



Mysore Chapter

eMagazine

Edition 103

August 2012

Happy Independence Day!



Independence Day Celebration at Mysore Chapter

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Constructive Ambiguity

8

Depository Receipts



**CSMysore eParivaar
celebrates its
5th Anniversary!**

For Private Circulation Only



**E- Magazine from
The Mysore Chapter of the
Institute of Company Secretaries
of India**

-: Editorial Team :-

CS. Dattatri H M
CS. Sarina C H
CS. Omkar N G
CS. Rashmi M R
CS. Abhishek Bharadwaj A B

Support Team:

CS. Ravishankar Kandhi
CS. Ajay Madaiah

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Message from Chairperson



Dear Members and
Students of CS fraternity,

As we gear up to celebrate the 2nd ICSI Corporate Governance Week from 27th to 31st August, I remember the famous quote by Mahatma Gandhi - "You must be the change you wish to see in the world . . ."

We, being the corporate professionals, are in a pivotal role in furthering the cause of good governance amongst the Corporate India and we must be the ones to practice the governance both in letter and spirit. I would like to quote Mervyn King, the Chairman of King Commission on Corporate Governance whose golden words and ever relevant.

"Good corporate governance is about 'intellectual honesty' and not just sticking to rules and regulations. To set aside one's prejudices, one's present needs, and one's own self interest in making a decision is an intellectual exercise that takes constant practice. In short, intellectual honesty is a journey and not a destination."

I hope, we all have the intellectual honesty within us which is required to lead India toward not only Corporate Governance but good governance in general. As rightly said, "When the people fear the Government, there is tyranny but when the government fears the people, there is liberty..." and I wish this liberty would soon become the reality.

The students who have appeared for June 2012 exams are awaiting their results which are due this month. I wish you all success in the examinations.

Yours in CS fraternity,
CS. Srilatha T G

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CSMysore celebrates its 5th Anniversary!

CongratulatoNs eParivaarians!

CSMysore is an elite eParivaar of people associated with Company Secretaryship initiated on 15th August 2007 by the Mysore Chapter of the ICSI at the Cultural Capital of Karnataka - Mysore.

Like tiny drops of water make a mighty ocean, persons joining this eParivaar have made it a mighty ocean of knowledge.

Let us move together to make it mightier!

As of today – 15th August 2012, CSMysore is an eParivaar of 2319 eParivaarians!

If you have not yet joined the eParivaar, visit <https://groups.google.com/group/csmysore>

and

join today!

Activity Report – June 2012

12th All India Company Law Quiz Competition:

The Chapter level selection round Company Law Quiz Competition for 12th All India Company Law Quiz was held at the chapter premises on 15th July 2012. After the written quiz, Two students Mr. Guruprasad Bhat and Mr. Mahesh were selected for participation in regional level competition which was held in Chennai on 23rd July 2012

10th All India Moot Court Competition:

Chapter level selection round for 10th All India Moot court competition was held on 29th July 2012 and one team was selected for representing the chapter at regional level competition.



'Constructive' ambiguity



CS. Dattatri H M B Com, LLB, ACS, PGDIBL
AGM - Legal & CS, Essilor India Private Ltd, Bangalore
dattatrics@gmail.com

When employers feel that the project is very important and that legal is making a fuss, in-house counsels face tough challenge of convincing their own employers that certain clauses shall not be signed for avoiding future risks. Some times it is possible to convince. Some times not. Then the counsels would find a way.

Create Constructive Ambiguity!



The agreements are made for managing future business risks. Agreements are made to resolve ambiguities with respect to all probable future disputes and risks that might arise between the parties. Therefore, ideally, there should not be any ambiguities while drafting the agreements. Then, what can be "constructive" with respect to ambiguities?

For in-house counsels (that is how employed lawyers and Company Secretaries are called) it is quite routine to get requests for a "simple" "one page/two page" agreements. Yes, there could be simple agreements but it is not always possible. Besides, we have heard about standard agreements. Banks do that for loan agreements. If it is possible for one party to enforce his standard format on other party, the other party generally will be weaker. For the same reason, if the clauses are unilateral and unjust, it will not stand in the courts of law, even though it is signed.

If an agreement has to pass the test of legal appropriateness, both the parties shall have equal rights to demand modifications and they have to agree upon on all clauses. Under such ideal situation, each agreement will be unique. There can not be one standard format at all. Except for routine agreements, most of the agreements will undergo the test of appropriateness from both the sides.

When negotiations go tougher, the projects get stuck. In major projects, signing of the agreement itself might take months or even years together. However, business has to move. Particularly if parties are unable to find a via media and employers feels that the project is very important and that legal is making a fuss, in-house counsels face tough challenge of convincing their own employers that certain clauses shall not be signed for avoiding future risks. Some times it is possible to convince. Some times not. Then the counsels would find a way. Draft a clause in such a way

that it should be possible to interpret in the way he wants and at the same time the other counsel thinks that the interpretation is in his favour. That way he will be able to approve the agreement for signing and projects will move. Creating this kind of ambiguity in the interest of the parties is known as 'Constructive Ambiguity'.



Normally while drafting international treaties, this technique is used, so that different countries come to some conclusion and move little ahead. Henry Kissinger is said to be the creator of the term 'Constructive ambiguity'. By this term he referred to the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose. Wikipedia has recorded some of the historic ambiguities created in the international treaties. These examples are very interesting and you can open the related page by clicking [here](#).

