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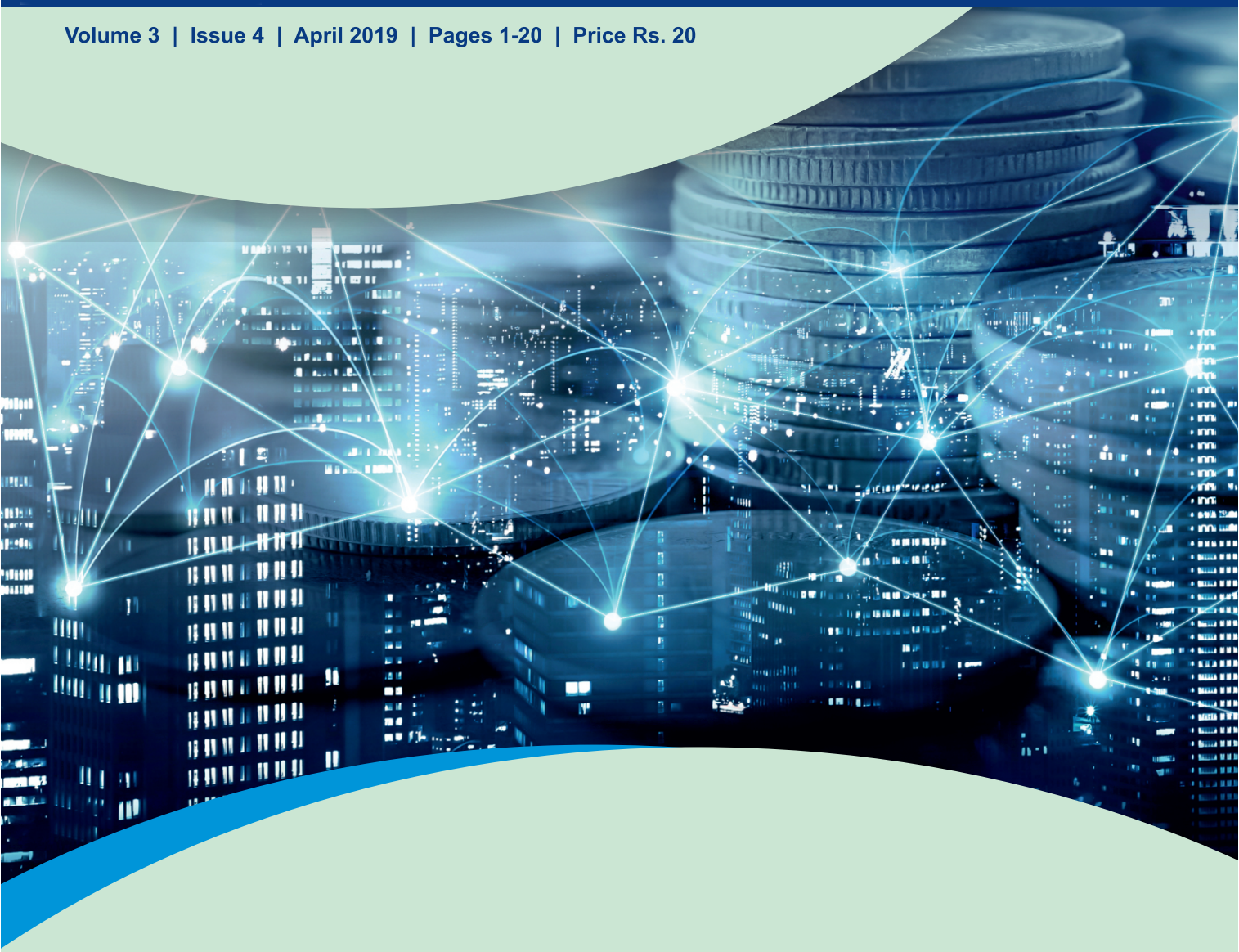

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Correspondence:

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MESSAGE FROM THE PRESIDENT

"The will to win, the desire to succeed, the urge to reach your full potential... these are the keys that will unlock the door to personal excellence."

-Confucius

Dear Students,

This is the time of the year when we have just relished the festival of colours and ready to pass in the pleasant weather of spring. With so many colour around, we learn to reconcile our lives, responsibilities and energy in a positive way. And with changing weather, we learn the art of adaptability toward changing surroundings and changing demands of contemporary times. Therefore, with colours and weather together, we learn to energize our spirits to reconcile our abilities in adapting and suitably implementing the transformation for successfully achieving our goals in life and striving to do better every time.

Believing in our ability is the biggest strength that we possess but this strength is constantly affected by negative thoughts and anxiety about future. Everyone faces this doubt and depression. But what separates the highly successful is the ability to stay positive and keep moving forward. Therefore, instead of thinking negative thoughts you should focus on your positive energies that will help you overcome anxiety and stay calm and motivated.

In the end, I would like to conclude with a quote by Helen Keller "Optimism is the faith that leads to achievement. Nothing can be done without hope and confidence". My best wishes for all your endeavours. I am sure that you will give serious consideration to my views in this regard.

With Best wishes,

CS Ranjeet Pandey

President, ICSI

Residential Status under FEMA vs Income-Tax Act, 1961 : A Comparative Analysis

Income-Tax Act, 1961 and the Foreign Exchange Management Act, 1999 are the laws in India which determine the residential status of person and the residential status under both the laws become the point of conflict and has created confusion in the minds of people. In this article, the focus will be on understanding the residential status of person under both the laws along with the practical issues in order to analyze the reason for same.

Anurag Khandelwal, Student – CS Professional Program

Email : anuragapkhandelwal@gmail.com

Resident Status Compared

Income-Tax Act, 1961 (ITA)	Foreign Exchange Management Act, 1999 (FEMA)
● Under the ITA, the purpose for determining the residential status of the assessee is to ascertain the tax liability of the assessee.	● Under the FEMA, the purpose of determining the residential status is to ascertain the extent of the cross boundary transaction* which will be permissible.
● ITA is the revenue Act.	● FEMA is a regulatory Act.
● The residential status of the assessee is the most relevant factor for the ITA because if the assessee is resident of the country, the whole of the income earned by the assessee will be taxable in India *i.e.*, global income is taxable. On the other hand, if the assessee is non-resident of the country, then only the income earned in India will be taxable in India.	● The restriction on the person for the cross boundary transaction is based on his/ her residential status. For Illustration, in India, only the non-resident in India is allowed to open the deposit account and the resident of the country are not allowed to open such account in the bank. Hence, it can be said that the person must know about his/ her resident status at the time of undertaking a transaction.

