India Spectrum

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May 2010
Vol. 3 Issue 5

Editorial

We are delighted to present another issue of *India Spectrum*.

There are mixed indications on the economic front, both internationally as well as in India. With debt crisis in Greece having not settled completely, the international economy is still feeling the pressure, although the quarterly results of corporations in US are in line with expectations and show an improvement over the last few quarters. On the domestic front, industrial production growth has maintained its momentum with a growth of 15.1% year-on-year in February, 2010. At the same time, the wholesale index price rose to 9.90% in March, 2010.

On 20 April, 2010, the Reserve Bank of India ("RBI") Governor announced an increase in key policy rates by 25 basis points in the long-awaited monetary policy. While the RBI had its focus on fighting inflation, it has ensured that the momentum of the pace of growth is not hurt in this process.

The RBI has also released for public comments draft guidelines to govern holding / investing companies. As per these guidelines Core Investing Companies ("CICs") having an asset size of INR 1 billion will be required to register with the RBI. These guidelines, once effected, will have a significant impact on group holding companies.

In order to make the FDI policy transparent, simple and clear, the Department of Industrial Policy & Promotion released a Circular containing the Consolidated FDI Policy Framework of Government of India effective from 1 April, 2010. Going forward, the DIPP will issue such a policy consolidating circular on a six monthly basis, every 31 March and 30 September.

There has been a change in the valuation guidelines governing issuance of shares by Indian companies to foreign shareholders under the extant FEMA regulations governing FDI. Before this change, while private limited companies were required to issue shares at a price not lower than that arrived as per CCI valuation norms (which generally gave a lower price based on net asset value), effective 21 April, 2010, the issue price would need to be compliant with fair valuation as per the DCF valuation methodology.

After the Supreme Court decision in Dharmendra Textile Processors, doubts were raised regarding the levy of penalty in a case where the assessee's claim in the return is finally not accepted. Recently, the Supreme Court has clarified the legal position on this issue in the case of Reliance Petroproducts Ltd. and held that making a claim which may not be sustainable in law does not tantamount to furnishing inaccurate particulars of income and would not attract penalty under section 271(1)(c) of the Act. PwC tax alert analysing this decision was released recently: for access to this alert, we

would urge you to visit http://www.pwc.com/in/en/publications/News-Alert/2010/PwC-NewsAlert-2010.jhtml and provide your comments and suggestions.

We trust you will enjoy reading this *India Spectrum* and we welcome your comments.

Thank you

Ketan Dalal & Shyamal Mukherjee
Joint Leaders-TRS Practice

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Glossary

AAR	Authority for Advance Rulings
AY	Assessment Year
CBDT	Central Board of Direct Taxes
CESTAT	Customs, Excise and Service Tax Appellate Tribunal
CIT(A)	Commissioner of Income-tax (Appeals)
FII	Foreign institutional investors
FY	Financial year
HC	High Court
LIBOR	London Interbank Offered Rate
NBFC	Non-Banking Financial Company
PE	Permanent Establishment
SEBI	Securities and Exchange Board of India
TDS	Tax Deduction at Source
The Act	Income-tax Act, 1961
The Tribunal	The Income-tax Appellate Tribunal
TO	Tax Officer
TPO	Transfer Pricing Officer

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Corporate Tax

Case Law

Business Expenditure

Payment of lump sum royalties for non-exclusive licence to manufacture is an allowable business expenditure

The assessee entered into a licence agreement with a Mauritius-based company. According to the agreement, the licensor granted the licensee a non-exclusive licence to manufacture, use tube making machines and tools and parts thereof, with the right to register the licence. The agreement was restricted to the territory of India. Under the agreement, the technical know-how fees were payable in instalments and royalties were fixed at five per cent of captive / domestic sales and eight per cent of export sales for five years.

The TO held that the lump sum royalties payment was for the acquisition of technical know-how, an intangible asset. Furthermore, the expenditure, being capital in nature, was not allowable as a deduction under section 37(1) of the Income-tax Act, 1961 ("the Act").

The Income-tax Appellate Tribunal ("the Tribunal") allowed the deduction of the lump sum royalty payment on the grounds that the assessee was not entitled to transfer the right and had limited rights to use the technical know-how for manufacturing machines over a limited tenure.

The High Court ("HC") observed that the assessee had obtained a non-exclusive licence confined to the territory of India to manufacture and use tube making machines for a limited term and that the proprietary rights in patents continued to vest in the hands of the licensor. Hence, the assessee did not acquire an asset of a capital nature. While arriving at the conclusion, the HC relied on the decision in the case of CIT *v.* CIBA of India Ltd. [1968] 69 ITR 692 (SC). The HC held that the assessee cannot be regarded as having acquired, either wholly or partly, proprietary rights under the licence agreement, since the assessee obtained only a non-exclusive licence, which was restricted to the territory of India. Furthermore, the provisions of section 32 of the Act would not be applicable since the assessee had not acquired any proprietary interest or ownership in the licence. The lump sum payment for royalty was hence held allowable as a deduction.

CIT *v.* Essel Propack Ltd. [2010-TIOL-209-HC-MUM-IT]

Lump sum Royalty paid for non-exclusive licence to manufacture is business expenditure

FCCB issue expenses are revenue in nature

The assessee company issued Foreign Currency Convertible Bonds ("FCCBs") which were convertible into shares at the option of the bond holders after the initial lock-in period of six months. The FCCBs were fully convertible into shares and the issue of bonds was made after increasing the authorised capital which could take into account all bonds as shares. The issue document stated that the proceeds of the issue were intended to be used for capital expenditure

and general corporate expenditure. The expenditure incurred on FCCBs was claimed by the assessee as revenue expenditure. The TO held that the expenditure incurred on FCCBs was capital in nature since it led to enhancement of the capital structure of the assessee company and accordingly disallowed the entire expenditure. The Tribunal treated it as revenue expenditure relying on the Rajasthan HC decision in case of CIT *v*. Secure Meters Ltd. [2008] 175 Taxman 567 (Raj.), wherein it was held that debentures when issued is a loan, whether it is convertible or non-convertible, does not militate against the nature of the debenture being a loan. Therefore, the expenditure incurred would be admissible as revenue expenditure. Since the issue under consideration was directly covered by the judgement of the Rajasthan HC and there was no contrary decision pointed out by the revenue, the Tribunal allowed the assessee's claim.

Mahindra & Mahindra Ltd.*v*. JCIT
[2010] 36 SOT 348 (Mum.)

Fines and penalties paid to NSE allowable as business expenditure

The assessee was a member of the National Stock Exchange ("NSE") and claimed deduction for fines levied by the disciplinary action bench of the NSE. The TO disallowed the claim on the ground that these fines being penal in nature, could not be allowed as a deduction in view of explanation 37(1) of the Act. This was upheld by the CIT(A).