However, creation of such ambiguity certainly requires lot of knowledge and expertise, for a simple reason that the wordings should not act against the interest of the drafting person/organisation itself. One has to be extremely careful while drafting such clauses. Because of the efflux of time parties might have totally forgotten the background of the clause. Or may be a different person would have taken up the responsibility who might never realise the way he needs to interpret the clause to his advantage. Therefore it may be a good practice to make clear note with respect to such clause, so that when the conflict really arises, concerned persons may refer to the note and take advantage of possibility of the interpretation.

OPPRESSION AND MISMANAGEMENT



CS. Monika Sharma

Company Secretary and Compliance Officer
Grameen Financial Services Private Limited, Bangalore
monikasharma_2380@yahoo.com

The management of a Company is based on the majority rule, but at the same time the interests of the minority can't be completely overlooked. If majority take decisions which are in interest of a particular group of shareholders as such and not of the company as a whole, the minority can raise voice against such actions.

Rule of Majority governing by majority and 'supremacy of majority' have been settled in very old leading case - Foss V Harbottle (1843) where court ruled favouring majority. For protecting the rights of minority, certain exceptions to the above rule are recognized and applied. These exceptions are as follows:-

1. Ultra vires acts
2. Fraud on the minority
3. Act requiring special majority
4. Wrongdoers in control
5. Individual membership rights
6. Oppression and Mismanagement

In this article, we will be dealing with the last exception in detail. The term "oppression" has not been defined under the companies Act, 1956 ("the act"). However, National Company Law Tribunal ("NCLT") considers the facts and circumstances of each case and the conduct can be said to be oppression only when it is burdensome, harsh and wrongful. Oppression involves an element of lack of probity and fair dealing to a member. The relief against oppression is available u/s 397 of the Act.

The term "mismanagement" has also not been defined. Normally, mismanagement means gross mismanagement means gross mismanagement of affairs of the company. It may include: (a) drawing of funds for personal expenses (b) gross negligence in managing the affairs (c) inaction can also be mismanagement.



Statutory protection to minority:

1. In case of different classes of shares, rights attached to shares of any class can be varied with consent of 75% majority u/s 106. This is termed as 'variation of class right'. In such case, holders holding at least 10% shares of that class who have not assented to the variation can apply u/s 107 to the NCLT for cancellation of the variation.
2. In case of reconstruction or amalgamation of the company, NCLT cannot sanction the scheme unless a report from Registrar is received that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest [proviso to section 395(1)]
3. If a takeover bid is accepted by holders of 90% of the shares, the party making the offer can acquire shares from remaining shareholders also. However, the dissenting shareholders can apply to NCLT praying that his shareholding should not be allowed to be acquired.

Who can apply to NCLT?

1. Atleast 100 members
2. Atleast 10% total number of members
3. Any member holding 10% of shareholding of the company
4. If company does not have share capital, at least 20% of the total number of members of the company
5. Central government (CG) may itself make an application or may authorise any person to make an application

However CG may authorise a lesser number of members to make the application. Shareholders even in management (i.e. Directors) can file petition to NCLT complaining that

Continued in page 7

CREATION OF CHARGES

STATUTORY PAYMENTS Vs SECURED LENDERS

Part 2



CS. K P C Rao LLB., FCMA., FCS
Practicing Company Secretary, Hyderabad
kpcrao.india@gmail.com

An important provision of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) [Sec 13 (9)] is that in case there are multiple security interests on an asset, no secured lender may take an action against such asset without the consent, in writing, of at least 75% of the secured lenders. As per the principles of statutory first charges, obviously, the government becomes a security interest holder over an asset to the extent of unpaid taxes. This is automatic, and without any need for registration of charges or any similar act of creation or perfection of security interests. The question is, if such a security interest exists, is a bank or financial institution, as secured lender, entitled to take action against an asset without consulting the government as a security interest holder? The word "secured creditor" is defined in sec 2 (zd) of the Act to mean only such persons who have extended financial facility against an asset. An unpaid Government is certainly a security interest holder, but not a secured lender. Hence, sec. 13 (9) does not seem applicable to need the consent of the government before taking of any action under sec 13 (4). However, surely enough, in light of the statutory first charge, the distribution of assets upon sale by the secured lender will have to be first towards the statutory first charge holders, and thereafter, to other secured lenders.

Illustration: Assuming the value of assets of an entity is Rs. 10 crores, and the entity has the following out standings:

- Dues to banks, holding charges over the assets: Rs. 15 crores
- Excise dues: Rs.1 crore
- Sales-tax dues Rs.1 crore
- EPF dues Rs.1 crore

As per the principles of statutory first charges, the government becomes a security interest holder over an asset to the extent of unpaid taxes.

If such a security interest exists, is a bank or financial institution, can take action against an asset without consulting the government as a security interest holder?



