# Devadhaantu Insights – March 2021

**Dear Reader,**

**Greetings!**

**We are happy to present the Devadhaantu Insights highlighting important legislative updates in direct taxes and regulatory updates in SEBI and Corporate laws.**

**We hope that we are able to provide an insight into various updates that you would find to be informative as well as useful. For any deeper discussion as to how the updates covered in this document could affect your transactions, please do not hesitate to contact Devadhaantu.**

**Happy Reading!**
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# DIRECT TAX UPDATES

## MARCH 2021

# Direct tax updates (1/10)

## TDS u/s 194C is not required to be deducted by online platform service provider providing lead generation services to Driver Parters

Assessee, Uber India Systems Private Limited, is Uber group company incorporated to market and promote the Uber App in India and provide support services in relation to same. Uber App, is owned and developed by Uber Technologies Inc. a company based out of US which provides lead generation services to the various independent driver partners through online platform. Uber Technologies Inc. had granted a license of Uber App to a company incorporated in Netherlands viz, Uber B.V., which had been granted right to operate Uber App worldwide including in India.

During scrutiny assessment, AO held that since Uber India is in the business of providing transportation services, provisions of section 194C of ITA are applicable when payment are made to drivers onboarded on Uber platform and accordingly, TDS must be deducted. CIT(A) upheld the order of AO. Upon further appeal to Tribunal, it was held that Uber BV is only involved in rendering lead generation service to driver partners and transportation service is not provided either by Uber BV nor by Uber India.

ITAT pointed out that, for section 194C, 3 conditions needs to be satisfied: (i) Uber India should be person responsible for payment of taxable sum; (ii) The disbursement to driver should be in pursuance of any work done by Driver for Uber India; (iii) There is a contract between Uber India and driver for the work done. In the instant case none of the 3 conditions are getting satisfied as (i) Uber India is only remitter of money; (ii) No direct assistance was provided by Drivers to Uber India; (iii) Uber India has not entered into any contract with the driver partners. Driver partners have entered into only one agreement i.e. with Uber BV for availing the lead generation service.

**Devadhaantu Comment:** The decision provides clarity around the withholding tax applicability to aggregator businesses providing technology support



1 Under India Systems Private Limited

# Direct tax updates (2/10)

**Taxes paid in foreign jurisdiction cannot be claimed as refund in the absence of no tax in India; Deduction as business expenditure is allowed**

Assessee had earned business income from foreign branches and dividend income from foreign companies from different countries and had paid tax on the same in respective jurisdictions. However, due to losses in India, no taxes were paid on such foreign income in India and hence, assessee contended to claim refund of foreign taxes, or alternatively, to claim deduction of foreign taxes as business expense.

Hon'ble ITAT, Mumbai bench observed that claiming credit of foreign taxes should not result into claiming refund from the exchequer of resident jurisdiction. ITAT, distinguished Karnataka High Court ruling in case of Wipro Ltd Vs. DCIT[2] on the ground that Wipro's case is applicable in a scenario where foreign income is eligible for profit-linked deduction but there are still other taxable income against which credit of foreign taxes can be claimed and does not apply where there is no tax payable in India. Relying upon coordinate bench ruling in case of JCIT Vs. Digital Equipment Pvt Ltd[3] where it was held that India – US DTAA grants credit of foreign taxes to the extent of tax liability on such foreign income in India and does not allow refund of taxes paid in US from Indian exchequer. Also denied refund of taxes paid in countries with which India does not have a DTAA on the grounds that in the absence of taxability in India, there is no 'doubly taxed income' in India and hence, condition of Section 91 of the Act does not get satisfied. Relying upon Bombay HC ruling in case of Reliance Infrastructure Vs. CIT[4], being a binding jurisdictional HC ruling, allowed deduction of foreign taxes as business expense.

1 Bank of India vs ACIT (TS-118-ITAT-2021)
2 Wipro Limited vs DCIT (2012) 341 ITR 385 (Karnataka HC)
3 JCIT vs Digital Equipment Pvt Ltd (2004) 94 ITD 340 (Mumbai ITAT)
4 Reliance Infrastructure Limited vs CIT (2016) 390 ITR 271 (Bom HC)

# Direct tax updates (3/10)

## Taxpayer can not be held as 'assessee in default' if TDS not deposited by deductor; Further such tax cannot be recovered from deductee[1]

The taxpayer a non-resident Indian, sold 25% of its holding of an Indian private limited company to an Indian Group. Indian Group withheld tax u/s 195 of the ITA from the sales consideration and remitted net consideration to the taxpayer. However, no TDS was deposited with the Government and also no TDS certificate. At the time of filing the tax return, the taxpayer offered the said income to tax and claimed credit for the taxes withheld. AO denied the TDS credit and treated the taxpayer as 'assessee-in-default'. The First-Appellate Authority granted partial relief by holding the taxpayer not an 'assessee-in-default'. However, it upheld that TDS credit cannot be allowed to the taxpayer. Aggrieved, the taxpayer filed an appeal before the Delhi Tribunal.

