finalization, credit notes were raised towards difference.

Referring to the Apex Court judgment in Addision & Company Limited, High Court states that claimant assessee has to establish nil unjust enrichment i.e. duty in relation to which refund is claimed was, in fact, paid by him and has not been passed on to any other person.

Also, stated that this a mandatory exercise that is to be undertaken by a assessee manufacturer claiming excess duty refund. High Court ruled that excise duty refund pursuant to post clearance turnover discounts offered by manufacturer to dealers by way of credit notes shall be available, subject to establishment of nil unjust enrichment. It was remanded back to the Adjudicating Authority.

[TVS ELECTRONICS LTD. v. THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE, CHENNAI & ORS - TS-497-HC-2016(MAD)-EXC, MADRAS HIGH COURT]

CUSTOMS

CESTAT Allows 'Project Import' benefit on plant & machinery disposed after 2 years of installation and use thereof

The issue before Mumbai CESTAT was regarding the applicability of Notification No. 132/85 pertaining to project import benefit, to imported plant and production machinery which was diverted after use for a certain period of time.

The appellant, NOCIL, imported a secondhand thermoforming plant and production line under CTH 98.01 as project imports. Accordingly, as per CBEC Instruction No. 512/8/89-Cus-VI, request was made to Deputy Commissioner to conduct plant site verification for imported goods. Since the said goods were not found installed at site, verification could not be completed.

Consequently, the Deputy Commissioner informed that the appellant had sold the said goods to Pololight Industries Ltd. Accordingly, a notice was issued to the appellant alleging that it could not have diverted the goods to local market violating the provisions of Project Regulations, 1986.

It was held that that since the appellant had violated the conditions of said Regulations, it was not entitled to finalization of assessment under CTH 98.01 and at effective rate of duty prescribed under Notification No. 132/85. Accordingly, the goods were classified under CTH 8479.89 and a demand was issued for basic customs duty @ 80%, auxiliary duty @ 50%, CVD @ 10% and special excise duty @ 15%. The demand was confirmed by Deputy Commissioner and Commissioner (Appeals). Being aggrieved, appellant filed appeal before CESTAT.

After going through the rival submissions, CESTAT observes that CTH 98.01 is an extension of facility and not grant of concession, same has been introduced to classify entire plant (which may consist of several components) under single heading and to charge single rate of duty.

In present case, the installed plant & machinery was disposed only due to economic unviability and absent any restriction on sale under the Notification or Regulations, benefit of final assessment under CTH 98.01 cannot be denied.

In view thereof, CESTAT allowed appellant appeal

[NOCIL v. COMMISSIONER OF CUSTOMS - TS-521-CESTAT-2016-CUST, MUMBAI CESTAT]

Enhanced Customs duty demand on goods loaded prior to enhancement is unsustainable

The issue before CESTAT was whether the Revenue was justified in demanding the enhanced rate of duty on the material which was loaded on the ship before the enhancement of duty.

The assessee, Fomento Resources Private Limited, was engaged in the export of iron ore from Goa. When the iron ore was being loaded on the ship at the port, the rate of duty was enhanced, consequential enhanced duty was demanded on the entire quantity exported. Duty was enhanced from 20% to 30% vide Notification No. 129/2011- Customs dated December 30, 2011.

Further, whereas in case of another assessee, Chowgule & Co. Private Limited the duty was enhanced from Nil to 5% ad valorem vide Notification 146/09-Customs dated December 24, 2009. The original adjudicating authority assessed the entire quantity under the higher rate of duty. The appellate authority in all the cases allowed the benefit of lower duty on the material loaded in the ship prior to enhancement of duty and also allowed the consequential refund of duty paid. Aggrieved by the order of appellate authorities, revenue filed an appeal before CESTAT.

After going through the rival submissions, CESTAT observed that enhanced duty inapplicable on goods loaded on ship for export, before enhancement of duty. CESTAT accepted assessee’s contention that, checklist of shipping bill indicates that permission has been granted on each day when loading has taken place, therefore, enhanced rate of duty would be applicable only to consignments loaded after issue of notification. Further, observed that, preventive officer, at time of export, made endorsement “passed for shipment”, and duty has been paid before start of loading, which implies that goods are not prohibited, accordingly, holds that, in each of the cases, entire duty has been paid on the first date of loading, thus each permission of loading can be construed to be a ‘permission’ u/s 51 of Customs Act.

