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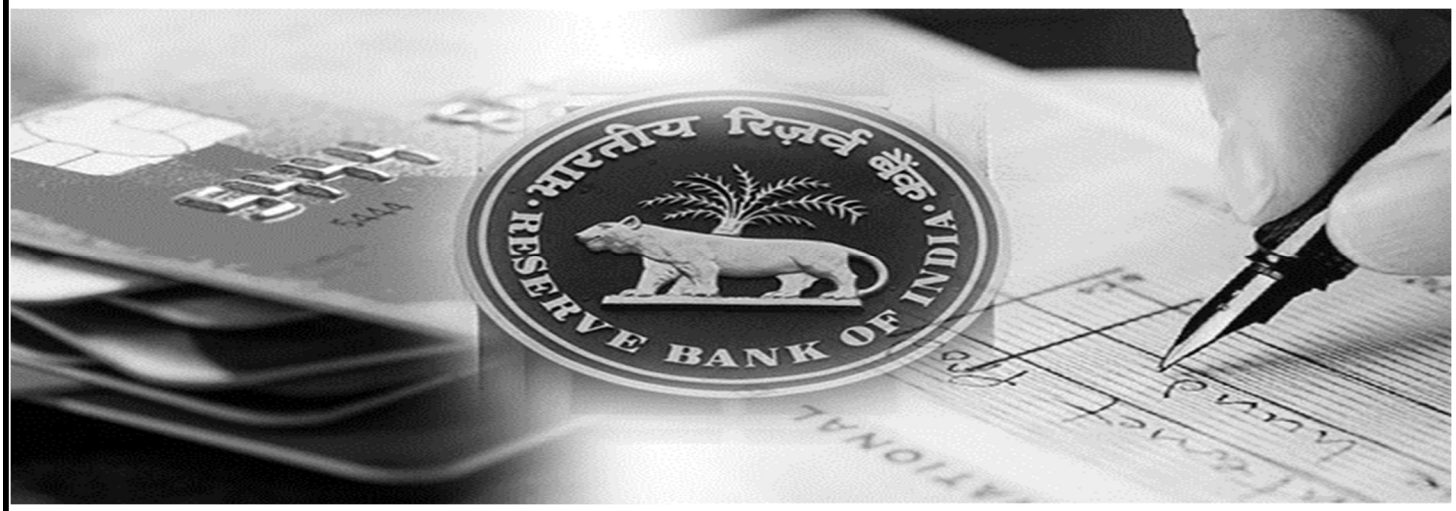

RBI Updates

1. Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) or any other place of business in India by foreign law firms:

With regard to the circular AP (DIR Series) Circular No. 23 dated October 29, 2015, advising that no fresh permissions/ renewal of permission shall be granted by the Reserve Bank/AD Category-I banks to any foreign law firm for opening of Liaison Office in India, till the policy is reviewed based on, among others, final disposal of the matter by the Hon'ble Supreme Court.

The Hon'ble Supreme Court has while disposing of the case, held that advocates enrolled under the Advocates Act, 1961 alone are entitled to practice law in India and that foreign law firms/companies or foreign lawyers cannot practice profession of law in India. As such, foreign law firms/companies or foreign lawyers or any other person resident outside India, are not permitted to establish any branch office, project office, liaison office or other place of business in India for the purpose of practicing legal profession.

2. Discontinuation of certain Returns/Reports under Foreign Exchange Management Act, 1999:

In order to improve the ease of doing business and reduce the cost of compliance, the existing forms and reports prescribed under FEMA, 1999, were reviewed by the Reserve Bank and accordingly, it has been decided to discontinue 17 returns/reports.

Please refer the link for the list of such discontinued reports/returns:
https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11994&Mode=0#AN1

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3. Co-Lending by Banks and NBFCs to Priority Sector:

The Reserve Bank has come out with a Co-Lending Model (LM) scheme under which banks can provide loans along with NBFCs to priority sector borrowers based on a prior agreement.

