

Highlights

- Government approves amendments in FDI Policy on 'Construction Development Sector'
- MCA extends Company Law Settlement Scheme and clarifies on immunity from disqualification to Directors under section 164(2)
- MCA clarifies on matters related to Consolidated Financial Statement
- RBI delegates power to compounding of contraventions to Regional Offices.
- MCA amends Companies (Audit and Auditors) Rules, 2014
- DIPP streamlines the procedure for grant of Industrial Licenses.
- MCA clarifies with regard to Trusts/Trustees as a partner in LLPs
- MCA amends Schedule VII of Companies Act, 2013
- Ministry of Health and Family Welfare amends the Drugs and Cosmetics Rules, 1945
- SEBI order bars DLF & its certain Officials from securities trading
- Marketing of tobacco In question, yet again
- Issue of shares at a premium, by an Indian subsidiary to its foreign holding company, is not taxable in India.

Corporate Brief

➤ Government approves amendments in FDI Policy on 'Construction Development Sector'

The Union Cabinet has approved amendments in the extant Foreign Direct Investment Policy on 'Construction Development Sector'. Highlights of the amendment are: (a) In case of development of serviced plots, the condition of minimum land requirement has been removed; (b) Minimum floor area requirement in case of construction-development projects is reduced from 50,000 sq mt to 20,000 sq. mt; (c) Minimum capital requirement is USD 5 million, irrespective of whether for wholly owned subsidiary or for joint ventures; (d) Investor is permitted to exit on completion of the project or after three years from the date of final investment, subject to development of trunk infrastructure; (e) Repatriation of funds or transfer of stake by one non-resident investor to another non-resident investor before the completion of the project is subject to the FIPB approval; (f) Indian investee company is permitted to sell only developed plots; (g) 100 percent FDI under the automatic route is also permitted in completed projects for operation and management of townships, malls/shopping complexes and business centres. Press Notes to be issued by DIPP is expected to clear the ambiguities. [Press Information Bureau, Government of India, Cabinet Print release, dated October 29th, 2014]

➤ MCA extends Company Law Settlement Scheme and clarifies on immunity from disqualification to Directors under section 164(2)

MCA has extended the Company Law Settlement Scheme (CLSS) up to November 15th, 2014. CLSS was introduced by MCA to grant immunity for prosecution and to charge reduced additional fee for filing of belated documents

(financial statements and annual return) under the Companies Act 2013 (The Act). Earlier the scheme was offered for a period of 2 months from 15th August 2014 to 15th October 2014. [See MCA General Circular No. 40/2014 dated October 15, 2014]

MCA has clarified that immunity from disqualification to Directors under Section 164(2) of the Act will also be applicable in case the company has filed its financial statements and annual returns on or after April 01, 2014 but prior to the launch of CLSS. [See MCA General Circular No. 41/2014 dated October 15, 2014]

➤ MCA clarifies on matters related to Consolidated Financial Statement

MCA clarifies on the manner of presentation of notes in Consolidated Financial Statement (CFS) to be prepared under Schedule III to the Companies Act, 2013 and provides that the Schedule read with Accounting Standards does not envisage that a company while preparing its CFS merely repeats the disclosures made by it under stand-alone accounts being consolidated. In the CFS, companies would need to give all disclosures relevant for CFS only. [MCA General Circular No. 39/2014 dated October 14th, 2011]

➤ RBI delegates power to compound contraventions to Regional Offices

RBI has delegated the power to compound the following contraventions under Foreign Exchange Management Act, 1999 and Foreign Exchange (Compounding Proceedings) Rules, 2000 to Regional Offices: (a) Delay in submission of Form FC-TRS on transfer of shares from Resident to Non-Resident and Non-Resident to Resident and (b) Taking on record transfer of shares by Investee Company in the absence of certified form FC-TRS.