The Tribunal held that NSE is a company incorporated under Companies Act, 1956 and its rules and by-laws could not be equated with any statutory rules or regulations. Also, payments made by the assessee to NSE could only be considered as compensatory since the by-laws of NSE were only procedural and violation could not be treated as a penalty falling with the mischief of explanation to section 37(1) of the Act. Hence, the assessee's claim is allowed.

Goldcrest Capital Market Ltd. *v*. ITO [2010]
2 ITR's Tribunal Reports 355 (Mum)

Deduction / Exemption

Providing recruitment and training services eligible for deduction under section 10A

The assessee-company was a 100% subsidiary of a USA company, engaged in the business of software consultancy services and providing recruitment and placement of qualified / trained software professionals for performing assigned tasks at different client locations and software application development. In its return of income, the assessee claimed exemption under section 10A of the Act for receipts from its parent company (as per the agreement entered into) for recruitment charges and training charges. The TO held that the assessee would not be eligible for deduction on the grounds that it was engaged in recruitment and training of personnel for its parent company and the activity would fall outside the purview of eligible items for claiming deduction under section 10A of the Act.

There was difference of opinion between two members of the Tribunal who heard the appeal and the matter was referred to a Third Member of the Tribunal. On analysis of the case, the Third Member held that the activity of the assessee was covered by the Central Board of Direct Taxes ("CBDT") notification no. 11512 dated 26 September, 2000 in which human resource services was described as an information technology enabled service. Since the CBDT is authorised to notify the categories of information technology enabled services covered, the principle of *ejusdem generis*, for interpreting the words 'products or services of similar nature' cannot be applied. Furthermore, since the data pertaining to recruitment and training of personnel was stored in an electronic device and transmitted to the parent company, it was customised electronic data within the purview of section 10A of the Act. Hence, the profits earned by the assessee from the activity were held eligible for deduction under section 10A of the Act.

ITO *v.* Accurum India Pvt. Ltd.
[2010-TIOL-127-ITAT-MAD-TM]

Deemed Dividend

Deemed dividend taxable in hands of shareholder and not in hands of concern in which the shareholder has substantial interest

The directors of C Ltd. transferred a certain amount to the bank account of the assessee company. One of the directors was holding over 10 per cent of the equity capital of C Ltd. and over 20 per cent of the equity capital of the assessee. The TO treated the amount received by the assessee from C Ltd. as deemed dividend under section 2(22)(e) of the Act. The assessee

Section 10A deduction available to recruitment and training services

contended that the Vice-President (Finance) had misappropriated the amount. Since the amount received was neither a loan nor an advance, the conditions provided in section 2(22)(e) of the Act were not fulfilled. Even if the amount was to be treated as deemed dividend, it was taxable in the hands of the shareholder and not in the hands of the assessee. The Tribunal held that the provisions of section 2(22)(e) of the Act were not applicable since the amount was not received either as a loan or as an advance.

The HC held that the issue of whether the amount received by the assessee was in the nature of the loan or an advance was a question of fact. On taxability in the hands of the recipient, it observed that section 2(22)(e) of the Act broadens the ambit of the expression *dividend* by including certain payments which a company makes by way of loan or advance or payment on behalf of or for the benefit of an individual shareholder. The definition does not alter the legal position that such a sum paid should be taxed in the hands of the recipient i.e. the shareholder. Accordingly, the amount received was held to be not taxable as deemed dividend in the hands of the assessee company.

CIT *v.* Universal Medicare Pvt. Ltd. [2010-TIOL-215-HC-MUM-IT]

Cost of Assets (acquired in foreign currency)

Adjustment of foreign exchange loss to the cost of asset

The assessee public sector undertaking was engaged in capital intensive exploration and production of petroleum products. The assessee had made three types of foreign exchange borrowings, viz. (i) on revenue account; (ii) on capital account; and (iii) for general purposes, partly utilised on revenue account and partly on capital account.

The foreign exchange loss on revaluation at the end of the accounting year, incurred on revenue account on account of repayment of loan was allowed as a deduction. The loss on capital account, on actual repayment, was also allowed to be adjusted to the cost of the asset under section 43A of the Act.

The loss / gain on revenue account in respect of loan outstanding as on the year end was not allowed on the grounds that the assessee followed a mercantile system of accounting and it was a notional loss. Similarly, loss on capital account was disallowed on the grounds that the amended section 43A of the Act allowed loss to be adjusted to the cost of the asset only on actual payment.

Relying on the decision of SC in the case of CIT *v*. Woodward Governor India P. Ltd. [2009] 312 ITR 254 (SC), it was held that foreign exchange loss on revenue account in respect of the outstanding liability as on the last day of the financial year is not merely notional or contingent in nature and hence allowable as a deduction.

The assessee's case was prior to the amendment to section 43A of the Act, which currently allows for adjustment only at the time of settlement of the liability. It was clarified that the amendment to section 43A of the Act is not clarificatory but prospective i.e. effective from 1 April, 2003 and hence not applicable to the assessee. The assessee was allowed to make adjustment to the cost of the asset.

Oil & Natural Gas Corporation Ltd. *v*. CIT [2010-TIOL-20-SC-IT]

Fees for Technical Services

Fees for referral services, in the absence of a PE, not subject to withholding tax

The applicant, a UK based company, engaged in the business of providing recruitment services, placed candidates with Indian companies, and also provided referral services where it referred potential clients to a third party based in India. The applicant sought a ruling on the issue of whether payments received from recruitment services and referral services from Indian clients are liable to withholding tax under section 195 of the Act, read with the India-UK Double Taxation Avoidance Agreement ("tax treaty").

The revenue contended that the applicant had a permanent establishment ("PE") in India and also in terms of Article 13(4)(a) / (c) of the India-UK tax treaty, the database maintained by the applicant of information for candidates for recruitment was a consultancy service and the applicant was making available the experience and skill of the candidates. Furthermore, as per the information downloaded from internet, the assessee's office in New Delhi indicated the presence of a PE.

In the absence of information about recruitment fees, the Authority for Advance Rulings ("AAR") declined to give a ruling on recruitment services. The AAR observed that providing information relating to candidates by collecting and analysing data, even if it is in the nature of consultancy services, it could not be considered as ancillary and subsidiary to application / enjoyment of the rights or information referred in Article 13(3)(a) of the tax treaty and therefore article 13(4)(a) of the tax treaty would not apply.

Furthermore, making available the experience and skill of candidates for recruitments did not fall within the ambit of making available the technical knowledge and experience of service providers. Therefore, article 13(4)(c) of the tax treaty would not apply. It was also observed that the applicant was not required to have a PE to render the referral service. Furthermore, the office in New Delhi was a virtual office since the applicant clarified that it had no real office in New Delhi. The address and phone number was given to serve as a contact point for routine work of inconsequential nature.