Further, CESTAT rejects Revenue’s contention that multiple clearances for loading of goods given as a trade facilitation measure and each order permitting loading of goods is not a ‘let export order.

Accordingly, CESTAT dismissed Revenue’s appeal.

[COMMISSIONER OF CENTRAL EXCISE, GOA v. FOMENTO RESOURCES PVT. LTD. & ANR. - TS-567-CESTAT-2016-CUST, MUMBAI CESTAT]

DIRECT TAX UPDATES

CIRCULARS/NOTIFICATIONS/PRESS RELEASES

Protocol amending India-Singapore tax treaty

Article 13(4) of India – Singapore tax treaty provided that gains derived by a resident of Singapore from alienation of shares in an Indian company shall be taxable only in Singapore, subject to fulfilment of Limitation of Benefits clause. To prevent double non-taxation, curb revenue loss, India and Singapore have signed a third protocol to the tax treaty, continuing the trend reflected in recently revised treaties with Mauritius and Cyprus. The key features of protocol are as under:

Capital Gains

- Protection provided to investment in shares acquired before April 1, 2017 - Capital gains arising on alienation of shares of Indian company taxable only in Singapore (residence based taxation) subject to following tests:
  - Primary purpose is not to take benefit of capital gains tax exemption
  - Satisfies the criteria of bonafide business i.e. not a shell/conduit entity – Listed on recognised stock exchange or expenditure on operations is equal to/more than SGD 2,00,000 in Singapore or INR 50,00,000 in India for each of the 12 month periods in the immediately preceding period of 24 months from the date on which the gains arise
- Capital gains arising during the period from April 1, 2017 to March 31, 2019 taxed at 50% of Indian domestic tax rate, subject to specified conditions. Conditions are similar to those provided as in case of gain on grandfathered investments except that expenditure test (SGD 2,00,000 in Singapore or INR 50,00,000 in India) is to be considered for immediately preceding period of 12 months from the date on which the gains arise
- Capital gains arising from fiscal year 2019-2020 onwards taxed at full Indian domestic tax rate.

Associated Enterprise

- The protocol provides that if profits accruing to an enterprise (as if an independent transaction) and taxed accordingly in a state, have also been taxed in the other contracting state, then the other state shall make appropriate adjustment to the tax amount charged on such profits. In making such adjustment, other provisions of the tax treaty are to be considered and competent authorities of two states shall consult each other, if necessary.

Miscellaneous

- A new Article 28A is inserted to provide that this Agreement shall not prevent a contracting state from applying its domestic law and measures concerning the prevention of tax avoidance or tax evasion.

  [Press Release dated December 30, 2016 and text of protocol released by Singapore tax authorities (IRAS)]

Declaration of Cyprus as notified jurisdictional area rescinded

Section 94A of the Income-tax Act, 1961 (the IT Act) empowers the Government to notify any country/territory as a notified jurisdictional area considering lack of effective exchange of information. In this regard, Cyprus was declared as a notified jurisdictional area in November 2013. As a result, inter-alia, transfer pricing provisions applied to all the parties to a transaction of taxpayer with person in Cyprus. Further, the sum/income/amount receivable by person located in Cyprus was liable for withholding at higher of Indian tax rates or tax treaty or 30%. This notification has now been rescinded from the date of its issue. However, this is subject to exception as respects things done or omitted to be done before such rescission.

[Notification No. 114/2016 dated December 14, 2016 and Notification No. 119/2016 dated December 16, 2016]

Clarifications on indirect transfer provisions

Indirect transfer provisions were introduced to tax the income arising from transfer of share or interest in a foreign company or entity if such share or interest derives its value substantially from assets located in India. Threshold is prescribed for application of this provision - value of such assets exceeds INR 100Mn and represents at least 50% of the value of global assets. Exclusion is provided to investors with no right of management/control in foreign company/entity and those holding less than 5% of voting power/share capital/interest in entity that directly/indirectly owns assets situated in India (small investors). The Central Board of Direct Taxes (CBDT) has issued clarifications on scope of indirect transfer provisions, primarily for offshore funds. Some of the key clarifications issued include:

- Redemption by investors of their units/shares in a fund, that invests into Indian securities and fulfilling above conditions will be covered under the ambit of indirect tranfer provisions. However, small investors will not be taxed in accordance with exclusion provided in IT Act.