Delhi Tribunal stated that as per Section 195 r.w.s 205 of the ITA, where tax has been deducted, tax payer shall not be held responsible for payment of tax to the extent of TDS on income. Further, as per Office Memorandum[2] issued by the CBDT, demands created on account of the credit mismatch due to non-payment of TDS to the credit of Government by the deductor were not to be enforced. Accordingly, it was stated that the legislative intent of CBDT, is that the taxpayer whose tax has been deducted by the deductor under section 195 of the ITA shall not be treated as 'assessee-in-default'. Accordingly, fresh demand on account of mismatch of credit due to non-deposit of TDS by the deductor shall not be enforced and credit of TDS deducted shall be given to the taxpayer irrespective of the fact that TDS so deducted has not been deposited with the state exchequer by the deductor. Referring to the Gujarat High Court judgement in the case of Devarsh Pravinbhai Patel[3], it was held that when the tax authorities have accepted that the taxpayer cannot be treated as assessee-in-default, the TDS credit cannot be denied to taxpayer. Further reference was made to the Bombay High Court's judgement in the case of Pushkar Prabhat Chandra Jain[4] wherein under identical facts, it was directed to tax authorities to make coercive recovery of tax not deposited from the deductor and to refund the amount to the taxpayer. Accordingly, the tax tribunal directed the tax authorities to refund the TDS deducted along with interest to the taxpayer.

This is welcome judgement as it provides relief to taxpayers in case of TDS mismatch.

1 Shri Jasjit Singh vs ITO (ITA No. 4097/Del/2016, Delhi Tribunal)
2 Office Memorandum F.No. 275/29/2014-IT(B), dated 11 March 2016
3 Devarsh Pravinbhai Patel Vs. ACIT, Circle 5(1)(1) (Gujarat High Court)
4 Pushkar Prabhat Chandra Jain Vs. UOI [2019] 103 taxmann.com 106 (Bombay High Court)

# Direct tax updates (4/10)

## Payment made for use of Software is not taxable as 'Royalty', thus not liable to withholding tax provisions (1/2)

A long-standing controversy on whether software is royalty has been resolved in favour of the appellant by the Supreme Court in case of Engineering Analysis Centre of Excellence Private Limited[1] wherein it held that that cross-border payments made for sale of software to a nonresident shall not be taxed as 'Royalty'.

The SC examined the provisions of the Copyright Act, and held that the creator of the computer programme has the exclusive right to do or authorize the doing of several acts in receipt of such work; the right to reproduce a computer programme and exploit the reproduction commercially is at the heart of the said exclusive right, however, the making of copies or adaptation of a computer programme in order to utilize the said computer programme for the purpose for which it was supplied, or to back-up copies as a temporary protection against loss, destruction or damage, does not constitute an act of infringement of copyright.

Further, on examination of the End-User Service Agreement ('EULA') / distribution agreement, the SC found that what was granted to the distributor was only a non-exclusive, non-transferable license to resell the computer software. Apart from a 'right to use' the computer programme by the end-user, there was no further right given to sub-license or transfer, nor was there any right to reverse-engineer, modify or reproduce in any manner otherwise than permitted by the license to the end-user. Hence, the license that was granted was not a 'license' that transfers an interest in all or any of the copyright rights but is a 'license' that imposes restrictions or conditions on the use of computer software.

The SC relied on its earlier ruling in GE Technology Centre Private Limited2, where it was held that TDS deductions can only be made if the non-resident assessee is liable to pay tax under section 195 of the ITA. Further, The SC ruling in PILCOM3 case was distinguished (which was in the context of deduction u/s 194E of the ITA on payments made to non-resident sportsperson/association) and the SC observed that section 194E deals with TDS without reference to chargeability under the ITA by the concerned non-resident assessee.

1 Engineering Analysis Centre of Excellence Private Limited [Civil Appeal No. 8733-8734 of 2018]
2 GE Technology Centre Private Limited [CA No. 8735-8736/2018]
3 PILCOM [2020] SCC Online SC 426

# Direct tax updates (4/10)

## Payment made for use of Software is not taxable as 'Royalty', thus not liable to withholding tax provisions (2/2)

Further, the SC noted that once a relevant DTAA applies, the provisions of the ITA can apply to the extent they are more beneficial to the assessee and not otherwise. Further, explanation 4 to Section 90 of the Act stipulates that where a term is defined in the DTAA, the definition contained therein has to be applied. It is only where there is no such definition that the definition in the Act can be applied. The SC acknowledged the fact that persons mentioned in Section 195 (i.e., deductors of tax at source) cannot be expected to do the impossible, that is, apply the expanded definition of royalty inserted by said explanation vide Finance Act, 2012 , for the relevant assessment year i.e. 2001-02 and 2002-03, at the time when such explanation was not actually and factually in the statute. Thus, retrospective applicability of expanded meaning of Royalty does not arise.

