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Comments on Companies Ordinance, 2016

by
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The companies' law is the primary and mother law for the businesses to be run under the corporate sector. Other laws, including banking laws etc rely on this primary law with respect to corporate regulations.

1984 Ordinance was introduced to repeal the then operative Companies Act, 1913. There had been substantial developments in the intervening period that required complete revamping of the corporate law in 1984. Same rationale can be applied for the introduction of 2016 Ordinance; however the primary analysis of the 2016 Ordinance reveals that, except for certain sections identified in the following paragraphs, amendments are in general operational and procedural in nature.

The law has been introduced by way of an Ordinance. Under the Constitution of the Islamic Republic of Pakistan, this law will have to be passed both by the Lower and Upper Houses of the Parliament within a stipulated time. It is a preferred option that substantive legislation really affecting all segments of the society are not introduced by way of Ordinances. This process in the present situation will be followed as and when the Ordinance is placed before the respective houses; however, the effect of substantive changes in the intervening period (from promulgation of 2016 Ordinance ie November 11, 2016 to the effective date of Act of Parliament), if not approved in the same form by the Parliament, shall have to be deliberated.

The financial developments over the years led to a movement for improvements in Corporate Governance. This is a commendable approach. However, all the steps to be undertaken in this field have to take into account the respective stage of corporate structure in that country and latitude to be provided to the owners of businesses in running their affairs. The balance between the corporate regulation and business decisions, in our view, is directly linked with the level of economic growth in the society. There cannot be any universal principle on this subject. The present statute is rightly emphasising on improvement in the regulations; however, the other side of the picture is also required to be kept in mind as for Pakistan, the wealth and employment creation by the private sector is an essential and indispensable economic requirement. We hope that this aspect will be kept in mind whilst debating the subject in the Parliament.

Company incorporation

1. Simplified Memorandum and concept of principal line of business

Concept of principal line of business has been introduced, which is defined as the business in which substantial assets of the company are

held or from which substantial revenue is earned by a company, whichever is higher.

Companies are allowed to carry on any lawful business or activity by mentioning only the principal line of business in the object clause of their memorandum which shall commensurate with the name of the Company.

In case of memorandum of association of existing companies, object stated at serial number 1 of the object clause is to be considered as the principal line of business of those companies. If the object stated at serial number 1 of the object clause is not the principal line of business of a company, intimation of the same to the registrar is required along with a revised set of memorandum indicating its principal line of business activity at serial number 1 of the object clause within a time period to be specified.

The principal line of business can be changed by altering the memorandum without requiring confirmation by the Commission.

2. Payment of initial subscription money

Initial subscription money in respect of shares subscribed by the sponsors as mentioned in the memorandum is now required to be paid to the company in cash within thirty (30) days of incorporation with confirmation to this effect by the auditor of the company.

3. Negative list regarding name of a company

A negative list has been added regarding the name that a company can be registered with. The Commission has also been empowered to add to the list and having finality of decision in this respect.

4. Clarification of certain concepts

Certain concepts introduced in the corporate law over the period (eg single member company etc) which were introduced through small changes in the provisions existing at that time, have now been enshrined and harmonised with the other provisions of the corporate law.

Similarly, procedural matters in respect of conversions of companies from one form to the other have also been clarified and simplified. For example, requirement of preparing and submitting statement in lieu of prospectus for conversion of a private company to a public company etc have been done away with.

5. Restriction on layers of holding and subsidiary companies

A concept of layers of companies (holding and subsidiary relationship) has now been introduced and the Commission has been empowered to notify the maximum number of such layers of subsidiaries in respect of a class or classes of holding companies.

Use of technology

1. Enabling provisions

Many enabling provisions have been introduced for the use of technology. Some of these are:

i- Service of documents / notices to the members, registrar and the Commission through electronic mean

ii- E-voting and postal balloting

iii- Enabling provision empowering the Commission to notify mandatory on-line filing. Concept of licensed e-intermediaries where companies do not have requisite IT Infrastructure

iv- Delivery of notices and documents through electronic mail

v- Dematerialised form of shares

vi- Service of notices through email

vii- In certain cases, the electronic copies of the record to be taken to be valid evidence

Such concepts shall be placed by the companies in their articles of association for application.

Jurisdiction of court under the Ordinance

1. Disposal of cases in prescribed time

The (High) Court having jurisdiction over the matter has now been required to decide the case within a period of one hundred and twenty (120) days from the date of presentation of the case and for this purpose the Court may, if it is in the interest of justice, conduct the proceedings on a day to day basis and if the Court deems fit, it may impose costs which may extend to Rupees one hundred thousand per day or such higher amount as the Court may determine against any party to the proceeding causing the delay.

2. Concept of 'Registrar of Company Bench'

The concept of registrar of company bench has been introduced to perform functions assigned to it under this Ordinance including all ministerial and administrative business of the company bench.

The registrar has also been empowered, if referred by the Court, for recording of cross examination of the deponent.

The Registrar of the Company Bench shall have all the powers of the Civil Court under the Code of Civil Procedure, 1908 for the purposes of execution of service and summoning of deponents and conducting cross examination in accordance with the directions of the Court.

3. Personal appearance only in exceptional circumstances

The Court is to treat affidavits, counter affidavits and other documents filed by the parties to the proceedings as evidence and decide the matter on the basis of the documents and affidavits placed before the Court, in a summary manner and pass final orders within the time stipulated.

In exceptional circumstances where the Court is of the view that any issue of facts requires cross examination, the Court may order attendance of the relevant deponent or deponents for the purposes of cross examination by such opposing party or parties.

4. Qanun-e-Shahadat and Code of Civil Procedure not to apply

The provisions of the Qanun-e-Shahadat (Order) 1984 and the Code of Civil Procedure, 1908 shall not apply to the proceedings except to such extent as the Court may determine in its discretion.

Investigation and powers of the Commission

1. Empowerment of the Commission

With respect to the seizure of documents by the registrar, the power of magistrate or court for such authorisation has been given to the Commission. In addition, the scope of the items to be seized has been extended.

2. Serious Fraud's Investigation

Concept of Serious Fraud's Investigation has been introduced. A Serious Fraud is to be one as specified in the Sixth Schedule (False statement, falsification, forgery, fraud and deception).

In cases of Serious Fraud where there is a matter of public importance or it is in the interest of public at large, the Commission has been empowered to request the concerned Minister in Charge to form a Joint Investigation Team (JIT).

Issue of shares

1. Earmarking from further issue of capital for Employee Stock Option Scheme

Enabling provisions have been created to earmark percentage of further issue of a public company for its employees under 'Employees Stock Option Scheme'. The Commission has been empowered to prescribe its procedure and terms and conditions.