Accordingly, it was held that the amount received in the nature of referral fees by the applicant was not subject to withholding tax. The applicant was directed to notify factual position to TO in India so that inquiries could be made about the role of the so-called office. At the same time, it was clarified that the revenue was bound by the position clarified in the case of Cushman & Wakefield (S) Pte. Ltd. [2008] 305 ITR 208 (AAR).

Real Resourcing Ltd., *In re* [2010-TIOL-13-ARA-IT]

Capital Gains

Interest on borrowings treated as cost of acquisition of asset

The assessee borrowed from its directors to purchase land for building a hotel. As the hotel could not be constructed, the company sold off the property. For computing long-term capital gains arising on sale of land, the assessee added the interest payment to the directors, on borrowed funds to the cost of acquisition.

The tax authorities contended that the resolution for interest payment was passed only after the property was sold, and as such no liability to pay the interest existed on the date of sale.

The Tribunal held that interest accrues annually and since the property was bought out of borrowed funds i.e. loan proceeds, any interest accrued thereon is rightly included in the cost of acquisition of the asset. The HC upheld the Tribunal's order and held that interest accrued on borrowed funds was includible in the cost of acquisition of the asset.

CIT *v.* Shri Hariram Hotels Pvt. Ltd. [2009] 229 CTR 455 (Karnataka)

Provisions of section 50C cannot be applied to business assets

The assessee was engaged in the business of property development, obtained power of attorney from the owners of a property developed by him. The property was treated as current assets (i.e. business assets) in the books of the assessee. The assessee sold the property. While registering the sale deed, the Registrar considered the higher value of the property for the purpose of stamp duty and registration of sale deed. The TO invoked the provisions of section 50C of the Act and computed the sale consideration on the basis of the value taken by the Registrar. The assessee contended that section 50C of the Act would apply only to computation of capital gains and not business income. On appeal by the revenue, the HC agreed with assessee's contention and held that there was no question of invoking the provisions of section 50C of the Act, since the property was business asset of the assessee.

CIT *v*. Thiruvengadam Investments (P) Ltd. [2010] 320 ITR 345 (Mad.)

Loss on transfer of right to partly convertible debentures allowed

The assessee claimed short-term capital loss in respect of sale of rights to certain partly convertible debentures on the grounds that the resultant fall in the market price of the existing shares should be deducted from the amount received. It was held that the market value of the rights issue was to be reckoned regardless of whether the sale contribution of the rights was less than the notional loss on original shares or not. The assessee was allowed to claim the capital loss.

CIT *v*. New Ambadi Investment (P.) Ltd. [2010] 188 Taxman 67 (Mad.)

Business Loss v. Capital Loss
Loss in share transactions as a result of a systematic activity would be treated as business loss, even if shares are held as investments

The assessee claimed loss arising on transactions in shares as a trading loss. The TO as well as the CIT(A) held that the shares in respect of which the loss was claimed was in the nature of investment and therefore the loss incurred in respect thereof would be a capital loss and not a trading loss. The Tribunal, however, found that the shares in question were held as stock-in-trade and remanded the matter back to the TO, with a direction to pass a reasoned order with specific reference to the material on record. The TO re-examined the matter and treated the loss as capital loss since the shares were held as investment and the same were shown as investments in the balance sheet.

The Tribunal allowed the assessee's appeal after examining the facts that demonstrate that the assessee had significant frequency in dealing with the shares, which really constituted stock-in-trade, even though they were shown as investment in the books of account. The loss was a result of a systematic activity in relation to shares and, therefore, the Tribunal came to the conclusion that the loss claimed by the assessee should

have been accepted as a business loss. The Delhi HC accepted the Tribunal's order and dismissed the TO's appeal.

CIT *v.* SMC Credit Ltd. [2010] 228 CTR 353 (Del.)

Interest

Interest under section 234B not applicable where income is subject to withholding tax

The assessee, a tax resident of Germany, filed its return of income disclosing royalty income received from an Indian company. The TO charged interest under section 234B of the Act. On appeal, the Commissioner of Income-tax (Appeals) ("the CIT(A)") held that the assessee's income was subject to tax withholding under section 195 of the Act. Hence, the assessee was not required to pay advance tax.

The Tribunal agreed that the assessee was not liable to pay interest under section 234B of the Act. The Tribunal relied on the decision of the Bombay HC in the case of DIT(IT) *v.* NGC Network Asia LLC [2009] 222 CTR 86 (Bom) where it was held that once the income is subject to withholding tax, it is out of the preview of the requirement to pay advance tax under section 209 of the Act.

DDIT (IT) v. Daimler Chrysler AG
[2010-TIOL-172-ITAT-MUM]

Set-off of losses

Set-off of speculation loss allowable against gains from delivery based share transactions

In the assessment year ("AY") 2003-04, the assessee claimed set-off of speculation losses brought forward from the AYs 1996-97 to 1998-99 against profit earned on sale of shares and securities held as stock-in-trade. The TO treated these profits as non-speculative business income on the ground that the assessee had settled its transactions of sale and purchase of shares through physical delivery, and therefore, these were not speculative transactions in terms of section 43(5) of the Act. The revenue further contended that while the loss from a delivery based transaction would constitute a loss from speculation business in light of the deeming provisions of the Explanation to section 73 of the Act, this deeming fiction would not apply to profits from delivery based transactions.

The HC observed that the Explanation to section 73 of the Act created a deeming fiction, i.e. if any part of the business of the company consisted of the purchase and sale of shares of other companies, it would be deemed that the assessee is carrying on a speculative business to the extent of such purchase and sale of shares. No restriction could be placed on the scope and ambit of such a deeming fiction, to hold that it does not apply when there is profit in the transaction.

Accordingly, it was held that the assessee was eligible to claim set-off of speculation losses against the gains on delivery based shares transactions since the latter were deemed to be speculative in nature.

CIT *v.* Lokmat Newspapers Pvt. Ltd.
[2010-TIOL-193-HC-MUM-IT]

Speculative transaction

Mere speculative transaction may not result in income treated as income from speculation business

The assessee had set-off the loss incurred on bargain settlement and price difference on the basis of a wash out contract against the business income. The TO as well as the CIT(A) disallowed the claim of set-off on the grounds that the transactions did not amount to payment on breach of contract and would be covered within the definition of *speculative transaction* under section 43(5) of the Act. On appeal, the Tribunal held that the loss was incurred by the assessee in the regular course of business with regard to the breach of contract, and hence, the loss would be set-off against the regular business income.

