MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

July | 2022

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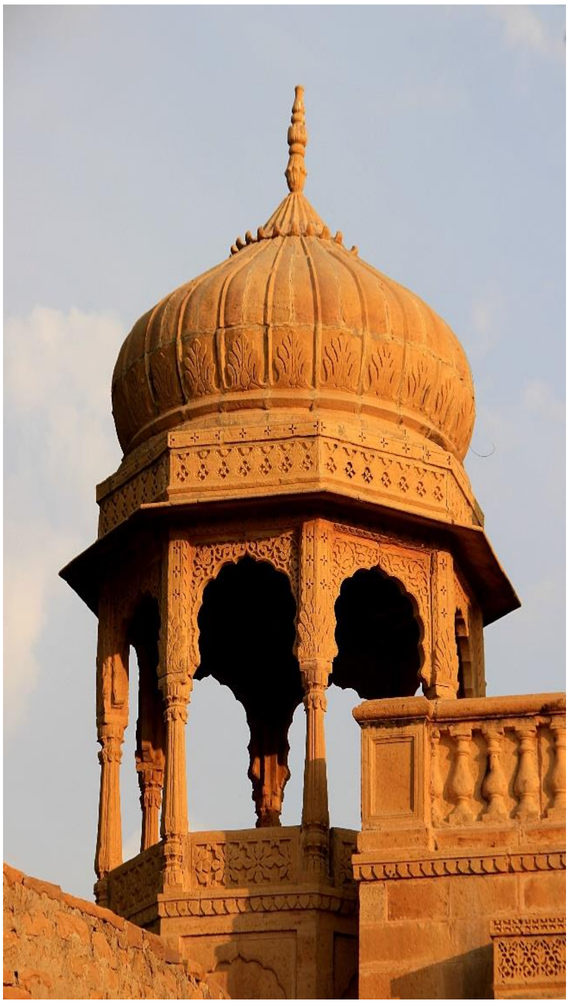

FOREWORD

Dear Reader,

Most of the tax assessments under the provisions of the Income-tax Act (the Act) in India are being carried out under "Faceless Assessment", which was given statutory recognition by the Finance Act 2021 by introduction of Section 144B in the Act. It involves all compliances by Electronic mode. So far taxpayers had a mixed experience in adopting to this procedure and in respect of outcome of tax assessments made.

Recently, in the Finance Act, 2022, the Procedure for `Faceless Assessment' has been streamlined by suitably amending Section 144B of the Act. The amended procedure has come into force from April 01, 2022.

A Note on the current process of such procedure forms part of this Update.

In addition, important judgments on direct taxes, GST Regulations, as well as note on important notification/changes in Foreign Exchange Management Act is also analysed in this Update.

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DIRECT TAX

DOMESTIC TAXATION

Recent amendment to Section 14A which relates to 'removal of doubts' would not have retrospective effect, when such an amendment alters or changes the law as it stood earlier

PCIT v. M/s Era Infrastructure (India) Ltd. [TS-577-HC-2022 (Del HC)]

Recently, the Delhi High Court has held that recent amendment to Section 14A of the Income-tax Act, 1961 ('Act') which is for "removal of doubts" does not have retrospective effect, if such an amendment alters or changes the law as it stood earlier.

As per Section 14A of the Act, for the purpose of computing total income, no deduction shall be allowed towards expenditure incurred in relation to an exempt income (i.e., income which does not form part of total income) of the taxpayer. Recently, Finance Act, 2022 inserted a clarificatory explanation in Section 14A which states that no deduction of expenditure shall be allowed in relation to an exempt income even if such exempt income has not accrued, arisen or been received during the financial year. The said amendment is applicable with effect from April 01, 2022 i.e., Assessment Year (AY) 2022-23 onwards.

In the tax scrutiny proceedings for AY 2013-14 of the Respondent, the Assessing Officer (AO) made a disallowance of INR 36.15 million under Section 14A of the Act. This was done as the Respondent had not earned any exempt income but had claimed a deduction of INR 36.15 million under Section 14A. On appeal before Tax Tribunal, the Tribunal placing reliance on decision of the Delhi High Court in the case of **PCIT v. IL & FS Energy Development Company Ltd. [SCC online Del 9893 (2017)]** deleted above disallowance made by AO. In said decision, the Delhi High Court had held that no disallowance under Section 14A can be made of expenditure incurred in relation to an exempt income where such income has not been earned during a financial year.

