

# THE NEWSLETTER

## CLARIFICATION ON PROCESSING OF DEPOSIT RELATED COMPLAINTS UNDER COMPANIES ACT, 2013

Ministry of Corporate Affairs has *vide* General Circular No. 09/2015 dated 18<sup>th</sup> June, 2015 (“**Circular**”) has issued a clarification pertaining to processing of deposit related complaints received from investors under Section 74 of the Companies Act, 2013 (“**Act**”) in respect of the defaults made by companies in repayment of deposits accepted by them before the commencement of the Act, i.e. before 1<sup>st</sup> April, 2014. The MCA has clarified that till the National Law Company Law Tribunal (“**NCLT**”) is constituted, the Company Law Board (“**CLB**”) has been empowered to exercise the powers of NCLT, pursuant to which the depositor is free to file an application under the Act with the CLB. The Circular has also clarified that a company can also file an application under the Act with the CLB for extension of time of making the repayment of deposits accepted by it. Further, it has also been clarified that the Registrar of Companies can also file a complaint with the CLB against a company if such company fails to repay the deposits accepted by it.

### INCOME TAX EASY RETURN

The Press release dated 01.07.2015 of Govt. of India, Ministry of Finance, Department of Revenue and CBDT provides for commencement of e-filing of Income Tax Returns for the AY 15-16 and can be done through e-filing website <https://incometaxindiaefiling.gov.in>. The use of Departmental software will ensure preparation of error-free returns thereby avoiding any need for future rectification due to data validation mistakes. In case of individual or HUF, Income Tax>Returns form 1-SAHAJ, 2 and 2A can be used for the incomes which do not include income from business whereas ITR 4S-SUGAM can be used where income includes business income assessable on presumptive basis. Pre-filing of information of software is available for preparing of the return forms. In exercising pre-filing, by filling PAN, personal information, other tax information and TDS information will be auto filled in the form.

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## GOVERNMENT ENACTS BLACK MONEY ACT

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (“**Act**”) was enacted on 26.05.2015 and has been made effective from 1.07.2015. Under this Act, provisions for separate taxation of any undisclosed income in relation to foreign income and assets have been framed. Therefore, such income will not be taxed under the Income Tax Act, 1961 but under the stringent provisions of the Act.

As per the provisions of this Act, undisclosed foreign income or assets shall be taxed at the flat rate of 30% in the year in which such income is detected. Any exemption or deduction or set off of any carried forward losses which may be admissible under the Income Tax Act, 1961 shall not be allowed under this Act.

The major highlight of the Act is the One-time Compliance opportunity scheme to those who have undisclosed assets situated overseas which is open for a limited time period i.e., 1-7-2015 to 30-09-2015. Such persons now can declare their undisclosed assets in the prescribed form with the prescribed authorities and come clean by payment of tax at the rate of 30% and an equal amount by way of penalty. Prosecution provisions will not be launched against them under the Act.

***“The Delhi High Court has applauded Zaheer for his kind gesture.”***

## MUSLIM COUPLE ADOPT DECEASED HINDU FRIEND’S CHILDREN, HC CALLS IT A NOBLE EFFORT

Ayush and Prarthana Dayal were the twin children of Praveen and Kavita Dayal, a pilot and an air hostess by profession. In less than 12 months, the twins lost both their parents during the year of 2012. In a bad turn of events, the twin’s relatives and cousins allegedly started claiming bank accounts and family property of their parents. Meanwhile, the twins had no one to take care of them except their driver who could only meet their basic needs. However, the kids soon called Zaheer explaining how they were being mistreated. Zaheer immediately filed a suit in court, under the Hindu Minority & Guardianship Act, 1956 and pleaded the court to give him the kids’ guardianship. The Delhi High Court has applauded Zaheer for his kind gesture while deciding *Shahnawaz Zaheer v. Government of NCT of Delhi*<sup>1</sup>. Along with making Zaheer the guardian of these Hindu orphans and the Court also approved Zaheer’s request to set up a Trust in the name of the twins so that the remaining wealth of the twin’s dead parents and their entire estate will go to the Trust and not to the guardians. The Indian Commercial Pilots Association and other well-wishers have already contributed more than Rs. 1 crore to the Ayush-Prarthana Benevolent Trust. The twins will be able to attain the money collected in the trust at the age of 25.

1. (MANU/DE/1457/2015).

## INVESTMENT IN COMPANIES ENGAGED IN TOBACCO RELATED ACTIVITIES

In terms of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (“**Regulations**”), foreign direct investment is prohibited in manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes. The Reserve Bank of India *vide* A.P. (DIR Series) Circular No.2 dated 3.07.2015 has clarified that the prohibition applies only to manufacturing of the products mentioned hereinabove and foreign direct investment in other activities relating to these products including wholesale cash and carry, retail trading, etc., shall be governed by the sectoral restrictions laid down in the FDI policy framed by the Department Of Industrial Policy & Promotion, Ministry of Commerce and Industry, Government of India and in the Schedule 1 of Regulations, as amended from time to time.