- Workmen's Compensation dues Rs.1 crore
- Workmen's dues Rs.3 crore

Assuming the company is not under liquidation, the order of priorities will run as follows:

1. Workmen's Compensation Dues – Rs.1 crores
2. Sales Tax Dues – Rs.1 crores
3. Dues to Banks – Rs. 8 crores

Assuming the company is under liquidation, the order of priorities will run as follows:

1. EPF dues –Rs. 1 crores
2. Workmen's Compensation Dues – Rs.1 crores
3. Sales Tax Dues – Rs.1 crores
4. Dues to Banks (pari passu with Workmen's Dues) – Rs.5.83 crores
5. Workmen's Dues (pari passu with Bank Dues) – Rs.1.17 crores

Ruling in EPF Commissioner Vs Official Liquidator

In another significant judgment (November 8, 2011) in the case of *Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited*¹, the Supreme Court while allowing the applications filed by the appellant held that in terms of Section 530(1), all revenues, taxes, cesses and rates due from the company to the Central or State Government or to a local authority, all wages or salary or any employee, in respect of the services rendered to the

¹ *Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited; (2011) 10 SCC 727*

company and due for a period not exceeding 4 months all accrued holiday remuneration etc. and all sums due to any employee from provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in priority to all other debts. The court also directed the Official Liquidator appointed by the High Court shall deposit the dues of provident fund payable by the employer within a period of 3 months.

An interesting question was resolved by the Supreme Court in this case. This sprang up a rather unusual situation where the Court was required to decide between *non obstante* clauses contained in two different legislations that ran somewhat contrary to each other.

Section 529-A of the Companies Act provides that “notwithstanding anything contained in any other provision of this Act or any other law for the time being in force”, in case of a winding up, the workmen’s dues and debts due to secured creditors shall be paid in priority to all debts.

On the other hand, section 11(2) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (EPF Act) provides that amounts due under that Act from an insolvent employer shall be deemed to be a first charge and be paid in priority to all other debts “notwithstanding anything contained in any other law for the time being in force”. The argument made by the company was that since section 529-A was introduced by an amendment to the Companies Act and was later in point of time, that should prevail. However, the court refused to accept that contention.

Of course, after the amount due from an employer under the EPF Act is paid, the other dues of the workers will be treated at par with the debts due to secured creditors and payment thereof will be regulated by the provisions contained in Section 529(1) read with Section 529(3), 529A and 530 of the Companies Act.

The Supreme Court’s reasoning was based on principles of statutory interpretation, and the court was also persuaded by the fact that the EPF Act is a welfare legislation that must be given importance.

OPPRESSION AND MISMANAGEMENT – Contd from page 5

... affairs are being conducted in an oppressive manner (KN Bhargava v. trackparts of India Ltd. (2000) 2 CLJ 413 (275) – 23 SCL 320 -104 Comp Cas 611 36 CLA 291 (CLB).

Who cannot apply to NCLT?

1. Holder of partly paid shares
2. Holder of share warrants
3. Transferee who has not lodged the shares with the company
4. Company itself can not file application
5. Worker cannot apply, but they may be heard if their interest are to be affected

Reliefs that can be claimed from NCLT:

1. Direction for proper conduct of affairs of the Company
2. Removal of some or all directors
3. Declaration that removal of certain person as director/ MD is invalid
4. Appointment of administrator or receiver till final order of NCLT
5. Revision of Company’s account recovery of funds alleged to have been misappropriated by existing management
6. An order that affairs of the company should be investigated.

Penalty provisions: Penalty provisions in respect of falsification of books, frauds, not keeping proper accounts or fraudulent conduct of business are applicable in proceeding for oppression and mismanagement (section 406).

Power of NCLT:

1. NCLT can pass interim order, upon such terms and conditions as appears just and equitable.
2. NCLT can pass order for change in Memorandum and Article of Association
3. NCLT can pass order even if oppression/ mismanagement not established, NCLT can pass appropriate orders to put an end to the act, taking into consideration the interest of company and shareholders.

Power of Civil court/ High court:

Section 10GB bars jurisdiction of civil court where NCLT has powers. Generally, court doesn’t interfere in matters of oppression and mismanagement, in view of specific power conferred on NCLT. However, in some cases, civil court can be approached. Writ power of High court remains unaffected despite power of NCLT.

Tapping Global Investors Through Depository Receipts



CS. Amar Kakaria ACS, ACA, ACWA

Owner and Director,
Fusion Advisors Private Limited, Mumbai
amar.kakaria@gmail.com

Many actively listed companies wish to make their shares accessible to investors outside their home country – more particularly to investors based in the United States. These companies can then easily focus on raising new capital abroad, diversifying their shareholder base, improving their profile with foreign investors and even using own shares to make international acquisitions.

Investing money in companies which are listed on domestic stock exchange is very simple. However, investing in a company that is listed overseas is very difficult due to variety of reasons. And hence, there is a simplified option in the form of Depository receipts (DRs).

Depository receipts (DRs) are certificates that represent an ownership interest in the ordinary shares of stock of a company, but that are marketed outside of the company's home country to increase its visibility in the world market and also access greater amount of investment in other countries. Depository Receipts mechanism is preferred for over 75 years and can be divided into 2 broad categories:

- American Depository Receipts (ADRs)
- Global Depository Receipts (GDRs)

Major difference between ADRs and GDRs lies in their structures.

American Depository Receipts

In case of American Depository Receipts, non-US shares are converted into domestic US securities which are also denominated in US dollars. ADRs enable US investors to acquire and trade non-US securities denominated in US dollars without any concerns the differing settlement time-

Investing in a company that is listed overseas is very difficult due to variety of reasons. And hence, there is a simplified option in the form of Depository receipts.

Depository Receipts mechanism is preferred for over 75 years.



table and other problems associated with overseas markets. They also provide non-US companies with easy access to the US capital markets which has the largest investor base in the world.