However, the counsel for Petitioner had submitted before the Tax Tribunal that recent amendment to Section 14A had nullified the above decision of IL & FS Energy Development Company Ltd. *(supra)* as it had brought about a change in law due to insertion of non-obstante clause and an explanation in Section 14A. It may be mentioned that the Income-tax Authorities have not accepted said decision of Delhi High Court and have filed a Special Leave Petition (SLP) before Apex Court against the same.

Thereafter, when the matter travelled to the Delhi High Court, the Court placed reliance on the Apex Court decision in the case of **Sedco Forex International Drill Inc. v. CIT [12 SCC 717 (2005) (SC)]** and **M.M. Aqua Technologies Ltd. v. CIT [SCC Online SC 575]** wherein, it was held that a retrospective provision in the Act which is for "removal of doubts" cannot be presumed to be retrospective, if it alters or changes the law as it stood earlier.

Accordingly, the Delhi High Court placing reliance on certain earlier decisions held that Section 14A having retrospective effect cannot be presumed if it alters or changes law as it stood earlier. However, the Delhi High Court has mentioned that its decision in the present appeal shall be dependent upon the outcome of SLP file in the case of IL & FS Energy Development Company Ltd (supra) by the Department, as and when it is decided by the Apex Court.

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Income Tax Assessment Procedure - Faceless Assessment - related amendments and issues faced

Introduction

The Government of India had announced the E-Assessment Scheme, 2019 in September 2019. Subsequently, another notification was issued which renamed the said scheme as Faceless Assessment Scheme, 2019 and brought certain amendments to the earlier introduced scheme. Further, section 144B was introduced in the Income-tax Act, 1961 (Act) w.e.f. April 01, 2021, to give statutory recognition to faceless assessment procedure to avoid litigation.

Faceless Assessment Scheme (FAS) as covered by section 144B was introduced for realizing the following goals of (i) reduction in human interface between tax authorities and the Assessee; (ii) introduction of team based working atmosphere; (iii) introducing dynamic jurisdiction; and (iv) better utilization of resources through functional allocation and specialization of personnel. It is a huge change for the taxpayers in the procedure for assessment.

Implementation

Initially, under FAS, the authority for passing of all assessment orders in a faceless manner was with National E-Assessment Centre (NeAC). Subsequently, the NeAC acted as National Faceless Assessment Centre (NFAC).

However, certain areas have been kept out of the purview of faceless assessments as follows - (i) Assessment orders in cases assigned to Central charges (i.e., search and seizure cases); (ii) Assessment orders in cases assigned to International Tax charges; and (iii) Cases where pendency could not be created on ITBA portal because of technical reasons or cases not having Permanent Account Number. Foreign company's tax assessment is presently not covered under the faceless assessment provisions.

Initially, assessment under Section 143(3) and Section 144 were to be conducted in a faceless manner in accordance with provisions of Section 144B of the Act. However, recent amendments to Section 144B of the Act have extended the ambit of Faceless Assessment to reassessment or recomputation under Section 147 as well.

For ensuring smooth implementation of FAS, multiple tax authorities have been set up under the overarching presence of NFAC. The said authorities as well as NFAC shall work together in ensuring that the assessment proceedings are completed in a timely, fair and qualitative manner. Brief roles of each of the tax authorities set up under NFAC have been enunciated as under:

- **Assessment Units (AU)** – These units shall perform conduct assessments by rendering functions such as identifying relevant point/ material for assessment, seeking specific information/ evidence on points of enquiry, analyzing material/ information furnished by assessee etc.

- **Verification Units (VU)** – These units shall perform verification, examination of books of accounts, examination of witnesses, recording of statements and certain other functions required for performing verification role effectively.

- **Technical Units (TU)** – These units shall provide advice/ assistance on any legal, accounting, forensic, informational technology, valuation, transfer pricing, data analytics, management or any other technical matter under the Act or Double Taxation Avoidance Agreements (DTAA).

- **Review Units (RU)** – These units shall review the income or loss determination proposal of AU and shall perform review of certain functions of AU such as - collation of relevant and material evidence by AU, relevant points of fact and law have been incorporated in the Income or Loss determination proposal, submissions and arguments of Assessee have been considered, etc.