On appeal, the HC held that the loss incurred on bargain settlement did not arise out of speculative transactions as it was a result of a breach of contract. Even if the transactions were regarded as speculative transactions, section 43(5) of the Act was merely a definitional clause, defining a speculative transaction is for the purposes of sections 28 to 41 of the Act. If the speculative transaction, as defined in section 43(5) of the Act, matures into a speculative business, the loss in the transaction can be set-off only against the gains or profits of a speculative business in terms of section 73 of the Act. Accordingly, it was held that the loss would be eligible to be set-off against business income.

CIT *v.* Gora Mal Hari Ram Ltd.
[2010-TIOL-171-HC-DEL-IT]

Mere speculative transaction may not result in income treated as income from speculation business

Personal Taxes

Case law

The hypothetical tax deductible even if actual tax in host country is lesser

In a recent ruling, the HC held that hypothetical taxes ("hypo taxes") would be deducted from the salary of an employee even if the actual taxes paid in India are less than the hypo taxes.

In this case, the assessee was employed in the United States and deputed to work in an Indian company. While fixing salary for deputation, the assessee was assured of the net amount of salary which he was getting in the US. Accordingly, the hypo tax, as per the US tax rates, was deducted from the salary of the assessee and the employer was to bear any incremental taxes in India. During assignment in India, the taxes payable in India were less than the hypo taxes deducted in the US. Accordingly, the employer saved the differential amount represented by the difference between hypothetical taxes and actual Indian taxes. While filing the Indian tax return, the assessee claimed deduction of the hypo taxes. This claim was rejected by the learned TO. The Tribunal, however, allowed the same and concluded that the income of the assessee includes only net salary and the Indian taxes borne by the employer. Accordingly, the hypo taxes should be deducted while computing the total income of the assessee.

The HC upheld the Tribunal's order wherein it was held that the hypo taxes, which were deducted from the salary of the assessee, never accrued in India. It was also observed that the issue of taking credit of the Indian taxes in the US was not relevant. The income arising in India, in the present case, was the salary net of hypo taxes plus incremental tax liability arising out of India assignment. Since the hypo taxes never accrued to the assessee, these were not to be included in the total income of the assessee.

CIT *v.* Dr. Percy Batlivala [2010-TIOL-175-HC-Del-IT]

> Hypothetical tax is deductible even if actual tax in host country is lesser

Mere economic nexus is not sufficient to invoke the provisions of section 163 to hold an entity as an agent of the expatriate employees

The Delhi Tribunal held that the appellant company could not be treated as an agent of the expatriate employees of its associate company, who were deputed to work for the appellant under a technical assistance agreement, as the expatriate employees did not receive any income directly or indirectly from the assessee.

In this case, Pride Foramer ("PF"), a French company, entered into a contract with ONGC for carrying out drilling services. For these drilling services, PF deputed its own employees as well as employees of its associate company, Pride Forasol ("associate company"). For this purpose, PF entered into a technical assistance agreement with the associate company, whereby PF obtained the services of employees of associate company on payment of technical fees. The appellant company was issued a notice under section 148 of the Act to explain as

to why it should not be treated as an agent of the expatriate employees of the associate company. The appellant company submitted that there was no nexus between itself and the expatriate employees. No payments were made by the appellant company to the employees. Furthermore, the employees were not liable to pay tax in India as they were entitled to treaty exemption by satisfying all the conditions of Article 16(2) of the India – France tax treaty and therefore the provisions of section 163 of the Act could not be invoked.

The TO did not agree with the submissions of the appellant and treated it as an agent of the expatriate employees. It was observed by the TO that as per section 163(1)(c) of the Act, an agent in relation to a non-resident would include any person from or through whom, the non-resident is in receipt of any income, whether directly or indirectly. The fees paid by PF to its associate company were inclusive of remuneration, statutory contributions and taxes of the employees and PF was considered as the real employer of the expatriate employees. As per the TO, the employees were not entitled to treaty benefits as the remuneration was borne by the PE of the appellant and therefore, the employees were liable to tax in India. Accordingly, PF was considered to be an agent of the employees. The CIT(A) also upheld the order of the AO in the first appeal.

On second appeal by the assessee before the Tribunal, it was held that the expatriate employees did not receive any income directly or indirectly from PF and there was no employer-employee relationship between PF and the employees. The assessee did not have any lien on the employees. There was no live nexus between PF and the income earned by the expatriate employees. Mere economic nexus does not provide powers under section 163 of the Act to hold PF as an agent of the expatriate employees. The Tribunal, based on the facts above, quashed the order of the CIT(A).

Pride Foramer S.A.S *v.* ACIT [2010] 127 TTJ 210 (Delhi)

Notifications / Circulars

New TDS rules notified

The CBDT amended the Income Tax Rules, 1962 relating to tax deduction at source (“TDS”). These rules govern the provisions relating to the time and mode of payment to Government account of tax deducted at source or paid under section 192(1A) of the Act (Rule 30), issuance of certificate of tax deducted at source or tax paid under section 192(1A) of the Act (Rule 31), furnishing of quarterly statement of deduction of tax under section 200(3) of the Act (Rule 31A), furnishing of returns regarding tax deducted at source in the cases of non-residents (Rule 37A), time and mode of payment to Government account of tax collected at source under section 206C of the Act (Rule 37CA) and issuance of certificate for collection of tax at source under section 206C(5) of the Act (Rule 37D).

The above rules have been made applicable with effect from 1 April, 2009.

Notification no. 9/2010 dated 18 February, 2010

Mergers & Acquisitions

Case law

Companies Act and Other laws

Second buy-back of shares under section 77A

Supreme Petrochem Ltd. ("SPL") completed its buy-back offer (1.56 per cent of share capital) in terms of resolution passed by Board of Directors. The offer of buy-back of equity shares commenced on 27 December, 2008 and closed on 4 December, 2009. As per proviso to section 77(A)(2)(b) of the Companies Act, 1956, if buy-back is authorised by a board resolution, then no offer of buy-back can be made within a period of 365 days from the date of preceding offer. SPL sought clarification as to from which date the period of 365 days would be computed i.e. from date of public announcement or date of opening of offer or any other date and also whether subsequent open offer for buy-back can be made within 365 days if it is made pursuant to special resolution passed by shareholders ("shareholders' resolution").

SEBI has clarified that the period of 365 days is to be reckoned from the date of completion of the preceding offer of a buy-back, made pursuant to Board resolution.

On the second query, SEBI held that a second buy-back authorised by the shareholders' resolution can be made at any time after completion of the first buy-back offer since the Companies Act, 1956 does not provide for any cooling-off period when the first offer of buy-back is made pursuant to a Board resolution and second offer pursuant to the shareholders' resolution. However, it was clarified that the other conditions under section 77A and SEBI (Buy-back of Securities) Regulations, 1998 were required to be complied with.