**Cross boundary transaction means transaction which involves exchange of goods and services between two or more countries.*

Resident Status under the FEMA

The term 'resident' is defined under clause (*v*) of section 2 as per which a person is said to be resident is subject to the following conditions:

- The person resides in India for a period of more than 182 days, during preceding financial year. However, following are two exceptions to it,
  - Person leaving India for (*a*) employment; or (*b*) carrying on any business; or (*c*) For any purpose which indicates his intention to stay outside India for an uncertain period.
  - Persons coming to India or stays in India, in either case otherwise than – (*a*) for employment, or (*b*) carrying on business or vocation, or (*c*) any other purpose, in such circumstances as would indicate his intention to stay in India for uncertain Period.
- Any person or body corporate registered or incorporated in India,
- An office, branch or agency in India owned or controlled by a person resident outside India,

- An office, branch or agency outside India owned or controlled by a person resident in India;

Illustration – Jack resides in USA from last 5 years comes to India for the purpose of employment on 20th May 2018. As per sub–clause (*i*) of clause (*v*) of section 2, a person will be treated as resident if he resides in previous financial year for more than 182 days but there is exception available under which he will be treated as resident during the financial year, if the person comes to India for the purpose of employment. Jack comes to India for the purpose of employment, he would be considered as resident during the financial year 2018-19.

Illustration – A person has been a non-resident of India since last 10 years. In November, 2017, he comes to India for employment. Will such a person be an Indian resident? If yes, from when? Will such a person be covered under clause (B) and what will be his residential status? In financial year 2016-17, he was in India for less than 182 days, primary condition is not satisfied. Hence, he will continue to be a non-resident for Financial Year 2017-18. If a person does not fulfill the basic condition, it is implied that he would be out of the purview of the exceptions. Hence, from November, 2017 to 31st March, 2018, the person continues to be a non-resident.

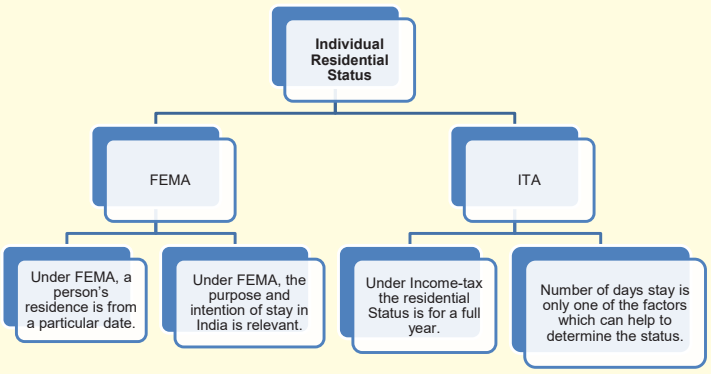
Residential status under the Income-Tax Act, 1961

The term 'resident' is defined under sub-section (1) of section 6 which determines the resident status of the person. An individual is said to be resident if he (*a*) Is in India for 182 days or more in the preceding financial year or (*b*) (*i*) Is in India for 60 days or more in the preceding financial year; and (*ii*) Stays for 365 days or more in the preceding 4 financial years.

Following are the persons who must fulfill the first condition in order to become the resident for the preceding financial year :

- *Indian citizen leaving India for the purpose of employment or business* – In the case of *ITO* v. *M.P Konanhalli*[1] it was held that the person will be entitled to the relief if he left in the relevant year. If he left in the earlier year for employment he will not be entitled for the relief. Similarly in the case of *ITO* v. *Manoj Kumar Reddy*[2] it was held that the person should have left India in the financial year in which relief is claimed.
- *Person of Indian origin visits to India* – HUF, firm or AOP is said to be resident in the previous year except where during the previous year the control and management of its affairs is situated wholly outside India. A company is said to be resident in India in the previous year if it is an Indian company or, its place of effective management is in India during the year. Every other person is said to be resident in India in any previous year in every case, except where during that year the control and management of his affairs is situated wholly outside India

