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A Monthly Journal of
The Chamber of Tax Consultants

Vol. VIII | No. 5 | February – 2020

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The Chamber's Journal

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Editorial

THODI KHUSHI….. …. ….. …. JYADA GUM

For the tax professionals, the month of February witnesses the annual ritual of post – budget postmortem exercise; more often with pessimist and criticizing note. We the Indians have at least one very good quality and that is keeping everlasting hope against all odds,with the expectation that the things will change for better. Perhaps, it is such hope that only keeps the people survived. A Budget is no exception to this. Every year we expect a miracle, a magic wand, which would usher a new era of tax regime. But the government obliges us by keeping the eternal flame of hope alive in us for the next year and so on………!

While a Budget can be analysed – cursorily or minutely – from many angles, the professionals are more concerned with the amendments concerning direct and indirect tax laws. Hot discussions and debates at various forums and at various levels take place all over India, generating quite a number of views, counter views, analysis and suggestions, with the amendments getting dissected with microscopic precision by tax experts. At the end of such elaborate exercise, appropriate noise is made at the appropriate level against the unfair amendments, met by the appropriate government response of not paying any heed to the objections/ considering only few suggestions. And the whole spectacle gets over with this ………. till the next year! With the passing of the Finance Bill, all such discussions, suggestions, etc. get buried then and there only, with hardly any further continued protest or follow up against the obnoxious provisions and we tend to accept to live with such amendments. And comes the next February and follows the same annual ritual!

However, in this annual melee of discussions and suggestions, while the public and the scholars get obsessed with thread-bare analysis of the budget provisions,year after year, what is missed out is the bigger picture and the macro view. In the piecemeal analysis of stray provisions every year, the need to have a long term stable tax regime is lost sight of. This makes me to again refer the 'Preface to the Eight Edition' for Kanga & Palkhivala's treatise on 'The Law and Practice of Income Tax', two paragraphs of which are already reproduced in Editorial for August, 2019. In fact, the entire Preface is so mesmerizing - perhaps echoing the sheer frustration and anger of this greatest legal luminary of India over the sorry state of affairs about the Indian tax regime – that I repeat my request to the readers to read the Preface in toto. Still, I cannot resist my temptation to reproduce some paragraphs therefrom:

"Today the Income – tax act, 1961, is a national disgrace. There is no other instance in Indian jurisprudence of an Act mutilated by more than 3300 amendments in less than thirty years. Simple provisions like sections 11 to 13 (which deal with exemption of the income of charitable trusts) have suffered no less than fifty amendments.

The tragedy of India is the tragedy of waste – waste of national time, energy and manpower. Tens of millions of man-hours, crammed with intelligence and knowledge – of tax-gatherers, taxpayers and tax advisers – are squandered every year in grappling with the torrential spate of mindless amendments. The feverish activity achieves no more good than a fever.

The cardinal error of our times is to mistake amendment for improvement and change for progress. The Finance Ministry has become almost pathological in its 'change mania'. A stable fiscal policy is to a nation what a stable family life is to an individual. But stability is anathema to the North Block. The obsessive attitude that the exercise of power must take the form of churning out new laws and regulations is shared by the legislature and the rule-making authority alike………"

One is saddened to note that we remain in the same state of affairs even after almost 30 years of penning this Preface.

The only solution is to come out with altogether new enactment on income tax, which not only should remove so many anomalies, ambiguities and inconsistencies of the present Act but which is also pragmatic and futuristic so as to provide a strong foundation for compact and stable tax regime for a fairly long period of time. Unfortunately, such exercises undertaken in past did not see light of the day; for various reasons. But the rot has spread so vast and deep in the present dilapidated 60 years old structure that no amount of patch work or repairing is worth, leaving no alternative but to construct altogether new edifice by demolishing the old one. The only hitch is: From where to get such long term vision with bold and firm determination?

As regards analysis of the provisions of the Finance Bill, 2020, most of them are dealt with in the Special Story of this issue, where the learned authors have accomplished the frenetic job of giving lucid analysis in short time. However, one cannot help but take notice of some proposals, not because of their nature but because they depict the lopsided mind set and approach. Take, for example, the proposal concerning dividend being made taxable again in the hands of the shareholders. This amendment is stated to be for restoring the earlier position of taxation of dividend income, on the ground that "with the advent or technology and easy tracking system available, justification of current situation of taxation of dividend has outlived itself." The government is graceful enough to accept that the existing provisions of the Dividend Distribution Tax ["DDT"] are "iniquitous and regressive". Therefore, one hoped that the bailing out amendments would alleviate the tax payers from such regression. However, instead of rubbing a soothing balm on the injured wound, the proposal – of putting artificial cap of 20% of the dividend income and that too of only interest expenses, as allowable expense against such dividend income – adds insult to the injury by being equally regressive. The highly arbitrary and unfair method of disallowance of legitimate expenses u/s. 14A is now sought to be replaced by another arbitrary and artificial method u/s. 57(iii), keeping the misery and the plight of the dividend receivers intact! Logically also, one thought that by scrapping the DDT regime, the position ante would be restored, thereby permitting the assessees to claim all expenses as allowable u/s. 57(iii) as was the position prior to introduction DDT regime. However, while restoring such position ante, unnecessary tinkering is done to deprive the assessees of their legitimate right to claim the deductions otherwise allowable u/s. 57. There is absolutely no logic or rationale for such a move nor is any discernible from the Memorandum. If an assessee has incurred genuine expenses for acquiring shares and earning dividend income, on the basis of the very first principle of taxation – an income can be taxed only on net basis – such expenses are allowable as deduction.

I firmly believe that instead of adding more and more deeming fictions, in the name of plugging revenue leakage, in the Act that is already overburdened with plethora of such artificial provisions, if only the present Income-tax Act, 1961 – even with the existing provisions – is enforced fully, impartially and strictly without any fear and favour, the government will be able to garner far more tax revenue and there will remain no necessity to churn out further artificial provisions on such pretext. No amount of amendments is going to work, if the same are not enforced impartially and strictly. Then again, the intention of the government to bring best of the international tax practices into India can be successful only if there exists the best of the international tax administration to match. If there is any mismatch, hardships, chaos and, of course, corruption are bound to generate.

But then again, we are there to keep the flame of hope burning. So wishing everybody a very best of luck for keeping the hope – for better tax regime – alive forever….!

Vipul B. Joshi
Editor

P.S.: As regards Direct Tax Vivad se Vishwas Bill, 2020, it is not understood why the basic and fundamental issues / clarifications are not incorporated in the proposed enactment itself, instead of keeping the entire nation guessing, especially when the common / perennial issues concerning such a scheme requiring clarification are already within the knowledge of the government, based on similar schemes notified in past. Of course, there are many other aspects in the proposed enactment that require review / modifications, some of which are dealt with in this Special Issue. As given to understand, the Government is likely to make some amendments in this scheme itself, based on feedbacks. The government will also come out with clarification in the form of comprehensive FAQs. One will therefore need to wait till then!

Corrigendum

In January, 2020 issue of The Chamber's Journal in the article on "Section 56(2)(x)" by CA Abhitan Mehta, inadvertently, CA Bhavna Doshi was mentioned as co-author. The article was written by CA Abhitan Mehta only. We sincerely apologies for the error.

From the President

Dear Members,

Due to the sluggish pace of growth of India's economy, the general public had very high hopes about a very pragmatic Budget 2020, the first 'full' budget of the Modi Government 2.0 which would give much needed impetus to the economy. The Finance Minister, Smt. Nirmala Sitharaman, who gave the longest budget speech, presented her second budget. The Budget unfortunately, has no major fiscal stimulus and has only a few convincing steps to revive the economy. There have been some measures to revive the economy such as proposal to increase basic customs duty on certain category of goods to give boost to the local manufacturers, various other measures to give push to agriculture, MSME, infrastructure sector etc. which in turn would help revive the economy. Needless to mention that Budget is not the only measure through which the economy can revive. Radical changes are needed across all the sectors to improve productivity and competitiveness.

However, the Finance Bill 2020 has proposed sweeping changes to the overall direct tax regime, which will impact taxation of individuals and companies and change the ambit of taxation of non-residents. All the aspects relating to the proposed amendments on Direct Tax have been dealt with in this issue. The Law and Representation Committee of The Chamber is in the process of making detailed representation on the Finance Bill to the Finance Minister. In the mean time, The Chamber was invited on 7th February by the Income Tax Department to have interactive meeting with the Finance Minister in Mumbai. During this meeting, we made representation to the Hon'ble Finance Minister on key amendments.

A few days after the presentation of the Budget by the Finance Minister, the Reserve Bank of India announced its Monetary Policy which is a quarterly exercise and an important one since some of the measures through the policy have direct bearing on the economy of the country. Understanding the need for revival of the economy, the Monetary Policy Committee of the RBI has come out with measures which would hopefully give boost to automobile sector, real estate and small industries. As per the policy if banks finance these sectors then concession would be given to banks in maintenance of CRR. This measure is unprecedented and is taken by the RBI considering the fact that growth has indeed stagnated.

On global front, the problem of epidemic due to Corona virus in China seems to have taken a serious turn and there is no clear indication from the Chinese Government about its magnitude. According to reports, the economy of China will be significantly hit in first quarter. If the epidemic is not contained then it may have cascading effect on the global economy.

All the committees continue to organise seminars, Study Circle meetings and webinars for the benefit of members. The past month witnessed as many as fifteen events conducted by various committees and Study Groups at Pune and Bengaluru. The highlight of the month was GST RRC at the Hotel Fairmont ,Jaipur organised by the Indirect Taxes Committee from 9th to 12th January 2020. This RRC met with an overwhelming response with total registration of 332 delegates who were from as many as 36 different cities across the country. That shows the increased popularity of this event over a period of time. The RRC was indeed memorable and befitting its theme, "Research, Rejuvenate, Connect", the delegates were technically enriched in a seven star relaxed ambience and got connected to their professional brethren. The workshop on GST Law jointly with five other organizations which is being organised for more than a decade has received such a good response that we had to refuse registration. Direct Tax Committee very successfully orgainsed full day seminar on Litigation under Direct Tax Laws which was addressed by eminent professionals and ITAT Members.

Another flagship event of The Chamber, the 43rd RRC on Direct Tax is being held at Coimbatore from 27th February to 1st March, 2020 with enrolment of more than 240 delegates. We are going to close the enrolment soon and therefore those who have not enrolled may do so at the earliest to avoid disappointment.

The Student Committee continues to do excellent programmes for the benefit of Student Members. Third edition of The Dastur Debate Competition was organised on 16th and 18th January '2020 jointly with H. R. College of Commerce. As many as 24 colleges and CA firms participated in this debate competition. Information Technology and social media has become integral part of our life. IT Connect Committee therefore organised a very important workshop on building of brand using LinkedIn. I am happy to inform that all the webinars held during the year have been uploaded on Youtube Channel of The Chamber – ctcconnect & we will continue to upload the webinars henceforth.

This issue of the Journal is on the Finance Bill 2020. With so many complex amendments, giving articles within a short period of seven days is indeed praiseworthy. I thank all the authors for writing articles in a very short period of time and sparing their valuable time for a noble cause.

I would like to sign off with a meaningful and relevant quote by Peter Drucker:

> ***"The only skill that will be important in the 21st century is the skill of learning new skills. Everything else will become obsolete over time."***

VIPUL K. CHOKSI
President

Optional Scheme for Tax Payments for Individuals, HUFs and Societies

CA Ketan Vajani

The Finance Bill 2020 has been presented in Parliament by the Hon. Finance Minister on 1st February, 2020. This year's Budget had some high hopes from the Finance Minister in the areas of personal taxation. The Taxation Laws Amendment Act, 2019 had already catered to the demand from corporates about reduction of taxes by introducing sections 115BAA and 115BAB in the Act. Considering that the corporate rates of tax have been reduced to an acceptable level, the hopes of the non-corporates was that they also will not be deprived of rate cuts. In fact the report of the Akhilesh Ranjan Committee had also suggested that the rates of taxes for the individual and HUFs shall be realigned. The Committee had suggested more realistic way of addressing the issue and had suggested the highest slab rate of 35% beyond the income of ₹ 2 crore. That would have probably been the real progressive method of taxation.

However, it seems that the Hon. Finance Minister is very innovative and brings out newer ideas every time she is supposed to address any issue. The innovative approach can be vouched for by the optional scheme for tax payments as introduced by section 115BAC and section 115BAD in the Income-tax Act. This is the first time that tax rates have been prescribed in the Income-tax Act rather than the Schedules to the Finance Bill. This is also the first time that a tax payer is given a choice in terms of selecting the rates of tax. The tax payer is perhaps now being treated as a customer and a customer deserves to have multiple choices as a matter of healthy practice. So here is the Finance Minister giving options to the Individuals, HUFs and Societies and leaving it to their wisdom as to what suits them.

This article seeks to critically analyse two new sections introduced in the Income-tax Act and also try to understand as to whether there is any real and material choice as such or it is just a different shade of the same product.

New Section 115BAC – Optional Tax Scheme for Individuals and HUFs

Clause 53 of the Finance Bill seeks to introduce two new sections in the Income-tax Act, 1961 namely section 115BAC and section 115BAD. Section 115BAC provides for Tax on Income of Individuals and Hindu Undivided Families. Sub-section (1) of the section 115BAC provides that notwithstanding anything contained in the Act but subject to the provisions of the Chapter-XII, the income-tax payable in respect of the total income of an Individual or Hindu Undivided Family, for A.Y. 2021-22 onwards shall at the option of the assessee be computed at the rates given as under:

Total Income	Rate of Tax
Up to ₹ 2,50,000	Nil
From ₹ 2,50,001 to ₹ 5,00,000	5%
From ₹ 5,00,001 to ₹ 7,50,000	10%
From ₹ 7,50,001 to ₹ 10,00,000	15%
From ₹ 10,00,001 to ₹ 12,50,000	20%
From ₹ 12,50,001 to ₹ 15,00,000	25%
Above ₹ 15,00,000	30%

The deductions and exemptions to be forgone

The above rates of taxes are optional and also they are subject to certain conditions laid down in sub-section (2) of the section. The proviso to sub-section (1) also provides that in a previous year where the assessee fails to satisfy the conditions laid down in sub-section (2), the option shall become invalid and the other provisions of the Act shall apply as if the option had not been exercised for that previous year.

Sub-section (2) of the section lays down the conditions which are to be fulfilled for the purpose of availing the new concessional tax rates. The sub-section (2) provides that the total income of the individual or HUF shall be computed without claiming various deductions and exemptions as under :

Section	Description
Section 10(5)	Leave Travel Concession
Section 10(13A)	House Rent Allowance
Section 10(14)	All allowance except (a) Transport allowance to Divyang Employee (b) Conveyance Allowance (c) Travel Allowance (d) Daily Allowance for duty at place other than Residence
Section 10(17)	Daily Allowance or Constituency Allowance of MP/MLA
Section 10(32)	Exemption for Clubbing of Minor's Income
Section 10AA	Profit from Units in SEZ
Section 16	Standard Deduction and Professional Tax
Section 24(b)	Interest on Housing Loan for Self Occupied Property. ***Note** : Interest on loan taken for Leased Out Property is permitted as deduction. Restriction is only for Interest on loan for Self-occupied property which is covered by section 23(2) of the Act.*
Section 31(1)(iia)	Additional Depreciation – Normal depreciation permissible
Section 32AD	New units in Andhra Pradesh, Bihar, Telangana, West Bengal.
Section 33AB	Deposits in Tea/Coffee or Rubber Development Account
Section 35ABA	Deposit in Site Restoration Fund by assessee engaged in business of prospecting or extraction or production of petroleum or natural gas
Section 35(i)(ii)	Payment to research association having object of undertaking Scientific research

Section	Description
Section 35(i)(iia)	Payment to a company to be used for scientific research
Section 35(i)(iii)	Payment to research association having object of undertaking research in social science
Section 35(2AA)	Payment to National Laboratory or university or IIT or a specified person with a specific direction to use the amount for scientific research undertaken under an approved programme
Section 35AD	Profits of specified business as per section 35AD – cold chain facility, warehousing facility, building and operating of hotel etc.
Section 35CCC	Expenses on agricultural extension project
Section 57(iia)	Standard Deduction against family pension earned
Deductions under Chapter VI-A	All deductions under Chapter-VIA are denied except section 80CCD(2) i.e., Contribution to NPS by the employer (own contribution is not permitted) and section 80JJAA i.e. deduction for employment of new employees.

Sub-section (2) also provides that the income will have to be computed (a) without set-off of any loss carried forward or depreciation from earlier assessment year to the extent such loss or depreciation pertains to various deductions as listed in the above table and also (b) without set off of loss under Income from House Property with any other head of income. Clause (iii) of sub-section (2) also provides that the assessee will not be allowed the additional depreciation as provided in section 32(1)(iia). However, the normal depreciation will have to be claimed by the assessee as per normal practice.

As a matter of abundant caution, sub-section (3) provides that the loss and depreciation referred in sub-section (2) shall be deemed to have been given full effect to and no further deduction for such loss or depreciation shall be allowed for any subsequent year. The proviso to sub-section (3) further provides that in the case of block of assets where the depreciation allowance has not been given full effect to prior to A.Y. 2021-22, corresponding adjustment shall be made to the WDV of the block of assets as on 1-4-2020 in the manner to be prescribed. These provisions are mainly back-up provisions with a view to take care of a possible argument by the assessee in a later year that he has actually not been allowed the corresponding loss or depreciation earlier and therefore the same is available for deduction in a subsequent year, where probably the assessee might decide to opt out of the optional tax regime.

Sub-section (4) of the section provides for allowing the deduction u/s. 80LA in the case of a person having a unit in International Financial Services Centre subject to fulfilment of the conditions of the said section.

Exercise of Option by the assessee

Sub-section (5) of the section provides that for the purpose of availing the concessional tax, the assessee has to exercise the option as under :

In the case of a person having business income

In the case of a person having business income, the option is to be exercised on or before the due date specified u/s. 139(1) of the Act for A.Y. 2021-22 or any subsequent year. Once the person has exercised the option, the option shall be applicable for all subsequent assessment years. However, the option exercised in any year can be withdrawn only once later on and thereafter the person shall never be eligible to exercise option under this section except in a case where the person ceases to have any business income. If the person ceases to have business income, option as available to non-business cases will be available.

Thus the exercise of option is a one-way street with only one U-turn and on taking a U turn, there is a dead end which does not permit you to re-enter. Questions do arise as to whether such a condition can be said to be a reasonable condition for allowing an option to the assessee which has the primary purpose of allowing some concession to the assessee. Should it not have been more graceful on the part of the law-makers to avoid such condition and give the concession whole-heartedly rather than putting such a stringent condition? Whether the purpose is to give the concession in true spirit or to discourage the person in exercising the option? Is it justified for the government to expect a person to foresee today as to what will be his tax position after few years? The government is expecting a commitment from the taxpayer for perpetuity but is the government in a position to give a counter commitment that the tax rates shall be static and will not change in either direction over next decade or half a decade?

In the case of a person having no business income

In the case of a person having no business income the option is to be exercised along with the return of income to be furnished u/s. 139(1) for any assessment year. As such, it can be seen that for non-business cases, the option can be exercised on a year-to-year basis and it will be possible for a person with income other than business income to keep on shifting from one scheme to the other back and forth as per his need. This is the correct way of giving the option and is to be appreciated.

Issues and Observations

Whether the assessee can claim relief under section 87A after opting for the new scheme under section 115BAC ?

Sub-section (2) of the section does not include section 87A as one of the sections which is to be ignored. However, it is relevant to note that sub-section (1) of the section 115BAC provides that notwithstanding anything contained in the Act **the income-tax payable** in respect of the total income of Individual or Hindu Undivided Family is to be computed as provided therein. Accordingly, on plain reading of the sub-section (1), it seems that the same gives the computation of income-tax payable and hence no further relief under section 87A may be permissible. This however, needs some clarification and it will be good if the CBDT can clarify it favourably.

Applicability of Surcharge and Cess in optional tax scheme

It is clear from the 10th proviso to sub-section (9) of section 2 of the Finance Bill that the surcharge and cess will have to be added to the tax as computed under section 115BAC and section 115BAD respectively.

No special rate for Senior Citizen and Very Senior Citizen as available in normal scheme

The concessional rates of tax as provided u/s. 115BAC do not distinguish between an individual on the basis of his age. Under normal provisions, senior citizens having age of more than 60 years and very senior citizens having age more than 80 years enjoy some concession on basic threshold limits. However, such concession is not available in the alternate scheme now provided.

TDS Deduction by Employer

As per section 192 of the Income-tax Act an employer needs to deduct tax at source from the salary to employees on the basis of applicable rates of tax. Now, with two options available to all individuals, it will also be incumbent on the employer to understand from the respective employee right at the stage of deducting the tax at source as to which option the employee is going to select. Without the correct information on this point, the calculation is likely to result into short deduction or unnecessary excessive deduction, none of which is desirable.

Committed outflows

Assessees with committed outflows towards repayment of housing loans including principal and interest and also committed insurance premiums are likely to have some adverse impact if they opt for the scheme. They will not get the deductions under section 24 and also will have to continue honouring their commitment. As such, it is more likely that they will not opt for the new scheme.

Promoting consumerism at the cost of discouragement towards the culture of savings

Savings is a virtue and specially in Indian society savings has always been considered as a tool for retirement and future security. Tax savings has been one of the motivators for savings. The new scheme denies tax advantage out of savings and hence the citizen in the long run might be discouraged to save. The government on the other hand will lose the tax revenue and as such it is not working well either for the citizen or for the government. Yes, the more amount of money in the hands of the tax payer will lead to higher consumption and higher demand. But a question is whether such demand will be in productive areas or a non-productive and destructive area. If this is the idea of increasing the demand, one also needs to factor in the fact that supply might fall short and eventually inflation may move upwards.

What about options for Professionals – Can they select year-to-year ?

Clause (i) of sub-section (5) talks about business income. It does not cover professional income. It is a settled position of law that both the terms "business" and "profession" are different and have completely different meanings. In view of this, will it be possible for the professionals to contend that they are not governed by clause (i) but governed by clause (ii) and hence they have the possibility to select the option year to year basis. It looks possible on literal interpretation though may not be easily acceptable to the department on the basis of purposive interpretation.

For non-business cases the return needs to be filed on or before the due date

The option to be exercised by the business cases is on or before the due date u/s. 139(1). As against this, for non-business cases, the option is to be exercised while filing the Return u/s. 139(1). Accordingly, it appears that in a case where the return by an assessee with non-business income is filed belated u/s. 139(4), he will loose the chance to opt for the scheme and will have to follow the erstwhile tax scheme.

Is the new scheme attractive after all?

The million dollar question is whether the optional scheme as per section 115BAC is at all attractive? When one considers some very basic and common deductions like Insurance Premiums etc. u/s. 80C for ₹ 1.50 lakh, Medical Insurance Premium u/s. 80D, Standard Deduction from salaries and Interest on Housing Loan, it appears that the scheme is either not very lucrative or may be even disadvantageous depending on the facts.

In the following table an attempt has been made to make a comparison at each stage of such deduction. Each deduction is cumulatively factored into and figures have been worked out to check the position of tax under both the options.

Tax Payable	*10 Lakh*			*12.5 Lakh*			*15 Lakh*		
	Present	*New*	*Gain/ Loss*	*Present*	*New*	*Gain/ Loss*	*Present*	*New*	*Gain/ Loss*
Without Claiming Deduction	1,12,500	75,000	37,500	1,87,500	1,25,000	62,500	2,62,500	1,87,500	75,000
80C– 1.5L	82,500	75,000	7,500	1,42,500	1,25,000	17,500	2,17,500	1,87,500	30,000
80D –25K	77,500	75,000	2,500	1,35,000	1,25,000	10,000	2,10,000	1,87,500	22,500
Standard Deduction ₹ 50 K	67,500	75,000	**-7,500**	1,20,000	1,25,000	**-5,000**	1,95,000	1,87,500	7,500
Interest on Housing Loan ₹ 2 L	27,500	75,000	**-47,500**	77,500	1,25,000	**-47,500**	1,35,000	1,87,500	**-52,500**

It can be seen that the picture is not that rosy as projected and probably one feels that the present scheme is better given the certainty of the same apart from the arithmetic calculations. The scheme can work wonders for the class who do not have any investment at all or do not qualify for standard deductions but there are very few people in this category and accordingly it seems that the larger part of the citizen will either be affected marginally or may in fact be at a loss under the new scheme. One will need to evaluate each case on its facts to decide about exercising the option.

New Section 115BAD

The new section 115BAD is also proposed to be inserted in the Income-tax Act with a view to provide for concessional rate of tax for co-operative societies. Under the present rates of tax, co-operative societies are taxed at 10% for the income up to ₹ 10,000/-. The tax rate is 20% for income between ₹ 10,000 to 20,000 and thereafter it is 30%. As against these slabs, the new section provides an option to have a flat rate of tax @ 22%. The surcharge and cess will also apply depending on the income amount of the society.

Sub-section (2) of the section is on similar lines with the sub-section (2) of section 115BAC and provides the list of deductions and exemptions which will not be allowed under the new concessional scheme. The list of deductions and exemptions to be forgone are also almost same with a variance that the deductions and exemptions that are available only to individuals are not mentioned here for obvious reasons.

Provisions of sub-section (3) and sub-section (4) are also akin to the provisions of the respective sub-sections under section 115BAC. One can refer to the same under section 115BAC as discussed hereinabove.

Sub-section (5) of the section provides that the section will not apply unless the option is exercised by the person in the manner to be prescribed. The option is to be exercised on or before the due date of Return of Income as per section 139(1) of the Act for any year starting from A.Y. 2021-22 onwards. The option once exercised shall apply to all the subsequent years. All these provisions are similar to section 115BAC. However, there is a point of difference between two sections. Under section 115BAC the option by a person having business income can be withdrawn once. As against this under section 115BAD, no such withdrawal is at all possible and it will be always required to be followed.

Impact of Deduction under section 80P

As per the provisions of sub-section (2), all deductions under chapter VIA except 80JJAA are not available to the society. Many of the co-operative societies are struggling with their claim of deduction under section 80P as of now due to different interpretations by judicial forums. It may be worth for the co-operative societies to explore this concessional scheme and forgo the controversial deduction under section 80P. The same will however need to be evaluated on legal touchstone before concluding either way.

Non-applicability of Alternative Minimum Tax (AMT) to assessees opting for both the sections

Clause – 57 of the Finance Bill seeks to amend provisions of section 115JC of the Income-tax Act so as to provide that Alternate Minimum Tax will not be applicable to the assessees opting for the new concessional tax scheme either under section 115BAC or under section 115BAD.

Further Clause – 58 of the Finance Bill seeks to amend provisions of section 115JD to provide that the unutilised credit of AMT will not be available to set-off to all the assessees opting under the new scheme u/s. 115BAC and section 115BAD. If at all an assessee is having unutilised credit of AMT, he will be better advised to claim the same first and then opt for the scheme at a later year once he exhausts the AMT credit.

Conclusion

The alternate schemes offered are giving an option. However, whether the option is worth it or not will have to be decided on a case to case basis. The availability of choice generally leads to confusion and this becomes all the more so when it is about the monetary aspects of a person. Non-reversal of option exercised once is not in line with the spirit of the concessions sought to be given and one hopes that some amendments are carried out on this front while enacting the Bill.

We are now at a stage where corporates have an optional concessional tax rate, non-corporates have also been given optional rates. However, there is no action as regards the reduction of tax rates for Firms and LLPs which are also engaged in similar activities as corporates. This should have been addressed by the Finance Bill. Let's hope that something happens for them also so as to provide a level playing field to all the types of entities.

❍❑❍

The best way to find yourself is to lose yourself in the service of others.

– *Mahatma Gandhi*

Meditation can turn fools in to sages but unfortunately fools never meditate.

– *Swami Vivekananda*

Taxation of Dividend



Paras S. Savla, Pratik Poddar *Advocates* & CA Kunal Desai

A. Introduction

As per the current regime, the domestic company declaring, paying or distributing, dividend, is required to pay Dividend Distribution tax (DDT) at the rate of 15%. However, the rate of 15% is required to be grossed up by the domestic company, which effectively brings the tax rate at 20.35%. In order to mitigate the cascading effect, dividend paid by a subsidiary company is available to the holding company, as deduction, while paying DDT. Additionally, dividend received by specified assessee in excess of ₹ 10 lakh was chargeable to tax at the rate of 10%.

The current regime of DDT led to a lot of challenges faced by various taxpayers. The non-resident shareholders were unable to avail the applicable treaty rate in case the same was beneficial and were also unable to claim credit of DDT paid in their country of residence. The resident taxpayer falling in lower tax slabs were subjected to a higher rate of DDT. Further as dividend income was exempt expenditure incurred on such investments were subject to disallowance under section 14A.

There was a lot of clamour pre-budget by various stakeholders to abolish Dividend Distribution Tax and to revert to the classical system of taxing dividend income in the hands of the shareholders. The Finance Minister in her Budget Proposal yielded to the populous demand and has proposed to abolish DDT.

In the above backdrop, we have discussed below the details the proposed dividend taxation regime to be introduced by the Finance Bill, 2020 in the ensuing paragraphs.

B. DDT abolished – Changes made to section 115-O and 115R which details with tax on dividend distributed by domestic companies and tax on income distributed by specified companies or Mutual funds

Changes in provisions

As per the current provisions DDT was to be paid on dividends distributed on or after 1st April, 2003. The amendment in Finance bill 2020 provides that DDT is no longer applicable to dividends paid after 1st April, 2020, thus being applicable for AY 2021-22 onwards. Similarly tax which was chargeable on income distributed by the specified company or a Mutual Fund to its unit holders, will no longer be taxable for distribution made after 1st April, 2020.

Effect of amendment

The removal of DDT shall result in higher income in the hands of the shareholder. Seems that the Government hopes that increased income in the hands of public helps revive consumption demand in the Economy.

With the removal of DDT non-resident shareholders are now eligible to avail the concessional rate under respective tax treaties and shall be able to claim credit of the said tax paid in the home country. Earlier non-residents usually reinvested in India or used other routes for repatriation. The amendment may result in dividend becoming the most favored route for cash repatriation mechanism for non-resident investors and could affect capital investments in our country.

With a potential surcharge rate of 37% it is likely that the earning dividend may no longer be appealing to promoters and high net worth individuals. With Buy-back distribution tax still are rate of 20% it is possible that the promoters shall prefer this route over earning dividend income.

The small retail investors who were falling under the lower slab on 0% or 5% shall benefit from the removal of DDT.

Similarly the dividend pay-out plans for Mutual funds which had become less competitive against the systematic withdrawal plan route may be revived in view of the removal of distribution tax on income distributed by Mutual Funds.

C. Corresponding changes in exemption provisions i.e., Section 10 - Incomes not included in total income

1. **Dividend income in the hands of recipient - Exemption under Section 10(34) removed**

   The current Section 10(34) provided exemption to income in the nature of dividend referred to in section 115-O i.e. dividends on which DDT had been paid. *Vide* amendment in the Finance Act 2016, the said exemption was restricted to dividends received up to ₹ 10 lakh. Dividends received in excess of ₹ 0 lakh was made chargeable to tax in accordance with the provision of section 115BBDA i.e., dividend received by specified assessee in excess of ₹ 10 lakh was chargeable to tax at the rate of 10%. Finance Act 2020 further amended section 10(34) and exemption will not be available for dividends received after 1st April, 2020.

   Effect of amendment

   Pursuant to removal of DDT, the exemption provided in the hands the recipient has been withdrawn.

2. **Income in hands of unit holders of mutual funds where DDT is paid under section 115R**

   Section 10(35) currently exempted distributed income received by a unit holder of mutual fund and specified companies. Finance bill 2020 has made such income taxable in the hands of the unit holder from AY 2021-22.

   Effect of amendment

   Pursuant to removal of Tax of distributed income, the exemption provided in the hands the recipient has been withdrawn.

3. **Income of Mutual Funds**

   Currently section 10(23D) provided exemption to income of certain Mutual Funds if tax is paid on distributed income by such mutual funds or specified companies as per the provisions of section 115R. The Finance Bill, 2020 removed such condition, with effect from AY 2021-22.

Effect of amendment

Pursuant to removal of DDT, the income of such mutual funds and specified companies is exempt and not subject to prior payment of DDT.

4. **Income of business trusts which included dividends**

Currently dividends paid by domestic companies/Special Purpose Vehicles (SPVs) to a Business Trust after a specified date was not subject to DDT as per the provision of sub-section 115-O. Such dividends received were also exempt in the hands of the business trust by virtue of section 10(23FC). The Finance Bill has replaced reference to dividend in section 115-O with "dividend received or receivable from a special purpose vehicle", and is effective from AY 2021-22.

Effect of amendment

Pursuant to removal of DDT by the current Finance Bill, consequential amendment is made to the wordings of the section, so as to provide exemption to all dividends received or receivable by the business trust from a SPV.

5. **Income in hands of unit holders for dividends received from business trust**

Current section 10(23FD) exempted distributed income in the nature of dividend received by a unit holder of business trust. However by Finance Bill 2020, same has now been made taxable in the hands of the unit holder with effect from AY 2021-22.

Effect of amendment

Pursuant to removal of DDT by the current financial bill, consequential amendment is made to the tax dividend income received by the unit holder of a business trust.

6. **Dividend income exempt of Abu Dhabi Investment Authority (ADIA) & sovereign funds, subject to conditions**

The Finance Bill 2020 has proposed to insert Section 10(23FE) to grant exemption for dividend income of ADIA and Sovereign funds. The section states that any income by way of dividend received by the following persons who invest in infrastructure facilities subject to certain conditions, is exempt from tax

– a wholly owned subsidiary of the Abu Dhabi Investment Authority

– a sovereign wealth fund

Effect of amendment

The government has given the infrastructure sector a big boost by exempting income in the nature of dividend, interest or long term capital gain arising from investment in India by certain sovereign wealth funds or their subsidiaries. This exemption could have been granted to anyone who invests in infrastructure facilities except for restricting it to above two.

D. Deduction provisions

1. **Deduction in respect of Income from other sources – Section 57**

Section 57 provided deduction of expenses incurred in relation to any income earned which was taxable as income from other sources. In relation to dividends wherein DDT was not paid, deduction of reasonable sum paid by way of commission or remuneration to a banker or any other person for the purpose of realising such dividend was allowed. Pursuant to removal of DDT, deduction of expenses in relation to all dividends received would have otherwise been allowable. Further expense in relation to income in respect of units of mutual funds or specified companies would also be allowed. However a proviso has been inserted, vide Finance bill 2020, to restrict the deduction only to interest expense in relation to such dividend income or income in respect of such units. Further in any previous year such deduction cannot exceed 20% of such income.

Effect of amendment

Considering dividend and income from units of mutual funds or specified companies is made taxable in the hands of the recipient, expense deduction was allowed under section 57 in relation to such income. The nature of expense deduction has however been restricted only to interest portion, unlike commission and remuneration which was earlier allowed in respect of dividends where DDT was not applicable. Further the quantum of deduction has also been restricted to 20% of such income.

Suppose now the investments are made out of a common pool of interest free and interest bearing funds, it will an irony where the department now would start disallowing any interest expense claimed by the taxpayer citing availability of own funds. Further expenses incurred by the assessee to obtain professional advice to earn dividend income would not be allowed as a deduction.

2. **Deduction in respect of certain inter corporate dividends - Section 80M**

Section 80M was part of Income-tax Act earlier and omitted from AY 1998-99 when the income from dividend was exempt. It was reintroduced for a year i.e. AY 2003-04 only to be omitted again from AY 2004-05. Finance Bill 2020, reintroduces this section to remove the cascading affect. It states that if total income of a domestic company (A) includes dividend income received from another domestic company (B), then

– Deduction shall be allowed to Company A in respect of dividends so received, subject to the maxim of amount distributed as dividend by Company A on or before the due date.

– Deduction so allowed, shall not be allowed in any other previous year

– Due date has been defined as - date one month prior to the date for furnishing the return of income under sub-section (1) of section 139.

Effect of amendment

This amendment is reintroduced to remove the cascading effect of tax on dividends. The scope of cascading effect covers all the dividends received, unlike the erstwhile provision of section 115-O which restricted the scope of cascading effect only to dividends received from a subsidiary company. Therefore, even the dividend that is received by the company from its investments shall be available as a deduction, unlike in the DDT regime wherein the said dividend would have been subjected to tax again on distribution by the company. Further, the above deduction would be available even in cases, where companies have opted for concessional rate of tax under section 115BAA and 115BAB, wherein those companies do not avail other specified deductions and incentives.

E. Tax Rates

1. **Tax on dividends in case of non-residents - Section 115A**

Currently, dividends on which DDT was not paid exempt for non-residents. Tax rate of 20% was applicable for dividends on which DDT was not paid. Finance Bill 2020 amends to remove reference of dividends on which DDT was paid. Consequently all dividend income would be taxable @ 20%. Further the section is amended to provide that if the TDS is deducted at a lower rate than 20%, then the non-resident would have to file a return of income in India.

Effect of amendment

Pursuant to removal of DDT by the current financial bill, consequential amendment is made to the tax dividend income received by non-residents at the rate of 20%. Currently there was a dispute wherein companies wanted to apply the treaty rate in respect of tax on dividends on which DDT was paid higher than the treaty rate. Only some treaties specifically provided such a benefit. Pursuant to removal of DDT, non-residents would have the benefit to apply treaty rate wherever beneficial. Illustrative list of countries which have lower rates as per the DTAA entered with India is as follows:

Country	***Tax rate on dividend as per DTAA***
USA	• 15% of the gross dividend in case the beneficial owner is a company which owns at least 10% of voting stock of the company paying the dividends • 25% of gross dividend in other cases
UK	• 5% of the gross amount of the dividends where those dividends are paid out of income (including gains) derived directly or indirectly from immovable property within the meaning of Article 6 by an investment vehicle which distributes most of this income annually and whose income from such immovable property is exempted from tax; • 10% of the gross amount of dividend
Singapore	• 10% of the gross dividend in case the beneficial owner is a company which owns at least 25% of shares of the company paying the dividends • 15% in other cases
Mauritius	• 5% of the gross dividend in case the beneficial owner is a company which owns at least 10% of capital of the company paying the dividends • 15% of gross dividend in other cases
Cyprus	• 10% of the gross amount of dividend if the beneficial owner of the dividends is the resident of Cyprus.

The non-resident shareholders shall now also be eligible to claim credit of the taxes paid on dividend income in the country of residence unlike under the DDT regime which shall reduce the overall tax outgo on an investment for non-resident taxpayer and make the Indian capital market more attractive.

If the non-resident applies for a lower withholding certificate in respect of dividend income based on beneficial treaty rates, then the exemption in filing of return of income will not be available and return of income will have to be filed in India.

Further, some treaties prescribe the 'beneficial ownership' for availing the lower treaty rate. Further any relief claimed under the treaty shall be subject to Multilateral Instrument and General Anti Avoidance Rules (GAAR). The tax authorities may challenge 'beneficial ownership' to deny lower rate of tax.

2. **Tax on dividends on Global Depository Receipts received by non-resident - Section 115AC**

Earlier dividend on which DDT was paid was excluded. The rate of 10% is now applicable to all dividends received after 1st April, 2020 considering that DDT has been removed. Further the section is amended to provide that if the TDS is deducted at a lower rate than 10%, then the non-resident would have to file a return of income in India. Pursuant to removal of DDT by the current financial bill, consequential amendment is made to the tax all dividend income on Global Depository Receipts received by non-residents at the rate of 10%.

3. **Tax on dividends on Global Depository Receipts received by resident employee - Section 115ACA**

Similar to Section 115AC above, the current Financial Bill has made consequential amendment to the tax all dividend income on Global Depository Receipts received by resident employee at the rate of 10%.

4. **Tax on dividends received by Foreign Institutional Investors (FIIs) - Section 115AD**

Dividend on which DDT was paid was excluded for FIIs. The rate of 20% is now applicable to all dividends received after 1st April, 2020 considering that DDT has been removed.

Effect of amendment

Foreign Portfolio Investments (FPIs) that are registered as corporate entities shall be liable to a maximum surcharge of 5% on dividend income while the FPIs which are registered as Trust shall be liable to a maximum surcharge of 37%. This is sure to re-ignite the controversy which was settled when the surcharge on capital gains for non-corporate FPIs was capped at 15% by The Taxation Laws (Amendment) Act, 2019. Further FPIs being non-resident shall be eligible to avail concessional rate of tax on dividend income (As per section 115A of the Act discussed above). It may be pertinent to note that at present FPIs that do not claim any treaty relief are excluded from the purview of GAAR. With the taxability of dividend income in the hands of FPIs it is likely that most FPIs would claim treaty relief which may potentially subject them to GAAR.

5. **Tax on income of certain domestic companies - Section 115BAA**

Currently companies opting to be governed by the provisions of section 115BAA of the Act are not eligible to claim any deduction under Chapter VI-A other than provisions of section 80JJAA of the Act. It is proposed to allow the companies opting to be governed by provisions of section 115BAA of the Act to claim deduction under section proposed section 80M of the Act. Pursuant to removal of DDT by the current financial bill, this consequential amendment is made to allow companies opting to be governed by section 115BAA of the Act to claim deduction under section 80M of the Act to avoid cascading effect on taxation of dividend income.

6. **Tax on income of new manufacturing domestic companies - Section 115BAB**

New manufacturing companies opting to be governed by the provisions of section

115BAB of the Act are not eligible to claim any deduction under Chapter VI-A other than provisions of section 80JJAA of the Act. An amendment similar to that of 115BAA is proposed to claim deduction under section proposed section 80M of the Act to avoid cascading effect on taxation of dividend income.

7. **Tax on dividends received by specified residents above 10 lacs - Section 115BBDA**

Vide amendment in the Finance Act 2016, the exemption under 10(34) was restricted to dividends received up to ₹ 10 lakh. Dividends received in excess of ₹ 10 lakh was made chargeable to tax in accordance with the provision of section 115BBDA i.e., dividend received by specified assessee in excess of ₹ 10 lakh was chargeable to tax at the rate of 10%. Finance Bill 2020 proposes to make the said rate of 10% applicable only in respect of dividend income received prior to 31st March. 2020. This is because the threshold limit of ₹ 10 lakh is no longer applicable and any amount dividend received after 1st April, 2020 will be included in the total income of the recipient, being a specified resident.

8. **Definition of Investment Income for purpose of Chapter XII-A - Section 115C**

Current definition of 'investment income' for the purpose of chapter XII-A excludes dividends on which DDT is paid. The definition has been amended to include all dividends from a foreign exchange asset received by a Non-Resident Indian. This consequential amendment is made to the definition of investment income to include all dividend income derived from a foreign exchange asset by a non-resident Indian and the same is taxable at the rate of 20%.

9. **Tax on income of unit holder and business trust - Section 115UA**

Currently due to pass through status of a business trust, income of a business trust in the nature of interest and rent was deemed to be income of the unit holder. Further as per section 115-O, no DDT was liable to be paid by the specified domestic company in respect of dividends declared, distributed or paid to a business trust. Finance Bill 2020 has extended the pass through status even to dividends, and the same will be deemed to be income in the hands of the unit holders.

F. Tax Withholding Provisions

1. **Deduction of tax at source on dividend income-Section 194.**

Earlier this section was omitted by the Finance Act, 2003, w.e.f. 1-4-2003. Finance Bill, 2020 reintroduced this section to provide for tax deduction at source on the dividend paid by domestic company in excess of INR 5,000 at rate of 10% to a resident shareholder.

2. **Deduction of tax at source on income distributed by specified Mutual Funds - Section 194K**

Consequential amendment is proposed by introducing new section 194K to provide for tax deduction at source on the income distributed by specified Mutual Funds in excess of INR 5,000 at rate of 10% to a resident investor. The term used under section 194K of the Bill is income and not dividend. Accordingly, as per extant proposals mutual funds shall be required to deduct tax at source even on capital gains income. However, the Ministry of Finance has issued a press release to clarify that the intention is to only cover dividend income and necessary clarification/amendments shall be brought in the proposal to give effect to the same.

3. **Deduction of tax at source on dividend income distributed by business trust - Section 194LBA**
Presently the dividend paid by Business Trust to its unit holders were exempt and accordingly, not subjected to deduction of tax at source. Consequential amendment is proposed under section 194LBA to provide for tax deduction at source on the dividend paid Business Trust at rate of 10% to a resident unitholders and at rate of 20% in case of non-resident unitholders.

4. **Deduction of tax at source in case of non-resident - Section 195**
Any income paid by a person to a non-resident are subjected to deduction of tax at source at rates in force. However, proviso to section 195 of the Act, provides that no tax is to be deducted at source in case the dividend paid are subjected to DDT. Consequential amendment is proposed under section 195 of the Act to provide for tax deduction at source on the dividend paid to non-resident shareholders at rates in force. Further, payment by any mode is proposed to be covered.

5. **Deduction of tax at source in case of non-resident unitholders - Section 196A**
This section was omitted by the Finance Act, 2003, w.e.f. 1-4-2003. Consequential amendment is proposed to reintroduce section 196A to provide for tax deduction at source on the income paid to a non-resident by a specified company referred to in section 10(35) of the Act shall be subjected to tax at rate of 20%. Further, payment by any mode is proposed to be covered.

6. **Deduction of tax at source in case of income from foreign currency bonds or shares in an Indian Company-Section 196C**
Currently, no tax was required to be deducted at source in relation to any dividend received from bonds or Global Depository Receipts as referred to section 115AC of the Act which are subjected to DDT. Consequential amendment is proposed under section 196C of the Act to provide for tax deduction at source on the dividend received from bonds or Global Depository Receipts as referred to section 115AC at rate of 10%. Further, payment by any mode is proposed to be included.

7. **Deduction of tax source in case of income of Foreign Institutional Investors from securities-Section 196D**
Presently no tax was required to be deducted at source in relation to any dividend received by an FPI from securities which is subjected to DDT. Consequential amendment is proposed under section 196D of the Act to provide for deduction of tax at source on the dividend received by FPIs from securities at rate of 20%. Further, payment by any mode is proposed to be included.

We have summarised below the various rates of withholding applicable on dividend income:

Payer	***Receiver***	***Type of dividend***	***Rate (As per Bill)***
Domestic Company	Resident shareholder (in excess of INR 5,000)	Dividend on shares	10%
	Non-resident including foreign company	Dividend on shares	20%

Payer	*Receiver*	*Type of dividend*	*Rate (As per Bill)*
	Non-resident including foreign company	Dividend on foreign currency bonds	10%
	Foreign Portfolio Investors	Dividend on shares	20%
Specified Mutual Funds	Resident assessee	Income on units in excess of INR 5,000 (though the ministry has clarified that only dividend is proposed to be covered)	10%
	Non-resident assessee	Income on units	20%
Business Trust	Resident assessee	Dividend on units	10%
	Non-resident assessee	Dividend on units	10%

G. Issues that may arise

1. Beneficial Ownership

- Most of the tax treaties that India has entered into prescribe a beneficial ownership test to avail the concessional rate of tax on dividend income and accordingly the non-resident taxpayers shall be required to substantiate that they are the beneficial owner of the dividend income before they can avail the lower rate prescribed under the treaty. The concept of 'beneficial ownership' has been a vexed issue which is littered with litigation. Non-residents that have investment in India through tax haven jurisdiction like Mauritius, Singapore, and Cyprus etc. have already faced increased scrutiny by the tax authorities when trying to avail treaty relief on dividend & interest income.

- Advance Ruling No. P-9 (220 ITR 377 AAR) examined the concept of beneficial ownership *vis-à-vis* Article 10 of the Double Tax Treaty entered into between India and Mauritius. In this case, a UK company had set up a wholly-owned subsidiary in Mauritius. The AAR in the extant case emphasised that the companies were using Mauritius to route investments into India for deriving tax advantage. The AAR drew support from Klaus Vogel to indicate the understanding for 'beneficial ownership' as under:

"Hence, the 'beneficial owner' is he who is free to decide (1) whether or not the capital or other assets should be used or made available for use by others or (2) on how the yields therefrom should be used or (3) both. The model conventions do not require the beneficial owner also to be the legal owner of the right or property giving rise to the payments ….……

(c) The fetters that exclude beneficial ownership may be legal or merely factual ('effectif'). Where individuals are involved, it will normally hardly be possible to prove the existence of a factual restriction of the individual's power of disposition. But it may be of significance in cases of control under company law. Of course, a joint stock company which receives dividends, interest or royalties may very well be the beneficial owner of such payments… Even if such a

company were obliged to distribute all of its profits to its shareholders . . . this would not affect its beneficial ownership, as would a commitment to pass on such profits"

- It is pertinent to note that the Central Board of Direct Taxes ('CBDT'), has issued Circular No. 789 dated April 13, 2000, clarifying that wherever a Certificate of Residence is issued by the Mauritian authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as 'beneficial ownership' for applying the double taxation convention accordingly. However, whether it can be extended to other countries is arguable. Further, the said circular was issued prior to GAAR and MLI and it is yet to pass the test of GAAR or MLI.

- Further, in case of FPIs registered as Trust in could be difficult to prove that the FPIs are the beneficial owner of the dividend income.

- Accordingly, while the abolishment of DDT does provide a relief to non-resident taxpayers to avail the concessional rate of tax on dividend income, the hurdle of satisfying the beneficial ownership conditions is a monumental roadblock.

2. Pass through entities

- As per the provisions of Act any non-resident availing treaty benefit has to submit a tax residency certificate issued by the tax authorities of county of residence. In case an entity is a pass through entity in the county of residence, it may be difficult for the them to obtain a tax residency certificate and accordingly they may be ineligible to avail the concessional rate of tax prescribed under the tax treaties in the absence of a tax residency certificate.