ADRs are created when a broker, acting on behalf of a potential ADR investor, buys domestic shares in a non-US company and places them in custody with a depository bank. The depository bank then issues US dollar-denominated receipts conveying beneficial ownership of those shares. These depository receipts are deemed by the United States Securities and Exchange Commission (SEC) to be domestic US securities and their trading and settlement is done in United States.

There are several types of ADR, each of which involves different level of disclosure of information and compliance with the regulations of the SEC that provide a mechanism which makes it easy for US investors to buy and trade existing shares.

Level I ADRs

Level I ADRs do not involve raising of capital or listing on leading US Stock Exchange. However, they provide enhanced exposure to US based investors with minimal additional reporting. These ADRs can only be traded over-the-counter.

Level II ADRs

Level II sponsored programs are initiated by non-US companies to give US investors access to their stock in the US. They do not involve capital raising, however, they can be listed on leading US Stock Exchange. A sponsored Level

II ADR must comply with the SEC's full registration and reporting requirements.

Level III ADRs

Level III sponsored ADRs are similar to Level II ADRs in that the issuer initiates the program, deals with one depositary bank, lists on one of the major US exchanges, and complies with other statutory formalities of the SEC. The major difference is that a Level III program allows the issuer to raise capital through a public offering of ADRs in the US.

Global Depositary Receipts

Global Depositary Receipts (GDRs) also work on similar principle, with trading and settlement taking place in Europe. If they are placed with qualified US buyers then trading and settlement will happen in the United States. GDRs are usually denominated in US dollars or Euro.

There are 3 types of GDRs – The Reg S GDRs, Rule 144A GDRs and the pairing type.

Reg S Type GDRs

The Reg S Type GDR is similar to ADR. It is issued to the public through a sponsor bank / brokerage. Once issued, this GDR is either listed on European Stock Exchange or remain unlisted. This type of a GDR is open for every kind

of investor except US-resident investors. Unlike ADRs, where each type of ADR determines the investors that can trade it, the Reg S type GDR can be traded from any kind of investor to different kind of investors.

Rule 144A Type GDRs

Rule 144A Type GDRs are used to raise capital but are placed exclusively with Qualified Institutional Buyers (as defined by SEC) in the United States. Due to sophisticated investor base, registration and reporting requirements are very minimal.

Pairing Type

It is a combination depositary program of Reg S type GDR and Rule 144A GDR. Often Rule 144A GDRs are placed with US investors in conjunction with a Reg S GDR offering to non-US investors.

Due to its unique structure, depositary programs are highly beneficial for investors as well as issuer companies. Domestic capital markets are not doing well due to delayed monsoon, slow growth, political uncertainty, etc. Perhaps, there can be an opportunity for growing companies to explore the possibility of using this mechanism to tap overseas investors on selective basis.

From Readers' Desk...

Every time I see the e-magazine, I get delighted. Contents are good. My immediate reaction on 101st issue, I liked the carrots, egg and coffee story and to my liking of coffee, I enjoyed coffee.

CS P. Jagannatham
Past Chairman - SIRC

The 101 edition of the news letter is excellent.

CS P Chiranjeevulu
Past Chairman, Hyderabad Chapter

Thank you for sharing. Really appreciate it!

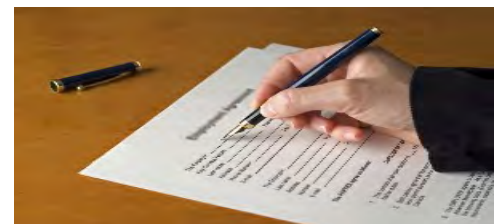
Olive W.
Corporate Secretary and Administrative Manager at
Mercatus Capital Pte Ltd, Singapore

Very Informative and moral booster edition specifically the "LIVING ROOM" article

CS Manoj Kumar Panda
KOLKATA

I found e-Magazine very interesting and have good content. Thanks to all for this nice initiative.

Amit Bhadouria
Consultant - Accenture
Singapore





LIVING ROOM

THE 99 CLUB...!

Once upon a time, there lived a King who, despite his luxurious lifestyle, was neither happy nor content. One day, the King came upon a servant who was singing happily while he worked. This fascinated the King; why was he, the Supreme Ruler of the Land, unhappy and gloomy, while a lowly servant had so much joy.

Later in the day, he sought the advice of his most trusted advisor. After hearing the King's woes and the servant's story, the advisor said, "Your Majesty, I believe that the servant has not been made part of The 99 Club."

"The 99 Club? And what exactly is that?" the King inquired. The advisor replied, "Your Majesty, to truly know what The 99 Club is, place 99 Gold coins in a bag and leave it at this servant's doorstep."

When the servant opened the bag, he let out a great shout of joy... So many gold coins! He began to count them. After several counts, he was at last convinced that there were 99 coins. He wondered, "What could've happened to that last gold coin? Surely, no one would leave 99 coins!

He looked everywhere he could, but that final coin was elusive. Finally, exhausted, he decided that he was going to have to work harder than ever to earn that gold coin and complete his collection.

From that day, the servant's life was changed. He was overworked and chastised his family for not helping him make that 100th gold coin. He stopped singing while he worked. Witnessing this drastic transformation, the King was puzzled. When he sought his advisor's help, the advisor said, "Your Majesty, the servant has now officially joined The 99 Club." He continued, "The 99 Club is a name given to those people who have enough to be happy but are never contented, because they're always yearning and striving for that extra 1 telling to themselves: "Let me get that one final thing and then I will be happy for life ."