[Informal guidance in the matter of Supreme Petrochem Limited]

Application to Takeover Panel under Regulation 4(2) of SEBI (Substantial Acquisition of shares and Takeovers) Regulation, 1997

Quadrant Enterprises Ltd. ("acquirer") proposed to acquire 53.36 per cent of equity shares of HFCL Infotel Ltd. ("acquiree") pursuant to the proposal for settlement / change of management approved under the Corporate Debt Restructuring ("CDR") System by the CDR cell. The implementation of CDR package was to revive the target company and induct funds to enable the Target Company repay its outstanding debts. The shares of the Target Company were also traded infrequently. Considering these, the Takeover panel found the proposal in the interest of all stakeholders including public shareholders and recommended grant of exemption under regulations 10 and 12 of the SEBI (Substantial Acquisition of shares and Takeovers) Regulation, 1997 ("Takeover code").

In another similar application, Citadel Realty and Developers Ltd. ("Target Company 2") proposed to allot equity shares aggregating INR 9.74 million on a preferential basis to the acquirer (one of the promoters) against settlement of inter-corporate deposit of INR 7.38 million and inducting funds in the target for balance amount. The allotment would increase the shareholding of the acquirer from 26.51 per cent to 36.98 per cent and that of the promoter group from 61.29 per cent to 66.81 per cent. The Takeover panel noted that the Target Company was not a sick company and the proposal was not

in the interest of public shareholders and hence denied exemption.

These cases reflect that the exemption from the applicability of the Takeover Code is granted by the Takeover panel on the basis of facts and circumstances of each case after considering interest of the company and the stakeholders.
[Application under regulation 4(2) in the matter of HFCL Infotel Limited and Citadel Realty and Developers Limited]

Persons acting in concert (“PAC”) – commonality of objective is must

SEBI in its investigations noticed that a substantial quantity of shares of a Target Company had been acquired by the Ketan Parekh group (“KP”) (comprising of five entities and the appellant). It was alleged that these entities including the appellant, while acting in concert with each other, had acquired more than 5% shares of the Target Company without disclosing their shareholding to the Target Company, thereby violating Regulation 7 of the Takeover Code.

The appellant accepted that it had a close business relationship with KP entities and had acted as a broker for them; however, it had denied having acted in concert with any of the KP entities.

SEBI noted that the show-cause notice issued by the Adjudicating Officer included only an assertion that the appellant had acted in concert with KP entities and nothing else.

Before two or more persons can be said to be PAC, it is necessary that they must have a common objective, which should be the substantial acquisition of shares. The shares then should be acquired pursuant to an agreement or an understanding (formal or informal). An association between two persons is one thing; their acting in concert with a common objective to acquire substantial shares of a company, pursuant to an agreement or understanding is another. A close business association between two or more persons does not by itself make them PAC for the purpose of acquiring shares.
Triumph International Finance India Ltd. *v.* SEBI [2010] 98 SCL 319 (Mum)

Transfer Pricing

The Transfer Pricing audits and the Dispute Resolution Panel hearings continue to be in progress during this month. Notable developments internationally include revisit of its decision by the U.S. Court in the case of Xilinx and arriving at a conclusion contrary to the earlier decision to include the stock compensation cost in the cost pool, shared in a cost sharing agreement under the U.S. Transfer Pricing Regulation, the issuance of tax audit plan for 2010 by the Polish tax authorities which emphasised on detailed analysis of related party transaction and the arm's length character of such transactions and the announcement of Annual Statutory Report on Advance Pricing Arrangement ("APA") by the IRS, which revealed a record number of APA submissions for the second straight year, confirming that the APA program remains a popular vehicle for taxpayers that seek certainty in their transfer pricing results.

Case Law

Tribunal rules on profitability of international transactions

The taxpayer was engaged in the business of sale of finished jewellery to its Associated Enterprises (AE) and also to non-AEs. The taxpayer was located at Santacruz Electronics Export Processing Zone ("SEEPZ"), Special Economic Zone ("SEZ") and was enjoying benefit of 100% tax holiday in respect of its operations under the Act. In the Transfer Pricing documentation, the taxpayer considered cost plus method as the most appropriate method. As the gross margin earned by the taxpayer from transactions with AEs were higher than that earned from transactions with non-AEs, it was concluded that the transfer price of the taxpayer was at arm's length.

During the Transfer Pricing audit, the revenue rejected the selection of cost plus method by the taxpayer as the details of computation of gross margin were not furnished. Further, the Revenue observed that comparison of AE transactions with the third party transactions was inappropriate as there existed differences with respect to functions, risks and terms and conditions of the contract. Accordingly, the revenue applied the transactional net margin method ("TNMM") as the most appropriate method and computed the arm's length price based on the net mark-up on cost arrived at by the comparable companies selected.

In response to the adjustment made by the revenue, the taxpayer filed a rectification petition contending that the revenue made Transfer Pricing adjustment to total sales, inclusive of sales with third parties. However, the petition was rejected by the revenue referring to the original order. Aggrieved, the taxpayer preferred an appeal before the CIT(A) who decided the case in favour of the taxpayer.

Aggrieved, the revenue appealed to the Tribunal against the above order. Before the Tribunal, the revenue contested that the taxpayer failed to provide the classification of sales and gross margin between the AE and non-AEs. As such, the application of TNMM at an enterprise level was argued to be appropriate. The revenue also contested exclusion of interest cost in the computation of net profit by the taxpayer, alongwith lack of details regarding basis of allocation of purchase cost and direct cost.

Quashing the order of the CIT(A), the Tribunal issued a direction to

the TO to compute the average net profit applying TNMM and observed that the adjustment, if any, should be made only on the international transactions entered into by the taxpayer.

ACIT *v.* T Two International Pvt. Ltd. [2010-TIOL-166-ITAT-MUM]

PKN US – U.S. Court changes its decision to hold that the stock option cost does not need to be included in cost sharing pool

The taxpayer entered into a cost sharing agreement with its overseas subsidiary under which both the taxpayer and the subsidiary shared the costs of Research and Development ("R&D") of a new technology. However, the taxpayer did not include stock option compensation costs related to the R&D in the cost pool. The revenue contended this position, and the Tax Court held in favor of the taxpayer that unrelated parties do not share stock option compensation costs in comparable arm's length arrangements.

On appeal against the above order of the Tax Court, the U.S. Court initially reasoned that the regulatory language requiring all costs to be included in the pool of shared costs was more specific and therefore trumped the general regulatory guidance requiring application of arm's length standard. The decision so issued was a 2-1 decision (with one judge dissenting). Subsequently, the taxpayer appealed for rehearing of the decision *en banc*. The petition was supported by *amicus curiae* briefs filed by various business organisations, former IRS and treasury officials, which emphasised on the importance of the arm's length principle.

