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INDIAN LEGAL AND BUSINESS UPDATE

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1. CBSDT notifies the new valuation rules for taxing perks.

The Finance Act, 2009 abolished the Fringe Benefit Tax payable by employers on fringe benefits provided to employees, and restored the taxation of these benefits as perquisites at the hands of employees. The Central Board of Direct Taxes has now notified the new valuation rules for taxing perquisites, retrospectively applicable from April 1, 2009. The rules are almost a replica of the rules that prevailed prior to the FBT regime, with only minor modifications. Benefits provided by an employer such as a chauffeur-driven company car, club membership fees, personal traveling expenses, food and beverages, employee stock options, gift vouchers, etc. would now fall within the personal tax ambit.

2. Supreme Court clears way for Company Law Tribunal.

In a landmark judgment, a five-judge constitution bench of the Supreme Court has upheld the legality of the Companies (Second Amendment) Act, 2002, providing for the establishment of the National Company Law Tribunal and National Company Law Appellate Tribunal to deal exclusively with the company cases for their speedy disposal.

Barring the judicial review power under Articles 226 and 227 of the Constitution, almost all jurisdictions exercised by the High Courts with regard to company matters would now be transferred to the proposed Tribunal and the Appellate Tribunal. All company-related matters pending with the Company Law Board, and the Board for Industrial and Financial Reconstruction (BIFR) will also be transferred to the NCLT and the NCLAT.The apex court, however, did not approve of the practice of filling the post of judicial members in tribunals with bureaucrats saying adjudication of these matters needed judicial bent of mind. It said, bureaucrats could at best be made technical members of the tribunals and all appointments to the post of presiding officers has to be made in consultation with a committee headed by Chief Justice of India or his nominee and comprising a Judge of the Supreme Court or the High Court, Secretaries in the ministries of company affairs and law and justice. The apex court said, since the matters from the High Courts too would be transferred to NCLT and NCLAT, the presiding officers have to be of the rank of the High Court Judges or persons meeting the qualification prescribed for High Court Judges.

3. Supreme Court Rules narco-analysis, lie detector test, brain mapping illegal.

The Supreme Court has held that narco analysis, polygraph and brain mapping tests on an accused are illegal. The court, however, permitted use of such techniques in criminal cases with consent

and with some safeguards "*We hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty",* observed the Supreme Court. The bench further said, *"Our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (the narco analysis technique, polygraph examination and BEAP test) come within the scope of testimonial compulsion, thereby attracting the protective shield of Article 20 (3)".* The court rejected the plea of various state governments which had said that administering these techniques on the accused does not cause any bodily harm and that the extracted information will be used only for strengthening investigation.*"Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the right against self incrimination"* the court said in its elaborate 251-page judgement. *"However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place"* the court .

4. Supreme Court decides the Ambani brothers legal dispute.

The Supreme Court today ruled in favour of Mukesh Ambani's Reliance Industries Limited (RIL) in a gas pricing dispute with Reliance Natural Resources Ltd (RNRL), controlled by his estranged younger brother, Anil Ambani. While rejecting RNRL's plea of cheaper gas from RIL operated Krishna Godavari basin's D6 field (KG-D6) off the east coast, the apex court directed both the brothers to renegotiate the gas supply master agreement (GSMA) within six weeks. The court also struck down a Bombay High Court order of June 2009 which had upheld a family memorandum of understanding (MoU) between the two brothers, on the basis of which Anil Ambani was seeking cheaper gas. The Supreme Court said an MoU between family members was "not legally binding" and the government had the sovereign right on fixing the price of the country's resources.

5. FDI in multi-brand retail set to get 100 percent backing.

The commerce and industry ministry is likely to propose 100 percent foreign direct investment (FDI) in multi-brand retail, opening the doors to the likes of Wal-Mart and Tesco, but will suggest stiff local sourcing requirements and mandatory investments in backward linkages."We are preparing the paper that will be placed for public debate in some time," a senior official of the department of industrial policy and promotion (Dipp), the nodal body for foreign investment policy, told ET.Though the earlier view within the department was to keep the FDI limit at 51%, same as in single-brand retail, it has veered around to keeping it much higher and even pegging it at 100 percent to have an intense debate on the subject.A final decision on the proposed cap will be taken after deliberations with the consumer affairs ministry, the nodal department for retail.Interestingly, in another paper on FDI in defence, the department has proposed foreign investment up to 74 percent The paper on retail will be the second in a set of six discussion papers proposed to be put out by Dipp.Mandatory domestic procurement will ensure improved returns for farmers while strong back-end linkages will contribute to the development of food processing and cold chains in the country.

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6. ADR, GDR holders may get to vote.

The Securities & Exchange Board of India (SEBI) has recommended a change in current rules to allow holders of American Depository Receipts (ADRs) or Global Depository Receipts (GDRs) issued by Indian corporates to exercise their voting rights, raising the possibility of increased shareholder activism in future.