- The pass through entities may not be subjected to tax in the country of residence as the tax may be paid on the income by the beneficiaries and accordingly the pass through entity may not be able claim credit of taxes paid in India on dividend income. Further, the beneficiaries may also not be eligible to claim credit of the taxes paid since it is not tax paid by them but the pass through entity in India

3. General anti-avoidance rule (GAAR) and MLI (Multilateral Instrument)

- The provisions of GAAR are applicable where the main purpose of entering into a transaction is to avail a tax benefit.

- The provisions of GAAR are applicable from 1st April 2017. Though GAAR provides a grandfathering for capital gain arising from investment made prior to 1st April 2017 there is no such grandfathering for any other income derived from such investment post 1st April 2017.

- Accordingly, the dividend income not only from investment made after 1st April 2017 but also the grandfathered investment i.e. investment made prior to 1st April 2017 may also be subjected to GAAR in case treaty relief is claimed under the treaty to avail the concessional rate of tax for dividend income.

- Further, at present FPIs that do not claim any treaty relief are excluded from the purview of GAAR. With the taxability of dividend income in the hands of FPIs it is likely that most FPIs would claim treaty relief which may potentially subject them to GAAR.

- The provisions of MLI are applicable where one of the principal purpose of entering into a transaction is to avail a tax benefit. Accordingly, the non-resident taxpayers shall be required to satisfy the conditions of principal purpose test (PPT) under MLI while availing the concessional rate of tax for dividend income prescribed under the respective treaties. However, it may be noted that while India has notified Mauritius in its instrument of ratification, Mauritius has not notified India in its instrument of ratification and accordingly, at present MLI does not apply to the India – Mauritius tax treaty.

4. LLP vs. Company

- The recent cut in the corporate tax rate for domestic companies along with the abolishment of DDT may lead to reevaluation of the ideal structuring option for inbound investment as the LLP structure may no longer be tax efficient.

- We have highlighted below the tax liability for a company and LLP under the various provisions of the Act:

Pre-amendment

Particulars	*LLP*	*Company (25% turnover based)*	*Company (not paying tax under section 115BAA or 115BAB)*	*Company paying tax under section 115BAA*	*Company paying tax under section 115BAB*
Profits	100	100	100	100	100
Less: Tax	(34.94)	(29.12)	(34.94)	(25.17)	(17.16)
PAT	65.06	70.88	65.06	74.83	82.84
Less: DDT	Nil	(12.09)	(11.09)	(12.76)	(14.13)
Distributed income	65.06	58.79	53.96	62.07	68.71
Tax outgo as per existing regime	34.94	41.21	46.04	37.93	31.29

Post-amendment

Particulars	*LLP*	*Company (25% turnover based)*	*Company (not paying tax under section 115BAA or 115BAB)*	*Company paying tax under section 115BAA*	*Company paying tax under section 115BAB*
Profits	100	100	100	100	100
Less: Tax	(34.94)	(29.12)	(34.94)	(25.17)	(17.16)
PAT	65.06	70.88	65.06	74.83	82.84
Less: DDT	Nil	Nil	Nil	Nil	Nil

Particulars	*LLP*	*Company (25% turnover based)*	*Company (not paying tax under section 115BAA or 115BAB)*	*Company paying tax under section 115BAA*	*Company paying tax under section 115BAB*
Distributed income	65.06	70.88	65.06	74.83	82.84
Tax outgo post amendment	**34.94**	**29.12**	**34.94**	**25.17**	**17.16**

- As can be seen from above table under the tax regime proposed to be introduced is at least at par if not better than the LLP structure from a tax standpoint.
- However, it is pertinent to note while evaluating the LLP vs Company structure in an inbound investment that the dividend received from a company shall likely be taxable in the hands of promoter at the highest slab rate of approximately 43% while the profits received by the partners from LLP share be exempt.

H. Conclusion

The taxation of dividends in the hands of investors may lead to a conflicting struggle between foreign investors, small domestic investors to whom incidence of tax on dividend has reduced and promoters and high net worth individuals for whom the incidence of tax on dividend income has increased.

The challenges for non-resident investors to claim lower treaty rates such as fulfilment of beneficial ownership test, GAAR and MLI are significant. However, it should be a welcome relief to the non-resident taxpayers that they shall now be eligible to claim credit of tax paid on dividend income.

Further, with the removal of DDT and the clarification by RBI that LLP cannot have ECBs, it is likely that while looking at structuring options the proposal of setting up an LLP may no longer be that attractive.

With the exemption of dividend income being removed it is finally time to bid farewell to the vexed issue of disallowance under section 14A of the Act. This shall help in reducing litigation burden on the taxpayer as well as tax authorities.

While the proposed amendments have removed some challenges faced by the taxpayers, some provisions as are being currently proposed are sure to create a few new ones in their place!

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> Almost half of the population of the world lives in rural regions and mostly in a state of poverty. Such inequalities in human development have been one of the primary reasons for unrest and, in some parts of the world, even violence.
>
> *– A. P. J. Abdul Kalam*

Budget 2020 : Towards a perfect ecosystem for start-ups

Devendra Jain & Radha Halbe, *Advocates*

"In everything, there should be freshness, new ways, new thinking. The world cannot move ahead without innovation" said the Hon'ble Prime Minister in his monthly radio address 'Man ki Baat' in December, 2015, referring to the 'Start up India' Campaign. The campaign was first announced by Indian Prime Minister, Narendra Modi during his 15th August, 2015 address from the Red Fort, in New Delhi visioning India to be the start-up capital of the world.

For making India an attractive start-up hub for the world, the government introduced various tax holidays for eligible start-ups. The then Finance Minister Late Mr. Arun Jaitley in his budget speech while introducing the Finance Bill, 2016 acknowledged that "Start-ups generate employment, bring innovation and are expected to be key partners in Make in India programme. I propose to assist their propagation through 100% deduction of profits for 3 out of 5 years for startups set up during April 2016 to March 2019." Thus, our country saw the blooming of what appears to be an era of start-ups.

The taxability of start-ups also bagged significant importance in the Union Budget-2020 with the following proposed amendments to the Income-tax Act, 1961:

Section 80IAC - Special provision in respect of specified business

This section in its introduction stage provided 100% deduction of profits for 3 consecutive assessment years out of five assessment years beginning from the year in which the eligible start-up was incorporated, provided that such start-up was incorporated between 1-4-2016 to 31-3-2019. The said section applied to any business which involved innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property and having turnover up to ₹ 25 crore in the relevant previous years for which deduction was claimed. The Finance Act 2017 amended the section to allow deduction of 100% of the profits for 3 out of 7 assessment years instead of 5 assessment years thus enhancing government support to start-ups. Finance Act 2018 saw further significant amendments to this section as the definition of eligible business was amended to include scalable business models with a high potential of employment generation or wealth creation. Further the period of incorporation of such business was extended up to 31st day of March, 2021 from the previous limit of 31st day of March, 2019.

The said section is proposed to be amended by the Finance Bill, 2020 *vide* Clause 36 of the Finance Bill to provide that the deduction under the said section shall be available to an eligible start-up for a period of three consecutive assessment years out of ten years (previously seven) beginning from the year in which the eligible start-up is incorporated. This will enable the loss making start ups to defer the period of deduction to later part of the business cycle where initial losses are recouped, subject of course to the limit of 10 years from the year of incorporation. The second and major proposed amendment is that the total turnover limit of a business for being eligible to claim deduction under this section is increased to one hundred crore rupees instead of the previous twenty five crore rupees in the previous year relevant to the assessment year for which deduction under this section is claimed. The said proposed amendment is a positive development from the perspective of a start-up as growth will no more be a hurdle to claim deductions from the tax burden.

Deferring payment of TDS or tax payment in respect of income pertaining to Employee Stock Option Plan (ESOP) of start-ups

ESOPs have been a significant component of the compensation for the employees of various companies especially start-ups. It is seen that start-ups do not generate significant income in the early stage of their life cycle and hence ESOPs allow the founders and start-ups to employ highly talented employees at a relatively low cash salary with balance being made up via ESOPs.

It is first important to look at section 17(2) of the Act which defines 'perquisites' which are taxable under the head salary by virtue of section 15. Essentially, perquisites are non-cash benefits given by an employer to employees in addition to cash salary or wages. Clause (vi) of section 17(2) states that perquisites include the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, free of cost or at concessional rate to the assessee. Rule 3 of the Income-tax Rules, 1962 specifies the method of valuation of these equity shares in a company as specified in section 17(2)(vi).

Thus, ESOPs fall in the ambit of section 17(2)(vi) read with Rule 3(8)(iii) of the Rules and are therefore taxed as below:

i. Tax on perquisite as income from salary at the time of allotment of securities.

ii. Tax on income from capital gain at the time of sale of such shares/rights.

Thus the tax on perquisite is required to be paid at the time of allotment of securities which may lead to cash flow problem as this benefit of ESOP is in kind.

It has been observed that the start-ups do not gain much in the initial years of operation and are majorly loss making at the introduction stage of their life cycle. This in turn, has consequential effect on the payments to be afforded to the skilled employees of such start-ups. In order to make these start-ups equally attractive employers and to ease the burden of payment of taxes by the employees of the eligible start-ups or payment of TDS by the start-up employer, the following amendments are proposed in the Union Budget 2020:

Section 191 - Direct payment

Presently, this section provides that in the case of income in respect of which provision is not made for deducting income tax at the time of payment, and in any case where income tax has not been deducted in accordance with the provisions of Chapter XVII, income-tax shall be payable by the assessee directly at the time or before the filing of income tax return for that year.

The Finance Bill, 2020 proposes to insert a corresponding sub-section (2) in the said section so as to provide that where the income of the Assessee in any assessment year, from A.Y. 2021-22 onwards includes an income of the nature specified in section 17(2)(vi) (perquisites in the form of ESOPs), allotted or transferred directly or indirectly by the current employer, being an eligible start-up referred to in section 80-IAC, such assessee can defer the payment of tax for 5 years, which was earlier required to be paid before or at the time of filing of the return of income for that year. The income-tax on such income shall now be payable by the assessee within fourteen days from:

1. expiry of forty-eight months from the end of the relevant assessment year;
2. sale of such specified security or sweat equity share by the assessee;
3. the assessee ceasing to be employee of the employer who allotted or transferred him such specified security or sweat equity share;

whichever is earlier.

Section 140A- Self-assessment

A corresponding amendment has been proposed in section 140A (payment of self-assessment tax) so as to defer the payment of self-assessment tax on the amount of perquisite in the form of ESOPs from eligible start up, by way of allowability of deduction of the amount of tax as referred to in section 191(2). In simple words, while calculating the self assessment tax payable by the employee, he can deduct the tax on such perquisite, which is deferred u/s. 191(2).

For example, say an assessee being an employee of eligible start-up, exercises the ESOPS in F.Y. 2020-21 which are allotted to him in the same year. Though such perquisite will be included in his income for A.Y. 2021-22, tax on such perquisite is payable within 14 days from the expiry of 48 months from the end of A.Y. 2021-22. Therefore, while calculating his self assessment tax liability u/s. 140A, he can deduct the tax which is thus deferred u/s. 191(2). In case, he sells the specified security etc. received in ESOP or he terminates his employment with such employer prior to the expiry of 48 months from the end of A.Y. 2021-22, tax will become payable immediately within 14 days from the happening of any such event.

Section 156 - Notice of demand

Clause 71 of the Bill seeks to amend section 156 of the Income-tax Act, which, *inter alia*, provides that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand in such form, as may be provided in the rules, specifying the sum so payable which is supposed to be paid within 30 days from the receipt of such notice of demand.

The Finance Bill, 2020 proposes to insert a sub-section (2) in the said section so as to provide that where income of the assessee for any assessment year, from AY 2021-22 onwards, includes an income of the nature specified in clause (vi) of sub-section (2) of section 17 and such specified security or sweat equity shares as referred to the said clause are allotted or transferred directly or indirectly by the current employer, being an eligible start-up referred to in section 80-IAC, then tax or interest on such income included in the notice of demand shall be differed and will be payable by the assessee within fourteen days from:

1. expiry of forty-eight months from the end of the relevant assessment year;
2. sale of such specified security or sweat equity share by the assessee;
3. the assessee ceasing to be employee of the employer who allotted or transferred him such specified security or sweat equity share;

whichever is earlier.

Section 192 – Salary

Every employer is liable to deduct tax at source from the payment of salary to employees u/s. 192. Sub-section (1) of the said section provides that any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year.

Sub-section (1A) of the said section provides that without prejudice to the provisions contained in sub-section (1), the person responsible for paying any income in the nature of a perquisite which is not provided for by way of monetary payment, referred to in clause (vi) of sub-section (2) of section 17, may pay, at his option, tax on the whole or part of such income without making any deduction therefrom at the time when such tax was otherwise deductible under the provisions of sub-section (1).

Thus, in respect of perquisite in the form of ESOPs, either the employer can deduct tax at source under sub-section (1) or he can choose to pay such tax, from his own funds, in sub-section (1A) without deduction from employee's salary.

Clause 73 of the Bill proposes to insert new sub-section (1C) so as to provide that for the purpose of deducting or paying tax under sub-section (1) or sub-section (1A), as the case may be, a person, being an eligible start-up referred to in section 80-IAC, responsible for paying any income to the assessee being perquisite of the nature specified in clause (vi) of subsection (2) of section 17 in any previous year relevant to any assessment year, from AY 2021-22 onwards, shall deduct or pay, as the case may be, tax on such income within fourteen days from:

1. expiry of forty-eight months from the end of the relevant assessment year;
2. sale of such specified security or sweat equity share by the assessee;
3. the assessee ceasing to be employee of the employer who allotted or transferred him such specified security or sweat equity share;

whichever is earlier, at the rates in force for the financial year in which the said specified security or sweat equity share is allotted or transferred.

Conclusion

India is the third largest start-up ecosystem, behind only the US and China. India's start-ups raised $14.5 bn. in 2019, with a $150 bn. valuation. The number of IMB certified start-ups in India currently is around 250 with an average valuation of ₹ 200 crore. Standard ESOP pool size is 10% with an average exercise rate of 2%. Thus the tax payable with respect to ESOPs is around ₹ 1.2 crore which is negligible against what the start-ups have the potential to earn for the country.

Considering Benchmarking as a tool for growth, it is important to have a birds-eye view of the global taxability of ESOPs, which is to defer taxation to the point of sale (China); allow for any method taking into consideration asset value, including book value, so long as it's performed by a registered valuer (USA) and tax the difference between the book value and the exercise price (Singapore).

ESOPs remain a paper gain for the employee till the actual sale of the securities and ideally should be taxed at the time of sale. Therefore, the current proposal of deferring the tax liability on ESOPs for 5 years is a welcome amendment.

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Amendments related to International Taxation

CA Naresh Ajwani

1. Residence in India for individual and HUF – Section 6 [Clause 4 of Finance Bill 2020]

This has been one of the most controversial provisions of the Finance Bill. It required the Government to give a clarification by a press release on 2nd Feb. 2020 (Sunday).

There are three specific amendments in the definition of residence of an individual, and one amendment for an HUF. These are as under:

i) Relief for **NRIs to visit India** and maintain their non-resident status has been reduced from 181 days to 119 days in a year.

ii) **Deemed residence** has been introduced for Indian citizens who are not residents of any country.

iii) The period of relief for **Resident but Not Ordinarily Resident** has been enhanced.

These amendments will come into force from AY 2021-22. The details are discussed below.

1.1 Relief for NRIs to visit India reduced [*Explanation* (b) to Section 6(1)]

Existing provisions

1.1.1 If an NRI who is outside India, comes on a "visit" to India, he can be up to 181 days in India during the year and still be a non-resident. Under Section 6(1)(c), normally if a person is India for:

– 365 days or more in previous 4 years, and

– 60 days or more in the relevant year (for which the residence has to be determined)

the person will be considered as a "resident of India".

This test of 60 days gets increased to 182 days for NRIs. This is the existing relief.

The term "NRI" is used in common parlance. Legally the relief is available for Indian citizens, and persons of Indian origin as explained in *Explanation* to Section 115C(e).

1.1.2 This relief was provided as NRIs represented that they are being invited by India to invest. If they invest, they have to come to India to look after their investment's. They should be granted relief from the 60 days test as it is too short. The relief has been increased from 90 days to 182 days over 20 years.

Finance Bill proposal

1.1.3 It is now proposed that the number of days which a NRI can be in India for a visit and maintain his non-resident status will be reduced to 119 days.

Several people maintain their NRI status by just being in India for less than 181 daySection They have Indian and foreign activities but manage the same from India while they are here. They claim NRI status and do not pay tax on foreign income. To curb this practice, the period has been reduced to 119 days (about 4 months).

It now means that a person should be out of India for at least 246 days (247 days in a leap year) to maintain their non-resident status.

1.1.4 This will affect different kinds of NRIs as under:

– Employees who work abroad. They will not be affected by this provision as they actually come to India only for short vacations. Their stay in India will be much less than 119 days.

– Retired people who come to stay in India – especially during winter months in USA and Europe. They will have to see that they spend less than 119 days in a year.

– People who have their own business abroad. They will not be affected if they stay abroad for more than 8 months.

– Those who have Indian businesses but want to stay abroad to be NRIs. Such persons will have a lot of difficulties. If people have businesses in India, to stay abroad for six months is also difficult. Now to stay abroad for 8 months will be even more difficult.

The amendment is targeted for last category of people.

1.2 Deemed residence for Indian citizens – New section 6(1A)

Finance Bill proposal

1.2.1 This is a new provision proposed in the Finance Bill. It provides that:

– an individual,

– who is Indian citizen,

– and who is not liable to tax in any other country or territory,

– by reason of domicile, residence or any criteria of similar nature,

– **will be deemed to be an Indian resident.**

The above is "notwithstanding anything contained in clause (1)"... i.e., even if a person is a non-resident u/s. 6(1), he will be considered as an Indian resident.

This provision will apply only to Indian citizens.

1.2.2 The memorandum explaining the finance bill states that the issue of **"stateless person"** has been causing difficulties internationally. Persons can arrange affairs in a manner that they are not residents of any country. Hence they pay tax only on incomes arising in a country. They may not pay tax on all their income in any one country.

As an anti-avoidance measure, such persons (who are Indian citizens) will be considered as Indian residents.

It may be noted that stateless person has a different meaning in International Law. Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'.

What the memorandum refers to are **nomads** – not residents in any country.

1.2.3 This provision has caused concern among many NRIs. This difficulty is more acute in case of NRIs in UAE, Oman, Qatar, etc. where there is no income-tax law. As there is no income-tax law, a person cannot be liable to tax in that country in absence of tax law. If a person is not liable to tax, he will be considered as Indian resident.

Persons who are not liable to tax in Dubai will be Indian residents even if they do not come to India even for one day.

The objective is not to catch genuine residents of other countries. However as per interpretation of the amendment, such people will be caught by the amendment.

This issue was dealt with extensively in the Advance Ruling of Cyril Pereira (239 ITR 650) where the authority ruled that if there is no tax in UAE, there is no double tax. DTA applies only if there is double tax. There is no income-tax law in UAE applicable to individuals. As there is no law, a person cannot be "liable to tax". As there is no liability to tax in UAE, there is no double tax. Hence DTA cannot apply. It was argued that there is a potential liability to tax as in future, tax law can be enacted. However this argument was rejected. Subsequent to this, section 90 was amended to provide that India can enter into DTA to promote mutual economic relations, trade and investment.

If one strictly reads the amendment, person who are not be liable to tax in UAE, will be considered Indian residents.

1.2.4 Due to adverse media reports, the Government issued a press release dated 2-2-2020. It provides that *bona fide* employees will not be affected and only their Indian incomes will be charge to tax. If necessary the Government will make provision in the tax law to clarify the above.

This is a positive approach of the Government. The objective is not to catch *bona fide* employees. However what is *bona fide* and what is not *bona fide* can lead to difficulties.

The clarification in the meaning of residence should be stated that *bona fide* employees will not be considered as Indian residents.

If they are only given relief by saying that their foreign incomes will not be taxable (but will be residents), it will not resolve all the issues. For example, such persons will have to disclose foreign assets.

1.2.5 Further, those who are in UAE for their own business but are not employees, will be affected if the Government provides relief only for employees.

The Government should come out with comprehensive relaxation for all *bona fide* residents and not just employees.

For example, it can be provided that if a person has stayed in any country for atleast 183 days in a year and obtains a Tax Residency Certificate, will not be considered as deemed resident under the new provision. Such a provision is already there in the DTAs which India has signed with a few countries (including UAE). This will clearly help *bona fide* residents of other countries.

Just because the other country does not levy income-tax should not make *bona fide* residents of other countries, as residents of India.

1.2.6 This provision will however not affect residents of those countries which levy tax based on territoriality basis. For example, Hong Kong levies tax based on income sourced in Hong Kong even for its own residents. Such persons are still residents of Hong Kong. If a Hong Kong resident has income outside Hong Kong (say Singapore), he will not pay tax in Hong Kong. If Singapore also does not levy tax on such income, the person will not pay tax anywhere. While under BEPS anti-avoidance measures, double non-taxation is not preferred, if the counties do not want to tax, it is all right.

1.2.7 **Tie-breaking rules in a DTA** – One needs to consider tie-breaking rules of a DTA.

Under the India-UAE DTA, a person is a resident if he stays in UAE for at least 183 days in a year. Such a person will be a resident of UAE. Such a person can also be a resident of India under the new proposal. Such a person will be a **dual resident**.

In this situation, one will have to apply tie-breaking rules in Article 4(2) of the DTA. The rules contain a hierarchy of tests. These include examining where does a person have a permanent home, personal and economic relations, habitual abode or citizenship.

For many people, they may be having permanent home, personal and economic relations and habitual abode in UAE and India. Indian residents will not get citizenship in UAE. In such situations, the person will be considered as Indian resident under the tie-breaking rules.

Assuming that the person is a UAE resident under the DTA, still such person is an Indian resident under section of ITA. Only for DTA the person is a non-resident. While he may not be liable to tax on incomes earned out of India, he will have to file a return and claim the DTA relief. Further such person will have to disclose his foreign assets. This is based on the clear understanding that a person who is a non-resident of any country only because of the DTA, does not get reliefs as a non-resident of that country. He will get relief only as per the DTA. Subject to the DTA, other provisions of Indian income-tax act will continue to apply to such residents.

1.2.8 Thus people in countries without a tax law will face difficulties.

1.3 Relief for Resident but Not Ordinarily Resident [Section 6(6)]

Existing provisions

1.3.1 Under section 6(6), a person is considered as Resident but Not Ordinary Resident (RNOR) if:

– the person has been a non-resident in 9 out of 10 preceding years (preceding the year for which residence has to be determined), or

– during the preceding 7 years, the person has been India for not more than 729 days.

Being RNOR means that the person's foreign income is not taxable in India.

The whole idea is that when a person becomes an Indian resident, such person is not immediately taxable on the global income right away. There is a breathing time.

Finance Bill proposal

1.3.2 It is now proposed to delete the test of 729 days in preceding 7 years.

Further it is proposed that persons who are non-residents in 7 out of 10 preceding years, such persons will be RNOR.

Thus for example, for FY 2020-21, if a person has been a non-resident in 7 years out of the 10 years 2010-11 to 2019-20, he will be RNOR.

This means, if a person is a non-resident for 10 or more consecutive years, such a person can be a RNOR for 4 years.

This is a welcome relief.

1.3.3 A similar proposal is there for HUFs. If the above conditions are satisfied by the manager, then the HUF will be considered as RNOR.

1.4 These amendments will apply from AY 2021-22.

2. Limitation on interest deduction on payment to non-resident Associated Enterprise – Section 94B [Clause 46 of Finance Bill 2020]

Existing provisions

2.1 Under Section 94B, there is a limitation on deduction of <u>interest paid to a non-resident Associated Enterprise (AE)</u> based on prescribed formula. Briefly, the limitation is that any <u>interest paid</u> by an Indian company or a PE of a non-resident, <u>in excess of 30% of</u> Earnings Before Interest, Tax, Depreciation and Amortisation (EBIDTA), will be <u>disallowed</u>. Any excess interest which is disallowed, can be carried forward to subsequent years. This disallowance will also happen if the non-resident AE gives a guarantee or places a corresponding and matching deposit with the lender. (The lender and borrower are not AEs. Still disallowance will happen.)

The interest paid is allowed as a deduction from profits. If the person is liable to tax @ 30%, deduction of interest reduces tax by 30% of interest paid. This interest when paid to the non-resident AE, may be taxed at a lower rate. Under the income-tax, the rate is usually 20% u/s. 115A in case of foreign currency borrowings. In case of a DTA, the rate is still lower. Thus for the group, there is a tax saving. Profits are shifted out of India.

At the same time, there are *bona fide* requirements for a loan. If the group company has funds, there should be no need to borrow from a third part bank. Hence interest up to 30% of EBIDTA has been considered as reasonable.

This provision is a part of Base Erosion measures of OECD/G20 in which India is an active participant. Profits can be shifted abroad by way of interest. To curb excessive interest deduction, the limitation on interest deduction has been provided.

2.2 Representations were made for interest paid to Indian branches of foreign bank (Indian bank branch). Indian bank branch is fully taxable in India at 40% plus surcharge and education cess as it is a foreign company. If an Indian resident pays interest to such an Indian branch, there is no base erosion. Therefore it should not be covered by Section 94B.

However section 94B applies if interest is paid to an AE. Does Indian bank branch become an AE?

2.3 Under section 92A(2)(c), if one enterprise gives loan to another enterprise and the loan is at least equal to 51% of the book value of assets of the borrower, then the two enterprises will be AEs.

This view is itself a debatable matter. The reason is as under:

Section 92A had two sub-sections. Section 92A(1) provides that if one enterprise participates in management or control or ownership of another enterprise, then the two are AEs.

Section 92A(2) provides that *"For the purpose of sub-section (1), two enterprises shall be deemed to be associated enterprises, ….".* This sub-section provides for thirteen specific situations where two enterprises will be AEs.

One interpretation is that only if both sub-sections are applicable, then the enterprises can be considered as AEs. This means if one enterprise owns capital in another enterprise (sub-section (1) is satisfied) AND, the first enterprise has given a loan to the other enterprise which exceeds 51% of the book value of the second enterprise(sub-section 2 is satisfied), then the two enterprises are AEs.

The other view is that if any one sub-section applies, two enterprises are AEs. This is the view of the revenue. There are a few Tribunal decisions which have ruled that both sub-sections of Section 92A should be fulfilled for two enterprises to become AEs. The position remains that today this is a grey area.

Assuming that the Indian bank branch and borrower become AEs, the Finance Bill proposal provides a relief.

Finance Bill proposal

2.4 It has been proposed that interest paid to an Indian bank branch will not be affected by Section 94B.

Hence if an Indian resident pays any interest to such an Indian branch, there will be no disallowance of the interest.

Thus disallowance of interest will not happen in any of the following situations:

i) Where the Indian bank branch and borrower are AEs.

ii) Where a non-resident AE has given a guarantee to the Indian bank branch for loan given to the Indian borrower (borrower is an AE of non-resident guarantor).

iii) Where a non-resident AE has placed a deposit of corresponding and matching amount with the Indian bank branch, for loan given to the Indian borrower (borrower is an AE of non-resident depositor).

This is a logical and beneficial proposal.

2.5 The amendment will apply from AY 2021-22.

3. Safe Harbour under Transfer Pricing Rules – Section 92CB [Clause 43 of Finance Bill 2020]

Existing provisions

3.1 Under the Transfer Pricing rules, any transaction between two Associated Enterprises (related entities) where at least one of the AE is a non-resident, has to be considered as Arm's Length Price (market price). Without these rules, profits can be shifted out of India by over-pricing or under-pricing the transactions.

3.2 Conceptually it is all right. However transfer pricing is a very subjective area. It has led to a lot of litigation. To mitigate the litigation risk, under section 92CB, the CBDT has been empowered to prescribe Safe Harbour Rules. Safe Harbour means that if the transaction is above certain thresholds, these will be accepted by the income-tax department. There is minimal risk of litigation. It helps to provide certainty to the assessees.

3.3 CBDT has prescribed detailed rules for Safe Harbour for some businesses – particularly low end businesses (like BPO), or where transactions are simple and prices are available (like loan transactions).

For example, if a software development company in India charges fees for developing software for its MNC parent company, and it declares an operating profit margin on operating costs of not less than 20% where aggregate value of the transactions does not exceed ₹ 500 cr., that will be accepted by the revenue. Thus a minimum 20% operating margin is a Safe Harbour.

Finance Bill proposal

3.4 While the Safe Harbour rules are designed for transactions between two AEs, there are no Safe Harbour rules for attribution of profits to a PE. Attribution of profits to a PE is a separate issue. To give a simplified view, consider following examples.

Example 1 – An MNC has received a project of building a dam and hydel power plant in India. It sets up a project office in India. The project involves procuring goods from abroad and in India; procuring services from abroad and in India. The Indian project office will be a PE in India. It will be taxed based on the scope of income prescribed in Sections 5 and 9. The entire profits of the MNC cannot be taxed. What can be taxed is income which accrues in India or which is deemed to accrue in India. This involves attributing the profits to the PE in India. Safe Harbour rules do not consider such a situation.

Example 2 – MNC has a subsidiary in India which acts as an agent for procuring sales orders. Under Transfer Pricing rules, the subsidiary is required to charge commission as per market price under the Transfer Pricing rules. Safe Harbour rules do not consider agency business specifically. However assuming that Safe Harbour rules were applicable to such agency transactions, the rules would have considered transactions between two AEs.

Considering further, the subsidiary is also considered as a dependent agent of the MNC. This is because it gets sales orders for the MNC. As a dependent agent, it becomes a PE of the MNC. If the MNC is considered to have a PE in India, then profit (of the MNC) attributable to the PE will be charged to tax. The profit can be over and above the price paid to the subsidiary under Safe Harbour rules. For such attribution of profits to the PE of the MNC, Safe Harbour rules are not prescribed.

3.5 Attribution of profits has been a subjective area for many decades. This is because PE is not a separate person. It is a part of the MNC. Hence to attribute profits to the PE out of the total profits of the MNC is a subjective area.

The Finance Bill now provides that CBDT can prescribe Safe Harbour rules for attribution of profits to a PE u/s. 9(1)(i). This is an enabling provision. After the Finance Bill is passed by Parliament, CBDT will come out with detailed rules.

This should help in providing certainty to the assessees and help in reducing disputes.

3.6 Income u/s. 9(1)(i) refers to income on account of business connection, property, asset or source of income, or transfer of capital asset in India. However Safe Harbour is not for all kinds of incomes. The main disputes are for business profits. Hence profits attributable to PE/business connection in India would be covered.

3.7 The amendment comes into effect from 1-4-2020.

4. Advance Pricing Agreement under Transfer Pricing rules – Section 92CC [Clause 44 of Finance Bill 2020]

Existing provisions

4.1 Section 92CC provides that the CBDT may enter into an Advance Pricing Agreement (APA) for transactions between AEs. This is another provision to reduce disputes under Transfer Pricing. The APA is an involved exercise and requires understanding the business of the assessee, etc. The revenue and the assessee may then enter into an agreement for agreeing on the parameters of income under Transfer Pricing rules.

The agreement can be for 5 years, or even 4 years in the past.

The APA provides certainty to the payer and the revenue and minimises disputes.

While Safe Harbour is for any assessee which falls within the Safe Harbour rules, the APA operates *qua* each assessee and for businesses covered within the APA.

As in case of Safe harbour rules, the APA is for international transactions between AEs. There is no provision for APA for attribution of profits to a PE.

Finance Bill proposal

4.2 The Finance Bill now proposes to enable CBDT to enter into an APA for attribution of profits to a PE.

This will be one more step in minimising disputes.

It may however be mentioned that an APA is a long and costly exercise. During past 7 years, about 300 APAs have been entered into. This is a good achievement by India. However in the overall context of number of assessees and number of businesses, it is a small number.

4.3 The amendment comes into effect from 1-4-2020.

5. Double Tax Avoidance Agreement with countries, specified territories and specified associations – Sections 90 and 9A [Clauses 41 and 42 of Finance Bill 2020]

Existing provisions

5.1 Section 90 enables the Government to enter into agreement with other countries for the purpose of avoiding double taxation. Section 90A enables the Government to adopt the agreement between specified associations in the two countries for the purpose of avoiding double taxation. Under the BEPS programme, more than 100 countries have agreed to amend their laws and enter into Multilateral Instrument (MLI) to curb tax avoidance.

One of the minimum standard of the MLI is to have a preamble in the DTAs stating that the DTA is for avoiding double taxation *"without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory)".*

India has entered into the MLI and also given its final position on several provisions in the MLI. The MLI will operate alongside the DTAs.

The particular phrase in italics above is not there in section 90 and 90A. It may be argued that without this phrase, India cannot enter into a DTA with such a preamble.

Finance Bill proposal

5.2 It is proposed to provide in Section 90(1)(b) and insert the phrase in italics in the above para.

This phrase will also be useful for entering to DTA in future with countries with which India does not have any DTA; or where India and the other country want to negotiate a revised DTA.

5.3 It should be noted that this is a preamble. In case of interpretation of a DTA, the object and purpose of the DTA has to be kept in mind. The DTA should also have specific clauses which do not permit tax avoidance and tax evasion.

However this does not mean that in every case of double non-taxation, the DTA relief has to be denied. See para below.

5.4 The above phrase has led to discussion within professional circles regarding non-taxation or reduced taxation of a person. Let us take an example of a person working in Dubai. He is a proper resident of Dubai and has obtained a Tax Residency Certificate from UAE. He has various kinds of incomes from India.

As per the DTA with India, he will pay no tax in India or reduced tax in India – depending on the kind of income. In Dubai, there is no tax. It leads to nil taxation of some incomes and reduced taxation of some other incomes.

Will the preamble prevent such non-taxation or reduced taxation?

No. This is a case of a *bona fide* resident who is actually staying in Dubai for employment. If as per the laws of the country there is no tax, DTA does not prevent such a situation.

5.5 Consider the full phrase in italics. A DTA is for avoiding double taxation –

without creating opportunities for non-taxation or reduced taxation

through tax evasion or avoidance

(including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory).

The non-taxation or reduced taxation should happen *through tax evasion or avoidance*. Tax evasion or avoidance can be through various means including treaty shopping where DTA benefits are available to residents of a country which is not a signatory to the DTA.

Thus there is a requirement of tax evasion or tax avoidance. If there is no tax evasion or tax avoidance, then double non-taxation or reduced taxation will not be affected.

Consider a case of a resident of UK. The UK resident wants to avail of the India-UAE DTA benefit. Hence it will set up a company in UAE and then invest in India. This is known as treaty shopping. The benefit of India-UAE DTA will be available to the UK resident through is UAE company. Such arrangements will be caught within the preamble.

Take another example, where a person becomes a non-resident of India for one year in which he expects to make a capital gain in India. He becomes a resident of Mauritius, undertakes a transaction and takes advantage of the India-Mauritius DTA. He does not pay tax in India and Mauritius also does not charge any tax. Then he returns to India and becomes an Indian resident again. Such arrangement leads to non-taxation or reduced taxation. This will be caught by the preamble. Of course it may be caught by other anti-avoidance provisions also.

Thus if the matter is controversial, then the preamble will be considered to interpret whether DTA relief will be available or not.

5.6 The amendment will come into force from AY 2021-22.

6. Exemption in respect of certain income of wholly owned subsidiary of Abu Dhabi Investment Authority and Sovereign Wealth Fund – Section 10 (23FE) – [Clause 7(II)(d) of Finance Bill 2020]

6.1 This is a new proposal to encourage investments from Sovereign Wealth Funds and investment from Abu Dhabi Investment Authority. The details are as under.

6.2 Following incomes will be exempt from income tax:

dividend,

interest, and

long-term capital gains.

The above incomes should be from investment made in India, whether in the form of debt or equity.

6.3 The investment should be made on or before the 31st day of March, 2024, and is held for at least three years.

Investment is in a company or enterprise carrying on the business of infrastructure facility as defined in the *Explanation* to Section 80-IA(4)(i).

The activity can be of developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility.

The Government may also notify any other business for the above purpose.

6.4 Following "specified persons" are eligible for the above relief.

(a) a wholly owned subsidiary of the Abu Dhabi Investment Authority which––

(i) is a resident of the United Arab Emirates; and

(ii) makes investment, directly or indirectly, out of the fund owned by the Government of the United Arab Emirates;

(b) a sovereign wealth fund which satisfies the following conditions:

(i) it is wholly owned and controlled, directly or indirectly, by the Government of a foreign country;

(ii) it is set up and regulated under the law of such foreign country;

(iii) the earnings of the said fund are credited either to the account of the Government of that foreign country or to any other account designated by that Government so that no portion of the earnings inures any benefit to any private person;

(iv) the asset of the said fund vests in the Government of such foreign country upon dissolution;

(v) it does not undertake any commercial activity whether within or outside India; and

(vi) it is specified by the Central Government, by notification in the Official Gazette, for this purpose.

6.5 These amendments will apply from AY 2021-22.

7. Significant Economic Presence in India of non-residents – Sections 9 and 295 [clauses 5 and 103 of Finance Bill 2020]

Background and Existing provisions

7.1 Taxing non-residents on business income which accrues in India is one of the most difficult and subjective issues. It is an accepted principle, that a non-resident who does business "with India" is not taxable. If however he does business "in India", then he is taxable.

It is also accepted that the entire income cannot be taxed. Only that much income can be taxed which accrues in India u/s. 5, or which is deemed to accrue in India u/s. 9.

7.2 Under section 9(1)(i), income is deemed to accrue in India which arises on account of Business Connection in India. If there is a DTA, a non-resident is taxable only if he has a PE in India.

One can consider business connection and PE as nexus. Once nexus is established, India gets the right to tax.

While business connection is a broad term, PE is narrower term. PE exists only if the non-resident has a physical presence in the country. It has a historical background. Earlier it was possible to do business in any foreign country by being physically present in that country. Hence PE was linked to physical presence. If there was no physical presence, no PE was constituted. If there was no PE, there could not be any tax in the country of source.

There are other kinds of PEs such as dependent agency PE, construction PE and service PE. Each of them tries to overcome the limitation of physical PE. However with technology growing exponentially, all these PEs become inadequate for a country to tax the income of a non-resident even though the non-resident may be earning substantial income from that country.

7.3 If nexus is established, the next issue is **attributing income** to the nexus. Under both – business connection and PE – only that much profits can be taxed which can be considered to be attributed to Indian operations.

Attribution is an involved exercise. Full profits cannot be taxed. Income attributable to the operations in India or attributable to the activities of a PE only can be taxed. The rule for business connection and PE lay down a cap on income which can be attributed to the nexus.

7.4 Technology has improved tremendously over the past 20 or 30 years. Today it is possible for a non-resident to be actively involved in the economy of the country without being physically present. Most of the technology companies such as Google, Facebook, Amazon and even Apple would fall under this category. Apart from these, there are several smaller companies in the area of entertainment, social space, consultancy, news, etc., which use technology to deliver services to the consumer over internet, TV etc. without being physically being present in the country where customers are located.

The law has not kept pace with technology. The law is still based on tax on physical presence in the country. **As companies do not have physical presence in the country of source, there is no nexus. As there is no nexus, such companies do not pay any tax in country of source.** To overcome such unfairness, countries have come together to frame new rules to tax such businesses – broadly known as digital commerce.

Under the forum of G20/OECD, discussions are going on as to how to tax such income.

Most of the technology companies are in USA. Hence USA does not want other countries to tax such incomes. They would like status quo or minimal changes in tax rules. Some European countries, India, Australia, Brazil etc., would like changes to happen. The negotiations are likely to be concluded by end of 2020. Final rules may take another year or so – and that too if countries can come to an understanding. If there is no understanding, unilateral actions may be taken by the countries. Already some countries like India, France, Australia, UK have taken unilateral action. This will lead to difficulties, double taxation, etc. **OECD has cautioned that tax war should not lead to trade war.**

7.5 As a message to the world, India had proposed Equalisation Levy in 2016. This was largely on advertisement and related revenues. This directly affected Google and Facebook.

In the negotiations going on internationally, Significant Economic Presence is one of the nexus being considered actively. Briefly it is being considered that if the non-resident is involved with country of source through digital means, or it has revenue beyond a certain threshold, it is participating in the economy of the country. It has **Significant Economic Presence.**

In anticipation of the changes in International tax rules, subsequently India has enacted the concept of **Significant Economic Presence (SEP)** in 2018. It provides that SEP will be business connection. The SEP is not yet operative. Criteria of revenue and users (discussed later in case of revised SEP) has to be fixed as to what can constitute SEP. Further unless the SEP concept is incorporated in the DTAs, SEP in the ITA will be inoperative. This is because DTA overrides the ITA.

7.6 The SEP as drafted in Finance Act 2018 had ambiguities. However as it was not operative, it did not have any impact.

In anticipation that OECD will be able to finalise the rules for digital commerce by 2020-21, India has enacted a new definition of SEP in this Finance Bill.

Pending finalisation of SEP, Finance Bill has proposed rules for taxing advertisement & data related incomes.

Finance Bill proposal

7.7 It should be noted that there are several issues in this topic. A comprehensive discussion can take a few hundred pages. Here a gist has been discussed.

There are two proposals in the Finance Bill:

i) Removing the old SEP meaning from AY 2021-22, and inserting a new meaning of SEP from AY 2022-23. (There will be no SEP phrase for AY 2021-22 as it is not expected that countries will come to a conclusion before that) (*Explanation 2A*).

There is a related amendment in Explanation 1 to Section 9(1)(i) which limits the income to operations carried on in India.

ii) Providing that income attributable to operations in India will include income from advertisement and data related revenues. (*Explanation* 3A).

These are discussed below.

7.8 **Revised meaning of SEP –**

7.8.1 It has been proposed to replace the existing definition of SEP with a new definition from AY 2022-23. Thus today it is not operative. It is possible that based on negotiations, this may be further modified.

The old definition will not exist from AY 2021-22. Even if old definition exists, there is no implication as the criteria for SEP has not been notified.

SEP will be the additional nexus.

7.8.2 **Section 9(1)(i)** provides that income is deemed to accrue in India which arises on account of **business connection** in India. ***Explanation 1*** provides that income on account of business connection will be deemed to accrue in India to the extent of **operations carried out in India**.

There is an amendment proposed in ***Explanation 1*** to segregate income due to "business connection other than SEP", and income due to "SEP business connection". Thus income attributable to regular business connection will be governed by existing rules. However income attributable to SEP business connection will be governed by separate rules.

7.8.3 The new definition of SEP has been provided in *Explanation 2A* to Section 9(1)(i). SEP is considered as business connection. The new definition provides two tests. Fulfilment of any of the tests will mean that the non-resident has SEP in India. The tests are broken down in separate phrases as under.

i) *transaction in respect of any goods, services or property carried out by a non-resident with any person in India including provision of download of data or software in India,*

if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed.

ii) *systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed.*

The revenue threshold in first test and number of users threshold in the second test will be prescribed. Till then the SEP nexus will be inoperative.

In the first test, any "transaction" with Indian residents including download of data or software, will be SEP if it exceeds a certain amount (to be prescribed). This test does not apply only to digital commerce. It applies to all kinds of transactions.

In the second test, if there is any soliciting of business activities, or engaging in interaction with prescribed number of users (to be prescribed) in India, it will be SEP. This will apply to digital companies like Google etc. It should be noted that when people use gmail or google maps, there is an interaction with Indian residents. However Google does not earn any money from the users. But the data which it collects of the users, is used for its advertisement services. This will make Google taxable in India on its advertisement revenue.

7.8.4 The definition further clarifies that transactions or activities shall constitute SEP in India, whether or not–

(i) the agreement for such transactions or activities is entered in India; or

(ii) the non-resident has a residence or place of business in India; or

(iii) the non-resident renders services in India:

7.8.5 Both the tests (discussed in para 7.8.3) establish **"nexus"** with India. Once there is nexus, India can tax the income. How much income can be taxed is dependent on how much can be attributed to such transactions of interactions. Detailed attribution rules may be prescribed later. The existing rules of attribution are based on traditional rules where a person has physical presence through 4 different kinds of PE. As the digital business is able to overcome all of these, new rules have to be prescribed.

There is a proviso to *explanation 2A*. It states that only so much of income as is attributable to the transactions or activities, shall be deemed to accrue or arise in India.

Thus entire income will not be taxable. It will be restricted to income attributable to transactions or activities.

India had issued draft rules for attribution of profits in 2019 based on fractional apportionment method. Once the international negotiations are over, the Indian rules will be finalised.

7.9 Income from advertisement and data related revenues

7.9.1 There is a new *explanation 3A* – which is proposed to be inserted from AY 2021-22 (i.e., FY 2020-21). This pertains to income from advertisement and data related services.

7.9.2 The *explanation* begins with the phrase **"for the removal of doubts"**. It has been enacted as if it is a clarification. However it has no retrospective application. The memorandum explaining the Finance Bill explains that internationally it is accepted that advertisement and data related income should be taxed in the country from where it arises. If customers are in India, it should be Indian based income.

7.9.3 The *explanation* further states that income from **advertisement** and **data related revenue** will be <u>included in income from Indian operations</u>. It states that income attributable to Indian operations will include the following:

(i) *such <u>advertisement which targets a customer who resides in India</u> or a customer who <u>accesses the advertisement through internet protocol address located in India</u>;*

(ii) *sale of <u>data collected from a person who resides in India or from a person who uses internet protocol address located in India;</u> and*

(iii) *<u>sale of goods or services</u> using <u>data collected from a person who resides in India</u> or from a <u>person who uses internet protocol address located in India</u>.*

Thus incomes which are covered in the *explanation* are income from advertisements, sale of data, sale of goods and services using the data.

7.9.4 In case of **advertisement**, the advertisements targeted at customers **residing in India** are covered. Even if customers are not residing in India, but access advertisement through Indian ISP, it will be considered as Indian operations.

It may be noted that companies like Google do not advertise to Indian viewers. It is the customers of Google who use Google platform to advertise, target the advertisement to viewers. The word "customer" creates a confusion. The viewer to whom advertisement is targetted, does not pay. Here the "customers" should mean those who are targeted as "viewers" by the advertiser.

For Google, viewers are users of Google services. Google does not charge anything to users/viewers.

Advertiser also does not charge anything to viewers.

Advertiser pays to Google for the use of platform.

Tax is to be levied on Google which is the income earner.

Google can earn income from:

i) Indian advertisers who target Indian viewers.

ii) Indian advertisers who target foreign viewers.

iii) Foreign advertisers who target Indian viewers.

iv) Foreign advertisers who target foreign viewers.

The first kind of income is clear. Google will be taxed.

The fourth kind of income is clear. Google will not be taxed in India.

The second kind of income will not be taxed as viewers are not residing in India.

However if they are in India and use an Indian ISP to view the advertisements, then it will be taxed.

The third kind of income will be taxed. However will Indian Government tax the income, is a separate matter.

In reality, the things are mixed. Practically it will be difficult to have a segregation of various kinds of incomes.

7.9.5 In case of **data**, income will be taxed if following criteria is fulfilled.

Data is collected from persons **residing in** India or those who use **Indian ISP**, and

that data is sold, or

data is used to sell goods or services.

For example, if Facebook sells Indian data to anyone interested in targeting Indian customers (advertisement or otherwise), it is taxable in India.

If such data is used to provide goods and services, then also the same can be taxed. For example, if weather apps collect data and sell weather analysis services, it will be taxed in India.

However how will this provision apply to sale of goods based on data collected, is difficult to comprehend. For example, if Nike wants to sell its shoes in India, they will collect market data of various kinds. Only then they can decide on their sales strategy and then sell the shoes. The sale will happen from outside India. Will such sale be taxed?

One can consider the following example to have a logical meaning. A seller of fashion garments sells the garments on Amazon's platform. Amazon's platform and the data analytics helps the seller to sell the garments to targeted customers. Without the data, the online seller of garments would not be in a position to sell. If the garment seller sells garments based on the data collected, then such sale of goods will be considered as income from Indian operations. It may be noted that data can be collected by anyone and not necessarily the seller.

7.9.6 In the above situations of advertisement income or data related income, will whole of the income be taxable in India or only that which can be attributable to collection of data? *Explanation 3A* does not have provision of attributing income only to these activities. This cannot be the intention. One will have to wait for the rules. The manner in which the *explanation* is enacted, it seems that the entire income will be taxable in India. However that will be unfair and is not the objective.

7.9.7 Proviso to *Explanation 3A* (advertisement and data) has been inserted. It states that provisions of *Explanation 3A* will apply to attribute income to transactions and activities referred to in *Explanation 2A* – i.e., SEP. This will be applicable from AY 2022-23.

It is difficult to understand how will the *explanation* pertaining to advertisement and data related income, apply to SEP transactions and activities. SEP covers several more kinds of transactions than advertisement and data activities. One will have to wait for rules.

7.9.8 **Legal issue** – Before income can be taxed in India, it has to be established that it has a nexus with India. The *Explanation 3A* only says income from advertisement and data will be considered as income from Indian operations. It does not state that such activities will be considered as business connection. Only if there is business connection, income can be considered for taxation in India.

One may counter the above by saying that advertisement and data related activities amount to SEP as defined in *Explanation 2A*. However *Explanation 2A* is operative from AY 2022-23; and that too after the criteria for revenue and users is specified. Further for *Explanation 2A*, the proviso in the *explanation* itself states that income attributable to transactions and activities in India will considered as deemed to accrue in India.

Explanation 3A has been drafted independently and is linked to *Explanation 1*.

There is thus inconsistency in the drafting.

Further unless the DTA is amended to consider advertisement and data related activities as taxable in India, it will be difficult to tax the same.

7.10 As there are several *explanations* for different activities, the same are captured below in the table.

Explanation to Section 9(1)(i)	***Nexus/activity***	***Limitation on attribution of income***
1	Business connection – other than SEP (for business other than those covered by SEP)	Income attributable to operations carried out in India
2A	SEP business.	Income attributable to transactions or activities
3A	Advertisement and data related revenue	Income will be considered as attributable to operations in India under *Explanation 1*.