### ADOPTION OF E-ROUTE FOR SERVICE OF NOTICE BY SEBI

The Securities & Exchange Board of India has introduced an e-route for the purposes of serving of notice which allows the Adjudicating Officer to serve notice via email and fax. An amendment has been made in Rule 7 of the SEBI( Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 1995 *vide* notification number GSR 430(E) [F.NO.5/11/cm/2006] dated 28.5.2015. The following shall come into force upon the date of its publication in the Official Gazette. Rule 7 deals with service of notices and orders. Changes have been made in Rule 7(b), after the words “by sending it to the person by”, the words “fax or electronic mail or courier or speed post with acknowledgment due or” shall be inserted.

Moreover the following provisos are to be inserted are as follows:

**“Provided** that a notice sent by Fax shall bear a note that the same is being sent by fax and in case the document contains annexure, the number of pages being sent shall also be mentioned:

**Provided** further that a notice sent through electronic mail shall be digitally signed by the competent authority and bouncing of the electronic mail shall not constitute valid service”

Furthermore after clause (c), the following clause shall be inserted, namely, -

“(d) if it cannot be affixed on the outer door a per clause (c), by publishing the notice in at least two newspapers, one in an English daily newspaper having nationwide circulation, and another in a newspaper having wide circulation published in the language of the region where that person was last known to have resided or carried on business or professionally

## **BANK SELLING MORTGAGE PROPERTY, CONSENT OF MORTGAGOR REQUIRED**

A mortgagee, is empowered to sell the mortgaged property on default of payment of the mortgage money without any intervention whatsoever by the court under Section 69 of the Transfer of Property Act, 1882. Moreover, under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI Act, 2002**”) read along with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (“**Rules**”) sets out the procedure regarding the enforcement of the security interest on a rather similar premise, i.e. without any Judicial interference.

In the case of *Nupur Enterprises v Punjab National Bank* [(2015)58 Taxmann.com 251(Delhi)], the respondent bank extended a loan amounting to Rs. 25 Lakhs to the petitioner. The subject property was offered by the petitioner which was duly accepted by the respondent bank. On a default made by the petitioner in with respect to discharging its financial obligations towards the respondent, it issued a demand notice under Section 13(2) of the SARFAESI Act, 2002 calling for payments within the prescribed time period. On the failure of the petitioner to comply with the demand notice, the Bank moved to the Debt Recovery Tribunal under the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 (“**RDDBI Act, 1993**”) claiming the sum along with the interest. The respondent bank obtained a recovery certificate from the DRT, which was conveyed to the petitioner along with the notice under Section 13(2), but still no payment was made by the petitioner. The inability of the petitioner to pay, compelled the respondent bank to issue a possession notice and subsequently holding an Auction. Since the subject property could not be sold by an auction, the Bank informed the petitioner that it intended to sell the same through a private treaty. The Court based its decision taking into account Rule 8 and held that sale of the subject property by any method other than a public auction or a tender, i.e. by obtaining a private treaty must necessarily be on such terms as may be settled between the parties in writing. This implies a valid consent of both the parties. Moreover, as per Rule 9(2), the sale cannot be effected for a price less than the reserve price, except with the consent of both the parties. The nexus behind these provisions is to keeping the mortgagor duly informed. Since the respondent bank could not sell the subject property through an auction, it moved towards selling the property unilaterally through a private treaty, which could not be held valid without the consent of the mortgagor. Since in the instant case there was no consent, the sale would not be held valid and the Court dismissed the petition being devoid of



**EDITORIAL****RENTING OF CARS IN THE TOURISM INDUSTRY****Mr. Rahul Lakhwani, Senior Associate & Ms. Aditi Tank, Associate**

In the tourism industry, there is a general practice that a part of the tour such as transport or accommodation is outsourced to another service provider. Another prevalent practice is regarding supply of cars by a small market player to bigger market players for providing services in relation to transport or renting of vehicles. In this article we have endeavoured to discuss the applicability of reverse charge mechanism (RCM) on this service of provision of car to a tour operator and availability of CENVAT Credit under the provisions of CENVAT Credit Rules, 2004. Before analyzing the interplay between the RCM and abetments, it is imperative to first discuss the applicable legal provisions in this regard.

**Category of Service**

The service of providing vehicle can be covered under various categories of services such as renting/hiring, transportation and tour operator. In the current scenario, in absence of clear definitions demarcating the scope of the said services, there is an overlap in the scope of the said services. It is a settled position of law, that mere nomenclature used in the books of accounts, invoices, etc of the service provider cannot determine the category of service and that the nature of the transaction has to be understood in order to determine the correct classification of a particular service.