The employee stock option schemes has been defined and now shares of the holding company or the subsidiary companies have been made eligible to form part of the Employee Stock Option Scheme.

2. Government's power to convert its loan to a public sector company into shares

In case of public sector companies who have obtained loan from a Government, the Government has been given overriding power, where it considers it necessary in the public interest so to do, to direct that such loan or any part thereof be converted into shares in that company, on such terms and conditions as appear to the Government to be just and reasonable in the circumstances of the case, even if the terms of such loan do not include the option for such conversion. In such circumstances, the other provisions of further issue shall not apply.

A public sector company has been defined to mean a company which is directly or indirectly controlled, beneficially owned or not less than fifty-one percent (51%) of the voting securities or voting power of which are held by the Government or any agency of the Government or a statutory body, or in respect of which the Government or any agency of the Government or a statutory body, has otherwise power to elect, nominate

or appoint majority of its directors and includes a public sector association not for profit.

3. Issue of share at discount

Approval of Commission for issue of shares at discount in case of listed companies where discount is upto 10% of face value and 90 days' closing volume weighted price remained below the proposed issue price has been done away with.

4. Application to court against issuance of shares for inadequate consideration

An enabling provision has been made for a director, creditor or member of a company to apply to the Court for a declaration that shares of the company have been allotted for inadequate consideration.

Transfer/Transmission of shares

1. Right of first refusal in case of private companies

In case of private companies, mandatory requirement on the seller of shares has been introduced to first offer these to the existing members in proportion of their shareholding through the board of directors of the company. The pricing of the offer shall be subject to the rules to be formulated by the commission in this respect.

The seller shall only be able to sell to a third person if, and to the extent, the existing members do not exercise their right of first refusal.

2. Nominee (at death of a member) to be trustee for the legal heirs

In the past, a member could nominate a person in whose name shares were to be transferred on the death of the member.

It has now been required that such nominee in whose name shares shall be transferred at death of the member shall be trustee of these shares as to facilitate the transfer of shares to the legal heirs of the deceased in accordance with the applicable personal law.

Also, if the deceased was a director of the company (in case of unlisted companies), the nominee acquiring the shares as trustee shall act as director of the company to protect the interest of the legal heirs.

3. Approval of transfer of shares by licensed agents

The Commission has been empowered to notify the companies in which, before making any application for registration of the transfer of shares to the board, the transferor and the transferee shall appear before the agent licensed by the Commission.

Directors and the board

1. Appointment and removal

-- Certain conditions previously brought through the Code of Corporate Governance (CCG) have been enshrined in the Ordinance.

-- Instead of 20%, members representing at least 10% of voting power are now entitled to apply to the Court for declaring elections of directors invalid.

-- The 1984 Ordinance provided a substantial acquirer in a 'listed' company to apply to the Commission to hold fresh elections of directors. This facility appears to have been taken away in the 2016 Ordinance and is now available only in case of non-listed company to a member with requisite holding to be elected a director.

-- The commission has been given right to remove a director of a public interest company by disqualifying him for upto a period of 5 years in cases of fraudulent activities, insider trading and other specified offences and such directors shall be personally liable for all debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company or was acting on instructions given by him respectively.

2. Manner of selection of independent directors

It is made mandatory that an independent director under any law, rules, regulations or code shall be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, maintained by any institute, body or association, as may be notified by the Commission, having expertise in creation and maintenance of such data bank and post on their website for the use by the company making the appointment of such directors.

3. Action against independent and nonexecutive directors

It has now been provided that action against independent and non-executive directors can only be taken in respect of such acts of omission or commission by a listed company or a public sector company which had occurred with his knowledge, attributable through board processes, and with his consent or connivance or where he had not acted diligently.

For this, non-executive director has been defined to mean a person on the board of the company who:

-- is not from among the executive management team and may or may not be independent

-- is expected to lend an outside viewpoint to the board of a company

-- does not undertake to devote his whole working time to the company and not involve in managing the affairs of the company

-- is not a beneficial owner of the company or any of its associated companies or undertakings

-- does not draw any remuneration from the company except the meeting fee

4. Relaxation of conditions for loan to Directors

The restriction on giving loan by a public company (or a subsidiary of a public company) to:

-- any firm in which any such director or a relative of a director is a partner,

-- any private company of which any such director is a director or member,

-- any body corporate at a general meeting of which not less than twenty five per cent of the total voting power may be exercised or controlled by any such director or his relative, or by two or more such directors together or by their relatives, and

-- any body corporate, the directors or chief executive whereof are or is accustomed to act in accordance with the directions or instructions of the chief executive, or of any director or directors, of the lending company has been done away with.

Loan to, or a guarantee or security in respect of, a director of the company or of its holding company or any of his relatives can now also be provided by public companies (other than listed) with a resolution of the members of the company, and in case of listed companies with a resolution of the members of the company and sanction of the Commission.

5. Proceedings at directors' meetings

-- Assignment of office of directorship previously allowed under authority of a special resolution has been prohibited.

-- Time for providing minutes of a meeting to directors has been reduced from 14 days to 7 days and the minutes are now to be maintained for a period of twenty (20) years in physical form and permanently in electronic form.

-- Concept of resolution by circularisation has been made part of the Ordinance. Such resolution will be considered valid if signed by all directors or the committee of directors.

-- Restriction on the board to sell an Undertaking or a Sizeable Part thereof only under the authority of a general meeting in case of public companies or subsidiaries of public companies has been extended to all companies. Another addition to such restriction is sale or disposal of a subsidiary. However, the general meeting can authorise the board in this respect, and the resolution passed has been given an execution time of one (1) year.

Also, terms 'Undertaking' and 'Sizeable part' in terms of restricting board's power of disposal of assets have been defined.

'Undertaking' is to mean one in which the investment of the company exceeds twenty percent (20%) of its net worth as per the audited financial statements of the preceding financial year or one which generated twenty percent (20%) of the total income of the company during the previous financial year.

'Sizeable' in any financial year is to mean twenty five percent (25%) or more of the value of the assets in that class as per the audited financial statements of the preceding financial year.

6. Addition to the duties of directors

Some expressive additions have been made in the duties of the directors being:

-- To act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees the shareholders the community and for the protection of environment.

-- To discharge his duties with due and reasonable care, skill and diligence and to exercise independent judgement.

-- Not to involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

Related party transactions

1. Manner of conducting related party transactions

All transactions by a company with a related party (other than in the ordinary course of business) in respect of the following, are to be in line with a policy approved by the board, and conditions to be specified by the Commission:

-- sale, purchase or supply of any goods or materials;

-- selling or otherwise disposing of, or buying, property of any kind;

-- leasing of property of any kind;

-- availing or rendering of any services;

-- appointment of any agent for purchase or sale of goods, materials, services or property; and

-- such related party's appointment to any office or place of profit in the company, its subsidiary company or associated company.