7.11 It is also proposed to amend section 295 which gives power to CBDT to make rules for certain purposes. It is proposed to give power to CBDT to prescribe rules for operations carried out by a non-resident in India; and transactions and activities of a non-resident.

There are no guidelines for attributing profits to a PE except Rule 10 under which the revenue can attribute profits if the books of account of the assessee do not provide reliable information.

CBDT may come out with rules to attribute profits u/s. 9(1)(i) for normal business connection and SEP.

Notes:

1. The views expressed in this article are based on *prima facie* reading of the Finance Bill 2020 read with Income-tax Act, 1961. Going forward there may be clarifications issued by the Government. Further, more issues and interpretations may come to light.

2. By the time the Finance Bill is passed into an Act, there can be amendments in the Finance Bill proposals.

3. Readers should not take any decision based on this article. This article is meant for academic information of the readers.

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Procedural Amendments

CA Ganesh Rajgopalan

Exemption from filing return of income by non-residents [amendment to section 115A(5)]

Section 115A of the Act provides for the tax payable for non-residents in respect of their income consisting of (a) dividends and certain interest and (b) royalties and fees for technical services (FTS) received from the Government or Indian concern in pursuance of an agreement made after 31st March 1976 and which is not effectively connected with a PE of the non-resident in India.

At present, a non-resident is not required to furnish his return of income under section 139(1) of the Act, if his total income, consists only of certain dividends or interest income and the tax-deductible under Chapter XVII-B of the Act has been so deducted. No such relief exists for the non-residents having income by way of royalty or FTS.

It is now proposed to extend this relief in respect of a non-resident also having income by way of royalty or FTS. However, the exemption from filing a return of income is available only if the tax-deductible under Chapter XVII-B has been deducted from such income, and the rate of deduction is not less than the rate specified in sub-section (1). The impact of this change is that where tax is deducted at a rate lower than that prescribed in the Act, say pursuant to lower rate available in a double tax avoidance agreement, this exemption from filing the return of income shall not be available. This would be the position in all cases, including for dividends and interest.

This amendment will be effective from 1st April 2020 and apply from AY 2020-21.

E-Assessments [amendment to section 143(3A)]

The E-Assessment Scheme, 2019 pursuant to section 143(3A) of the Act. The objective of the Scheme is to impart greater efficiency, transparency and accountability in the assessments to be done under section 143(3). Now under the Scheme, best judgment assessments under section 144 of the Act can also be passed.

Further, the time limit for issuing notifications with respect to the applicability of various provisions of the Act for giving effect to the Scheme and issuing any directions in this regard is being extended up to 31st March 2022.

This amendment will be effective from 1st April 2020 and apply from AY 2020-21.

Verification of return of income [amendment to section 140]

The verification of return is to be done in case of a company by its managing director if there is one and by any director of the company where the managing director is not able to verify the return for any unavoidable reason or if there is no managing director. In case of a limited liability partnership, the return of income is required to be verified by the designated partner. If he is unable to verify the return for unavoidable reasons, or where there is no designated partner, any other partner can verify the return.

There are provisions in case of a company to the effect that where an application for corporate insolvency resolution process is admitted under the Insolvency and Bankruptcy Code, 2016, the insolvency professional appointed by the Adjudicating Authority is authorised to verify the return. Similar enabling provisions in respect of an LLP are not currently in statute.

Consequently, section 140 is amended to provide the Board with the power to prescribe persons other than those listed in under section 140 for verifying returns of income in case of companies and LLPs.

This amendment will be effective from 1st April 2020 and apply from AY 2020-21.

Authorised representatives [amendment to section 288]

Section 288 lists the persons who are authorised to appear before any income-tax authority or the Appellate Tribunal in connection with any proceeding under the Act.

The power to prescribe any other person to act as an authorised representative has now been given to the Board by amending the said section.

This amendment will take effect from 1st April 2020.

Discontinuance of Form 26AS [omission of section 203AA]

Section 203AA of the Act requires the prescribed income-tax authority or the person authorised by such authority to prepare and deliver a statement in Form 26AS to every person from whose income tax has been deducted or in respect of whose income the tax has been paid specifying the amount of tax deducted or paid.

In the current scenario, multiple information relating to a tax payer is captured by the CBDT enabled by the technological advances and increased capacity of the IT systems. It is intended that the data like sale or purchase of immovable property, share transactions and the like pertaining to taxpayers is made available on a portal for the taxpayers to access. Such data can then be used by the taxpayers in computing their correct tax liability and filing their return of income. Since the information relating to the tax payers available with the Income-tax Department is now far more than TDS related, Form 26AS is being discontinued by the omission of section 203AA with effect from 1st June 2020. That Form would now be replaced with an annual financial statement being prescribed under section 285BB.

This amendment will take effect from 1st June 2020.

Amendments to tax audit-related provisions [amendment to secion 44AB]

Every person carrying on business is required to get his accounts audited if his total sales, turnover or gross receipts in business exceeds ₹ 1 crore in any previous year.

It is now proposed to increase the threshold limit from ₹ 1 crore to ₹ 5 crore where the aggregate of all receipts, as well as payments in cash during the previous year, does not exceed 5% of total receipts or payments, respectively. The conditions are cumulative for the higher threshold to apply. Apparently, these amendments are with the objective to promote a less-cash economy.

However, curiously, there is no change in the current provisions requiring a person with a turnover or gross receipts of less than ₹ 1 crore and claiming a profit of less than 8% or 6% of the turnover of his business to get his accounts audited though a person with a turnover of up to ₹ 5 crore is exempted from tax audit by virtue of this amendment.

Currently, the due date for completing the tax audit and furnishing the Report is the due date for furnishing the return of income. These provisions are now amended to delink the specified date from the due date for filing the return of income since the CBDT is taking steps to provide pre-filled returns to all assesses with various information of transactions done by the assesses available with it. The pre-filled returns will facilitate assessees to take into account such information and file correct returns duly considering the income arising from such information.

To further that objective in case of assesses having profits from business or profession, and for capturing the disallowances and deductions reported in the Tax Audit report in the pre-filled returns, the definition of the 'specified date' is amended as a date one month prior to the due date for filing the return of income.

This provision will be effective from 1st April 2020 and apply from AY 2020-21.

Since the due date for filing of tax audit is no longer the due date for filing of the return of income after the above amendment, provisions that require the filing of the audit report(s) along with the return of income are also consequently being amended. Accordingly, the assessee is now required to complete the audit and furnish the audit reports specified in section 10, section 10A, section 12A, section 32AB, section 33AB, section 33ABA, section 35D, section 35E, section 44DA, section 50B, section 80-IA, section 80-IB, section 80JJAA, section 92F, section 115JB, section 115JC and section 115VW of the Act before the specified date referred to in section 44AB.

This provision will be effective from 1st April 2020 and apply from AY 2020-21.

Due date for filing return of income [amendment to section 139(1)]

The due date for filing of return of income in case of companies and other entities subject to tax audit or audit under any other law, and for working partner of a firm subject to tax audit under section 44AB, is 30th September of the relevant assessment year. In the case of an assessee who is required to furnish a report under section 92E in respect of transactions subject to transfer pricing provisions, the due date for filing the return of income is 30th November of the assessment year. The tax audit report under section 44AB is currently required to be filed before the due date for filing the return of income under section 139 of the Act.

Section 139 is proposed to be now amended to enable the CBDT to provide pre-filled returns containing the information extracted from the tax audit reports of the assesses. The assesses having the due date of 30th September of the assessment year for filing of their returns will now have one more month to file their return as the due date has been extended to 31st October of the assessment year. Importantly, the due date for filing of returns for assesses having transfer pricing audits remains at 30th November of the assessment year, but due of furnishing report of transfer pricing has been preponed to 31st October.

This provision will be effective from 1st April 2020 and apply from AY 2020-21.

Exemption from TDS /TCS [amendments to sections 194A, 194C, 195H,194I, 194J and 206C]

At present, an individual or a HUF is not required to deduct tax at source under various sections in Chapter XVII-B (*viz.*, relating to payment of interest, payment to contractors, payment of brokerage, payment of rent, payment of professional fees, etc. (sections 194A, 194C, 194H, 194I and 194J) or to collect tax at source under section 206C where the total sales, gross receipts or turnover from business or profession carried on by him does exceed the monetary limits specified in section 44AB for tax audit in the preceding year.

This threshold has now been delinked from the monetary limits specified for tax audit to a fixed limit of sales, gross receipts or turnover exceeding ₹ 1 crore for business and ₹ 50 lakh for the profession.

This provision will be effective from 1st April 2020.

Power of survey [amendments to section 133A(6)]

At present, any income-tax authority below the rank of Joint Director/Commissioner is permitted to conduct any survey under section 133A only with the prior approval of the Joint Director/ Commissioner. These permissions have been amended as follows:

i. Where the information has been received from an authority (to be prescribed), the survey can be conducted by an income-tax authority below the rank of Joint Director/ Commissioner only with the prior approval of the Joint Director/Commissioner;

ii. Other than the above, a survey can be conducted by an income-tax authority below the rank of Director/Commissioner only with the prior approval of the Director/Commissioner.

The amendment will be effective from 1st April 2020.

Penalty for false entry or omission of entry [insertion of section 271AAD]

The Memorandum to the Finance Bill illustrates cases under Goods and Services Taxes (GST) regime of fraudulent invoices records without actual supply of goods or services to illegally reduce GST liability and states the intention of the Government to impose harsher penalties on such practices. Accordingly, section 271AAD is being inserted which operates in addition to the other penalties under the Act.

If it is found that in the books of account maintained by any person that there is (i) a false entry or (ii) an omission of any entry which is relevant for computation of income, in both cases, to evade tax liability, the assessing officer may levy a penalty of a sum equal to the aggregate amount of such false or omitted entry. A penalty is also imposable of like amount on any other person, who causes another person to make a false entry or omit any entry.

The term "false entry" is defined in a wide and inclusive manner. It includes use or intention to use (a) forged or falsified documents such as a false invoice or a false piece of documentary evidence; or (b) invoice in respect of supply or receipt of goods or services or both issued by a person or any other person without actual supply or receipt of such goods or services or both; or (c) invoice in respect of supply or receipt of goods or services or both to or from a person who does not exist.

The Memorandum refers to cases of 'fake invoices' obtained by suppliers registered under GST to fraudulently claim ITC and reduce their GST liability where there is no actual supply of goods or services and the GST shown to have been charged on such invoices are neither paid nor is intended to be paid. However, the definition of 'false entry' in the section is not limited to invoices which show a charge of GST where GST is *not* paid.

This penalty is to be initiated during any proceeding under the Act and is appealable before the Commissioner (Appeals). However, section 273B which permits the assessee to avoid the imposition of a penalty by showing reasonable cause is not extended to this penalty for false entry. Under the existing provisions contained in section 275, the penalty under this section cannot be imposed after the expiry of the financial year in which the proceedings during which the penalty has been initiated are completed or six months from the end of the month in which the penalty is initiated, whichever period expires later.

This amendment will take effect from 1st April 2020.

ePenalty facilitation measures [insertion of section 274(2A)]

Section 274 mandates that no order imposing a penalty under Chapter XXI of the Act shall be passed unless the assessee has been heard or has been given a reasonable opportunity of being heard. The Board has introduced the e-Assessment Scheme for carrying out assessments. On the same lines, it is now proposed to introduce a similar scheme for the imposition of e-penalty by obviating the need for the assessee or his authorised representative to visit the Income-tax office to present his case.

The intention behind this measure is to impart greater efficiency, transparency and accountability by eliminating the interface between the Assessing Officer and the assessee in the course of the penalty proceedings. The scheme shall introduce a mechanism for imposing penalty with dynamic jurisdiction in which penalty shall be imposed by one or more income-tax authorities.

Such directions for the introduction and operationalising the scheme are to be issued on or before 31st March 2022.

This amendment will take effect from 1st April 2020.

Taxpayer's Charter [insertion of section 119A]

A new section 119A is proposed to be inserted empowering the CBDT to adopt and declare a Taxpayer's Charter. The CBDT is empowered to issue such orders, instructions, directions or guidelines to other income-tax authorities as it may deem fit for the administration of the Charter. The Taxpayer Charter will explain what taxpayer can expect from tax-gatherer and what is expected from the taxpayer. The broad aim of the Charter is that of nurturing the relationship between the Revenue departments and the community that they serve, a relationship of mutual trust and respect.

Unlike the Taxpayer's Charter announced by the CBDT in the past, this Charter which is pursuant to section 119A would carry more weight as it would emanate from the Act. However one need to see whether the provisions of Tax Payers Charter are directory or mandatory? Currently no penal measures has been specified if taxpayers is not complied with.

This amendment will take effect from 1st April 2020.

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God, our Creator, has stored within our minds and personalities, great potential strength and ability. Prayer helps us tap and develop these powers.

– A. P. J. Abdul Kalam

Amendments related to TDS & TCS

CA Prachi Parekh

The Finance Bill 2020, as far as the direct tax provisions are concerned, had a whooping 104 amendments. In this article, an endeavour has been made to present and discuss the amendments related to TDS and TCS. The amendments have been covered chronologically, by making a reference to the bare provision wherever considered necessary.

A summary of amendments covered in the write-up is as under:

Sr. No	***Section No.***	***Coverage***	***Clause No. of The Finance Bill***
1	194A – Interest other than Interest on Securities	Certain co-operative societies now under an obligation to make TDS	Clause 75
2	Section 194C	Definition of "Work" as covered in the section widened.	Clause 76
3	Section 194J	Rate of TDS in respect of Fees for Technical Services lowered to 2%	Clause 79
4	Section 194LC	Extension of time for borrowings	Clause 82
5	Section 194LD	Extension of time for borrowings	Clause 83
6	Section 194-O	New Section introduced for TDS in respect of E-Commerce	Clause 84
7	Section 206C	Amendments related to TCS	Clause 93
	Section 206(IG)	Applicability of TCS to LRS and overseas tour operator programmes	
	Section 206(IH)	Applicability of TCS to sale of goods	

1. Section 194 A: Interest other than Interest on Securities

This section presently provides for deduction of TDS by a person (not being an Individual or HUF) on interest payments made to a resident payee. Individuals and HUF's are required to make TDS only when their total sales/gross receipts or turnover from the business/profession carried on exceed the monetary limits specified under the provisions of Section 44AB. TDS is warranted at the time of payment/credit whichever is earlier.

Let us understand the application of existing provisions in the context of co-operative societies. For a co-operative society engaged in the business of banking, a threshold limit of INR 40,000 has been specified, and TDS is to be made on interest amounts credited or paid by such society on time deposits, only for payments exceeding the specified limit.

The provisions of this section are presently not applicable to interest paid or credited in respect of deposits with the following:

i. primary agricultural credit society

ii. primary credit society

iii. co-operative land mortgage bank

co-operative land development bank

Further, interest paid on other than time deposits (savings, interest etc.) is also not governed by the applicability of TDS provisions.

With an intention to extend the scope of this section, and include interests paid by large co-operative societies, the following proviso is sought to be inserted to sub-section (3) of Section 194A:

"Provided that a co-operative society referred to in clause (v) or clause (viia) shall be liable to deduct income tax in accordance with the provisions of sub-section (1), if-

(a) the total sales, gross receipts or turnover of the co-operative society exceeds rupees during the financial year immediately preceding the financial year in which the interest referred to in sub-section (1) is credited or paid; and

(b) the amount of interest, or the aggregate of the amounts of such interest credited or paid, or is likely to be credited or paid, during the financial year is more than fifty thousand rupees in case of payee being a senior citizen and forty thousand rupees in any other case."

An *explanation* is sought to be inserted as under:

"For the purpose of this sub-section, senior citizen means an individual resident in India who is of the age of sixty years or more at any time during the relevant previous year."

Resultant of this amendment, co-operative societies having total sales, gross receipts or turnover in excess of INR 50 Crores in the preceding financial year will now be liable for TDS on income paid or credited by a co-operative society to its member, or to any other co-operative society. Also, income credited/paid by primary agricultural credit societies/primary credit society or co-operative land development bank on its deposits would also come under the ambit of TDS subject to the thresholds specified.

It is likely to impact large sugar/milk related co-operative societies.

2. Section 194C: Payments to Contractors

Section 194C requires any person responsible for making payment to a resident contractor for carrying out any work in pursuant of a contract to make TDS on such amount at the time of payment or credit whichever is earlier.

Presently the term "work" includes manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer. Any manufacturing or supplying by using material purchased from a person, other than such customer is excluded under the existing provisions.

The meaning of the term "work" in section 194C is sought to be amended as under:

In the meaning of the term "work" as contained in clause (iv), sub-clause (e) is proposed to be substituted as under:

"(e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer or its associate, being a person placed similarly in relation to such customer as is the person placed in relation to the assessee under the provisions contained in clause (b) of sub-section (2) of section 40A."

In view of which, Contractees would procure or ask the contractor to procure the material from a related entity or associate to carry out the work under the terms of contacts, and getaway the liability to make TDS in respect of such payments.

In order to cover instances like these, the ambit of the term "work" as covered in section 194 J has been widened to include the above situation. The list of related or associated entities in this context is as referred to in section 40A(2)(b). Therefore, any payment made for any work carried out under a contract by the contractor, wherein materials were procured from either the contractee or the related persons of the contractee will now be within the scope of section 194C.

3. Section 194J: Fees for Professional or Technical Services

Presently, as per section 194J, any person (not being an Individual or HUF) is required to deduct tax at 10% on the following amounts paid/credited to a resident payee. Individuals and HUF's are required to make TDS only when their total sales/gross receipts or turnover from the business/profession carried on exceed the monetary limits specified under the provisions of Section 44AB.

- fees for professional services;
- fees for technical services;
- any remuneration or fees or commission by whatever name called (other than those on which tax is deductible under section 192), to a director of a company;
- royalty;
- sum referred to in section 28(va) in the nature of non-compete fees

The following amendment has been proposed in sub-section (1) of Section 194J:

(a) in the long line, for the words "ten per cent of such sum" the words "two per cent of such sum in case of

fees for technical services (not being professional services) and ten per cent of such sum in other cases, shall be substituted."

The rate of TDS in respect of payments made as fees for technical services is proposed to be reduced to 2%, instead of 10%.

The term "professional services" has been defined under this section in the *explanation*, and it is as under:

(a) professional services means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of Section 44AA or of this section.

As far the meaning of the term "Fees for Technical Services" is concerned, for the purpose of Section 194J, it shall have the same meaning as in Section 9(1)(vii) reproduced for reference:

"Fees for technical services means any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient under the head salaries."

In respect of certain routine payments incurred by assessees, for e.g., in case of annual maintenance contracts for electronic equipment, or contracts for upkeep of machinery, etc., there were deliberations about these amounts to be covered in the scope of Section 194J or Section 194C. Further, on account of the rate of TDS contained in both the sections being different, payers usually employed the higher of the two rates in order to avoid consequences of short-deduction and TDS on such payment was made at 10%. To remove the inconvenience caused on account of disparity in rates, the rate of tax as far as technical services was concerned, is now reduced to 2% post this amendment. The intention was thus to clarify the situation, and bring uniformity in rates. However, if one closely reads the meaning of the term "Fees for Technical Services" and "Professional Services", there is some over-lapping likely since "Technical Consultancy" finds a place in both. To that extent, there might still be deliberations, and as a safeguard TDS at higher rates could be effected.

4. Section 194LC: Income by way of interest from Indian Company

Under the existing provisions, a concessional TDS rate of 5% in respect of interest paid to non-residents on certain borrowing and bonds issued up to 1st July, 2020 from sources outside India is mandated.

As per the amendment, the concessional TDS rate would now be available to borrowing made or bonds issued up to 30th June, 2023. Further, the concessional TDS rate in respect interest on long term bonds and rupee denominated bonds issued during the period 1st April. 2020 to 30th June. 2023, which are listed only on any recognised stock exchange located in IFSC would be 4%.

The consequential amendment specifying the rate of tax in the hands of the non-resident recipient has not been amended.

5. Section 194LD: Income by way of Interest on certain bonds and Government Securities

Under the existing provisions, a concessional TDS rate of 5% in respect of interest paid to Foreign Institutional Investor (FII) and Qualified Foreign Investors (QFI) on investment in government securities and rupee denominated bonds issued up to 1st July, 2020.

After the amendment, the concessional TDS rate would now be available to interest paid to FII and QFI on government securities and RDB issued up to 30th June, 2023.

Also, the benefit of concessional rate has been extended to investment made by FII and QFI in municipal debt security from 1st April, 2020 to 30th June, 2023.

6. Section 194-O: Payment of certain sums by e-commerce operator to e-commerce participants

For quite some time now, there have had been speculations about with-holding tax provisions being extended to the e-commerce sector. The sizeable growth in the e-commerce segment and the complex structure of business models resulted in non-applicability of existing TDS provisions to these set of transactions. While no specific judicial decisions have been referred to in the explanatory memorandum, there have been a couple of Tribunal decisions tackling the issue of withholding tax for such payments. The Finance Bill 2020 has introduced a new section altogether for TDS in respect of transactions between e-commerce operators and participants. The proposed section is as under followed by some analysis:

(1) Notwithstanding anything to the contrary contained in any of the provisions of Part B of this Chapter, where sale of goods or provision of services of an e-commerce participant is facilitated by an e-commerce operator through its digital or electronic facility or platform (by whatever name called), such e-commerce operator shall, at the time of credit of amount of sale or services or both to the account of an e-commerce participant or at the time of payment thereof to such e-commerce participant by any mode, whichever is earlier, deduct income-tax at the rate of one percent. of the gross amount of such sales or services or both.

Explanation.– ***For the purposes of this sub-section, any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant for the sale of goods or provision of services or both, facilitated by an e-commerce operator, shall be deemed to be the amount credited or paid by the e-commerce operator to the e-commerce participant and shall be included in the gross amount of such sale or services for the purpose of deduction of income-tax under this subsection.***

(2) No deduction under sub-section (1) shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of an e-commerce participant, being an individual or Hindu Undivided Family, where the gross amount of such sale or services or

both during the previous year does not exceed five lakh rupees and such e-commerce participant has furnished his Permanent Account Number or Aadhaar number to the e-commerce operator.

(3) Notwithstanding anything contained in Part B of this Chapter, a transaction in respect of which tax has been deducted by the e-commerce operator under sub-section (1), or which is not liable to deduction under sub-section (2), shall not be liable to tax deduction at source under any other provision of this Chapter:

Provided that the provisions of this sub-section shall not apply to any amount or aggregate of amounts received or receivable by an e-commerce operator for hosting advertisements or providing any other services which are not in connection with the sale or services referred to in sub-section (1).

Explanation.–*For the purposes of this section–*

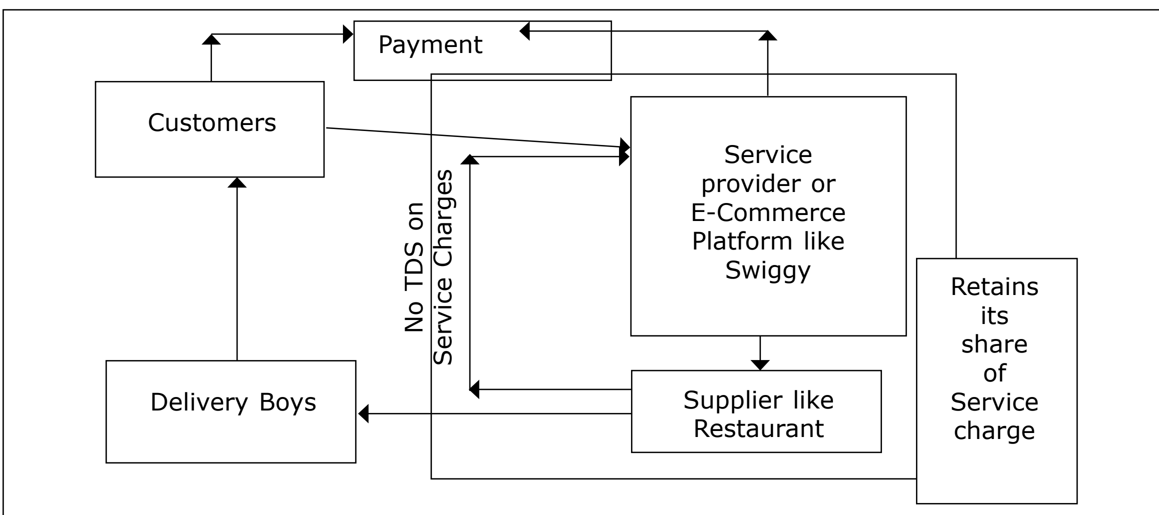
(a) "electronic commerce" means the supply of goods or services or both, including digital products, over digital or electronic network;

(b) "e-commerce operator" means a person who owns, operates or manages digital or electronic facility or platform for electronic commerce and is responsible for paying to e-commerce participant;

(c) "e-commerce participant" means a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce;

(d) "services" include 'fees for technical services' and fees for 'professional services', as defined in the Explanation to section 194J.'

For ease of understanding the *modus operandi* employed by the e-commerce segments, reproduced with due credits is a graphic representation:



(image courtesy:taxguru.in)

The intention of the amendment seems to be on a correct note as far as widening the scope of TDS is concerned, but it poses certain challenges.

There are instances wherein the e-commerce participant makes payments to e-commerce operators (apart from the hosting charges which have been specifically excluded) and such payments have not been covered under this new proposed section. Whether such payments will the be covered in the scope of any other provision remains to be seen.

The new section also places an onerous responsibility of deducting TDS on the e-commerce operator even in a scenario where the buyer pays directly to the account of the seller. It might be challenging to implement the same practically.

The manner in which the section is worded now, a non-resident e-commerce operator is also likely to be covered in its scope, although meaning of an e-commerce participant has been restricted to a resident. Therefore, the challenges posed in the implementation of this section will be revealed in due course of time of its implementation.

7. Amendments related to Tax Collection at Source (TCS)

Sub-sections (1G) & (1H) are proposed to be inserted in Section 206C, and account of which, the provisions of TCS will now be applicable in respect of the following:

a) Receipts by an Authorized Dealer amounting to INR 7 lakh or more in a financial year for remittances outside India under the Liberalized Remittance Scheme ('LRS') of the RBI;

b) Receipt of any amount by a seller of overseas tour programme packages; and

Under the said provision, the Authorised Dealer or the tour operator shall collect TCS at the rate of 5% (to be increased to 10% if neither PAN nor Aadhar number are provided).

However, no TCS is to be collected in the following cases –

a) Where the buyer is a Government Authority or any other notified person;

b) In case of payments under LRS and payments for overseas tour programs, if the buyer is liable to deduct tax at source under any other provision of the Act and has deducted such amounts; and

The provisions of TCS have also been made applicable in respect of sale of goods.

Every seller, whose turnover in the immediately preceding financial year exceeds INR 10 crore, and receives an amount exceeding INR 50 lakh in aggregate from a buyer in any previous year on sale of goods (other than receipts from sale of alcohol, motor vehicles, remittances under LRS and overseas tour programme packages), shall collect a sum of 0.1% (to be increased to 1% if neither PAN nor Aadhaar number are provided) on the sale consideration exceeding INR 50 lakh from the buyer of such goods.

TCS shall not apply in case of sale of goods, where the seller is liable to collect TCS under any other provisions of section 206C or the buyer is liable to deduct TDS under any other provision of the Act and has deducted such amount.

The intention of the amendment seems to be widening the scope of transactions to which TCS is applicable, and facilitate early recovery of taxes. However, there are several emergent issues from these amendments.

As far as remittances made under the LRS are concerned, the threshold at INR 7 lakh if made applicable *qua* Authorized Dealer (AD), it may fail to achieve the intended result. Further, in most transactions, the AD is at the customer facing end, who in turn involves a bank at the time of actual remittance. The wordings of the section presently hint at TCS being done only by such AD, who receives any amount from buyer. However, there is specific clarity required for the banks not applying these provisions when they engage in actual remittance of such amounts overseas.

Further, the term "tour operator" is wide enough to cover even aggregators for hotels or payments to hotels outside India. There is no threshold specified as far as this sub-section is concerned. There needs to be more clarity with regards to coverage of amounts within the purview of this section. Also, not all tour-operators are equipped to themselves remit the funds abroad for booking of hotels etc., on overseas travel being booked by customers. They engage AD's to carry out the remittances. In a scenario like this, the LRS quota available of the customer remains the same and could result in possibility of TCS being collected twice!

As fat as the applicability of TCS in respect of sale of goods is concerned, that sub-section too will cause some upheaval. To begin with, the term "goods" has not been defined in the Section or even under the Income-tax Act. It is likely to open a pandora's box for fresh set of litigations. To give a trailer, shares and securities (since the definition of goods under Sale of Goods Act covers it) & electricity are covered under the sub-section?

Further, though the thresholds are quite high, there will be an additional compliance burden on the businesses to which these provisions become applicable.

The provisions related to TDS have always been tedious to the assessees as far as their implementation is concerned and with the amendments they have just become more so! It has been my effort to present by way of this article the amendments made and the probable issues likely to surface on implementation of these amendments.

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Take up one idea, make that one idea your life. Think of it, dream of it, Live on that idea let the brain, muscles, nerves, every part of your body be full of that idea, and just leave every other idea alone. This is the way to success.

– *Swami Vivekananda*

Amendments related to Appeals

Dharan Gandhi
Advocate

The Hon'ble Finance Minister Smt. Nirmala Sitharaman just delivered the longest budget speech in the history of this Country. The Budget has received a mixed reaction. I have been entrusted with the task of dealing with the amendments concerning the appeal provisions under the Income-tax Act, 1961 ('Act').

Amendments in section 250

The concept of 'hearing' and as a consequence, 'appeal' *per se*, is nearing death, in so far as the First Appellate Authority is concerned.

Part A of Chapter XX of the Act, deals with appeals to CIT(A). Section 246A enumerates the orders which can be challenged before the CIT(A). Section 249 prescribes the form of appeal and limitation, whereas section 250 prescribes the procedure in respect of such appeal. A radical amendment is proposed by the Finance Bill, 2020 ('Bill'), in respect of procedure of appeal before the CIT(A). Before jumping to such proposals, let us first understand the provisions relating to hearing of an appeal.

Section 250(1) states that the CIT(A) shall fix a day and place for the hearing of the appeal, and shall give notice of the same to the appellant and to the AO against whose order the appeal is preferred.

Section 250(2) states that the following shall have right to be heard at the hearing of the appeal:

a. appellant, either in person or by an authorised representative

b. AO, either in person or by a representative.

Section 250(6A) provides that in every appeal, the CIT(A), where it is possible, may hear and decide such appeal within a period of one year from the end of the financial year in which such appeal is filed.

What can be discerned from above is, since day one importance is given to "hearing" in an appeal. The CIT(A) has to hear and decide the appeal; hearing here has to be understood in its natural avatar i.e., to listen. The principle of natural justice which is common to all the judicial and quasi-judicial proceedings envisages or rather mandates an opportunity of being heard. Thus, since golden days, the concept of hearing was *sine qua non* in any appeal proceeding under the Act, wherein the parties in dispute are heard in person. Practically also, it can be said that the oral arguments had an altogether different impact on the CIT(A) as compared to the written submissions. It has been experienced that some issues are difficult to explain by way of written submission though the same may not require more than few minutes when explained orally. The importance of stress and emphasis on certain aspects of the arguments while arguing orally also cannot be undermined. Further, in a hearing, there are arguments and debates and there are questions and answers which go on simultaneously; which leads to clearance of any doubts or issues which is harboured by or which crops up in the mind of the appellate authority. To sum up, oral arguments were an indispensable part of appeals before CIT(A).

This concept is now sought to be changed by the Bill. *Vide* clause 95, the Bill seeks to insert sub-sections (6B), (6C) and (6D) in section 250 of the Act. By virtue of sub-section (6B), the Central Government is proposed to be empowered to make a scheme, by notification in the Official Gazette, for the purposes of disposal of appeal by CIT(A), so as to impart greater efficiency, transparency and accountability. These objectives are sought to be achieved by-

(a) <u>eliminating the interface between the CIT(A) and the appellant</u> in the course of appellate proceedings to the extent technologically feasible;

(b) optimising utilisation of the resources through economies of scale and functional specialisation;

(c) introducing an appellate system with dynamic jurisdiction in which appeal shall be disposed of by one or more CIT(A)s.

Even wider powers are proposed to be given to Central Government under sub-section (6C). It states that the Central Government may, for the purposes of giving effect to the scheme made under sub-section (6B), by notification in the Official Gazette, direct that any of the provisions of this Act relating to jurisdiction and procedure for disposal of appeals by CIT(A) shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification. However, no such direction shall be issued after 31-3-2022.

Though thankfully, any notification issued under sub-section (6B) and sub-section (6C) shall require ratification of Parliament as soon as the same is notified.

There is no doubt that one will have a much better picture to comment once the scheme is notified by the Government. However, we can take help from the scheme of e-assessment to understand the expected plan of the Government. In so far as the positives are concerned, apart from bringing transparency and reducing corruption, the benefit of not visiting the Department repeatedly is a big relief.

The object behind such introduction is laudable i.e., to impart greater efficiency, transparency and accountability. However, the means to achieve the end brings nothing but fear. Elimination of interface, in my understanding, means elimination of personal hearing which also includes all the elements of personal hearing. Further, introduction of an appellate jurisdiction with dynamic jurisdiction in which the appeal shall be disposed of by one or more CIT(A) appears to me being similar to faceless appeals. The new scheme will be deprived of all the benefits of personal hearing and oral arguments which have been brought out earlier. This may also lead to compromise of the principles of natural justice.

To cut it short, this proposal would have an adverse impact on the overall decision making process and the persons to be affected the most would be the assessees. The concept of e-proceeding and faceless proceeding, is many a time detrimental even in case of assessments. Stretching this concept to appellate proceeding, in my view, is something which will not inspire confidence in the masses.

Everyone is aware that the institution of CIT(A) is already in a bad shape. It is not as healthy as it used to be. There are number of factors contributing to such state of affairs. There is some sort of indirect pressure or interference from the side of the Department. The same came out in black and white in the CBDT Action Plan. The Hon'ble Bombay High Court in the Petition filed by CTC [***Chamber of Tax Consultants vs. CBDT - 416 ITR 21(Bom)***] came down heavily on the Board for interfering in the appellate functions of the CIT(A).

CIT(A) is a quasi-judicial authority to adjudicate disputes between the assessee and Department, who has to act independently, though the person adjudicating the appeal is an employee of one of the parties to dispute. It is presumed that even the respondents i.e., the AO and the Jurisdictional Pr. CIT is not aware about CIT(A) adjudicating the dispute in case of faceless appeals. Otherwise, it is anybody's guess as to what will be the situation once the entire scheme is made interface free and faceless. Thus, the above scheme, raises fear of compromise of independence. Further, there are bright chances that they may be increase in litigation as a result of such proposal, which is again not what the Government is seeking to achieve.

Therefore, I would suggest, where the assessees require a personal hearing the same should be granted to the assessee without enforcing such faceless and interface free scheme.

The provisions of sub-section (6C) empowering government to direct non-application of any provision of jurisdiction and procedure relating to disposal of appeals by CIT(A) or application after modification or exception, is more dangerous as it is prone to misuse by the Government which we have very well experienced in the past. The fear which is looming is that personal hearing will be completely done away with.

Of course, transparency gets compromised when personal interface is involved, however, completely doing away with such interface will generate new set of problems in future which may be even worse. The legislature should come out with some solution balancing both the issues.

Amendment in section 254(2A) dealing with the power of the ITAT to grant stay of demand

First proviso to section 254(2A) of the Act, empowers the ITAT to grant a stay of demand in relation to an appeal filed before the ITAT. Such stay can be granted for a period not exceeding 180 days and the ITAT has to dispose of the appeal within such period. Second proviso to section 254(2A) of the Act, invested the ITAT with the power to extend such stay, if the appeal is not so disposed of within the period of stay and such delay in disposing of the appeal is not attributable to the assessee. Such extension can be granted for such period so that the aggregate period of stay does not exceed 365 days. Further, the ITAT has to dispose of the appeal within the period of stay so extended.

Thus, the ITAT could have even granted stay of 100% of the demand. This, power of the stay vested in ITAT is now proposed to be restricted by the Bill. *Vide* clause 97 of the Bill, the first proviso to section 254(2A) of the Act is proposed to be amended so as to restrict the power of the ITAT to grant stay of demand subject to the condition that the assessee deposits not less than 20% of the amount of tax, interest, fee, penalty, or any other sum payable under the provisions of this Act, or furnishes security of equal amount in respect thereof. Thus, now the ITAT cannot grant full stay of demand rather it can grant stay only if the assessee has paid 20% of the tax, interest etc. Similarly, the second proviso to section 254(2A) of the Act, dealing with extension of stay, is proposed to be amended so as to enable ITAT to extend the stay only on making payment of 20% of the tax, interest etc. or on furnishing of security of equal amount. Thus, the Tribunal can now either grant stay of demand or extend such stay, only on payment of 20% of the demand or on furnishing of security of an equal amount.

The above provision, in my opinion, impinges on the independence of the judiciary. Though, the appeal before the ITAT is a statutory right and not an inherent one, however, such restriction on the powers of the ITAT in respect of stay of demand is unreasonable. In this regard, one may refer to the **Office Memorandum No. 404/72/93-ITCC dated 29-2-2016**, whereby the Board instructed that in a case where the outstanding demand is disputed before CIT(A), the AO shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand. However, the above standard rate was subject to the exception contained in part (B), wherein the AO was granted liberty to refer the matter to Pr. CIT for grant of stay of an amount on payment of less than 15% in certain cases like,

a. Where the addition on same issue has been deleted by the appellate authorities for the earlier year, or

b. Where the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.

The above Office Memorandum was then modified by **Office Memorandum F. No. 40/72/93-ITCC dated 31-7-2017,** whereby the standard rate of 15% was raised to 20%. Thus, when an appeal is filed before the CIT(A), the Revenue officers have power to grant stay of more than 80% of the demand. However, no such power will be available to the ITAT after the Bill is enacted. Further, even in a genuine and *bona fide* case, where either the issue is covered by a judgment in assessees own case for earlier year or by judgment of the Apex Court or jurisdictional High Court, there is no provision to grant complete stay of demand. One of the factors to be taken into consideration while granting stay of demand is the financial difficulty faced by the assessee. Even, the proposed amendment does not provide exception to this 20% payment in cases where the assessees are facing genuine financial difficulty. This appears to be absurd.

Where ITAT has originally granted either stay of complete demand or required the assessee to pay less than 20% of the demand, prior to the proposed amendment kicking in and where such assessee seeks extension of such stay after the amendment kicks in, the ITAT will have to modify its earlier order of stay and extend such stay only on the condition of assessee either making payment of 20% of the demand or providing security of such amount. Thus, even without any fault of the assessee, he will be required to make payment of 20% of the demand.

Against the order of the ITAT direction payment of 20% of the demand, as a result of the proposed amendment, one can always file a writ before the High Court. Further, the High Court would not be bound by such limitation which is proposed to be imposed on the ITAT. Thus, the High Court in the writ jurisdiction can grant stay of complete demand or ask for payment which is less than 20% of the demand. One can also take a stand of not going to ITAT for stay of demand and directly approach the High Court on the ground that the facts of the case justify complete stay of demand and that ITAT has no power to allow such prayer.

The second proviso, though restricts the power of the ITAT to grant stay of demand for a period not extending 365 days, however, in the context of the old proviso, whose wordings are absolutely identical to the new proviso except the payment of 20% of the demand, the Courts have held that the ITAT has the power to grant stay for a period exceeding 365 days [See ***Narang Overseas (P) Ltd. v. ITAT - 295 ITR 22(Bom); Pepsi Foods (P) Ltd. v. ACIT - 376 ITR 87 (Delhi)***]. Such judgment should still hold the field even after the insertion of the new proviso.

Also, on the flip side, one may try to argue that on payment of 20% of the demand, the ITAT should grant stay, however, the wordings suggest payment of 'not less than' 20% of the demand, which means the ITAT can ask the appellants to pay more.

Thankfully, unlike the indirect tax laws where the appeal itself is not allowed to be filed unless 20% of the demand is deposited, the proposed amendment kicks in only if a stay application is filed and it does not hamper the filing of the appeal per se.

Amendments in reference to Dispute Resolution Panel ('DRP') u/s. 144C

DRP is an alternate appellate mechanism set up to deal with cases of certain eligible assessees. In such cases, the AO is bound to pass a draft assessment order. Such draft order can be challenged before the DRP and DRP is supposed to deal with such challenge in a time bound manner i.e., within 9 months from the end of the month in which the draft order is forwarded to the assessee.

There are two amendments, in so far as, section 144C is concerned. First amendment concerns the meaning of the term 'eligible assessee'. Earlier, the route of DRP was available only to an assessee in whose case a transfer pricing adjustment was made as a result of an order of TPO passed u/s. 92CA(3) of the Act and to a foreign company. *Vide* clause 70, the Bill proposes to extend this facility even to non-residents other than a foreign company. Thus, in case of a non-resident individual, firm etc., the AO has to pass a draft assessment order if he proposes to make any variations. If he directly passes a final assessment order, such order shall be treated as bad in law, as held by various Courts. This amendment is effective in case of variations made after 1-4-2020. Thus, even in a case for an earlier period, if the matter has been set aside to the AO for making *de novo* assessment, he has to pass a draft assessment order in such remand proceeding after 1-4-2020.

The other amendment which has been proposed, is in sub-section (1) of section 144C of the Act. Earlier, the requirement of passing a draft assessment order was in a case where any variation was made in the income or loss returned which was prejudicial to the interest of the eligible assessee. The words *"in the income or loss returned"* is proposed to be removed by clause 70 of the Bill. The Explanatory Memorandum seems to be mum about the reasons behind such amendment. However, it appears that in all the cases pertaining to a non-resident assessee or a foreign company, where a variation is proposed which is prejudicial to the assessee, irrespective of the fact whether a return of income has been filed or not or whether variation concerns the income or loss returned, the route of DRP is made available u/s. 144C of the Act. There are many provisions under the Act, whereby on deduction of tax at source, the non-residents are exempted from filing a return of income. In such cases, if any variation is proposed by the AO, route of DRP will be available.

This amendment will take effect from 1.4.2020.

These are the amendments concerning the appeal provisions. In light of the above discussion, one can only hope that adequate representation is made by the stakeholders and the same is considered judiciously by the Government so as to avoid unnecessary hassles.

Amendments related to Charitable & Religious Trusts

CA Paras K. Savla

"No, he doth but mistake the truth totally." So said Sebastian to Antonio in Act II: Scene 1 of William Shakespeare's The Tempest, which means "No, he just gets reality completely wrong."

Background

The Comptroller and Auditor General of India (C&AG) in its Audit Report No. 20 of 2013 (Exemptions to Charitable Trusts and Institutions) highlighted certain lapses by Income-tax Department (ITD) such as (a) grant of approval/ registration without adequate documents; (b) irregular exemptions to trusts creating huge surpluses consistently; (c) application of income in prohibited mode of investment; (d) non-monitoring of foreign contributions received by trusts etc.

Later on, in July 2018, Public Accounts Committee (PAC) in their 104th Report (July 2018) on the Action Taken by the Government on the observations/recommendations of the Committee contained in their 27th Report (16th Lok Sabha) on 'Exemptions to Charitable Trusts and Institutions' *inter alia* expressed their concern that public charitable trusts were being used to run commercially for profit business and had repeatedly violated provisions of the Income-tax Act. The Committee was concerned over the serious nature of all the violations and failure of the ITD to monitor whether the trusts were fulfilling the objectives under which they have been established and also ensuring that there is no abuse of the concession enjoyed by such trusts.

The C&AG in its report No. 9 of 2019 for the year ended 2019 has further observed following the irregularities found in Audit are (a) Diversion of income/property to related group trusts/ institutions considered as application of income; (b) Exemptions to assessees whose activities were not charitable in nature; (c) Lack of monitoring the investment of accumulated money by the trusts in the forms or modes other than those specified in the Act; (d) Exemption to assessee where voluntary contribution including foreign currency donation was considered as corpus fund without specific direction of donor; and (e) Non-cancellation of registration where activities of the Trust and Institutions are not in accordance with the provisions of the Act.

Every year one or other amendment is made by the Finance Minister in respect to the provisions relating to charitable trust or institution. This year is no exception. The seems that C&AG and PAC reports have paved road for amendments in last few years. Major amendment proposed is relating to the reregistration of charitable or religious trusts or institutions for availing exemption and also for availing deduction on account of payment of donation; electronic filing of a statement in respect of donors availing deduction u/s 80G.

Revenue Secretary in one of the meetings that was organised post presenting a budget has highlighted that there is no consolidated list of the NGO and charitable institutions with Government. Hence in order to have a consolidated list, provision for reregistration has been proposed.

I. Amendment in Section 10(23C)

W.e.f 1st June 2020 for the first and second proviso following proviso shall be substituted:

Exemption to the fund or trust or institution or university or other educational institution or hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) under the respective sub-clauses of section 10(23C) shall not be available to it unless they make an application in the prescribed form and manner to the Principal Commissioner or Commissioner, for grant of approval,––

1. When such fund or trust or institution or university or other educational institution or hospital or other medical institution is already registered then within Three months from 1st June 2020.
2. When such fund or trust or institution or university or other educational institution or hospital or other medical institution is approved and the period of such approval is due to expire, at least six months prior to the expiry of the said period.
3. When such fund or trust or institution or university or other educational institution or hospital or other medical institution has been provisionally approved, at least six months prior to the expiry of the period of the provisional approval or within six months of commencement of its activities, whichever is earlier.
4. In any other case, at least one month prior to the commencement of the previous year relevant to the assessment year from which the said approval is sought.

Principal Commissioner or Commissioner, on receipt of an application made under the first proviso, shall

1. If an application is made by the existing fund or trust or institution or university or other educational institution or hospital or other medical institution is already registered then pass an order in writing granting approval to it for a period of five years
2. Where the application is made under above point no 2 or 3 then
   - 2.1. call for such documents or information from it or make such inquiries as he thinks necessary in order to satisfy himself about
     - 2.1.1. The genuineness of activities of such fund or trust or institution or university or other educational institution or hospital or other medical institution.
     - 2.1.2. The compliance of such requirements of any other law for the time being in force by it as is material for the purpose of achieving its objects.
   - 2.2. after satisfying himself about the objects and the genuineness of its activities specified under point 2.1.1 and compliance of the requirements under 2.1.2, of point 2.1
     - 2.2.1. Pass an order in writing granting approval to it for a period of five years

2.2.2. If he is not so satisfied, pass an order in writing rejecting such application and also cancelling its approval after affording it a reasonable opportunity of being heard

3. Where the application is made under point 4 then order will be passed in writing granting approval to it provisionally for a period of three years from the assessment year from which the registration is sought.

Revenue has been rejecting registration application in case newly set up trust or institution has not commenced activity. However, various courts have held that registration of newly set up trust or institution should not be denied merely because such trust or institution has not commenced its activities. The introduction of the provision for provisional registration for new trust or institution will reduce litigation.

Registration granted to the trust or institution or university or other educational institution or hospital or other medical institution will be effective from -

o	Where the application is made by the trust already registered under 10(23C)	:	From the assessment year from which approval was earlier granted to it
o	When the trust is provisionally approved	:	From the first A.Y from which it is provisionally approved
o	In other cases	:	from the assessment year immediately following the financial year in which such application is made. In this case, registration is not available for the year in which application was made and this may create an undue hardship.

The time limit for passing the order is as follows from the expiry of the month in which application was received by the Principal Commissioner or Commissioner :

o	Where the application is made by the trust already registered under 10(23C)	:	Three months
o	When the trust is provisionally approved	:	Six months
o	In other cases	:	One month

Rationale behind amendment

With a view of not conducting a roving inquiry in the day-to-day affairs of the new and already registered exempt entities approval or registration or notification for exemption should be for a limited period. This would act as a check to ensure that the conditions on the basis of which approval or registration or notification was granted are followed by the entity. Also with the pace of which technology is growing now a day's change in the registration process is required.

Due date

As per the amendment in the tenth proviso now trust has to submit there Tax Audit Report at least one month prior to the due date specified in section 139(1) (i.e 31st October). After which they have to submit their return of income. Currently, the due date for submission of both Audit Report and Income Tax return are the same. Now post amendment due date for the submission of return of income has been extended by one month. It seems that data available in the audit report will help revenue in compiling pre-fill return of income.

Pending applications

The Eighteenth proviso provided that all the application that is pending before the Principal Commissioner or Commissioner, on which no order has been passed shall be deemed to be an application made under amended section. In view of this trust or institution may be required to provide additional information under new provisions.

II. Amendment in Section 11(7)

- In section 11(7) reference of 10(46) is added after (23C).
- According to the First Proviso registration, u/s. 12AA becomes inoperative when the trust or institution is claiming benefit under 10(23C) or 10(46) or the date on which this proviso is come in to force whichever is later.
- According to the Second Proviso trust whose registration has become inoperative can apply for the fresh registration u/s 12AB, but while doing so registration under 10(23C) or 10(46) cease to have any effect from the date on which registration u/s 12AB becomes operative and they cannot take benefit of 10(23C) or 10(46).

Rationale behind amendment

It has been noticed that trust claiming the benefit of sections 11 and 12 can claim exemption u/s. 10(1) and 10(23C) but cannot avail the benefit of 10(46). Benefit of 10(46) can be availed by a body or authority or Board or Trust or commission established or constituted by or under a central, State or Provincial Act, or constituted by the Central Government or a State Government, with the object of regulating or administering any activity for the benefit of the general public.

Hence in order to carve out such hardship sub-clause 46 has been added in section 11(7). Also when the registration u/s. 12A or 12AA is in force only one mode of exemption will be enforced and switching may be allowed only once so that switching is not done routinely and also remains efficient and administered.