Following the submission for re-hearing the case and various supporting briefs, the U.S. Court recently issued an opinion that stock compensation cost does not need to be included in the pool of costs shared in a cost sharing agreement under the regulation in effect during the relevant year.

Xilinx, Inc., and Consolidated Subsidiaries *v.* Commissioner of Internal Revenue [Ninth Circuit, No. 06-74246, dated 22 March, 2010]

PKN US – IRS APA Program receives record high number of APA submissions

The IRS recently released its Annual Statutory Report ("Report") covering APA administration for the 2009 calendar year. The Report revealed that the APA program received a record high number of APA submissions for the year. A snapshot of the APA applications received during the year and completed, the details of unilateral and bi-lateral APAs are provided in the table below:

Particulars	Nos.
APA requests received during the year	127
APA requests executed in 2009 (21 unilateral and 42 bilateral APAs)	63
Pending APA requests by the end of year 2009 - 57 Unilateral APAs - 264 Bilateral APAs	321
The number of months each APA request pending at the end of year 2009	
Unilateral APAs - 21 pending for 18 months or longer - 28 pending for one year or less Bi-lateral APAs - 170 pending for two years or less - 218 pending for three years or less	

The high number of requests demonstrated that the APA program remains a popular vehicle for the taxpayers who seek certainty in their transfer pricing results. Although, during the financial year 2009, the overall processing time generally increased slightly and the inventories also experienced a slight increase, the APA Program expects that additional available staffing will provide the APA Program with the resources it needs, to decrease processing times and inventories in the coming years.

Courtesy PricewaterhouseCoopers Pricing Knowledge Network (PKN)

Stock option cost is not to be included in cost sharing pool

Indirect Taxes

VAT / Sales Tax

Case Law

Penalty for failure to produce transit documents cannot be levied mechanically

The West Bengal Taxation Tribunal has held that the penalty for failure to produce transit documents cannot be levied mechanically, especially where the goods are exported outside India and there is no loss of revenue to the exchequer.

Madan Lal Goel *v*. Commercial Tax Officer [2010] 27 VST 213 (WBTT)

Notifications / Circulars

Additional tax imposed in the State of Uttaranchal

An additional tax has been levied on taxable turnover of the goods mentioned in Schedule-II(B) other than declared goods at the rate of 0.5 per cent and on unclassified goods at the rate of 1 per cent with effect from 1 April, 2010. Accordingly, the effective rate of tax will be 4.5 per cent and 13.5 per cent on specified scheduled goods.

Notification No. 234/2010/TC 294/XXVII(8)2007 dated 26 February, 2010 read with Notification No. 250/2010/TC 294/XXVII(8)2007 dated 4 March, 2010

Various tax amendments notified in Rajasthan

The Rajasthan State Govt. has notified the following amendments in the VAT laws with effect from 9 March, 2010:

- Solar Energy equipment included in the list of goods exempt from tax
- Dealers leasing cinema print or films for exhibition included in the list of dealers exempt from tax
- Increase in rate of tax to 5 per cent for goods earlier chargeable to VAT at the rate of 4 per cent (excluding declared goods)
- Bitumen, generators, inverters, etc. excluded from the list of goods chargeable to VAT at the rate of 5 per cent
- The composition rate of tax increased from 0.25 per cent to 0.50 per cent.

Notification Nos. S.O. 384 to 389 dated 9 March, 2010

CENVAT

Case Law

Bonus received from customer for better performance / quality of goods is not includible in the value of goods

The Bangalore CESTAT has held that bonus payments received from customers subsequent to clearance of goods, for better performance / quality of goods, are not includible in the value of goods.

Vishwakarma Refractories Pvt. Ltd. *v*. CCE [2010-TIOL-287-Bang]

Credit is not deniable in relation to inputs issued for production but destroyed in fire subsequently

The Mumbai CESTAT has held that CENVAT credit is not deniable in relation to inputs issued for production but destroyed in a fire thereafter.

Gitanjali Chemicals Pvt. Ltd. *v*. CCE [2010] 173 ECR 90 (Mum)

Revenue precluded from challenging correctness of its own circular even if inconsistent with statutory provisions

The Punjab and Haryana HC has held that the Revenue is precluded from challenging the correctness of a departmental circular, even if it is inconsistent with the statutory provisions

CCE *v*. Malwa Industries Ltd. [2010] 251 ELT 32 (P&H)

Notifications / Circulars

Procedures for collection of cess on tractors is provided under the Tractor Cess Rules, 1992

The CBEC has clarified that the procedures for collection of cess payable on tractors under the IDRA Act, 1951 is provided under the Tractor Cess Rules, 1992.

CBEC Circular No. 916/06 /2010 - CX dated 4 March, 2010

Service Tax

Case Law

Rebate of service tax available as long as benefit of services accrue outside India

The Mumbai CESTAT has held that rebate of service tax is available as long as the benefits of services accrue outside India, even where all the relevant activities take place in India.

KSH International Pvt. Ltd.*v.* CCE [2010-VIL-05-Mum]

Notifications / Circulars

The CBEC has prescribed the procedure for electronic filing of excise and service tax returns

The CBEC has issued a circular prescribing the procedures for electronic filing of Central Excise and Service Tax returns by all the assessees who have paid central excise duty or service tax of INR 1 Million or more (including payment by utilisation of Cenvat credit) in the previous financial year

CBEC Circular No. 919 / 09 / 2010 – CX dated 23 February, 2010

Customs / Foreign Trade Policy Case Law

For regulating exemption allowed to EOUs the term manufacture should be construed as defined in Foreign Trade Policy

The Bangalore CESTAT has held that the term *manufacture* for the purpose of regulating exemptions allowed to EOUs should be construed as defined in the Foreign Trade Policy and not as per section 2(f) of the Central Excise Act, 1944.

Tirumala Impex *v.* CC [2010] (251) ELT 240 (Bang.)

Interest to be levied in case of failure to fulfil export obligations under the EPCG scheme

The Karnataka HC has held that in case of failure to fulfil the export obligations under the EPCG scheme, interest is also to be levied in terms of section 28AA of the Customs Act.

Dhwani Fashions *v.* DCC [2010] 251 ELT 173 (Kar)

Notifications / Circulars

Tariff concessions increased on goods imported under SAFTA

The Central Government has increased the extent of tariff concession from 50 per cent to 75 per cent and from 75 per cent to 100 per cent on the specified goods imported under the South Asian Free Trade Area (“SAFTA”) agreement.