**Devadhaantu Comment:**

Ruling in favour of the taxpayers, the SC has pronounced that cross-border payments made for such software to a non-resident, shall not be taxed as 'Royalty'. However, considering provisions of Significant Economic Presence are introduced in the ITA, it would be interesting to see how such transactions are treated for withholding tax provisions and DTAA benefits. While the definition of 'Royalty' has been expanded vide Finance Act 2012 under the ITA, the judgement has granted the benefit of the beneficial provisions of the DTAA despite which would be applicable if the software transaction is undertaken by any non-resident assessee coming from a Treaty country. However, not to forget, provisions of equalization levy are also in place to cover similar transactions depending upon facts of each case. We have analysed this case in more detail and also provided our detailed analysis on equalization levy. It can be obtained by simply putting request on contact@devadhaantu.in.

# Direct tax updates (5/10)

## AO's rejection of DCF valuation relied upon by assessee not justified;

During the year under consideration, Rockland Hospitals Limited had subscribed to 3,26,741 equity shares of the assessee company at INR 10 each (i.e., INR 32,67,410) at a share premium of INR 33 (i.e., INR 1,07,82,453) per share.

An independent CA valued the equity shares on the on the basis Discounted Cash Flow ('DCF') method. The said basis was disregarded by the Assessing Officer ('AO') mainly on the ground that the valuation of equity shares was based on a projection of revenue which did not match with actual revenues of subsequent years. Consequently, the entire share premium was deemed as an "unjustified premium" and was accordingly taxed as income in the hands of the assessee company u/s 56(2)(viib) of the ITA.

The Delhi ITAT observed that as per section 56(2)(viib) of the ITA read with Rule 11UA of the Income tax Rules, 1962 ('IT Rules'), every assessee has an option to value the shares and determine its Fair Market Value ('FMV') either by DCF or Net Asset Value method and the AO cannot examine or substitute his own value in place of the value so determined. Since the AO has not pinpointed any specific inaccuracies or short comings in the valuation report and merely rejected the same on assumption, the Delhi ITAT held that the AO was not justified in rejecting the valuation report as submitted by the assessee and directed the AO to examine the issue afresh after giving due opportunity to the assessee to present its case.

**Devadhaantu Comment:**

While the above ruling reassures the assessee to choose any option as prescribed to value the FMV of its shares, the fact that the ITAT has stated that since AO was unable to pinpoint any specific inaccuracies, leaves a chance for rejection of the DCF Valuation in case the assessee is unable to justify the suitable parameters of projections while determining the FMV under the valuation method adopted.

1 Rockland Diagnostics Services Pvt Ltd [ITA No. 316 /DEL/2019]

# Direct tax updates (6/10)

## Loss on investment arising pursuant to capital reduction by subsidiary allowable as business loss

Assessee[1] had invested in share capital of its subsidiary, viz. Indian Britain BV and during the year under consideration, the said subsidiary had reduced its share capital, by way of share cancellation without any consideration, due to heavy losses. The losses incurred by the assessee of INR 99.90 Cr was not claimed as a deduction from profit and gains of business and profession in its return of income, but was claimed as a long-term capital loss by the assessee on account of write-off the said strategic investment in the subsidiary.

During the assessment proceedings, the assessee company claimed the aforesaid losses as business loss stating that investment in the subsidiary was made for the purpose of its business to set up supply chain system and manufacturing units in global overseas market. However, the AO disregarded the assessee's claim and the question before the Ahmedabad ITAT was whether the assessee was right in claiming long-term capital loss as revenue loss during the course of appellate proceedings.

The Ahmedabad ITAT observed that the assessee incurred losses on account of capital reduction, by way of share cancellation, by the subsidiary due to heavy losses incurred by it on account of recession in textile industry in Europe. Hence, due to deterioration of economic conditions, continued financial difficulty and other adverse factors, the subsidiary incurred huge losses and became a sick unit. Hence, the ITAT allowed the claim of the assessee by stating that since it has made an investment in subsidiary company on account of business development out of commercial expediency, accordingly on reduction of its capital of the said subsidiary, the loss incurred in the value of shares were in the nature of business losses.

**Devadhaantu Comment:**

As basis of allowability of losses in the hands of assessee is prevailing out of commercial expediency considering investment was made for strategic business purpose, it would be interesting to see where investment in a subsidiary are made where subsidiary is into different business domain completely.