The CLM, which is an improvement over the co-origination of loan scheme announced by the RBI in September 2018, seeks to provide greater flexibility to the lending institutions, while requiring them to conform to the regulatory guidelines on outsourcing, KYC, etc

The primary focus of the revised scheme, rechristened as "Co-Lending Model" (CLM), is to improve the flow of credit to the unserved and underserved sector of the economy and make available funds to the ultimate beneficiary at an affordable cost, considering the lower cost of funds from banks and greater reach of the NBFCs.

Detailed features of the CLM can be viewed in the notification in the following link: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11991&Mode=0

4. External Trade – Facilitation - Export of Goods and Services:

With a view to further enhance the ease of doing business and quicken the approval process, it has been decided to delegate more powers to the Authorised Dealer Category – I banks (AD banks) in certain areas:

The detailed link for the same can be viewed in in the following link: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12005&Mode=0

5. Opening of Current Accounts by Banks - Need for Discipline:

With reference to the circulars DOR.No.BP/7/21.04.048/2020-21 dated August 6, 2020 and DOR.No.BP.BC.27/21.04.048/2020-21 dated November 2, 2020, RBI has decided to permit banks to open specific accounts which are stipulated under various statutes and instructions of other regulators/regulatory departments, without any restrictions placed in terms of earlier issued circular[August 6, 2020].

Significant list of such accounts are as follows:

a. Accounts for real estate projects are mandated under Sec. 4(2)I(D) of the Real Estate (Regulation and Development) Act, 2016 [Purpose – Maintaining 70% of advance received from the home buyers].
b. Accounts for settlement of dues related to debit card/ ATM card/credit card issuers/acquirers.
c. Accounts permitted under FEMA, 1999.
d. Accounts for the purpose of IPO/NFO/FPO/buyback of shares/payment of dividend/issuance of commercial papers/allotment of debentures/gratuity, etc., which are mandated by respective statues or regulators are meant for specific/limited transactions only.
e. Accounts for payment of all Statutory Dues, taxes, duties, etc., opened with banks authorized to collect the same.

The above permission is subject to the condition that the banks shall ensure that these accounts are used for permitted/specified transactions only. Also, banks shall monitor all currents accounts and CC/ODs at least on a half-yearly basis to ensure proper compliance with earlier circulars.

6. Risk Based Internal Audit (RBIA) Framework – Strengthening Governance arrangements:

With reference to circular DBS.CO.PP.BC.10/11.01.005/2002-03 dated December 27, 2002 issued by RBI, banks are required to appoint a Risk Based Internal Audit (RBIA) system as a part of their internal control framework within the bank. Banks are expected to restructure their approach and adapt to the evolving best practices and are encouraged to acquire the International Internal Audit standards [like, BCBS and IIA].

In order to bring uniformity in the approach and Internal Audit function followed by banks, RBI has advised the banks as under:

a. The internal audit function must have necessary **authority, statute, resources and independence** within the bank. The Head of Internal Audit [HIA] shall be a senior executive of the bank who has the authority to give independent judgement. Both HIA and the internal audit function have the authority to question any staff member and have access to all the records of the bank.
b. Requisite professional **competence**, knowledge and experience of internal auditor is essential for the effectiveness of internal audit functions.
c. Except in case of outsourced internal auditors, the Audit Committee Board [ACB] should **rotate the staff members** involved in Internal Audit function. Also, the board should allot at least a small amount of work to those staffs that have knowledge regarding internal audit function but are working in other departments.
d. The HIA shall hold his office for a **long period [minimum of 3 years]**. This advise is not applicable in case of outsourced internal auditors.
e. HIA's direct '**reporting authority**' is the ACB or MD & CEO/WTD [where BOD permits such reporting] and the 'reviewing authority' is the ACB [at least once in a quarter] and 'accepting authority' is the BODs. In case foreign banks having branches in India, HIA shall report to Internal Audit function in operating/head office.
f. The **remuneration** of internal audit staffs should not be related to the performance of the business and should be provided to them irrespective of their financial results [profit or loss].