- In master-feeder fund structure, investors of feeder fund not having any right of control or management in master fund or not holding voting power/share capital/interest (direct or indirect) exceeding 5% in master fund will not be covered under indirect transfer provisions.
- Where a fund has set-up an India focused sub-fund for investing exclusively in Indian securities, indirect transfer provisions will be applicable to the said fund, since value of shares/units held by it in sub-fund derives its value substantially from assets located in India.
- The shareholders/investors of amalgamating foreign entity (fund) will be liable to tax under indirect transfer provisions.
- Foreign Portfolio investors (FPI) regulated and listed on overseas stock exchange are not excluded from ambit of indirect transfer provisions.
- The withholding tax, interest and penalty provisions shall apply to FPI as per provisions of the IT Act.

[CBDT Circular No.41 of 2016 dated December 21, 2016]

After issue of this Circular, representations have been made by various FPIs, Foreign Institutional Investors, Venture Capital Funds and other stakeholders stating that circular does not address issue of possible multiple taxation of same income. Pending decision in this matter, operation of this Circular is kept in abeyance by the CBDT.

[Press Release dated January 17, 2017]

Direct Tax Dispute Resolution Scheme, 2016

The Direct Tax Dispute Resolution Scheme provides an opportunity to settle tax disputes pending at first appellate authority. The CBDT has issued some clarifications in response to queries received from stakeholders:

- The addition made by the tax officer before retrospective amendment and such addition has been validated by a provision later retrospectively amended, is eligible to avail the scheme, provided dispute in respect of such addition is pending as on February 29, 2016.
- The scheme does not provide for withdrawal of appeal or proceedings by revenue authorities. Therefore, if a taxpayer avails the scheme for a particular year, the revenue authorities would not withdraw its appeal (challenging relief to taxpayer) in some other year on similar issue.
- The penalty order under section 271C (for failure to deduct tax at source) or 271CA (for failure to collect tax at source) are not linked to assessment proceedings, therefore such orders are not covered under the scheme.

[Circular No. 42/2016 dated December 23, 2016]

Vide a separate notification, the deadline for filing declaration under the scheme has been extended till January 31, 2017.

[Notification No. 124/2016 dated December 29, 2016]

Tax officers not to reopen past assessments merely on ground of increase in turnover due to digitisation

Pursuant to the demonetisation announcement and measures to curb black money, there is shift towards use of digital modes of payment. As a result, enhanced turnover might be reflected in books of accounts. The CBDT has clarified that mere increase in turnover in a particular year, because of use of digital means of payment or otherwise, cannot be a sole reason to believe that income has escaped assessment in earlier years. Therefore, tax officers are advised not to reopen past assessments merely on the ground that turnover of current year has increased.

[Circular No 40/2016 dated December 9, 2016]

Electronic filing of Form 26A and Form 27BA

The taxpayer is not treated as 'assessee in default' for failure to deduct/collect tax at source, if, inter-alia, payee/buyer has paid tax on such amount and certificate to this effect is furnished from an accountant. The CBDT has notified that Form 26A and Form 27BA are be filed electronically for the years upto fiscal year 2015-16 and from fiscal year 2016-17 for defaults in case of withholding tax and collection of tax respectively. The tax officer has to ensure that interest on non-deduction/non-collection of whole or any part of tax or failure to pay after deduction/collection is paid before furnishing of statement.

[Notification no 11 and 12 of 2016 dated December 2 and 8, 2016]

JUDICIAL UPDATES

Tax holiday under section 10A is a deduction provision and deduction to be allowed at stage of computing total income of undertaking

Section 10A of the IT Act provides for deduction of profits and gains derived by an undertaking from export of articles or things for specified number of years. The Supreme Court dealt with a question as to whether this section (amended from April 2001) is a deduction or an exemption provision (since it falls under Chapter III of the IT Act dealing with exempt income) and whether business loss or unabsorbed depreciation of other units (eligible/non-eligible) can be set off before computation of deduction under section 10A. The Supreme Court held that the amended section is a provision for deduction. The introduction of word 'deduction' in the section, in the absence of any contrary material and scope of deduction contemplated, reflects intention of legislature to alter the nature from exemption to deduction provision.

Further, the deduction is qua the eligible undertaking of a taxpayer standing on its own, without reference to other eligible/non-eligible units or undertakings of the taxpayer. The benefit of deduction is to an undertaking on a stand-alone basis. Thus, the deduction has to be made independently at the stage of determination of its profits and gains, before application of provisions of set off of losses and unabsorbed depreciation considered while computation of total income of taxpayer.