III. CLAUSE (ac) IN SUB-SECTION 1 OF SECTION 12A AND SECTION 12AB

Section 12A(1)(ac)

Application for registration needs to be given to Principal Commissioner or Commissioner of Income Tax. Clause (ac) overrides the clauses (a), (aa), (ab) of section 12A.

The procedure of applying for registration/re-registration is as follows:

1. If trust is already registered under section 12A or 12AA, then application needs to be given within 3 months (i.e., from 1st June 2020) from the day on which this clause came into enforce;
2. If trust or institution is registered under section 12AB and the period of the said registration is due to expire, at least six months prior to the expiry of the said period;
3. Where the trust or institution has been provisionally registered under section 12AB, at least six months prior to the expiry of the period of the provisional registration or within six months of commencement of its activities, whichever is earlier;
4. Where registration of the trust or institution has become inoperative due to the first proviso to sub-section (7) of section 11

[which says trust claiming benefit of section 11 and 12 cannot take benefit of section 10 other than clause (1) and clause (23C)], need to apply for registration at least six months prior to the commencement of the assessment year from which the said registration is sought to be made operative;

5. Where the trust or institution has adopted or undertaken modifications of the objects which do not conform to the conditions of registration, within a period of thirty days from the date of the said adoption or modification;

6. In any other case, at least one month prior to the commencement of the previous year relevant to the assessment year from which the said registration is sought.

Rationale behind amendment

With a view of not conducting a roving inquiry in the day-to-day affairs of the new and already registered exempt entities approval or registration or notification for exemption should be for a limited period. This would act as a check to ensure that the conditions on the basis of which approval or registration or notification was granted are followed by the entity.

Also with the pace of which technology is growing now a day's change in the registration process is required.

Hence new section 12AB has been inserted which governs with the registration of the trust and section 12A(1)(ac) deals with the procedure for the obtaining registration.

IV. Section 12AA

Registration under this Section will be ineffective from 1st June 2020 and all registration would be done u/s new section 12AB.

New Section 12AB

Grant of registration as per section 12AB

- Principal Commissioner or Commissioner of Income Tax on receipt of application as per the above provision shall grant the registration as follows:

1. If trust is already registered under section 12A or section 12AA then order for granting registration will be passed in writing for a period of five years.

2. When the application is made under any other clause then Principal Commissioner or Commissioner shall:

   2.1. Call for such documents or information from the trust or institution or make such inquiries as he thinks necessary in order to satisfy himself about

   2.1.1. The genuineness of activities of the trust or institution

   2.1.2. The compliance of such requirements of any other law for the time being in force by the trust or institution as is material for the purpose of achieving its objects; and

After satisfying himself about the objects of the trust or institution and the genuineness of its activities under 2.1.1, and compliance of the requirements under item 2.1.2, of point 2, Principal Commissioner or Commissioner will either

A. Pass an order in writing registering the trust or institution for a period of five years or

B. If he is not so satisfied, pass an order in writing rejecting such application and also cancelling its registration after affording a reasonable opportunity of being heard.

C. Where the application is made in the residual case then the order will be passed in writing provisionally registering the trust or institution for a period of three years from the assessment year from which the registration is sought.

In all the above cases copy of the order will be sent to trust or institution.

- In all the cases on which order is not yet passed by the Principal Commissioner or Commissioner of Income Tax under earlier section 12AA before 30-6-2020, then shall be deemed to be an application made under residual section of 12A on that date.
- The time limit for passing the order is within the period as prescribed below from the end of the month in which application is received.

• Order for existing trust registered under sec 12A or sec 12AA	:	Three months
• Order for Trust registered under 12AB and whose registration is due to expire o Order for provisional registration o Order for the trust who became inoperative o Order for the trust who had taken modification in the object	:	Six Months
• Order for any other case	:	One Month

- If after granting the registration trust, authority is satisfied that activities are not genuine or are not carried out as per the object then he shall pass an order in writing cancelling the registration after affording a reasonable opportunity of being heard.
- Without prejudice to the above where the registration granted as per the above point 1 and 2 and subsequently if Principal Commissioner or Commissioner notice that activities of the trust are carried out as per the provision of section 13(1) (i.e., for the benefit of the particular religion or community) or the trust has not complied with the provision of any other law as per the point 2.1.2 of point no 2 and the order, direction or decree, by whatever name called, holding that such non-compliance has occurred, has either not been disputed or has attained finality by an order in writing, cancel the registration of such trust or institution after affording a reasonable opportunity of being heard.

Conditions for registration

The registering authority besides satisfying itself about the genuineness of activities is also required to satisfy himself that such trust or institution has complied with the requirements of any other applicable law which are material for the purpose of achieving its objects.

Genuineness of activities

The genuineness of the objects and activities of the Trust has to be tested at the time of registration[1]. Examination of the genuineness of the activities would mean to see that the activities are not by way of camouflage or bogus or artificial and whether these are in accordance with the objects of the institution. The scope of such enquiry does not extend beyond that point. The exemption under section 11 can be availed of by institutions which are genuinely engaged

1. *CIT vs. R.S. Bajaj Society [2014] 42 taxmann.com 573 (All.)*

in 'charitable activities'. The genuineness of the purpose gets tested by the obligation created to spend the income exclusively or essentially on charity, i.e., it's charitable objects. The profit-making, or running the school on business or commercial principles, would not exclude it from being regarded as existing for a charitable purpose[2].

- The Commissioner has to satisfy himself about the objectives of the trust and the genuineness of its activities. For such purpose, he has the power to call for such documents or information from the trust as he thinks are necessary. However, this does not mean that if the activities of the trust have not commenced, the Commissioner has authority to reject its application for registration on the ground that the Trust failed to convince him about the genuineness of the activities. It is, of course, true that even if the activities of the trust have not commenced, if the Commissioner has sufficient material in his command, he may still come to the conclusion that he is not satisfied with the objectives of the Trust or the genuineness of its activities[3]. The provision under the new proposed section does not stipulate such a condition about commencing the activity for grant of registration. To overcome the situation of non-commencement of activities provision for temporary registration has been introduced.

- Section 12AB(1)(b) contemplates satisfaction of the Commissioner about the objects of the trust and the genuineness of the activities and make such enquiry as may be necessary for the purpose of grant of registration. Considering the fact that the continuance of registration is further a subject matter of scrutiny by the Commissioner as contemplated under the section, the Revenue would not be justified in refusing the registration at the threshold[4].

- The object of Section 12AB is to examine the genuineness of the objects of the trust but not the income of the trust for charitable or religious purpose.

- The power of the Commissioner to look into the objects of the Society and the genuineness of the same cannot be doubted when the basis is of non-supply of information[5].

- The assessee-trust, running children's home after getting compulsory registration in Directorate of Social Defence of State of Tamil Nadu under Juvenile Justice (Care and protection of children) Act, 2015, its genuineness could not be doubted[6].

- 71% of the receipts of the Trust are being spent in accordance with its objects. Therefore, this itself would establish that the Trust is in existence. A partial expenditure which is not authorized by the Trust would not by itself lead to the Trust becoming non-genuine. The consequence would be that the benefit of Section 11 of the Act will not be available to that extent. At the stage of registration, this issue is premature[7].

2. *Lord Shiva Educational Welfare Society vs. CIT(E) [2018] 97 taxmann.com 501 (Amritsar - Trib.)*
3. *CIT vs. Kutchi Dasa Oswal Moto Pariwar Ambama Trust [2013] 29 taxmann.com 228 (Gujarat); Hardayal Charitable & Educational Trust vs. CIT [2013] 32 taxmann.com 341 (Allahabad)*
4. *DIT (Exemption) vs. Seervi Samaj Tambaram Trust [2014] 362 ITR 199 (Mad.)*
5. *CIT vs. Sri Guru Gorakh Nath Charitable Educational Society [2015] 60 taxmann.com 56 (Punjab & Haryana)*
6. *Hosanna Ministries vs. ITO(E) [2017] 80 taxmann.com 173 (Madras)*
7. *CIT(E) vs. Manekji Mota Charitable Trust [2019] 109 taxmann.com 258 (Bombay)*

- The object of section is to examine the genuineness of the objects of the trust and though while examining genuineness, the income, as well as resources of the trust, may be taken into consideration but any suspicion as to these facts cannot be the sole criteria for rejecting an application. If a trustee is a life-long member of a trust, it automatically does not raise an inference that the trust is not charitable. The fact that a trustee is a life member, may be relevant but cannot by itself lead to a finding that the Trust is not charitable[8].

- When a trust is created for the purpose of carrying out CSR activities, the registration cannot be denied. *Vide* notifications dated 27-2-2014 the ministry of Corporate Affairs in the rules framed for the purpose of CSR has implicitly provided for forming the dedicated trust under sub-rule 2 to rule 4[9].

- The application cannot be rejected merely on the ground that the Secretary of the Society was getting lease rent for the land given to the Society for running the School or his wife who had requisite qualification was teaching in the school and was being paid the salary[10].

- The only duty of the Commissioner of Income-tax was to satisfy himself about the genuineness of the activities of the trust or institution and not about the credential, capacity, qualification, etc. of the trustee[11].

Genuineness has been doubted

- The assessee society was registered with Registrar of Societies but no activity had been started up to the date of present proceedings. It was also observed that some of the objects are not genuine. In the absence of the commencement of activities, there was no material to verify the objects and activities of the society and their genuineness[12].

- While granting registration to a trust, authorities are empowered to examine only genuineness of trust and its activities and that only during assessment eligibility in terms of sections 10, 11 and 12 is to be verified as to whether or not what was professed in Deed of trust. SLP has granted against the High Court's ruling[13].

- The list of donors showed that the only names are mentioned without any address. The lack of information in respect to parentage, age, address or PAN Numbers in the list of donors are the good reasons for declining the registration of the assessee as a charitable trust[14].

Requirements of any other applicable law: Another condition is the compliance of the requirement of another law. Let us examine the requirement of the phrase *"the compliance of such requirements of any other law for the time being in force by the trust or institution as are material for the purpose of achieving its objects"*.

- Whether trust or institution is required to comply with each every requirement

8. *CIT vs. Baba Kartar Singh Dukki Educational Trust [2014] 42 taxmann.com 17 (Punjab & Haryana)*
9. *Nanak Chand Jain Charitable Trust vs. CIT(E) [2018] 91 taxmann.com 197 (Delhi - Trib.)*
10. *CIT(E) vs. Ambala Public Educational Society [2018] 100 taxmann.com 131 (Punjab & Haryana)*
11. *Prayer for India vs. ITO [2012] 20 taxmann.com 359 (Chennai)*
12. *Suchinta Educational Society vs. CIT [2013] 35 taxmann.com 178 (Chandigarh - Trib.)*
13. *CIT vs. Sree Anjaneya Medical [2016] 74 taxmann.com 243 (SC)*
14. *CIT vs. Savior Charitable Trust [2013] 35 taxmann.com 295 (Punjab & Haryana)*

even if it is trivial or procedural, of such identified law or not? The expression is followed by the word 'material for the purpose of achieving its object'. The material mean of such consequences, importance or significance as to be likely to influence the determination of a cause; to alter the character of an instrument, etc.[15]. The Hon'ble FM in her budget speech of 2019, when the similar provision was introduced under the existing section, has said that "In order to ensure that trust or institution complies with local laws that are material for the purpose of achieving its objects…". Hence view can be formed that the requirements have to be material and that also for achieving the objects are required to have complied.

- The trust or institution is required to comply with any State or Central Law, Rules under a statute and Notifications issued under a law e.g., Maharashtra Public Trust Act 1950, Societies Registration Act 1860, Foreign Contribution Regulation Act, 2010 etc. and Rules made under those Acts. The expression *"any other laws"* will not include Income-tax Act 1961.

- In past it was held that compliance of Rights to Education Act[16], Education institution run without obtaining requisite permission[17] Society is not registered under a particular State statute[18], charging excess fees in violation of fee prescribed by the Government[19], some part of land on which a university setup was not owned as per certain Government notification[20], etc., are not relevant while grant of registration, so long as objects are charitable in nature. But post amendment registering authority is required to satisfy himself about the compliance with other statutes which are material for the purpose of achieving its objects.

- Trust or institution may have multiple objects. Some of the objects may not be perused immediately. Non-compliance of the certain laws relating such objects may not be a hindrance for grant of registration. Especially when Registering Authority has been granted with the power to can cancel registration when the trust or institution has not complied with the requirement of any other law. If Trust or Institution hasn't started the activity then the requirement should be deemed to be complied with and the registering authority ought to be considered as satisfied with the genuineness of activities[21].

Cancellation of Registration

Where a trust or an institution has been granted registration u/s. 12AA or 12A or 12AB and subsequently the Principal Commissioner or Commissioner can cancel the registration of such trust or institution by an order in writing, if

15. Legal Glossary 2015 by Govt. of India, page No. 258
16. *CIT(E) vs. Kids-R-Kids International Education & Social Welfare Trust [2018] 99 taxmann.com 384 (Punjab & Haryana); Shri Gian Ganga Vocational & Educational Society vs. CIT [2013] 35 taxmann.com 17 (Delhi - Trib.)*
17. *Shri Krishna Education & Welfare Trust vs. CIT [2009] 27 SOT 331 (Delhi - Trib.)*
18. *CIT(E) vs. Ambala Public Educational Society [2018] 100 taxmann.com 131 (Punj. & Har.)*
19. *R. K. Educational Society vs. CIT [2015] 56 taxmann.com 154 (Visakha. - Trib.)*
20. *Indian Medical Trust vs. PCIT [2018] 99 taxmann.com 273 (Jaipur - Trib.)*
21. *Hardayal Charitable & Educational Trust vs. CIT [2013] 32 taxmann.com 341 (All.); DIT vs. Foundation of Ophthalmic and Optometry Research Education Centre [2012] 25 taxmann.com 376 (Delhi)*

- Section 12AB(4) – he is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, after giving a reasonable opportunity of being heard; or

- Section 12AB(5) - notices that

  o the activities of the trust or the institution are being carried out in a manner that the provisions of sections 11 and 12 do not apply to exclude either whole or any part of the income of such trust or institution due to the operation of section 13(1), or

  o the trust or institution has not complied with the requirement of any other law as specified u/s. 12AB(1)(b)(i)(B), and the order, direction or decree, by whatever name called, holding that such non-compliance has occurred, has either not been disputed or has attained finality.

Cancellation: Section 12AB(4)

- The objects and activities of the trust or institution are genuine registration cannot be cancelled merely because receipts are exceeding the threshold limit as provided under the second proviso to section 2(15) of the Act. It is open to the Assessing Officer to deny exemption under section 11 on the receipts of the assessee[22].

- There is a distinction between objects and the power to carry out those objects. The amendment made in the Trust Deed not even remotely suggest any change/addition to the objects of the Trust. It has only to do with the appointment of the Chief Trustee and the manner of managing the Trust. Hence cancelling registration under section 12AA is not justified[23].

- The registration of assessee trust under section 12AA was cancelled for receiving a bogus donation but High Court by impugned order restored registration holding that one bogus donation would not establish that activities of trust were not genuine. Apex Court held that the reason assigned by High Court was erroneous and ran contrary to the plain language of section 12AA(3) and, therefore, the order of High Court was to be set aside and the matter was remanded to Commissioner (Exemptions) for consideration on merits[24].

Cancellation: Section 12AB(5)

- It provides for the cancellation of registration under 2 circumstances. First – due of operation of section 13(1) trust or institution is not entitled to the benefit of section 11 or 12 on whole or part of its income. Second – due non-compliance of any other law order etc., has been passed to that effect.

- Section 13(1) provides that nothing contained in section 11 or 12 will not apply in the following circumstances:

  o any part of the income from the property held under a trust for private religious purposes which does not ensure for the benefit of the public;

22. *Vanita Samaj vs. DIT(E) [2014] 45 taxmann.com 303 (Mumbai - Trib.); SAE India vs. DIT(E) [2014] 52 taxmann.com 209 (Chennai - Trib.)*
23. *CIT(E) vs. Sadguru Narendra Maharaj Sansthan [2018] 92 taxmann.com 405 (Bombay)*
24. *CIT(E) vs. Jagannath Gupta Family Trust [2019] 102 taxmann.com 34 (SC)*

- o a charitable trust or a charitable institution created or established for the benefit of any particular religious community or caste;
- o a trust established for charitable or religious purposes or a charitable or religious institution has applied it's any income directly or indirectly for the benefit of any related person specified in section 13(3);
- o a trust established for charitable or religious purposes or a charitable or religious institution invests in investments which are not in accordance with section 11(5).

- Cancellation for registration under section 12AB(5) may not arise in every situation when trust or institution does not comply with requirements of any other law. It needs to be read with requirements as specified u/s 12AB(1)(b)(i)(B) i.e. the compliance of such requirements of any other law for the time being in force by the trust or institution as is material for the purpose of achieving its objects. The authority may not be required to independently examine compliance with the requirements. His role is limited to satisfy himself that the requirement which is not complied with, and in respect of which order, direction or decree, etc., is received and whether it is material for achieving the objects or not.

- On the occurrence of the specified event under sub-section (5) is it mandatory for the PCIT or CIT to cancel the registration? It is provided *"...then, the Principal Commissioner or the Commissioner may, by an order in writing, cancel ..."*. Word 'may' shows such cancellation is discretionary and not mandatory. Cancellation is not automatic. Support can be drawn from section 271(1)(c), which also uses word may for levy of concealment penalty. Courts have held that levy of penalty is not automatic and it's discretion. Further section 12AB(4) uses the language "....he shall pass an order in writing cancelling the registration....", the word 'shall' has been used in contrast to the word 'may' under section 12AB(5). Two consecutive provisions under sub-section (4) & (5) two different words have been used and hence word 'may' should not be read as 'shall' under sub-section (5). Hence PCIT/CIT has to exercise his discretion considering the facts and circumstances of the case.

- The order rejecting/cancelling the registration need to be speaking order after considering the representation of the trust or institution. The object of natural justice is to ensure that parties views/objections are taken on board and considered before it is rejected. The requirement of natural justice is only to ensure that the party's stand is effectively dealt with by the authorities under the Act. Mere ritualistic giving of hearing and reproducing the submissions made without understanding the party's case would not satisfy the test of natural justice[25].

- Whether the power of cancellation will apply to the defaults that occurred prior to 1-9-2019. (Similar provision was introduced u/s. 12AA(4) w.e.f. 1-9-2019) Cancellation

25. *TLG India (P.) Ltd. vs. DCIT [2019] 111 taxmann.com 376 (Bombay)*

is a penal provision. It cannot be applied retrospectively unless specified accordingly. Hence in respect to defaults occurred prior to 1-09-2019 and order etc. passed whether prior to 1-9-2019 or thereafter should not trigger vigour of this sub-section.

Due date of audit and submission of return of income

As per the existing provision of Income-tax Act 1961 ("the Act") trust whose total income exceeds the maximum amount not chargeable to tax has to submit its audit report along with return of Income as per the specified date in section 44AB (i.e as per the due date in section 139(1). After amendment now, the charitable trust has to submit there tax audit report at least one month prior to the due date specified in section 139(1) (i.e 31th October). After which they have to submit there return of income. Currently, both the audit report and income tax return needs to be submitted together. Now post amendment due date of filing return of income has been deferred by one month.

V. Amendment to Section 80G

From 1st June 2020 institution or fund should be approved by Principal Commissioner or Commissioner instead of Commissioner as prescribed in the Act.

Cross verification of deduction claimed in return of Income rational behind amendment

With the ingress of technology now it is possible for the department to have one-to-one check about the claim of donation made by the donee in his return of Income and what is actually received by the exempt entities. A similar method is followed while claiming the TDS. The entities receiving donation have to furnish a statement in respect thereof and issue a certificate to the donor. On this return and certificate basis deduction will be allowed to the donee.

a. **In sub-section 5 after sub-clause (vii) is inserted**

The institution or fund prepares such statement for such period as may be prescribed and deliver or cause to be delivered to the prescribed income-tax authority or the person authorized by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed. It is also provided that such a statement could be rectified or modified.

b. **Sub-Clause (ix)**

According to this sub-clause institution or fund will furnish to the donor a certificate specifying the amount of donation in the manner prescribed containing such details within such time from the date of receipt of donation as may be prescribed.

Provided that the institution or fund registered in this section shall make an application in the prescribed form and manner to the Principal Commissioner or Commissioner, for grant of approval. All exiting trust or institutions who have obtained registration earlier are also required to apply for registration. The proposed amendment re-introduces the proviso which provided that any approval shall have effect for not exceeding five assessment years, omitted by the Finance (No. 2) Act, 2009, w.e.f. 1-10-2009.

Time Limit for application: Details of the time limit within which approval is to be given is as follows-

Sr No.	*Details of trust*		*Time Limit within which application to make for registration*
1	When the trust is already registered under this section	:	Three months
2	When a period of approval is due to expire	:	At least six months prior to the date of expiry
3	When institution or fund is provisionally approved	:	At least six months prior to the date of expiry or within six months from the commencement of activity whichever is earlier
4	In any other case	:	One month prior to the financial year for which approval is required

Principal Commissioner or Commissioner, on receipt of an application, made as per the above table shall-

1. If the application is made by the registered trust then pass an order in writing granting approval to it for a period of five years

2. where the application is made under above point no 2 or 3 then

   2.1. Call for such documents or information from it or make such inquiries as he thinks necessary in order to satisfy himself about

   2.1.1. The genuineness of activities of such fund or institution

   2.1.2. the fulfilment of all the conditions laid down

   2.2. After satisfying himself about the genuineness of its activities under 2.1.1 the and fulfilment of all the condition under point 2.1

   2.2.1. Pass an order in writing granting approval to it for a period of five years

   2.2.2. If he is not so satisfied, pass an order in writing rejecting such application and also cancelling its approval after affording it a reasonable opportunity of being heard

3. Where the application is made under point 4 (any other case) then the order will be passed in writing granting approval to it provisionally for a period of three years from the assessment year from which the registration is sought.

Time Limit for passing order: Time limit for passing the order is as follows from the expiry of the month in which application was received by the Principal Commissioner or Commissioner :

- o Where the application is made by the trust already registered : Three month
- o When the trust is provisionally approved : Six month
- o In other cases : One month

Approval granted to the institution or fund will be effective from -

o	Where the application is made by the institution or fund already registered	: From the assessment year from which approval was earlier granted to it
o	When the institution or fund is provisionally approved	: From the first AY from which it is provisionally approved
o	In other cases	: From the assessment year immediately following the financial year in which such application is made. In this case, registration is not available for the year in which application was made and this may create an undue hardship.

As per sub-section 5E all the application that is pending before the Commissioner on which no order has been passed then it shall be deemed to be an application made under amended section.

c. In sub-section 5D after *Explanation 2* following explanation shall be inserted

Deduction u/s. 80G is allowed to the assessee in his return of Income for the donation made is on the basis of Information furnished by institution or fund or there authorized representative as per the statement furnished by them, subject to verification in accordance with the risk management strategy formulated by the board from time to time.

d. Amendment in section 115TD

Where reference of section 12AA given reference of section 12AB is substituted.

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Service which is rendered without joy helps neither the servant nor the served. But all other pleasures and possessions pale into nothingness before service which is rendered in a spirit of joy.

– Mahatma Gandhi

We are what our thoughts have made us; so take care about what you think. Words are secondary. Thoughts live; they travel far.

– Swami Vivekananda

Those who cannot work with their hearts achieve but a hollow, half-hearted success that breeds bitterness all around.

– A. P. J. Abdul Kalam

Miscellaneous Amendments

CA Kalpesh Katira

In the backdrop of economic slowdown, the Finance Minister has presented the budget in Parliament with various amendments. Some of the important amendments are narrated as under.

Rationalisation of tax treatment of employer's contribution to recognised provident funds, superannuation funds and national pension scheme

Under the existing provisions of the Income-tax Act, 1961 ("the Act"), the contribution made by the employer to the account of an employee is taxable in the hands of employee as follows:

Contributions made by the employer to the account of an employee towards	**Exempt in the hands of employee not exceeding**
Recognised provident fund	12% of salary – section 17(1)(vi)
Approved superannuation fund	₹ 1,50,000/- section 17(2)(vii)
National Pension Scheme (NPS)	Fully taxable u/s. 17(1)(viii) but entitled for deduction u/s. 80CCD(2) – up to 10% of salary (14% in case of CG employees)

From the above, we can observe that there is no combined upper limit for deduction on the amount of contribution made by the employer since there are only individual limits as stated in respective sections. As per Memorandum to Finance Bill, it gives undue benefit to employees earning high salary, since they are able to design their salary package in a manner where a large part of their salary is paid by the employer in the above three funds. While an employee with low salary income is not able to let employer contribute a large part of his salary to all these three funds. Accordingly, the employees earning high salary do not suffer taxation at any point of time and they fall under Exempt-Exempt-Exempt (EEE) regime.

To overcome this issue, the Finance Bill, 2020 has proposed to provide a combined upper limit of ₹ 7,50,000/- in respect of employer's contribution in a year to the above three funds. The aforesaid combined limit is over and above the limits mentioned for the above three individual funds. This has been done through insertion of clause 13 in the bill which seeks to substitute existing section 17(2)(vii) of the Act.

Currently, section 17(2)(vii) is dealing only with taxability of superannuation fund as a perquisite when the employer contribution exceeds the limit of ₹ 1,50,000/-. However, the Finance Bill, 2020 by virtue of amendment in section 17(2)(vii) substitutes the earlier provision and now covers the amount or aggregate amounts of any contributions made by the employer to the account of an employee towards Recognised Provident Fund, NPS and Approved Superannuation Fund shall be treated as perquisites if the same exceeds an amount of ₹ 7,50,000/-. It may be noted that this limit in addition to the existing limits of PF and NPS contribution provided in section 17(1)(vi) and 17(1)(viii) respectively. Hence, it may lead to taxation of higher percentage of Recognised Provident fund (exceeding 12%) and NPS (10%/14%) under section 17(1)(vi) or 17(1)(viii), as the case may be and also under section 17(2)(vii) if the amount or aggregate of amount of contribution exceeds ₹ 7,50,000/-. This may result into higher amount getting taxed viz., one under section 17(1) as salary and another under section 17(2) as perquisite in respect of contributions to above funds as compared to earlier.

By substituting section 17(2)(vii), there would be no individual limit for contributions made by the employer to the account of an employee towards Approved Superannuation Fund which was earlier at ₹ 1,50,000/-. Hence, if the contribution is only towards Approved Superannuation Fund then it would not be taxable in employee's hand unless it exceeds ₹ 7,50,000/- as provided in section 17(2)(vii) of the Act.

Further, the Finance Bill, 2020 also inserted new sub-section 17(2)(viia) which deals with any portion of annual accretion by way of interest, dividend or any other amount will be treated as perquisite if it relates to the employer's contribution which is taxable and included in total income under section 17(2)(vii) of the Act.

Hence to conclude, the amendment in section 17(2)(vii) states that employer's contribution in a year to NPS, Superannuation Fund and Recognised Provident Fund will be taxable in the hands of employee if combined contribution to the aforesaid three funds exceeds a limit of ₹ 7,50,000/-. Consequently, by insertion of new sub-section 17(2)(viia) any annual accretion by way of interest, dividend or any other amount of similar nature to the balance at the credit of the fund or scheme may be treated as perquisite to the extent it relates to the employer's contribution which is included in total income.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.

Widening the scope of Commodity Transaction Tax (CTT)

The Finance Act, 2013 had introduced CTT on the sale of commodity derivatives based on non-agricultural commodities traded in recognised associations. The intention behind introducing CTT was to bring parity between the derivative trading in the securities market and the commodity market. The CTT was levied at the rate of 0.01%. Subsequently, the scope of CTT was expanded *vide* the Finance Act, 2018 by also including the sale of options on commodity derivatives as taxable commodity transactions.

Presently, as per Securities Contract Regulation Act, 1956 ("SCRA"), derivatives trading in commodities is limited only to commodity 'futures' and 'option on commodity futures'. The underlying asset in the 'option on commodity futures' is a 'commodity future'. This means that upon expiry, if the 'option' is exercised, the option-holder gets a right to buy or sell a 'commodity future' and not the right to buy or sell the goods directly. However, *vide* notification dated 18th October, 2019, 'option in goods' has also been included in the definition of 'derivatives' in clause (ac) of section 2 of the SCRA. This has paved the way for new derivative product 'options in goods' with goods notified on 27-9-2016 directly as the underlying asset. Moreover, 'commodity futures' based on prices or indices of prices of 'commodity futures' is also likely to be introduced as a new product in the commodity derivatives market.

Accordingly, it is proposed to charge CTT on the new commodity derivatives products at following rates.

- Sale of a commodity derivatives based on prices or indices of prices of commodity derivatives at the rate of 0.01% payable by the seller, which is the same rate at which CTT is currently charged on a transaction of sale of a commodity derivative;
- Sale of an option in goods, where option is exercised resulting in actual delivery of goods at the rate of 0.0001% payable by purchaser; and
- Sale of an option in goods, where option is exercised resulting in a settlement otherwise than by the actual delivery of goods at the rate of 0.125% payable by purchaser.

This amendment will take effect from 1st April, 2020.

Modification of the definition of "Business Trust"

Section 115UA of the Act provides for a taxation regime applicable to business trusts. Under the said regime, the total income of the trust excluding capital gains income is charged at the maximum marginal rate. Further, the income by way of interest and rent received by the Business Trust from a Special Purpose Vehicle (SPV) is accorded pass through treatment i.e., there is no taxation of such interest or rental income in the hands of the Trust and no withholding tax at the level of SPV.

The Finance Bill, 2020 proposed to amend section 115UA(3) of the Act to tax dividend income as referred to in clause (b) of section 10(23FC) in the hands of unit holders. Earlier, only interest income as referred to in clause (a) of section 10(23FC) was getting taxed in the hands of unit holder.

The definition of "Business Trust" has been provided in section 2(13A) of the Act, to mean a Trust registered as an Infrastructure Investment Trust (InvIT) or a Real Estate Investment Trust (REIT) under the relevant regulations made under the Securities and Exchange Board of India (SEBI) Act, 1992 and the units of which are required to be listed on a recognised stock exchange in accordance with the relevant regulations.

SEBI (Infrastructure Investment Trusts) (Amendment) (Regulations), 2019 *vide* notification No.SEBI/LAD-NRO/GN/2019/10 has, *inter alia*, done away with the mandatory listing requirement for InvITs. In light of this, the definition of Business Trusts under the Act is aligned with the amended SEBI Regulations by amending section 2(13A) of the Act to modify the definition of "Business Trust" so as to do away with the requirement listing of units of the Business Trust on the stock exchange.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.

Increase in Safe Harbour limit under sections 43CA, 50C and 56 from 5% to 10%

Under the current provisions, for computing the income arising from transfer of land or building or both under the heads Business or Profession, Capital Gains and income from Other Sources, if the actual sale consideration is less than the stamp duty value then the stamp duty value shall be treated as full value of consideration.

However, the sections 43CA, 50C and 56 also provide that where the stamp duty value does not exceed 105% of the sale consideration, then the consideration so received or accruing as a result of the transfer shall be deemed to be the full value of consideration.

It is now proposed to expand the said limit of 5% to 10% of actual sale consideration by amending the provision of sections 43CA, 50C and 56(2)(x) of the Act.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.

Rationalisation of provisions of section 55 of the Act to compute cost of acquisition

Section 55 deals with meaning of "adjusted", "cost of improvement" and "cost of acquisition". The current provisions of the said section provides that the cost of long-term capital asset acquired before the 1st day of April, 2001 is taken to be the actual cost of acquisition to the assessee or the fair market value of the asset on that date, at the option of the assessee.

The Finance Bill, 2020 inserted a proviso to section 55(2)(b)(i) and (ii) to cap the fair market value of capital asset on the 1st day of April, 2001 at its stamp duty value as on 1st April, 2001, wherever it is available, as under.

> "stamp duty value" for the purposes of the said proviso to mean the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property.

Accordingly, the fair market value of long term capital asset acquired before 1st day of April 2001 shall be limited to stamp duty value as on 1st April 2001.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-22 and subsequent assessment years.

Extending time limit for approval of affordable housing project for availing deduction under section 80-IBA of the Act

Under the existing provisions of Section 80-IBA of the Act, the assessee engaged in the business of developing and building affordable housing projects are eligible for a 100% deduction of the profits and gains derived from such business subject to certain conditions specified therein. The conditions contained in the section, *inter alia*, prescribe that the project is approved by the competent authority during the period from 1st June, 2016 to 31st March, 2020.

To incentivise developers of affordable housing, the date by which the project should be approved is proposed to be extended to 31st March 2021.

Extending time limit for sanctioning of loan for affordable housing for availing deduction under section 80EEA of the Act

The existing provisions of section 80EEA of the Act provide for a deduction in respect of interest on loan taken from any financial institution for acquisition of an affordable residential house property. The deduction allowed is up to ₹ 1,50,000/- and is subject to certain conditions. One of the conditions is that loan should be sanctioned by the financial institution during the period from 1st April, 2019 to 31st March, 2020.

The said deduction is aimed to incentivise first time buyers to invest in residential house property whose stamp duty value does not exceed ₹ 45,00,000/-.

This deduction is now extended for one year in the case of loans sanctioned up to 31st March 2021.

Rationalization of the provisions of section 49 and clause (42A) of section 2 of the Act in respect of segregated portfolios

The existing provision of section 49 provide for considering cost of acquisition with reference to certain modes of acquisition of capital assets. Various sub-sections are included in section 49 for determining cost of capital assets in the hands of the assessee under different situations.

SEBI has permitted the creation of segregated portfolio of debt and money market instruments under the Mutual Fund schemes. All the existing unit holders in the affected scheme as on the day of the credit event shall be allotted equal number of units in the segregated portfolio as held in the main portfolio. On segregation, the unit holders come to hold same number of units in two schemes – the main scheme and segregated scheme.

In view of the above, it is proposed under the Finance Bill, 2020 to amend section 49 of the Act. New sub-section (2AG) has been proposed to insert in section 49 to provide for the cost of acquisition of a unit or units in the segregated portfolio which shall be the amount that bears the cost of acquisition of a unit or units held by the assessee in the total portfolio, the same proportion as the net asset value of the asset transferred to the segregated portfolio bears to the net asset value of the total portfolio immediately before the segregation of portfolios.

It is also proposed to insert another sub-section (2AH) in the said section to provide that the cost of the acquisition of the original units held by the unit holder in the main portfolio shall be deemed to have been reduced by the amount as so arrived at under the proposed sub-section (2AG).

Further, it is also proposed to amend section 2(42A) of the Act by inserting sub-clause (hh) in clause (i) to *Explanation* 1 of the said section. The new sub-clause (hh) states that, in the case of a capital asset, being a unit or units in a segregated portfolio referred to in sub-section (2AG) of section 49, there shall be included the period for which the original unit or units in the main portfolio were held by the assessee.

These amendments will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years.

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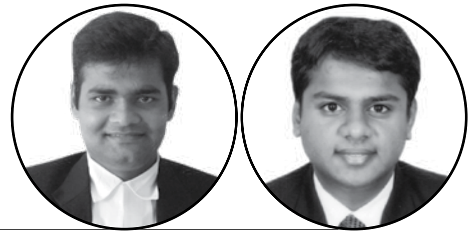
As different streams having different sources all mingle their waters in the sea, so different tendencies, various though they appear, crooked or straight, all lead to God.

– Swami Vivekananda

Every nation has to follow a certain policy: Commercial, trade, various other types of policies.

– A. P. J. Abdul Kalam

The Direct Tax Vivad Se Vishwas Bill, 2020



Dharan V. Gandhi *Advocate* & CA Viraj Mehta

After the success of Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, concerning the indirect tax litigation, there were murmurs about the introduction of similar scheme for settling litigation under the Income-tax law. This was confirmed, when our Hon'ble Finance Minister in her longest budget speech so far, announced the Vivad Se Vishwas Scheme i.e., No dispute but Trust Scheme [420 ITR (St.) 146].

The above announcement leads to instillment of vishwas (faith) in this action of the Government. However, when the scheme was introduced in the form of 'The Direct Tax Vivad Se Vishwas Bill, 2020' ('Bill') and when the same was read in greater detail, 'Vivad se Vishwas' turned into 'Vishwas se Vivad' as there are number of vivads (issues) arising in such proposed scheme, which is highlighted in the present article.

Brief Background

Though termed as scheme, actually it is introduced as a separate Bill which, after being passed by Parliament and on receipt of the assent of President, it will turn into an Act (though in the present article the term 'Bill' and 'scheme' are used interchangeably). The Bill is accompanied by statement of object and reasons, which explains the rationale. It can be discerned from such statement that roughly ₹ 9.32 lakh crore is the disputed direct tax arrears which is locked up in appeals. Further, it is stated that such disputes consume copious time, energy and resources of both the Government and taxpayers and therefore, to provide an urgent resolution, the scheme is proposed.

The scheme is introduced on the presumption that the disputed tax arrears of ₹ 9.32 lakh crore locked in disputes is legitimate and on resolution of the same demand can be easily recovered. This is far from truth. All of us are aware about the quality of assessments made under the Income-tax Act, 1961 ('Act') and the success ratio of such orders at the higher appellate stage. This, in our view, is the major distinguishing feature between the direct tax cases and the indirect tax cases and therefore, it is not necessary that the success which the Sabka Vishwas Scheme got may be emulated by the impugned scheme. This coupled with the issues arising from the bare reading of the Bill and discussed in this article, and the FAQ's which will be necessarily issued by the Government in the time to come, will determine the fate of the scheme.

Definitions

At the outset, let us first understand some of the relevant terms defined in the Bill.

a. **Appellant/Specified date/Appellate Forum**

Appellant has been termed as person or income-tax authority or both who has filed appeal before any appellate forum and the aforesaid appeal is pending on the specified date [Section 2(1)(a)]. As per the Bill, specified date is 31st January, 2020 [Section 2(1)(n)]. Further, Appellate Forum is defined to include the Supreme Court, the High Courts, the Income Tax Appellate Tribunal or the Commissioner (Appeals) [Section 2(1)(b)].

From the above, following emerges:

i. Bill applies to the appeals filed by the assessee as well as the Department. Further, the word 'both' is used which means the scheme also applies to cross appeals i.e., appeals by both the assessee and the Department for a particular year. Here, it may be noted that, initially, the Kar Vivad Samadhan Scheme of 1998 did not cover the Department appeals. However, after the Hon'ble Delhi High Court decision in the case of *All India Federation of Tax Practitioners vs. UOI (236 ITR 1)*, declarations in case of pending departmental appeals were also accepted.

ii. Such appeals should be pending before any of the appellate forum. Thus, the scheme applies to assessee appeals pending before CIT(A) and appeals by both i.e., Department and assessee pending before the ITAT, High Courts and Supreme Court.

iii. Declarant will be eligible to take benefit under this Bill only if an appeal is pending on the specified date i.e., 31st January 2020.

iv. It may be noted that appellate forum does not include DRP (Dispute Resolution Panel) and Settlement Commission as in such cases; the reference or application is made before any assessment order is passed by the AO. Thus, the formula as discussed in the latter part of the article will fail in such cases.

In this regard, one can ponder over the following issues:

1. Time limit for filing of appeal before the CIT(A) is 30 days, before the ITAT is 60 days and before the High Court is 120 days. When the time limit for filing an appeal has not expired as on 31st January, 2020, and therefore appeal has not been filed; whether such cases should be granted benefit under the Bill?

2. When time limit for appeal has expired before 31st January, 2020, but an appellant wants to file an appeal along with genuine reasons for condonation of delay post 31st January, 2020; whether such cases should be granted benefit under the Bill?

   For the above cases, we would like to suggest that the specified date should be the date of passing of such Bill so as to give benefit to those who have filed appeal up to that period. Or appropriate modifications may be made to the effect that orders passed up to 31st January, 2020, should allowed the benefits under the scheme. Necessary clarification may be issued in this behalf.

3. Where an appeal is already filed by the appellant up to 31st January, 2020, however, there is a delay in filing of such appeal and the appellant has filed an application for condonation of delay; in such case, can one say that the appeal is pending before the appellate forum or that the appeal cannot be said to be pending until the delay is condoned. However, the Hon'ble Bombay High Court in case of *Avantika Pratap Sinh Morarji vs. CIT (WP No. 1691 of 2005)* has held that in case of appeal filed belatedly; appeal shall be construed to be pending. In this case, the Court had followed the judgment of the Apex Court in case of *CIT vs. Shatrushilya Digvijaysingh Jadeja (277 ITR 435)*

   In this regard, it is pertinent to understand the wordings of section 249(3) of the

Act, which states that if an appeal is filed after the prescribed time period, then the CIT(A) may admit the appeal after condoning the delay. To similar effect, is section 253(5) and 260A(2A) in relation to appeals before ITAT and High Courts respectively. Thus, from the provisions brought out above, it can be seen, that technically an appeal cannot be said to be admitted or pending till the time delay is condoned. However, one can always argue that an appeal once filed amounts to an appeal which is pending, though one has to first make out a case for condonation of delay. Also, considering the purpose of the scheme, it may be interpreted that such appeals should be allowed to take benefit of the present scheme. Though, it is always desirable to have a clarification in this regard.

4. In a case where a matter is disposed by an appellate authority i.e., ITAT or higher courts by setting aside the same to the AO for conducting the assessment *denovo* and the set aside proceeding is pending before the AO, in such case also it will be difficult to avail the benefit under the Bill. However, where the matter has been set aside by the higher appellate authority to a lower appellate authority, then the appeal can be said to be pending before the lower appellate authority to which it has been set aside and the benefit under the scheme can be availed.

5. What happens to a case where hearing of an appeal is concluded before 31st January, 2020, but the order is yet to be passed (in case of ITAT and CIT(A), the appellate authorities have time of 90 days to pass an order); whether in such cases, the assessees will be eligible to take benefit under the scheme?

   In our view, such cases should fall within the frame of the scheme as the appeal is pending as on the specified date until the order is passed. Appropriate directions should be issued to the Courts to not pass order in such cases. Further, benefit under the scheme may be availed by the assessees who are of the opinion that hearing did not go as desired.

   It may however, be noted that in case, if no declaration is filed under the Bill and the period of 90 days has expired, then the Appellate Authorities viz., CIT(A) or ITAT will have to rehear the matter.

b. Declarant [Section 2(1)(c)]

Declarant has been defined as a person who files declaration under section 4 of the Bill.

Under section 2(1)(a), appellant has been defined as a person as well as an Income tax authority. Thus, Income-tax Department ('Department') is considered different from 'person'. Accordingly, Department cannot file any declaration under this scheme. The result of reading of the entire scheme as a whole, appears to be that even in case of Department appeals, the taxpayers can file a declaration and pay tax amount under the scheme. This aspect is discussed in detail in the ensuing paras.

c. Disputed fee [Section 2(1)(f)]

Disputed fee has been defined as fees which has been determined as per the Act for which appeal has been filed by the appellant.

Such appeal as per the present wordings of the Bill would mean an appeal filed up to 31st January, 2020 and pending before an appellate forum.

d. Disputed tax [Section 2(1)(j)]

The term 'disputed tax' has been split up into two parts. One which deals with the additions under normal computation of income and the other which deals with TDS and TCS assessments. Further, such term 'disputed tax' is *qua* an assessment year.

In so far as the normal computation is concerned, the disputed tax means tax determined under the Act in accordance with the following formula:

(A – B) + (C – D) where:

A = an amount of tax on the total income assessed as per the normal provisions of the Act other than the MAT/ AMT provisions;

B = an amount of tax that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of income in respect of which appeal has been filed by the appellant;

C = an amount of tax on the total income assessed as per the provisions contained in section 115JB or section 115JC of the Act;

D = an amount of tax that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC of the Act been reduced by the amount of income in respect of which appeal has been filed by the appellant.

The term 'amount of tax' has not been defined, however, it appears that such tax has to be computed as per the relevant rates applicable for the relevant assessment years while computing normal income as well as MAT.

It appears that the Legislature has fallen in love with the above formula. At all places possible, the Legislature has inserted the above formula so as discard any issues arising as a result of dual computations. However, not everywhere, the above formula fits.

The portion (C-D) shall apply only in a case where the provisions of section 115JB/ 115JC are applicable (second proviso). Further, in case where an item of addition is common for normal computation and for MAT computation, then such item shall be considered only once in part (A-B) and it shall be ignored while computing (C-D) (first proviso).

In case where the amount of income, in respect of which an appeal has been filed by the appellant, has the effect of reducing the loss declared in the return or converting that loss into income, the amount of disputed tax shall be the amount of tax that would have been chargeable on the income in respect of which appeal has been filed by the appellant had such income been the total income (third proviso).

Example of how the disputed tax will be computed:

Particulars	***Normal Computation***	***Book Profits u/s. 115JB***
Return of Income	100	300
Total Additions	50	50
Appeal Filed (Disputed Additions)	40	50
Appeal not filed (Undisputed Additions)	10	0
Assessed Income	150 (=100+50)	350 (=300+50)

Particulars	***Normal Computation***	***Book Profits u/s. 115JB***
Tax Rate	30%	18.5%
	A=30% (150) = 45	C=18.5% (350) = 64.75
	B=30% (150-40)=33	D=18.5% (350-10)=62.90
	(A-B)=12	(C-D)=1.85
Disputed tax	**Aggregate = 13.85**	

Though, in first blush, the above appears to be quite a simple mechanism, however, on detailed scrutiny one will come across number of issues when the above formula is read with the other terms defined in the Act. The same are discussed hereunder:

1. By taking an appeal under the scheme, it amounts to acceptance of the additions made in the assessment order by the assessee as he pays the tax on such disputed items. Thus, any consequential effect of such additions will have to be followed: for example, if an addition in the block of asset is under dispute and depreciation is disallowed by the AO, and if such dispute is being settled under this scheme, then in the subsequent years also, depreciation on such addition will not be allowed. Or where the revenue expenditure is treated by the AO as capital one and depreciation is allowed by and when such assessment is settled under the present Bill, then in subsequent years also, depreciation on such item should be allowed. There is no clarity on this aspect and therefore, necessary clarification may be issued by the Department in this regard.

2. When an appeal is settled by an assessee under the Bill, can it be said that the issues *qua* which the dispute is settled is accepted by such assessee and that even in future years, such view should be continued? For example: where the dispute is regarding treatment of capital gains as business income on sale of shares; if for one year, the assessee settles the dispute, can it be said that such assessee has acceded to such view or can he raise the dispute in later years? In our view, it cannot be said that the issue has been accepted by the assessee and that he should be allowed to raise such issue for other years. In fact, similar issue arose in context of the KVSS Scheme. In such context, the Board had issued clarification *vide* Instruction number Board's F. No. 149/145/98-Tpl Dt. 7th October, 1998, in reply to Q. 21, that the order under the scheme does not decide the judicial issue and one can agitate such issues in future years.

3. When the formula prescribed above is read with the term 'appellant', it appears that even the department appeals can be taken under such Bill by the assessee. By taking the department appeal under the Bill, the assessee will be required to pay tax on the additions which are already deleted by one appellate authority. Further, such appeals of the department will be the ones where the disputed tax amount without interest will be more than ₹ 50 lakh and ₹ 1 crore when the same is pending before the ITAT and High Courts respectively, subject to the exceptions; as other appeals with low tax effect must already have been dismissed by the respective

courts. There doesn't appear any logic in settling such department appeals. Also, if such interpretation is accepted, then the formula will also give absurd results. This is because, in 'A' part of the formula one will have to take assessed income after giving effect to the order of the appellate authority, which will not include the tax demand on account of the disputed issue.

4. Let us stretch the above situation; say there are cross appeals i.e., both assessee's appeal and department's appeal before the ITAT as the order of the CIT(A) was partly in favour of the assessee. In such case, what if the assessee only wants to settle its own appeal and not the department's appeal. The formula uses the term "amount of income in respect of which appeal is filed by the appellant". Further, appellant includes assessee, department as well as both. Thus, on conjoint reading of the definitions, it appears that one has to settle both the appeals and there is no option to settle only the assessee's appeal. If this interpretation is correct, then it will turn out to be a big damper in the success of the scheme. A clarification in this regard will help.

5. Even in case of settlement of assessee's appeal, there doesn't appear any option to settle any particular issue in the appeal. If an appeal is settled then, all the issues in such appeal have to be settled.

6. Difficulties will arise in a case where there is an adjustment in loss. The same is explained with an example: say there is a loss return and such loss is reduced by the AO in the assessment. As a result, there arises no demand in such assessment. In such case, if the assesse has to settle the dispute under the Bill, he will have to treat the disputed loss as income and pay tax on such amount; though there is no tax payable even after the adjustment of loss in the assessment. There may be an argument that such loss when set off in future, there will be some tax consequence. If in a case, where the loss lapses due to efflux of time, there is no tax effect, still the person will have to pay the tax on such loss if settled under the scheme. It doesn't make much sense. Assuming the loss is set off after two years. In such year, during the assessment proceeding, the AO will disallow the set off and if the assessee is in appeal against such order, then there shall be two appeals which shall be pending. If both are settled then the assessee will have to pay double tax, one in the year in which the loss is disallowed and one in the year in which the set off is disallowed. If we assume that the assessee doesn't settle the subsequent years appeal or a case, where for subsequent year no adjustment has been made till date; in such case also there will be double whammy, if the first year, in which loss is disallowed, is settled. Once the first year is settled, it means the consequential effect in the subsequent year has to follow and therefore, in subsequent year also tax will have to be paid along with the interest after disallowing set off of the losses. Thus, in a loss case, there appears to be a double whammy. A clarification in this regard will help.

7. What happens to a case, where the appeal is dismissed on the ground of limitation and before the higher appellate forum, the only ground

taken is in respect of condonation of delay? There is no issue or addition which is under dispute before the higher appellate forum. Here, one may say that all the issues which are disputed before the lower authority, should be considered for the formula; since, if the delay is condoned, all such issues become live and the appellate authority has to adjudicate upon such issues.

