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The Companies Act, 2013 has provided various new definitions and new provisions which did not exist in the erstwhile Companies Act, 1956. Such new concepts have been introduced in view of the global corporate governance trends and to make the Companies accountable for their stakeholders.

InSync in this edition aims at explaining the latest circulars and notification passed by the MCA and SEBI affecting the corporate world.

Companies Cannot Claim 'Premium' Received on Shares as 'Deduction'

The Supreme Court in its latest judgement in the matter of Berger Paints India Ltd. v. C.I.T., Delhi-V has held that premium collected by Company on its share capital cannot be claimed as deduction. The Supreme Court in this matter adjudged the spectrum of section 35D of the Income Tax Act, 1961 and passed a dictum that such amount be treated as part of capital of Company employed in business for one or other purpose, as case may be, even under Companies Act.

Background

In the present case the Appellant ("Assessee") filed income tax return and declared total income. While the return was being processed, the A.O. was of the view that expression "capital employed in business of Company" did not include "premium amount" received by Appellant on share capital and accordingly the A.O. calculated allowable deduction under Section 35D of Income Tax Act, 1961. Revenue, felt aggrieved, filed appeals before Tribunal. Tribunal held that, premium collected by Appellant-Company on share capital did not tantamount to "capital employed in business of Company" within meaning of Section 35D(3) of Act. Appellant-Company filed appeals before High Court. By impugned judgment/orders, High Court dismissed Appeals and affirmed orders of Tribunal.

Key Points

Supreme Court while agreeing with view of High Court opined that, "premium amount" collected by Company on its subscribed issued share capital is not and cannot be said

Premium amount collected by Company on its subscribed issued share capital cannot be said to be part of "capital employed in business of Company"

Section 78 of Companies Act, 2013 does not say that such amount be treated as part of capital of Company employed in business

Legislature did not intend to extend benefit of Section 35D of Act to such sum

Company was rightly held not entitled to claim any deduction in relation to amount received towards premium from its various shareholders on issued shares of Company

to be part of "capital employed in business of Company" for purpose of Section 35D(3)(b) of Act and hence, Appellant-Company was rightly held not entitled to claim any deduction in relation to amount received towards premium from its various shareholders on issued shares of Company.

Further section 78 of Companies Act, 2013 which deals with "issue of shares at premium and discount" requires a Company to transfer amount so collected as premium from shareholders and keep same in a separate account called "securities premium account". It does not anywhere says that, such amount be treated as part of capital of Company employed in business for one or other purpose, as case may be, even under Companies Act.

The notification comes into force from 03.03.2017

No prior government approval is required for converting a company operating in sectors where FDI was permitted in an LLP under the automatic route

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LLPs are no longer barred from availing external commercial borrowings

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The requirement of designated partner in an LLP with FDI being a "person resident in India" has been removed

FDI in LLPs

On 3 March 2017, the Reserve Bank of India (RBI) notified the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Second Amendment) Regulations 2017 (RBI Amendment), which shall come into effect from date of its notification in the Official Gazette.

The RBI had earlier in November 2015, partially liberalised FDI in LLPs by permitting investment under the automatic route *only in sectors* where (a) 100% FDI was permitted under the automatic route, and (b) there were no FDI linked performance conditions.

Key Points

1. No Government Approval for conversion of certain Companies to LLPs- The requirement of Government approval for converting a company operating in sectors where FDI was permitted in an LLP under the automatic route has been removed.

2. Availing of external commercial borrowings (ECBs)- LLPs were explicitly barred from availing ECBs including masala bonds. The RBI Amendment has deleted such explicit prohibition on LLPs availing ECBs

3. Designated Partners- A designated partner of an LLP with FDI had to satisfy the requirement of being a "person

resident in India", as defined under the FEMA Act, in addition to satisfying the requirement of being "resident in India" as provided under the Limited Liability Partnership Act 2008 (LLP Act). Separately, the language of the old provision required that only a company registered in India under the Companies Act could be appointed as a designated partner.

The RBI Amendment has deleted the above provision. Accordingly, one needs to look at only the LLP Act provisions with respect to requirements of a designated partner.

Conclusion

While the RBI Amendment has simplified compliance requirements and broadened financing options for LLPs, FDI in LLPs under the automatic route is restricted to a limited number of sectors. If the Government provides appropriate clarifications in relation to FDI linked performance conditions, and increases the number of sectors in which FDI in LLPs will be permitted, entrepreneurs may have more opportunities to take advantage of the LLP structure, and consequently giving impetus to foreign investment.

For any clarification or delineation, feel free to contact us.

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