[Yokogawa India Ltd Civil Appeal Nos. 8498 of 2013 & Others (Supreme Court)]

Capital gain arrived at with indexed cost of acquisition to be considered for computation of book profits

Section 10(38) of the IT Act exempts any income from transfer of long term capital asset, being listed shares/units held for more than 12 months and chargeable to transaction tax on stock exchange. Section 115JB of the IT Act states that income to which provisions of section 10(38) are applicable, are not to be adjusted (reduced) from profit or loss considered while computing book profits. The Bangalore Tax Tribunal noted that term 'any income' used in section 10(38) refers to only the amount of long term capital gains computed under the provisions of section 48 (provides the mechanism of computation of capital gains). This means that the benefit of indexation of cost of acquisition should be given to the taxpayer while computing long term capital gain for section 115JB of the IT Act. The Tax Tribunal held that profits eligible for exemption under section 10(38) should be considered for computation of book profits.

[Karnataka State Industrial Infrastructure Development Corporation Ltd ITA 1659, 1660, 1861 & 1862 (Bang.) of 2013 (Bangalore Tribunal)]

TRANSFER PRICING UPDATES

PRESS RELEASE

Tax Tribunal Deletes Location Saving Adjustment

The Mumbai Tax Tribunal deleted the Transfer Pricing adjustment on 'location saving' in respect of Indian contract manufacturing entity and held that if the taxpayer and its Associated Enterprises (AE) are operating in a perfect competitive environment, than any kind of return or advantage towards location savings /environmental costs savings would be embedded in the margin of comparables and thus separate adjustment is not warranted. Thus, if good local comparable companies are selected, then the benefit of locational saving can be said to have been captured in the Arm's Length Price determination. However, in a situation where the overseas entity is taken as a tested party or good local comparables are not available, then the problem of capturing the benefit of location saving would be an issue for the determination of Arm's Length Price.

[Syngenta India Limited ITA No. 1373 (Mum) of 2014 (Mumbai Tax Tribunal)]

Tax Tribunal upholds NIL Arm's length Price for payment of Management fees as availing of services was unsubstantiated

The Bangalore Tax Tribunal determined the arm's length price of management and support service fees as NIL, as the availment of services was not adequately substantiated by the taxpayer. The onus to prove that adequate services were availed from the AE lies with the taxpayer. The taxpayer produced only certain correspondence which did not prove that services were actually rendered. The tax tribunal relied on section 86 of the Indian Evidence Act and concluded that since the taxpayer failed to discharge its onus to prove that services were received it could be concluded that the payment of management fees was mere siphoning of funds from India with the intention of avoidance of tax. The tax tribunal also rejected the plea of the taxpayer to bundle the transaction as they were not closely related.

[Volvo India Private Limited ITA No. 384 (Bang) of 2013 (Bangalore Tax Tribunal)]

Cost Sharing Agreement for Sharing of Sponsorship fees with Associated E an international transaction

The taxpayer had entered into a cost sharing agreement with its AE, for a contract with BCCI for securing sponsorship of Indian Cricket Team, as per which the Indian Cricket team and its officials were required to use Nike brand name on the uniform and accessories during the matches. Noting that the 'NIKE' name does not indicate any specific product but clearly promotes brand name, the tax tribunal levied a Transfer Pricing adjustment on the expenditure incurred for promotion of 'NIKE' brand in India. Further, as per definition of international transaction under section 92B read with section 92F(v) of the IT Act, even an arrangement, understanding or an action in concert having a bearing on the profit income, losses or assets of the enterprises would qualify as international transaction. Thus, the Bangalore Tax Tribunal held that expenditure incurred by the taxpayer for promotion of brand 'NIKE' is under conscious understanding and agreement between the parties to promote and enhance the brand of 'NIKE' and hence an adjustment to the extent of expenditure incurred is warranted.

[Nike India Private Limited ITA No. 260 (bang) of 2014 (Bangalore Tax Tribunal)]

THE CORPORATE LAW AMENDMENTS

Notification for commencement of certain Sections

MCA vide notification dated 7th December, 2016 has enforced certain additional \provisions of the Companies Act, 2013 w. e. f. December 15, 2016, the notable ones being Compromise & Arrangement (Sections 230 – 240 (excluding Section 234) and winding up of a company (Sections 270 – 378).