8. Whether an appeal against an order u/s. 263 can be settled is something which is not coming out clearly. Further, in such cases, how does one compute the disputed tax and the tax arrears and the sum payable under the scheme, is again something which requires clarification.

9. There shall also arise some difficulty in interpreting the formula when two appeals are pending for the same assessment year: For example:

   a. If an appeal is filed against the order u/s. 263 as well as against the order giving effect to the order u/s. 263.

   b. If an appeal is filed against both the order u/s. 143(1A) or 143(3) and the order u/s. 154 rejecting the rectification request in respect of such order.

   c. If an appeal is filed against the original assessment order u/s. 143(3) and against the reassessment order u/s 147 of the Act.

   This is something where the Department will have to issue some clarifications.

10. There may also arise a peculiar case, where the ITAT has remanded the matter back to the AO for some issues and for some other issues it has remanded the matter back to the CIT(A). What stand can be taken and how to compute disputed tax in such case is something which will require some assistance from the Department in the form of clarification.

    Now, we deal with the second part of the definition of the term disputed tax. As per sub-clause (ii), disputed tax shall also include tax determined u/s. 200A, 201, 206C(6A) or section 206CB of the Act in respect of which appeal has been filed by the appellant. Thus, TDS and TCS assessment cases are also covered by the present scheme, where an appeal has been filed upto 31st January, 2020.

    As issue will arise where an expense has been disallowed u/s. 40(a)(ia) of the Act for non-deduction of TDS as well as a demand is raised u/s. 201 of the Act. Thus, for the same payment, two proceedings are carried on, which in first place is not permissible. In such cases, there shall be two appeals pending before the appellate authority and settlement of both the appeals will entail payment of tax for both the appeals, which again is a double jeopardy.

e. Disputed Interest/Dispute Penalty/ Disputed Appeal

Disputed interest means interest determined in any case under the provisions of the Act where:

i. Such interest is not charged or chargeable on disputed tax;

ii. An appeal has been filed in respect of such interest. [Section 2(1)(h)]

Disputed penalty means penalty determined in any case under the provisions of the Act where:

iii. Such penalty is not levied or leviable with respect to disputed income or disputed tax;

iv. An appeal has been filed in respect of such penalty. [Section 2(1)(i)]

Disputed Income has been defined as so much income which is relatable to disputed tax [Section 2(1)(g)].

From the above definitions, following can be discerned:

1. Disputed interest and disputed penalty is something which is not relatable to disputed tax. Disputed tax is defined in section 2(1)(j) which is already discussed above. Disputed tax is a tax on amount of income in respect of which an appeal has been filed by the appellant. Thus, if in respect of the additions made in the assessment order an appeal has been filed by an assessee, any interest or any penalty in respect thereof, would not qualify as disputed interest or disputed penalty, though an appeal would have been filed to challenge such interest or penalty. Similar will be the situation, in case of interest and penalty for default of TDS and TCS provisions.

2. Suppose, if there is no appeal filed by the appellant in respect of the quantum additions, but only qua the interest on such additions or only qua the penalty on such additions. In such case, it cannot be said that the interest or the penalty are in respect of the disputed tax, as there is no disputed tax.

3. There is no conjunction used i.e. 'and'/ 'or' between the two conditions in the definitions of the term 'disputed interest' and 'disputed penalty'. However, since the second condition is in respect of filing of the appeal and we are dealing with something which is 'disputed', therefore, it appears that both the conditions have to be fulfilled simultaneously.

4. As a result of the above, the word 'chargeable' or 'leviable' in the above definition is creating some confusion, since the second condition as specified above requires an appeal to be filed in respect of such interest or penalty and such appeal can be filed only when interest or penalty is already charged or levied. Thus, such words are inserted to link such penalty to the disputed tax and disputed income.

5. Apart from the above discussion, such disputed penalty may include penalty levied under various provisions of the Act i.e. section 271A, 271B etc.

f. Tax Arrears [Section 2(1)(o)]

Tax Arrear has been defined to include:

- Aggregate of disputed tax, interest chargeable or charged on said disputed tax and penalty leviable or levied on said disputed tax
- Disputed interest
- Disputed penalty
- Disputed fees

The above definition when juxtaposed with the definition of the term 'disputed tax', 'disputed interest', 'disputed penalty' and 'disputed fees', we can draw two category of cases, in so far as tax arrears is concerned, as under:

- First category will include a case, where the quantum is challenged. In such category, apart from the dispute tax, interest and penalty on such disputed tax will also be included. Further, such interest and penalty amount is included whether charged/ levied or chargeable/leviable
- The second category will, cover a case, where quantum is not challenged.

g. 'Last day' means the date which will be notified by Central Government [Section 2(1)(l)]. However, such day has not been notified yet. Though, as per the Budget Speech, last day to avail benefit of this Bill is 30th June, 2020.

h. It has been provided in Section 2(2) of the Bill to refer to the Act for meaning of any term which has not been defined in the Bill.

Amount Payable and no refund [Section 3, 7]

As per provisions of section 3 of the Bill, if declarant files declaration in accordance with provisions of section 4 on or before 'last day' then following amount shall be payable by the declarant:

Sr. No	*Nature of tax arrears*	*Amount payable on or before 31st March, 2020 (Phase 1*)*	*Amount payable on or after 1st April, 2020, but on or before last day (Phase 2*)*
1	Where tax arrear is aggregate of disputed tax, interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax	Amount of disputed tax i.e. 100% of disputed tax without any interest or penalty	Aggregate of disputed tax i.e. 100% of disputed tax without any interest or penalty + Lower of • 10% of disputed tax or • Aggregate of interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax
2	Where tax arrears relates to disputed interest or disputed penalty or disputed fee	25% of disputed interest or disputed penalty or disputed fee	30% of disputed interest or disputed penalty or disputed fee
* for the sake of convenience the different due dates are termed as Phase 1 and Phase 2			

The purpose of beneficial rate up to 31st March, 2020, is obvious i.e., the fiscal deficit for the FY 2019-20 and the deficit in the tax collection as compared to the targets laid down.

Term used in section 3 is 'Amount Payable' and not 'Amount Paid'. So a question will arise as to when a declaration is filed u/s. 4 and such declaration is approved before 31st March, 2020 u/s. 5(1), then declarant will fall under Phase 1 or Phase 2, if the payment is not made up to such date? Further, if the declaration is filed before 31st March, 2020 but the declaration is not approved u/s. 5(1) up to such date; can one say that the case still falls under phase 1?

The above questions assume importance because today the scheme is at the Bill stage. The same will have to be passed by Parliament to become an Act. Once the Act is enacted, the Government will have to frame the Rules and forms. Today we are in third week of February and the first phase ends on 31st March, 2020. This is coupled with the fact that the Designated Authority has 15 days' time to accept the declaration and further time of 15 days is given to the declarant to make payment as determined u/s. 5(1). In all probability, after evaluating the scheme and applying the same in the facts of a particular case, an assessee will be able to make a declaration only by 1st or 2nd week of March. Therefore, there are good chances of a declaration being not approved u/s. 5(1) of the Act before 31-3-2020 or a case where though approved, the payment is not made up to such date. In such case, the beneficial rate of tax of phase 1 may be missed out.

Considering the fact that the Government is in dire need of funds, they will push hard to receive as much tax possible up to 31st March, 2020. Also, it is well known that the Government follows cash system and therefore, they will be more interested in tax collection by the last day of the year rather than acceptance of the declaration by such date. Nevertheless, to take benefit of beneficial rate applicable up to 31-3-2020, an assessee should try to make the declaration by 1st week of March.

Another interesting issue which may arise is what will be fate of those cases where the full payment of tax along with interest is already made earlier. In such cases, once the case is settled under the present Bill, such tax paid earlier should be adjusted against the payment under the scheme and the balance, if any, should be refunded. A clarification in this regard will help.

As per section 7 of the Bill, any amount paid in pursuance of a declaration made u/s. 4 will not be refunded under any circumstances. This is little harsh as we are not dealing a case of undisclosed income or black money law where the defaulters are given one more opportunity. Rather, the purpose is to settle the pending litigations. Further, this is also coupled with the fact that there is no power to rectify any mistake apparent from record under the present Bill.

In case where the amount of tax along with interest is already paid in full, and application is made under the Bill, then only the tax amount can be appropriated here and the interest can be claimed as refund. This section i.e., section 7 will not come as a hindrance in claiming such refund as such interest was not paid under the present scheme.

Procedure for Filing Declaration and time and manner of payment (Sections 4 and 5)

a. Declaration shall be filed by the declarant before the Designated Authority in such form and manner as prescribed [Section 4(1)]. Designated Authority means an officer not below rank of Commissioner of Income Tax as notified by Principal Chief Commissioner [Section 2(1)(e)].

b. Section 4(2) states that upon filing of declaration, any appeal pending before the ITAT and CIT(A) shall be deemed to have been withdrawn from the date on which certificate u/s. 5(1) is issued by the Designated Authority.

c. However, section 4(3) mandates declarant to withdraw appeal or writ petition filed before appellate forums and furnish proof of such withdrawal along with declaration as referred in sub-section (1).

d. Further, section 4(4) also provides that the declarant shall withdraw any proceeding initiated for arbitration, conciliation or mediation or notice issued under any law and furnish proof of such withdrawal along with declaration as referred in sub-section (1).

e. Section 4(5) states that, without prejudice to the provisions of sub-sections (2), (3) and (4), the declarant shall furnish an undertaking in such form and manner as maybe prescribed, waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the tax arrears which may otherwise be available to him under any law for the time being in force, in equity, under statute or under any agreement entered into by India with any country or territory outside India whether for protection of investment or otherwise.

f. However, if any material furnished in the declaration is found to be false at any stage or declarant violates the conditions or declarant acts in any manner which is not in accordance with the undertaking given, then all proceedings & claims which were withdrawn u/s. 4 & all consequences under the Act shall be deemed to have been revived.

g. No appellate forum or arbitrator, conciliator or mediator can proceed to decide on issue relating to tax arrears filed in the declaration in respect of which an order has been made u/s. 5(1).

h. The Designated Authority shall, within a period of 15 days from the date of receipt of the declaration, by order, determine the amount payable by the declarant in accordance with the provisions of this Act and grant a certificate to that effect [section 5(1)]

i. The declarant shall pay the amount determined within 15 days from the date of receipt of the certificate and intimate the details of such payment to the Designated Authority in the prescribed form [Section 5(2)].

j. Once an intimation is received from the assessee about the payment, the Designated Authority shall pass an order stating that the declarant has paid the amount [Section 5(2)].

k. Every order passed u/s. 5(1), determining the amount payable under this Act, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding [Section 5(3)].

The above procedures are most confusing and at the Same time inconsistent. Not less than five sub-sections have been proposed to deal with the appeals in respect of which a declaration has been filed. One deems the appeal to have been withdrawn from certain date, the other two require the assessee to withdraw the appeal/arbitration and file proof thereof along with the application while one requires the assessee to file an undertaking to the effect that he shall not seek or pursue any remedy in respect of the issues which are settled under the scheme. The last one requires the Court to not proceed with the hearing. This demonstrates the confusing state of affairs. Instead of all such hullabaloo, simple provision could have been made to the effect that once an application is filed, the Courts as well as the Parties to dispute are debarred from proceeding with the hearing and once the application is accepted, payment of tax is made and an order is issued u/s 5(2) of the Bill, the appeal shall stands withdrawn and necessary steps in this regard shall be taken by the appellant. However, consistent with its nature, complex provisions are made and several issues arise there from which are discussed hereunder:

1. Section 4(2) states that, where a declaration is filed, on issuance of a certificate u/s. 5(1), the appeal before the CIT(A) and ITAT shall be deemed to have been withdrawn. However, the very next sub-section i.e., sub-section (3) states that the assessee who files a declaration u/s. 4(1), will have to withdraw any appeal or writ filed by such assessee with the leave of the Court wherever required and furnish proof of such withdrawal along with the declaration referred to in sub-section (1).

Thus, an assessee has to withdraw his appeal or writ and only then he can file a declaration under this Bill. Further, if any appeal is filed in respect of the penalty on the disputed tax, then he has to withdraw even such appeal. This condition is quite onerous. There is no need for one to withdraw an appeal or writ before filing of declaration. What if the declaration is rejected; in such case, one will have to take steps for revival of appeal. Further, there is no condition prescribed for the Department to withdraw their appeals. Also, if the appeals have not been given any date in the coming period, the assessees will have to mention the matter before the Courts and get an order withdrawing such appeal, which will consume precious time, if a declarant is willing to wind up his case up to 31st March, 2020. Mere filing of application for withdrawal of appeals etc. and attaching copy of such application with the declaration would suffice or whether the Bill requires attachment of the order of the appellate authorities disposing the appeals as withdrawn is not clear. Further, in so far as the appeals before the CIT(A) and ITAT is concerned, the same are governed by section 4(2) which speaks of deemed withdrawal, then one fails to understand the need to withdraw such appeals u/s. 4(3). That apart u/s. 4(5), the declarant is required to file an undertaking that he shall not seek or pursue any remedy or any claim in relation to the tax arrear which may otherwise be available to him under any law. If there is insistence on such undertaking, then there should not be any insistence of withdrawal of the appeals etc.

2. Also, the appellate forums or arbitrator, conciliator or mediator are barred from proceeding with the appeal where a certificate has been issued u/s. 5(1). If the appeals are to be withdrawn, how can the appellate forums etc., proceed with the appeals? Thus, confusing provisions are proposed. Also, when such directions are issued to the appellate forums, the insistence on withdrawing the appeals by the assessee seems absurd.

3. The point discussed above also applies *mutatis mutandis* to the withdrawal of any proceeding initiated for arbitration, conciliation or mediation or notice issued under any law.

4. It is also important to note that section 4(2) provides that on the date of receipt of the certificate u/s. 5(1), the appeals before the CIT(A) and ITAT shall be deemed to have been withdrawn. Further, assessees appeal before the High Court and the Supreme Court have to be withdrawn before filing of the declaration. However, there is no provision concerning the appeal of the Department before the High Court and the Supreme Court. Also, section 4(7) only states that the appellate forum shall not proceed with the hearing of any case, where a certificate u/s. 5(1) is issued. There is no provision which states that on receipt of certificate u/s. 5(1) the appeals before the High Court and Supreme Court shall be deemed to be withdrawn.

5. One moot question which may arise is whether writ petitions filed before the High Court and SLPs or writs filed before the Supreme Court are covered by the present scheme. If one looks at the definition of the term 'appellant' then one will find that appellant means a person who has filed an appeal before any appellate forum. Further, disputed tax, penalty, interest or fee also refers to appeal and appellant. Thus, there is no mention of writ or SLP at any place except section 4(3) which requires the assessee to withdraw writs filed before the Courts. Thus, this issue needs to be clarified by the Board.

6. Assuming, writs are covered by the present scheme, the next issue which will arise is whether a writ challenging notice u/s. 147 of the Act will also be governed? It seems difficult that such writs will be covered, as such writs are filed before any assessment order is passed. Therefore, there is no question of any disputed tax.

7. Section 5(3) states that the order u/s. 5(1) shall be conclusive, however, no such similar provision is made for the order u/s. 5(2).

8. There is no provision for allowing rectification of any mistake apparent from record in respect of orders u/s. 5(1) or 5(2). Though, one may argue that such power to rectify mistake is inherent and it does not require any statutory recognition.

Immunity from proceeding [Section 6, 8]

Section 6 states that the designated authority shall not institute any proceeding in respect of an offence; or impose or levy any penalty; or charge any interest under the Act in respect of tax arrears.

The section debars only the designated authority from the above actions. It is submitted that such designated authority is an officer of the rank of Commissioner. He is in any case not going to initiate any such proceeding under the Act, except revision u/s. 263 of the Act. Thus, section 6 should actually debar the Assessing Officer from taking any of the actions.

Section 8 states that except for the benefit provided under the Bill, nothing shall be construed as conferring any benefit, concession or immunity on the declarant in any proceedings other than those in relation to which the declaration has been made. Therefore, benefit if any is available only *qua* the year for which the declaration is made and not for other years. For example: if an addition was made u/s. 68 of the Act in respect of any cash credit, and appeal in respect thereof has been settled under this scheme, and if a person for any subsequent year explains any cash deposit to being linked to such cash credit, then such benefit, shall not be allowed.

Interesting issues arise, in so far as penalty on disputed tax is concerned where quantum appeal is brought under the scheme. The same is below:

1. If penalty is not levied and declaration is filed under the Act in respect of the disputed tax, there shall be an immunity from levy of penalty u/s. 6. This also comes out from the wordings of section 2(o) and section 3 wherein the tax arrears include penalty leviable. Thus, on filing of an application, even the penalty gets settled.

2. Where penalty has already been levied, and an appeal has been filed in respect of such penalty, then such penalty amount will become part of the tax arrears as per section 2(o) and section 3. In respect of such tax arrears, the declaration is filed u/s. 4(1) and certificate is issued u/s. 5(1) of the Act. On payment of the tax under the Bill, such appeal if before the CIT(A) and ITAT shall be deemed to be withdrawn. If such appeal is an assessee's appeal then, in any case, he has to withdraw such appeal before filing the declaration, whether before any forum. However, if the appeal is a Department's appeal before the High Court or Supreme Court, then there is no provision for withdrawing such appeal nor any provision which makes such appeal deemed to have been withdrawn. In such case, since the penalty issue is already settled by the declaration, the Department should file necessary application in the Courts to withdraw the appeal. Consider a case, where assessee has challenged the quantum addition before the High

Court and Department has challenged the penalty on such addition before the High Court. In such case, if the assessee goes for settlement of his appeal, then he has to pay his tax arrears without any interest or penalty in which case, the penalty does not survive. In such case, the Department's appeal have to be withdrawn by the Department. To avoid controversies, Board may issue necessary clarification in this behalf.

3. Take a case, where penalty has been levied but no appeal is filed or the time limit to file such appeal has not expired up to 31st January, 2020. In such case also, since the quantum appeal is brought under the Bill, the penalty amount should go. As already discussed above, section 2(o) and section 3 provides that tax arrears shall include penalty levied and therefore, even the penalty levied gets settled under the scheme.

Exceptions to the scheme [Section 9]

Section 9 provides for the cases, in respect of which no benefits can be taken under the scheme. The same are listed hereunder:

In respect of tax arrears,–

(i) if an assessment has been made u/s 153A or 153C of the Act, if it relates to any tax arrears;

(ii) in relation to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration;

(iii) in relation to any undisclosed income from a source located outside India or undisclosed asset located outside India;

(iv) if an assessment or reassessment is made on the basis of information received under an agreement referred to in section 90 or section 90A of the Act, if it relates to any tax arrears;

(v) if an appeal is pending before the CIT(A) in respect of which notice of enhancement u/s. 251 of the Act has been issued on or before 31st January, 2020.

From the above, the following can be discerned:

1. Search assessments made u/s. 153A or 153C of the Act are outside the scope of this Bill. However, the year in which search takes place, is not an assessment u/s. 153A or 153C of the Act. Thus, assessment of the year of search can be settled under the scheme. Further, any undisclosed asset found during the course of search is generally added in such year, and therefore, it becomes beneficial for the assessee to apply under the scheme considering the merits of the case involved.

2. Even the penalty in respect of search cases levied u/s. 271(1)(c) or u/s. 271AAA or 271AAB cannot be brought under the scheme as tax arrears includes penalty levied or leviable on disputed tax.

3. Appeal in respect of block assessment u/s. 158BC of the Act appears to be outside the ambit of the present scheme, though not specifically excluded, as all the terms as well as the formula are from the perspective of an assessment year and not from the perspective of block of years. Necessary clarification can be issued in this regard so that one can settled old block cases.

4. The second exception is the biggest negative of the scheme. In last few years, we have witnessed a rampant increase in the prosecution cases. The assessees will readily agree to settle under this scheme, if prosecution has been launched under the Act. However, such cases are kept outside the purview of this scheme. The logic probably appears to be the compounding charges. Such charges are levied at

exorbitant rates, which revenue cannot be forgone by the Department.

5. The issue under consideration here will be meaning of the term *'prosecution has been instituted'*. Does this term means the date of issuance of show-cause notice by the CIT before the launch of prosecution or date when the sanction is granted by the CIT or date when the complaint is actually lodged before the Court? In our understanding, it should mean a case, where the complaint has been lodged with the appropriate Court. Thus, only those cases cannot be brought under the scheme. It is desirable to have necessary clarification in this regard.

6. It is also worth pondering that this exception clause excludes cases where prosecution is instituted before the date of declaration. Thus, if the declaration is filed say on 29th February, 2020, however, if the prosecution is launched on 5th February, 2020, then the declarant becomes ineligible to file a declaration, though he will not be aware of the same.

7. Exception is also carved out for the cases relating to an undisclosed asset or income from a source located outside India. This exception should apply to the assessments made after the enactment of the Black Money Act, 2015 and the old appeals in respect of such subject matter should be allowed the benefit under the scheme.

8. Last exception is an interesting one. It excludes a case, where there are chances of enhancement by CIT(A). Thus, if the CIT(A) has issued notice for enhancement prior to 31st January, 2020, then the scheme becomes inapplicable. This appears to be absurd. Take a case, where the CIT(A) is satisfied with the explanation offered by the assessee and is ready to drop the enhancement, in such case also, the assessee will not be able to apply under the scheme. Further, take a case, where the CIT(A) has already made an enhancement and against such enhancement, appeal is already filed before the ITAT. In such case, the assessee will be able to take the benefit under the scheme. Thus, completely debarring cases where notice of enhancement is issued will affect the success of the scheme especially in a case where the enhancement notice is issued for an issue involving miniscule tax liability whereas the original addition under contest involves substantial tax amount. Thus, there should be some mechanism involved to include such cases also under the ambit of the scheme.

There are certain other exceptions also from the applicability of the scheme as follows:

a. any person in respect of whom an order of detention has been made under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on or before the filing of declaration subject to certain exceptions.

b. any person in respect of whom prosecution for any offence punishable under the provisions of the Indian Penal Code, the Unlawful Activities (Prevention) Act, 1967, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Prevention of Corruption Act, 1988, the Prevention of Money Laundering Act, 2002, the Prohibition of Benami Property Transactions Act, 1988 or for the purpose of enforcement of any civil liability has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any of those Acts.

c. any person notified u/s. 3 of the Special Court (Trial of Offences Relating to

Transactions in Securities) Act, 1992 on or before the filing of declaration.

Power to issue instructions, directions, remove difficulty and rule making power [Section 10, 11 and 12]

The CBDT has been empowered to issue such directions or orders to the Income-tax authorities, as it may deem fit, so however that no such direction or order shall require any Designated Authority to dispose of a particular case in a particular manner.

The Central Government has been given the power to remove any difficulty arising in giving effect to the provision of the Act by way of an order. Further, the Central Government has also been empowered to make rules for carrying out the provisions of this Act, by way of notification.

Issue specific analysis

From the detailed analysis of the scheme, it appears that the taxpayers will be happy to pay the tax without any interest and penalty, where the taxpayers have very weak case. Thus, it indirectly amounts to an income disclosure scheme, where the assessees have been given a chance to withdraw their appeal and accept the addition by paying the tax amount without any interest or penalty.

In so far as the demonetization cases are concerned, in our view, the scheme will hardly be helpful. Apart from the fact, that in some cases, appeal would not have been filed by 31st January, 2020, even otherwise, the basic tax rate itself is 60% + surcharge and cess. Further, interest would hardly be for 2-3 years and penalty is levied on such cases at 5% u/s. 271AAC of the Act. Thus, the tax liability itself will be on the higher side so as to dissuade the taxpayers from entering the scheme.

The scheme may prove beneficial to old cases and reopened cases, where the interest amount constitutes substantial part of the demand and where the assessee would like to close the litigation process by making some onetime payment.

In so far as the penny stock cases are concerned, due to the slow or nil movement in the appeal process, the taxpayers may think of moving towards the scheme.

Otherwise, in many cases, we have seen that the demand arises as a result of some bogus and baseless additions made by the AOs. In such cases, the taxpayers will not like to shift towards the scheme. Further, the scheme seems unviable in cases where the losses have been disallowed involving no tax liability as already discussed earlier.

Conclusion

After going through the various amendments brought out in the past few years, we are of the view that the quality of draftsmanship has nosedived. It appears, as if the bill is drafted first and analyzed later on. A simple example to explain this is section 115BAB. One can compare the wordings of section 115BAB as brought out in the Taxation Law (Amendment) Ordinance, 2019, and the one which was enacted in Taxation Law (Amendment) Act, 2019, and then analyze the number of changes that were brought in to make the section viable.

Similar experience is faced in the present scheme, as can be seen from the discussion earlier. Time will say as to how many clarifications are issued by the Government in this regard and how far the scheme would be successful to get the taxpayers pay the tax dues up to 31st March, 2020.

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Union Budget 2020 – Amendments in GST and other Recent Development in GST Law

CA Rajkamal Shah

The Finance Bill 2020 has proposed certain amendments to the Central Goods and Services Tax Act, 2017 and Integrated Goods and Services Tax Act, 2017. The significant changes are discussed hereunder:

1. Union territory to include Ladakh & Dadra and Nagar Haveli and Daman and Diu

- Ladakh is now included as a separate Union Territory under CGST Act, 2017.
- Dadra and Nagar Haveli and Daman and Diu are now single Union Territories.

The effective date, transitional provisions, and rules are to be notified

2. Composition Scheme to restrict the supply of certain service

Presently supplier in goods who opts for composition scheme can provide services (whether within or outside the state) not exceeding 10% of turnover in State or INR 5 lakh, whichever is higher.

In the composition scheme, the supplier of goods was not entitled to undertake the following supplies in relation to supplies of the goods. Now, similar conditions are prescribed that the supplier of goods will not undertake the following supplies of services:

- Services not leviable to GST
- Inter-State supply of services
- Supply of services through electronic commerce operator

3. Relaxation of time limit for ITC claimed in respect of debit notes

- Presently, the time limit for taking ITC on debit notes is linked to the invoice relating to such a debit note. Now the last date of taking ITC of debit notes will be earlier of the following:

  a. Due date of furnishing the return for the month of September of the subsequent financial year to which debit note pertains, or

  b. Date of filing the relevant annual return.

4. Voluntary registration allowed to be cancelled

- A Person registered voluntarily is not allowed to apply for cancellation of registration, now such person will also be eligible for cancellation of registration if he is no longer liable to be registered otherwise u/s. 22 or 24 of the CGST Act.

5. **Extension of the application period for 'revocation of cancellation of registration'**

   - Presently the person can apply for revocation of cancellation of registration within thirty days from the date of service of cancellation order.

   - However, there was no provision for condonation of delay applying for such revocation. Now, the time period can be extended for revocation of cancellation of registration as follows:

     a. Up to 30 days by Additional Commissioner or Joint Commissioner.

     b. Further 30 days by Commissioner after considering (a).

6. **Tax invoice**

   Presently, the tax invoice for the supply of services is to be issued within the specified time limit. Now, the Government has been empowered to specify certain categories of services or supplies in respect of which a tax invoice is to be issued within the prescribed time and manner.

7. **TDS Certificate**

   The person deducting tax at source is required to issue TDS Certificate in prescribed form and manner and a penalty is prescribed for the failure of issue of such a certificate. It is now proposed to omit existing penal provisions for failure to furnish TDS Certificate.

8. **Penalty on the beneficiary (counter-party) and the person at whose instance such transactions are conducted**

   Presently GST legislation provides for levy of penalty on 'taxable person' for the following offenses:

   - Making supply without invoice or on false invoice

   - Issuing invoice without supply

   - Taking or utilizing ITC without actual receipt of supply

   - Taking or distributing ITC in contravention of ISD provisions

   It is now proposed to levy a penalty for above offences also on:

   - Beneficiary (i.e., counter-party) of above-referred transactions, and

   - A person at whose instance such transactions are conducted

9. **Non-bailable offences to cover fraudulent availment of ITC**

   Presently, S. 132 provides for imprisonment and fine on a person committing the following offenses. Now, the person who causes to commit such offense or retains benefit thereof is also liable,

   a. supplies any goods or services or both without the issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

   b. issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

c. avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill

d. collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

e. evades tax, or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

10. Transitional provisions retrospectively prescribe the time limit

No time limit is hitherto prescribed under the CGST Act to take transitional credit under the CGST Act. However, the rules specified the time limit without any enabling power under the statute. The courts have taken the view that the time limit specified under the rules is extra-jurisdictional. To overcome the challenge, provision has been made to prescribe the time limit within the various sub-clauses of sub-section 140.

This amendment is effective from 1st July 2017.

11. The time period for issuance of Removal of Difficulties order

The time period for issuance of Removal of Difficulties order was prescribed up to three years, the same has now been extended up to five years.

(Similar amendments have also been made under the IGST Act)

12. Retrospective exemption

- The supply of fishmeal (falling under heading 2301) is exempted retrospectively for the period 1st July 2017 to 30th September 2019.
- No refund shall be granted of tax already paid.

(Similar amendments have also been made under the IGST Act)

13. Retrospective rate change

- Supply of pulley, wheels and other parts (falling under heading 8483) and used as parts of agricultural machinery (falling under heading 8432, 8433 and 8436) will be taxed at the rate of 12% for the period 1st July 2017 to 31st December 2018.
- No refund shall be granted of tax already paid at a higher rate.

(Similar amendments have also been made under the IGST Act)

14. Denial of refund of unutilized ITC with retrospective effect

- A retrospective amendment from 1st July 2017 made to deny a refund of unutilised ITC of Compensation Cess arising out of inverted rate structure in respect of tobacco and manufactured tobacco substitutes.

15. Other Propositions

- Simplified return system (currently in a pilot run) is proposed to be introduced from 1st April 2020 with following features:
- SMS-based filing of NIL returns;
- Pre-filled returns;
- Improved input tax credit flow;

- Aadhaar based verification of taxpayers for weeding out the dummy and non-existent units;
- Implementation of e-invoicing system in a phased manner, starting optionally from February 2020 (refer Para 16 below);
- Dynamic QR-code for consumer invoices and capturing of GST parameters while making payment through the QR-code (refer Para 17 below);
- Cash rewards to incentivise customers to seek invoice;
- Usage of deep data analytics and AI tools for cracking down on GST input tax credit, refund and other frauds.

16. E-Invoicing

Notification No.	*Particulars*
68/2019-Central Tax, dt. 13-12-2019	Rule 48 of the CGST Act deals with the manner of issuing of Invoice. The said rule is amended to provide that certain notified class of registered persons shall be required to issue GST invoice containing particulars in Form INV-01 after obtaining an Invoice Reference Number by uploading information contained therein on the Common Goods and Services Tax Electronic portal. The scheme of INV-01 is provided in Notification No. 2/2020-CT dtd. 1-01-2020.
69/2019-Central Tax, dt. 13-12-2019	Following websites are notified as common portal for the purpose of e-Invoicing (i) www.einvoice1.gst.gov.in; (ii) www.einvoice2.gst.gov.in; (iii) www.einvoice3.gst.gov.in; (iv) www.einvoice4.gst.gov.in; (v) www.einvoice5.gst.gov.in; (vi) www.einvoice6.gst.gov.in; (vii) www.einvoice7.gst.gov.in; (viii) www.einvoice8.gst.gov.in; (ix) www.einvoice9.gst.gov.in;

Notification No.	*Particulars*
	(x) www.einvoice10.gst.gov.in
70/2019-Central Tax, dt. 13-12-2019	The Central Government has notified the following categories of registered persons who are mandatory required to issue e-invoice – Registered person, whose aggregate turnover in a financial year exceeds one hundred crore rupees. This provision is to become effective from 1-4-2020.
71/2019-Central Tax, dt. 13-12-2019	Rule 46 of the Central Goods and Services Tax Rules was amended by Notification No. 31/2019-CT dtd. 28-6-2019 requiring the tax invoice to have Quick Response (QR) code. This provision shall become application from 1-4-2020.
72/2019-Central Tax, dt. 13-12-2019	In following cases QR code would be mandatory – Supplier is a registered person, whose aggregate turnover in a financial year exceeds Five Hundred Crore rupee; AND – Supply is made to an unregistered person (B2C Invoice)
	[It's also permissible to make available to the recipient Dynamic Quick Response (QR) code through a digital display provided the B2C invoice issued by the supplier contains a cross-reference of the payment using such a Dynamic Quick Response (QR) code]

17. Other Important Amendments in recent times

a. Amendment restricting availment of Input Tax Credit (Notification No. 75/2019-CT) dtd. 26-12-2019

Rule 36(4) of the CGST Rules, provided that the Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20% of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37. The said percentage of 20% has not been further reduced to 10%.

b. Rule 86A is inserted empowering the officer not below the rank of an Assistant Commissioner and authorized by the Commissioner to not allow debit of certain amounts equivalent to ITC in electronic credit ledger, in certain circumstances, for the discharge of any liability under section 49 or for a claim of any refund of any unutilized amount. The circumstances are given below:

i. the credit of input tax has been availed on the strength of tax invoices or debit notes or any other prescribed document etc. issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained or without receipt of goods or services or both.

ii. the credit of input tax has been availed on the strength of tax invoices or debit notes or any other prescribed document etc. in respect of any supply, the tax charged in respect of which has not been paid to the Government.

iii. the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained.

iv. the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36.

The power can be exercised only if the officer has reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible due to aforesaid circumstances and he has to record his reasons in writing.

Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction.

c. w.e.f. 11-1-2020, Rule 138E, no person (whether as consignor, consignee or a transporter) shall be allowed to furnish the information in PART A of FORM GST EWB-01 in respect of any person who has not furnished the statement of outward supplies for any two months or quarters, as the case may be.

d. Change in the due dates for the purposes of filing of return in FORM GSTR-3B for the months of January, 2020, February, 2020 and March, 2020 in a staggered manner. (Notification No. 07/2020-Central Tax, dt. 3-2-2020)

	Particulars	***Jan. 2020***	***Feb. 2020***	***Mar. 2020***
1)	Taxpayers having an aggregate turnover of up to rupees Five crore in the previous financial year whose principal place of business is in the States of - Chhattisgarh - Madhya Pradesh - Gujarat - Maharashtra - Karnataka - Goa	22-2-2020	22-3-2020	22-4-2020

Particulars		Jan. 2020	Feb. 2020	Mar. 2020
	- Kerala - Tamil Nadu - Telangana - Andhra Pradesh - The Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep			
2)	For taxpayers having an aggregate turnover of up to rupees Five crore in the previous financial year, whose principal place of business is in the States of - Himachal Pradesh - Punjab - Uttarakhand - Haryana - Rajasthan - Uttar Pradesh - Bihar - Sikkim - Arunachal Pradesh - Nagaland - Manipur - Mizoram - Tripura - Meghalaya	24-2-2020	24-3-2020	24-4-2020

Particulars		Jan. 2020	Feb. 2020	Mar. 2020
	- Assam - West Bengal - Jharkhand or - Odisha or - The Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi			
3)	Other Registered Persons	20-2-2020	20-3-2020	20-4-2020

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Satisfaction lies in the effort, not in the attainment, full effort is full victory.

– Mahatma Gandhi

The more we come out and do good to others, the more our hearts will be purified, and God will be in them.

– Swami Vivekananda

Be more dedicated to making solid achievements than in running after swift but synthetic happiness.

– A. P. J. Abdul Kalam

Citizenship consists in the service of the country.

– Jawaharlal Nehru

DIRECT TAXES

Supreme Court

Keshav B. Bhujle,
Advocate

1 ***Universal Cables Ltd. vs. CIT***
[2020] 420 ITR 111 (SC)
dated 12/12/2019

Refund – Interest on refund – S. 244A of ITA 1961 – Refund of tax deducted at source erroneously – Deductor entitled to interest on refund

The appellant deducted tax on interest payments made to the IDBI and deposited the same into the Government Treasury. The IDBI objected to the deduction of Income-tax. The appellant sought refund of the sum erroneously deducted and credited to the account of the Central Government. The Commissioner directed the Income-tax Officer (TDS) to refund an amount of ₹ 7,06,022 to the assessee. After grant of refund the appellant requested the Department to grant interest on the refund u/s. 244A of the Income-tax Act, 1961. The Income-tax Officer (TDS) refused to pay interest.

On appeal, the Commissioner (Appeals) directed the Income-tax Officer (TDS) to grant interest u/s. 244A of the Act on the sum refunded for the period from the date of payment to the Government treasury to the date of issue of the refund voucher. The Tribunal held that interest was not payable. The High Court dismissed the assessee's appeal.

The Supreme Court allowed the appellant's appeal and held that there was no reason to deny interest to the deductor who had deducted tax at source and deposited it with the Treasury.

The Supreme Court directed the Department to pay interest as prescribed u/s. 244A of the Act as applicable at the relevant time at the earliest.

2 ***Dalmia Power Ltd., And anther vs. ACIT***
[2020] 420 ITR 339 (SC)
dated 18/12/2019

Return – Revised return – Delay in filing – Amalgamation of companies – Scheme of amalgamation containing provisions enabling assessee (transferee company) to file revised return after prescribed time limit without incurring liability to interest or penalty – Notices of scheme sent to department and department not raising any objection within 30 days – Scheme sanctioned by NCLT – Effect – Scheme attains statutory force not only *inter se* transferor and transferee companies, but also *in rem* – Assessee filing revised loss return after lapse of time limit – Delay on account of time taken to obtain sanction of NCLT – Not a case where condonation of delay to be sought from

CBDT – Succession of transferor company by assessee – Department to receive revised return and assess income of assessee taking into account scheme of amalgamation as sanctioned by NCLT – Companies Act, 2013, s. 230(5) – ITA, 1961, ss. 119(2)(b), 139(5), 170(1) – Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, r. 8(1) – CBDT Circular No. 9 of 2015 dated 9-6-2015: (A.Y. 2016-17)

The assessee-companies filed their original returns of income for A.Y. 2016-17 u/s. 139(1) of the Income-tax Act, 1961 on September 30, 2016 and November 30, 2016, respectively, declaring loss and nil income, respectively. They entered into inter-connected schemes of arrangement and amalgamation with nine (transferor) companies and their respective shareholders and creditors. The appointed date of the schemes was January 1, 2015. The schemes were duly approved and sanctioned by the National Company Law Tribunal (NCLT) at Guwahati by two orders, the latter of which was dated August 30, 2017 and by the National Company Law Tribunal at Chennai by seven orders, the last of which was dated May 1, 2018. The assessees, the transferee companies, thereafter manually filed revised returns of income for the A.Y. 2016-17 u/s. 139(5) on November 27, 2018 claiming losses to be carried forward, based on the revised and modified computation of total income and tax liability of the transferor companies. On December 5, 2018, the Department held that the assessee had belatedly filed their revised returns without obtaining permission from the CBDT for condonation of delay u/s. 119(2)(b) of the Act, 1961 read with Circular No. 9 of 2015 dated June 9, 2015.

The assessees filed writ petitions for a direction to the Department to complete the assessment for the A.Ys. 2015-16 and 2016-17 taking into account the revised returns filed on November 27, 2018, and the orders passed by the National Company Law Tribunal approving the schemes of arrangement and amalgamation. The single judge of the High Court [see 418 ITR 221 (Mad.)] directed the Department to receive the revised returns filed pursuant to the approval of the schemes of arrangement and amalgamation by the National Company Law Tribunal, Chennai and complete the assessments for the A.Ys. 2015-16 and 2016-17 in accordance with law. The Department filed appeals whereupon a Division Bench of the High Court reversed the judgment of the single judge, directed the assessees to comply with the procedure for filing belated revised returns of income, and held that clause 64 of the scheme could not be read to infer that the Department had agreed to consider the revised returns of income, irrespective of whether they complied with the procedural and statutory requirements under the Act.

The Supreme Court allowed the appeals filed by the petitioners and held as under:

"i) Clauses 63(c) and 64(c) respectively of the schemes of arrangement and amalgamation between the assessees and the nine companies incorporated provisions to enable the assessees to file revised returns even after the prescribed time limit for filing or revising such returns had lapsed, without incurring any liability on account of interest, penalty or any other sum. In compliance with section 230(5) of the Companies Act, 2013, notices in form CAA.3 under Rule 8(1) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 had been sent to the Department. The Department had not raised any objection within the stipulated period of 30 days despite service of notice. Pursuant thereto, the schemes were sanctioned by the National Company Law Tribunal and attained statutory force not only *inter se* the transferor and transferee companies, but also *in rem*, since there was no objection raised either by the statutory authorities, the Department, or other regulators or authorities, likely to be affected by the schemes. As a consequence, the amalgamating companies lost their separate identity and character, and ceased to exist upon the approval of the schemes of amalgamation and their assets, profits and losses were transferred to the books of the assessees. The schemes, which incorporated provisions for filing revised returns beyond the prescribed time limit, would come into force retrospectively from the appointed date, i. e., January 1, 2015. Accordingly, the assessees filed their revised returns on November 27, 2018. The recomputation would have a bearing on the total income of the assessees with respect to the A.Y. 2016-17, particularly in relation to matters such as carrying forward losses and unabsorbed depreciation.

ii) Section 139(5) of the Income-tax Act, as it stood at the relevant time, which permits the assessee to file a revised return where he discovers an omission or mistake in the original return, would not apply since the revised returns were not filed by the assessee on account of an omission or wrong statement or omission contained in the original return. The delay had occurred on account of the time taken to obtain sanction of the schemes of arrangement and amalgamation from the National Company Law Tribunal. It was an impossibility for the assessee-companies to have filed the revised returns of income for the A.Y. 2016-17 before the due date of March 31, 2018, since the National Company Law Tribunal had passed the last orders granting approval and sanction of the schemes only on April 22, 2018 and May 1, 2018.

iii) Section 119(2)(b) is applicable in cases of genuine hardship to admit an application, claim any exemption, deduction, refund or any other relief under the Act after the expiry of the stipulated period under the Act. This provision would not be applicable where the assessee had restructured its business, and filed a revised return of income with the prior approval and sanction of the National Company Law Tribunal, without any objection from the Department.

iv) Section 170(1) of the Act provides that the successor of an assessee shall be assessed in respect of the income of the previous year after the date of succession. The predecessor companies (transferor companies) had been succeeded by the assessees, the transferee companies, which had taken over their business along with all assets, liabilities, profits and losses. In view of the provisions of section 170(1) of the Act, the Department was required to receive the revised returns of income for the A.Y. 2016-17 filed by the assessees, and to assess the income of the assessees taking into account the schemes of arrangement and amalgamation as sanctioned by the National Company Law Tribunal."

3 *Special Leave Petitions*

3.1 Appeal to Appellate Tribunal – Power of Tribunal to grant stay

Supreme Court granted special leave to the Department to appeal against the judgment of the Punjab and Haryana High Court whereby the High Court following 387 ITR 441 dismissed the Department's appeal on the questions whether the Tribunal had acted in contravention of the second proviso to section 254(2A) of the Income-tax Act, 1961, as the combined period of stay has exceeded 365 days and whether the stay of demand would stand vacated after expiry of a period of 365 days, even if the delay in disposal of appeal is not attributable to the assessee.

Principal CIT vs. Jindal Steel and Power Limited; (2020) 420 ITR 01 (st), dated 29-11-2019

3.2 Capital gains – Exemption u/s. 54B of ITA, 1961 – Condition that new agricultural land acquired from capital gains should be held for three years

Supreme Court granted special leave to the assessee to appeal against judgment of the Gujarat High Court (reported in 419 ITR 276) whereby the High Court held that u/s. 54B of the Income-tax Act, 1961, after acquiring the new agricultural land (rural or urban), if the new agricultural land was transferred within a period of three years from the date of the purchase, the tax exemption allowed earlier (i.e., with respect to the first transaction of sale of urban agricultural land) would be withdrawn and the assessee would be required to pay tax on the exemption claimed earlier.

Hitesh Mansukhlal Bagdai vs. Asst. CIT; (2020) 420 ITR 03 (st), dated 8-11-2019

3.3 Cash credits – Allotment of shares

Supreme Court dismissed the Department's special leave petition against the judgment of the Madras High Court (reported in 407 ITR 145) whereby the High Court held that when there was no cash involved in the transaction of allotment of shares, section 68 was not attracted and since the identity of the shareholders and the liability of the assessee to the shareholders had been established the allotment of shares could not be treated as unexplained cash credit.

ITO vs. V. R. Global Energy Pvt. Ltd.; (2020) 420 ITR 03 (st), dated 5-11-2019

3.4 Reassessment – Approval of officer other than designated officer

Supreme Court dismissed the Department's special leave petition against judgment of the Bombay High Court (reported in 406 ITR 545) whereby the High Court held that the Assessing Officer had not sought the approval of the designated Officer, the Additional Commissioner, but of the Commissioner and that the order of the Tribunal quashing the order u/s. 143(3) r.w.s. 147 was correct.

CIT vs. Aquatic Remedies Pvt. Ltd.; (2020) 420 ITR 08 (st), dated 29-11-2019

3.5 Reassessment – Jurisdiction to reopen where final order passed by Settlement Commission

Supreme Court dismissed the Department's special leave petition against the judgment of the Gujarat High Court (reported in 417 ITR 11) whereby the High Court held that once an order had been passed u/s. 245D of the Income-tax Act, 1961 by the Settlement Commission, the assessment for the year stood concluded and the Assessing Officer thereafter had no jurisdiction to reopen the assessment.

Dy. CIT vs. Komalkant Faikirchand Sharma; (2020) 420 ITR 08 (st), dated 6-12-2019

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DIRECT TAXES

High Court

Paras S. Savla, Jitendra Singh, Nishit Gandhi, *Advocates*

1 ***Pr. CIT vs. Pinaki D. Panani***

Income tax appeal No. 1543 of 2017, Hon'ble Bombay High Court, Order dated 9th January, 2020

Bogus Purchases – net profit of 5.76% applied

The assessee carried on business as a Civil Contractor. He filed a return of income for the AY 2009-10 on 29 September 2009 declaring a total income of ₹ 48,65,060/-. The assessment was completed under Section 143(3) of the Income-tax Act on 7th December, 2011. Thereafter the assessment was reopened under Section 147 of the Income-tax Act. Information was received from the Sales Tax Department that Assessee had taken bogus purchase entries of ₹ 1,69,48,368/- from the different parties. The reassessment order was accordingly passed on 17 February 2014 determining the total income of ₹ 2,18,13,430/-. The CIT(A) partly allowed the appeal. He observed that Assessee had approached the Settlement Commission for the subsequent years and the case was settled accepting the additional income offered by the Assessee based on the net profit @ 5.76% on the total contracted amount. Hence sustained addition of ₹ 50,44,947/- and deleted ₹ 1,19,03,421/- out of addition of ₹ 1,69,48,368/-. Aggrieved by this order the Revenue filed an appeal to the Income Tax Appellate Tribunal, which was dismissed.

On further appeal before the High Court, it was submitted by the Department that information was received from the Sales Tax Department that certain parties from whom the Assessee had purchased material were Hawala dealers and when Assessee was confronted with the same he could not produce the confirmation from the said parties. He submitted that merely because the payment was made by crossed cheque, it was not enough to establish that the purchases were genuine. It was also submitted that out of various purchases made by the Assessee, Revenue had questioned only purchases to the tune of ₹ 1,69,48,368/- and that business could have been carried out by the other purchases which we have not been questioned. The counsel for the Assessee submitted that even if the purchases were made from the parties in question are to be treated as bogus, it does not necessarily mean that the entire amount should be disallowed and that no benefit should be given to the Assessee. It was submitted that bifurcation of purchases of ₹ 1,69,48,368/- and the contention that genuine material purchased in question is not the case urged before the authorities. The High Court observed that Assessee was doing work on a contract basis with the Municipal Corporation of Greater Mumbai. He had submitted the bills to the Corporation which were verified by the Engineers of the Corporation. It is upon the acceptance of the quality and quantity of the work that the payment was released. It was also noted by the Commissioner (Appeals) that the Assessing Officer did not doubt the completion of the contract work and that the consumption of the material by the Assessee which was duly verified by the Engineers of the Municipal Corporation. The Commissioner (Appeals) and the Tribunal opined that without actually consuming the raw materials, the work done by the Assessee could not have been possible. The Court held that assuming that the purchasers from whom the purchases were made were bogus, in view of the finding of fact that the material was consumed, the question would be of extending the percentage of net profit on total turnover. This would be a matter of calculations by the concerned authority. In this context, if the Commissioner of Income Tax (Appeals) and the Tribunal chose to follow the percentage arrived by the Settlement Commission in the Assessee's own case for the other years, this exercise cannot be considered as irregular or illegal. The Court held that no substantial question of law arose in this appeal and thus dismissed the appeal.