Other Highlights

a. All communications between NFAC, Assessee, AU, RU, VU and TU shall be exclusively by electronic mode. Further, all internal communications between Assessee, AU, VU, RU and TU shall be through NFAC.

b. An appeal against the assessment order passed under FAS shall lie with Commissioner (Appeals) having jurisdiction over the assessee.

c. In the past, various writ petitions were filed before High Courts on the ground that FAS was arbitrary and contrary to principles of natural justice as it did not grant sufficient opportunity of being heard (i.e., personal hearing) to the Assessee. Considering various decisions rendered by High Courts at different points in time, the Government has now revised FAS by allowing personal hearing at specific request of the Assessee or its authorised representative.

Various Changes/ Amendments to FAS

a) **Re-assessment included within the ambit of Section 144B** – The earlier provisions of Section 144B included faceless assessment under Section 143(3) or 144 of the Act. The Finance Act, 2022 has extended said provisions to re-assessment or re-computation under Section 147 of the Act.

b) **Removal of Regional Faceless Assessment Centers (RFAC)** – RFAC has been removed which has led to streamlining of process under NFAC and reduction in involvement of multiple tax authorities.

c) **Reduction in number of reviews** – Under earlier process, multiple reviews by AU, RU and another AU were taking place. However, now any modification proposed by RU shall be directly forwarded to AU which was originally involved in preparing income or loss determination proposal.

d) **Personal Hearing allowed** - Where the request for personal hearing has been received, the ITA of relevant unit shall allow such hearing, through NFAC. Such hearing shall be conducted exclusively through video conferencing or video telephony only.

e) **Prior issuance of show cause notice before review by RU** – Earlier, NFAC, at the time of initial draft assessment order, used to decide as to whether the case needs to be referred to the RU or it should be finalized or an opportunity to be given to the assessee against the additions. However, under the revised procedure, a show cause notice shall be first issued to the Assessee and only after considering the reply filed by the Assessee, NFAC may refer the case to RU.

f) **Issuance of show cause notice in case of adverse variation proposed** – A show cause notice shall be issued by AU through NFAC, where a variation prejudicial to interest of the Assessee is proposed.

g) **Special Audit** – AU has been granted power to initiate special audit where it thinks necessary to do so owing to certain factors such as - nature and complexity of the accounts, volume of the accounts, doubts about the correctness of accounts, multiplicity of transactions in the accounts or specialized nature of business activity of the Assessee, and in the interests of the revenue.

h) **Removal of Section 144B(9)** – Section 144B(9) provided that faceless assessment proceeding shall be void if procedure mentioned in Section 144B was not followed. In the past, various writs petitions were filed by Assessees seeking declaration of such proceedings as void as due process outlined in Section 144B was not followed. However, the said sub-section has now been removed to ensure that the faceless assessment proceeding is not declared void where due process is not followed by tax authorities.

Issues Faced

a) Assessment order passed without granting adequate time to furnish response against show cause notice issued.

b) Notices were served on wrong mail address even where the new mail address was updated in the 'profile section' on the Income-tax portal which caused delay in compliance or unnecessary failure in compliances by Assessees.

c) Technical challenges in e-verification of submissions using non-PAN encrypted DSC which led to avoidable delays in compliances by the Assessees.

d) Size limit of 5MB per attachment is making it difficult for bulky submissions with annexures to be uploaded. Lot of times, the Assessee is required to break the relevant submissions/ annexures into various parts which increases the number of attachments and makes it difficult for tax authorities to comprehend.

e) In numerous cases, assessment orders were passed without considering submissions placed on record or discussing a particular case on merits, thereby causing the final outcome of faceless assessment proceedings to lack focus, quality and completeness.

f) Final assessment order considers total income based on intimation under Section 143(1) of the Act without considering the rectifications filed against the said intimation.

Concluding Remarks

The introduction of FAS is a welcome change considering its overall objectives. While there may be initial hiccups in FAS, it is widely believed that the said scheme would help in reduction of various issues being faced by the tax authorities and Assessees in tax assessment process since long. So far, the experience of taxpayers has been mixed one as some tax assessments have been done in a much fairer manner while some others in a hasty manner. As and when the entire faceless assessment process gets streamlined, it would not only pave the path for a transparent, equitable and time-bound assessment system and also reducing the cost of taxpayers.