Different residential status under the FEMA and the Income-Tax Act, 1961



Illustration

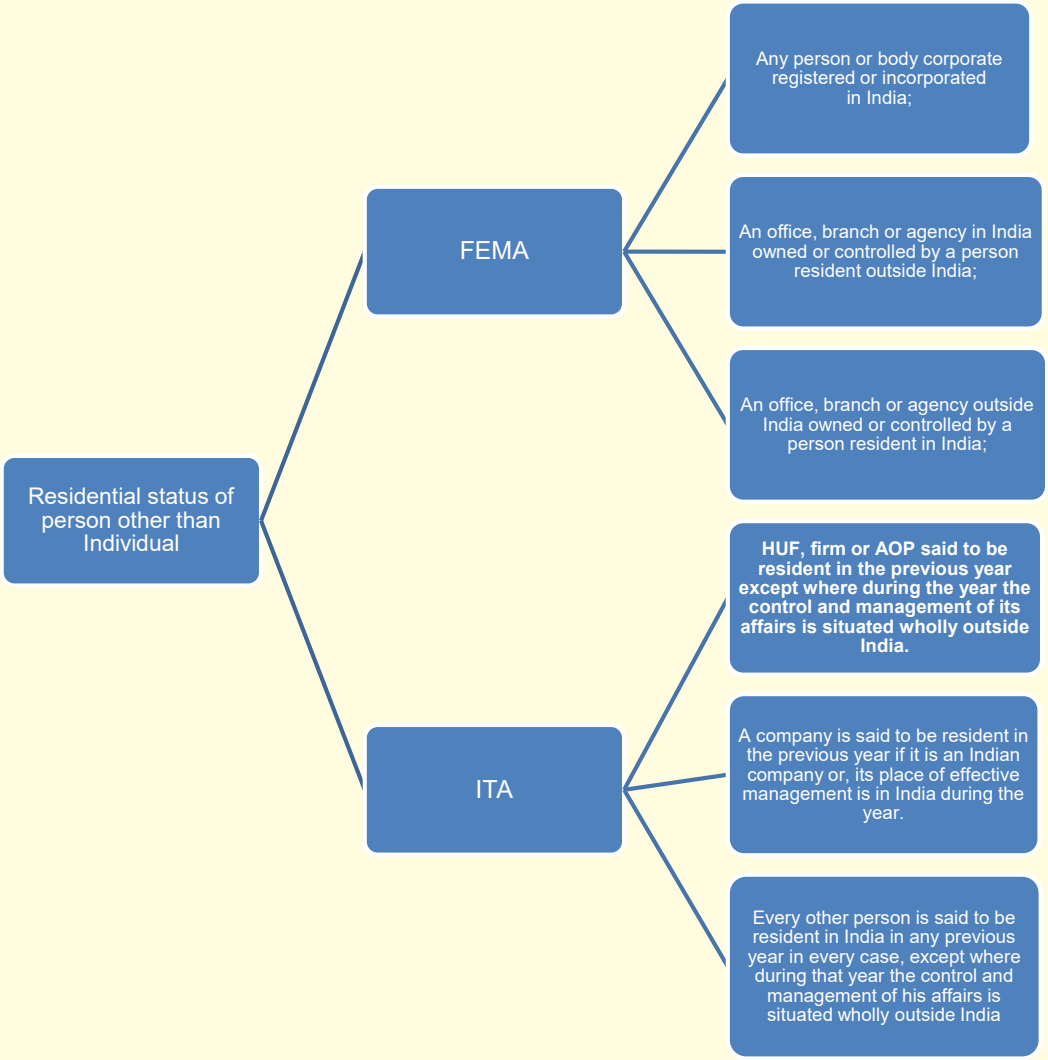
Watson, a resident of Russia, comes to India on a tour for a period of 20 days but unfortunately falls ill and stays for a period of more than 182 days in

1. *(1955) 55 ITD 266*
2.. *(2010) 132 TTJ 328*

the year. He is the resident of India as per the ITA. However, he did not come to India for the purpose of employment, business or in any other manner which indicated his intention to stay in India for an uncertain period. He will return to Russia once he is fit. Under FEMA, the person is not resident during the year. Due to different definition under ITA and FEMA, there could be a situation where a person can be a resident under ITA, and non-resident under FEMA, or vice-versa.

Illustration

Mukesh, who is an Indian resident in the financial year 2017-18, takes up a job in USA in November, 2017. From November, 2017, he is a non-resident under the FEMA. However, under Income - tax Act, 1961 the person will be a resident as his stay during the previous year exceeds 182 days in India. His U.S. salary from November, 2017 to March, 2018 will be liable to tax in India subject to DTAA relief.



Conclusion

Under the FEMA, a person's residence is determined with respect to a particular date. Under Income-tax the residential Status is for the whole financial year. This is the fundamental difference between residential status as per the Income-Tax Act and the FEMA. The status of resident under the Income-Tax Act is determined on the basis of number of days of stay in India. Purpose and intention have no relevance. Under the FEMA, the purpose and intention of stay in India is also of relevance. Numbers of days stay being an important factor in determining the residential status.

FDI in E-Commerce : A Policy Perspective

In this article, the author deliberates upon the revised Foreign Direct Investment Policy on e-commerce sector, which came into effect on 1st February, 2019. The article also goes ahead in highlighting key issues related thereto.

Keerti Kulkarni, Student – CS Professional Program

Email : keertikulkarni@live.in

Introduction

Department of Industrial Policy and Promotion ('DIPP') released a Press Note No. 2 of 2018, to clarify the Foreign Direct Investment Policy on e-commerce sector, by amending paragraph 5.2.15.2 of the current Consolidated FDI Policy Circular 2017. The Press Note[1] was released on 26th December, 2018 which will be effective from 1st February, 2019. The Revised Policy makes it tougher for e-commerce entities to offer heavy discounts, free delivery or shipping. E-commerce players are barred from selling products of businesses in which they hold stake. It is tightening norms over the relationship of marketplace owner and its seller. On the positive side, it supports the small traders on such e-commerce platforms to get equally competitive platform with the vendors in whom the e-commerce operators hold stake or interest or vendors of large volume trades. On the negative side of it, contradicts idea, purpose of make in India as it prohibits the FDI in inventory-based model of e-commerce such as Flipkart and Amazon and Big Basket. The Policy reflects the positivity towards online travel agencies Ola, Snapdeal as such.

Key Highlights of revised FDI Policy on e-commerce

- ***Ownership and Control over Inventory*** – Before this policy, e-commerce marketplace entities were restricted from (*a*) exercising actual ownership over inventory, and (*b*) permitting total sales value on its Marketplace from 1 seller or such seller's group companies in excess of 25 per cent of such marketplace's total sales value in a financial year. In the revised policy, more clarity has been brought in determining the inventory-based model. Ownership and control of marketplace entity over the inventories of its vendor is the determining factor of inventory driven model. Inventory of vendor is deemed to be controlled by e-commerce marketplace entity if more than 25 per cent of purchases of such vendor is from the marketplace entity or its group companies. Such vendors in turn list their products on such e-commerce platform for retail customers. This will impact the marketplace entities which presently use one or more of their group entities to sell goods/products to sellers on business to business (B2B) basis with such sellers being listing their products on such e-commerce platforms.
- ***Equity Participation and Control over Inventory*** – Consolidated FDI Policy 2017 did not have any prohibition on e-commerce entities participating in the equity of vendors whose goods/ products are listed on e-commerce platform. An entity having equity participation by e-commerce marketplace entity or its group companies or having control on its inventory by e-commerce marketplace entity or its group companies, shall not list its goods or products on such e-commerce

1. *https://dipp.gov.in/sites/default/files/pn2_2018.pdf*

platform for sale to retail customers. DIPP has not yet clarified whether such equity participation is direct or indirect. The term 'equity participation' is used which means it does not cover 'capital instruments' such as CCPS, CCD and warrants. Hence, marketplace entity that holds CCPS, CCD or warrants in its seller, is permissible to list its seller's goods/products on its platform. Marketplace entities cannot exercise any degree of control over the actual supply of goods/service.