2 ***Bandish Saurabh Soparkar vs. UOI***

Civil Application No. 1 of 2019 in Special Civil Application No. 17329 of 2017, Hon'ble Gujarat High Court, Order dated 27th December 2019

Linking of Aadhaar with PAN not necessary

The applicant sought declaration that he would not be in default in any proceedings only for the reason that the permanent account number is not linked with Aadhaar or Aadhaar number is not quoted; and that pending the petition, the petitioner may not be subjected to the proviso to sub-section (2) of section 139AA of the Income Tax Act, 1961. The relief claimed in the main petition was to direct the Department to accept the return of income of the applicant for the Assessment Year 2017-18 furnished electronically under section 139(1) of the Income Tax Act, 1961; and to declare that section 139AA of the Act violates Article 21 of the Constitution of India. Pursuant to interim order passed by the court, the applicant had already filed the return of income for Assessment Year 2017-18; however, during the pendency of the petition, the validity of section 139AA of the Act has been upheld by the Supreme Court in ***Justice K. S. Puttuswamy (Retd) (2019) 1 SCC 1.*** In view of the Supreme Court order, the challenge to the constitutional validity of section 139AA of the Act thus failed. On the question as to whether the Aadhaar Act was rightly introduced as a "Money Bill", the Supreme Court *vide* its judgment and order dated 13th November 2019 made in the case of ***Rojer Mathew vs. South Indian Bank Ltd.*** rendered in Civil Appeal No. 8588 of 2019, has referred the issue for consideration by a larger Bench. The validity of the Aadhaar Act, therefore, had not attained finality. The Court observed that in the event, the larger Bench holds that the Aadhaar Act could not have been introduced as a Money Bill, section 139AA of the Act would be rendered redundant. Therefore, if the applicant is directed to abide by the provisions of section 139AA of the Act, in the event the challenge to the Aadhaar Act being introduced as a Money Bill were to succeed, it would not be possible to turn the clock back as the applicant would be required to provide all the necessary information for obtaining an Aadhaar card and the claim of privacy of the applicant would be lost for all times to come. Under these circumstances, and with a view to balance the equities, the Court was of the opinion, that the applicant needed to be protected by directing that his PAN shall not be declared inoperative and the applicant may not be subjected to the proviso to sub-section (2) of section 139AA of the Act till the judgment of the Supreme Court in ***Rojer Mathew vs. South Indian Bank Ltd.*** is delivered and available. The Court observed that grant of such interim relief in favour of the applicant can in no manner have wide repercussions as is sought to have contended on behalf of the revenue. In the light of the above, the Court ordered that PAN of the applicant shall not be declared inoperative and the applicant would not be in default in any proceedings only for the reason that the permanent account number is not linked with Aadhaar or Aadhaar number is not quoted and the applicant shall not be subjected to the proviso to sub-section (2) of section 139AA of the Act till the judgment of the Supreme Court in the ***Rojer Mathew vs. South Indian Bank Ltd. and others in Civil Application No. 8588 of 2019*** was delivered and available.

3 ***Kuthannur Service Co-operative Bank Limited & Ors. vs. The Income Tax Officer & Ors***

I.T. Appeal Nos. 197 of 2019, 198 of 2019, 199 of 2019 & 202 of 2019, Hon'ble Kerala High Court, Order dated 8th January 2020

Deduction u/s. 80P – Tribunal failed to consider the Circular – Circulars or instructions do bind the department and its officers. But they do not bind the Court in interpretation of statutory provisions

The assessee were Co-operative Societies registered under the Kerala Co-operative Societies Act, 1969. The issue raised in the appeals related to the claim for deduction under Section 80P(2) of the Income-tax Act, 1961. The claim for deduction u/s. 80P (2) was denied by the Assessing Officer by treating them as co-operative Banks and not as Primary Agricultural Credit Societies. Aggrieved by the assessment orders, the Societies filed appeals before the CIT(A). The CIT(A), allowed the appeals and directed the Assessing Officer to grant deduction under Section 80P (2) of the Act, on the ground that the assessees are classified as Primary Agricultural Credit Societies by the Registrar of Co-operative Societies. The revenue challenged these orders passed by CIT(A) in second appeals before the Income Tax Appellate Tribunal. The Societies filed cross-objections supporting the CIT(A) orders, making reference to a circular issued by the department. The Tribunal relied upon the decision of Jurisdictional Court in *Chirakkal Service Co-operative Bank Limited* and dismissed the appeals filed by the revenue. The cross-objections filed by the Societies were also dismissed on the ground that they only supported the view taken by CIT(A). Though the decision of the Tribunal was in favour of the Societies, the Societies filed further appeals against ITAT orders, raising the grievance that the Tribunal has not considered the effect of the circular issued by the department in the matter. The Court after referring to section 80P further observed that the decision of Chirakkal (supra) stood overruled by the decision of a Full Bench of this Court in ***Mavilayi Service Co-operative Bank Limited vs. Commissioner of Income Tax: 2019 (2) KHC 287: 2019 (2) KLT 597.*** Thus, the orders passed by the Tribunal, confirming the decision of the first appellate authority merely on the basis of *Chirakkal (supra)*, were erroneous, in the light of the law laid down by the Full Bench of this Court in *Mavilayi Service Cooperative Bank (supra)*. However, the revenue had not filed any appeal or cross objection challenging the orders passed by the Tribunal and hence the Court was not inclined to interfere with the decision of the Tribunal in the appeals filed at the instance of the Societies. The Court further moved to the grievance of the Societies that though the orders passed by the Tribunal were in their favor, the Tribunal had not considered the effect of Circular No. 133/6 of 2007 dated 9-5-2007 issued by the Central Board of Direct Taxes. In this circular, it was clarified that for the purpose of Section 80P(4) of the Act, a co-operative bank shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949. The Court observed that the contention of the Societies was that in view of the aforesaid circular, in order to ascertain whether a cooperative society is conducting the business of banking, what shall be considered is whether it is a co-operative bank within the meaning of Part V of the Banking

Regulation Act, 1949 and that the criteria shall not be as stated by the Full Bench of this Court in *Mavilayi (supra)*. The Court observed that such a contention was misconceived. The Court held that clarificatory circulars are issued by Government departments for the guidance of the officers. Such circulars or instructions do bind the department and its officers. But they do not bind the Court in the interpretation of statutory provisions. Circulars issued by a Government department cannot have any primacy over the decision of the jurisdictional High Court. Circulars and instructions thus issued will not survive, if they are contrary to the decision of a Constitutional Court. The Court held that if a circular provides an interpretation of the law that runs contrary to the interpretation given by the jurisdictional High Court, it no longer survives. Circulars or instructions given by the department are no doubt binding on the authorities under the Act, but when the Supreme Court or the High Court has declared the law on the question arising for consideration, it will not be open to a party to contend that the circular should be given effect to and not the view expressed in the decision of the Supreme Court or the High Court. Any direction issued by the Government in a circular would be a mere expression of its opinion. But, once a provision has been interpreted by the superior court, then it will not be open to the assessee to project an interpretation on the concerned provision in tune with the circular, but against the law laid down by the Court. The Court observed that when the Tribunal passed the orders, the decision in ***Mavilayi (supra)*** was not in existence. But, the decision in ***Chirakkal (supra)***, was then in force. In view of the decision in ***Chirakkal (supra)***, it was not necessary for the Tribunal to consider the effect of the circular issued by the department. A circular issued by the department is not binding on the Income Tax Appellate Tribunal also. The Court held that the Societies have filed these appeals challenging the orders passed by the Tribunal in their favour and hence no substantial question of law arises for consideration in these appeals. The appeals were misconceived and were dismissed.

4 ***Peroorkkada Service Co-Operative Bank Limited vs. The Income Tax Officer & Ors.***

I.T. Appeal No. 320 of 2019, Hon'ble Kerala High Court, Order dated 7th January 2020

Penalty u/s. 271B – Assessee failed to furnish audit report – penalty confirmed

The Assessee was a cooperative bank registered under the Co-operative Societies Act, 1969. It challenged the Tribunal order confirming the penalty u/s. 271B on the ground that it had failed to furnish a report of audited accounts as required under Section 44AB with respect to the assessment year 2014-15. A show-cause notice was issued preceding the imposition of the penalty, requiring the assessee to show cause as to why penalty under Section 271B should not be imposed. In the reply, the Society said that, as per the second proviso to Section 44AB, if a person is required by or under any other law to get his accounts audited, getting the accounts audited under that law before the specified date and furnishing of a report of such audit, would be sufficient compliance of the requirement under that Section and that no penalty can be imposed. But the Assessing Authority found that the Assessee had failed to furnish the report of audit in the prescribed form, duly signed and verified by an Accountant as required under Section 44AB or to furnish the report of audit conducted under any other law along with the further report by an Accountant in the Form prescribed, as required under the second proviso to Section 44AB. Therefore, it is held that the Assessee was liable to be imposed with penalty under Section 271 B and ordered to pay a penalty of ₹ 1,50,000/- as provided under the said Section. The CIT(A) found that the Assessee only filed a 'Certificate' issued by the Joint Director (Audit), Thiruvananthapuram, Co-operative Department, dated 3-7-2018, accompanied by the 'Audit Note' of the assessee Society. It was found that filing of Form No. 3CA along with a further report by an Accountant is the mandatory requirement and the mere getting of the accounts audited under any other law will not be sufficient compliance of the said requirement. The CIT(A) held that in the absence of compliance of the provisions contained in the second proviso to Section 44AB read with Rule 6G(1) of the Income Tax Rules, 1962, it cannot be said that there is proper compliance of the provision. It was also found that the Assessee had failed to prove that there existed no 'sufficient cause' for the failure or that there existed any 'reasonable cause' for such failure. Therefore, the penalty order was confirmed. In the second appeal filed before the Tribunal, the assessee contended that the audit was completed under provisions of the Co-operative Societies Act, 1969. But the audit was completed at a later stage. The Society does not have any power to appoint an Auditor and to get its account audited within the time stipulated under the Income-tax Act. Therefore, the delay occurred in submitting the audited account was reasonable. It was pointed out that there was proper compliance of the first limb of the second proviso to Section 44AB. According to the Assessee, the failure was only with respect to the furnishing of the further report by an Accountant, as required under the second limb of the second proviso. It was argued that the penalty under Section 271B could be imposed only if there is a failure to get the accounts audited or if there is a failure to furnish the report of such audit. It was contended that the scope of Section 271B cannot be extended, alleging non-compliance to furnish the further report by an Accountant. The Tribunal found that that the Assessee had furnished documents such as Annual report of the Financial Year 2013-14 depicting the audited financial statements. But the Audit Report in the prescribed Form was not produced before the Assessing Officer. It was held that the non-production of the Audit Report in the prescribed format can be a reason for imposing a penalty under Section 271B. Therefore, the contentions were discarded and the orders of the authorities below were confirmed. On further appeal, the Court observed the Assessee had not furnished the report of the audit under Co-operative Societies Act in the form prescribed, which was Form 3CA. On the other hand, the contention was that the accounts were audited by the Co-operative Department and the Joint Director had issued a Certificate to that effect. Probable contention raised by the Assessee was that since the Assessee is a person required by the Co-operative Societies Act to get its accounts audited under that Act, the audit report need not be filed in Form 3CA. The Court held that even assuming (without admitting) that the furnishing of a report of the audit conducted by the competent Auditor stipulated under the Co-operative Societies Act would suffice compliance of the first limb of the second proviso, it is evident that the further report by an Accountant, as mandated to be furnished in Form 3CD, was not furnished by the Assessee. Moreover, the factual finding arrived by the Tribunal is to the effect that the Assessee had furnished only the Annual Report depicting the audited financial statement along with a copy of the receipts and distribution statements. It was also evident that the Assessee had furnished a Certificate issued by the Joint Director (Audit) of the Co-operative Department. The Court held that when the second proviso carves out an exemption from the general provisions of Section 44AB, the stipulations therein need to strictly adhere and the mere fact that the audit of the assessee was conducted under the provisions of the Co-operative Societies Act, would not be sufficient for such compliance. Since the Assessee failed to show any 'reasonable cause', coming within the purview of Section 273B, the imposition of penalty under Section 271B was not interfered with. The Assessee had also drawn Court's attention to a Circular issued by the Central Board of Direct Taxes, Circular No. 03/2009, dated 21-5-2009, based on which it is contended that the audited report need not be attached along with the returns or furnished separately at any time before or after the due date, but it need only to be retained by the assessee and produced if it is called for by the Income Tax Authority during any proceedings under the Act. The Court did not accept the above contention in view of the mandatory provisions which insists on furnishing the audit report in the prescribed form before the due date stipulated, along with a further report of an Accountant. The Court held that when the specific provision contained in the statute is unambiguous in this respect, it cannot be held otherwise based on any circular of the Department. The appeal was thus dismissed.

5 ***St. Thomas Orthodox Syrian Church vs. CIT (Exemptions) & Ors.***

Writ Petition No. 3633 of 2019, Hon'ble Bombay High Court, Order dated 3rd January, 2020

Accumulation u/s. 11(1) – Mistake in Form 10 – Delay in filing the form

Assessee, a public trust, was registered under section 12AA of the Act. It carried on various charitable activities including services of spiritual nature. It filed the return of income on 19th September 2015 under section 139(4A) disclosing 'NIL' income after claiming exemption under section 11 of the Act. While doing so, it had claimed accumulation of income to the tune of ₹ 58,00,000/- under section 11(2) of the Act. Intimation under section 143(1) of the Act was received on 21 October 2016. By this intimation, the benefit of accumulation under section 11(2) was refused, on the ground that Form 10, as required to be filed under the Income-tax Rules, 1962, was filed beyond the period specified in section 11(2). The Trust had filed an application for condonation of delay in filing Form 10, which was rejected by the Commissioner *vide* order dated 26th September 2019, on two counts. First, that the Trust had made no claim of accumulation under section 11(2) in the return of income and second, no cogent reason was given for condonation of delay. The Assessee Trust challenged this order passed by the Commissioner of Income Tax (Exemptions) before the Bombay High Court. As regards the primary ground of refusal that the Trust did not claim of accumulation under section 11(2) in the return of income, it was submitted that in the return of income the claim has been made; however, under a wrong head. Attention was drawn to the return of income filed wherein amount of ₹ 58,00,000/- is entered under the column 9(iv) of the form. It was further submitted that this was due to an error while filling up Form No. 10 electronically and that for this error the entire claim ought not to be rejected.

The Court observed that there was no finding in the impugned order as to whether the entry was made due to an error or it was a deliberate act. The Court held that the case of the Trust of an error of making a claim under a wrong head needs to be considered by the Commissioner, and it is not possible for the Court to decide this question of fact at the first instance. It is for the Commissioner to decide whether the action of the Trust was due to inadvertence as claimed by Trust or is a part of design as claimed by Department. In these circumstances, the Court remanded the proceedings to the Commissioner to consider this aspect. The Court directed the Commissioner to consider the case on its own merits. It further directed that if the Commissioner concludes that the Trust had made a claim inadvertently in a wrong column, then the question of whether cogent reason exists for condonation of delay would arise for consideration.

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DIRECT TAXES

Tribunal

Neelam Jadhav, Neha Paranjpe & Tanmay Phadke, *Advocates*

Unreported Decisions

1 ***Bajrang Naredi vs. ITO***
[ITA 327/Ran/2018] (Assessment Year 2014-15), Order dated 20-1-2020

Section 56(2)(vii)(b): Amended provisions will not be applicable in the year of registration of an agreement if the Assessee had already entered into the agreement, paid the entire consideration and taken the possession in a preceding year

Facts

The Assessee is an individual and the assessment year is 2014-15. During the Financial Year 2011-12, the Assessee entered into an agreement for purchase of an immovable property and paid the consideration to the seller. However, the said agreement was not registered in the same year and the Assessee along with the seller registered it at a belated stage on 17-6-2013 (i.e. in the financial year 2013-14 pertaining to the assessment year 2014-15). There was a difference between the agreement value and the stamp duty value. During the course of the assessment proceedings, the AO asked the Assessee to file his reply as to why the difference of ₹ 9,79,350/- should not be added as deemed income u/s. 56(2)(vii)(b) of the Act. Pursuant to the same, the Assessee filed his submissions. However, while completing the assessment, the AO did not accept the submissions and made an addition of the difference under the head Income from Other Sources. Being aggrieved, the Assessee filed an appeal before the CIT(A) but did not find any success. Thereafter, the Assessee filed an appeal before the ITAT. After hearing both the sides, the ITAT held as under:

Held

The ITAT noticed that the purchase transaction under consideration was completed in the Financial Year 2011-12 as the Assessee already paid the entire consideration and took the possession in the said year. However, only the registration of the agreement was pending. The ITAT perused the section and observed that prior to the amendment to the said section; the inadequate consideration with regard to an immovable property could not have been taxed in the hands of an individual. It was further observed that the said provision was amended and brought on the statute book from the Assessment Year 2014-15 onwards. The ITAT found force in the contention of the Assessee that the purchase transaction *de facto* took place in the Financial Year 2011-12 pertaining to the Assessment Year 2012-13 and not in the year under consideration and thus, the same would be governed by the pre-amended section. In the light of the aforesaid observations, the ITAT held the issue in the favour of the Assessee.

2 ***Maharashtra Police Mega City Co-operative Housing Society Ltd. vs. ITO***

[ITA 1390/Pun/2019] (Assessment Year 2014-15), Order dated 21-1-2020

Section 57: In the case of a co-operative housing society, administrative expenses are allowable against the interest earned on fixed deposits made out of amount received from members. Interest on fixed deposit is not *per se* a separate source of income and must be taxed only after allowing administrative expenses of a society

Facts

The Assessee is a co-operative housing society. During the year under consideration, the Assessee had received amount from its members that were temporarily invested in fixed deposits on which the Assessee earned interest income. The Assessee thereafter utilised the said interest for paying administrative expenses. While filing a return of income, the Assessee credited to its income and expenditure account the said interest income along with contribution received from the members. On the other hand, the Assessee claimed all the administrative expenses and offered the net income to tax. The return of income was selected for the scrutiny assessment. The AO in the assessment proceedings taxed the interest income under the head income from other sources and denied a deduction of professional fees paid to a chartered accountant who was entrusted to look after all legal compliances, accounting work and other statutory work of the Assessee from time-to-time. Being aggrieved by the stand of the AO, the Assessee preferred an appeal before the first appellate Authority but did not succeed. Thereafter, an appeal was preferred to the ITAT. After hearing both the sides, the ITAT held as under:

Held

The ITAT perused the material available on record and observed that the Assessee is a housing society and the main issue under consideration is with regard to allowability of professional fees being an administrative expense against the interest income. The ITAT relied on judgment of the Co-ordinate bench in the case of "***Nivedita Garden Condominium vs. ITO (ITA 1210/PUN/2019)***" and held that an identical issue has been dealt with in the said case wherein it has been held that the interest income is to be adjusted against the expenditure incurred by the assessee during the year and the same is not separately assessable in the hands of the assessee. Ultimately, the ITAT held that the present Assessee is entitled to claim a deduction of professional fees paid to its chartered accountant against the interest income.

Reported Decisions

3 ***Surendra Engg. Corporation vs. JCIT***

[ITA 2386/Mum/2017] (Assessment Year: 2012-13), Order dated 5-12-2019 [2020] 113 taxmann.com 290 (Mumbai-Tribunal)

Penalty – section 271D r.w.s 273B & 269SS – If the Assessee availed a loan from its partner under a *bona fide* belief that provisions of section 269SS are not applicable in relation to a transaction between firm and partners, the Assessee

would be protected by the provisions of section 273B and no penalty can be levied under section 271D

Facts

The Assessee is a Partnership Firm and the Assessment Year under consideration is AY 2012-13. While finalising the assessment u/s 143(3) of the Act, the Assessing Officer [AO] observed that the Assessee had accepted the cash loan of ₹ 11 lakh from one of its partners, Shri Surendra Parikh. Thus, the AO was of the view that the Assessee had violated the provisions of Section 269SS of the Act. Accordingly, the Assessee was show caused to explain as to why a penalty u/s. 271D cannot be levied. In response to the same, the Assessee filed its reply and explained that the cash loan was received from one of the partners of the firm. Further, referring to the definition of "Firm" and "Partner" as per Indian Partnership Act, 1932, it was explained that though as per the Income-tax Act, 1961, Partner and firm are two distinct taxable entities, the same are considered to be the one entity as per the general law. Further, it was submitted that the Assessee was under the *bona fide* belief that the firm not being a separate legal entity, the provisions of Section 269SS and 269T are not attracted with respect to transactions between the Firm and the Partner. It was also explained that a loan was taken by the Assessee to meet business exigencies. The loan received was deposited in the bank and cheque was issued to creditors. Thus, the violation of Section 269SS was due to reasonable cause. The AO did not accept the explanation of the Assessee and levied the penalty u/s. 271D of the Act. On appeal, the Assessee did not find any success before the First Appellate Authority. Being aggrieved, an appeal was preferred before the ITAT. After considering the submission of both the parties, the ITAT held as under:

Held

The ITAT held that there is no dispute that the Assessee had availed a cash loan of ₹ 11 lakh from one of its partners during the year under consideration. From the material on record, the ITAT noticed that a cash loan was availed from one of the partners for making payment to creditors. Further, the ITAT relied on various decisions cited by the Assessee wherein it was held that the cash loan received from a partner by the partnership firm would not attract provisions of section 269SS and section 271D of the Act. The ITAT further observed that the Assessee was under *bona fide* belief that the provisions of section 269SS of the Act are not applicable to transactions between the partner and firm. It was further observed that Section 273B which also includes Section 271D of the Act makes it clear that if failure to comply with a relevant provision is due to reasonable cause, then, in such a case, no penalty should be imposed. Thus, keeping in view the overall facts and circumstances of the case, the ITAT held that the Assessee has made out a case of reasonable cause for availing cash loan from the partner. Accordingly, the ITAT deleted the penalty and held in favour of the Assessee.

4 ***N. Ramaswamy vs. ITO***

[ITA 925/Chennai/2019] (Assessment Year:2014-15), Order dated 6-12-2019 [2020] 113 taxmann.com 289 (Chennai-Tribunal)

Exemption – Section 54F r.w.s. 2(47) – the transaction of perpetual lease agreement by which the Assessee took possession of the property for unlimited period has to be construed as purchase of the property within the meaning of section 54F

Facts

During the year under consideration, the Assessee, an individual, sold an asset other than residential property and the capital gain earned from the said transaction was invested by acquiring the residential premises from M/s. Mahindra Residential Developers Limited. While filing the return of income, the Assessee claimed an exemption u/s. 54F of the Act. The assessment for the year under consideration was completed u/s. 143(3) of the Act by allowing the claim of an exemption u/s. 54F of the Act. Subsequently, the Principal Commissioner of Income Tax [PCIT] was of the view that the assessment order passed by the AO is erroneous and prejudicial to the interest of the Revenue. The PCIT initiated the revision proceedings u/s. 263 by holding that the Assessee is not entitled to claim an exemption u/s. 54F of the Act as the property acquired by him by way of perpetual lease agreement cannot be treated as purchase for the purpose of Section 2(47)(vi) of the Act. Thereafter, the order u/s. 263 of the Act was passed by the PCIT directing the AO to verify the claim of Section 54F in view of the observations made in the order passed u/s. 263 of the Act. Being aggrieved by the said order u/s. 263, the Assessee preferred an appeal before the ITAT. After considering the submission of both the parties, the ITAT held as under:

Held

The ITAT observed that the only issue involved in the present appeal is whether the Assessee has to purchase the property absolutely for claiming exemption under Section 54F of the Act or perpetual lease for unlimited period would amount to purchase of the property for the purpose of Section 54F of the Act. The language of Section 54F is very clear that the Assessee has to purchase within a period of one year before or two years after the date on which the transfer took place or to construct a residential house within a period of three years after the sale of capital asset. In this case, after the sale of property, the Assessee entered into a perpetual lease for unlimited period. The ITAT further observed that the Assessee has every right to transfer the perpetual lease to third party in the open market and to continue to be in possession of a residential house. Further, it was held that a bare reading of Section 2(47)(vi) of the Act shows that the agreement or arrangement which has the effect of transferring or enabling the enjoyment of immovable property has to be considered as transfer in relation to capital asset. In this case, there is a perpetual lease agreement for unlimited period and the Assessee is in possession of residential house. Therefore, the ITAT in view of the provisions of Section 2(47)(vi) of the Act held that the transaction of perpetual lease agreement by which the Assessee took possession of property for unlimited period has to be construed as purchase of property within the meaning of Section 54F of the Act. The ITAT further, observed that Section 269UA(2)(iii)(f) of the Act clearly says that any lease for a term of not less than twelve years and includes holding possession of such property has to be construed as transfer. The ITAT observed that in this case, admittedly, the lease was not for less than twelve years. Hence, for all practical purposes, the acquisition of property by perpetual lease exceeding the period of twelve years, has to be construed as purchase within the meaning of Section 54F of the Act. Thus, the ITAT held that the Assessee is entitled to claim an exemption u/s. 54F of the Act. Hence, the ITAT quashed the order of the PCIT passed u/s. 263 of the Act and allowed the appeal of the Assessee.

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INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

TRIBUNAL DECISIONS

1 ***Clearview Healthcare Pvt. Ltd vs. ITO***
[TS-3-ITAT-2020(DEL)]
Assessment Year 2014-15

Addition under section 56(2)(viib), deleted based on specific fact pattern and there being nothing to suggest the use of unaccounted money in the garb of share premium

Facts

i) The assessee company filed its return for the FY 2013-14 declaring a loss.

ii) During the same FY, the assessee had issued shares at a premium.

iii) The same amount of premium was charged and collected from both resident and non-resident applicants.

iv) The issue price for shares was determined based on a valuation re-port from a chartered accountant using the discounted cash flow (DCF) method.

v) The Assessing Officer determined the fair market value (FMV) of the shares under Rule 11UA of the Income-tax Rules, 1962 (Rules) and added the difference between such FMV and the share issue price to the total income of the assessee under section 56(2)(viib) of the Act.

vi) Assessee's contentions before the Tribunal:

(a) The money received as share premium was clean money and did not involve any unaccounted money. As per the legislative intent behind the insertion of section 56(2)(viib) of the Act, the said provision applies when unaccounted money is received in the garb of share premium.

(b) Share premium is fully justified from the fact that the same shares were sold in the next FY, after proper due diligence, to a non-resident at more than double the issue price, and capital gains were also offered to tax by the seller.

(c) The valuation report determining the fair value of shares was not countered by AO through a substitute -valuation from an alternate expert on the basis of the chosen DCF method.

vii) The Revenue contended that:

(a) Share premium received by the assessee in excess of the valuation determined under Rule 11UA of the Rules should be liable to tax under section 56(2)(viib) of the Act.

Decision

The Tribunal held in favour of the assessee as follows:

i) There is considerable cogency in the assessee's plea mentioning that the share premium received is justified due to the fact of shares being sold subsequently to a non-resident buyer for a much higher value.

ii) When shares are bought by the non-resident buyer on the basis of detailed due diligence and the same is substantiated by share purchase agreement and resolution, it cannot be said that the subsequent money received by the seller is not clean money.

iii) The assessee does not come within the mischief of section 56(2)(viib) of the Act as the legislative intent is to tax unaccounted money received in the garb of share premium, whereas the share premium received by the assessee is clean money.

iv) Hence, FMV of shares as substantiated by the assessee should be accepted and the addition of share premium made by the assessing officer is deleted.

2 ***M/s. Acciona Wind Energy Private Limited vs. DCIT***

[TS-797-ITAT-2019(Bang)]

Assessment Year : 2014-15

Capital Gains arising under section 46Aof the Act, on buyback of shares, not exempt under section 47(iv) of the Act

Facts

i) The assessee is a domestic company in which the foreign parent company holds 99.99% shares and the remaining 0. 01% shares are held by another group company.

ii) The assessee purchased its own shares from the parent company under a buyback scheme and claimed it to be exempt under section 47(iv) of the Act.

iii) During assessment proceedings, the Assessing Officer – held that exemption under section 47(iv) of the Act is not available as parent company is holding only 99.99% shares in the assessee.

iv) The First Appellate Authority affirmed the AO's order and also held that section 47(iv) of the Act is applicable in the context of prescribed modes of transfer specified in section 2(47) of the Act and the transaction involving buyback of shares being distinct from such prescribed modes, is not covered under section 47(iv) of the Act.

Decision

The Tribunal held as under:

i) Asseessee's submissions before the Tribunal

(a) As per the provisions of the Companies Act, 1956, a minimum of two shareholders are required for the incorporation of a private limited company. In the assessee's case, 99.99% of the shares were held by the parent company and the balance was held by a group company. Consequently, for all practical purposes, the parent company should be considered to hold the whole of the share capital.

(b) If, for applicability of section 47(iv) of the Act, the view that the entire share capital should be held by the parent company in its own name, is taken, practically, then there will be no situation in which section 47(iv) of the Act can be applied, and therefore this cannot be a correct view.

(c) Further, section 45 of the Act and not section 46A of the Act, is a charging section for capital gain and section 47 of the Act provides exemption from chargeability of capital gain. Therefore, the transaction of buyback of shares should not be taxable.

ii) The Revenue contended as follows:

(a) Section 47(iv) of the Act is not applicable, as the parent company is holding 99.99% of the share capital of its subsidiary company and the remaining shares are held by the group company.

(b) Section 47 of the Act is limited in its application only to section 45 of the Act, which is a general provision for the taxation of capital gain arising on transfer of capital asset. It does not apply to gain arising on buyback of shares to which provisions of section 46A of the Act applies.

iii) **Decision**

The Tribunal observed and held as under:

(a) Tribunal observed that to avail the exemption under section 47(iv) of the Act, one of the prescribed conditions is that shareholding in the Indian company should be entirely held by one company or its nominees.

(b) In the facts of the case, the Tribunal observed that group company was not holding the shares in the capacity of a nominee of the parent company. Therefore, the exemption under section 47(iv) of the Act is not available.

(c) The Tribunal observed that section 45 of the Act deals with the taxability of capital gain on transfer of capital asset, and section 47 of the Act provides exemption to certain category of transfers.

(d) Section 46A of the Act, applicable in case of buyback of shares does not require transfer of any capital asset.

(e) Therefore, buyback of shares taxable under section 46A of the Act is not entitled to exemption under section 47(iv) of the Act.

Thus, the Tribunal stressed that to be covered within the purview of section 47(iv) of the Act, strict compliance of the conditions prescribed in that section is required.

3 ***Audi AG vs ADIT***
[TS-548-ITAT-2019(Mum)]
Assessment Years: 2009-10 and 2010-11

India-Germany DTAA – Permanent Establishment – Article 5 - German company does not have a PE or business connection in India for sale of cars on a principal to principal basis to its associated enterprise in India

Facts

i) The assessee, a German company, is one of the world's leading car manufacturers. The assessee is a part of Volkswagen Group Sales India Private Limited (VGS) and is engaged in the business activities i.e. export of cars, export of parts and accessories, export of tools and machinery and export of sales promotion material. It also provides service to its Indian Group Companies for grant of right to use information technology system, provision of training outside India, consultancy/ management and other support services.

ii) The assessee had appointed VGS as a sole distributor of Audi brand cars in India. The assessee also sold part and accessories to Skoda Auto India Private Ltd (SAIPL/ Skoda India), pursuant to which Skoda India manufac-tures/assembled Audi brand cars in India in its manufacturing unit at Au-rangabad, India. VGS is engaged in wholesale trading of Audi and Volkswagen brand car. VGS purchases fully built-up cars from the as-sessee, Volkswagen Group (AG) and Skoda India and sales the same to the dealers/distributor.

iii) During the Assessment Years 2009-10 and 2010-11, the assessee sold fully built-up cars and accessories to its AEs in India.

iv) The Assessing Officer (AO) observed that VGS is the exclusive distributor whose only source of income was from Audi business. The business activi-ties of VGS were devoted wholly on behalf of the assessee. Further, the activities of the assessee and VGS completed each other and VGS was functioning as an extended arm and replacement of the assessee in India. The AO held that the assessee had business connection in India and had a PE in India in the form of VGS as per Article 5(1) and 5(5) of the tax trea-ty. Accordingly, it was held that income attributable to the PE was taxable in India. Consequently, the AO attributed 35 per cent of the total income of the assessee in India. The Dispute Resolution Panel (DRP) upheld the order of the AO.anel (DRP) upheld the order of the AO.

Decision

On Appeal, the Tribunal held in favour of the assessee as under:

i) There was no dispute that the activities of manufacturing of car was completed by the assessee outside India and constitute a separate and independent activity. The assessing officer did not bring any material to counter the stand of the assessee that Cars are not sold to VGS on principal to principal basis and thereafter, VGS sold it on a principal to principal basis to the dealers.

ii) The Tribunal relied on the decision of ***ACIT vs. Daimler AG [2012] 52 SOT 93 (Mum).*** In the said case also, the assessee was in the business of manufacturing and selling premium vehicles worldwide and it was tax resident of Germany. In the case of Daimler AG, despite the fact that the AE was performing more activities than the VGS, it was held that the AE was not created either fixed place PE nor dependent agency PE.

iii) The income arising on the sales of car by VGS to dealers in India was income accruing or arising in India and was taxed separately in the hands of VGS. The Tribunal observed that merely acting for non-resident principal would not itself render an agent to be considered PE for the purpose of allocating profit. The assessee was not undertaking any definite activity to which profit can be attributed.

iv) Accordingly, it was held that the VGS was an independent and sepa-rate entity, which was engaged in selling of fully built-up cars import-ed from the assessee, Volkswagen AG and Skoda India to dealers and distributors. Thus, it cannot be regarded as a PE of assessee in India.

v) The decision in the case of ***Aramex Logistic Private Limited [2012] 22 taxmann.com 74 (AAR)*** relied on by the tax department was distinguishable on facts of the present case. In the said case, Aramex (F Co.) entered into a contract with the customer outside India for delivery of parcel, where the delivery of the parcel located in India. Further, Aramex (F Co.) had an agreement with Aramex India for the delivery of the parcel to the location in India. The privity of contract was between Aramex and customer outside India. The completion of the contract for the delivery of the parcel will only be complete once the parcel is delivered to the location in India. Accordingly, the activity performed in India by Aramex India, viz; delivery of the parcel to the location in India is part of one transaction which cannot be independently performed.

vi) However, in the present case, the car was manufactured by the assessee outside India and constitutes a separate and independent activity. The car was sold to Volkswagen Group for further sale in India and VGS was not acting on behalf of the assessee nor was the assessee selling cars through VGS. Moreover, the cars were sold on principal to principal basis. Hence, the assessee did not have business connection under the Act and PE under Article 5 of the tax treaty.

5 ***DCIT v. Reliance Jio Infocomm Ltd***
[TS-305-ITAT-2019(Mum)]
Assessment Year: 2016-17

India-Singapore DTAA –Payments for availing bandwidth services are not taxable as royalty under the India-Singapore tax treaty

Facts

i) i) The assessee is engaged in the business of providing telecom services in India. During the Assessment Year (AY) 2016-17, the assessee entered into a 'bandwidth service agreement' (agreement) with a Singapore based entity. The Singapore entity was holding a facility-based operator licence in Singapore which enabled it to establish, install, maintain, operate and provide telecommunication services in Singapore and also provide bandwidth services to the service recipients across the globe.

ii) As per the terms of the agreement, the assessee remained under an obligation to withhold tax, if any, on the payments made to the Singapore entity for provision of bandwidth services.

iii) In pursuance of the aforesaid terms, the assessee remitted the payment to the Singapore entity for provision of bandwidth services and deposited taxes at the rate of 11.11 per cent [i.e. rate of 10% under Article 12 of the DTAA duly grossed upon in terms of Section 195A] in terms of Section 195 of the Act.

iv) However, the assessee thereafter took a stand that it was not obligated to deduct tax at source under Section 195 of the Act from the aforesaid payment made to Singapore entity. The assessee carried the matter to the Commissioner of Income-tax (Appeals) [CIT(A)] under Section 248 of the Act claiming that no tax was required to be deducted on the amount paid to the Singapore entity.

v) The assessee contended that the amount remitted for providing bandwidth services was the Singapore entity's business income. However, the Singapore entity did not have any business connection or Permanent Establishment (PE) in India and therefore, as per Article 7 of the tax treaty the amount remitted by the assessee to the Singapore entity could not be taxed in India.

vi) The Commissioner of Income-tax (Appeals) [CIT(A)] observed that the assessee had only received access to service and not to any equipment that was deployed by the Singapore entity for providing the bandwidth services. Therefore, CIT(A) concluded that the payments made for the provision of bandwidth services were in the nature of business profits and could not be classified as royalty or fees for technical services.

Decision

On appeal, the Tribunal held in favour of the assessee as under:

i) The assessee pursuant to the terms of the 'agreement' had only received standard facilities, i.e., bandwidth services from the Singapore entity. The Tribunal observed that the assessee had access to services and did not have any access to any equipment deployed by the Singapore entity for providing the bandwidth services. Further, the assessee did not have any access to any process which helped in providing of such bandwidth services by the Singapore entity. As a matter of fact, all infrastructure and process required for the provision of bandwidth services were always used and under the control of the Singapore entity, and the same was never given either to the assessee or to any other person availing the said services.

ii) The Tribunal agreed with CIT(A) that as the process involved to provide the bandwidth services was not a 'secret,' but was a standard commercial process that was followed by the industry. Therefore, the same could not be classified as a 'secret process' to treat the payment as 'royalty' under the tax treaty.

iii) The amount paid by the assessee to the Singapore entity was neither towards use of (or for obtaining right to use) industrial, commercial or scientific equipment, nor towards use of (or for obtaining right to use) any secret formula or process, therefore, the same could not be classified as payment of 'royalty' by the assessee.

iv) The amendment in Section 9(1)(vi) of the Act will not have any bearing on the definition of 'royalty' as contemplated in the tax treaty. The Tribunal relied on the decision of Bombay High Court in the case of ***CIT vs. Reliance Infocomm Ltd. (ITA No. 1395 of 2016, dated 5 February 2019)*** wherein it was observed that mere amendment in the Act would not override the provisions of tax treaties.

v) The Tribunal observed that though the term 'royalty' as used in Article 12 of India-Hungary tax treaty takes within its sweep transmission by satellite, cable, optic fibre or similar technology, the definition of 'royalty' in the India-Singapore tax treaty has a narrow meaning. It has been observed that despite the fact that the India-Singapore tax treaty was amended, however, the definition of 'royalty' therein has not been tinkered with and remained as such.

vi) Accordingly, the Tribunal held that the amount received by the Singapore entity from the assessee for providing standard bandwidth services could not be characterised as 'royalty' as per the tax treaty, and was taxable as 'business profits'. The Singapore entity did not have any business connection or a PE in India. Therefore, business profits were not taxable in India.

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CA Ashit Shah

GST Gyan – E-Invoicing under GST – One more step towards digitalisation

Background

The GST Council has approved introduction of **'e-invoicing'** or **'electronic invoicing'** in a phased manner for reporting of business to business (B2B) invoices to GST System, starting from 1st January 2020 on voluntary basis. Since there was no standard for e-invoice existing in the country, standard for the same has been finalized after consultation with trade/industry bodies as well as ICAI after keeping the draft in public place. Having a standard is a must to ensure complete inter-operability of e-invoices across the entire GST eco-system so that e-invoices generated by one software can be read by any other software, thereby eliminating the need of fresh data entry – which is a norm and standard expectation today. The machine readability and uniform interpretation is the key objective. This is also important for reporting the details to GST System as part of Return. Apart from the GST System, adoption of a standard will also ensure that an e-invoice shared by a seller with his buyer or bank or agent or any other player in the whole business eco-system can be read by machines and obviate and hence eliminate data entry errors.

What is e-invoice?

If an invoice is generated by a software on the computer or Point of Sales (PoS) machine then does it become an e-invoice? Is e-invoice as a system where taxpayers can generate the invoices centrally? Many such questions are raised when e-invoice gets discussed. E-invoice does not mean generation of invoices from a central portal of tax department, as any such centralisation will bring unnecessary restriction on the way trade is conducted. In fact, taxpayers have different requirements and expectation, which can't be met from one software generating e-invoices from a portal for the whole country. Invoice generated by each software may look more or less same, however, they can't be understood by another computer system even though business users understand them fully. For example, an invoice generated by SAP system cannot be read by a machine which is using 'Tally' system. Likewise there are hundreds of accounting/billing software which generate invoices but they all use their own formats to store information electronically and data on such invoices can't be understood by the GST System if reported in their respective formats. Hence a need was felt to standardize the format in which electronic data of an Invoice will be shared with others to ensure there is inter-operability of the data. The adoption of standards will in no way impact the way user would see the physical (printed) invoice or electronic (ex PDF version) invoice. All these software would adopt the new e-Invoice standard wherein they would re-align their data access and retrieval in the standard format. However, users of the software would not find any change since they would continue to see the physical or electronic (PDF/Excel) output of the invoices in the same manner as it existed before incorporation of e-invoice standard in the software. Thus the taxpayer would continue to use his accounting system/ERP or Excel based tools or any such tool for creating the electronic invoice as s/he is using today. To help small taxpayers adopt e-invoice system, GSTN has empanelled **eight accounting & billing software** which provide basic accounting and billing system free of cost to small taxpayers. Those small taxpayers who do not have accounting software today, can use one of the empanelled software products, which come in both flavours, online (cloud based) as well as offline (installed on the computer system of the user).

Benefits of e-invoice

1. **Better taxpayer services**

- One time reporting on B2B invoice data in the form it is generated to reduce reporting in multiple formats (one for GSTR-1 and the other for E-Way Bill).
- To generate sales and purchase register (ANX-1 and ANX-2) from this data to keep the Return (RET-1 etc.) ready for filing under New Return. E-Way Bill can also be generated using e-invoice data.
- It will become part of the business process of the taxpayer.
- Substantial reduction in input credit verification issues as same data will get reported to tax department as well to buyer in his inward supply (purchase) register.
- On receipt of info thru GST System as buyer can do reconciliation with his Purchase Order and accept/reject in time under New Return.
- No need to prepare invoices in triplicate or duplicate

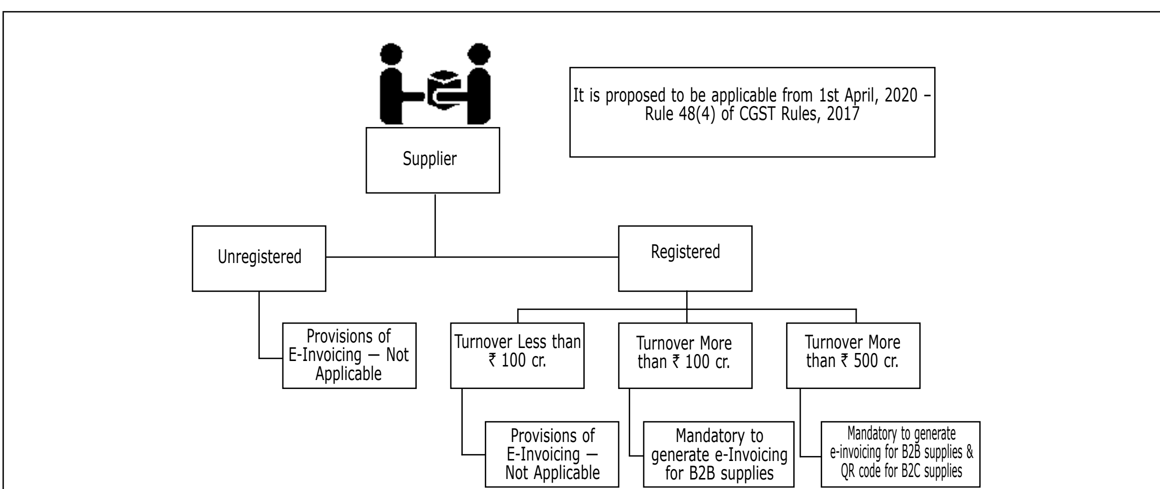
2. **Reduction of tax evasion**

- Complete trail of B2B invoices.
- System level matching of input credit and output tax

3. **Efficiency in tax administration**

- Elimination of fake invoices.

Applicability



E-invoice is mandatory for registered person, whose aggregate turnover in a financial year exceeds INR 100 crore w.e.f 1st April, 2020 [Notification No. 70/2019–Central Tax dated 13th December, 2019].

QR Code on B2C Invoice is **mandatory** for registered person, whose aggregate turnover in a financial year exceeds INR 500 crore w.e.f. 1st April, 2020 [Notification No. 72/2019-Central Tax dated 13th December, 2019].

The QR code will consist of the following e-invoice parameters:

a. GSTIN of supplier

b. GSTIN of Recipient

c. Invoice number as given by Supplier

d. Date of generation of invoice

e. Invoice value (taxable value and gross tax)

f. Number of line items.

g. HSN Code of main item (the line item having highest taxable value)

h. Unique Invoice Reference Number (hash)

How the system will work

Part A – Interaction between Tax payer and Invoice Registration Portal (IRP)

Generation of invoice by seller in his own accounting software in confirmation with e-invoice schema and mandatory parameters.
Seller should have utility that will generate output invoice data in JSON format.

⇨

Seller can generate unique Invoice Reference Number (IRN) based on 3 parameters viz.
- Supplier GSTIN,
- Invoice Number and
- Financial Year.

⇨

Upload the JSON of the e-invoice along with IRN into IRP by seller.
JSON may be uploaded directly on the IRP or through GSP's or through third party apps.

⇩

IRP will generate the hash (IRN) and validate the hash uploaded JSON and check for any duplicate invoice for the same FY. Then IRP will add its signature on the invoice data as well as QR code to JSON.

⇦

Sharing the uploaded data with GST and e-Way Bill system.

⇦

Digitally signed JSON with IRN will be returned to the supplier and purchaser along with a QR code and also sent on the mail IDs as provided in the invoice.
QR code contains GSTIN of supplier and buyer, invoice number, date, HSN, Hash etc.

Part B – Interaction between IRP & GST/E-Way Bill System and Buyer

Share the signed e-invoice data along with IRN to the GST System and e-Way bill system

Auto updation of ANX-1 of the supplier and ANX-2 of the purchaser, which in turn determine liability and ITC

Auto creation of Part A of e-Way bill using the data received.

Modes of generating of e-invoice

E-invoices can be generated in following manner–

- Web based
- API based
- SMS based
- Offline tool based
- GSP based

Other features

a. E-Invoice generated is not required to be signed again by the supplier of goods or services or both, as it is digitally signed document validated by the GST system.

b. E-invoice will not replace the current e-Way Bill system. For transportation or movement of goods, the e-Way Bill will continue to be mandatory.

c. Maximum number of line items permitted in each e-invoice is restricted to 100.

d. E-invoice can be cancelled but it has to be reported within 24 hours. Any cancellation after 24 hours could not be possible, however one can manually cancel the same on GST portal before filing the return.

e. Supplier of goods or services or both can display the currency in e-invoice and default currency is in INR.

f. Supplier of goods or services or both can print his paper invoice as he is doing today including logo and other information.

Conclusion

Let's hope that new step towards digitalization would be implemented in proper manner so that business would not have to suffer in terms of non-compliance, complexities and anxieties.

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All compromise is based on give and take, but there can be no give and take on fundamentals. Any compromise on mere fundamentals is a surrender. For it is all give and no take.

– Mahatma Gandhi

Man is like an infinite spring coiled up in a small box, and that spring is trying to unfold itself.

– Swami Vivekananda

Creativity is the key to success in the future, and primary education is where teachers can bring creativity in children at that level.

– A. P. J. Abdul Kalam

INDIRECT TAXES

CA Naresh Sheth & CA Jinesh Shah

GST – Recent Judgments and Advance Rulings

A. Writ Petition

1. *MOHIT MINERALS PVT. LTD. VS. UNION OF INDIA – GUJARAT HIGH COURT*

Facts, Issue involved and Contention of Petitioner

Petitioner is engaged in importing non-coking coal from Indonesia, South Africa and U.S.A. and supplying it to various domestic industries including power, steel, etc. Petitioner is discharging customs duty on the imported products on the full value including ocean freight component. Further, as per IGST Act, petitioner is also discharging integrated tax at the time of import itself, which also includes value of ocean freight.

Petitioner has challenged legality and validity of Notification No. 8/2017-Integrated tax (rate) and entry 10 of Notification No. 10/2017-Integrated tax (rate) which casts liability on importer to discharge integrated tax (under reverse charge mechanism) on ocean freight component. Some of the grounds of writ are as under:

- **Notifications *ultra vires* the IGST Act**
  Impugned notification sought to levy tax on transaction carried out in non-taxable territory as the service provider as well as service recipient are located outside India;

  Such levy go beyond section 1 of IGST Act, which extends to whole of India but not outside India.

- **No levy can be imposed twice under the same Act**
  Petitioner has already paid IGST on the imported coal, which includes the value of freight and insurance. The impugned Notifications again seek to levy IGST on freight components on reverse charge basis. In such circumstances, levy and collection of IGST again on the freight component amounts to double taxation under the same Act, which is impermissible under the law.

- **'Deeming fiction of value' in notification is illegal and there is no concept of value of taxable services**
  Para-4 inserted by the Corrigendum dated 30-6-2017 has a deeming fiction for the

'value of taxable service' as 10% of the CIF value of the imported goods. In given case, petitioner is not concerned about the freight and does not know even about the charges for the same, as it is the sole responsibility of the supplier of the coal outside India. In GST, there is no concept of 'taxable service', which has been the concept only in the erstwhile Finance Act, 1994, to levy the service tax.

Through the delegated legislation there cannot be a deeming fiction to ascertain the value on which the tax is payable as it is an essential legislative function.

- **Entry 10 of Notification No. 10/2017 is *ultra vires* to the Act**
  As per section 5(3) of the Act, the tax liability could be shifted on the 'recipient' of supply under reverse charge basis. However, as per Entry 10 of the Notification No. 10/2017-Integrated Tax (Rate), the liability has been shifted on the 'importer' and not the 'recipient'.

Some of the contentions of the respondent are as under:

- **Necessity for tax on ocean freight**
  In order to enable Indian shipping line to avail input tax credit on services and to provide a level playing field *vis-à-vis* the foreign shipping lines, service tax was imposed on the service of inward transportation of goods. Subsequently representations were received that many FOB transactions were converted into CIF transaction (entered in non-taxable territory – outside India). In order to see that both Indian shipping lines and foreign shipping lines suffer tax on inward transportation of goods, the importers were made liable to pay tax on the service of inward transportation of import cargo.

- **Two separate taxable events**
  There are two separate taxable events. The levy under the notification draws power from the charging section of the Act. In the present case, the levy on the transportation services received by the importer under the impugned notification draws power under Section 5 of the IGST Act, 2017. Further, levy of IGST on import of goods is a separate taxable event as provided under Section 3(7) of the Customs Tariff Act, 1975.

- **No violation of Article 14 or Article 19(1)(g) of Constitution**
  There is no violation of Article 14 or Article 19(1)(g) of the Constitution of India as the importers are free to carry on their trade. This levy is on all importers and does not interfere with the right of the importers to practice any profession, or to carry on any occupation, trade or business.