1 Dy. CIT vs. GHCL Ltd. & 10 others

# Direct tax updates (7/10)

## Capital gains upon sale of shares of Indian Company acquired prior to March 31, 2017 not taxable in India in the hands of Singapore-based Investment Company

Appellant is Singapore based and engaged in investment activity. It had acquired 65% stake in Gujarat Gas Company Ltd ('GGCL'), a listed entity in 1990. In 2012, as part of its global restructuring exercise, appellant proposed to transfer its stake in GGCL as an 'off market transaction' and sought an advance ruling to determine its tax liability as per provisions of the IT Act and India – Singapore DTAA ('India-SG DTAA'). The AAR perused the facts of the case and held as under:

(i) On divestment of shares in GGCL: AAR observed that the decision to divest non-core businesses was not just limited to Indian jurisdiction but also extended to investments in Brazil and Italy pursuant to bonafide business restructuring. Hence, it quashed the Revenue's contention that the affairs of the appellant were arranged with a primary purpose of availing treaty benefits.

(ii) On investment activity being considered as bonafide business activity: AAR also rejected the Revenues contention that assessee's group investment holding was not a bonafide business activity by relying on SC ruling in Vodafone International Holdings B.V.[1] and Andhra Pradesh HC ruling in case of Sanofi Pasteur Holding SA[2] and held that it is well established globally that investment activity in itself legitimate business.

(iii) Applicability of minimum total annual expenditure of SGD 2,00,000 under Limitation of Benefit ('LoB') clause: AAR took cognizance of the Tax Residency Certificate and the certificate issued by Tax Authority of Singapore certifying its annual expenditure and principal activity. Further, AAR also considered the details of dividend income, administrative expenses and payroll cost as per audited accounts for past 10 years and opined that such expenses were much above the prescribed limit stipulated in Article 3.3 of the Protocol to the India-SG DTAA.

(iv) Applicability of LoB clause to holding companies: AAR rejected the Revenue's contention that the intention of LoB clause was to curb the use of holding companies, not having any bonafide business activity in India or Singapore, from getting any treaty benefits by stating that no such condition is mentioned in the India-SG DTAA that the Treaty benefit under Article 13(4) will not be available to holding companies and hence the one cannot read the DTAA and the Protocol beyond what is provided therein.



1 Vodafone International Holdings B.V. [2012] 341 ITR 1 (SC)

2 Sanofi Pasteur Holding SA [2013] 354 ITR 316 (AP)

# Direct tax updates (8/10)

## Form 15E notified – Application by resident person for no/ lower withholding tax on income payable to non-resident or foreign company

CBDT notified new Rule 29BA and Form 15E w.e.f. April 1, 2021, for the purposes of making an application by resident person responsible for paying any income (other than salary income) to non-resident or foreign company u/s 195(2) of the ITA for determination of lower / no withholding of taxes on income of such non-resident or foreign company.

CBDT has prescribed detailed procedure for making application. We have described entire procedure in the flow chart format and same is available for review in ensuing slide.

Upon obtaining certificate for lower/ no withholding of taxes, same shall be valid for the period as mentioned in the certificate.

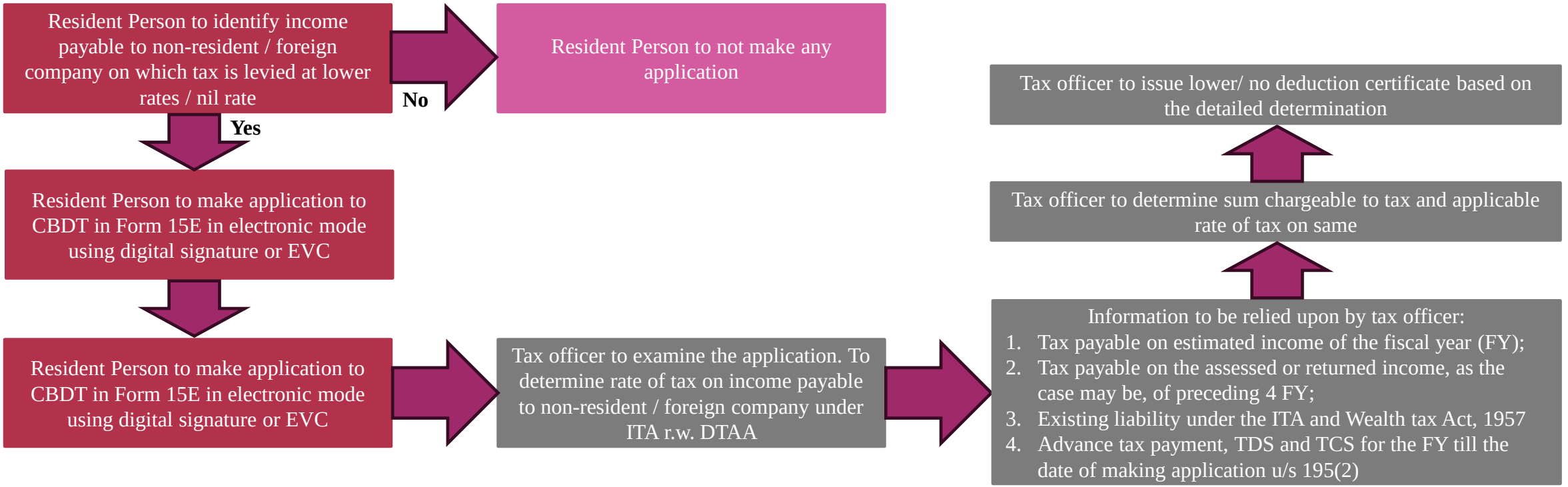
Until now, there was no such form available for making application to CBDT and hence application were made in plain paper. Now, with the form being prescribed, making application to CBDT would be made with clarity. However, certain fields in the form makes it an additional obligation on the resident applicant task to obtain information from non-resident / foreign company, as the case may be.