- ***Exclusivity Arrangements*** – E-commerce marketplace entities cannot mandate vendors to sell their goods/products exclusively on their platforms. (Any agreements/ arrangements for such exclusivity as on the effective date of this revised policy shall stand repealed and shall not have any effect after 1st February, 2019). However, DIPP, through a separate clarification, has clarified that the private labels of marketplace entities may still be sold online without any restrictions.
- ***Compliance Certificate*** – All e-commerce marketplace entities are now required to annex a certificate of compliance of these RBI guidelines, confirming such compliance, by 30th September following the end of a financial year. This reporting requirement is to ensure that marketplace e-commerce entities comply with applicable regulations and guidelines.
- ***Ensuring Level Playing Field*** – Previously, e-commerce entities were influencing prices of goods on their platform through various means, including direct price discounts, covering market expenses (marketing campaigns, exchange offers) and also extending concessional logistics services (packing, courier, return). E-commerce entities shall not have any direct or indirect influence on sale price of goods/services of its sellers. Press note clarifies that the services provided by marketplace entities (including its group companies) to its sellers in whom it has (i) direct or indirect equity participation or (ii) common control must be at arm's length, fair and non-discriminatory manner. Preferential treatment, debt discounting as such will not be allowed any further.
- ***Other Changes*** – Restriction on the sales cap for one seller to be 25% of total sales volume of such marketplace entity is done away with. It means one seller of marketplace entity shall not contribute to more than 25% of the total sales value of such platform.

Conclusion

Nevertheless, these changes in the policy are the setback for the inventory-based models of e-commerce, Flipkart, Amazon as such, but a positive change for the marketplace-based e-commerce such as Ola, Uber, Paytm, etc (tech platform that connects buyers and sellers). Forward looking applicability of this Press Note, is only to marketplace-based e-commerce entities that receive FDI on or after 1 February 2019 through Automatic Route. It is very short timeline that is provided for, as it has significant ramifications for the current business models on which marketplaces are running, there have been many applications for clarifications and extension of time.

KNOWLEDGE UPDATE

INSOLVENCY AND BANKRUPTCY LAW

Re-Constitution of Insolvency Law Committee as Standing Committee for Review of Implementation of Insolvency & Bankruptcy Code, 2016

IBBI, *vide* Notification No. Order No. 30/3/2019 dated 6th March, 2019, has re-constituted the Insolvency Law Committee as Standing Committee for review of implementation of Insolvency & Bankruptcy Code, 2016.

External Commercial Borrowings (ECB) – Liberalization and Simplification of Policy

In this article, the author discusses revised External Commercial Borrowings Policy issued by the Reserve Bank on 16th January, 2019. The new framework is instrumently neutral and seems to further strengthen the provisions of Anti-Money Laundering, etc.

Jaya Sharma, Company Secretary, Jaya Sharma & Associates

Jatin Gade, Intern, Jaya Sharma & Associates

E-mail : jaya@jsa-cs.com

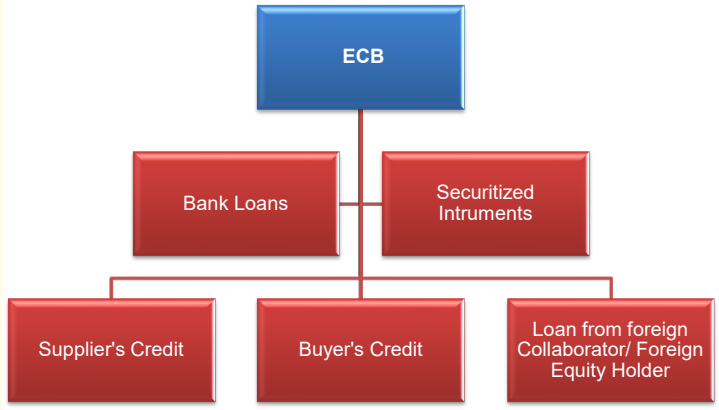
Introduction

External commercial borrowing ('ECB') means commercial loans availed by eligible resident entities from recognized non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end uses, maximum all-in-cost ceiling, etc. ECBs include commercial bank loans, buyer's credit, and supplier's credit, securitized instruments such as floating rate notes and fixed rate bonds etc., credit from official export credit agencies and commercial borrowings from the private sector window of multilateral financial Institutions.

The Reserve Bank of India proposed to consolidate regulations governing all types of borrowing and lending transactions between a person resident in India and a person resident outside India in both foreign currency and Indian Rupee.

The Reserve of India has relaxed foreign borrowing norms under the external commercial borrowings (ECB) framework, as the Central Bank aims to make it easier for Indian companies to raise money from foreign entities. The RBI issued a revised ECB policy (the "New ECB Policy") on 16th January, 2019. The new framework is instrument neutral and would further strengthen the AML (Anti Money Laundering) / CFT (Combating the Financing of Terrorism) framework. The amendment policy will come into force with immediate effect.

The RBI under the revised regulation has reduced the ECB maturity tenure, increased borrowing limits and removed qualification restrictions for companies wanting to borrow funds from abroad, boosting the chances of these companies to borrow from overseas.