Notification No. 36/2010 dated 22 March, 2010

Mumbai Customs has extended an optional facility for grant of payment of 4 per cent special additional duty refund amount directly to the importer’s bank account

The Mumbai Customs authorities at Jawaharlal Nehru Customs House, Nhava Sheva have extended the facility of payment of 4 per cent special additional duty refund amount directly to importer’s bank accounts instead of by way of issuing cheques.

Public Notice no. 16/2010 dated 16 February, 2010

Duty imposed retrospectively on supply of electrical energy from SEZ to the non-processing areas of the SEZ or to the DTA

The Central Government has imposed a duty at the rate of 16 per cent ad valorem, retrospectively with effect from 26 June, 2009, on supply of electrical energy from the Special Economic Zone (“SEZ”) to the non processing areas of the SEZ or to the Domestic Tariff Area (“DTA”). Exemption from levy of duty on import of electricity from overseas will continue.

Customs Notification No. 25/2010 dated 27 February, 2010

Duty drawback can be recovered from exporters where export proceeds are not realised within the time allowed

The Central Government has clarified that in terms of the provisions contained in Chapter 2 of the Handbook of Procedures, the amount of duty drawback allowed at the time of export is recoverable by the customs authorities in the event the export proceeds are not realised within the allotted time.

Customs Circular No. 07/2010 dated 23 March, 2010

Supply of goods from DTA to SEZs can be made under claim of rebate of excise duty

The Central Government has clarified that supply of goods from the DTA to the SEZ for its authorised operations is permissible under claim of rebate in terms of Rule 18 of the Central Excise Rules, 2002.

Customs Circular No. 06/2010 dated 19 March, 2010

Regulatory Developments

Foreign Direct Investment Consolidated Foreign Direct Investment ("FDI") policy

The Government of India, with an objective of having a transparent and a simple policy framework on FDI, has issued a Circular consolidating all prior policies / regulations and clarifications on FDI.

This Circular has been issued to consolidate the FDI Policy at one place and is not intended to make changes in the extant Regulations. However, it includes the following notable points:

- For computing the indirect foreign investment in downstream subsidiaries of Indian companies (having foreign investment), the reference now needs to be made to *capital* instead of *equity interest*.
- Instruments such as warrants, partly paid-up shares are not considered to be capital and hence cannot be issued to non-residents.
- FII investments made under FDI Scheme would need to comply with limits of 10% / 24% applicable under the portfolio investment scheme.
- The pricing of capital instruments (including convertible instruments) should be determined upfront at the time of issuance of the instrument.
- For the purpose of downstream investments, it is clarified that in addition to investing companies, operating-cum-investing companies have also been restricted from domestic leveraging.
- Exhaustive guidelines issued for FDI in wholesale cash and carry.
- FDI in trusts is not permitted, with the exception of venture capital funds registered with SEBI.
- Besides the entry conditions on foreign investments (such as minimum capitalisation, lock-in period etc), it has been specifically provided that the investment / investors may also need to adhere to:
  - all relevant sectoral laws / regulations / rules, etc.
  - national security / internal security related conditions as may be applicable
  - the State Governments / Union Territories regulations where prescribed, such as land use, etc.

PwC has prepared detailed sector-wise analysis of this Circular outlining the key points emerging from the Circular. For access to the analysis, we would urged to visit http://www.pwc.com/in/en/publications/News-Alert/2010/PwC-NewsAlert-2010.jhtml.

Circular No. 1 of 2010 effective from 1 April, 2010

Change in RBI Valuation Norms for Issue of Shares under FDI Route

FEMA currently prescribes the following pricing norms for issue of shares to a non-resident under the FDI route -

- Where the shares are listed, the price as determined in accordance with the applicable SEBI guidelines; and
- In all other cases including unlisted companies, the price as determined by a Chartered Accountant as per the erstwhile CCI Guidelines.

RBI has now amended the pricing norms for issue of shares to a non-resident under the FDI route to the following -

- Where the shares are listed, the price as determined in accordance with the applicable SEBI guidelines;
- Where the shares are unlisted, the fair valuation determined by a SEBI registered Category-I Merchant Banker or a Chartered Accountant as per the Discounted Cashflow ("DCF") Method; and
- Where the issue of shares is on preferential allotment, the price as applicable to transfer of shares from resident to non-resident as per RBI pricing guidelines.

There is a significant change in the valuation methodology for issue of shares by unlisted companies viz. changed from CCI Guidelines to fair valuation as per the DCF method. This is effective from 21 April, 2010.

FEMA notification 205/2010-RB dated 7 April, 2010

FCCBs – Buy-back

The window available to Indian corporates to buy back its FCCBs at a discount, both under the automatic route and the approval route, was closed by the RBI from 1 January, 2010.

The RBI has reopened this window and will now consider FCCB buy-back applications under the approval route until 30 June, 2010. Indian Corporates wishing to buy back their FCCBs need to comply with the prescribed conditions.

A.P. (DIR Circular) Circular no. 44 dated 29 March, 2010

Outbound Investment

Outbound Investment by Telecom companies

The RBI has permitted Indian telecom companies having license from the Department of Telecommunication to establish, install, operate and maintain International Long Distance Services, to participate in a consortium with other international operators to construct and maintain submarine cable systems on co-ownership basis. Such companies would need to comply with prescribed conditions and other reporting requirements.

A.P. (DIR Circular) Circular no. 45 dated 1 April, 2010

Draft RBI Guidelines on Core Investment Companies ("CICs")

As per the Annual Monetary Policy for the year 2010-11 announced by the RBI on 20 April, 2010, companies (not holding or accepting public deposits) having their assets predominantly as investments in shares, not for trading (except for block sale), but for holding stakes in group companies and which do not carry any other financial activity would be regarded as CICs.

The draft guidelines laying down the regulatory framework for CICs has been released by RBI for public comments. Highlights of the proposed guidelines are as follows.

- CICs with asset size of less than INR 1 billion to be exempt from the requirement of RBI registration, provided 90% of their total assets are in investments in shares of investee companies (for the purpose of holding stake in the said investee companies)
- All CICs having an asset size of INR 1 billion or more to be considered as Systemically Important Core Investment Companies ("CICs-ND-SI"). Such CIC-ND-SI required to obtain certificate of registration ("CoR") from the RBI and ensure that 90% of their total assets comprise investments in equity, debt, or loans in group companies (with at least 60% of total assets being investment in equity shares of group companies for the purpose of holding stake in these companies)
- All CICs including CIC-ND-SI will have to comply with following conditions:
  - They should not trade in shares except for block sale to dilute or divest the holding
  - They should not accept or hold public deposits
  - They should not carry on any other financial activities referred to in Section 45I(c) and 45I(f) of the Act except investments in bank deposits, Government securities, loans to and investments in debt issuances of group companies, or guarantees issued on behalf of group companies

CoR required from RBI even if such CICs-ND-SI have been advised in the past that registration was not required by them

- Once registered, all CIC-ND-SI required to comply with following norms at all times –
  - To maintain a minimum Capital Ratio whereby its adjusted Net Worth should not be less than 30% of its aggregate risk weighted assets on balance sheet and risk adjusted value of off balance sheet items as on the date of the last audited balance sheet.
  - To comply with the prescribed leverage ratio i.e. outside liabilities not to exceed 2.5 times of its Adjusted Net Worth calculated as on the date of the last audited balance sheet.
  - To submit an annual certificate

from their statutory auditors regarding compliance with the above guidelines.