1 Notification No. 18/2021 [F.No. 370142/24/2019-TPL]

# Direct tax updates (8/10)

## Form 15E notified – Application by resident person for no/ lower withholding tax on income payable to non-resident or foreign company

Detailed Procedure for making application to CBDT by resident applicant for lower/ no withholding of taxes




1 Notification No. 18/2021 [F.No. 370142/24/2019-TPL]

# Direct tax updates (9/10)

## Rule 3B notified – Application by resident person for no/ lower withholding tax on income payable to non-resident or foreign company

CBDT issued a circular[1] wherein detailed analysis of residential status determination under provisions of ITA, various DTAA and OECD commentary has been provided with respect to year 2020 considering there were restriction on Individual to travel due to lockdown conditions amid Pandemic. According to CBDT, there ought to be no case of double taxation considering provisions of residential stay of more than 182 days as a criteria for determination of residency in most of the jurisdictions.

It has been provided that inspite of this condition, if any individual is facing double taxation even after taking into account the reliefs provided by the relevant DTAA, such individual may electronically furnish the specified information by 31st March 2021 in 'Form –NR' (prescribed format annexed to the said Circular).

The Form-NR will be submitted to the Principal Chief Commissioner of Income-tax (International Taxation) for further examine the below:

(i) Whether any relaxation is required to be provided in the case of that particular individual taxpayer; and

(ii) If required, then whether general relaxation can be provided for a class of individuals or specific relaxation is required to be provided in individual cases.

**Devadhaantu Comments:**

We have made detailed analysis of the reasoning stated by CBDT for cases to not fall under double taxation critieria. To obtain the report, simply request on email at contact@devadhaantu.in.

1 Circular No. 2 of 2021 dated March 3, 2021

# Direct tax updates (10/10)

## Rule 3B notified – Application by resident person for no/ lower withholding tax on income payable to non-resident or foreign company

As announced by Hon'ble Finance Minister during budget announcement, insertion of sub-rule 5A to Rule 114E has been notified[1] to provide as under:

For the purposes of pre-filling of statement of financial transactions containing information relating to capital gains on transfer of listed securities or units of mutual funds, dividend income and interest income, reporting shall be required to be made by following persons:

| Sr. No. | Nature of Transaction | Reporting persons |
|---|---|---|
| 1 | Capital gains on transfer of listed securities or units of Mutual Funds | (i) Recognised Stock Exchange;<br>(ii) Depository as defined in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996 ;<br>(iii) Recognised Clearing Corporation;<br>(iv) Registrar to an issue and share transfer agent registered under sub-section (1) section 12 of the Securities and Exchange Board of India Act, 1992. |
| 2 | Dividend income | A Company |
| 3 | Interest income | (i) A banking company or a co-operative bank to which the Banking Regulation Act, 1949 applies (including any bank or banking institution referred to in section 51 of that Act);<br>(ii) Post Master General as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898;<br>(iii) Non-banking financial company which holds a certificate of registration under section 45-IA of the Reserve Bank of India Act, 1934, to hold or accept deposit from public. |

1 Notification No. 16/2021 dated March 12, 2021

# FOREIGN EXCHANGE MANAGEMENT REGULATIONS UPDATES

**MARCH 2021**

# FEMA Regulatory updates

## Relaxations in FPI investments in Non-Convertible Debentures / Bonds

Authorised Dealer Category-I (AD Category-I) banks are requested to refer to Foreign Exchange Management (Debt Instruments) Regulations, 2019 notified vide Notification No. FEMA. 396/2019-RB dated October 17, 2019, as amended from time to time, and the relevant directions issued thereunder.

A.P. (DIR Series) Circular No. 31 dated November 26, 2015 stated that Foreign Portfolio Investors ("FPIs") were permitted to acquire Non-Convertible Debentures ("NCDs")/bonds, which are under default, either fully or partly, in the repayment of principal on maturity or principal instalment in the case of amortizing bond, and to A.P. (DIR Series) Circular No. 31 dated June 15, 2018 (hereinafter called Directions), as amended from time to time.

Currently, FPI investments in corporate bonds are subject to a minimum residual maturity requirement, short-term investment limit (paragraph 4 (b)(ii) which stated that FPIs were required to invest in corporate bonds with a minimum residual maturity of three years) and the investor limit (paragraph 4(f)(i), which stated that Investment by any FPI, including investments by related FPIs, shall not exceed 50% of any issue of a corporate bond) in terms of the Directions.