The terms 'transportation' and 'hiring' are not defined under the Finance Act, 1994 ("**Act**") or the rules made thereunder. The term 'renting' has been defined under the Act as "*allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property*". However, the said definition has been used in the context of immovable property and thus meaning used in common/trade parlance of the word 'renting' in context of motor vehicle shall have to be referred.

On an analysis of the meaning of the terms used in common/trade parlance, a major difference between renting and hiring is that in case of renting the owner supplies tangible goods and has to part with effective control and possession of such goods. The former transaction is covered under the ambit of sale of goods and is leviable to sales tax/VAT. Hence, in the context of service tax, the meaning to the term renting has to be understood as that of hiring of a vehicle. Moreover, the term 'transportation' in common/trade parlance means a transaction where one has a contract or ticket for travel and not for the vehicle.

The term 'tour operator' has not been defined on the Act. However, the **Abetment Notification**<sup>1</sup> defines the said term as any person engaged in the business of planning, scheduling, organising, arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours. Renting of cars/providing transportation by cars should be as per the plan or schedule of the tours made by the tour operator or in organising the said tours is also covered under the said category. Earlier, only the vehicle having tourist permit were covered under this category.

However, currently there is no such requirement under law. Currently abetment is available in relation to the three categories of services mentioned above subject to the fulfilment of the conditions mentioned in the Abetment Notification.

On a perusal of the conditions mentioned in the Abetment Notification it is clear that a tour operator claiming abetment can avail CENVAT credit of the service tax paid on services availed from another tour operator. Similarly, a rent-a-cab operator claiming abetment can claim CENVAT credit of the service tax paid on the input service of renting of motorcab.

As discussed above, transportation service is generally the one where there is a contract to travel to a point with a ticket/ contract for transportation and not for the vehicle. However, in the context of abetment notification, it is the general industry practice that entry 9A of the abetment notification regarding transport covers within its ambit the transaction of renting/hiring. Hence, abetment for renting of all kinds of contract carriage is available under the abetment notification.

#### **Reverse Charge Mechanism ("RCM"):**<sup>2</sup>

In case of services provided or agreed to be provided by way of renting of motor vehicle designed to carry passengers to any person who is not in similar line of business, by any individual, HUF or partnership firm (whether registered or not) including AOP, located in the taxable territory to a business entity registered as body corporate, located in taxable territory, the recipient of service is liable to pay service tax under RCM.

At this instance, it is pertinent to discuss the legislative intent being introducing the reverse charge mechanism on renting of motor vehicles. As discussed above, it is a common practice that car owners supply/rent out their cars (with or without drivers) to tour operators or service providers providing similar services. However, in many cases, such cars were directly let out/rented to corporate houses or business entities for transportation of their employs, clients, etc. It was very difficult and nearly impossible for the Department to detect tax evasion by such car owners.

1. Notification No. 26/2012—ST.

2. Notification No. 30/2012—ST.

Hence, vehicles provided to corporate entities have been covered under the RCM to address such situations and ensure that there are no tax leakages. As RCM notification uses the term 'engaged in similar line of business'. It has to be appreciated that the term used is not 'same line of business'. That there is a difference between the terms 'same' and 'similar'. The Hon'ble Supreme Court in the case of *National Steel Equipment (P) Ltd. v. CCE*<sup>1</sup> observed that, "*The expression 'similar' is a significant expression. It does not mean identical but it means corresponding to or resembling in many respects; somewhat like; or having a general likeness.*" Moreover, in the case of *CCE v. Wood Craft Products Ltd.*<sup>2</sup>, the Hon'ble Apex court distinguished between the two terms and held that the word 'similar' is expansive and not restrictive like the word 'same'. Hence, in the current case, the requirement under the RCM notification is not that the service provider and the service receiver should be in the same line of business.

That in our view in the context of the 'renting of motor vehicle', the activity of rent-a-cab, transportation and tour operator **would be similar line of business**. As discussed above, the scope of the said categories of services is overlapping. Moreover, we would also like to draw an inference from the CENVAT Credit Rules, 2004 ("**CCR**"). As per the definition of the term 'input service' in Rule 2(l), the CENVAT in relation to renting of motor vehicles is available only to the persons which can have motor vehicle as a capital goods. As per rule 2(a) of the CCR, motor vehicle designed to carry passengers including their chassis, registered in the name of the provider of service, when used for providing output service of -

- (i) transportation of passengers; or
- (ii) renting of such motor vehicle; or
- (iii) imparting motor driving skills;

is covered under the definition of the term 'capital goods'. Hence, CENVAT Credit on renting of motor vehicle is available to person providing services of transportation of passengers or renting of such motor vehicles. Therefore, the two services can be said to be in similar line of business. Moreover, as discussed, a tour operator provides services in relation to transportation and renting of motor vehicle both.

1. (1988) 1 SCC 605.

2. (1995) 3 SCC 454.

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