(Visit: <http://www.helpothers.org>)





Shruthi K.

CS Professional Student, Mysore
shruthikundur@gmail.com



Taxation has been at the heart of the economy throughout history. Taxes are “a compulsory levy, imposed by a government or other tax raising body, on income, expenditure or capital assets” Every year end most of us receive newsletters that set forth various year-end tax planning ideas. Simpletaxindia.net, an ideal website, helps to understand the Indian tax policies and procedures and in tax planning.

It makes it possible for professionals, students and common man to know the tax rates for the financial year (including tax rates of past 8 years), procedure to calculate the tax on salary and other heads of income, clubbing of income, deductions that are allowed etc., It provides the detailed information on the following:

1. TDS (Rate of TDS for the FY 2012-13, Due dates, Formats of Form 16 & 16A)
2. Capital Gain (Index, Deduction summary, Section 54, 54B, 54EC & 54F Advance forfeiture etc.,)
3. House Property (House property income, Income tax on interest on housing loan, Sale of house, Setoff or carry forward of loss on sale etc.,)
4. Service Tax (Rates, Due dates for deposits, Due date for filings, List of negative services, Reverse charge, Abatement rate etc.,)

This site provides numerous articles related to Indian Taxation, posted by registered members, it enumerates the do's and don'ts a taxpayer must follow. Simpletaxindia.net enhances our knowledge about the taxes which we are paying to our government which is our pride.

IT FOR CORPORATE PROFESSIONALS

Windows 7(continued)

CS. Omkar Nagesh Gayatri,

B.Com, LLB, ACS, PGDHRM & DISM
 Bangalore

omkargayatri@gmail.com



Friends, here we have some more shortcuts for exclusively you with Shift and Control key!

Shift + Delete	Deletes the item without taking to Recycle Bin	Shift + F10	Accesses the context menu for the selected item
Shift + Tab	Cycles backward through the elements in a window or dialog box	Ctrl + E	Selects the Search box in the upper-right corner of a window
Ctrl + A	Selects all items	Ctrl + D	Deletes the selected item
Ctrl + Z	Undoes an action	Ctrl + Y	Redoes an action
Ctrl + N	Opens a new window in Windows Explorer	Ctrl + W	Closes the current window in Windows Explorer
Ctrl + Shift + N	Creates a new folder	Ctrl + Esc	Opens the Start menu
Ctrl + Shift + Esc	Opens the Windows Task Manager	Ctrl + Alt + Delete	Accesses the Windows Security screen
Ctrl + Mouse scroll wheel	Changes the icon size on the desktop or the Views setting in Windows Explorer or Zoom IN or Zoom OUT of the active screen display		

Have patience to practice. There are many more shortcuts, which can make your work very easy and fast.

Practice makes process perfect!



Compilation:
CS. Ajaḡ Madaiah, Mysore

How Standard & How Poor?

Below is an overview of how the rating agency Standard & Poor's analyzes sovereign risk as the basis for that sovereign's rating. Sovereign rating criteria address the factors that are believed to affect a sovereign government's willingness and ability to service its debt on time and in full. Analysis focuses on a sovereign's performance over past economic and political cycles, as well as on factors that suggests greater or lesser fiscal and monetary flexibility over the course of future economic cycles.

The five factors that form the foundation of S&P sovereign credit analysis are:

1. Institutional effectiveness and political risks, reflected in the political score.
2. Economic structure and growth prospects, reflected in the economic score.
3. External liquidity and international investment position, reflected in the external score.
4. Fiscal performance and flexibility, as well as debt burden, reflected in the fiscal score.
5. Monetary flexibility, reflected in the monetary score.

The three factors that are the key drivers of a sovereign's economic score are of its income levels, growth prospects, and its economic diversity and volatility.

Source: www.standardandpoors.com

Did you know?

Clarification on IEPF Rules 2012

MCA vide its Circular No. 20/2012 dated August 01, 2012 has again issued clarification w.r.t filing of eform 5 INV and the supporting excel sheet. It has been observed by the Ministry that some of the companies have filed multiple forms 5INV w.r.to Financial Year ending March 2011, whereby only one such form was required to be filed.

Therefore now, the companies, which had filed multiple forms, prior to the issue of this circular, shall have to file a single form and its supporting excel sheet again on or before August 31, 2012.

Moreover, date of filing of the form, by companies which have failed to file the form till the due date of filing the form, i.e. July 31, 2012, shall file the same on or before August 31, 2012.



Pick of the month

Board Powers

Certain powers to be exercised by Board only at meeting. (Sec 292 of Companies Act, 1956)
The Board of Directors of a Company shall exercise the following powers on behalf of the company only through resolutions passed at its meeting.
The power to make calls on shareholders in respect of money unpaid on their shares;
The power to authorize buyback; [Sec 77A(2)(b)]
The power to issue debentures;
The power to invest the funds of the company; and
The power to make loans:



Compiled by:
CS. Abhishek Bharadwaj A.B.
Bangalore



CA. Ashit Shah, Team Genicon, CS. Kasturi S.,
Mumbai Chennai Bangalore



CUSTOMS & FTP Notifications/ Circulars

It is clarified that the exemption provided under Notification No. 146/94-Cus. is wide enough to include all kind of sports requisites falling within any chapter of the Customs Tariff and therefore, exemption may not be denied to such goods merely on a technical ground or taking a narrow meaning of the term sports requisite. In view of this and since the notification covers all goods of the description specified therein and falling under any of the chapter of the first schedule, the issue of classification of imported item would not be relevant for the purpose of extending the exemption.