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Sec. 56(2)(viib) of the Income-tax Act, 1961 would also apply to conversion of Compulsorily Convertible Debentures (CCDs) into equity shares, even if CCDs were issued before introduction of the said Section

Recently, Kolkata Tribunal in the case of *Milk Mantra Dairy (P.) Ltd. v. Deputy Commissioner of Income-tax (ITA No.413/Kol/2022)* held that section 56(2)(viib) is applicable to conversion of Compulsorily Convertible Debentures ('CCDs') in the year in which such conversion took place irrespective of the fact that section 56(2)(viib) was not in force at the time of issuance of CCDs.

In the present case, the assessee was a private limited company engaged in manufacturing and selling of dairy products which primarily caters to the domestic market. During the year under consideration i.e. financial year 2012-13, the assessee issued 13,40,629 equity shares at face value of Rs. 10 per share at a premium to various parties including venture capital funds, non-residents and other angel investors. The total issue price of the equity shares was Rs. 17,45,07,000, which included share premium of Rs. 16,11,00,710.

During the course of assessment proceedings, the AO alleged that the issue of equity shares has been made over and above the Fair Market Value ('FMV') and applied the provision of Rule 11UA(2)(a) of the Rules by applying Net Asset Value ('NAV') method of valuation. The AO calculated negative FMV of the shares at (-) Rs.294 and adopted the figures from the audited financial statements as on 31 March 2012 for calculating the FMV of the shares by applying NAV method. The AO thus treated the FMV under Rule UA as 'Nil' and completed assessment by making an addition of Rs. 17,45,07,000 i.e. making addition of whole of the consideration for the issue of shares.

At the first appellate level, the assessee was granted partial relief of Rs. 9,24,03,061 being share premium received from non-residents by holding that the provisions of section 56(2)(viib) are applicable to proceeds received from residents only.

On further appeal before the Tribunal, the assessee submitted that the entire consideration was received at the time of issuance of CCDs in AY 2011-12 and AY 2012-13 and conversion of CCDs into equity shares in AY 2013-14 did not require any further payment of money. The assessee further submitted that the provision of section 56(2)(viib) was not in existence at the time of receipt of money when CCDs were issued and there was no 'consideration' at the time of conversion of CCD into shares. The Tribunal held that the provision of section 56(2)(viib) is applicable on conversion of CCDs into the equity shares as the term 'consideration' includes all forms of consideration, tangible or intangible, pecuniary or non-pecuniary, direct or indirect and not limited to only receipt of money. Few examples of consideration received by assessee on conversion of CCDs into equity shares were listed by the Tribunal like the extinguishment of debt obligation, release of charge created on assets/properties, mitigation of periodic payment of interest, leveraging of own capital in stock market, favourable debt-equity ratio etc.

On the addition relating to the shares issued to venture capital funds, non-residents and other angel investors, the Tribunal held that such cases fall under the exclusionary clause of section 56(2)(viib).

Regarding the method of valuation adopted by the AO, the Tribunal held that the AO cannot change the valuation method adopted by the assessee merely by comparing the projections to the actual results. However, the assessee is required to submit MIS data and other relevant details required for valuation of shares on the basis of DCF method to the AO to analyse the FMV as computed by the assessee. Accordingly, the Tribunal remitted the matter back to AO in order to ascertain the correctness of data being considered for the purpose of scientific valuation of shares as per DCF method adopted by the assessee.

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No TDS is deductible under section 194J of the Income-tax Act, 1961 on services in case of indivisible contract, where dominant purpose is supply and service component is negligible

In a recent case, the Hon'ble High Court of Karnataka in case of Commissioner of Income-tax vs. Bangalore Metro Rail Corporation Ltd. (I.T.A No.60 of 2014) held that where the dominant purpose of contract is supply of rolling stock and service component is negligible, no TDS is deductible under section 194J of the Income Tax Act 1961 (the IT Act).

Section 194J of the IT Act, requires deduction of tax (withholding) @ 2% when any person pays any sum by way of Royalty or Fees for technical services to a resident.

In the present case, Bangalore Metro Rail Corporation Ltd. (BMRCL) entered into a Contract with a consortium consisting of M/s BEML Ltd., M/s Hyundai Rotem Company, Mitsubhishi Corporation and M/s Mitsubhishi Electric Corporation, for design, manufacture, supply, testing and commissioning of passenger Rolling Stock, including training of Personnel and Supply of spares. The total cost of the Contract was Rs.16,725 million.