In case of the majority of directors to be interested in the transaction, the matter is to be placed before the general meeting for approval as special resolution.

Related party has been defined to include:

-- a director or his relative;

-- a key managerial personnel or his relative;

-- a firm, in which a director, manager or his relative is a partner;

-- a private company in which a director or manager is a member or director;

-- a public company in which a director or manager is a director or holds along with his relatives, any shares of its paid up share capital;

-- any body corporate whose board chief executive or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

-- any person on whose advice, directions or instructions a director or manager is accustomed to act;

-- any holding, subsidiary or associated company; and

-- such other person as may be specified by the Commission.

(Relative for this purpose means spouse, siblings and lineal ascendants and descendants of a person).

Office of profit has been defined to mean any office:

i- where such office is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise

ii- where such office is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise Unclaimed shares, dividends etc.

1. Unclaimed shares, modarba certificates and dividend to vest with Federal Government

An overriding provision has been introduced whereby where shares of a company or modaraba certificates of a modaraba have been issued, or where dividend has been declared by a company or modaraba which remain unclaimed or unpaid for a period of three years from the date it is due and payable, or where any other instrument or amount which remain unclaimed or unpaid, having such nature and for such period as may be specified by the Commission; this has to be deposited, after following a process of two (2) notices, to the credit of Federal Government and deposited with the State Bank of Pakistan or National Bank of Pakistan in an account to be called 'Companies Unclaimed Instruments and Dividend and Insurance Benefits and Investors Education Account' (which shall be deemed to be part of public accounts) where it is in the form of monetary amount, and with the Commission where it is in the form of shares or modarba certificate.

The Commission shall sell these shares or modarba certificates and deposit the money to the above named account.

There is procedure described for claiming such principal amount by the claimant from the Commission.

Companies are required to preserve and continue to preserve all original record pertaining to the deposited unclaimed or unpaid amount and the shares or modaraba certificates or other instrument and provide copies of the relevant record to the Commission until it is informed by the Commission in writing that they need not to be preserved any longer.

2. Establishment of Investor Education and Awareness Fund

A fund with the name of 'Establishment of Investor Education and Awareness Fund' has been created for objects as described in the name.

Some of the moneys credited to this account shall be the earnings from the Companies Unclaimed Instruments and Dividend and Insurance

Benefits, as mentioned in (1) and the left over funds at winding up of a company licensed to act with non- for-profit objects, which are not given to another company having similar objects.

Dividends

1. Dividend in specie

A specific mention as to dividend in kind has been added as a mode of payment of dividend.

However, an explanation to the same has been provided that restricts such dividend in kind only to be in the form of shares of a listed company.

Jurisdiction over schemes of arrangements

1. Power of court given to the Commission

All the powers and jurisdiction over compromises, arrangements and reconstruction, including over the schemes of arrangements, has been taken over from the respective Honourable High Courts and given to the Commission.

It has been an established principle that this jurisdiction was exercised by the Courts as a separate jurisdiction where other matters of corporate law did not apply.

Also, the jurisdiction of court in this respect also interacted with its jurisdictions under other laws over which the Commission does not have jurisdiction.

In comparative legal frameworks, this jurisdiction is exercised by judicial courts / tribunals which are totally independent of the regulator.

Further, invariably schemes of arrangements require reduction of share capital where over which the jurisdiction still rests with the court.

2. Boards of directors empowered for amalgamation in certain cases

Board of directors have been given the jurisdiction for amalgamation of following without any regulatory / court approval:

- Wholly owned subsidiaries of a holding company

- wholly owned subsidiary(ies) into its holding company

New concepts

1. Registered valuers

A regime has been brought in whereunder any valuation required to be done under the Ordinance shall be required to be done by a registered valuer.

Commission has been empowered to specify the registration criteria including qualification, experience and the terms and conditions.

2. Inactive companies

A company, other than a listed company, that (i) has been formed for a future project or to hold an asset or intellectual property and that has no significant accounting transaction, or (ii) has not been carrying on any business or operation, or that has not made any significant accounting

transaction during the last two financial years; can now make an application to the registrar for obtaining the status of an 'inactive company'.

An inactive company shall be required to have lesser filings and procedural requirements, to be prescribed by the Commission.

3. Easy exit of defunct companies

The easy exit procedures, under easy exit schemes earlier, have now been incorporated in the law.

4. Certificate of Shariah Compliance by the Commission

Commission has been empowered to certify a company or a security to be 'Shariah Compliant' conducting its business or usinf proceeds of the security according to the principles of Shariah and for Shariah permissible business.

Unless a certificate in this respect is obtained, no company or security shall be called 'Shariah Compliant'.

Significant new and specific disclosures have been introduced for Shariah Compliant Companies listed on Islamic index under the new 4th Schedule.

5. Free Zone Company

A company incorporated for the purpose of carrying on business in the export processing zone or an area notified as Free Zone shall be eligible to such exemptions from the requirements of this Ordinance as maybe notified.

The disclosure of information maintained by the registrar regarding promoters, shareholders and directors of the Free Zone Company who are foreign nationals shall be restricted by the Commission for the protection of foreign investors and to secure foreign investment.

The concerned Minister-in-Charge of the Federal Government has been empowered to exempt Free Zone Companies from any provisions which relate to the legislative competence of the Parliament.

6. Acceptance of advances by real estate company

A company shall not engage in the business of real estate project unless its principal line of business is development of real estate projects. It cannot undertake projects until it has obtained requisite no objection certificates from relevant authorities to the satisfaction of the Commission. The money received shall be kept in an escrow to be used for the specific project, not to be used by the general creditors of the company.

Minister-in-Charge of the Federal Government has been empowered to exempt such Companies from any provisions which relate to the legislative competence of the Parliament.

7. Agriculture promotion companies

A concept of establishing Agriculture Promotion Company by a person, having its principle line of business related to produce for agriculture promotion or managing produce as collateral or engaged in any activity connected with or related to any Produce or other related activities, has been introduced. Such company shall be formed in the manner and subject to terms and conditions as maybe specified.

Such a company shall deal primarily with the produce of its members.

Minister-in-Charge of the Federal Government has been empowered to exempt such Companies from any provisions which relate to the legislative competence of the Parliament.

8. Prevention of offences relating to fraud, money laundering and terrorist financing

A duty has been imposed on every officer of a company shall endeavour to prevent the commission of any fraud, offences of money laundering including predicated offences as provided in the Anti-Money Laundering Act, 2010 with respect to affairs of the company and shall take adequate measures for the purpose.