KEY HIGHLIGHTS OF ECB POLICY

Changes	Particulars
Eligible Borrowers	• The list has now been expanded to include all entities eligible to receive foreign direct investment ("FDI"), essentially permitting them to borrow through the ECB route. • Additionally, Port Trusts, Units in SEZs (Special Economic Zones), SIDBI (Small Industries Development Bank of India), EXIM Bank (Export Import Bank), registered entities engaged in micro-finance activities, (including registered not for profit companies, registered societies and trusts, co-operatives and non-government organizations) can also borrow under the new ECB Policy.
Borrowing Limit	• The amount of trade credit increased from USD 20 Million to USD 50 million or equivalent per import transaction for import of capital or non-capital goods.
Currency of Borrowing	• It can be denominated in foreign currency as well as in Indian currency or any such currency as specified by RBI in consultation with Government of India.
Merging of Tracks	• Tracks I and II have been merged into the category foreign currency denominated ECB ("FC ECB"). • Track III and rupee denominated bonds have been merged into the category rupee denominated ECB ("INR ECB").
Recognized Lender	• The lender should be resident of Financial Action Task Force (‘FATF’) or International Organisation of Securities Commissions (‘IOSCO’) compliant country. • Multilateral and regional financial institutions where India is a member country will also be considered as recognized lenders. • Individuals as lenders can only be permitted if they are foreign equity holders.
Minimum Average Maturity Period (MAMP)	• Minimum average maturity period (MAMP) is unchanged at three years for all ECBs, irrespective of the amount borrowed. • However, manufacturing sector companies may raise ECBs with MAMP of one year for ECB up to $50 million (Rs.355 crore) per financial year. • Further, any ECBs raised from foreign equity holder utilized for specific purposes will have a minimum average weighted maturity of 5 years. Note: The previous framework provided for multiple minimum average weighted maturities, depending upon the amount of borrowing.
Funds Limit	• All eligible borrowers can now get funds up to $750 million or equivalent per financial year under the automatic route, replacing the existing sector-wise limits.
All-in-Cost Ceiling Per Annum	• It includes rate of interest, other fees, expenses, charges, guarantee fees, export credit agency (ECA) charges, whether paid in foreign currency or Indian Rupees but will not include commitment fees and withholding tax payable in Indian Rupees. • In the case of fixed rate loans, the swap cost plus spread should not be more than the floating rate plus the applicable spread.

	• Additionally, for foreign currency convertible bonds (FCCBs), the issue related expenses should not exceed 4 per cent of issue size and in case of private placement these expenses should not exceed 2 per cent of the issue size, etc. • Various components of all-in-cost have to be paid by the borrower without taking recourse to the drawdown of ECB/ TC, *i.e.*, ECB/TC proceeds cannot be used for payment of interest/charges.
Other costs	• Prepayment charge/ penal interest, if any, for default or breach of covenants should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.
End-uses (Negative List)	The negative list, for which the ECB proceeds cannot be utilized, would include the following: ✓ Real estate activities ✓ Investment in capital market ✓ Equity investment ✓ Working capital purposes except from foreign equity holder ✓ General corporate purposes except from foreign equity holder ✓ Repayment of Rupee loans except from foreign equity holder ✓ On-lending to entities for the above activities.

Aspects to be focused under ECB

- Eligible Borrowers
- Eligible Lenders
- Limits for raising ECB
- Average Maturity Period
- All-in-Cost ceiling
- End use permitted
- End use not permitted

- **Raising loans through ECB comprise the following two options**

Parameters	FCY (foreign currency) denominated ECB	INR (Indian rupee) denominated ECB
Exchange Rate	Conversion of FCY ECB into INR ECB can be at the exchange rate prevailing on the date of the agreement between the parties which is less than the rate prevailing on the date of agreement, if consented to by the ECB lender.	For conversion to Rupee, exchange rate shall be the rate prevailing on the date of settlement.
Change of Currency of Borrowing	Change of currency of ECB from one freely convertible foreign currency to any other freely convertible foreign currency as well as to INR is freely permitted.	Change of currency from INR to any freely convertible foreign currency is not permitted.

- **LATE SUBMISSION FEE (LSF) FOR DELAY IN REPORTING:**

Type of return/form	Period of delay	Applicable LSF
Form ECB 2	Up to 30 calendar days from due date of submission	INR 5,000
Form ECB 2/Form ECB	Up to three years from due date of submission/date of drawdown	INR 50,000 per year
Form ECB 2/Form ECB	Beyond three years from due date of submission/date of drawdown	INR 100,000 per year

LIMIT AND LEVERAGE

Borrower Categories	Eligible Limits
Companies in Infrastructure and Manufacturing Sectors, Non-Banking Financial Companies (NBFC), Infrastructure Finance Companies, NBFC's - Asset Finance Companies, Holding Companies and Core Investment Companies	USD 750 million
Software Development Sector	USD 200 million
Entities Engaged in Micro Finance Activities	USD 100 million
Others	USD 500 million

Conclusion

The revised framework has made certain changes which allow trading companies to raise foreign funds, allowing LLP to raise foreign funds, etc. These would increase India's attractiveness as an investment destination and go a long way in improving India's ranking in the Ease of Doing Business Index. It is expected that even lower rated companies will seriously look at ECB as a funding option after the new guidelines.

Webliography

https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11456

https://www.google.com/search?q=external+commercial+borrowing&source=lnms&tbm=isch&sa=X&ved=0ahUKEwid4aTl7YrhAhUH3o8KHbr1A64Q_AUIDygC&biw=1280&bih=689#imgrc=C2NfaDfOgc_jCM:

Angel Tax – Implication on Startup Ecosystem

In this article, the author makes an attempt to highlight the impact on angel investments in startup ecosystem under the provisions of sections 52(z) (viib) and 68 of the Income Tax Act, 1961.

Karan Sahi – Lawyer & Company Secretary, Vaish Associates

Email : karan.sahi@vaishlaw.com

Introduction

'Angel Tax' means the tax payable by unlisted companies during the raising of capital wherein the share price exceeds the fair market price of the share sold. The tax was initially conceptualized in the 2012 Union Budget by then Finance Minister Pranab Mukherjee with an endeavour to curtail the flow of illegitimate laundering of funds. The provision had a draconian impact on angel investments in startups ecosystem and sending shivers down the entire ecosystem. Notice from the Income Tax Department has been served to 73 per cent startups that raised angel funding since their inception (before or after 2011) as per the survey conducted by the Private Equity ('PE') and Venture Capital ('VC') body Indian Private Equity and Venture Capital Association (IVCA) and community social media platform Local Circles.

Relevant Provisions of the Income Tax Act, 1961 Related to Angel Tax

Clause (*viib*) of sub-section (2) of section 56 provides that where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares. However, this clause shall not apply where the consideration for issue of shares is received (*i*) by a venture capital undertaking from a venture capital company or a venture capital fund; or (*ii*) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Section 68 provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. Where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless (*i*) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and (*ii*) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory.