However, FPI investments in security receipts and debt instruments issued by Asset Reconstruction Companies and debt instruments issued by an entity under the Corporate Insolvency Resolution Process as per the resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 are exempt from these requirements. RBI has now decided to exempt investments by FPI in NCDs/bonds which are under default, either fully or partly, in the repayment of principal on maturity or principal instalment in the case of amortizing bond from the aforesaid requirements.

# FEMA Regulatory updates

## Relaxations in FPI investments in Non-Convertible Debentures / Bonds

An Insurance (Amendment) Bill, 2021 is introduced in the Rajya Sabha, which inter alia seeks to raise the FDI limit in an Indian insurance company from the existing 49%, to 74% and to allow foreign ownership and control with safeguard.

The Bill, according to its Statement of Objects and Reasons, is aimed at achieving the objective of Governments FDI Policy of supplementing domestic long-term capital, technology and skills for the growth of the economy and the insurance sector, and thereby enhance insurance penetration and social protection.

Further, the Bill proposes to amend the definition of "Indian insurance company" to mean a company in which the aggregate holdings of equity shares by foreign investors including portfolio investors, do not exceed 74% of the paid-up equity capital of such Indian insurance company, and the foreign investment in which shall be subject to such conditions and manner, as may be prescribed.

## Downstream investment made by NRI on non-repatriation basis to also be treated as domestic investment

As per Foreign Direct Investment Policy ('FDI') Circular of 2020 and Schedule IV of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, investments by Non-resident Indians ('NRIs') on non-repatriable basis are considered deemed to be at par with domestic investments made by residents.

The DPIIT vide press note 1 dated March 19, 2021, has now inserted a new clause (c) under Para 1.2(ii) in Annexure 4 of the FDI policy stating that the downstream investments by an Indian company owned and controlled by a NRI on a non-repatriation basis shall not be considered for calculation of indirect foreign investment. Accordingly, downstream investment by such Indian companies will also not be treated as FDI in India.

# INSOLVENCY AND RESOLUTION

## MARCH 2021

# IBC - Regulatory updates

## National Company Law Tribunal Initiates Corporate Insolvency Resolution Process ("CIRP") against Banyantree Developers Private Limited.

NCLT, New Delhi Bench ("Tribunal") admits the Financial Creditor's application filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and initiates CIRP against the Banyantree Developers Private Limited ("Corporate Debtor").

The Corporate Debtor had availed a loan from the Applicant worth more than INR 2 Crores on personal terms in the year 2015. The Corporate Debtor had made a part payment of INR 1.50 Crores in the same year leaving a sum of INR 70 lakhs outstanding and payable by the corporate debtor. It was mutually agreed between the Corporate Debtor and the Applicant that the repayment of INR 70 Lakhs shall be made till June 2019 along with interest @ 18% per annum. However, the Corporate Debtor failed to make the repayment in spite of repeated requests from the Applicant. The Applicant issued demand notice upon the corporate debtor to pay the aforesaid sum of INR 70 Lakhs along with interest at the rate of 18% per annum. The corporate debtor replied to the demand notice acknowledging the receipt of INR 70 Lakhs from the applicant. However, denied the liability alleging that the said amount was towards capital contribution and not towards a loan. The applicant further sent a response to the reply of Section 8 notice denying the contention of the corporate debtor and further raising a demand for the due amount and filed an application under Section 7 of IBC, 2016.

In response to the application filed by the Applicant, the Corporate Debtor denied all contentions of the applicant and further affirming that the said application and claim are time barred. Further, the Applicant filed a rejoinder to the reply filed by the corporate debtor, denying the various averments made by the Corporate Debtor. Based on the facts presented, Tribunal was satisfied that the application filed by the Applicant under section 7 of the IBC, 2016 was complete and the default had occurred with respect to the payment of the financial debt of the Applicant. Tribunal admitted the said application filed by the Financial Creditor and declared moratorium in accordance to section 14 of the IBC. Tribunal resolved to appoint Mr. Anil Tayal to act as the Insolvency Resolution Professional ("IRP"). Tribunal further directed the Financial Creditor to pay an advance amount of INR 2,00,000 (INR Two Lakh only) to the IRP for ensuring smooth conduct of CIRP within three days for the date of receipt of this order by the applicant.

# SEBI REGULATORY UPDATES

## MARCH 2021

# SEBI Regulatory updates

## Adjudication Order in the matter of Solitaire Machine Tools Limited

Securities and Exchange Board of India ('SEBI') conducted an examination in the scrip of Solitaire Machine Tools Limited, during the examination SEBI observed that, the shareholding of the promoters (Noticee) increased more than 1% and Noticee had not made necessary disclosure to the Company and the exchange (BSE).