No. 21 /2012-Customs dated 1st August 2012

It has been clarified that since EDI system of message exchange is still not in place, verification of genuineness of duty credit scrips shall continue to be carried out prior to registration of scrips despite deletion of such requirement vide Annual Supplement 2012-13 dated June 5, 2012 from Foreign Trade Policy.

No. 17/2012-Cus dated July 5, 2012

It has been clarified that ambulance, sewage disposal truck, refuse disposal vehicle that are pre-designed structurally and pre-fitted with relevant devices and cannot be put to generalised use may be imported under Served From India Scheme subject to compliance with specified conditions.

No. 18/2012-Cus dated July 5, 2012

Existing system of physical Bank Realisation Certificate ("BRC") issuance permitted to continue till August 16, 2012. Banks must, however, transition to the e-BRC system by August 16, 2012.

DGFT Public Notice No. 08(RE-2012)/2009-14 dated July 6, 2012

Case Law

Non-Speaking order was electronically communicated to the assessee in September, 2008 and reasoned order was passed in February, 2009 by the adjudicating authority. The Calcutta High Court held that limitation for filing an appeal/ review lies from date of communication of first order of September, 2008.

AI Saif International Vs. Uol [2012 (281) ELT 72]

The Customs, Excise & Service Tax Appellate Tribunal ("the CESTAT") held that interpretation of a schedule has to be in

terms of the language used therein and not on the basis of interpretation recorded in the Ministry files on assessee's representation. *Bharat Forge Ltd. Vs. CC [2012-TIOL-795]*

Ship was confiscated by customs and thereafter sold in auction to a ship breaker. The Gujarat High Court held that vessel was sold as property of the Central Government within territory of India and not as imported goods. Therefore, no liability to pay customs duty by purchaser ship breaker arose in the case.

Chaudhary Industries Vs. Uol [2012 (281) ELT 216]

Regulatory Developments Notifications/ Circulars

The Central Government hereby amends the notification number G.S.R. 501(E), dated the 6th July, 1999 to prescribe fee in case of delays in filing applications with the Central Government under sub-section (2) of section 233B of the Companies Act.

G.S.R. 617(E) Dated 7-8-2012

The Central Government constitutes the Product or Activity Groups as given in the Annexure attached to this notification. Pursuant to this, all companies shall use the Product or Activity Groups as given in the Annexure, wherever it appears, in the Cost Audit Report and in the Compliance Report to be filed with the Central Government.

Notn No. S.O. 1747(E) Dt 7-8-2012

The Ministry of Finance has formed a committee of seven members under the chairmanship of Mr. Yogendra Garg, Commissioner Export, Mumbai to frame a model legislation of GST for the Central Government.

The Indian Express, July 3, 2012

CENVAT Notifications/ Circulars

Goods cleared against Focus Product Scheme duty credit scrip shall be exempt from duties of excise subject to certain conditions.

No. 29/2012-CE dated July 9, 2012

Goods cleared against the Focus Market Scheme duty credit scrip exempt from duties of excise subject to compliance with specified conditions.

No. 30/2012-CE dated July 9, 2012

Specified capital goods cleared against agriinfrastructure incentive scrip under the Vishesh Krishi and Gram Udyog Yojana Scheme ("the VKGUY") Scheme exempt from duties of excise subject to compliance with specified conditions.

No. 31/2012-CE dated July 9, 2012

Goods cleared against the VKGUY Scheme duty credit scrip exempt from duties of excise subject to compliance with specified conditions.

No. 32/2012-CE dated July 9, 2012

Capital goods cleared against the Status Holder Incentive Scheme duty credit scrip exempt from duties of excise subject to compliance with specified conditions.

No. 33/2012-CE dated July 9, 2012

Case Law

The Central Government inserted Rule 12CC in the Central Excise Rules, 2002 and Rule 12AA in the Cenvat Credit Rules, 2004 providing for some deterrent action/ withdrawal of certain facility. The Orissa High Court quashed these two rules since the Central Excise Act, 1944 did not vest rule making power on these aspects in the Central Government in 2009 when these two rules were framed.

Aryan Ispat & Power Ltd. Vs. UoI [2012 (281) ELT 15]

The Karnataka High Court held that there are no provisions in law to recover duty from legal heirs of an individual assessee unless they take over and continue to carry on the very same business of deceased. The High Court further held that legal heirs are not entitled to use unutilised Cenvat credit after surrender of central excise registration in case of death of proprietor of a proprietary firm.

CCE Vs. Dhiren Gandhi [2012 (281) ELT 64]

The CESTAT held that the assessee cannot be denied benefit of non-payment of central excise duty on cigarettes destroyed during moisture test in internal laboratory on the ground that no records of such destroyed quantity were maintained in the laboratory.

International Tobacco Co. Ltd. Vs. CCE [2012 (281) ELT 294]

The CESTAT held that there is no requirement that invoice number should be printed on invoice. The only requirement is that invoice should be serially numbered. Therefore, denial of Cenvat credit on the ground that invoice number was handwritten or rubber stamped is not proper.