Depository receipts, or DRs, are securities issued to overseas investors by Indian companies. In September 2009, the capital market regulator had brought holders of such securities under the takeover code. Investors or holders of ADRs/GDRs are entitled to vote on the shares underlying or representing the receipts, but their rights are restricted by the clauses in the 'terms of issue' or agreements between the holders of these instruments and the issuers. In reality, their voting rights are as good as having none.The regulator now wants to prevent Indian firms issuing ADRs/GDRs from incorporating provisions which curtail the voting rights of depository receipt holders and which empower the management to exercise voting rights on their behalf. The finance ministry and the Reserve Bank of India will need to amend the rules to bring into force the proposed changes. SEBI's proposal, which was tabled at the last board meeting and formed part of the agenda notes, is on the lines of other regulators such as the US SEC, which has a similar provision. The regulator analysed the overseas offerings of some companies where the depository holders are entitled to exercise their right to vote and did provide instructions to the custodian bank.

7. New FDI norms for Indian Firms likely.

The government is planning to ask companies with less than 50 per cent foreign equity to seek approval of the Foreign Investment Promotion Board (FIPB) to make any downstream investment. Key stakeholders in the country's FDI regime have agreed on a proposal to route all investments by such companies through FIPB into sectors where caps on FDI are in place or where they are not on automatic route.This would result in significant dilution of a series of Press Notes issued by the Ministry of Commerce and Industry last year, which redefined the country's FDI policy. Press Notes 2 to 4 had deemed firms that had less than 50 per cent foreign ownership and where the control was in Indian hands as 'Indian' companies. Such companies were permitted to make downstream investments even where there were sectoral caps on FDI, without seeking clearance from FIPB. The notes defined "control" as the power to appoint majority of the directors on the company's board.This policy, however, came under sharp criticism from the Reserve Bank of India and some departments in the finance ministry as it allowed foreign companies to make investments through their Indian units into sectors where FDI was restricted, as in multi-brand retail where FDI is banned.

These issues came up for a debate in a meeting last month between FIPB, RBI and the departments of legal affairs, financial services, economic affairs, and industrial policy and promotion. The meeting, which took place following a directive from Finance Minister Pranab Mukherjee, reached a consensus to impose checks on downstream investments by companies with less than 50 per cent foreign equity and which were under Indian control.This means that such companies would now have to approach FIPB for clearance if they wished to make an investment in, say, defence, a

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sector where foreign investment cannot be more than 26 per cent. They, however, can make downstream investment, without FIPB clearance in areas where 100 per cent FDI is on the automatic approval route.

8. Foreign education bill tabled in Parliament.

The bill allowing foreign education institutions to set up campus in the country was introduced in the lower house of Indian Parliament (Lok Sabha). The government also introduced three other bills – proposing to set up a national education tribunal, having a legal frame work to deal with malpractices by education institutions and mandatory accreditation for all institutions – relating to higher education. All four bills have been referred to the parliamentary standing committee. The proposed legislation prescribes a time bound format for granting approval to foreign educational institutions to set up campuses in India. These campuses would be registered with UGC or any other regulatory body, which will scrutinize proposals. Keeping in mind the country's priorities, the regulatory body will advice the government on whether to allow the institute to operate in the country. To set up a campus in India, the foreign university will have to deposit Rs. 50 crore (USD 10 million) as corpus fund. It will not be allowed to repatriate surplus generated from educational activities that the foreign institute undertakes in India. A maximum of 75 percent of its income can be spent on developmental activities while the remaining 25 percent will have to be deposited in the corpus.

9. Large Companies may get to list with 10 percent public holdings.

The finance ministry plans to exempt large unlisted companies from the proposed 25 percent minimum public holding norm to ensure that it does not discourage them from going public. Large companies could be allowed to list with a 10 percent offer to the public, but will have to raise public holding to at least 25 percent over a prescribed period. A relaxation in listing norms will benefit public sector companies that are expected to tap the market. The government is planning a slew of listing this year as part of its efforts to raise Rs. 40,000 crore (USD 9 billion) from sale of its stake in public sector firms. The minimum public holding rule, expected to be notified soon says all listed companies must achieve at least 25 percent public holding over a prescribed period and continue to maintain that limit for continuous listing. Even now, companies are required to offer at least 25 percent shares to public at the time of an IPO, but some relaxations have been provided to companies in sectors such as telecom, software, media and infrastructure. This is used by many companies to skirt the minimum requirements.

10. SEBI seeks disclosure from credit rating agencies.

The Securities and Exchange Board of India (SEBI) today asked credit rating agencies to disclose the fees they charge companies for assessing their debt profile and the default rate on their previous ratings. The role of rating agencies had come under the scanner during the global financial crisis, as many companies and their issues collapsed despite high ratings. SEBI said the agencies would have to comply with the guidelines by June 30 and make mandatory disclosures at least twice in a year. In a circular issued by SEBI, the market regulator also asked the rating agencies to recognize default at the first instance of delay in paying interest or principal on the

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rated debt instrument. In addition, the agencies have been asked to ensure their analysts do not participate in any marketing and business development, including negotiations of fees with the issuer whose securities they are rating. Also, employees involved in the rating process and their dependents should not own shares of the issuer. The new guidelines ask the credit rating agencies to maintain records of the important factors underlying the credit rating and a summary of discussions with all the stakeholders involved, as well as decisions of the rating committee, including voting details and notes of dissent. The new guidelines require the credit rating agencies to disclose their shareholding patterns as well.

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