A person failing to comply with this duty shall be liable to punishment of imprisonment for a term which may extend to three years and with fine which may extend to one hundred million rupees unless such officer has taken all reasonable measures available under the applicable laws within his capacity to prevent commission of such offence.

9. Security clearance of shareholders and directors

The Commission has been empowered to require the security clearance of any shareholder or director or other office bearer of a company from any local and foreign agency in such manner as may be deemed appropriate.

The consequences of failing such a clearance, however, are not provided.

10. Offences to be cognisable only be the Commission

All offenses in which punishment of imprisonment is provided under this Ordinance (except few as detailed in the 8th schedule) have been made cognisable by the Commission only, to be proceeded in accordance with section 38 of the Securities and Exchange Commission of Pakistan Act, 1997 and this Ordinance; and nothing contained in the Code of Criminal Procedure, 1898 or any other law shall apply in this case.

11. Companies' Global Register of Beneficial Ownership

Every substantial shareholder or officer of a company, having ten percent (10%) or more shares in a foreign company or body corporate has been required to report to the company regarding his beneficial ownership or any other percentage or interest as may be notified by the Commission.

The company has been required to submit all the aforesaid information received by it during the year to the registrar along with the annual return.

The above information is required to be reported to the registrar through a special return on a specified form within sixty (60) days from the commencement of this Ordinance.

The Commission shall keep record of the information in a Companies' Global Register of Beneficial Ownership.

Substantial shareholder has been defined to mean a person who has an interest in shares of a company:

- the nominal value of which is equal to or more than ten per cent of the issued share capital of the company; or

- which enables the person to exercise or control the exercise of ten per cent or more of the voting power at a general meeting of the company.

Beneficial ownership of shareholders or officer of a company has been defined to mean ownership of securities beneficially owned, held or controlled by any officer or substantial shareholder directly or indirectly, either by:

- him or her;

- the wife or husband of an officer of a company, not being herself or himself an officer of the company;

- the minor son or daughter of an officer where 'son' includes step-son and 'daughter' includes step-daughter; and 'minor' means a person under the age of eighteen years;

- in case of a company, where such officer or substantial shareholder is a shareholder, but to the extent of his proportionate shareholding in the company:

Provided that 'control' in relation to securities means the power to exercise a controlling influence over the voting power attached thereto.

Provided further that in case the substantial shareholder is a non-natural person, only those securities will be treated beneficially owned by it, which are held in its name.

Financial Statements

1. Preparation of financial statements

Under the 2016 Ordinance the first financial statements are required to be laid before the company in the annual general meeting within 16 months of incorporation as against 18 months in the 1984 Ordinance.

All the requirements with regard to the financial statements applicable to companies have been exempted for a single member company. These principally relates to laying the financial statements before the annual general meeting and audit of financial statements.

A new third schedule to the Companies Ordinance, 2016 has been added that provides for classification of companies and the applicable financial reporting framework for the respective types of companies.

For the purpose of preparation of financial statements and related accounting treatment of associated companies shall be in accordance with

financial reporting standards or such other standards as may be notified by the Commission.

Notwithstanding anything in this Ordinance any company that intends to make unreserved compliance of IFRS issued by the IASB shall be permitted to do so.

The requirement to prepare consolidated financial statements for holding companies has been retained however for a private company and its subsidiary, where none of the holding and subsidiary company has the paid up capital not exceeding one million Rupees the consolidated financial statements are not required.

The provision in 1984 Companies Ordinance that all interim financial statements of a subsidiary prepared for consolidation purposes where there is different financial year ends of holding and subsidiary companies to be reviewed by the auditors of that subsidiary has been deleted.

For listed companies chief financial officer of the company is also required to sign the financial statements in addition to the chief executive officer and one director.

2. Financial reporting framework

The third schedule to the 2016 Ordinance provides details of classification of companies and the respective financial reporting standards applicable to them. It also specifies which companies are required to follow requirements of fourth and fifth schedule to the 2016 Ordinance. The requirements are largely in line with 1984 Ordinance however in certain respect the new requirements are different. Also new criteria for determination of classification of companies have been added.

Under the fourth and fifth schedules to the 1984 Ordinance for components of financial statements detailed sub heads for classification were also prescribed. In the new schedules a few minimum mandatory heads of items are prescribed and require details mainly relating to associates, related parties and interests in foreign companies. Therefore now the requirements of the respective financial reporting frameworks are applicable with additional disclosures. The significant aspects and changes include financial statements to provide information relating to:

-- Geographical location and address of all business units including Mills/plant;

-- Particulars of company's immovable fixed assets, including location and area of land;

-- Various details about associated companies or related parties or undertakings and transactions.

-- Summary of significant transactions and events that have affected the company's financial position and performance during the year;

-- Shareholder agreements for voting rights, board selection, rights of first refusal, and block voting shall be disclosed;

-- Forced sale value shall be disclosed separately in case of revaluation of Property, Plant and Equipment or investment property;

-- In case of any loans or advances obtained / provided, at terms other than arm's length basis, reasons thereof shall be disclosed;

-- Certain additional disclosures with regard to security deposits

-- For matters of contingencies, in describing legal proceedings, under any court, agency or government authority, whether local or foreign, include name of the court, agency or authority in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis of the proceedings and the relief sought;

-- Management assessment of sufficiency of tax provision made in the Company's financial statements shall be clearly stated along with comparisons of tax provision as per accounts viz a viz tax assessment for last 3 years;

The overriding provisions relating to accounting treatment in relation to surplus on revaluation of fixed assets is changed that is to be part of equity which was previously required to be presented below equity. The new fourth and fifth schedules require disclosure of the surplus as separate line item on the face of the financial statements.

The definition of subsidiary company has been made closer to IFRS by bringing the provision relating to control of the company rather than prescribing the percentage holding given previously. However there still remain differences with the definition given in the IFRS.

3. Filing with the Commission and penalties

The requirement to file financial statements with the Registrar for private companies having paid up capital up to Rupees 7.5 million has been increased to Rupees 10 million. A new section has been added that correspond to the exemption from audit requirement for private companies having the paid up capital not exceeding 1 million Rupees or such other amount of paid up capital as may be notified by the Commission, shall file the duly authenticated financial statements whether audited or not with the registrar within 30 days from the holding of such meeting.

4. Directors' and chairman reports

The requirement to prepare director's report for a private company having the paid up capital not exceeding Rupees 3 million has been done away with.

For all companies where directors report is required it is to include a fair review of its business. Further for a public company or a private company which is a subsidiary of a public company the directors' report must also state certain additional details that among other matters to cover description of the principal risks and uncertainties facing the company and adequacy of internal financial controls. There are some more requirements for listed companies in the new Ordinance.