Angel Taxation Controversy

The issue pertaining to the angel taxation got escalated and snowballed into a major controversy when Travel Khana & Baby Go Go saw large sums of money being taken out of their bank accounts by the tax authorities. The management of Travel

Khana was baffled when the bank account was depleted by Rs 33 lakh on account of tax remittance and to further compound the problem Travel Khana's account with the State Bank was frozen. Similarly, startup Baby Go Go witnessed Rs 72 lakh had been deducted from the company account by the Central Board of Direct Taxes ('CBDT'). Adding salt to the wounds, CBDT issued a press release dated 08.02.2019 claiming that all procedures were diligently followed by the Assessing Officer and the start-ups are to blame for non-compliance.

The issue arises due to unreasonable expectation by the tax authorities from the startup founder. The authorities expect the startup management to share investor's bank statement, financial statements, and income tax returns. However, the information sought to be confidential in nature are not meant to be shared with a startup founder during the period of investment.

Panacea

Ever since the inception of 'Start-up India' in 2016, there has not even a single notification from the government that garnered so much appreciation from Indian entrepreneurs. The recent notification from the Department for Promotion of Industry and Internal Trade ('DPIIT') dated 19th February, 2019 signaled the death knell for the dreaded 'angel tax'. But as always, the devil lies in the details.

Before dwelling into the specifics, let us understand the benefits reaped from the current notification.

- Period for recognition as a startup stands to increase from 7 to 10 years
- Turnover limit has been increased from the existing Rs 25 crore to Rs 100 crore
- Condition for claiming exemption from Section 56(2)(*viib*) has been relaxed
- Limit mentioned above to exclude the investments received from:
  - non-resident
  - venture capital fund or a venture capital company and specified company (listed companies whose shares are frequently traded and who have a net-worth exceeding Rs 100 crore or turnover exceeds Rs 250 crore)
- Prior approval from Inter-Ministerial Board (as per 11th April, 2018 notification), and then from the CBDT in a time-bound 45 days (as per the relaxed notification on 16th January, 2019), has now been replaced with a simple declaration in Form 2.
- Long Form 2 required for substantiating the higher valuation with supporting documents and explanations have also been dispensed.
- Now, eligible startups are not required to obtain merchant banker valuation report.
- All the benefits shall continue to be available after receiving the recognition as a 'Startup' through online application over the mobile app or portal set up by the DPIIT.

Demon in the Details

While the majority have hailed the move and government's intent in giving startups a nearly free hand to grow, an undertone of dissent still echoes the ecosystem.

- There is ambiguity regarding income notices received prior to the notification. Moreover, the notification doesn't address assessments made under section 68.
- Even though an increase in turnover to be music to ears for the founders but the startups with a high growth curve, or ones addressing a larger market size, may not be able to leverage it favourably.
- There is voice echoing from the industry that profitability as a criterion for tax exemption instead of turnover or time since incorporation shall serve as a better representation for the purpose of recognition as a startup.
- Investments received from AIF Category II and other sub-categories of Category I AIF are still outside the purview of the exemption.
- Another dampen is the restriction laid done by DPIIT on the end use of the money for the

funding. The undertaking needs to provide by the startups that it shall not to invest in immovable property, transport vehicles above Rs 10 lakh, loans and advances, capital contribution to other entities, and some other specified assets such as shares and securities and jewelry, except in the ordinary course of its business. Further, startups cannot invest in shares and securities. It is common practice to park the surplus money received in debt mutual funds, however, the continuation of such practice to make the startups ineligible for the exemption.

- Companies are restricted from making capital contributions to any entity, which means that a startup cannot have subsidiaries, which makes it difficult for startups with overseas arms or operating in regulated spaces such as fin-tech and e-commerce. The group of companies is not just desirable but necessary to comply with regulatory requirements. It shall compel startups to alter their capital structure to seek any benefit under startup scheme.

Ruining the Golden Opportunity

There has been a substantial reduction in the amount of funding for angel investment from the year 2016. According to Inc42 DataLabs, in 2016, the number of early-stage investment deals stood at 624. It is in a downward spiral since active income tax notices to the startups. In the year 2017, the number decreased by 11.69 per cent to 551, and in 2018, it fell by a whopping 46.95 per cent to 331 as compared to the base year 2016.

A similar trend was observed in the number of deals carried out by major early-stage investment firms (angel investors and networks), which declined significantly in 2018 from 2017. The number of deals fell from 711 (2017) to 478 (2018) in the case of angel investors and from 75 (2017) to 62 (2018) in the case of angel networks.

On the contrary, the top ten listed companies in India are sitting on cash and cash equivalents of over 2.7 lakh crore, which is around $38 billion. However, merely $38.5 billion is raised by all Indian start-ups from 2014 to 2018, of which not even 10 per cent comes from Indian sources. Companies like TCS, Infosys, Indian Oil, are buying back crores of stock an indication that the company believes that the money is better returned to investors as opposed to being invested by the company.

Conclusion

When entrepreneurs have to go through a tough process for raising capital, any taxes on the capital raise is likely to kill the startup ecosystem. India cannot achieve the vision of creating a digital colony unless we have more active participation from domestic pools of capital. Our listed companies are sitting on piles of cash and, yet, their acquisitions of and investments into Indian start-ups are paltry. The need of the hour is clarity on the issue shall provide the necessary impetus to the early angel investment atmosphere and bring in the necessary liquidity in the system.

KNOWLEDGE UPDATE

FOREIGN EXCHANGE MANAGEMENT LAW

Voluntary Retention Route for Foreign Portfolio Investors Investment in Debt

RBI, vide A.P. (DIR Series) Circular No. 21 dated 1st March, 2019, has made amendment to regulations under the Foreign Exchange Management Act, 1999 to enable foreign portfolio investors participating in the voluntary retention route scheme to hedge their interest rate and exchange rate risks related to their investments under the scheme and to undertake repo/reverse repo transactions to meet their liquidity requirements.

Foreign Exchange Management (Permissible Capital Account Transactions) (First Amendment) Regulations, 2019

RBI, vide Notification No. G.S.R. 198(E) dated 7th March, 2019, has amended the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 by inserting sub-regulations (*c*) and (*d*) in regulation 4.

