

Highlights

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- Joshi Technologies International Inc. Vs. UOI

Corporate Brief

➤ *MCA amends the Companies (Acceptance of Deposits) Rules, 2015*

MCA has amended the Companies (Acceptance of Deposits) Rules, 2015. The amendment has revised the definition of 'deposit'. Any amount received from a relative of director of a private company will now not be treated as 'deposits' of such company, if such person furnishes a declaration to the company to the effect that such amount is not given out of funds acquired by him/her by borrowing or accepting loans or deposits from others. [See MCA Notification F.No. 1/8/2013-CL-V dated September 15, 2015]

➤ *Report on Corporate Social Responsibility Policies*

High Level Committee constituted by MCA has submitted its report on suggested measures for improved monitoring of the implementation of Corporate Social Responsibility (CSR) Policies. Highlights of the suggestion are: (a) Main thrust and spirit of the law is not to monitor but to generate conducive environment for enabling the corporates to conduct themselves in a socially responsible manner, while contributing towards human development goals of the company. (b) CSR should not be interpreted as a source of financing the gaps in inclusive growth. Use of corporate innovations and management skills in the delivery of 'public goods' is at the core of CSR implementation objectives of the companies. (c) There should be ring-fence of CSR resources. Adoption of project/programmes and change in project/programmes should be approved by the CSR committee/ board of the companies and board rules to be strengthened. (d) Leniency may be shown against the companies for non-compliances of CSR provisions in initial 2-3years to enable them to graduate to a culture of compliance. (e) Uniformity of tax-treatment for expenditure across all eligible activities. (f) Adoption of 2-models of implementation strategies: (i) Companies having CSR expenditure more than Rs. 5 crores are required to undertake programme based sustainable CSR activities with

some measurable outcome; and (ii) Companies having CSR expenditure less than Rs. 5 crores, could take up project based activities. (g) Unspent fund should be allowed to carry forward for private companies, to the extent of 5years. After that it should be transferred to funds listed in schedule-vii. (h) The committee encourages companies to involve their employees in CSR activities, as contribution and involvement of such employees in CSR activities will generate interest/pride in CSR work and promote transformation from CSR as an obligation to Socially Responsible Corporate (SRC) in all aspects of their functioning. (i) Information on CSR should be compiled by MCA and to be placed on public domain. (j) To incentivize the corporate to undertake their CSR policies. Annual awards one each for small and big companies should be introduced.

➤ *DIPP recognizes partly paid shares and warrants as eligible instruments*

DIPP has reviewed the FDI Policy and decided to allow partly paid shares and warrants as eligible capital instruments for the purposes of FDI Policy. Therefore Indian companies will be allowed issue warrants and partly paid shares to a person resident outside India subject to terms and conditions as stipulated by RBI. Earlier warrants and partly paid shares were allowed to be issued to person resident outside India only after obtaining approval through the government route. [DIPP Press Note No. 9 (2015 Series) dated September 15, 2015]

➤ *DIPP streamlines the procedure for grant of industrial licenses*

DIPP has revised initial validity of Industrial License for Defence Sector from 7 years to 15 years, further extendable up to 18 years for existing as well as future licenses. [DIPP Press Note No. 10 (2015 Series) dated September 22, 2015]

➤ *DIPP clarifies on the FDI Policy on Facility Sharing Arrangements between group companies*

DIPP has clarified that the 'Facility Sharing Agreements' between group companies through leasing / sub-leasing arrangements for the larger interest of business will not be treated as 'real estate' within the provisions of the FDI Policy, provided such arrangements are at arm's length price and annual lease rent earned by the lessor company does not exceed 5% of its total revenue.

➤ *DIPP permits foreign investment in White Label ATM*

DIPP has reviewed the FDI Policy and decided to allow foreign investment up to 100% in White Label ATM operations, under the automatic route, subject to

conditions including *inter alia* the following: (a) Any non-bank entity intending to set up White Label ATMs should have a minimum net worth of Rs. 100 crore as per the latest financial year's audited balance sheet, which is to be maintained at all times; and (b) In case the entity is also engaged in any other 18 NBFC activities, then the foreign investment in the company setting up White Label ATMs, shall also have to comply with the minimum capitalization norms for foreign investments in NBFC activities.

➤ **SEBI notifies revised Listing Regulations**

SEBI has notified SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 (The Listing Regulations), replacing the Listing Agreement, which will be effective from December 01, 2015. Highlights of the Listing Regulations are: (a) The Listing Regulations shall be applicable to listed entities who have listed designated securities in the recognized stock exchange. The Listing Regulations provide principles governing disclosures and obligations of listed entities. (b) The Listing Regulations provide broad principles (in line with IOSCO Principles) for periodic disclosures by listed entities and also have incorporated the principles for corporate governance (in line with OECD principles). (c) To bring in line with the Companies Act, 2013, all material related party transactions will now require ordinary resolution, instead of special resolution. [See *SEBI Notification No. SEBI/LAD-NRO/GN/2015-16/013 dated September 02, 2015*]