Further, Foreign Exchange Department (FED) CO Cell, New Delhi office are now authorized to compound the following contraventions: (a) Contraventions relating to acquisition and transfer of immovable property in India or outside India; (b) Contraventions relating to establishment of Branch Office, Liaison Office or Project Office in India; and (c) Contraventions falling under Foreign Exchange (Deposits) Regulations, 2000. The powers to compound the contravention as aforesaid have been delegated to all Regional Offices (except Kochi and Panaji), without any limit on amount of contravention, and to Kochi and Panaji Regional Offices for amount of contravention below Rs. 100,00,000/- (One Hundred Lakh) (See RBI A.P. DIR Series Circular No. 36 dated October 16, 2014)

➤ MCA amends Companies (Audit and Auditors) Rules, 2014

MCA has inserted Rule 10A in the Companies (Audit and Auditors) Rules, 2014 to provide that Auditor's Report, to be prepared under Section 143(3) of the Companies Act, 2013, for the financial year commencing on or after 1st April, 2015

are required to make a statement on the existence of adequate internal financial controls system and its operating effectiveness. Further auditor of a company may voluntarily include the statement for the financial year commencing on or after April 01, 2014 and ending on or before March 31st, 2015. (See MCA Notification No. F. No. 1/33/2013- CL-V-Part dated October 14, 2014)

➤ *DIPP streamlines the procedure for grant of Industrial Licenses*

DIPP has increased the validity period of Industrial License from 3 years to 7 years as a measure for ease of doing business. Further, DIPP has decided to deregulate the annual capacity stipulation for defence items for Industrial License. However, the licensee shall be required to submit half yearly production return to DIPP and Department of Defence Production (DoDP), Ministry of Defence. Also licensee are now allowed to sell defence items to governments entities under the control of Ministry of Home Affairs, State Governments, Public Sector Undertakings and other valid defence licensed companies, without obtaining prior approval of DoDP. However, for sale of the items to any other entity, licensee shall be required to obtain prior approval of DoDP. [DIPP File No. 9(8)/2014-IL(IP), Press Note No. 9(2014 Series) dated October 20th, 2014]

➤ *MCA clarifies with regard to Trust/Trustees as a partner in LLPs*

MCA has made clarification that a trustee, being a body corporate, representing a trust set up as 'Real Estate Investment trust' (REIT) or 'Infrastructure Investment Trust' (InvITs) or such other trusts set up under the regulations prescribed under Securities & Exchange Board of India Act, 1992 is permitted to hold partnership in a Limited Liability Partnerships in its name without the addition of the statement that it is a trustee. [See MCA General Circular No. 37/2014, dated October 14, 2014]

➤ *MCA amends Schedule VII of Companies Act 2013*

MCA has made amendments to Schedule VII of Companies Act, 2013 to provide that the following contributions shall be included in the Corporate Social Responsibility activities, (a) Contribution to the 'Swatch Bharat Kosh' set up by the Central Government for the promotion of sanitation and (b) Contribution to 'Clean Ganga Fund' set up by the Central Government for rejuvenation of river Ganga [See MCA Notification F.No. 1/18/2013-CL-V dated October 24, 2014]

➤ *Ministry of Health and Family Welfare amends the Drugs and Cosmetic Rules, 1945*

Ministry of Health and Family Welfare has made amendments in Drugs & Cosmetics Rules, 1945. Highlights of the amendment are: (a) Minimum experience requirement has been introduced for manufacturing supervisors of medical devices listed in Schedule C and C1 of the Act. Earlier there was no such requirement; (b) An exhaustive list of

labeling particulars for medical devices has been prescribed. Earlier manufacturers of medical devices were required to comply with the requirements of Bureau of Indian Standards only; (c) The labels on packages or container of devices for export are required to meet specific requirements of the law of the country; (d) Shelf life of the medical devices not to exceed 60 months from the date of manufacture. Earlier there was no such restriction. [See Ministry of Health and Family Welfare Notification F.No. X/11014/3/2013-DFQC dated September 25, 2014]

Litigation Brief

➤ *SEBI order bars DLF & its certain Officials from securities trading*

Recently, in a clear demonstration of the rule of law the Securities Exchange Board of India ("SEBI") in the matter of DLF Limited by way of its order dated October 10, 2014, restrained/banned DLF Limited, a blue-chip firm and seven of its members/ key officials from trading in securities directly or indirectly including fund raising for a period of three years. The Order has been passed on the grounds of suppression of material information by DLF Limited with the intention of misleading and defrauding its investors with respect to the issue of shares of DLF in its IPO in 2007. The Order finds its genesis in the Writ Petition filed before the Hon'ble Delhi High Court which directed SEBI to conduct the investigation in this case. On detailed investigation it was found that DLF Limited was in violation of the following protocols:

- ❖ Conducting sham transactions violating the Substantial Acquisition of Shares and Transfer ("SAST") Regulations and provisions of the Companies Act;
- ❖ Concealment of material information by way of Non-disclosure of related party transactions, Non-disclosure of financial details relating to subsidiaries and Non-disclosure of outstanding litigation against subsidiaries violating the Disclosure and Investor Protection ("DIP") Guidelines; and
- ❖ Misleading and defrauding the investors in securities market in connection with the issue of shares of DLF being in violation of various provisions of the SEBI Act and Prohibition of Fraudulent and Unfair Trade Practices ("PFUTP") Regulations amongst many other factual errs made by DLF.

The SEBI Order has far reaching consequences on DLF Limited. In particular, this ban hinders DLF from lowering their debt of Rs. 19,000 Crore which DLF Limited has been working towards. An Appeal has been preferred against the said Order in the SAT. While DLF and its investors have already suffered an immediate setback on stock exchanges, such an order holds a potential to become a landmark precedent for Corporates, planning to raise money with the

help of an IPO with respect to the threshold limits of disclosures.

➤ *Marketing of tobacco In question, yet again*

The Division Bench of the Allahabad High Court has, in the case of Love Care Foundation v. Union of India, while allowing the writ has interestingly opined on the much controversial issue prevailing in India on the trade and consumption of tobacco. The said order dated July 21, 2014 finds its genesis in the Writ Petition filed by one, Love Care Foundation before the Allahabad High Court on a limited prayer to implement plain packaging rule in cigarettes and other tobacco products by prohibiting use of logos, colors, brand names or prominent information on packaging with the objective of reducing the growing tendency of smoking among the Indian youths and thereby creating a healthy society free from several diseases.

The petitioner in their submissions apprised the court on how branding and packaging is a marketing tool for advertising and promoting the brand image of smoking as a status symbol. Thus, targeting and exploiting the youth of the country, who at a tender age can easily be influenced. Keeping in mind the addictive nature of such tobacco products and the challenge of giving up cigarettes later in life, it serves as an opportunity to the Tobacco industry to ensure a customer base for many years to come. The argument was supported by various international precedents, surveys and researches conducted by World Health Organization and the mandate of Cigarettes and other Tobacco Products Act, 2003.

The Hon'ble High Court on hearing extensive arguments observed that, at present, the cigarette packaging is very attractive and colorful and being displayed in open shops thus attracting unreasonable attention of the youths. They further held that a standard plain packaging across all brands will reduce the attractiveness of the tobacco products and will draw less attention amongst the youth and looked at the plain packaging measure as a long term investment to safeguard the health of the Indian youth. The Hon'ble High Court observing its duty towards under Constitution allowed the writ petition on plain packaging and recommended the Government of India to consider implementing the said scheme at the earliest.

➤ *Issue of shares at a premium, by an Indian subsidiary to its foreign holding company, is not taxable in India*

The Division Bench of Bombay High Court in a recent landmark pronouncement in Vodafone India Services Pvt. Ltd. v. Union of India and others (Judgment, dated 10.10.2014), has rejected imposition of tax on the issuance of shares at premium, by the Indian wholly-owned subsidiary to its foreign Holding Company.

In the financial year 2008-09, the Petitioner had issued equity shares at a certain premium, to its non-resident parent Company, in order to raise capital for its telecom business in

India. The Transfer Pricing Officer, had determined that the issue of shares by the Petitioner was not undertaken at arm's length price, which caused capital gains to the Petitioner. Based on said determination, the Income Tax Department had raised demand upon the Petitioner alleging that by issuing shares at a price lesser than the Arms length price, the Petitioner had foregone substantial income which it could have invested or earned interest thereon, inviting income tax liability. Alternatively, it was also contended that by issuing such shares, the Petitioner caused huge profits to its Holding Company, which ought to be taxable.

The Hon'ble Court categorically rejected the aforesaid contentions and observed that the transaction was a capital account transaction, not covered under the definition of "Income" under the Act, and therefore, the question of imposing tax thereon did not arise. The court clarified that there is no charging Section to tax issue of shares by the Indian subsidiary to its foreign Holding Company. It also expected to act as a guiding factor for the revenue authorities to establish the taxable event first, before commencing computation of income tax, over associated trans-national transactions.



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