Professional Opportunities under the Insolvency and Bankruptcy Code, 2016 : A Bird's Eyeview

In this article, the author gives concise of the Insolvency and Bankruptcy Code, 2016, which brings about far reaching reforms with a thrust on creditor driven insolvency resolution. This also delves into the opportunities for the professionals under the Code.

Anu Amodia – Company Secretary, Kiran Industries Pvt. Ltd.

Email : birla.anu7@gmail.com

Introduction

The Insolvency and Bankruptcy Code, 2016 ('Code') was enacted essentially with a view to address the long standing issues faced by the banks/ financial institutions/ creditors in recovering their dues from debtors and enforcement of the rights of the creditors, including liquidation of the assets of the borrowers/ debtors to settle their dues.

The Code consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India (IBBI), and for matters connected therewith or incidental thereto.

Applicability of the Code:

The provisions of the Code shall apply to the following :

- Any company incorporated under the Companies Act, 2013 or under any previous company law
- Any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act
- Any limited liability partnership incorporated under the Limited Liability Partnership Act, 2008
- Such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf
- Partnership firms and individuals, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

Procedure

A plea for insolvency is submitted to the adjudicating authority (NCLT in case of corporate debtors) by financial or operation creditors. The max time allowed to either accept or reject the plea is 14 days. If the plea is accepted, the tribunal has to appoint an insolvency resolution professional (IRP) to draft a resolution plan within 180 days (extendable by 90 days). For the said period, the Board of directors of the company stands suspended, and the promoters do not have a say in the management of the company. The IRP, if required, can seek the support of the company's management for day-to-day operations.

Institutional set up under the Code

With a view to improve ease of doing business in India, the Code provides for a time bound process for speedy disposal and also the manner for maximisation of value of assets. It will create a win-win situation not only for the creditor and

debtor companies, but it will also benefit the overall economy. The Code provides an institutional set-up comprising of the following five pillars:

- ***Insolvency Professionals*** – They conduct the corporate insolvency resolution process and includes an interim resolution professional; The role of the IP encompasses a wide range of functions, which includes adhering to procedure of the law, as well as accounting and finance related functions.
- ***Insolvency Professional Agencies*** – They enrol and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code 2016 and read with regulations.
- ***Information Utilities*** – They collect, collate and disseminate financial information to facilitate insolvency resolution
- ***Insolvency and Bankruptcy Board of India*** – A regulator who will oversee these entities and to perform legislative, executive and quasi judicial functions with respect to the insolvency professionals, insolvency professional agencies and information utilities.
- ***Adjudicating Authority*** – The National Company Law Tribunal (NCLT), established under the Companies Act, 2013 would function as an adjudicator on insolvency matters under the Code.

The implementation of any system does not only depend on the law, but also on the institutions involved in administration and execution of the same. It depends on the effective functioning of all the institutions but the insolvency professionals have a vital role to play in the insolvency and bankruptcy resolution process.

Key Roles of an Interim Resolution Professional

The key roles of an interim resolution professional are as follows :

- Issuance of public notice of the corporate insolvency resolution process (CIRP)
- Collation of claims received
- Constitution of the committee of creditors
- Conduct of the first meeting of the committee of creditors

Who can become an Insolvency Professional?

Category-I – Chartered accountant, company secretary, cost accountant and advocate who has passed the Limited Insolvency Examination and has ten years of experience and enrolled as a member of respective Institute/Bar Council or a Graduate who has passed the Limited Insolvency Examination, and has fifteen years of experience in management, after he received a Bachelor's degree from a university established or recognised by law; The Insolvency and Bankruptcy Board of India has notified the syllabus for Limited Insolvency Examination. For syllabus, enrolment process for the examination, etc., please visit: http:// www.ibbi.gov.in/limited-insolvency.html or www.iiipicai.in.

Category-II – Any other individual on passing the National Insolvency Examination. Although the Insolvency and Bankruptcy Board of India is yet to notify the syllabus for National Insolvency Examination.

Opportunities for Practicing Company Secretary (PCS)

- Interim resolution professional (IRP)
- Resolution professional (RP)
- Preparation of resolution plan
- Representing financial creditor, operational creditor, and corporate debtor before NCLT – DRT and NCLAT – DRAT
- Representing the winding up cases before the Tribunal
- Preparing scheme and seeking approval from Tribunal for Revival and Rehabilitation of Sick Companies.

Challenges for PCS

- Compete with best brain
- Learn art of drafting, advocacy and pleading

- Prove your competencies
- Evaluate and complete expectation of clients

Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

The Insolvency and Bankruptcy Board of India (IBBI) has notified the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017. These Regulations shall come into force on June 14, 2017. These regulations provide the process from initiation of insolvency resolution of eligible corporate debtors till its conclusion with approval of the resolution plan by the Adjudicating Authority. The process in these cases shall be completed within a period of 90 days, as against 180 days in other cases. However, the Adjudicating Authority may, if satisfied, extend the period of 90 days by a further period up to 45 days for completion of the process.

A creditor or a corporate debtor may file an application, along with the proof of existence of default, to the Adjudicating Authority for initiating fast track resolution process. After the application is admitted and the IRP is appointed, if the IRP is of the opinion, based on the records of corporate debtor, that the fast track process is not applicable to the corporate debtor, he shall file an application before expiry of 21 days from the date of his appointment, to Adjudicating Authority to pass an order to convert the fast track process into a normal corporate insolvency resolution process.

The Ministry of Corporate Affairs has notified the relevant sections 55 to 58 of the Code pertaining to the fast track process and also notified that fast track process shall apply to the following categories of corporate debtors :

- Small company, as defined under clause (*85*) of section 2 of the Companies Act, 2013;
- Startup (other than the partnership firm), as defined in the notification dated 23rd May, 2017 of the Ministry of Commerce and Industry;
- Unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs.1 Crore.

Eligibility for RP

An insolvency professional shall be eligible to be appointed as a resolution professional for a fast track process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor. Explanation – A person shall be considered independent of the corporate debtor, if he (*a*) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013 (18 of 2013), where the corporate debtor is a company; (*b*) is not a related party of the corporate debtor; or (*c*) has not been an employee or proprietor or a partner: 1) of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor; or 2) of a legal or a consulting firm, which has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm, at any time in the preceding three years.