Sections	Particulars
2(23)	Definition of Company Liquidator
7(7)(c) & (d)	Incorporation of Cos.
8(9)	Cos. with charitable objects
48	Variation of shareholders rights
66	Reduction of share capital
224(2)	Actions to be taken related to Inspector's report
230-240 (except Section 234)	Compromises and Arrangements
270-288	Winding up provisions and power of Tribunal
290-303	Winding up provisions and power of Tribunal
324	Winding up provisions and power of Tribunal
326 to 365	Winding up provisions and power of Tribunal
Proviso to Sec 370	Winding up provisions and power of Tribunal
372 to 373	Winding up provisions and power of Tribunal
375 to 378	Winding up provisions and power of Tribunal
Proviso to 391(2)	Application of Sec 34 to 36 and Chapter XX
434(1)(c)	Transfer of pending proceedings

Enforcement of Compromise and Arrangement Provisions under Companies Act, 2013

MCA vide notification dated December 7, 2016 has brought into force the much awaited sections of Companies Act, 2013 dealing with Compromises and Arrangements including mergers, demergers. The procedural aspects were further clarified through notified Rules called the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016; both of which shall come into effect from December 15, 2016.

Effectively, henceforth, Scheme of Arrangements will be disposed off by the National Company Law Tribunal (NCLT), in place of jurisdictional High Court.

The notification also enacts Fast Track mergers. The option of Fast Track mergers can be availed by small companies and holding-subsidiary companies.

Such companies need not approach NCLT for approval of proposed amalgamation and the same can be approved by Central Government.

The notified provisions are expected to bring about a radical change in the procedure related to compromises, arrangements and amalgamations making it faster and more transparent by ensuring active participation by all stakeholders.

Is the cross border merger provision notified?

MCA notifies the Companies (Transfer of Pending Proceedings) Rules, 2016

With a view to provide clarification on the existing proceedings related to Companies dealt with in the Jurisdictional High Court, MCA notified the rules relating to Transfer of pending proceedings in a phased manner to the jurisdictional bench of NCLT.

These rules are expected to facilitate smooth transfer of pending proceedings related to companies to NCLT from High Courts.

Commencement of Sections 248-252 of Companies Act, 2013

MCA vide its notification dated 26th December, 2016 has commenced the provisions of Sections 248 to 252 of the Companies Act, 2013. Also, Rules related to these Sections have been notified. The notified sections along with the rules lay down clear-cut guidelines related to removal of name of companies from the register of companies.

Enforcement of provisions related to Reduction of Share capital under Companies Act, 2013

MCA vide notification dated December 19, 2016 has brought into effect the Section and corresponding rules dealing with Reduction of Share Capital. This notification has thus brought more clarity on the process related to schemes which involve reduction of share capital.

MCA delegates its power under certain sections to the Regional Directors ('RDs')

MCA vide notification dated December, 19, 2016 has in supersession of all earlier notifications, delegated its power to RDs in matters related to

Sections	Particulars
8(4)(i)	Alteration of memorandum in case of conversion of section 8 company
8(6)	Power to revoke the licence granted to section 8 company.
13(4) & (5)	Approval of application for shifting of registered office from one State to another.
Section 16	Power to determine whether the name of company is identical with or too nearly resembles the name by which a company is existence has been previously registered or is identical with or too nearly resembles to an existing name of company registered under the Companies Act, 2013 or any previous company law.
Section 87	Power to order rectification or condonation in register of charges.
111(3)	Power to declare on application that the rights conferred by this section are being abused to secure needless publicity for defamatory matters.
140(1)	Approval for removal of the auditor.
230(5)	Sending the notice of meeting for compromise and arrangements to the Central Government.
233(2) to 233(6)	Confirmation for merger or amalgamation between two or more small companies or between a holding company and its wholly owned subsidiary company.
First and second proviso of 272(3)	Obtain the previous sanction by the Registrar to the presentation of a petition for winding up.
348(1)	Power to exempt the Company Liquidator for winding up of a company is not concluded within one year after its commencement.
Sections 361, 362, 364, 365	Power to order for winding up of the company has assets of book value not exceeding one crore rupees.
Clause (i) of the proviso to 399(1)	Power to allow inspection of documents filed under section 26 and 388
Section 442	Application for referring the matter to the Mediation and Conciliation Panel.