- **On discrimination, unreasonable classification, hardship & adverse effect on business**
  Merely because of the imposition of the levy, if the business becomes uneconomical or may cause any hardship, the same cannot be a ground for striking down the said levy.

The sum and substance of the submissions canvassed on behalf of the Union of India is that the levy introduced on the import freight service does not result in additional cost to the importer as the GST paid by them on the inward transportation of goods as well as on the import freight services is available as ITC.

Discussions by and observations of HC

- **Implementation of GST**
  The difficulty being experienced today in proper implementation of the GST is because of the erroneous misconception of law, or rather, erroneous assumption on the part of the delegated legislation that service tax is an independent levy as it was prior to the GST. They are vivisecting the transaction of supply to levy more taxes on certain components, completely overlooking or forgetting the basic concept of composite supply introduced in the GST legislation and the very idea of levying GST. If such an erroneous impression is not corrected and such trend continues, then in future even the other components of supply of goods, such as, insurance, packaging, loading/unloading, labour, etc., may be artificially vivisected by the delegated legislation to levy GST on the supply on which the tax is already collected.

- **Recipient is liable to pay GST under reverse charge mechanism**
  Generally the tax shall be payable by the person who is making the supply of goods or services, i.e., supplier. However, in case of certain specified supplies, the recipient of supply can be made liable to pay tax. Thus, a meaningful reading of the charging section would entail that the person who is neither the supplier nor the recipient of the supply cannot be made liable to pay tax under the IGST Act. The transportation of goods in a vessel is the obligation of the foreign exporter. The foreign exporter enters into contract with the shipping line for availing the services of transportation of goods in a vessel. Petitioner is not at all concerned with how the foreign exporter delivers the goods at the Indian port or whether the consideration of the shipping line has been paid by the foreign exporter or not. Hence, petitioner, being an importer, is not the recipient of transportation services and cannot be made liable to pay tax under reverse charge mechanism.

  It is a settled principle of construction of tax laws that there is no room for any intendment or presumption in tax statutes and one has to look only at the language used. It is a settled principle of law that if a delegated legislation goes beyond the power conferred by the statute, such delegated legislation has to be declared *ultra vires.* Hence the impugned notifications making importer liable to pay tax under reverse charge mechanism is *ultra vires.*

- **Neither an intra-State supply nor inter-State supply**
  High Court further examined that impugned services of goods transportation is neither an intra-State supply nor inter-State supply and hence not leviable to GST.

- **No provision for time of supply**
  That there is no provision for determining the time of supply of the ocean freight service. Sub-section (3) of Section 13 of the IGST Act deals with the time of supply of service on which tax is payable under reverse charge basis. The clauses under the section applies only to the person who is the actual recipient of the supply. A person who is not the recipient of supply cannot determine the time of supply under the provisions of Section 13(3) of the CGST Act.

- **Value of supply**
  Value of supply is the price actually paid or payable for the said supply and determined/agreed between the supplier and the recipient. Thus, a person other than the supplier or the recipient of the supply will not be able to determine the value of supply as such person will not be knowing the price actually paid or payable.

- **Input tax credit eligibility**
  When Section 16(1) states that a person to whom supply is made shall be entitled to take input tax credit, the same shall be construed as a reference to the recipient of supply. In the case of ocean freight services, the importer of goods is not the recipient of supply of ocean freight services and may not be able to avail the input tax credit, which is sought to be recovered under the impugned notifications. The provisions relating to the filing of returns apply only to the inward and outward supplies made by a registered person. The supply in the present case is neither an inward supply nor an outward supply for the petitioner.

- **Double Tax**
  Once the freight has already suffered the IGST as a part of the value of the goods being imported, the dual levy of the IGST cannot be imposed on the same freight amount by treating it as supply of service. It is a fundamental principle of construction of tax statutes that if the words of the Act on one construction results into double taxation of the same transaction, that result will be avoided by adopting another construction, which may reasonably be open.

Decision of HC

No tax is leviable under the IGST Act on the ocean freight component for the services provided by a person located in a non-taxable territory by way of transportation of goods from a place outside India up to the customs station of clearance in India. Levy and collection of tax on such ocean freight under the impugned Notifications is not permissible in law. The impugned notifications are held to be *ultra vires* and unconstitutional.

2. *M/S. ABBOTT HEALTHCARE PVT. LTD. VS. THE UNION OF INDIA – KERALA HIGH COURT (2020-TIOL-40-HC-KERALA-GST)*

Facts, Issue involved and Contention of Petitioner

Petitioner is engaged in the business of selling of pharmaceutical products, diagnostic kits etc. Petitioner has entered into **Reagent supply and instrument use agreement** with various hospitals/laboratories. As per agreement, it will place its diagnostic instruments at hospitals/laboratories for their use **without any consideration** for a specified period and the required quantities of reagents, calibrators, disposables will be supplied at the prices specified in the agreement, through its distributors, on payment of applicable GST.

Distributors purchase the said products from the petitioner on principal-to-principal basis. Thus, there is no direct sale/supply of reagents, calibrators and disposables by the petitioner to the hospitals. The agreement entered into between the parties also contained a clause which provided that if the hospital fails to purchase specified minimum quantum of reagents, calibrators etc., then the petitioner is entitled to recover from the hospital an amount equal to the deficit in the actual purchases. Pursuant to the agreement, the instruments were transported under a delivery challan and was not accompanied with a tax invoice. The consignment was seized by the Assistant State officer. Officer released the detained goods only after furnishing of bank guarantee by the petitioner.

Meanwhile petitioner thought to obtain an advance ruling for the question as to *whether the provision of specified medical instruments by the applicant to unrelated parties like hospitals, labs for use* ***without any consideration*** *constitute a supply or whether it constitutes movement of goods otherwise than by way of supply as per the provisions of CGST/SGST Act, 2017?*

AAR observed that the instruments supplied by the petitioner cannot function without the reagent/calibrators/disposables supplied by the distributors of the petitioner. Thus, the functioning of the instruments were dependent on the reagent/calibrators/disposables supplied by the distributors. Hence, the supplies effected by both persons was to be clubbed in order to ascertain the **real supply** effected by the petitioner. AAR held that the placement of specified medical instruments to unrelated customers like hospitals, laboratories for their use without any consideration, in backdrop of an agreement containing minimum purchase obligation like reagents, calibrators, disposables for a specified period constitutes a **composite supply**. The principal supply is the transfer of right to use goods which is liable to GST and so the supply of reagents, calibrators, disposables **become taxable at the rate of tax applicable to the instruments.** Appellate Authority of Advance Ruling (AAAR) upheld this decision of AAR. Hence, the petitioner filed a writ petition before the High Court.

Discussions by and observations of HC

In the writ petition, petitioner was of the contention that AAR/AAAR erred in rendering a finding as regards to composite supply, when the said query was itself not raised before them for clarification. Therefore, the said finding itself was illegal and against the provisions of the CGST/SGST Act.

Hon'ble High Court examined the order of AAR and it observed following:

- There was no occasion for the AAR to get into the issue of whether the supply effected was a composite supply or not. The concept of **enhancement of utility of the instruments** through the supply of reagents/calibrators/disposables may be relevant for the purposes of valuation of the supply of instruments, but same cannot be imported into concept of composite supply.
- A distinction has to be drawn between the nature of supply and the valuation thereof. While clubbing of two independent supplies may be resorted to for the purpose of valuation of each of those supplies, there is no scope of clubbing of two independent supplies to notionally alter the very nature of each of those supplies, as they existed in fact, at the relevant point in time.
- The value of instruments placed at the premises of the hospitals/laboratories compared to the total turnover of supply of reagents, calibrators and disposables by the distributors over the contract period is small and would only be around 20% of turnover of supply of reagents and calibrators.
- Many aspects of the agreement entered into between the petitioner and its customer - hospitals/laboratories militate against viewing them as a composite supply such as:

- The supplies are made by two different taxable persons i.e., the supply of instruments by the petitioner and the supply of the reagents, calibrators and disposables being by his distributor;
- Two supplies do not answer to the description of being "naturally bundled and supplied in conjunction with each other in the ordinary course of business";
- Matters will have to be decided based on the facts in a given case and not abstract as was done by the AAR.

Although one can argue that there was a relationship between the said persons that influences the valuation of the supply, however, same does not take away from the fact that the supplies are, in reality, made by two different taxable persons.

Nell Gwynn House Maintenance Fund Trustees vs. Customs and Excise Commissioners [(1999) Simon's Tax Cases 79 (HL)] and ***Telewest Communications PLC vs. Customs and Excise Commissioners [(2005) Simon's Tax Cases 481 (CA)]*** clearly provide that the concept of a composite supply will not be attracted in cases where there is more than one supplier.

Decision of HC

High Court disposed the writ petition by quashing the orders passed by AAR and AAAR and remitted the matter back to the AAR for a fresh decision on the query raised before it by the petitioner.

B. Decision by National Anti-Profiteering Authority

3. *SHRI SUSHEEL PRASAD TODI and DIRECTOR GENERAL ANTI-PROFITEERING BOARD VS. M/S. ACME HOUSING INDIA PVT. LTD. – (2020-TIOL-02-NAA-GST)*

Facts, Issue involved and Contentions of the Applicant

Shri Susheel Prasad Todi (Applicant 1) filed a complaint with standing committee against Acme Housing India Pvt. Ltd. – AHIPL (Respondent), who forwarded the matter to Director General Anti-Profiteering Board – DGAP (Applicant 2). DGAP alleged profiteering by the AHIPL contending that the AHIPL had not passed on the benefit of Input Tax Credit (ITC) by way of commensurate reduction in price w.e.f. 1-7-2017 while selling flats in their project named 'Acme Ozone Herbelia'.

DGAP observed that in pre-GST era, AHIPL was eligible to avail CENVAT credit of service tax paid on input services only. However, post GST, it could avail ITC of GST paid on all inputs and input services. From the data submitted by AHIPL for the project “Acme Ozone Herbelia”, **ratio of ITC to the turnover** for pre-GST and post GST period was worked out. Accordingly, DGAP in its report concluded that ITC (as a % of the turnover) available to the respondent during pre-GST period was 1.05% and during the post-GST period was 3.66% and so respondent had benefitted to the tune of 2.61% of his turnover.

DGAP also compared tax rates on services during pre and post GST and arrived at the amount of profiteering as follows:

S. N.	***Particulars***	***Pre-GST***	***Post GST***	
	Period	***A***	***Apr. 2016 to Jun. 2017***	***July 2017 to Dec 2018***
1	Tax rate	B	5.5%	12%
2	Ratio of CENVAT credit/Input Tax Credit to turnover as per above table	C	1.05%	3.66%
3	Increase in input tax credit availed post-GST (%)	D = 3.66% - 1.05%	-	2.61%
	Analysis of Increase in input tax credit			
4	Basic price collected during Jul-2017 to Dec-2018	E		72,03,56,512
5	GST @ 12% on Basic Price	F = E * 12%		8,64,42,781
6	**Total Demand collected/raised**	**G = E+F**		**80,67,99,293**
7	Recalibrated Basic Price	H = E * (1-D)		70,15,55,207
8	GST @12% on Recalibrated Basic Price	I = H*12%		8,41,86,625
9	**Commensurate Demand**	J = H+I		78,57,41,832
10	**Excess Realization or Profiteering Amount**	**K = G-J**		**2,10,57,462**

DGAP reported in its report that the AHIPL did not provide any evidence to show that benefit of ITC has been passed on to the other home buyers. The computation of profiteering by the DGAP has been done in respect of 152 home buyers from whom payments have been received by the Respondent during the post-GST period till 31-12-2018. AHIPL had booked a total 176 flats till 31-12-2018 and in respect of 24 flats, the customers had not paid any consideration during the post-GST period till 31-12-2018.

AHIPL submitted that observations made by the DGAP about non-passing of benefit were incorrect due to following:

- Benefit of ITC can only be ascertained after completion of project since neither sales nor purchases are evenly spread over the project period.
- Supply to the customers was not yet completed and therefore time for passing on the benefit had not lapsed yet.
- No provision of GST legislation prescribed the due date/time before which the supplier was required to pass on the benefit to the receiver.
- ITC availed by him was not final and it was required to be reversed in future in proportion to the unsold area of flats on the date of Occupation Certificate.
- Methodology of DGAP was not correct as it simply compared ITC from Returns filed. However, it should have considered only those goods/services on which credit was not available in the pre-GST period and now avilable.

- ITC benefit has been passed to all customers who booked flats before 1-7-2017 on entire demand, which will be issued in Post-GST period.
- Customers, who have booked flats in post-GST, are not eligible for discount towards anti-profiteering since the anti-profiteering provisions are not applicable.

DGAP in response to AHIPL's submission reported following:

- For arriving at amount of profiteering amount, it has considered turnover till 31-12-2018 and also only ITC (relevant to turnover) has been considered. It has not considered the unsold units and related data for this purpose.
- On the issue of methodology, it reported that going into the aspect of input/input service wise availability of ITC in pre-GST and post-GST periods was not relevant to compute profiteering amount.
- AHIPL did not submit any sales/booking agreement mentioning that the ITC benefit accruing to it in the post-GST period has been considered to arrive at the sale price for flat booked in post-GST period.

Discussions and observations by NAPA

Authority observed that DGAP determined profiteered amount of ₹ 2,10,57,462 (inclusive 12% GST) which included amount of ₹ 1,91,662 (inclusive 12% GST) profiteered by AHIPL from applicant 1. DGAP reported that AHIPL apparently passed ₹ 3,11,726 (excessive) as benefit of ITC to Applicant 1 which can be adjusted against demand raised.

However, submission of AHIPL shows that amount has been paid as a discount/rebate, which cannot be taken to be the benefit of ITC and hence no excess benefit of ITC has been passed on. Granting of rebates/discounts is the most prevalent practice followed in the construction industry to increase sales and hence the above discount/rebate cannot be equated with the passing on of the benefit of ITC.

With regard to AHIPL's objection to methodology, it is to be noted that even if the Authority under Rule 126 of the CGST Rules, 2017 had notified the 'Procedure & Methodology' for determination of the profiteered amount *vide* its Notification dated 28-3-2018, such methodology has to be applied on case-to-case basis. Further, the Authority has power-to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering.

Ruling of NAPA

In light of above, the authority ordered following:

a) AHIPL is required to return the profiteered amount along with interest.

b) AHIPL shall reduce the prices to be realised from the buyers of the flats commensurate with the benefit of ITC received by them.

c) Any benefit of ITC, which accrues subsequently, shall also be passed on to the buyers by the AHIPL, since the above investigation was only up to 31-12-2018.

d) AHIPL has denied benefit of ITC to buyers in contravention of Section 171 of the CGST Act, 2017 and has committed offence u/s. 171(3A) of the Act. Therefore, they are liable for penalty. Accordingly, show cause notice should be issued on them.

e) As intimated by DGAP, the AHIPL has other sub-projects under project "Acme Ozone" other than project "Acme Ozone

Herbilia". The present investigation covers only one sub-project i.e. "herbilia". Therefore, there are sufficient reasons to believe that there might be some sub-projects left under the whole project, which have not been investigated. Accordingly, the DGAP is directed to investigate the issue of passing on the benefit of additional ITC by the registrant Respondent in respect of the whole project "Acme Ozone".

C. Ruling by Appellate Authority for Advance Ruling

4. LIONS CLUB OF POONA KOTHRUD – AAAR MAHARASHTRA (2019-TIOL-72-AAAR-GST)

Facts, Issue involved and Contention of the Club

Lions Club consists of association of persons, joined together to undertake social activities without any profit motive. Membership fees is collected from individuals to meet the administrative/day-to-day expenses of the Club. Club organizes seminars and leadership development programmes exclusively for the members of the club. These funds received from members are utilized for mutual benefit of members. Surplus, if any, is used for charitable activities. Funds collected by Lions CLub can be broadly divided into following categories: (a) Club member fees (b) District fees (c) Cabinet member fees.

At the first stage, Club sought advance ruling for the following question:

1. *Since the amount collected by individual Lions Clubs and Lions District is for convenience of Lion members and pooled together only for paying meeting expenses & communication expenses and the same is deposited in single bank account. As there is no furtherance of business in this activity and neither any services are rendered nor any goods being traded. Whether registration is required?*

Club submitted that **aforesaid transaction(s) not covered u/s. 7 of CGST Act, 2017.** To tax a transaction between an association or club and its members, said transaction must either fit under 7(1)(a) or (c) of 'Supply' as under:

"(a) All forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(c) activities specified in Schedule I, made or agreed to be made without a consideration;"

The term 'Business' in clause (a) above is defined u/s. 2(17)(e) of the Act as under:

"provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its member".

In case of Lions Club, the members of the Club only come together for a social cause and there is neither furtherance of business nor benefits or facilities to the members. There is no deeming fiction under GST law to treat Club and its members as distinct persons. Further, members are not covered u/s. 25 as distinct persons.

Circular No. 35/9/2018-GST dated 5th March 2018 invoked the concept of deemed sale as provided under Article 366(29A) of the Constitution of India. It must be noted that clause (e) of said Article only enables to tax **supply of goods** by an association to its members as deemed sale. It does not enable to tax **supply of service** as a deemed service. Even Para 7 of Schedule II only covers **supply of goods** by any unincorporated association. It does not cover supply of services. Therefore, unless provision similar to that deemed sale is made either in the Constitution or the Act, services provided by an association to its members cannot be taxed.

As association and its members are the same because of principle of mutuality, they cannot be regarded as related person. Therefore, aforesaid transaction will not be covered within the scope of supply u/s. 7 of the Act.

Discussions by and observations of AAR

The purpose and activities as mentioned in constitution and bye-laws of the Club have been gone through by the authority and formed observations that the above stated section 2(17)(e) speaks about **subscription by members, however, this subscription must be for the facilities or benefits** that would be provided. As can be seen, the Club is not formed to provide any supply of goods or services to its members qua the fees received from them. There being no supply *qua* the fees received, there arises no occasion to visit the definition of 'Supply' for the purposes of the Act. Therefore, no more discussions in this matter would be required.

Seminars and leadership development programmes enable members to effectively perform towards social causes of the Club. Amounts are spent for building and empowering human resources to perform the activities of the club in a better way.

Ruling of AAR

In respect of above question, Club is not required to get registered under GST for the aforesaid supply of services.

Appeal to the AAAR and observations of AAAR

Aggrieved by the decision of AAR, the **department filed an appeal to AAAR**. AAAR reversed the decision of AAR. Pursuant to above order of AAAR, Club furnished additional submissions:

- Membership fee recovered by Club is not appropriated towards provision of the leadership programme to their members as envisaged in order of AAAR;
- Entire membership fee collected by the Club is spent towards meeting various administrative expenses only;
- Members shall not be entitled to any facilities whatsoever such as sports, fitness, entertainment, etc.

Club has brought to the notice of the Authority that they charge the registration fee from members for imparting communication skill, managerial skill and leadership skill by organizing various programmes and workshops. They agree to pay GST on registration fees, provided that their annual turnover exceeds the threshold limit prescribed under the GST law. The receipt of registration fee for conducting programmes/workshops will squarely fall under Section 2(17)(e) of CGST Act, 2017 i.e., definition of "business".

Order of AAAR

Originally AAAR held that membership fees collected by the Club from its members is consideration for supply of leadership programme by the Club. However, based on additional submissions made by appellant, AAAR amended its original order stating that membership fees collected by Club from its members will not be construed as consideration for levy of GST.

With regard to taxability of registration fees collected by appellant from members for organizing skill-oriented workshops, it held that it is to be construed as consideration against supply made by Club to its members and liable to GST.

5. MAHARASHTRA STATE POWER GENERATION COMPANY LIMITED – AAAR MAHARASHTRA (2019-TIOL-61-AAAR-GST)

Facts, issue involved and query of Appellant
Appellant is engaged in power generation and has entered into contract with various contractors for the purpose of construction of new power plants, renovation of old ones and operation of maintenance activities etc. The contractor is required to commence the trial operation by approximately 40 months from date of award of contract. Otherwise, failure to do so would attract liquidated damages at agreed percentage of the contract value.

Appellant had sought advance ruling as to whether GST is applicable on Liquidated Damages in case of Operation and Maintenance activities ***or*** *Construction of new power plants/renovation of old plants* ***or*** *in both the cases?*

AAR *vide* its Order No. GST-ARA-15/2017/B-30 dated 8-5-2018 held that GST will be levied on liquidated damages, treating it as independent supply.

Appeal to AAAR and Appellant's contentions
Being aggrieved by the said order, Appellant preferred an appeal to AAAR. Some of the appellant's contentions are as under:

- **Damages are paid for compensating the loss and not for any supply**
  It is evident from the fact that both the parties have estimated damages, which will arise due to breach of contract and have specified the same in the contract. Thus amount is not paid for any supply of service but paid for compensation of loss.

- **Supply is a voluntary act**
  In case of damages specified in contract, the recipient has no option but to accept the amount for the loss caused to him. He does not intend that the supplier should delay.

- **Interpretation of entry 5 (e) of Schedule II**
  Entries in the clause (5) of Schedule II to be interpreted on the principle of *ejusdem generis*, which means of the same nature or same kind. The terms 'agreeing to the obligation to refrain from an act', 'to tolerate an act' or 'to do an act' refer to a scenario where there is a specific agreement by the provider to carry out the obligation specified in the contract. In case of liquidated damages, there is no agreement ot tolerate any situation or act.

- **Taxable supply arises on performance of activity**
  Performance of any action by the person is necessary to consider as supply. In respect of services specified in Schedule II, the service provider must carry out the activity. Taxable event occurs when provider performs the services. Acceptance of damage amounts to compensation of loss and not 'tolerating of an act'.

- **Liquidated damages cannot be treated as independent supply**
  Liquidated damages is not a divisible contract. It is a part of contract for supply of equipment and service. It is not a separate contract of toleration of an act for which payment is made. Execution of contract and deduction cannot be enforced separately. Contract is for single supply and not for two supplies. Unless, there is delay the clause of liquidated damages will not apply. There are no two promises in the contract.

- **Liquidated damages is mere re-determination of contract value**
  Liquidated damages reduces the value of main supply and payment of liquidated damages as part of the same supply is mere re-determination of the consideration of same supply.

  Appellant also relied on decision of *Victory Electricals Ltd (supra)* wherein liquidated damages was allowed as a deduction from value of supply.

- **Foreign Jurisprudence**
  Australian rulings under Australia Goods and Services Tax Act, has held that early termination (of lease contract) in accordance with contract will be considered as change of consideration of early supply. It will not be considered as a separate supply.

- **Recovery of damages cannot be equated with supply**
  Liquidated damages are for recovering or compensating loss or damage suffered by the recipient. Indian Contract Act also provides for recovery of damages in case of breach of contract. Damages are not received for tolerating the act, but it is made to compensate the loss suffered by the appellant.

Discussion and observations of AAAR

The question put forth by appellant is that whether liquidated damages can be treated as supply of services and made liable to GST. AAR has held that the payment of liquidated damages by the contractor to the appellant is covered by the term 'obligation to tolerate an act or a situation' and hence liable to GST.

Section 3 of the contract refers to special conditions of the contract which lays down the provision for payment of liquidated damages by contractor to appellant. Specific provisions have been made in the contract for payment of liquidated damages by the contractor to the appellant.

AAR has correctly observed that separate provisions have been made for payment of liquidated damages and that contract price and liquidated damages are two different aspects completely separable from each other.

Contract provides for levy of liquidated damages if the project completion is delayed beyond the scheduled date. This leads to the conclusion that the appellant is in a contractual agreement with the contractor to impose levy of liquidated damages and to accept the amount of liquidated damages in case of delay in completion. Thus the appellant has tolerated an act or situation.

The purpose of payment of liquidated damages is an act of tolerance in the sense that when there is delay in completion of project, appellant is put to certain hardships which he tolerates in return of payment of liquidated damages.

Appellant was well within his rights to provide for termination of contract in case of a delay. However, in the instant case both the parties agreed that such would not be the effect. Appellant agreed to tolerate the delay in return for payment of liquidated damages.

Appellant had earlier justified that recovery of damages was just a redetermination of the consideration but it must be noted that deduction was just a method of recovering the money. The fact that there are two agreements remains unaltered.

When contract specifically provides for the payment of damages, it itself manifests that there is separate contractual agreement between both the parties.

Central Excise judgment of *Victory Electricals* deals with reduction in transaction value and not with taxability of liquidated damages. Therefore, it is not relevant in instant case.

Order of AAAR
AAAR did not find any reason to interfere with the ruling given by Maharashtra AAR and thereby confirmed the levy of GST on liquidated damages.

D. Rulings by Authority for Advance Ruling

6. M/s. GOA INDUSTRIAL DEVELOPMENT CORPORATION. (2020-TIOL-07-AAR-GST)

Facts, Issue involved and Query of the Applicant
GIDC ("Applicant") is an undertaking of Government of Goa which had allotted land (admeasuring 38,40,886 m^2) to the 7 parties for the purpose of SEZ setup but could not proceed further because of protests from the people. Consequently, it refunded back the deposits taken from aforesaid parties. However, GIDC refused to pay any compensation on these deposits, as the original Deed of Lease was devoid of any such clause. The parties approached Supreme Court who directed GIDC to compensate parties with interest @8.25%. The Government of Goa in its cabinet meeting resolved to approve the proposal of GIDC to take back all land and refund the deposit along with interest earned amounting to ₹ 256,56,90,593/-.

The applicant sought advance ruling as to *"whether an obligation to refrain from an act or to tolerate an act or a situation treated as supply of goods/ services?"*

Discussions by and observations of AAR
Authority analysed and understood the primary question whether the aforesaid receipt of compensation would be a supply made by the applicant. Section 7 of CGST Act defines the expression supply as follows:

(1) For the purpose of this Act, the expression "Supply" includes:

a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in course or furtherance of business;

b) import of services for a consideration whether or not in the course or furtherance of business;

c) activities specified in Schedule I, made or agreed to be made without a consideration; and

(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

In light of above, it observed that Schedule II does not define supply but classifies the supply into either "supply of goods" or "supply of services".

Entry 5(e) of Schedule II of CGST Act defines "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" as a **supply of services**.

In the given case the authority observed that GIDC refused to pay any compensation on the deposit taken from the parties. As the original deed never mentioned such clause, the parties approached Supreme Court who directed GIDC to compensate @ 8.25%.

In the process, the applicant has agreed to do **an act of vacating claim** by the parties of setting up SEZ units for which consideration has been paid.

Ruling of AAR
The compensation paid by GIDC would be a Supply under Entry 5(e) of Schedule II of the CGST Act, and therefore will be liable to GST.

7. SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED – AAR Maharashtra (2020-TIOL-03-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant has entered into 'Civil Construction Contract' with 'Joyville Shapoorji and Housing Pvt. Ltd.' (developer) wherein the applicant is appointed as the contractor for the construction of developer's ongoing project situated at Palghar, Maharashtra. The project comprises of 7 residential buildings having 1,360 apartments of carpet area less than 60 sq. mt. and 44 apartments of carpet area more than 60 sq. mt.

Applicant has sought an advance ruling in respect of following questions:

a) *Whether the applicant is eligible for concessional rate of tax i.e. at the rate of 12% under Entry 3(v)(da) of Notification No. 11/2017 CT(R) dated 28-6-2017 as amended by Notification No. 01/2018 CT(R) with effect from 25-1-2018?*

b) *Whether the Building completion and finishing services be regarded as a separate service or would it be a composite supply of works contract service to avail the benefit of reduced rate of tax?*

c) *The rate of GST on works contract services provided for the construction of the units and common areas and amenities on pro-rata basis which do not qualify the criteria of low cost houses?*

Relevant extract of Entry 3 v(da) of Notification No. 11/2017 CT(R) ['relevant entry'] is as under:

'Composite supply of works contract supplied by way of construction, erection, commissioning, or installation of original works pertaining to low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status vide *notification of Government of India, in Ministry of Finance, Department of Economic Affairs* vide *F. No. 13/6/2009-INF, dated the 30th March, 2017'*

Applicant's contention

Relevant entry does not create any restriction on the eligibility of the reduced tax rate based on provider of service. It is solely based on nature of service and to that extent applicant is also eligible for the benefit of reduced GST rate. Benefit is based on nature of service and not on basis of supplier. Service of similar nature [construction, erection, commissioning, installation, etc. of original works] would all be classifiable under this relevant entry irrespective whether it being provided by developer or contractor.

Benefit for Affordable housing available to the Project of 'Joyville' should not only be restricted to the Developer but also be given to the Contractor because the services provided by contractor to the Developer is of similar nature to the service provided by Developer to the customer.

Applicant also submitted that building completion and finishing services form part of the same transaction. It is a composite supply of works contract and eligible for the benefit under relevant entry of Notification No. 11/2017.

Discussions by and observations of AAR

"Affordable housing project" as defined under notification issued by Department of Economic Affairs means a housing project using at least 50% of the FSI for dwelling units with carpet area of not more than 60 sq. mt. It is observed that 95.37% sq. mt. of FSI is consumed in the project for flats having carpet area below 60 sq. mt. It is undisputed fact that low cost houses up to a carpet area of 60 sq. mt. in an affordable housing project would attract GST at 12%.

One of the recommendations made by the GST council in its 25th meeting was to extend the concessional rate of 12% to services by way of construction of low cost houses up to a carpet area of 60 sq. mt. in a housing project which has been given infrastructure status by the Department of Economic Affairs.

Since the project undertaken by the applicant falls under the definition of "Affordable Housing Project" the benefit of reduced rate would be available to them only in the cases of supply effected after 15-1-2018 i.e., the date on which Notification 1/2018 CT (R) was issued and the benefit of this reduced rate would be applicable in case of only those flats which are of carpet area up to 60 sq. mt. This position was clarified by Government of India *vide* F. No. 354/52/2018-TRU dated 7-5-2019.

The notification entry is *qua* the supply of service and not *qua* the person. Therefore, once the project qualify as an 'Affordable Housing Project' the benefit of concessional rate of tax would be available in respect of works contract services pertaining to low cost houses, irrespective of it being supplied by the developer or the contractor.

Terms of agreement entered into between Applicant and Developer is for composite supply of works contract services and that of building completion and finishing services cannot be regarded as separate services. It would be a part of the composite supply of works contract services with principal supply being building construction services. It would be eligible for concessional rate of tax in respect of units below 60 sq. mt.

Common amenities form a part of overall construction service and are always naturally bundled when offered to the customer. Therefore such services will also qualify as composite supply where principal supply would be construction services. Hence such services also qualify for concessional rate of tax for dwelling units having area less than 60 sq. mt. In respect of units having area more than 60 sq. mt., it would be taxed at rate of 18%.

Ruling of AAR

In respect of question (a), the applicant will be eligible for concessional rate of Goods and Services and would be required to discharge GST at the rate of 12% in respect of affordable houses of area below 60 sq. mt.

In respect of question (b), building completion and finishing services will not be regarded as a separate service. It will be a part of composite supply of Works Contract services with principal supply being building construction services.

In respect of question (c), GST rate would be 18% on works contract services provided for the construction of the units, common areas and amenities on pro-rata basis which do not qualify the criteria of low cost houses.

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INDIRECT TAXES

CA Rajiv Luthia & CA Keval Shah

Service Tax – Case Law Update

1 *M/s. GE T and D India Ltd. vs. Dy. CCE, Chennai*

2020-TIOL-83-HC-MAD-ST

Background facts of the case

The petitioner is a dealer assessable to service tax. The terms of employment of the petitioner company include a stipulation of a notice period prior to quitting the job which ranges from 2 to 3 months. An employee who is unable to serve the notice period has an option to pay an equivalent amount of salary for the period for which notice was not served. This is imperative if an employee wants to quit, he needs to inform the employer in advance so as to enable recruitment of a new employee in the meantime and also for smooth transition of the work. The petitioner received some amounts in lieu of notice period from few outgoing employees. The Adjudicating Authority was of the view that this amount would attract service tax as this amount is collected by the employer to facilitate the termination of employment and is liable to be taxed. SCN were issued to various units of petitioner all over the country. Despite the objections, the orders confirmed the demand and thus the impugned petition.

Arguments by the Revenue

a) Payment in lieu of notice constitutes payment to the employee by the employer or *vice versa* where the employer/employee desires an immediate exit from the organisation.

b) This amount attracts the provisions of section 66E(e), whereby an agreement by an entity to the obligation to refrain from an act or to tolerate an act or a situation, or to do not act, would constitute taxable service. According to the respondent, the petitioner has tolerated the act of immediate quitting from service, by the employees and such agreement/toleration results in the rendition of a taxable service.

Decision

a) The provisions of section 66E(e), have given rise to some ambiguity, which is clarified by the CBEC in its guidance notes dated 20th June, 2012 as under:

"2.9 Provision of service by an employee to the employer is outside the ambit of service.

2.9.3. Would amounts received by an employee from the employer on premature termination of contract of employment be chargeable to service tax?

No. such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would be chargeable to service tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act."

b) The query raised relates to a contra situation, one, where amounts have been received by an employee from the employer by reason of premature termination of contract of employment, and the taxability thereof. The Board has answered in the negative, pointing out that such amounts would not be related to the rendition of service. The employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. The definition in clause (e) of Section 66E as extracted above is not attracted to the scenario. The employer has not 'tolerated' any act of the employee but has permitted a sudden exit upon being compensated by the employee in this regard.

c) In view of the above discussion and findings the petitions are allowed.

2 *M/s. Bhanwar Lal Gurjar vs. Commissioner of CGST & Service Tax, Jaipur*

2020-TIOL-10-HC-RAJASTHAN-ST

Background facts of the case

The appellants provided manpower services. SCN was issued for demanding service tax with regard to the contribution towards provident fund and ESI of the labour provided by the appellants to his clients in view of section 67 of the Act. Hon'ble CESTAT upheld the demand of ST for normal period by concluding that extended period of limitation cannot be invoked in instant case.

The appellants are before the Hon'ble HC challenging the demand of service tax on reimbursement of PF/ESI from the service receiver of manpower services provided by them.

Arguments by the Appellants

a) Rule 5 of the Service Tax (Determination of Value) Rules, 2006 was struck down by the Hon'ble SC in ***Union of India vs. Intercontinental Consultants and Technocrats Pvt. Ltd.*** Hence, reimbursable expenses should not be included for calculating assessable value on which service tax is leviable. So far as the amount sought to be included for calculating service tax is concerned, the same was being deposited in the accounts of the labour, whereas, the appellant was only receiving commission for providing manpower.

b) That reliance placed by the department on the decision of the Division Bench of Kerala High Court in ***Security Agencies Association vs. Union of India & Others 2019-TIOL-2841-HC-KERALA-ST***, is not applicable to facts of present case as the Kerala High Court was dealing with a case prior to the amendment effected on 1-5-2006 *vis-à-vis* Section 67 of the Act. The Hon'ble Supreme Court has dealt with situation after amendment effected on 1-5-2006.

Decision

a) Rule 5 of the Rules dealing with inclusion in or exclusion from value of certain expenditure or costs, is concerned, the same came up for consideration before the Hon'ble Apex Court in ***Union of India vs. Intercontinental Consultants and Technocrats Pvt. Ltd.***

b) The Hon'ble Apex Court has observed the following :

- *Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessee. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.*

- *In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services.*

- *As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67*

- *Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the learned counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature.*

c) In the present case we are considering the case of the appellant after the amendment. Hence, the service provider (appellant) was liable to be charged service tax *qua* service rendered by him and the valuation of taxable service could not be anything more or less than the consideration paid for rendering such a service. Hence, substantial question of law framed in this appeal stands answered accordingly. Keeping in view the decision of the Hon'ble Supreme Court in ***Union of India vs. Intercontinental Consultants and Technocrats Pvt. Ltd. (supra)***, this appeal is allowed.

3 ***M/s. Gemini Software Solutions Pvt. Ltd. vs. CCE, Trivandrum***

2020 (1) TMI 844-CESTAT Bangalore

Background facts of the case

The appellant is a private limited company engaged in rendering various services in relation to information technology and is exporting the said services overseas and receiving consideration in convertible foreign exchange. They filed refund claim for unutilised CENVAT credit in terms of Rule 5 of the CCR, 2004 for export of services made during the disputed period. The Adjudicating Authority rejected the entire refund claim on the ground that the appellant was not eligible to credit of ₹ 2,07,499/- and that proof of debit of the amount was not submitted in view of Condition 2(h) of the Notification No. 27/2012-CE dated 18-6-2012. The CCE(Appeals) rejected the appeal filed by the appellants. Therefore, the present appeal.

Arguments by the Appellants

a) The authorities have erred in law in rejecting the refund claim in toto for non-submission of proof of debit of refund amount was a substantive requirement of law and subsequent debits could not be taken cognizance of as compliance with the requirement of law. It is an admitted fact that they have filed the revised Return in which they have debited the CENVAT account to the extent of refund claim and the same has been accepted by the Commissioner (A). He further submitted that this is only a procedural violation and the substantive benefit cannot be denied on procedural and technical violations.

b) Also, the authorities have not appreciated the fact that at the time of refund, eligibility to CENVAT credit cannot be questioned. Reliance was placed relied upon the decision in the case of ***K Line Ship Management (India) Pvt. Ltd. vs. CST, Mumbai, 2017-TIOL-2406 CESTAT MUM.***

Decision

a) Rejection of refund of ₹ 2,07,499/- on the ground of ineligibility is not sustainable in law in view of the settled law that at the time of refund, eligibility cannot be questioned. In view of the decision in the case of ***K Line Ship Management (supra)***, I hold that it is not open to the Department to examine the eligibility of CENVAT credit while adjudicating the refund claim application, since in such matters of admissibility, the Department has mandated to take recourse under Rule 14 of the CCR.

b) Debiting the CENVAT account subsequent to the filing of the refund claim is only a procedural violation which cannot defeat the substantive right of the appellant to claim refund under Rule 5 of CCR, 2004.

c) In view of the decision of ***Kony Labs IT Services Pvt. Ltd. (supra)*** wherein it has been held that debiting the CENVAT account subsequently after filing the refund will not defeat the substantive right of the assessee.

d) The appeal is allowed and the authorities below are directed to sanction the refund with interest on delayed refund as per Section 11BB of the Central Excise Act, 1944.

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Makarand Joshi,
Company Secretary

CORPORATE LAWS

Case Law Update

Companies Act, 2013

G. Vasudevan (Petitioner) vs. Union of India (Respondent)- (Writ Petition) – Madras HC dated 2nd December, 2019

Facts of the case

- Section 164 prescribes the disqualification for appointment of directors
- Section 167 enumerates the instances which lead to vacation of office of director
- Section 164(2) provides that if company does not file financial statements for any continuous period of 3 FY/fails to repay deposit or interest thereon/redeem debentures on due date/pay any dividend and such failure continue for one year or more, then a director of such company is not eligible to be reappointed as director or appointed in any other company for a period of 5 years.
- Proviso to section 167 states that when a company commits default as given in abovementioned point, then a director of such defaulting company should vacate the post in all other companies except defaulting company.
- Writ petition was filed under article 226 of Constitution of India praying for issuance of a writ of Declaration, to **declare the proviso** in Section 167(1)(a) of the Companies Act, 2013 (the act) as ***ultra vires*** **the articles 14, 19(1)(g)** of constitution of India and declare **illegal and null and void**.

Arguments

- Petitioner contended that proviso to Section 167(1)(a) of the act leads to **unequal treatment** being meted out to Directors of a company defaulting based on whether they are directors in other companies or not.
- Further claims that differential classification is not based on an intelligible differentia and no justification provided for mandating vacation in other Co's, thus provision is being **arbitrary and violative of Article 14** of the Constitution of India
- Vacating directorship in other companies while retaining in defaulting company leads to **unfair treatment** to those who hold posts in multiple Companies
- Impugned provision **irrationally has detrimental effect** on companies other than defaulting co.
- Further it **punishes individual** Directors for the **defaults of Company** even when **fault** cannot be **directly attributed** to them

- Impugned provision violates **Principle of Natural Justice**
- **No distinction** is made between its **failure and failure beyond the means of directors** of the company
- Though corresponding provision is in Co's Act 1956 and Co's Act 2013 deal with similar subject, there is important distinction between the same. It is important to note that liability u/s. 274(1)(g) was not a ground for a director to vacate his post in the company.

Held

The court held that the **proviso can be justified** on two grounds **Firstly**, it has been reiterated that the exclusion of Directors from vacating their posts in the defaulting company while doing so in all other companies where they hold Directorship has been done in order to prevent the anomalous situation. **Secondly**, the underlying object behind the proviso to Section 167(1)(a) is seen to be the same as that of Section 164(2) both of which exist in the **interest of transparency** and **probity in governance.**

Owing to these justifications, the Court thus holds that the proviso to Section 167(1)(a) is **neither manifestly arbitrary** nor does it **offend any of the fundamental rights guaranteed under Part III of the Constitution of India**. The impugned provisions are ***intravires*** for all the reasons hereinabove. The **writ petition** is accordingly **dismissed**.

While taking above decision, the bench took note of various judgments of High Courts as well as Supreme Court, which are summarised as follows:

- Bench took the note of judgment passed by the Hon'ble Delhi High Court in ***Mukut Pathak & Ors. vs. Union of India, WP. No. 9088 of 2018*** in which the **need for insertion of proviso**[1] by Amendment Act, 2017 is discussed and deliberated.
- In both cases of Gujarat and Bombay HC mentioned below, the *vires* of Section 274(1)(g) was challenged as being violative of the fundamental rights enshrined in the Constitution of India.
- Gujarat HC in ***Saurashtra Cement Ltd. & Another vs. Union of India, (2006) SCC Online Guj 258*** held that the intention and purpose of section is to **disqualify errant directors, protect the investors** from mismanagement, **ensure compliance** in filing of annual accounts and annual returns. Further **primary purpose** of the disqualification is **not to punish the individual but to protect the public against future** conduct by person whose past record as directors shows a great danger to creditors and others. Failure is often a sign of incompetence from which the community should be protected.
- **Bombay High Court** in ***Snowcem India Ltd. & Ors. vs. Union of India, (2004) SCC Online Bombay 1085*** held that Section does not violate the directors fundamental rights under Article 19(1)(g) of Constitution The amendment does **not debar** the petitioners from **carrying on any business, trade or occupation**, only that the person have been rendered **incapable of becoming directors** in other companies and the said amendment became imperative in view of a large number of companies becoming defaulters. The said section d oes **not violate the rules of natural justice.**
- Hon'ble Supreme Court in ***N. Narayanan vs. Adjudicating Officer, Securities and Exchange Board of India, (2013) 12 SCC*** stated that **rationale** of annual **reporting** required under the Companies Acts, as follows: On the basis that 'forewarned is forearmed' the **fundamental principle** underlying the **Companies Act** has been

1. ***Kaynet Finance Ltd. vs. Verona Capital Ltd.,*** Appeal Lodging No. 318 of 2019 *i*n Arbitration Petition No. 716 of 2019 (Delhi HC).

that of **disclosure**. Filing of returns and disclosures regarding the finances of the company are vital to **ensure greater transparency** and **accountability** to the public which is the need of the hour in today's corporate set up.

Further the Hon'ble Supreme Court also stated that irrespective of whether directors are described as **trustees, agents or representatives,** they have a **duty** to act for the **benefit of the company** and must not derelict their duty towards the shareholders and investors in the company.

- Hon'ble Supreme Court in ***Official Liquidator, Supreme Bank Ltd. vs. P.A.Tendolkar, (1973) 1 SCC 602*** holds that the Directors of a company must be **responsible for actions and affairs of the company** which are **visible to the public** even superficially.
- By taking aid of Section 166 of Companies Act, 2013 Bench stated that the **object of inserting the proviso** is to ensure that a person who is a Director in a Company that does not file its returns for a period of three years or **does not return the money back to its investors or creditors does not continue as Director in other companies.** This proviso will also act as a deterrent from incorporating shell companies to park illegally obtained money. There is thus a rational nexus between the amendment and the object for which the amendment was brought about in the Companies Act 2013.

SEBI

Ruling of Securities Appellate Tribunal– Insider Trading

Type of Proceedings: SAT Order
Name of Case: ***Jubilant Life Sciences Ltd vs. SEBI, Jubilant Stock Holding Pvt Ltd., Mr. Shyam Sunder Bhartia, Mr. Hari Shankar Bhartia vs. SEBI***

Facts of the case
Jubilant First Trust Healthcare an unlisted entity was a subsidiary of Jubilant Life Sciences Ltd ("Jubilant Life Sciences"). Jubilant Life Sciences is a listed company. This Jubilant First Trust Healthcare (hereinafter referred to as, 'Jubilant First trust') entered into Memorandum of Understanding (MoU) for sale of one of its hospital on December 24, 2013 with Narayana Hrudalaya Pvt. Ltd. (NHPL).

This transaction was discussed in the Board Meeting of Jubilant Life Sciences on January 31, 2014. Appellants Mr. Shyam Sunder Bhartia and Mr Hari Shankar Bhartia during relevant period were Chairman and Co-chairman of appellant Jubilant Life Sciences. Also they were authorised signatories and directors of Jubilant Stock Holding Pvt. Ltd.

Factum of MOU were not disclosed to the exchanges. Ultimately, business transfer agreement and share purchase agreement was signed on March 3, 2014. Money received was also passed on the same day and this transaction was intimated to BSE by Jubilant Life Sciences on the very same day on March 3, 2014.

However, just two days before the said announcement i.e. on February 28, 2014, appellant Jubilant Stock Holding had purchased 1.25 lakh shares of appellant Jubilant Life Sciences, for ₹ 1.55 crore at National Stock Exchange of India Ltd. (NSE) and disclosed the purchase of the same under Regulation 3 and 3A of the PIT Regulations.

Therefore, it was alleged that though the appellants Shyam Sunder Bhartia and Hari Shankar Bhartia as well as Jubilant Stock Holding were holding the unpublished information about the MOU they had purchased the shares in violation of Reg 3 and 3A of PIT Regulations.

Charge: Insider Trading in shares when in possession of UPSI.

Arguments by Appellant

I. MOU is mere proposal

(1) MOU is nothing but a proposal and counter proposal consolidated in one document.

(2) Further, Counsel for Jubilant Life Sciences took SAT through the various clauses of the MOU from the copy files on record to buttress his arguments at a concrete agreement upon the acceptance of the proposals was yet to take birth.

(3) He further submitted that after execution of MOU the trading window was not closed and the same is not objected by SEBI, which would definitely show that the MOU was not UPSI.

(4) It was additionally submitted that the transaction was insignificant in terms of the total revenue, net worth, etc., of Jubilant Life Sciences and the purchase of the share was part of pre-determined plan to have a gradual acquisition of shares within the limits prescribed by the applicable regulations.

(5) On the basis of these conditions, counsel for Jubilant Life Sciences submitted that MOU was not transfer or sale. It was not enforceable. It was merely an offer. The price was yet to be agreed subject to the conditions as detailed above.

II. MOU offer was confidential

The offer was confidential. In the circumstances, had Jubilant Life Sciences disclosed the MOU to the exchanges and thereafter the offer failed, then the appellant Jubilant Life Sciences would have been blamed for creating false market for the appellant Jubilant Life Sciences.

III. Sale of hospital business not "disposal of undertaking"

1. Counsel for Appellant submitted that the sale of hospital for ₹ 44 crore by the subsidiary of Appellant Jubilant Life Sciences was not a disposal of substantial part of the undertaking of appellant Jubilant Life Sciences.

2. It would show that the fixed assets of Jubilant First Trust i.e., the subsidiary of Jubilant Life Sciences are 0.07% of the appellant Jubilant Life Sciences. The revenue for the financial year 2013-14 of this subsidiary was 0.33% of the Appellant Jubilant Life Sciences revenues.

3. It was, therefore, submitted that the sale of the hospital was not disposal of the substantial part of the undertaking and could not have impacted the price of the scrip at all. It was further submitted that the shares were purchased as a part of strategy to acquire less than 5% of the shares (4.98% in the present case) as permitted by Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as, "SAST Regulations").

4. The shares were not sold thereafter which would show that the Appellant has not purchased the shares "on the basis of the information" but merely as a part of the overall strategy.

Held by SAT

A. MoU was binding on subsidiary

1. MOU when executed cannot be termed as a price sensitive information, the deeper scrutiny of the clauses of the MOU would show that it had become as price sensitive information definitely some time before February 28, 2014 when ₹ 1.25 lakh shares for ₹ 1.55 crore were purchased by Appellant Jubilant Stock Holding of the Appellant Jubilant Life Sciences. It is to be noted that the MOU was binding on the subsidiary of Appellant Jubilant Life Sciences.

2. March 2, 2014 was Monday and Appellant Jubilant Stock Holding purchased the

shares of Appellant Jubilant Life Sciences on February 28, 2014 i.e. on Thursday.

3. Thus, only one working day was left for actual execution of the transfer deed. In the circumstances, as the transfer became certain, the purchase of shares could not have been made by Appellant Jubilant Stock Holding. This however, is depending on the issue as to whether the sale itself was a price sensitive information or not.

B. Sale of hospital business by subsidiary was material information

1. Regulation 2(ha)(iv)of SEBI(PIT) Regulations shows that disposal of the whole or substantial part of the undertaking can be termed as price sensitive information likely to be materially affect the price of the securities of the company.

2. It is to be noted that the sale of hospital of the subsidiary of Appellant Jubilant Life Sciences was definitely an important information which would have affected the prices of the Jubilant Life Sciences to some extent. While the revenue from Jubilant First Trust to the appellant Jubilant Life Sciences was ₹ 188.68 crore for the financial year 2013-14, the hospital was sold for ₹ 44 crore.

3. Further, the fact that the actual transfer was disclosed by appellant Jubilant Life Sciences would show it was Price Sensitive Information.

4. The argument of appellant on this count fails. MOU was executed long back on December 24, 2013, the shares were purchased on February 28, 2014 while actual transfer was effected on March 3, 2014 when MOU had practically ripened into the transfer.