The requirement of attaching the relevant information as well as the nature of director's interest with the directors' report has been deleted as required previously under section 218 of the 1984 Ordinance.

In the case of a listed company an additional requirement of chairman's review report is included in the 2016 Ordinance.

5. Statement of Compliance

The new Ordinance has included an enabling provision that empowers the Commission to direct by general or special order such class or classes of companies to prepare a statement of compliance. The board of directors shall make out and attach to the financial statements such statement of compliance as may be specified. The contents of the statement of compliance have not yet been prescribed. The statement of compliance shall be subject to review of the auditor of the company.

Audit of financial statements

Under the repealed Companies Ordinance, 1984 all companies were required to have the financial statements of the company audited. In the 2016 Ordinance private company having paid up capital not exceeding one million rupees or such other amount of paid up capital as may be notified by the Commission have been exempted from the audit.

1. Qualification of auditor

The audit of financial statements of a public company or a private company which is a subsidiary of a public company and other companies having paid up capital of Rupees 3 million and above was required to be carried out by a chartered accountant or a firm of chartered accountants. That effectively meant that for private companies (other than subsidiary of public company) having paid up capital less than Rupees 3 million any person was allowed to be appointed as auditor. Further only a firm whereof all the partners practising in Pakistan are chartered accountants may be appointed by its firm name as auditors of a company.

The new Companies Ordinance, 2016 has, however, for companies having paid up capital of less than Rupees 3 million restricted the qualification of auditor to either be a chartered accountant or a cost & management accountant or the firms of chartered accountants or cost & management accountants. In case of appointment by firm name the requirement to have all the partners with above mentioned qualifications have been relaxed by stating that a firm whereof majority of practising partners are qualified for appointment can be appointed as auditor.

2. Disqualification of auditor

The repealed Companies Ordinance, 1984 contained specific disqualifications of auditor of a company. The new Ordinance has added some more situations of disqualification. Also with regard to disqualifications a new phrase 'other than in the ordinary course of business of such entities' has been introduced for the following situations:

-- a person who is indebted to the company;

-- a person who has given guarantee or provided any security in connection with the indebtedness of any third person to the company;

-- a person or a firm who, whether directly or indirectly, has business relationship with the company;

In case of a person indebted to the company other than in the ordinary course of business the new Ordinance however prescribed amount limits for credit card dues not exceeding Rs 1 million (this was previously Rs 500,000) and for utility company in the form of unpaid dues for a period not exceeding 90 days (no change from the previous position).

The new disqualifications include the following:

-- a person who has been convicted by a court of an offence involving fraud and a period of ten years has not elapsed from the date of such conviction.

-- a person who is not eligible to act as auditor under the code of ethics as adopted by the Institute of Chartered Accountants of Pakistan or the Institute of Cost & Management Accountants of Pakistan.

3. Appointment and fee of auditors

Appointment

The period within which first auditor of a company is appointed by the board of directors is increased from 60 days to 3 months of the date of incorporation.

Subsequent auditor appointment is to be made on the basis of recommendation of the board of directors. However a new provision is introduced that provides a minimum threshold for a member or members holding not less than 10 percent of shareholding of the company is entitled to propose any auditor whose consent has been obtained by him and a notice in this regard has been given to the company not less than 7 days before the date of the annual general meeting. The company is forthwith required to send a copy of such notice to the retiring auditor and shall also be posted on its website. The notice period was previously 14 days and there was no requirement to post this on the website of the company.

The company's auditor is now required to submit a copy of the consent letter to act as auditor of the company given to the company within 14 days to the registrar. Previously this was required for the company to submit the consent.

Fee

The remuneration of auditor of a company has been stated to be fixed by the:

a. company in the general meeting;

b. board or the Commission if the auditors are appointed by board or the Commission as the case may be.

Under the Companies Ordinance, 1984 the general meeting could also fix the remuneration of the auditor of a company in such manner as the general meeting may determine. This is not provided in the new Ordinance.

4. Auditors' right to information

A new section specifically detailing the auditors' right to the information has been added in the new Ordinance. Under the repealed Companies Ordinance, 1984 this was covered as powers of auditors however now it is in more detail.

Significant penalty of level 3 on the standard scale has also been prescribed for non-complying with the requirements by any officer of a company that also includes providing false or incorrect information to the auditor.

5. Duties of auditor

The 2016 Ordinance has specifically included the provision in relation to auditor report to be in compliance with the requirements of International Standards on Auditing (ISAs) as adopted by the Institute of Chartered Accountant of Pakistan.

Further for additional matters in the auditor report certain modifications have been made and now the audit is required to include opinion in respect of whether investments made, expenditure incurred and guarantees extended, during the year, were for the purpose of company's business. Previously this was only to the extent of expenditure.

The requirement to include opinion in respect of whether the business conducted, investments made and expenditure incurred during the year were in accordance with the objects of the company have been deleted.

6. Signature of auditor's report

Under the repealed Companies Ordinance, 1984 in case of a firm appointed as auditor of the company any partner of the firm can sign the auditor report that can be signed in the name of the firm. However the new Ordinance states that where the auditor is a firm, 'the report must be signed by the partnership firm with the name of the engagement partner'.

Rehabilitation of sick public sector companies

The provisions contained in the Repealed Companies Ordinance, 1984 relating to the rehabilitation of companies owing sick industrial units have been made applicable to only public sector companies. Accordingly the scope of rehabilitation related provisions has been limited to such companies only.

Prevention of oppression and mismanagement

Under the repealed Companies Ordinance, 1984 if any member or members holding not less than twenty per cent of the issued share capital of a company, or a creditor or creditors having interest equivalent in amount to not less than twenty per cent of the paid up capital of the

company, complains, or complain, or the registrar is of the opinion, that the affairs of the company are being conducted, or are likely to be conducted, in an unlawful or fraudulent manner, or in a manner not provided for in its memorandum, or in a manner oppressive to the members or any of the members or the creditors or any of the creditors or are being conducted in a manner prejudicial to the public interest, such member or members or, the creditor or creditors, as the case may be, the registrar may make an application to the Court by petition for an order.

The new Ordinance has decreased the prescribe threshold of member or members holding and creditor or creditors interest from not less than 20 percent to not less than 10 percent of the issued share capital and paid up capital respectively.

Further with regard to management by administration, the repealed Companies Ordinance, 1984 provided right to creditor or creditors of the company having interest of equivalent in amount to not less than 60 percent of the paid up capital of a company to represent to the Commission under the prescribed circumstances to appoint an Administrator to manage the affairs of the company. The said right to represent to the Commission is now also given to the shareholders of the company with the same threshold as for the creditors.