OTHER MISCELLANEOUS MCA AMENDMENTS

THE COMPANIES (REMOVAL OF DIFFICULTIES) FOURTH ORDER, 2016

MCA vide Notification dated December 07, 2016, has notified the Companies (Removal of Difficulties) Fourth Order, 2016 which shall come in force from 15.12.2016.

The Proviso to Section 434(1) (c) inserts to transfer proceedings other than winding up to be transferred to tribunal and High Courts to continue matters of winding up and other matters not transferred in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959"

CLARIFICATION REGARDING DUE DATE OF TRANSFER OF SHARES TO IEPF AUTHORITY

After receiving various representations from the Companies for simplification of transfer process of shares under Investor Education & Protection Fund (Accounting, Audit, Transfer and Refund) Rules, 2016, notified on 05.09.2016, MCA vide General Circular dated December 07, 2016 has clarified that the matters, including simplification of transfer process and extension of date for transfer of shares to IEPF, are under consideration and the rules are likely to be revised. The revised rules shall be notified in due course.

MCA TO DISCONTINUE NORMAL INCORPORATION PROCEDURE SHORTLY

Stakeholders may kindly note that existing INC-2 and INC-7 e-forms are likely to be withdrawn from the MCA portal shortly. Stakeholders will then have to use only SPICe (Simplified Proforma for Incorporating a Company electronically) forms viz. SPICe (INC-32), SPICe eMoA (INC-33) and SPICe eAoA (INC-34) for incorporation of all companies including Section 8 Companies (except Part I companies, a company having more than 7 subscribers/promoters, or foreign national subscribers not having a valid DIN).

FEMA ALERT

RBI further liberalises the Foreign Direct Investment (FDI) regulations in various sectors

RBI vide notification dated 7th December, 2016 amended the Schedule I of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, thus giving new opportunities to Foreign Investors to invest in Indian entities. This is a welcome change as the Indian entities can utilise these funds for expanding and diversifying their operations and enhancing their profitability and thus accelerating the overall growth in the economy.

100% Automatic route is allowed for the following sectors

- Agriculture and Animal Husbandry Sector
- Manufacturing Sector specific provision made with respect to trading (including through e-commerce), in respect of food products manufactured/produced in India through application to DIPP.
- Defence Sector specific provision made for manufacturing of small arms and ammunition under the Arms Act, 1959.
- Broadcasting carriage services like teleports, direct to home (DTH), cable networks, mobile TV, etc. as well as Cable networks subject to conditions given in the guidelines.
- Civil Aviation Including Existing Projects of Airports.

Other relaxation

- Single Brand Retail Trading ('SBRT') The 30% local sourcing requirement has to be reckoned from the date of opening the first store. In case of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible, sourcing conditions are relaxed for a period of 3 years.

  SBRT entity operating through brick and mortar stores is permitted to undertake retail trading through e-commerce.

  Indian manufacturer is permitted to sell its own branded products in any manner i.e. wholesale, retail, including through e-commerce platforms. Indian manufacturer refers to an investee company, which is the owner of the Indian brand and which manufactures in India, in terms of value, at least 70% of its products in-house, and sources, at most 30% from Indian manufacturers.

- Pharmaceuticals - FDI in Brownfield projects upto 74% is permitted under the automatic route while investment beyond 74% will require prior approval of the Government. On the other hand, FDI upto 100% in Greenfield projects is permitted under the automatic ruote.

  'Non compete' clause is not permitted except in special circumstances with the approval of Foreign Investment Promotion Board.

  The foreign investor & the resident investee company to certify all the agreements entered into between the two parties, including shareholders agreement and also certify the non existence of non compete clause, in any manner. All agreements entered into between the parties subsequent to the submission of application should also be submitted to Foreign Investment Promotion Board.

Foreign investment in brownfield projects will be subject to further conditions with respect to production level and R&D expenses.

100% FDI under the automatic route is permitted for manufacture of medical devices, irrespective of greenfield or brownfield.

RBI relaxes the norms for acquisition of Non-Convertible Debentures/bonds by Foreign Portfolio Investors ('FPIs')

With a view to provide flexibility related to the manner in which Non-Convertible Debentures/bonds issued by Indian Companies are acquired by FPIs, RBI has now decided to allow them to transact in such instruments either directly or in any manner as per the prevalent/approved market practice.

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