Pepsico India Holding P Ltd Vs. CCE [2012-TIOL-787]

The Karnataka High Court held that where dutiable waste is not removed from the factory 'as such' but destroyed within the factory premises, Cenvat credit need not be reversed.

CCE Vs. Geltec Ltd. [2012 (281) ELT 170]

Service Tax

Notifications/ Circulars

The Government of India Ministry of Finance (Department of Revenue) through Notification hereby makes the following rules further to amend the Service Tax Rules, 1994. These rules may be called the Service Tax (Third Amendment) Rules, 2012. They shall come into force on the date of their publication in the Official Gazette.

No. 46/2012 - Service Tax, dt 7th August, 2012

The Government of India Ministry of Finance (Department of Revenue) vide Notification clarifies the services of provided or

agreed to be provided by a director of a company to the said company is covered under Reverse Charge.

No. 45/2012 - Service Tax dated 7th August, 2012

Transportation by Indian Railways of passengers in first class or air conditioned coach and, transport of goods are exempted from service tax till September 30, 2012.

No. 43/2012-ST dated July 2, 2012

It has been clarified that remittances from abroad are not liable to service tax even when conversion charges are levied by foreign/ Indian bank.

No. 163/ 14/2012-ST dated July 10, 2012

Case Law

The appellant a manufacturer of cotton yarn, for procuring export orders, paid commission to various agents located in different countries. No service tax was paid on the same under reverse charge. The Department levied penalties along with tax and interest. The appellant pleaded that nonpayment of taxes was due to bona fide belief that services rendered by foreign agents are not taxable within India. Tribunal held that the appellant had disclosed not all the information and therefore, penalty u/s. 78 could be imposed.

DCM Textiles Vs. CCE, Gurgaon [(2012) 26 STR 359 (Tri.-Del.)]

The appellant received goods at the factory, however, the bills of entry showed that address of their head office. Moreover, the credit was claimed after a span of one year. The Department denied the credit it was held that, the credit cannot be denied to the appellant merely on the ground that credit was not taken immediately. The tribunal further observed that not taking credit immediately affected the assessee more than the revenue.

SGS India Pvt. Ltd. Vs. CCE, Thane I [(2012) 26 STR 395 (Tri.-Mumbai), Appeal No. E/209/10/Mum, dtd. 10.03.2011]

Credit of service tax paid by the Custom House Agents and leasing and Forwarding Agents for the services rendered to the assessee, is eligible for availment of cenvat credit.

CCE, Surat Vs. M/s. Chemie Organic Chemicals (I) Pvt. Limited [Appeal No. E/257 of 2011, CESTAT Ahmedabad Bench, dtd. 16.07.2012]

VAT, Sales Tax and Entry Tax

Karnataka Value Added Tax Act, 2003 (Karnataka Act 32 of 2004), read with Section 21 of the Karnataka General Clauses Act, 1899 (Karnataka Act III of 1899) the Government of Karnataka hereby amends, with effect from the first day of August, 2012, the Notification-III No. FD 82 CSL 10, dated 31st March, 2010: published in Part IV-A of the Karnataka Gazette, Extraordinary, dated 31st March 2010, as follows, namely. In the said Notification, for the words "five per cent", the words "five and one half per cent" shall be substituted.

No FD 143 CSL 2- Dated 31st July, 2012

The Government of Uttar Pradesh enhanced rate of VAT on cigarettes and pan masala to 50% ad valorem.

No.KA.NI.-2-564/XI-9(I)/08-U.P.Act.-5-2008-Order-(78)-2012 dated June 30, 2012

FEMA & RBI

Notifications/Circulars

The RBI has been decided to continue the scheme of buyback of FCCBs by Indian Companies under the Approval route subject to certain modification in terms and conditions. The scheme will be in force upto March 31, 2013.

A. P. (DIR Series) Circular No. 1 dated July 5, 2012.

The RBI has issued the revised A-2 form for remittance of funds abroad by the residents. *A.P. (DIR Series) Cir 5 dt. 12/07/2012.*

RBI clarified that when an application filed for compounding of application suo moto without referring the matter to RBI, then the compounding process shall be initiated by the concern authorities irrespective of nature of offence and RBI will not issue any cautionary advice. *A.P. (DIR Series) Circ. 11 dt 3/07/12*

Income Tax Notifications/Circulars

Relaxation from compulsory e-filing of return of income for assessment year 2012-13 - for representative assessee of non-residents and in the case of private discretionary trusts.

No. 6/2012 dated 3rd Aug 2012

Inadmissibility of expenses incurred in providing freebies to Medical Practitioner by pharmaceutical and allied health sector Industry

No. 05/2012 - dated - 01-08-2012

Regulatory News updates

New norms for mobile towers to save wildlife from radiation

Expressing concern over the harmful effect of the electromagnetic radiation (EMR) on the wildlife, especially birds and bees, the Environment and Forest Ministry has asked the Telecommunications Department not to allow installation of new mobile towers within a one-km radius of the existing ones.

In an advisory issued on the basis of the recommendation of an expert committee on the issue, the Ministry has directed that the new towers should be constructed with utmost care and precautions 'so as not to obstruct flight path of birds, and also not to increase the combined radiation from all towers in the area'. The service providers should be provided information on standards for safe limit of EMR and these norms should be notified.