Repeal, savings and other matters

1. Repeal of 1984 Ordinance

The 1984 Ordinance has been repealed except Part VIIIA thereof consisting of sections 282A to 282N and the provisions of the said Part VIIIA along with all related or connected provisions of the repealed Ordinance shall be applicable mutatis mutandis to Non-banking Finance Companies in a manner as if the repealed Ordinance has not been repealed.

All rules, regulations, notification, guideline, circular, directive, order (special or general) or exemption issued, made or granted under the 1984 Ordinance shall have effect as if they had been issued, made or granted under the corresponding provision of 2016 Ordinance unless repealed, amended or substituted under this Ordinance.

2. Validation of laws

A separation section in respect of validation of laws has been added stating that all the amendments made to the 1984 Ordinance or any administered legislation through various Finance Acts have been specifically shall be deemed to have been validly made from the date of commencement of such Acts.

Seychelles

Seychelles issues final ruling on expenses deduction

The Seychelles Revenue Commission (SRC) has issued its final Public Ruling 2016-2 to provide clarity regarding the methodology used to calculate the additional special business tax deduction allowed for marketing and promotion expenditure.

The SRC confirmed that certain businesses in the Seychelles are allowed, in addition to their normal business tax deduction (i.e. their actual marketing and promotion expenditure), a special deduction equal to five percent of their taxable business income or their actual expenditure on marketing and promotion, whichever is the lower.

The special deduction is allowed for farming entities; agriculture processors and exporters; boat owners; fishery processors; hotels, guest houses and self-catering establishments; cafes and restaurants; domestic air transport service providers; domestic ferry service providers; boat or yacht charter companies; car hire companies; underwater dive and water sports operators; travel agents, tour and/or tourist guides; and gambling/casino operators. – *Courtesy tax-news.com*

United States

IRS defers obamacare reporting deadlines

The US Internal Revenue Service (IRS) has issued Notice 2016-70 extending the due dates for certain 2016 information reporting requirements under the Affordable Care Act (ACA).

Within the provisions of the ACA, most Americans are required to maintain "minimum essential" health insurance coverage, and employers will be encouraged to offer that health coverage. Those individuals and employers who do not comply with these mandates – the "employee mandate" and "employer mandate" – are to make "shared responsibility" payments, or tax penalties, to the IRS.

The new Notice extends the due date for insurers, self-insuring employers, and certain other providers of minimum essential coverage to provide information forms to the IRS and to individuals under section 6055 of the Internal Revenue Code (IRC) from January 31 to March 2, 2017 (30 days). These returns are used by the IRS to administer – and by individuals to show compliance with – the employee mandate.

In addition, the IRS has noted that, because of the extension granted under the Notice, some individual taxpayers may not receive the information they need (for example, to show compliance with the employee mandate or to determine eligibility for the ACA's premium tax credit) by the time they are ready to file their 2016 tax return.

The agency confirmed therefore that taxpayers may rely on other information received from their employer or other coverage provider for filing their returns, and do not need to wait to receive the forms (which, if received later than tax-filing, should be retained and not sent to the IRS).

In addition, the information reporting requirements for applicable large employers under section 6056 of the IRC have been similarly extended. This information is used by the IRS to administer the employer mandate.

The IRS explained that it has granted the 2016 reporting extensions as it has found that a substantial number of employers, insurers, and other providers of minimum essential coverage need additional time beyond January 31, 2017, to gather and analyze data and prepare the 2016 forms. It does not anticipate extending this transition relief to reporting for 2017. – *Courtesy tax-news.com*

Trump confirms US withdrawal from trans pacific partnership

President-elect Donald Trump has confirmed that, during his first day in office, he will withdraw the United States from the Trans-Pacific Partnership (TPP) trade treaty.

In a short video on YouTube, he said that he would immediately "issue a notification of intent to withdraw from the TPP – a potential disaster for our country. Instead, we will negotiate fair, bilateral trade deals that bring jobs and industry back onto American shores." The decision was expected, but perhaps not as one of the first executive actions "he would take on day one."

Covering some 40 percent of the global economy, TPP was signed in February this year by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Approximately 86 percent of tariffs on industrial goods will be eliminated if the agreement enters into force.

With TPP in doubt, China has been pushing for a completion of negotiations for the Regional Comprehensive Economic Partnership (RCEP), as part of its longer term objective to oversee the formation of a wider Free Trade Area of the Asia Pacific.

While it is unlikely to have the same level of market access benefits as TPP, RCEP aims to bring together the existing free trade agreements of China, Japan, South Korea, India, Australia, and New Zealand with the Association of Southeast Asian Nations (ASEAN) into a single enhanced comprehensive agreement. ASEAN comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. – *Courtesy tax-news.com*

China

China opens international tax service hotline

On November 18, China launched an international tax service hotline at the 12366 Shanghai international tax service center, created in January this year with the aim of assisting Chinese businesses to meet new international tax standards.

At its opening ceremony, the Director of the State Administration of Taxation, Wang Jun, said that the center and hotline will support China's Belt and Road Initiative, its free trade zones, and Chinese enterprises investing overseas.

Wang added that, to contribute to more transparent and open tax services, the Shanghai center will support China's efforts to cooperate more deeply with other territories on international tax developments from the OECD, such as in the area of base erosion and profit shifting. – *Courtesy tax-news.com*

South Africa

SARS issues guide on film finance tax break

The South African Revenue Service has published a guide providing general guidance on the exemption from normal tax for income derived from the exploitation rights of a film.

South Africa had provided an incentive aimed at stimulating the production of films within South Africa. It previously provided an upfront tax deduction, or in some circumstances a deduction which was spread over 10 years, for certain production or post-production costs actually incurred by the taxpayer.

That incentive was repealed and replaced, with effect from January 1, 2012, by an exemption from normal tax on income derived from the exploitation rights of approved films. The exemption applies to all receipts and accruals of approved films if principal photography commenced on or after that date but before January 1, 2022.

The income derived from the exploitation rights of a film are exempt from tax under if the National Film and Video Foundation has approved the film as a local production or a co-production; if the income is received by or accrues to an investor acquiring the exploitation rights before the completion date of the film; and only to the extent that the income is received or accrues within a 10-year period after the film's completion date.

Taxpayers may also claim a net loss on a film in a year of assessment commencing at least two years after the completion date of the film. The deduction of a net loss results in a taxpayer being unable to claim the tax exemption on the particular film in the future.

The guide also confirms that any grant under the Department of Trade and Industry film production incentive received by a special purpose corporate vehicle responsible for the production of a film will be exempt from normal tax. In certain cases, if the grant is passed on to an investor, the investor will also qualify for the exemption. – *Courtesy tax-news.com*

Australia

Deloitte warns of widening Australian budget gap

Deloitte Access Economics has forecast that Australia's tax-take from individuals, indirect taxes, and "profit taxes" will fall below Government estimates over the next two years.