The internal audit function shall not be outsourced unless the board feels such expertise is required for the current situation and such expertise should not be found within the company.

The instructions contained in this circular shall come into force with immediate effect.

Company Law Updates

1. Extension of applicability of The Companies (Auditor's Report) Order, 2020 to April 01, 2021.:

Ministry of Corporate Affairs vide its Order dated December 17, 2020 extended the applicability of the Companies (Auditor's Report) Order, 2020 from April 01, 2020 to April 01, 2021 i.e., CARO 2020 will be applicable for the Auditor's Report to be issued commencing from the FY 2021-22.

2. Further time period allowed up to June 30, 2021 for companies to conduct EGMs through Video Conferencing (VC) or other audio-visual means (OAVM):

In view of the challenges faced by the companies in conducting meetings due to the outbreak of COVID-19 and after considering various representations received from the stakeholders, the Ministry of Corporate Affairs (MCA) had provided certain relaxations as follows:

a. Conducting of EGMs through VC or OAVM up to December 31, 2020 vide General Circular No. 14/2020, No. 22/2020 and No. 33/2020.
b. Issue of notice for EGMs through e-mail or via telephone calls vide General Circular No. 17/2020.

In continuation of the above, MCA vide General Circular No. 39/2020 dated December 31, 2020 has allowed a further time period for companies to conduct EGMs through VC or OAVM up to June 30, 2021. Further, all other requirements provided in the above said circulars remains unchanged.

3. Relaxation provided with respect to matters not be dealt with in meeting through VC or OAVM:

Rule 4 of The Companies (Meetings of Board and its powers) Rules, 2014 provides for the following matters which shall not be dealt with in a meeting held through VC or OAVM:

a. Approval of the annual financial statements;

b. Approval of the Board's report.
c. Approval of the prospectus;
d. Audit Committee Meetings for consideration of financial statements including consolidated financial statement and
e. Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

However, the above matters can be dealt with in a meeting held through VC or OAVM up to June 30, 2021 as amended by the Companies (Meetings of Board and its powers) Fourth Amendment Rules, 2020 vide Notification dated December 30, 2020.

DIRECT TAX UPDATES

1. Due dates for filing of Income Tax Returns, Audit Reports and declarations under the "Vivad Se Vishwas" scheme further extended by the government of India:

In view of the challenges faced by taxpayer in meeting the statutory and regulatory compliances due to the outbreak of COVID-19, the Government brought the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 ('the Ordinance') as on March 31, 2020 which, inter alia, extended various time limits for filing of Income tax returns and Audit Reports.

In order to provide more time to taxpayers for furnishing of Income Tax Returns and other reports by various assessees the due date was further extended vide notification dated December 31, 2020:

a. The due date for furnishing of Income Tax Returns for the AY 2020-21 for the taxpayers (including their partners) who are required to get their accounts audited and companies, has been further extended to February 15, 2021.
b. The due date for furnishing of Income Tax Returns for the AY 2020-21 for the taxpayers who are required to furnish report in respect of international/specified domestic transactions has been further extended to February 15, 2021.
c. Consequently, the date for furnishing of various audit reports under the Act including tax audit report and report in respect of international/specified domestic transaction has been further extended to January 15, 2021.
d. The last date for making a declaration under Vivad Se Vishwas Scheme and the date for passing of orders under Vivad Se Vishwas Scheme, has been extended to January 31, 2021.
e. The date for passing of order or issuance of notice by the authorities under the Direct Taxes & *Benami* Acts has also been extended to March 31, 2021.
f. Further, in order to provide relief for the third time to small and middle class taxpayers in the matter of payment of self-assessment tax, the due date for payment of self-assessment tax has been further extended. Accordingly, the due date for payment of self-assessment tax for taxpayers whose self-assessment tax liability is up to Rs. 1 lakh has been extended to February 15, 2021 for the taxpayers mentioned in (1) and (2) above.