- CICs-ND-SI complying with above conditions to be exempt from –
- Maintenance of statutory minimum Net Owned Fund ("NOF") ; and
- Requirements of "Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007" including requirements of capital adequacy and exposure norms.
- All CIC-ND-SI not fulfilling the above conditions are required to approach RBI's regional office, alongwith an action plan for compliance with the conditions, for availing the exemptions. The RBI may examine the action plan of such CICs-ND-SI as have applied for CoR and impose such conditions and restrictions as it deems fit
- Companies whose asset size expected to cross INR 1 billion at a later date required to apply to RBI for CoR within three months of crossing such limit.

Transition mechanism and consequences of non compliance:

- All CICs-ND-SI to compulsorily apply to RBI for CoR within a period of six months from the date of the guidelines becoming effective.
- Companies which apply for CoR within the stipulated time of six months may continue to carry on the existing business till the disposal of their application by RBI.
- Failure to apply within the stipulated time to be regarded as a contravention under RBI Act

These guidelines will be of significance for corporates having or planning or have holding / investing companies in their group structure.

Financial Services

Guidelines on stripping / reconstitution of government securities

Separate Trading of Registered Interest and Principal of Securities ("STRIPS") in Government Securities have now been introduced with effect from 1 April, 2010. This will ensure the availability of sovereign zero coupon bonds (ZCBs) and will provide institutional investors with an additional instrument for their asset-liability management.

- G-Secs with face value of INR 10 million and multiples thereof are allowed to be stripped
- Stripping is permitted for G-Secs (other than floating rate bonds) with coupon dates of 2 January and 2 July irrespective of the year of maturity
- Individual STRIPS (coupon as well as principal) will have a face value of INR 100
- Eligible G-Secs would have to be held in electronic form
- Window for stripping / reconstitution opened between 9:00 am and 2:00 pm (IST) on all business / working days
- STRIPS are tradable over the counter as ZCBs
- Short selling of STRIPS is not permitted
- No fees will be charged by the RBI for stripping / reconstitution of G-Secs. Primary Dealers ("PDs") may however charge a fee
- Detailed guidelines outlining the process of stripping / reconstitution and other organisational procedures regarding transactions in STRIPS have been provided, which include aspects such as eligibility, timing, eligible securities, etc.

RBI/2009-10/360IDMD.DOD.07/11.01.09/2009-10 dated 25 March, 2010

Guidelines for accounting of repo / reverse repo transactions

With effect from 1 April, 2010, RBI has revised the guidelines on the accounting of market repo transactions in government securities and corporate debt securities. The market participants may undertake repos from either held for trading, available for sale or held to maturity investments. The detailed accounting principles, recommended accounting methodology along with examples are illustrated in Annexure I and II of the circular. However, outstanding repo / reverse repo transactions would continue to be accounted until maturity.

RBI/2009-2010/356/ IDMD/4135/11.08.43/2009-10 dated 23 March, 2010

Maintenance of collateral by foreign institutional investors

The extant Securities and Exchange Board of India ("SEBI") norms require Foreign institutional investors ("FIIs") to post collaterals for their transactions in the cash segment of the market. In this regard, for their transactions in the cash segment of the market, FIIs are now permitted to offer domestic government securities (subject to the overall limit of USD 5 billion) and foreign sovereign securities (with AAA rating) as collateral to the recognised stock exchanges in India, in addition to cash, subject to prescribed conditions

and operational guidelines to be issued separately by SEBI. However, cross-margining of government securities placed as margins for transactions in cash segment shall not be allowed between the cash and the derivative segments of the market.

RBI/2009-10/393 - A.P. (DIR Circular) Circular no. 47 dated 12 April, 2010

Circular for regulating mutual funds

The following amendments have been provided for:

- The formats for disclosure of brokerage and commission paid to associates / related parties / group companies of sponsor / asset management company in the unaudited half-yearly financial results, etc. have now been prescribed
- SEBI has now extended the applications supported by blocked amount ("ASBA") facility to eligible investors subscribing to new fund offers ("NFO") of mutual fund schemes
- It has been decided to reduce the NFO period to 15 days except in the case of ELSS schemes, which shall continue to be governed by Government of India guidelines
- AMCs have been barred from entering into any revenue sharing arrangement with the underlying Funds

SEBI/IMD/CIR No.18/198647/2010 dated 15 March, 2010

Controlled fund – life insurance companies

In respect of financial year 2009-10 and onwards, all life insurers are directed to furnish the details of their Controlled Fund as per the format specified in the circular as a part of their annual financial statements. The definition of the term *Controlled Fund* as given in the Insurance Act, 1938 has been replicated in the circular.

Cir No: IRDA/F&I/CIR/F&A/045/03/2010 dated 17 March, 2010 and corresponding IRDA clarification dated 18 March, 2010

Mergers & Acquisitions

Amendment to Listing Agreement

The SEBI has issued circular no. CIR/CFD/DIL/1/2010 dated 5 April, 2010 amending the listing agreement by providing that while submitting a scheme of amalgamation / merger / reconstruction under clause 24(f) of the listing agreement, listed entities shall also submit an auditor's certificate to the effect that the accounting treatment contained in the scheme is in compliance with all the applicable accounting standards ("AS") specified by the Central Government in section 211(3C) of the Companies Act, 1956. Furthermore, an explanation has also been inserted, stating that mere disclosure of deviations in accounting treatments as provided in para 42 of AS-14 (Accounting for Amalgamations) shall not be deemed as compliance with the above.

Other notable amendments made to the listing agreement are:

- Insertion of sub-clause (ea) in clause 41 which requires the company to submit, by way of a note, a statement of assets and liabilities as at the end of half year, in addition to existing quarterly filing of the financial results.
- Listed companies are required to file quarterly financial results (audited or unaudited with limited review, consolidated or stand-alone) within 45 days of the end of the quarter, instead of one month (audited) and two months (limited review report) time period prevailing earlier. The company however, has the discretion to file audited annual results (stand-alone and consolidated) within 60 days from the end of the financial year, instead of three months period prevalent earlier.

Circular CIR/CFD/DIL/1/2010 dated 5 April, 2010

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