According to the latest Deloitte Access Economics Budget Monitor, wage and job growth will undershoot official forecasts, hitting the Government's income from personal taxes. It explained: "Wage growth lifts people into higher tax brackets. So any wage shortfall bites twice, because it also slows the bracket creep that accelerates the Pay As You Go [income tax] take. An underperformance on jobs hides an extra issue. As job growth has been concentrated among part-timers, it impact on the tax take is even more subdued than it seems."

"[Australia's] tax system is dominated by income taxes, and a slower-and-more-modest return to income growth means that we see this as a tougher economic backdrop for the performance of the tax take," the report stated.

As a result, Deloitte Access Economics expects the tax-take on individuals to fall short of the Government's Budget forecasts by AUD1.3bn (USD961.9m) in 2016-17 and by AUD2bn in 2017-18. In addition, it anticipates that indirect taxes will underperform by AUD0.5bn in 2017-18, with low inflation rates and shifts in the housing market to blame.

The report also cautioned against reliance on the notion that higher coal prices will boost the tax take. Deloitte Access Economics does not expect higher prices to last, and pointed out that "because many coal miners racked up losses in recent years, not all of their rebound into profit will show up as a higher tax take in 2016-17, or indeed 2017-18." It added that "the 'lowflation' world in which Australia is currently trapped takes its biggest toll on profits."

Deloitte Access Economics therefore forecasts that "profit taxes" will fall short of Budget forecasts by AUD0.3bn in 2016-17, and by AUD1.8bn in 2017-18. – *Courtesy tax-news.com*

Charitable bodies, religious trusts: Proposed Benami law will be applicable

The Federal Board of Revenue (FBR) has revealed that proposed Benami law against holding property in fictitious names would be applicable on charitable organisations and religious trusts, subsequent to the removal of exemptions by the National Assembly Finance Committee.

The high-ups of the FBR agreed to the suggestion of the finance committee to include whistle-blower provision in the proposed law for making it more effective here on Thursday during a meeting of the Senate Standing Committee on Finance held to take up the clause by clause reading of the law. Senator Saleem Mandviwalla presided over the meeting.

Chairman FBR Nisar Muhammad Khan said there would be no exemptions to the charitable organisation because the relevant section in the initially proposed draft bill to grant exemptions to the charitable organisation has been omitted by the Finance Committee of the National Assembly.

The meeting was informed that the bill introduced in the National Assembly reads: "The federal government may, by notification exempt any property relating to the charitable organisations or religious trusts from the operation of this Act." This section has been omitted, the meeting was informed.

The Secretary Finance said the law has been designed against multiple factors after some members of the committee voiced their concerns over confusion created from tax officials' statements, saying whether the law was designed against tax evasion or holding property in Benami. Senator Ilyas Bilour complained that the Secretary Finance wanted the committee to move ahead without satisfying its members.

The concerns were also raised on various other provisions of the law, especially those dealing with offence and prosecution, terms of reference for the special courts, etc, during the clause-by-clause discussion.

To the proposal of the committee members for inclusion of whistle-blower provision in the law, the chairman FBR agreed to the proposal and stated the concept of whistle-blowers has also been introduced to the income tax law in the current fiscal year. Benami Bill, he said was introduced two months earlier than income tax that is why the provision could not be made part of it. However, he

acknowledged the significance of the provision for the success of the law.

The National Assembly's Finance Committee has amended the law that no order would be passed after the expiry of one year from the receipt of the reference for provisional attachment of property. The committee has completed reading of the bill and would from the next meeting start hearing views of State Bank of Pakistan and Law Division, and may solicit opinion of tax experts before making recommendations to the proposed Benami law. – *Courtesy Business Recorder*

GST calculation Zones to determine highest retail price of fertiliser

The Federal Board of Revenue (FBR) is planning to divide Pakistan into zones for determination of the highest retail price of fertiliser sold in retail packing for accurate calculation of sales tax. Sources told here on Thursday the decision has been taken in the last meeting of the Board-in-Council regarding notification of zones for determination of highest retail price of fertiliser in retail packing.

A brief presentation was made by FBR Member (IR-Ops) highlighting the need for notifying zones for determination of the highest retail price of fertiliser in retail packing. The members of Board-in-Council were informed that a notification on similar lines was issued for determination of highest retail price of cement sold in retail packing vide STGO No 94 of 2014 dated 12th December, 2014.

After discussion the Board-in-Council unanimously decided that the requisite powers may be delegated to FBR Member (IR-Ops) for further necessary action in the matter. Experts said the retail price of items like cement/fertiliser varied from one to another province depending on the cost of transportation and other factors. Moreover, when region-wise price would be fixed, sales tax would be charged on highest retail price of cement sold in retail packing. Maximum price of fertiliser to be fixed in the region would be considered for the purpose of imposition of sales tax.

Earlier, the highest retail price of cement was fixed for both the zones for the purpose of calculation of sales tax of this item sold in retail packing. In the past, the FBR had divided Pakistan into two zones ie North Zone and South Zone, for determination of the

highest retail price of cement sold in retail packing for accurate calculation of sales tax.

For this purpose, the FBR had issued a sales tax general order (STGO) 94 of 2014 for the notification of zones for determination of highest retail price of cement sold in retail packing. According to the STGO, the FBR had notified following zones for the purpose of determination of highest retail price of any brand or variety of cement sold in retail packing: North Zone comprises Punjab, Khyber Pakhtunkhawa, Federally Administered Tribal Area, Azad Jammu & Kashmir and Northern Areas (Gilgit-Baltistan). South Zone comprises Sindh and Balochistan, the FBR added. – *Courtesy Business Recorder*

Imran issued notice, FBR tells SC

The Federal Board of Revenue informed the Supreme Court on Thursday that it has issued a notice to Imran Khan Niazi under Section 176 of the ITO 2001 on September 02, 2016 while investigating the case of Panama Leaks. Pakistan Muslim League (Nawaz) leader Hanif Abbasi has invoked the apex court's jurisdiction seeking the disqualification of Pakistan Threek-e-Insaf Chairman Imran from the Parliament as he (Imran) allegedly failed to declare his offshore companies before the Election Commission of Pakistan.

Making the FBR respondent with others, Abbasi also urged the court to issue directives to the FBR to investigate into financial 'mis-declarations' and 'tax evasion' by Imran in the matter. Submitting a concise statement in the matter, Member Legal of the FBR Hafiz Muhammad Ali Indhar said that the Board has discharged its duty as per law in relation to various financial irregularities alleged to have been committed by Imran.