2. Condonation of delay in filing Form 10BB for AY 2016-17 and subsequent AY's:

As per the provisions of section 10(23C) of Income-tax Act, 1961 where the total income, of the fund/trust/Institution/university/hospital or other medical institution referred to in sub-clause (iv) or (v) or (vi) or (via), without giving effect to the provisions of the said sub-clauses, exceeds the *maximum amount which is not chargeable to tax* in any previous year, such fund /trust /Institution /university/hospital or other medical institution shall get its *accounts audited* in respect of that year by an *accountant* before the due date as referred to in section 44AB and furnish by that date, the report of such audit in the prescribed form duly signed and verified by such accountant.

As per Rule 16CC of the Income-tax Rules, 1962 the *audit report of the accounts* of such a fund/trust/Institution/university/hospital or other medical institution is to be furnished in *Form No. 10BB*. As per Rule 12(2) of the Rules, such audit report is to be *furnished electronically*. The failure to furnish such report in the prescribed form along with the return results in *disentitlement* of such entity from *claiming exemption* under section 10(23C) of the Act.

In view of the above, CBDT has directed as below:

a. All the cases of belated applications in filing of Form No. 10BB for years prior to AY. 2018-19, the Commissioners of Income-tax are authorized to admit such applications for Condonation of delay u/s 119(2)(b) of the Act after satisfying themselves that the applicant was prevented by reasonable cause from filing such application within the stipulated time.

b. Where there is delay of up to 365 days in filing Form no. 10BB for Assessment Year 2018-19 or for any subsequent Assessment Years, the Commissioners of Income-tax are hereby authorized to admit such belated applications of Condonation of delay under section 119(2) of the Income-tax Act, 1961 based on merits of the case.

3. Indian Tax Tribunal issues decision on Most Favoured Nation ('MFN') Clause and make available test for Fees for Technical Services under tax treaty with Sweden:

The New Delhi Income Tax Appellate Tribunal issued a decision on October 29, 2020 concerning the application of the MFN clause in the 1997 India-Sweden tax treaty in relation to fees for technical services (FTS).

The case involved Bombardier Transportation Sweden AB, which received fees from Bombardier Transportation India Ltd. for intermediary services. For the year concerned, Bombardier Sweden did not include the fees in its taxable income because, based on the MFN clause of the India-Sweden treaty and the provisions of the 1998 India-Portugal treaty, the fees did not qualify as taxable FTS.

The provisions relied on include a make available test, which generally requires that for fees to be considered taxable FTS, technical knowledge or skill must be made available to the recipient of the services.

However, the assessing officer was of the opinion that it is not only technical knowledge or skill that must be made available, but even if commonplace experience, know-how, or processes are made available, this can result in taxable FTS. As such, the assessing officer determined that the fees received by Bombardier Sweden were taxable in India.

In its decision, the Income Tax Appellate Tribunal found in favour of Bombardier Sweden. The Tribunal referred to an earlier decision of the Karnataka High Court in a similar case, finding that a payment only qualifies as taxable FTS if the *twin test of providing services and making technical knowledge* available at the same time is satisfied, which includes that the recipient of the services must be capable of deploying the knowledge or skill in the future on its own, without the aid of the service provider. In this respect, the Tribunal determined that the intermediary services provided by Bombardier Sweden do not make available any technical knowledge, skill, etc. to Bombardier India and further that Bombardier India is not equipped to apply the technology contained in the services provided by the Bombardier Sweden. Therefore, the intermediary services provided by Bombardier Sweden are *not taxable FTS in India.*

4. Arbitration Tribunal issues decision in favour of Cairn Energy in the case of Cairn Energy PLC & Cairn UK Holdings limited v. India:

Background

The issue of retrospective taxation first came to public attention when the Department of Revenue in the Ministry of Finance pursued what they themselves described as a "test case" against Vodafone, seeking to tax indirect transfers of shares in a non-Indian company. In January 2012 the Supreme Court of India unanimously found in favour of Vodafone, confirming that such transfers were not within the Indian tax remit.