On personal hearing the authorized representative of Noticee, submitted its reply stating that change in shareholding of the Noticees has taken place by way of transmission of shares by operation of law and being nominee in the demat account of Jyoti Praful Sheth, further, the change has not resulted in any change in the shareholding of the promoter group per se. Therefore, the adjudication proceedings initiated may kindly be dropped. From the fact of the case, SEBI observed that pursuant to the off-market transactions the shareholding of the Noticees increased by more than 1%. Hence, it triggered disclosure requirement by the Noticees under Regulation 13(4A) of PIT Regulations. However, it was alleged that the Noticees did not make the said disclosures within prescribed timeline.

The noticee further submitted that, since transmission of shares is brought about by the operation of law and does not involve any voluntary act on part of the persons involved in it, So, there is no requirement of disclosure under PIT Regulations by the Noticees. Further SEBI find that Noticees were promoters of the company during the investigation period and the shareholding were increased during the investigating period which required them to make the necessary disclosures as prescribed under the Regulations, which they had failed to make within the stipulated timeline.

Considering the facts and circumstances of the case and above factors, SEBI imposed monetary penalty of INR 1,00,000/- (INR One Lakh) on the Noticees under Section 15A (b) of the SEBI Act, 1992.

# SEBI Regulatory updates

## Amendment in the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018

SEBI has amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations) to provide as under:

a) Further Public Offer: Amongst other, the requirement of minimum promoters' contribution shall not be applicable in the following situation - where the equity shares of the issuer are frequently traded on a stock exchange for a period of at least 3 years immediately preceding the reference date, and:

   i. the issuer has redressed at least 95% of the complaints received from the investors till the end of the quarter immediately preceding the month of the reference date; and
   ii. the issuer has been in compliance with the LODR for a minimum period of 3 years immediately preceding the reference date.

b) Preferential Issue: As per the extant norms, the equity shares issued on a preferential basis, pursuant to any resolution of stressed assets under a framework specified by the RBI or a resolution plan approved by the Tribunal, under the IBC, shall be locked-in for a period of one year from the trading approval. As per the amendment, the lock-in provision shall not be applicable to the specified securities to the extent to achieve 10% public shareholding.

# SEBI Regulatory updates

## SAT quashes SEBI order debarring Non- Executive Independent Director from accessing the Securities Market for a period of 5 years citing reasons as absent involvement in fraudulent GDR issue

SEBI passed an order debarring the Appellant from accessing the Securities market for 5 years in light of fraudulent issue of GDRs by MPS Infotecnics Ltd, where appellant was holding position of non-executive independent director.

The appellant filed appeal with the Hon'ble Securities Exchanges Tribunal (SAT) against the above SEBI order. SEBI had issued a show cause notice to various noticees, including the appellant, alleging violation of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (PFUTP) on the grounds that

a) the GDR proceeds were diverted, and concealing and suppressing such material facts was in violation of the provisions of SEBI Act and PFUTP Regulations;
b) since the Appellant was a signatory to the resolution to open a bank account for receiving the subscription money in respect of GDR, he was responsible and equally guilty of the aforesaid violation.

The appellant had argued that he was a Non-Executive Independent Director in the Company and was not involved in the day-to-day affairs of the management of the Company, and was only involved in policy decisions and the resolution that he signed was only for opening of bank account and could not be stretched for giving GDR proceeds as a loan to a third party who did not exist on the date when resolution was passed.

SAT relied on its decision in Adi Cooper to hold that the concept of fraud emerging through the said resolution signed by the appellant did not arise, as the said third party was nowhere in the picture as on resolution date. Further, SAT also remarked that there was no finding given by SEBI that the appellant was involved in the day-to-day affairs and management of the Company and therefore allowed the said appeal.

1 LSI-933-SAT-2020(MUM)

# CORPORATE LAW UPDATES

## MARCH 2021

# Corporate Law - Regulatory updates

## Ministry of Corporate Affairs ("MCA") notified Companies (Audit) Amendment Act, 2021 w.e.f. April 1, 2021

MCA notified amendment proposed in Companies (Audit) Rules, 2021 by issuing notification stating that w.e.f. April 1, 2021, every company maintaining their accounts on an accounting software shall use only such accounting software which has a feature of recording audit trail of each and every transactions creating audit log of each change made in its books of accounts along with the date when such change were made and ensuring that the audit trail cannot be disabled.

**Devadhaantu Comments:**
Amendment is made in line with the government's efforts to launch MCA21 version 3.0 which will enable data analytics, artificial intelligence and machine learning with additional modules for e-scrutiny, e-adjudication, e-consultation and compliance management.

## Definition of Small Companies – revised threshold limits

In line with Finance Minister's announcement during budget session, while presenting Union Budget 2021, MCA has notified revised threshold limits for small company w.e.f. February 1, 2021.
Accordingly, vide the Companies (Specification of Definitions Details) Rules, 2014, revised threshold of paid-up share capital for small companies is INR 2 Crore as against INR 50 Lakhs, and turnover is INR 20 Crores, as against INR 2 Crore.