BEML Ltd. was a resident company and was also the consortium leader. All payments under the contract by BMRCL were made to BEML Ltd.

The Income Tax Department conducted a survey under Section 133A of the IT Act and observed that a sum of Rs.1820 million had been paid by BMRCL to the consortium. The department was of the view that assessee should have deducted TDS before making the payment. A notice was issued upon the assessee to show cause as to why it should not be treated 'as an assessee in default' under Section 201(1) of the IT Act for not deducting TDS and consequently attracting levy of tax and interest.

The assessee submitted its reply contending that the contract was for supply of coaches, and other activities such as design, testing, commissioning and training were only incidental to achieve the dominant object and therefore, it would constitute a sale of goods and hence, the provisions of section 194C or 194J would not apply. It was also contended that assessee was not aware as to how the consortium partners had utilized the 10% of the contract amount given as 'Mobilization Amount'.

The assessing officer was not satisfied with BMRCL's reply, and treated it as 'an assessee in default' and levied tax and interest thereon under Section 201(1A) of the IT Act in respect of the 10% amount given as 'Mobilization Advance'.

An appeal filed before the commissioner of Income Tax (Appeals), Bengaluru, by the assessee challenging the said order also stood dismissed. On further appeal, the ITAT allowed assessee's appeals. The Revenue filed the appeal before the High Court of Karnataka.

The argument by the Revenue before the Hon'ble High Court was that the Contract between BMRCL and BEML consisted of two parts namely, the Supply and the Technical service. Therefore, TDS under section 194J of the IT Act is applicable so far as the Technical service part is concerned.

The assessee submitted that the case of both assessee and the Revenue throughout is that it is a composite Contract. He contended that the ITAT has recorded in its order that the Assessing Authority had held that the Contract was in the nature of a composite package. He contended that the Revenue has argued before ITAT that it is an 'indivisible' Contract for supply, commissioning, testing etc. Therefore, the Revenue cannot be permitted to improve its case at this stage of appeal to the High Court and change its stand.

The High Court observed that the question of deduction of tax under Section 194J was held against the assessee by the Revenue only in respect of 10% of the entire project value which was given as 'Mobilization Advance'. The project was complete. Assessment for all years in respect of the remaining 90% payment is complete. In respect of 90% payment, the Revenue has not raised any objection with regard to non-compliance with Section 194J.

The Hon'ble High Court allowed the assessee's appeal holding that firstly, the Revenue had taken a specific stand before the ITAT that the Contract is a composite Contract and it cannot be allowed to change that stand now. Secondly, the dominant purpose of the Contract is for supply of rolling stocks and the cost towards service component is almost negligible and the work undertaken is ancillary to supply of rolling stock and does not amount to technical service. Thirdly, fee for Technical services as defined under section 9(i)(vii) of the IT Act, does not include construction, assembly and therefore, manufacture/assembly of the Rolling Stocks by BEML Ltd. is excluded. Fourthly, the entire payment has been made in favour of BEML Ltd. Fifthly, the Revenue had not raised any objection with regard to payment of 90% of the Project costs, so far as deduction under Section 194J is concerned.

The High Court thus dismissed the appeal filed by the Revenue and decided the issues in favour of the assessee.

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INDIRECT TAX

CHANGES IN GST LAW

Supreme Court has directed re-opening of GST portal for TRAN-1 and TRAN-2

In a landmark move, Supreme Court in the case of UOI vs Filco Trade Centre Private Limited, 2022, has directed re-opening of GST common portal to claim and carry forward pre-GST input tax credits into GST regime. The gist of Supreme Court judgment/directions is provided as under:

- GSTIN will open the window of portal for filling/revising TRAN-1 and TRAN-2 for availing transitional credit, from September 01, 2022 to October 31, 2022;
- All taxpayers can file/revise their TRAN-1 and TRAN-2 irrespective of the fact whether they have filed any writ petition or not;
- GSTIN needs to ensure that there would not be any technical glitches during aforesaid period;
- Department would verify this claim within 90 days and pass orders on merit after providing reasonable opportunity to the tax payers;
- Post verification of the input tax credit, the same would be reflected in the electronic credit ledger of the tax payer;
- GST council may issue appropriate guidelines or SOPs to field formations for scrutiny of such claims.