On March 16, 2012, less than two months after the Supreme Court had unanimously rejected the Income Tax Department's attempts to expand the tax net in the Vodafone case, the Ministry of Finance introduced in the Finance Bill 2012 an amendment to section 9(1)(i) of the Income Tax Act 1961 – the Retrospective Amendment. Among other things, it explained that shares in a non-Indian company shall always be deemed to have been situated in India if its value derived substantially from underlying Indian assets. Describing it as "clarificatory" in order to effectively overturn the Supreme Court's decision in Vodafone, the Finance Act 2012 declared that the retrospective amendment shall be deemed to have taken effect from 50 years earlier, on April 01, 1962. The chief architect of the legislation, the then Finance Minister Shri Pranab Mukherjee, himself subsequently wrote that the purpose of the legislation was "to amend the Income Tax Act, 1961 with retrospective effect to undo the Supreme Court judgement in the Vodafone tax case".

The Case

In January 2014, eight years after the pre-IPO group reorganisation, Cairn Energy was preparing to sell its final stake in Cairn India Limited (CIL). It was then that the Indian Income Tax Department decided to launch a retrospective tax investigation into the company. As a result, Cairn received notification from the India Income Tax Department (IITD) that it was restricted from selling its remaining ~10% shareholding in CIL, since CIL merged with Vedanta Limited. The IITD has subsequently sold the majority of this shareholding and received the proceeds and dividend payments. In the notification, the IITD claimed to have identified unassessed taxable income resulting from the intra-Group share transfers undertaken in 2006 in preparation for the IPO. The notification made reference to retrospective Indian tax legislation enacted in 2012, which the IITD was seeking to apply to the 2006 transactions.

Cairn commenced international arbitration proceedings against the Government of India under the UK-India Bilateral Investment Treaty in March 2015. The Arbitral Tribunal issued an Award on 22 December 2020. In its decision, the Permanent Court of Arbitration ("PCA") Tribunal found in favour of Cairn. According to a release from Cairn, the tribunal ruled unanimously that India had breached its obligations to Cairn under the India-UK-India Investment Promotion and Protection Agreement. This result is similar to a recent Arbitral Tribunal decision regarding India's retrospective taxation of capital gains from an indirect transfer by Vodafone, which included the same general finding that India's actions were in breach of the guarantee of fair and equitable treatment laid down in the India-Netherlands Investment Promotion and Protection Agreement.

Cairn is seeking full restitution for losses resulting from: the expropriation of its investments in India in 2014; continued attempts to enforce retrospective tax measures; and the failure to treat the Company and its investments fairly and equitably. Cairn is not claiming for any form of special, punitive or consequential losses; the only damages that Cairn's is seeking are equal to the value of the Group's residual shareholding in CIL which was lost when the IITD seized it and subsequently sold it (retaining the proceeds), plus a further tax refund due to Cairn in an unrelated matter which has was also seized by the IITD, amounting to approximately INR 10,570 Crore (US$1.4 billion).

Further, the Government of India issued a release stating that the award in the arbitration case under India-UK Agreement for Promotion and Protection of Investments invoked by Cairn Energy Plc and Cairn UK Holdings Limited against Government of India has been passed. The Government of India will be studying the award and all its aspects carefully in consultation with its counsels. After such consultations, the Government will consider all options and take a decision on further course of action, including legal remedies before appropriate fora.

www.manian-rao.com

Address:

Bangalore
#361, First Floor, 7th Cross, 1st Block,
Jayanagar, Bangalore – 560011
Phone: +91 80 26569500 / 9501

Chennai
4, EaswranKoil Street
Old Pallavaram,
Chennai – 60017
Phone: +91 44 22641404

Madurai
110, First Floor
Old No 85, 4th Street
Harvey Nagar, Arasaradi
Madurai – 625016
Phone: +91 452 2343630

Key Contacts

Paresh Daga
Senior Partner
paresh@manian-rao.com

R Srikanth
Senior Partner
srikanth@manian-rao.com

Ravindra C
Partner
ravindra@manian-rao.com

Pallavi V Rao
Partner
pallavi@manian-rao.com