**Devadhaantu Comments:**
With this amendment, coverage of small companies has been enlarged to be in line with MSME definition. This would ease the compliance norms, relaxations in terms of procedures, reduction in compliance costs and also reduce timeline for obtaining approval for special transactions such as restructuring arrangements. This is definitely a step forward for ease of doing business.

# Corporate Law - Regulatory updates

## OPC incorporation by Non-Residents

W.e.f. February 1, 2021, MCA has notified conditionalities for non-residents who are Indian Citizen to set-up 'One Person Company'. Relaxation has been given to such non-residents by relaxing their stay in India to 120 days as against 182 days to be considered as non-residents. Further relaxation has been provided for the purposes of voluntary conversion of status of such OPC into Public / Private Companies (other than Section 8 Company) by removing lock-in period conditionality of 2 years and also removing thresholds' cross over on paid-up capital and turnover.

**Devadhaantu Comments:**

With this amendment, the step has been taken towards ease of doing business by allowing non-residents to also allow to incorporate company structure and upon expansion, to allow free convertibility without any stringent conditionalities. With the increase in tech products, this amendment is surely assist boost more and more entrepreneurs to emerge and retainership of talent in India for freely doing business in India.

## NCLT Benches to resume regular physical hearing w.e.f. March 1, 2021

NCLT vide an order file no. 10, dated February 26, 2021, issued an SOP for physical hearing and virtual hearing to come in force from March 1, 2021.

The said SOPs will be applicable to all NCLT Benches and has specified that while all NCLT benches will continue to receive online filing of cases through the e-portal, the Advocates / Representatives of the parties who opt to attend the hearing through Video Conference may send request with the item number to the concerned court officer.

# IFSC UPDATES

## MARCH 2021

# IFSC - Regulatory updates

## Consultation Paper on Proposed International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations, 2021

IFSC has issued a consultation paper titled 'Consultation Paper on Proposed International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations, 2021' on March 10, 2021 wherein it is proposed to unify a regulatory framework for issuance and listing of securities for several types of issuers. The comments have been invited by March 31, 2021.
Some key features as outlined in the consultation paper are as under:

i. The regulatory framework is intended to be for the following types of listing:

- An initial public offer of specified securities by an unlisted issuer
- A follow-on public offer of specified securities by a listed issuer
- Listing of specified securities by a start-up company or a SME
- Listing of debt securities (including SMART City bonds)
- Secondary listing
- Listing of depository receipts
- An initial public offer of specified securities by a SPAC
- Listing of ESG focused debt securities

ii. The salient features of raising of capital through IPO on a recognized stock exchange through IFSC contains certain conditions including an issuer being eligible to make an IPO only if it has an operating revenue of at least USD 20 Mn in the preceding financial year or an average pretax profit of at least USD 1 Mn during preceding 3 years and an offer size being not less than USD 15 Mn.

iii. A Special Purpose Acquisition Vehicle ('SPAC') shall be eligible to raise capital through IPO of specified securities on the recognized stock exchanges in IFSC, only if:

- The primary objective of the issuer is to effect a merger or amalgamation or acquisition of shares or assets of a company having business operations ("business acquisition").
- The issuer does not have any operating business.
- Additionally, the IPO size should not be less than USD 50 Mn, the sponsor should hold at least 20% of the post issue capital and the minimum application size in an IPO of SPAC would be USD 250,000.

# IFSC - Regulatory updates

## IFSCA updates

IFSCA issues International Financial Services Centres Authority (Finance Company) Regulations, 2021. These regulations are applicable to Finance Companies in the International Financial Services Centres.

The regulations are divided in several chapters covering various aspects. It related to setting up of a Finance Company that outlines registration requirements for commencing business as a Finance Company or Finance Unit. Also it specifies Prudential Regulatory Requirements outlining details relating to maintaining Capital Ratio ("CR"), Liquidity Coverage Ratio ("LCR"), Exposure Ceiling ("EC") by a Finance Company or Finance Unit.

Permissible Activities outlining details relating to Permitted Specialized Activities, Permitted Core Activities and Permitted Non-Core Activities that can be undertaken by a Finance Company or Finance Unit are also specified in detail.

Further it provides guidelines on (i) Currency of Operations; (ii) Know Your Customer and Anti-Money Laundering; (iii) Corporate Governance and Disclosure Requirements; (iv) Reporting Requirements; (v) Power to Specify Procedures and Issue Clarifications; (vi) Action in Case of Default

Further, IFSCA amends International Financial Services Centres Authority (Banking) Regulations, 2020, to enhance scope further to permitted activities to be undertaken by Bnaking, namely: (i) offering Portfolio Management services to person resident in India and persons resident outside India and (ii) Offering Investment Advisory services to person resident in India and persons resident outside India.