➤ **RBI permits resident importers to raise Trade Credits**

RBI has, with a view to provide greater flexibility for structuring of trade credit arrangements, decided to permit resident importers to raise trade credit in Rupees (INR) from overseas supplier, bank and financial institution for import of capital and non-capital goods in India. Trade credit can be raised after entering into a loan agreement with overseas lender subject to the conditions specified by RBI *inter alia* including the following: (a) Trade credit can be raised for import of all items, except gold, permissible under the extant Foreign Trade Policy; (b) Trade credit period for import of non-capital goods can be raised for upto one year from the date of shipment or upto the operating cycle whichever is lower; (c) Trade credit period for import of capital goods can be raised for upto five years from the date of shipment; (d) No roll over / extension shall be permitted; (e) AD Category Bank can permit trade credit upto USD 20 mn; (e) The all-in-cost of such Rupee (INR) denominated trade credit should be commensurate with prevailing market conditions. [See *A.P. (DIR Series) Circular No. 13 dated September 10, 2015*]

➤ **RBI permits online payment facility for import transactions**

RBI has decided to permit AD Banks to offer facility of payment of imports by entering into standing arrangements with Online Payment Gateway Service Providers (OPGSP) to facilitate e-commerce. The conditions under which AD Banks may permit the facility *inter alia* includes the following: (a) The facility shall only be available for import of goods and software of value not exceeding USD 2,000; (b) Separate Import Collection Account shall be opened with AD Bank; (c) AD Bank shall obtain a copy of invoice and airway bill from the OPGSP containing the name and address of the beneficiary as evidence of import. Further foreign entities desirous of operating as OPGSP shall be required to open liaison office in India with the approval of RBI before operationalising the arrangement with AD Bank. The domestic entities functioning as intermediaries for electronic payment transactions shall be required to maintain separate accounts for domestic and cross border transactions. [See *A.P. (DIR Series) Circular No. 16 dated September 24, 2015*]

➤ **RBI permits body corporate to issue rupee denominated bonds overseas**

RBI permits body corporate, including Real Estate Investment Trusts and Infrastructure Investment Trusts, to raise funds from overseas market by issuing rupee denominated bonds, subject to the following conditions: (a) Recognized investors for this purpose shall be investor from a Financial Action Task Force compliant jurisdiction; (b) Minimum maturity period shall be 5 years and call and put option, if any, shall not be exercisable prior to completion of minimum maturity; (c) The all-in cost of such borrowings should be commensurate with prevailing market conditions; (d) Funds equivalent to an amount of USD 750 million per annum shall come under automatic route and the funds beyond that limit shall require prior approval of RBI. [See *A.P. (DIR Series) Circular No. 17 dated September 29, 2015*]

➤ **RBI notifies FEM (Regularization of assets held by abroad by a person resident in India), 2015**

RBI has notified the Foreign Exchange Management (Regularization of assets held abroad by a person resident in India) Regulations, 2015 (The Regulations) to effectively deal with assets held abroad by persons resident in India in violation of FEMA, for which declarations have been made and taxes and penalties have been paid under the provisions of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (The Black Money Act). As per the Regulations, no action under FEMA shall be taken against a person resident in India who has made a declaration under section 59 of the Black Money

Act, in respect of any undisclosed asset located outside India, and has paid the tax and penalty in accordance with the provisions of Chapter VI of the Black Money Act. Where the declarant intends to continue to hold asset so declared, he shall seek permission from RBI within 180 days from the date of declaration. If the declarant does not intend to hold the asset so declared or the permission to hold such asset is refused by RBI, the declarant shall dispose of the said asset within 180 days from the date of making such declaration or the date of receipt of communication from RBI conveying refusal of permission and bring back the proceeds to India immediately. [See RBI Notification No. FEMA. 348 / 2015-RB dated September 25, 2015]

Litigation Brief

Joshi Technologies International Inc. Vs. UOI

The Supreme Court in a recent judgment held that a Writ may not lie in case of a private contract where one of the contracting parties is the Government or a state instrumentality. The facts are as follows:-

The Ministry of Petroleum and Natural Gas (MoPNG) issued notice inviting tenders along with Model Production Sharing Contract (MPSC) for 'development of Oil and Gas Fields'. Joshi Technologies, a Foreign Company (Appellant) after due selection entered into two Production Sharing Contract (PSC's) with MoPNG in respect of two oil fields. Article 16 of the MPSC provided for special deductions under Section 42 of Income Tax Act, 1961 which was somehow not included in PSC's later. The Ministry of Law opined that benefit of Section 42 should be extended to Foreign Companies in order to make their participation in these oil fields viable. No amendments to Article 16 of PSC were contemplated, as Joshi Technologies (Appellants) and MoPNG believed that all the benefits offered in MPSC were impliedly included in PSC's. The Revenue Department allowed the special deductions for the first three production years. However it proceeded to decline the deduction for fourth year and thereafter reopened assessment for all years. Aggrieved, Joshi technologies approached the High Court by the way of Writ Petition under Article 226 of Constitution of India. The High Court held that Joshi Technologies is not entitled to any deductions under Section 42 in absence of stipulations to this effect in the contracts, being a statutory requirement under Section 42.

The matter was taken to the Apex Court where the following issues were decided:-

Whether in terms of Provisions contained in the two PSC's, the appellant is entitled to special allowance stipulated under Section 42?

Whether a Writ in nature of Mandamus is maintainable?

It was held, Section 42 is special provision for deductions in the case of business for prospecting, etc. of mineral oil. However, such allowances are to be specifically mentioned in the agreement and the agreement must be laid on the table of each House of Parliament. If PSC's do not contain any stipulation providing for the Section 42 allowances, then deductions will not be available. The Contents of the MPSC were not relevant for granting deductions.

With respect to the second issue, it was held, mere legitimate expectation of the party without any element of public law is not a ground for invocation of extraordinary jurisdiction under Article 226 of Constitution even if one of the contracting parties is the Government or State instrumentality.



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