HC stays Delhi government's decision to hike court fees

The increased court fee issue saw a breakthrough when the Delhi High Court stayed the city government's decision to hike the court fees by ten-fold and asked it to resolve the impasse within two weeks after holding discussions with lawyers' bodies.

The court, however, agreed with the submissions of Nazmi Waziri, counsel for the Delhi government, that the legislative competence of the State cannot be questioned.

SC awards compensation of Rs. 1 crore to victim in a claim for medical negligence

The honorable apex court has awarded exemplary damages of Rs. 1 crore to the victim – a software engineer who suffered permanent disability (partial paralysis and other disabilities) due to medical negligence at a government hospital in the state of Andhra Pradesh. The High Court of Andhra Pradesh had awarded compensation of Rs. 15 Lakhs. However, it was increased from Rs. 15 lakhs to Rs. 1 crore by the Supreme Court.

Case Law

Gains arising from early settlement of forward foreign exchange contract has to be treated as capital gain consequently, the gains realized from early settlement should be regarded as capital gains and not income from other sources, Such capital gains are not liable to tax in India as per Article 13(4) of the India -Singapore tax treaty in favour of assessee.

- Credit Suisse (Singapore) Ltd. Versus Assistant Director of Income-tax (International Taxation)-Range 1(2) 2012 (8) TMI 284 - ITAT MUMBAI Dated: 27-07-2012

Levying penalty u/s 271(1)(c) - Held that:- The assessee had himself agreed for the amount to be assessed on the ground that the parties to whom it had offered commission did not respond to the notices - as the assessee countered the penalty proceedings on no concealment by him, the AO should have rendered a finding on the aspect of concealment - In the absence of any material to prove the concealment in the penalty order, the levy of penalty could not be sustained - the explanation must be preceded by a finding as to how and in what manner the assessee had furnished the particulars of his income and to impose penalty, element of mens rea was essential - penalty is thus liable to be deleted - in favour of assessee.

- Commissioner of Income Tax Chennai. Versus M/s. T.M. Abdul Azeez & Co. 2012 (8) TMI 279 - MADRAS HIGH COURT Dated: 19-07-2012





Compilation by:
CS. Chakri Hegde,

Company Secretary,
Synova Innovative Technologies Pvt Ltd,
Bangalore
chakrih@synovaindia.com



Russia may sign PTA or FTA with Pakistan

The Russian Federation, which ratified its accession to World Trade Organization (WTO) recently, may also agree to sign a Preferential Trade Agreement (PTA) or a Free Trade Agreement (FTA) with Pakistan. Russia has previously been reluctant to sign agreements such as PTA and FTA with Pakistan, linking the issue with its accessions to WTO, despite a proposal by Islamabad.

India escalates U.S. steel duties dispute at WTO

India has asked the World Trade Organization to set up a panel to adjudicate on its dispute with the United States over U.S. duties on some imports of Indian steel products, the WTO said on Friday.

India complained in April that Washington had wrongly slapped punitive tariffs, so-called countervailing duties, on certain hot rolled carbon steel flat products from India.

Countries impose countervailing duties when they believe their manufacturers are suffering because of competition from unfairly subsidised imports. In its complaint India challenged countervailing duties going back to April 2001, as well as the United States Tariff Act of 1930 and the U.S. Code of Federal Regulations, which it said were inconsistent with WTO rules.

India & Indonesia sign the revised DTAA

The Government of India signed a revised Double Taxation Avoidance Agreement (DTAA) with the Government of the Republic of Indonesia for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income.

The revised DTAA gives taxation rights in respect of capital gains on alienation of shares of a company to the source State. The Agreement further provides for rationalisation of the tax rates on dividend income, royalties and Fees for Technical Services in the source State up to 10% threshold limit.

The revised DTAA will provide tax stability to the residents of India and Indonesia and facilitate mutual economic cooperation as well as stimulate the flow of investment, technology and services between India and Indonesia.

WTO establishes panel to settle rare earths dispute

The World Trade Organization (WTO) has established a panel to consider China's exports of rare earths on the complaints of the US, the European Union (EU) and Japan. The US, the EU and Japan brought similar complaints to the WTO, claiming that China has put up improper export restrictions of various raw materials, including rare earths. Formal consultations were held afterwards under the WTO dispute settlement framework, but failed.

U.S. wins WTO case over China bank card monopoly

USA won a major victory in an election-year dispute against China when a WTO ruling found China had discriminated against U.S. bank card suppliers in favour of a state-owned enterprise that enjoys an illegal monopoly. The decision by a World Trade Organization dispute panel said Beijing was breaking WTO rules by requiring all yuan-denominated payment cards issued in China to work with the network belonging to China Union Pay (CUP), as well as requiring every merchant and ATM to accept CUP's cards.

India begins probe into alleged dumping of chemical from China

The government of India has initiated an investigation into alleged dumping of a chemical, mainly used in explosives, by China to protect domestic players from cheaper imports.

The Commerce Ministry's designated authority, the Directorate General of Anti-Dumping and Allied Duties (DGAD), has started the probe into alleged dumping of 'Sodium Perchlorate' from the neighbouring country.

The DGAD considers that it has sufficient evidence of dumping of the product from China "to justify initiation of an anti-dumping investigation. The main function of sodium perchlorate is to manufacture explosives for mining.