E-invoice mandatory for turnover above 10 Crore from October 01, 2022

Government vide Notification No 17/2022-CGST dated August 01, 2022 has made mandatory to raise E-invoice for business having aggregate turnover of more than INR. 10 Crores during any preceding financial year, starting from financial year 2017-18. It is to be noted that, earlier the said limit to raise e-invoice was INR. 20 Crores.

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REGULATORY

RECENT REGULATORY UPDATES

International Trade Settlement in Indian Rupees (INR)

In order to promote growth of global trade with emphasis on exports from India and to support the increasing interest of global trading community in INR, it has been decided to put in place an additional arrangement for invoicing, payment, and settlement of exports/ imports in INR. Before putting in place this mechanism, AD banks shall require prior approval from the Foreign Exchange Department of Reserve Bank of India, Central Office at Mumbai in accordance with the specified approval process.

The broad framework for cross border trade transactions in INR under Foreign Exchange Management Act, 1999 (FEMA) is as outlined below:

a. **Invoicing**: All exports and imports under this arrangement may be denominated and invoiced in Rupee (INR).

b. **Exchange Rate**: Exchange rate between the currencies of the two trading partner countries may be market determined.

c. Settlement: The settlement of trade transactions under this arrangement shall take place in INR in accordance with the specified procedure as follows. For the settlement of trade transactions with any country, AD bank in India may open Special Rupee Vostro Accounts of correspondent bank/s of the partner trading country. In order to allow settlement of international trade transactions through this arrangement, it has been decided that:

- Indian importers undertaking imports through this mechanism shall make payment in INR which shall be credited into the Special Vostro account of the correspondent bank of the partner country, against the invoices for the supply of goods or services from the overseas seller /supplier.

- Indian exporters, undertaking exports of goods and services through this mechanism, shall be paid the export proceeds in INR from the balances in the designated Special Vostro account of the correspondent bank of the partner country.

The salient features in this regard *inter alia* include the following:

a) Documentation: The export/ import undertaken and settled in this manner shall be subject to usual documentation and reporting requirements.

b) Advance against exports: Indian exporters may receive advance payment against exports from overseas importers in Indian rupees through the above Rupee Payment Mechanism. Before allowing any such receipt of advance payment against exports, Indian Banks shall ensure that available funds in these accounts are first used towards payment obligations arising out of already executed export orders / export payments in the pipeline. In order to ensure that the advance is released only as per the instructions of the overseas importer, the Indian bank maintaining the Special Vostro account of its correspondent bank shall, apart from usual due diligence measures, verify the claim of the exporter with the advice received from the correspondent bank before releasing the advance.

c) Setting-off of export receivables: 'Set-off' of export receivables against import payables in respect of the same overseas buyer and supplier with facility to make/receive payment of the balance of export receivables/import payables, if any, through the Rupee Payment Mechanism may be allowed, subject to specified conditions.

d) Use of Surplus Balance: The Rupee surplus balance held may be used for permissible capital and current account transactions in accordance with mutual agreement. The balance in Special Vostro Accounts can be used for:

- ➢ Payments for projects and investments.
- ➢ Export/Import advance flow management
- ➢ Investment in Government Treasury Bills, Government securities, etc. in terms of extant guidelines and prescribed limits.

[Source: A.P. (DIR Series) Circular No.10 dated July 11, 2022 issued by Reserve Bank of India]

Foreign Exchange Management (Borrowing and Lending) (Amendment) Regulations, 2022

Under the existing External Commercial Borrowing (ECB) Policy, all eligible borrowers can raise upto USD 750 million or equivalent per financial year under the automatic route.

The said limit has been increased from USD 750 million or equivalent to USD 1500 million or equivalent. The relaxation is temporarily available for ECBs raised till December 31, 2022.

[Source: Notification No. FEMA.3(R)(3)/2022-RB dated July 28, 2022 issued by Reserve Bank of India]

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Important dates to remember

Particulars	Date
Direct Taxes	
Issue of Quarterly TDS certificates for First Quarter	15.08.2022
Payment of monthly TDS and TCS for the month of August 2022	07.09.2022
Payment of Second Instalment of Advance tax	15.09.2022
Indirect Taxes	
Submission of Form GSTR-3B and payment of tax for July 2022	20.08.2022

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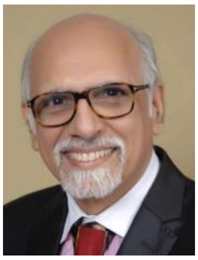

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