"During the current investigations carried out by the FBR in the case of the Panama Papers Leaks, it surfaced in different media reports and FBR taking due cognisance of the matter has initiated investigation, and has issued a notice under section 176 of the ITO 2001 dated 02.09.2016 to the Respondent No 1 (Imran Khan Niazi)," the concise statement added.

The FBR claimed that in response to Abbasi's petition relating to tax matters of Imran, the Board has verified the matter saying if any actionable discrepancy is found then the appropriate legal proceedings will be initiated. "The instant concise statement is

being submitted on the basis of the information so for available and the proceedings undertaken by FBR in pursuance thereof; FBR is keeping itself vigilant to any other information and exploring/exploiting all available resources to investigate the matter further," the FBR concluded. – *Courtesy Business Recorder*

2016 TRI 551 (H.C. Bom.)

HIGH COURT OF BOMBAY

M.S. Sanklecha and S.C. Gupte, JJ.

Commissioner of Income Tax-16, Mumbai
v.
M/s. D. Chetan & Co.

FACTS/HELD

37(1)/43(5): Loss suffered in foreign exchange transactions entered into for hedging business transactions cannot be disallowed as being "notional" or "speculative" in nature. S. Vinodkumar Diamonds is not good law as it lost sight of Badridas Gauridas 261 ITR 256 (Bom)

1. The Assessee is engaged in the business of import and export of diamonds. During the assessment proceedings, the Officer found that Respondent assessee explained that the amount of Rs.78.10 lakhs claimed as loss was on account of having entered into hedging transactions to safeguard variation in exchange rates affecting its transactions of import and export by entering into forward contracts. The Assessing Officer by order of Assessment dated 27 December 2011 disallowed the claim on the ground that it is a notional loss of a contingent liability debited to Profit and Loss Account. Resultantly, the same was added to the assessee's total income. Being aggrieved, the assessee carried the issue in appeal to the Commissioner of Income Tax (CIT (Appeals)). The CIT (Appeals) allowed the assessee's appeal inter alia relying upon the decisions of Tribunal in Bhavani Gems vs. ACIT (ITA No.2855/Mum/2010 dt.30.3.2011) and the Special Bench decision in the case of DCIT vs. Bank of Bahrain and Kuwait ((2010) 132 TTJ (Mumbai) (SB) 505). The CIT (Appeals) on facts found that the transaction of forward contract was entered into during the course of its business. It held it was not speculative in nature nor was it the case of the Assessing Officer that it was so. Thus the loss incurred as forward contract was allowed as a business loss. Being aggrieved, the Revenue preferred an appeal to the Tribunal. The Tribunal upheld the finding of the CIT (Appeals)

that the loss incurred by the Respondent Assessee was a revenue loss and not connected with any speculation activities. The Tribunal found that the transaction of forward contract had been entered into for the purpose of hedging in the course of its normal business activities of import and export of diamonds. On appeal by the department to the High Court HELD dismissing the appeal:

(i) The Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed.

(ii) So far as the reliance on Accounting Standard 11 is concerned, it would not by itself determine whether the activity was a part of the assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional.

(iii) The reliance placed on the decision in S. Vinodkumar Diamonds Pvt. Ltd. vs. Addl.CIT ITA 506/MUM/2013 rendered on 3 May 2013 in the Revenue's favour would not by itself govern the issues arising herein. This is so as

every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar are identical / similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar, the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in CIT vs. Badridas Gauridas (P) Ltd. (134) Taxman Pg. 376 was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

Appeal dismissed.

Income Tax Appeal No. 278 of 2014.

Decided on: 1st October, 2016.

Present at hearing: A.R. Malhotra, for Appellant. R. Murlidhar with P.C. Tripathi, for Respondent.

JUDGMENT

P.C.:–

This appeal under Section 260A of the Income Tax Act, 1961 (Act) challenges the order dated 14 August 2013 passed by the Income Tax Appellate Tribunal (Tribunal). The impugned order relates to assessment for Assessment Year 2009-10.

2. The Revenue has urged the following question of law for our consideration:–

> "Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs.78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed?

3. The Respondent Assessee is engaged in the business of import and export of diamonds. During the assessment proceedings, the Officer found that Respondent assessee explained that the amount of Rs.78.10 lakhs claimed as loss was on account of having entered into hedging transactions to safeguard variation in exchange rates affecting its transactions of import and export by entering into forward contracts. The Assessing Officer by order of Assessment dated 27 December 2011 disallowed the claim on the ground that it is a notional loss of a contingent liability debited to Profit and Loss Account. Resultantly, the same was added to the Respondent-assessee's total income.

4. Being aggrieved,the Respondent-assessee carried the issue in appeal to the Commissioner of Income Tax (CIT (Appeals)). By order dated 27 April 2012, the CIT (Appeals) allowed the Respondent assessee's appeal inter alia relying upon the decisions of Tribunal in *Bhavani Gems vs. ACIT*[1] and the Special Bench decision in the case of *DCIT vs. Bank of Bahrain and Kuwait*[2]. The CIT (Appeals) on facts found that the transaction of forward contract was entered into during the course of its business. It held it was not speculative in nature nor was it the case of the Assessing Officer that it was so. Thus the loss incurred as forward contract was allowed as a business loss.

5. Being aggrieved, the Revenue preferred an appeal to the Tribunal. The impugned order of the Tribunal upheld the finding of the CIT (Appeals) that the loss incurred by the Respondent Assessee was a revenue loss and not connected with any speculation activities. The Tribunal found that the transaction of forward contract had been entered into for the purpose of hedging in the course of its normal business activities of import and export of diamonds. Thus, the Revenue's appeal was dismissed by the impugned order of the Tribunal.

6. Mr.Malhotra, learned Counsel appearing for the Revenue submits that this appeal had to be admitted as the impugned order has ignored its order in the case of *S. Vinodkumar Diamonds Pvt.Ltd. vs. Addl.CIT*[3] rendered on 3 May 2013 which on similar facts is in favour of the Revenue. He further submits that the impugned order of the Tribunal is suspect because it accepts the Respondent assessee's claim without calling upon it to prove that the same was not speculative. Lastly, he sought to place reliance upon Accounting Standard-11 to claim that such a loss is not allowable thereunder.

7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were

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[1] ITA No.2855/Mum/2010 dt.30.3.2011

[2] (2010) 132 TTJ (Mumbai) (SB) 505

[3] ITA 506/MUM/2013

entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-11 is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in S. Vinodkumar (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar (supra) are identical / similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in *CIT vs. Badridas Gauridas (P) Ltd.*[1] was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained.

9. The appeal is dismissed. No order as to costs.

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[1] 2004 (134) Taxman Pg. 376