An insolvency professional shall not be eligible to be appointed as a resolution professional if he, or the insolvency professional entity of which he is a partner or director, is under a restraint order of the Board.

An insolvency professional shall make disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.

An insolvency professional shall not continue as a resolution professional if the insolvency professional entity of which he is a director or a partner, or any other partner or director of such insolvency professional entity represents any other stakeholders in the same fast track process.

The Rising League of Insolvency Professionals

India's incipient battle against bankruptcy is spawning new ideas - and career options. After India enacted tougher laws to deal with sticky loans and the central bank stepped in accelerate the pace of recoveries, finance executives have stumbled upon a career-growth opportunity based, ironically, on insolvency.

Independent insolvency professionals (IPs), are becoming critical for the success of a Rs 8-lakh crore recovery initiative. The IBBI, set up last autumn and tasked with providing the framework for recovery proceedings, conducts exams that

allow chartered accountants, company secretaries, cost accountants, and advocates to qualify as IPs.

Chartered and cost accountants, company secretaries, and lawyers with a minimum of 10 years of post-qualification experience may be eligible to be appointed as IPs. The IBBI has registered 396 IPs who have cleared their qualifying exams. There are 1,000 unregistered IPs. Former company CEOs, MDs, CGMs are also in the queue to qualify as IPs, which is seen as a crucial link in ensuring that competing claims from stakeholders are settled and funds made available for productive sectors of the economy.

Conclusion

The Code promises to bring about far-reaching reforms with a thrust on creditor driven insolvency resolution. This Code is in the implementation stage and is focused on the revival of businesses that can bring the change in lives, prospects and livelihoods of both creditors and debtors. Since, the Code intends to completely overhaul the resolution of the subject of bad debts and provide a timely resolution to the concerned parties, the implementation of the Code is been carried out in a staggered manner. Since its notification in May 2016, various sections of the Code has been made operational from time to time as this change shall require some time to digest (so that the stakeholders shall understand and appreciate the overall ramifications of the Code) as well as the building of the necessary infrastructure/ resources. Now, as part of such gradual progression, the provisions of the Code with respect to fast track insolvency process, as applicable to certain categories of debtors, have been made operational whereby the resolution process of such entities would take relatively lesser time period essentially owing to their size and nature of business. This is another step of the Government to introduce reforms with a view to address the issue of NPAs being faced by various creditors/ banks. This further highlights the efforts taken by the Government towards its agenda of ease of doing business as well as underlining India as a preferred destination for global investors and providing boost towards their confidence in the India growth story. It is also one of the most challenging and equally rewarding career options. In this era of major reforms in the uncharted territories, it is a big opportunity to work as an Insolvency Professional.

KNOWLEDGE UPDATE

COMPANY LAW

Part-Time Members of National Financial Reporting Authority

Central Government, *vide* Notification No. S.O. 1068 (E) dated 28th February 2019, has appointed part-time members of the National Financial Reporting Authority (NFRA) with immediate effect.

Companies (Incorporation) (Second Amendment) Rules, 2019

Central Government, *vide* Notification No. G.S.R. 180 (E) dated 6th March 2019, has amended the Companies (Incorporation) Rules, 2014.

Constitution of National Company Law Tribunal, Indore Bench And Amaravati Bench

Central Government, *vide* Notification No. S.O 1216 (E) dated 8th March 2019, has constituted the National Company Law Tribunal, Indore Bench at Indore and Amaravati Bench at Amaravati by amending the Notification No. S.O. 1935 (E), dated the 1st June, 2016.

Clarification on Filing of E-Form Rd-1-Conversion of Public Company into Private Company and Change in a Financial Year

Central Government, *vide* General Circular No. 03/2019 dated 11th March 2019, has clarified that Regional Directors are advised to process e-Form RD- 1 for application change in a financial year under clause (*41*) of section 2 and conversion of public limited company into private company under section 14, if 'others' is selected on account of aforesaid two counts, till the revised form is deployed by this ministry. Further, it is also clarified that such applications filed in e-Form RD-1 should not be rejected merely on the ground that others is selected and e-Form is not available, till the said form is deployed by this Ministry.

RNI Regd. No.DELENG/2017/71754
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THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

NOTIFICATION

ICSI/CS/03/2019

MERIT-CUM-MEANS ASSISTANCE SCHEME, 1983

In pursuance of para 13 of the "Merit-cum-Means Assistance (Company Secretaryship Course) Scheme, 1983", as amended upto 9th April, 2015, applications are invited to reach the Institute in the prescribed form on or before ***27th May, 2019 (25th & 26th May, 2019 is being Holiday)*** for award of 25 numbers of financial assistance each for pursuing Executive Programme and Professional Programme of the "Company Secretaryship" from students who fulfil the eligibility criteria laid down under the said scheme.

According to the scheme, a candidate applying for assistance should have passed Foundation Programme or Both Modules of the Executive Programme examination without exemption in any paper, at one sitting, in the first attempt in **December, 2018** examination. The total income of such an applicant, if employed or is having an independent source of income, should not be more than Rs.2,40,000/- per annum and if he/she is dependent on his/her parents/guardian/spouse whether partially or wholly, the combined gross income from all sources should not be more than Rs.3,60,000/- per annum.

Prescribed application form together with a copy of the Merit-cum-Means Assistance (Company Secretaryship Course) Scheme, 1983 can be downloaded from the Institute's Website at https://www.icsi.edu/Docs/Website/Application%20Form.pdf. Applications not made on the prescribed forms and/or **without supporting documents**, incomplete applications, applications not fulfilling the eligibility criteria laid down under the scheme or applications not reaching the Institute on or before ***27th May, 2019*** are liable to be summarily rejected.

BY ORDER OF THE COUNCIL

27/2/2019

(CS ASHOK KUMAR DIXIT)
OFFICIATING SECRETARY

If undelivered, please return to:
Krishna Law House,
128, Municipal Market, Super Bazar Compound,
Connaught Place, New Delhi-110001.