5. Hence reasoning of AO of SEBI need not be interfered. Penalty of ₹ 10,00,000 on each appellant.

Cases referred: ***Mrs. Chandrakala vs. SEBI (Appeal No. 209 of 2011), Mr. Manoj Gaur vs. SEBI (Appeal No. 64 of 2012)***

IBC

M/s Embassy Property Developments Pvt. Ltd. (Appellant) vs. State of Karnataka & Ors. (Respondent) dated December 3, 2019 (Supreme Court)

Facts of the Case

- Tiffins Barytes Asbestos & Paints Ltd. is the Corporate Debtor. National Company Law Tribunal Chennai (NCLT) commenced the Corporate Insolvency Resolution Process (CIRP) and appointed an Interim Resolution Professional (IRP) *vide* order dated March 3, 2018. And, accordingly a Moratorium was also declared u/s. 14 of the Insolvency and Bankruptcy Code, 2016 (IBC).

- Before commencement of CIRP, the Corporate Debtor had entered into a mining lease granted by the Government of Karnataka (hereinafter referred as Government) under the Mines and Minerals (Development and Regulation Act) 1957 (MMDR Act 1957). However, due to violation of statutory rules and terms and conditions of the lease, the Government issued a notice of premature termination of the lease after commencement of CIRP.

- The IRP applied to the Director of Mines and Geology for availing the benefit of a deemed extension of the said lease in view of the ongoing CIRP. In the absence of any response from the director of Mines and Geology IRP filed a writ petition under section 8A(6) of MMRD Act 1957 before the High Court of Karnataka.

- While this writ petition was still pending with High Court, Government passed an order rejecting the proposal for deemed extension of mining lease on the ground that Corporate Debtor had not only contravened the terms and conditions of the lease deed but also provisions of Rule 37 of Mineral Concession Rules, 1960 and Rule 24 of Mineral (Other than Atomic and Hydro Carbons Energy Minerals) Rules, 2016.

- Post this; IRP withdrew the writ petition with liberty to file a fresh writ petition. However, instead of filing of writ petition filed a Miscellaneous Application (MA) before NCLT to set aside the order of the Government and seeking extension of lease.

- NCLT allowed MA on the ground that the order of the Government was in violation of the moratorium declared under IBC and directing the Government to execute 'Supplemental Lease Deeds'. This order was an ex parte order passed by NCLT (Bangalore).

- Challenging the order of the NCLT, Government filed a writ petition in the High Court, which granted a stay on the operation of the direction contained in the order of NCLT. When the writ petition came for hearing it was agreed by the Resolution Professional (RP) that the order of the NCLT could be set aside and the matter be relegated to the Tribunal, after giving an opportunity to the State to respond to the reliefs sought in the Miscellaneous Application.

- The High Court set aside the order of the NCLT and remanded the matter back to NCLT for a fresh consideration of the Miscellaneous Application.

- The State of Karnataka filed a statement of objection relating to jurisdiction of NCLT to adjudicate upon disputes arising out of the grant of mining leases under the MMDR Act, 1957, between the State lessor and the lessee.

- NCLT Chennai passed an order allowing the Miscellaneous Application and directed the Government to execute Supplemental Lease Deeds after overruling the objections raised by them.

- Challenging the order of NCLT, Government moved a writ petition before High Court (hereinafter referred as HC). The HC adjourned the matter and stayed operation of direction contained in impugned order of NCLT. Interim Stay was necessitated in view of a Contempt Application moved by the RP before the NCLT against the Government for their failure to execute Supplemental Lease Deeds.

- It is in said context that an appeal before the Supreme Court was filed by RP, Resolution Applicant and Committee of Creditors.

The Question for Consideration

What is the extent of jurisdiction of the NCLT with regard to issues which relate to public law albeit in relation to corporate debtors undergoing CIRP?

Arguments by the Appellant

- The essence of IBC is the revival of a Corporate Debtor and the resolution of its problems to enable it to survive as a going concern

- IBC is a unified umbrella of code and the remedies provided thereunder are all pervasive and exclusive

- HC cannot do anything that will tinker with or destroy the very Resolution Plan approved by the NCLT

- The whole object of IBC will get defeated if the Orders of NCLT are declared amenable to review by the High Court under Article 226/227

- Section 238 of IBC has overriding effect over all other statutes

Arguments by the Respondent

- Case falls under the category of inherent lack of jurisdiction on the part of a Tribunal
- exercise of jurisdiction by the Tribunal would certainly be amenable to the jurisdiction of the High Court under Article 226
- order passed by a statutory/*quasi judicial* authority under certain special enactments such as the MMDR Act, 1957 falls in the realm of public law

Held

Supreme Court observed that:

- The MMDR Act, 1957 is a Parliamentary enactment which is in the public interest.
- The relationship between the Corporate Debtor and Government under the mining lease is ***not just contractual but also statutorily governed*** by MMDR Act, 1957 involving the aspect of 'public interest'.
- The decision of the Government to refuse deemed extension of lease is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action.
- The NCLT, being a creature of a special statute to discharge certain specific functions, **cannot be elevated to the status of a superior court** having the power of judicial review over administrative action. The NCLT is not a Civil Court which has jurisdiction by virtue of Section 9 of Civil Procedure Code, 1908 to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. NCLT can exercise only such powers within the **contours of jurisdiction as prescribed by the statute**, the law in respect of which, it is called upon to administer.
- There are no separate provisions in the Companies Act, 2013 exclusively dealing with the jurisdiction and powers of NCLT. Section 60 of the IBC gives an indication about the powers and jurisdiction of the NCLT. Any question of law or fact, arising out of or in relation to insolvency resolution will be within the jurisdiction of the NCLT.
- It was held that "a decision taken by the government or a statutory authority in relation to a matter which is in the **realm of public law**, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution".
- As per the scheme of provisions of IBC it is to be noted that if any right is to be exercised by the corporate debtor that falls outside the purview of the IBC, **especially in the realm of the public law,** they cannot bypass and go before NCLT for the enforcement of such a right.

Supreme Court held that NCLT did not have jurisdiction to entertain an application against the Government for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was *coram non judice.*

In the same judgment, Supreme Court has also elaborated on extent and limitations of Section 14 (Moratorium period) of IBC. Curious readers may read judgment to have better understanding of the same.

[Ref. ***M/s. Embassy Property Developments Pvt. Ltd. ...Appellant(s) vs. State of Karnataka & Ors. Respondent(s) - Civil Appeal No. 9170 of 2019 (@ Special Leave Petition (C) No. 22596 of 2019)***]

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CA Tejas Davda

Repository and Proficiency Test for Independent Directors

Historical Background of Good Governance vis-a-vis Role of Independent Directors

'Good' governance in the Indian context is not a new concept: India had ancient guiding scriptures such as the Arthashastra and the Manusmriti, propounding that the "Raja" (i.e., the King) and his ministers must follow a strict code of discipline which furthers the best interests of their "Praja" (i.e., the subjects). Perhaps history needs to repeat itself. Today's competitive and dynamic business environment requires a balanced blend of a sustainable growth model coupled with sound governance. Since the global financial crisis of 2007-08, Corporate India has accepted this as the "new normal" to survive this period of transition. However, practical reality is far from ideal.

Indian promoters had embodied the status of a 'Raja', considered as the final authority on all matters of his kingdom. The stakeholders of his kingdom, i.e., the 'Praja', had been reduced to mere spectators. This is not to say all Rajas are bad – India was built on the hard work and forward thinking leadership of a number of historical and 'corporate' Rajas.

Recognizing that this phenomenon has resulted in a significant loss to the Indian economy and dented investor confidence. Accordingly, it was proposed that Indian businesses make a transition from the 'Raja' model to the 'Custodian' or 'Trusteeship' model of governance. In the Raja model, the promoter's self-interest precedes the interests of the Praja. Custodian model would translate to protecting the minority and instilling a greater sense of accountability for the majority shareholders managing the business affairs.

Independent directors are essentially the custodians of good corporate governance. Though not required to be involved in the day-to-day running of companies, they are expected to monitor the actions of the executives and safeguard the interests of stakeholders. The rationale behind having independent directors is that it would increase the quality of board supervision and reduce the possibility of damaging conflict of interest. The whole edifice of good corporate governance is dependent on efficacy and effectiveness of independent directors. Independence, when it comes to boards, allows a director to be objective and evaluate performance and well-being of company without any conflict of interest or undue influence of interested parties. Having a majority of Independent Directors allows outside directors to feel they have support in raising contrary points of view. Otherwise, it may be difficult for a single outside director to raise an issue that may be sensitive to family or founder. The critical reason for breakout of recent scams is that most Indian companies are controlled by promoters and independent directors are only independent on paper. They are individuals familiar to a promoter or from a known close group. This familiarity between promoters and independent directors disturbs the true independent role of directors.

It's a bitter truth that, in majority cases, the independent directors are hired only for the sake of compliance of the Companies Act, 2013 and listing regulation, they are neither hired for better corporate governance nor for protecting minority shareholders' interests. Therefore, it's apt to say that independent directors are though appointed in the interest of the Company and the stakeholders, they end up doing good to the promoters. Even if few of them are discharging their duties and responsibility prudently and effectively but at the end of the day the decision of the majority prevails, which dilutes their effectiveness.

Changing dynamics and number game

The role of the independent directors has not changed. Expectations have increased in recent times. In the past, if there were corporate governance lapses, questions were raised on the competence of companies and their auditors. These days, however, the questions during such cases are on the competence of companies, auditors and their independent directors.

The current business environment is marked by regulators calling for greater emphasis on corporate governance in the wake of certain frauds/scams, proxy advisory firms influencing important decisions for which shareholder approval is required, foreign players demanding greater hygiene checks for deals and global standards trickling down into India Inc. In such a scenario, the independent director's role as a watchdog of sorts gains even more prominence.

Liability of directors have increased manifold and processes are becoming more onerous. Personal credibility is at stake and reputation is getting caught up in the midst of controversy, where the independent director may not be able to demonstrate his/her position effectively. With increasing corporate governance issues over the last few months, independent directors are uncomfortable being on the boards of companies with unclear operational practices. Independent directors feel better to move out at the slightest of doubt.

The number of independent directors who resigned from board positions doubled in 2019, compared with total exits in the previous two years, as greater liability, rising number of corporate governance cases, increasing fear of fraud risk and chances of personal reputation being at stake led to the exodus. A record 1,393 independent director posts were vacated in 2019, compared with 767 in 2018 and 717 in 2017, according to data from market tracker nseinfobase.com, run by Prime Database.

Way towards new regime

Regulatory Provisions

MCA notified new Rules by exercising powers conferred upon it by Section 150 and Section 469 of the Companies Act, 2013 named as "Companies (Creation and Maintenance of databank on Independent Directors) Rules, 2019" on 22nd October, 2019 also alongside new rules on databank of Independent Directors, MCA also notified "Indian Institute of Corporate Affairs" located at Manesar, Gurugram (Haryana) as an "institute having expertise in creation and maintenance of such databank".

Also, MCA amended Rule 6 of Companies (Appointment and Qualifications of Directors) Rules, 2014. All the notifications to be made effective from 1st December, 2019. An attempt has been made to simplify the harmonious interpretations of these 3 very important notifications affecting the process of appointments of Independent Directors on the Board of Indian Companies who is required to appoint Independent Directors in accordance with Section 149(4) of the Companies Act, 2013 and Rule 4 of the Companies (Appointment and Qualifications of Directors) Rules, 2014.

150.(1) Subject to the provisions contained in sub-section (5) of section 149, an independent director may 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 anybody, institute or association, as may be notified by the Central Government, having expertise in creation and maintenance of such data bank and put on their website for the use by the company making the appointment of such directors:

Provided that responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an independent director shall lie with the company making such appointment.

IICA, Manesar has been notified by the MCA on 22nd October, 2019 to be the "body or institute" as an institution having expertise in creation and maintenance of such databank.

When the Companies Act, 2013 was notified, Section 150 was kept inactive by the simple reason that absence of a body/institution who can create and maintain the databank. Alongside this companies falling under Section 149(4) and listed companies mandatorily needed to appoint Independent Directors. In the due course, in which the companies who are appointing/ re-appointing were not affected by Section 150 provided such appointments and reappointments are made in terms of Section 149(6) and provisions of SEBI (LODR) Regulations, 2015 (as amended from time to time), the Central Government was in process of creating the database of Independent Directors.

The interpretation of the expression "an independent director **may** be selected from a databank...." stands changed. The word "may" was interpreted in its literal meaning that any independent director appointed on the Board of any Indian Company may not be selected from the database as there was no database. Now, the interpretation has been affected by the amended Rule 6(1) of Companies (Appointment and Qualifications of Directors) Rules, 2014 and Rules 3 and 4 of Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019.

Repository of Independent Directors

The Amendment to Companies (Appointment and Qualification of Directors) Rules, 2014 says every individual, who has been appointed as an Independent Director in a Company shall within a period of 3 (three) months from the commencement of the said Rules, or who intends to get appointed as an Independent Director in a company after December 1, 2019 shall before such appointment, apply to the 'Indian Institute of Corporate Affairs (IICA) for inclusion of his/her name in the data-bank for a period of 1 (one) year or 5 (five) years or for his/her lifetime as the case may be. Subject to certain exemptions as provided hereinbelow, every individual whose name is included in the data bank shall pass an online proficiency self-assessment test conducted by the institute within a period of one year from the date of inclusion of his/her name in the data bank, failing which, his/her name shall stand removed from the data-bank of the institute. A person whose name appears in the data bank may restrict his personal information to the institute, to be disclosed in the data bank and may change his particulars within 30 days from the date of any change.

Exemption from the Online Proficiency Self Assessment Test

Individual who has served for a period of not less than ten years as on the date of inclusion of his name in the databank as director or key managerial personnel of:

a) listed public company

b) unlisted public company having a paid-up share capital of rupees ten crore or more

is not required to pass the online proficiency self-assessment test.

Utility of the database maintained

The data bank shall contain certain details in respect of each person included in the data bank who are eligible and willing to be appointed to be independent director. The information available in the data bank shall be provided by the Institute only to the companies required to appoint independent directors. However, necessary due diligence has to be carried out by the Company before appointment of any such independent director.

Well begun is half done

Removing years of slack and frequent allegations of corruption, nepotism and mute spectators in corporate boardrooms, the appointment of independent directors is set for an overhaul with Ministry of Corporate Affairs deciding to conduct examinations for such high-level appointments. The Indian Institute of Corporate Affairs under the MCA commenced holding of the examination in December and to make the process stringent, a score of 60 per cent marks will be mandatory criteria for qualification. It is not just domain knowledge that will be put to test, the institute will conduct an online proficiency self-assessment test covering companies law, securities law, basic accountancy and such other areas relevant to the functioning of an individual acting as an independent director. This method may help in bringing professionalism, alertness and more accountability leaving aside a usual passive role. The latest development with respect to a mandatory examination that all candidates chosen to be independent directors must appear for, reinforces the increased scrutiny that this role now faces. The expectations one has from an independent director have undergone a massive transformation.

"Formulating rules and conducting an online assessment for independent directors does not guarantee good governance and compliance."

While the intention of the MCA is laudable, an online assessment may not be the solution. Independence is basically a state of mind that one has to exhibit in a limited time-frame which cannot be taught in an online course. The IICA appears to be thinking that some level of knowledge of company and securities laws and accountancy should suffice for an independent director. What is possibly more necessary, however, is a list of things that companies cannot do under various laws that would apply to that entity.

Also, various professional courses in India are proof that just passing a theoretical exam does not necessarily translate into performing correctly in the course of doing one's duties. Whatever be the structure and content of the examination, chances of it transforming the present set of independent directors into an agile set of people who can smell and catch wrongdoing in an instant are limited.

The idea of having a single exam for all the independent directors is not sound since the skills needed to be in the board of a company vary significantly, said an independent director on the board of an auto company. The proficiency test requirements are wide because they adopt a "one size fits all" approach. Presumably, the test would have very little regard, if at all, to the type of company, type of controlling shareholder, nature of business or other specificities involving various boards. In that sense, independence must be tailored to suit individual circumstances. There is no indication thus far that the test would account for the divergence of expectations from board independence.

Measure such as proficiency certification carry risk, as they carry a false sense of security to shareholders and other beneficiaries of vigilance by independent directors. Capabilities assessed by a proficiency test are not always likely to bear results in real-life situations that independent directors encounter on a daily basis. Nevertheless, when confronted with questions regarding their actions or omissions, independent directors may likely use their proficiency testing as a shield against possible liability. Such a potential safe harbor defence, one that ultimately needs to be tested in the courts, will undermine the entire proficiency testing exercise.

Instead of an exam, the IICA should mandate training for independent directors every year. Since laws keep changing along with events in the corporate world, a training programme designed on live situations that permits independent directors to enact their roles is the need of the hour. Almost all corporate governance violations can be traced to lapses by the management or those charged with governance. Hence, these training programmes should also focus on the ability to say no and show dissent in writing. The MCA should ensure that just to meet the quorum requirements of women directors and independent directors, companies should not choose family and friends with no qualifications to merit that appointment.

An Inapt Solution

In all, it is hard to argue against a sustained overhaul of the board independence system in India, as it is an important tool for corporate governance. But, measures such as a databank of independent directors and their assessment through an online proficiency self-assessment test are hardly apposite for the situation, as they lead to unintended consequences. Ultimately, the measures must be firm-specific and not bureaucratic interventions of the kind presently attempted.

Reference

https://corporate.cyrilamarchandblogs.com/tag/independent-directors/

https://taxguru.in/company-law/database-independent-directors.html

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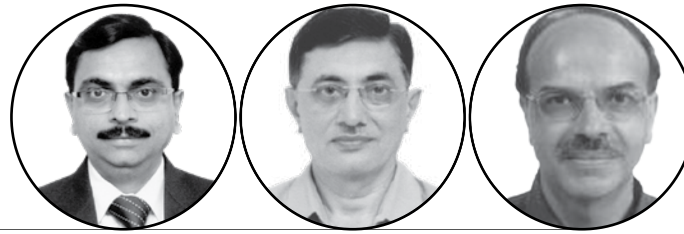
Power is of two kinds. One is obtained by the fear of punishment and the other by acts of love. Power based on love is a thousand times more effective and permanent then the one derived from fear of punishment.

– Mahatma Gandhi



OTHER LAWS

FEMA – Update and Analysis

CA Mayur Nayak, CA Natwar Thakrar & CA Pankaj Bhuta

In this article, we have discussed recent amendments through updating Master Directions and FAQs issued by RBI. In addition few selected recent compounding orders issued by RBI are also discussed

A. Updated through Master Directions

1) Master Direction No. 15– Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad (Updated as on September 18, 2019)

❖ ***Amendment in Section B - Direct Investment (or financial commitment) outside India, Para B.1 Automatic Route***

In terms of Regulation 6 of Notification No. 120 dated 7th July, 2004 as amended from time-to-time, Indian entities are allowed to offer any form of guarantee – corporate or personal (including the personal guarantee by the indirect resident individual promoters of the Indian Party)/ primary or collateral / guarantee by the promoter company / guarantee by group company, sister concern or associate company in India subject to certain conditions.

It has been further stipulated by the Reserve Bank of India that all corporate guarantees (including performance guarantees and Bank Guarantees / SBLC) are required to be reported to the Reserve Bank in Form ODI-Part I through their designated AD, at the time of issuance of such guarantees. Guarantees issued by banks in India in favour of WOS / JV outside India would be subject to prudential norms issued by the Reserve Bank of India (Department of Banking Regulation) from time-to-time.

❖ ***Amendment in Para B.14 Obligations of Indian Party (IP) and Resident Individual (RI)***

The Statutory Auditors of the Indian Party are required to certify that law of the host country does not mandatorily require auditing of the books of account of JV/ WOS and the figures in the APR are as per the un-audited accounts of the overseas JV/ WOS.

It has been clarified that exemption from filing the APR based on unaudited balance sheet will not be available in respect of JV/WOS in a country/jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or any other country / jurisdiction as prescribed by Reserve Bank of India.

(**Comment: This is a welcome step which shows RBI's faith on audited financial statements. Auditors need to be vigilant in auditing accounts of an entity in the FATF Jurisdiction.**)

❖ ***Allotment of Unique Identification Number (UIN)***

The Unique Identification Number allotted to each JV or WOS abroad, is required to be quoted in all correspondence with the Reserve Bank. AD Category-I banks may allow investment (or financial commitment) in an overseas concern set up by an Indian Party, in terms of Regulation 6 of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, only after the Reserve Bank has allotted necessary Unique Identification Number to the overseas project.

2) **Master Direction No. 18 – Reporting under Foreign Exchange Management Act, 1999 (updated as on September 18, 2019)**

In view of significant changes in the reporting requirements, RBI has replaced the Master Direction rather than showing the changes in track mode for reader convenience. The changes are listed at the end of Master Direction. The same can be viewed at

https://rbidocs.rbi.org.in/rdocs/content/pdfs/13MDR291215.pdf

3) **Master Direction No. 14 - Deposits and Accounts (updated as on September 03, 2019)**

❖ ***Insertion of definition of startup at para 2.4 (Para 2)***

2.4 A 'Startup' is an entity which complies with the conditions laid down in Notification No. GSR 180(E) dated February 17, 2016 issued by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India.

(Inserted by Amendment Notification No. FEMA 10(R)/(1)/2016-RB notified vide G.S.R. No. 570(E) dated June 1, 2016 intimated vide AP (Dir Series) Circular No. 77[(2)/10(R)] dated June 23, 2016.)

❖ ***Foreign Currency Accounts that can be held in India (Para 3)***

In the credits permitted to EEFC Account, following clause i. has been inserted-

i. Payments received in foreign exchange by an Indian startup arising out of sales/ export made by the startup or its overseas subsidiaries.

(Inserted by Amendment Notification No. FEMA 10(R)/(1)/2016-RB notified vide G.S.R.No.570(E) dated June 1, 2016 intimated vide AP (Dir Series) Circular No. 77[(2)/10(R)] dated June 23, 2016.)

❖ ***Foreign Currency Accounts that can be held outside India (Para 4)***

In Para 4.1 following clause d. has been inserted-

d) Insurance/ reinsurance companies registered with Insurance Regulatory and Development Authority of India

(IRDA) to carry out insurance/ reinsurance business.

(Inserted by Amendment Notification No. FEMA 10(R)/(1)/2016-RB notified vide G.S.R.No.570(E) dated June 1, 2016 intimated vide AP (Dir Series) Circular No. 77[(2)/10(R)] dated June 23, 2016. **Prior to insertion it read as "Life Insurance Corporation (LIC) of India or General Insurance Corporation (GIC) of India and its subsidiaries." This is a welcome amendment which brings at par all insurance companies.)**

In Para 4 following sub-para 4.9 has been inserted–

4.9 Indian startup, having an overseas subsidiary, may open a foreign currency account with a bank outside India for the purpose of crediting to the account the foreign exchange earnings out of exports/ sales made by the said startup or its overseas subsidiary. The balances held in such accounts, to the extent they represent exports from India, shall be repatriated to India within the period prescribed for realization of exports, in Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 dated January 12, 2016, as amended from time to time.

(Inserted by Amendment Notification No. FEMA 10(R)/(1)/2016-RB notified vide G.S.R. No. 570(E) dated June 1, 2016 intimated vide AP (Dir Series) Circular No. 77[(2)/10(R)] dated June 23, 2016.)

(Comment: This is a good move to encourage startups in India and help them go global)

❖ ***Non-Resident (Ordinary) Account Scheme – NRO account (Para 6)***

In Para 6 following sub-para 6.4 has been inserted-

6.4 Opening of accounts by individuals/ entities of certain countries:

(a) Opening of accounts by individuals / entities of Pakistan nationality / ownership and entities of Bangladesh ownership requires prior approval of the Reserve Bank. However, individuals of Bangladesh nationality may be allowed to open these accounts subject to the individual/s holding a valid visa and valid residential permit issued by Foreigner Registration Office (FRO) / Foreigner Regional Registration Office (FRRO) concerned.

(b) Authorized Dealers may open only one Non-Resident Ordinary (NRO) Account for a citizen of Bangladesh or Pakistan, belonging to minority communities in those countries, namely Hindus, Sikhs, Buddhists, Jains, Parsis and Christians, residing in India and who has been granted a Long Term Visa (LTV) by the Central Government. The account will be converted to a resident account once such a person becomes a citizen of India. This account can also be opened if such person has applied for LTV which is under consideration of the Central Government, in which case the account will be opened for a period of six months and may be renewed at six monthly intervals subject to the condition that the individual holds a valid visa and valid residential permit issued by Foreigner Registration Office (FRO) / Foreigner Regional Registration Office (FRRO) concerned. The opening of such NRO accounts will be subject to reporting of the details of accounts opened by the concerned Authorised bank to the Ministry of Home Affairs (MHA) on a quarterly basis. The report shall contain details of (i) name/s of the individual/s; (ii) date of arrival in India; (iii) Passport No. and place/ country of issue; (iv) Residential Permit/Long Term Visa reference and date & place of issue; (v) name of the FRO/FRRO concerned; (vi) complete address and contact number of the branch where the bank account is being maintained. The Head Office of the AD bank shall furnish the above details on a quarterly basis to the Under Secretary (Foreigners), Ministry of Home Affairs, NDCC-II Building, Jai Singh Road, New Delhi – 110 001. AD banks are advised to ensure strict compliance to these instructions.

(Modified by insertion of (a) and (b), vide Foreign Exchange Management (Deposit) (Amendment) Regulations, 2018 Notification No. FEMA 5 (R)(1)/2018-RB dated November 09, 2018 and AP (DIR Series) Circular No. 28 dated March 28, 2019. Prior to insertion it read as "Opening of accounts by individuals/ entities of Pakistan nationality/ ownership and entities of Bangladesh ownership requires prior approval of the Reserve Bank. However, individuals of Bangladesh nationality may be allowed to open these accounts subject to the individual/ s holding a valid visa and valid residential permit issued by Foreigner Registration Office (FRO)/ Foreigner Regional Registration Office (FRRO) concerned.")

❖ ***Special Non-Resident Rupee Account - SNRR account (Para 7)***

In Para 7 following sub-para 7.5 has been inserted–

7.5 The tenure of the SNRR account should be concurrent to the tenure of the contract/ period of operation/ the business of the account holder and in no case should exceed seven years. Approval of the Reserve Bank shall be obtained in cases requiring renewal. However, the restriction of seven years will not be applicable to SNRR accounts opened by persons resident outside India for the purpose of making investment in India in accordance with Foreign Exchange Management (Transfer or Issue of Security By a Person Resident Outside India) Regulations, 2017, as amended from time to time.

(Modified vide Foreign Exchange Management (Deposit) (Amendment) Regulations, 2018 Notification No. FEMA 5 (R)(1)/2018-RB dated November 09, 2018 and AP (DIR Series) Circular No.28 dated March 28, 2019. Prior to modification it read as, "The tenure of the SNRR account should be concurrent to the tenure of the contract/ period of operation/ the business of the account holder and in no case should exceed seven years. No operations are permissible in the account after seven years from the date of opening of the account.")

❖ ***Escrow Account (Para 8)***

In Para 8 following sub-para 8.2 has been replaced-

8.2 Transactions shall be in accordance with the Foreign Exchange Management (Transfer or Issue of Security by a person resident Outside India) Regulations, 2017 as amended from time to time and relevant regulations issued by the Securities and Exchange Board of India.

(FEM (Transfer or Issue of Security by a person resident Outside India) Regulations, 2000 repealed and replaced by FEM (Transfer or Issue of Security by a person resident Outside India) Regulations, 2017 vide FEMA Notification No. 20(R)/2017-RB dated November 7, 2017)

❖ ***Other Accounts / Deposits (Para 12)***

In Para 12 following sub-para 12.4 has been inserted-

12.4 An Authorised Dealer in India may allow a Foreign Portfolio Investor and a Foreign Venture Capital Investor, both registered with the Securities and Exchange Board of India (SEBI) under the relevant SEBI Regulations, to open and maintain a non-interest bearing foreign currency account for the purpose of making investment in accordance with Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2017, as amended from time to time.

(Inserted vide Notification No. FEMA 5(R)(1)/2018-RB dated November 09, 2018 and AP (DIR Series) Circular No. 28 dated March 28, 2019.)

B. Updated through FAQs

1. Overseas Direct Investments

RBI update on FAQs on Overseas Direct Investments as on 19th September 2019 contains the following Changes:

❖ ***Answer to Question No. 64 has been updated.*** *(update is highlighted in bold & italics)*

Q.64 Can an Indian Party (IP) set up a step-down subsidiary/joint venture in India through its foreign entity (WOS/JV), directly or indirectly through step-down subsidiary of the foreign entity?

Ans: No, the provisions of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time-to-time, dealing with transfer and issue of any foreign security to Residents do not permit an IP to set up Indian subsidiary(ies) through its foreign WOS or JV nor do the provisions permit an IP to acquire a WOS or invest in JV that already has direct/indirect investment in India ***under the automatic route. However, in such cases, IPs can approach the Reserve Bank for prior approval through their Authorised Dealer Banks which will be considered on a case to case basis, depending on the merits of the case.***

C. Analysis of recent compounding orders issued by RBI:-

1) Borrowing and Lending in Rupees Regulation (FEMA 4/2000-RB)

Borrowing in rupees from NRI other than by way of issue of Non-Convertible Debenture.

Applicant	Orient Box Movers Private Limited (OBM)
Compounding Application Number	C.A. 4904/2019

Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 71,593/-
Date of order	09th August 2019
Facts of the case	The applicant (OBM) had incurred huge losses from the contract with MSWC and accordingly was not in a financial position to repay the secured loans availed from Citizen Credit Co-op Bank. Eventually OBM was classified as Non Performing Asset (NPA) by Citizen Credit Co-op Bank in December 2012. In order to keep the company afloat, OBM decided to avail unsecured rupee loan from the son-in-law of the director of the company after passing a Board resolution to this effect. The loan of ₹ 28,79,100/- was sent by wire transfer from Australia by son-in-law of the director. The proceeds of the loan were utilized towards repayment of overdue bank loan and towards miscellaneous payments for keeping the company afloat. On application, RBI granted approval to the company for repayment of loan wherein the applicant was advised to immediately unwind the transaction. Pursuant to the aforesaid RBI approval, the applicant made repayment of principal amount of loan of ₹ 28,79,100/- on 09th July 2018 and had also made the payment of ₹ 13,92,211.25 on 27th February 2019 towards interest of the said loan.
Contravention	Borrowing in rupees from NRI other than by way of issue of Non-Convertible Debenture: Regulation 5(1)(i) of Notification No. FEMA 4/2000-RB states that "…. a company incorporated in India may borrow in rupees on repatriation or non-repatriation basis, from a non-resident Indian or a person of Indian origin resident outside India, by way of investment in Non-Convertible Debentures (NCDs) issue of which is made by public offer." Further, Regulation 5(1)(v)(A) Notification No. FEMA 4/2000-RB states that "the borrowing company files with the nearest office of the Reserve Bank, not later than 30 days from the date of receipt of remittance for investment in Non-Convertible Debentures (NCDs), full details of the remittances received, namely; (a) a list containing names and addresses of Non-Resident Indians (NRls) who have remitted funds for investment in Non-Convertible Debentures (NCDs) on repatriation and / or non-repatriation basis, (b) amount and date of receipt of remittance and its rupee equivalent; and (c) names and addresses of authorised dealers through whom the remittance has been received;"

	Further, Regulation 5(1)(v)(B) Notification No. FEMA 4/2000-RB states that "the borrowing company files with the nearest office of the Reserve Bank, not later than 30 days from the date of issue of Non-Convertible Debentures (NCDs), full details of the investment, namely; (a) a list containing names and addresses of Non-Resident Indians (NRls) and number of Non-Convertible Debentures (NCDs) issued to each of them on repatriation and / or non-repatriation basis and (b) a certificate from the Company Secretary of the borrowing company that all provisions of the Act, rules and regulations in regard to issue of Non-Convertible Debentures (NCDS) have been duly complied with." Since the applicant had raised loans through borrowings from NRI without using the requisite public offer route of issuance of non-convertible debenture, the applicant had contravened the provision of the above provision of Notification No. FEMA 4/2000-RB.

2) **Transfer or Issue of Security by a Person Resident Outside India (Inbound Investment) (FEMA 20/2000-RB)**

(i) **Prior approval was not sought from Reserve Bank in transfer of shares from resident to non-resident by way of gift; (ii) the face value of the shares transferred by way of gift exceeds 5% of the paid up capital of the Indian Company and (iii) the value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift in the calendar year exceeds the rupee equivalent of USD 25000/-.**

Applicant	S Namasivayam
Compounding Application Number	C.A. 915/2019
Compounding Authority Name	Foreign Exchange Department, Chennai
Amount imposed under Compounding Order	₹ 10,01,560/-
Date of order	27th August 2019
Facts of the case	The applicant is an individual Shri S. Namasivayam, a resident shareholder in the company M/s. Iminsight Software Private Limited.
	The applicant transferred by way of gift equity shares of face value ₹ 100/- each to the Non-Resident Shri N. Senthil Kumar at a notional share value of ₹ 190.93/- without Reserve Bank's approval on 16th May 2010.

	The transfer of equity shares by way of gift exceeded 5% of the paid-up capital of the Indian company. Also, The transfer of equity shares by way of gift exceeded the rupee equivalent of USD 25000/-.
Contravention	<u>Transfer of security as a gift by a person resident in India to the person resident outside India:</u> As per regulation 10A(a)(i) of Notification No. FEMA 20/2000-RB when a person resident in India who proposes to transfer to a person resident outside India any security by way of gift shall make an application to Reserve Bank for its approval. Further, Regulation 10A(a)(ii)(b) of Notification No. FEMA 20/2000-RB states that a person resident in India who proposes to transfer to a person resident outside India any security by way of gift shall make an application to Reserve Bank and Bank may grant such approval on being satisfied of the condition that the gift does not exceed 5% of the paid-up capital of the Indian company. Also, 10A(a)(ii)(e) of Notification No. FEMA 20/2000-RB, a person resident in India who proposes to transfer to a person resident outside India any security by way of gift shall make an application to Reserve Bank and Bank may grant such approval on being satisfied of the condition that the value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift in the calendar year does not exceed the rupee equivalent of USD 25000/- (as then applicable). Since in the present case the applicant being a person resident in India has transferred shares by way of a gift to a person resident outside India without the prior approval of the RBI, it was held that the applicant had contravened provisions of FEMA 20/2000-RB.
Comments	Though Foreign Exchange Management (Transfer or Issue of Security By a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; Regulation 10(5) of extant FEMA 20(R)/2017-RB dated 07/11/2017 corresponds to Regulation 10A(a)(i), Regulation 10A(a)(ii)(b), Regulation 10A(a)(ii)(e) of erstwhile FEMA 20/2000- RB dated May 3, 2000.

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Understanding Standards on Quality Control (SQC) 1

CA Milan Mody & CA Sandesh Rajapkar

Understanding Standards on Quality Control (SQC)-1 on Quality Control for Firms that Perform Audits and Reviews of Historical Financial Information, and Other Assurance and Related Services Engagements

Standard on Quality Control (SQC-1) - Framework for quality control

The Institute of Chartered Accountants of India ("the ICAI") with the goal of strengthening the accountancy profession in India and to provide high quality services to stakeholders have been constantly developing, updating the technical standards and other material issued by it (e.g. Standards on Auditing, Standards on Review Engagements, Standards on Assurance Engagements, Standards on Related Services). The non-observance of these standards is not only professionally delinquent but now it is also non-compliance with the provisions of the corporate law. The standards on auditing and other framework need to be observed in the letter and spirit to ensure the quality of the assurance engagements.

In June 2005, the International Auditing and Assurance Standards Board issued the International Standards on Quality Control (ISQC)-1 to provide guidance regarding a firm's responsibilities for its system of quality control for audits. In accordance with the convergence project the ICAI issued another standard, SQC-1 Standard on Quality Control in the year 2008. The purpose of SQC-1 is to offer guidance with respect to the responsibilities of a firm for the system of quality control for its assurance engagements and related services engagements.

Chartered Accountants in headlines

In recent times, India has been making the headlines of corporate frauds, the stakeholders particularly regulators have been demanding the need of regularly updating the methods/controls of preventing or detecting them. The role of the auditor and quality of the audit processes are constantly being challenged. Some of the areas which have come into constant scrutiny are as under:

- Independence – Audit services vs. non-audit services
- Familiarity threat
- Quality of engagement monitoring and oversight
- Quality of process and ability to detect errors and frauds

The expectation gap between what is the role of the auditor and what is the expectation of the stakeholders and public at large is glaring.

SQC-1 as a standard has various guidelines and measures to address the above issues and it focuses on the larger aspects of the practice management, leadership and the systems of quality control.

Importance of compliance with SQC-1

A recent NFRA report on a leading practicing firm has focused on various aspects of compliance with SQC-1. Compliance with requirement of SQC-1 gives both tangible and intangible benefits. The compliance is demonstrated through various certificates like peer review certificate, report of quality review board and also the benefits of compliance are:

- Greater confidence amongst clients and prospective clients. Peer review certificate is mandatory for a firm which carries out audits of listed and large entities
- Provides assurance to the organisation and also the outside world
- Creates a professional environment
- Acts as an shield in case of a regulatory action/review
- Helps in development of personnel and imbibing a culture of high quality audits. This in turn, leads to greater client satisfaction
- Clean peer review report can act as a morale boaster for the entire organisation
- Keeps the firm prepared for future challenges

Tone at the top

Firm level quality controls are instituted and sensed strongly within the firm by the top management. SQC-1 *Quality Control for Firms that Perform Audits & Reviews of Historical Financial Information and Other Assurance & Related Services Engagement* enlightens the importance of firm level quality controls. It acts as Internal Control for CA Firms. The preamble of SQC reads as *"it establishes standards and provide guidance regarding a firm's responsibilities for its system of quality control for audits and reviews of historical financial information, and for other assurance and related services engagements."* The focus of SQC-1 is on "Tone at the top",

Key aspects of SQC-1

The objective is to provide the firm with reasonable assurance that its personnel comply with applicable professional standards as well as the regulatory and legal requirements in addition to the firm's policies in respect of quality and ethics. Standard requires that the documented quality control policies and procedures to be communicated with a message that its observance is the responsibility of all the members. It also requires the personnel to communicate the concerns through the feedbacks and internal discussions.

This Standard requires a firm to establish a system of quality control that includes policies and procedures addressing the following six inter related elements:

i) Leadership responsibilities for quality within the Firm;

ii) Ethical requirements;

iii) Acceptance and continuance of client relationships and specific engagements;

iv) Human resources;

v) Engagement performance;

vi) Monitoring

The ICAI has always been emphasizing the importance of SQC through various announcements, amendments, clarifications etc. Considering its importance, the first Implementation Guide was issued for its easier implementation at the grassroots level in the year 2008.

Leadership responsibilities for quality within the Firm

- SQC require that the firm's managing partner (MP) or equivalent to assume the ultimate responsibility of developing, communicating and monitoring the quality control policies and procedures;
- Aforesaid responsibilities can also be delegated by MP to a partner or personnel with sufficient and appropriate experience, authority and ability;
- MP is required to emphasize to personnel that fee considerations and scope should not infringe upon the quality of work, documentation etc.;
- Performance evaluation of services and incentive system within the firm shall clearly demonstrate its overarching commitment to quality.

Ethical requirements

- Integrity, objectivity, professional competence, due care, confidentiality, and professional behaviour are the basic ethical requirements to be adhered by every member and other personnel's within the firm. Independence is the critical element of services offered.
- The designated independence and ethics officer shall ensure that the independence and ethical requirements as enumerated in code are communicated and also complied with, not only by the personnel but also the other organisation which assists in the engagement.
- Policies are designed to identify and evaluate possible threats to independence and actions are taken to reduce it to acceptable level. In the absence of inability to reduce the threats, the withdrawal from engagement is to be considered.
- The non-compliance with the ethical requirements reported by quality review board included
  - Failure to reduce the familiarity threat to an acceptable level;
  - Failure to mention date in declaration of independence obtained from partners.

Acceptance and continuance of client relationships and specific engagements

- The policies and procedures shall ensure that the firm will undertake or continue relationships and engagements only after considering below points:
  - The Integrity of the client;
  - Competence to perform the engagement; and
  - Compliance with the ethical requirements.
- Quality review board has observed that the firms did not have an established policy in relation to client acceptance including background checks of key management, performing conflict checks and formalizing

documentation for the same in compliance with the requirement of SQC-1.

- Integrity of the client may have to be judged with the resources available and in the absence of the same, third party verifications might have to be conducted to achieve the objective. This becomes practically difficult and hence small & medium firms should resort to alternate methods like references from known people, review of past financials, any publically reported news item etc.

- Procedures in relation to the withdrawal from the engagement shall consider the requirement of various laws and ethical constraint.

Human Resources

- Human resources run the organisation. In case of CA firm, they are the most valuable resources and hence the policies and procedures of this sensitive element are of utmost importance.

- Some of the key points which are to be considered are

  – Ensure the firms' culture of quality is ingrained across the organisation. This can be done by frequent communication from the top management and leaders.

  – Monitoring and supervision of the performance

  – Need to establish a proper system in place to for training, regular update and skill development of the team members

  – Timely performance review and feedback to the team as regards positive points, areas of improvements

  – Mapping of the assignments to the skill sets and past experience.

  – Communication of expectations and closing meeting to analyse the actual experiences gives the valuable feedback for future development.

- Quality review board shocks when the firms did not have a formal training programme schedule and a training calendar. It has reported instances of no monitoring as regards to compliance with CPE hours and training requirements.

Engagement performance

- Policies and procedures formed by the firm for performance of engagement shall be communicated at appropriate time to the team members.

- Often the objective, methods are communicated *via* electronic or manual tools by experienced personnel before the commencement of the assignment.

- Adequately documented review by the experienced and competent reviewer shall consider:

  – Adherence to professional standards and regulatory requirements;

  – Appropriate consultations with regard to significant matters;

  – Work performed and its documentation adequate to reach conclusion.

- Differences of opinion within team members are required to be documented and resolved before issue of report.

- Evidence obtained and documented is the evidence of work performed and conclusion or opinion formed and hence its assembly and retention is imperative.

In the best times of technology, the confidentiality, safe custody, integrity, accessibility and retrievability of documentation needs special attention. In recent years, QRB has almost every year the observation on non-compliance by firms on this matter.

Monitoring

- Over the time, we know that the there is always scope for improvement and nothing is perfect. It is just less wrong. Monitoring assists in providing the reasonable assurance that the policies and procedures relating to the system of quality control are relevant, adequate, operating effectively and complied with in practice.
- Similar to first element, the monitoring responsibilities are also assumed by the managing partner or equivalent.
- In addition to implementation of the firm's quality control policies and procedures, the managing partner or equivalent shall consider the developments in regulatory and legal requirements are reflected in the firm's policies and procedures. It can well be indicated or identified based on interaction and dialogue between the engagement team.
- As a procedure of monitoring, at least one engagement for each partner over an inspection cycle (no more than 3 years as per SQC-1) should be selected for inspection. Where the results of the monitoring procedures indicate that a report may be inappropriate or that procedures were omitted during the performance of the engagement, it should be communicated and enquired at necessary levels. Further, the firm should determine what further action (including legal advice) is appropriate to comply with policies and procedures.

Observance of SQC-1 in practice

Reports issued by the Quality Review Board for the last 3 years states that SQC1 has always been at the top in the list of observations and non-compliances by the firms.

Some of the observations reported are:

– Not maintaining detailed quality control policies addressing the six elements of SQC-1 and even if there are policies, there is no documentation evidencing its operation;

– Not including the requirements of independence envisaged by the ICAI, the Companies Act, 2013 and insider trading related aspects in the independence form;

– Not obtaining the annual independence confirmations;

– Non communication or improper communication to the team members for new clients added;

– Not including performance evaluation, career development and promotion aspects in HR policies;

– Not documenting the consultations sought and the decision taken;

– Not establishing the policies and procedures for engagement quality control review; and even if policies are there, no documentation of its review by the appropriate personnel;

– Not establishing the policies for assembly, safe custody, confidentiality, retention and retrievability of the final engagement files;

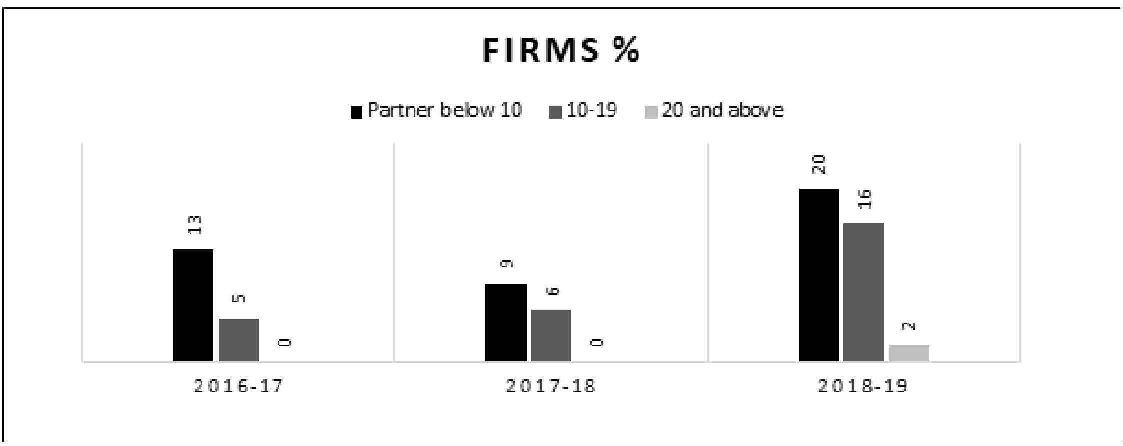
– Deficiencies in cross-referencing, in mentioning of dates, in custody and retrieval of audit work files;

– Not evidencing the assembly of audit files within 60 days of auditor's report;

– Not documenting the discussion between the engagement partner(s) and review partner or other partners;

– Not preparing checklists for complying with the applicable engagement standards and accounting standards along with reasons, supportings, corroborative evidence in support of the same;

Quality review board in its report of the year 2018-19 also reported number of partners wise percentage of reviewed audit firms having observations in SQC-1 as below:



From the above chart, it appears that the small and medium sized firms are not strictly observing the requirements of SQC-1. The non-compliance is either on account of lack of documentation of policies and procedures or on account of ineffective implementation of the same.

Practical difficulties faced by small & medium firms

- Lack of bandwidth and team size for ensuring compliance. Practical difficulties would arise in compliance with guidelines like partner rotation, internal quality review
- Mismatch between fees and the efforts required to ensure compliance
- Documentation – most of small and medium size firms do not have adequate documentation to prove compliance with the requirements of the standard. In practice a lot of steps would have been performed at the partner level but they do not get documented.
- Lack of checklist & documentation of compliance with auditing standards
- Resistance from clients in terms of timelines, additional fees and other support required to ensure compliance with the standard.
- Continuous changes in team resulting into lack of continuity

Practical Tips for compliance

The practicing firms should prepare the checklists for implementation of SQC-1 based on its size and engagements it performs. Compliance with

SQC-1 is not a one-time process but a continuous process which need to be emphasized through the actions of the management, staff meetings, internal documents such as employee manual, monthly newsletter, web-site contents etc.

Some practices to be followed for effective implementation of SQC-1 includes:

– Checklist to be maintained for adherence of ethical requirements of the SQC-1. The checklist should modified to suit the firms and its operating environment in order to ensure proper compliance;

– Creating awareness as regards independence & obtaining of independence form signed by team members before the commencement of the audit and annually;

– Rotation of partners or team at every 5 years;

– Assessment of the client integrity by way of background checks of the key management personnel shall be done;

– Quality control review partner shall be appointed who shall be different from partner-in-charge.

– Unbiased annual appraisals of team members along with feedback for improvements.

– Conducting exit interviews with standard questionnaire;

– Obtaining the consultation or opinion, wherever necessary;

– Documentation with regard to engagement performance including filling of checklists on standards on auditing, accounting standards, guidance notes etc.

– Reward staff and partners who deliver high-quality audits and make this a key indicator in performance reviews.

Such requirements in the form of checklists are also given in the implementation guide of SQC-1 issued by the ICAI. The MP shall obtain the sign-off from the person responsible for adhering to the compliance.

Conclusion

The ICAI is constantly targeting the desired quality through SQC-1, SA 220, Other SAs, and Code of Ethics. All this framework is for one non-negotiable motive – Audit Quality. The firms should understand the importance in the changing era where the quality of audit is always questioned first and strive to implement SQC-1 in true spirit.

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You are spoiling your lives in vain. Either Take up one idea, clear the deck, and to it dedicate the life; or be contented and practical.

– Swami Vivekananda

BEST OF THE REST

Rahul Sarda,
Advocate

Time limit for filing Written Statement in non-commercial suits – Directory or mandatory?

The Delhi High Court passed an order closing the right of the Appellant to file a Written Statement under Order VIII Rule 1 of the CPC and struck off his defence owing to repeated delays and non-adherence to prescribed deadlines. Appellant's revision petition against this order was also rejected. Hence, the Appellant filed the Civil Appeal before the Supreme Court.

The Appellant and the Respondent were brothers. The Respondent filed a suit against the Appellant claiming that an agreement to sell was executed between the parties whereby the Appellant agreed to sell a portion of an ancestral property to the Respondent. According to the Respondent, the agreement to sell was not honoured and the Appellant was attempting to sell the property to third parties. Hence, the suit came to be filed by the Respondent against the Appellant.

The Appellant was served on 1-5-2017 and he appeared through counsel on 15-5-2017 wherein the Civil Court granted the appellant 30 days to file his written statement. On 17-7-2017, noting that no written statement had been filed till then, the Court granted the appellant a final opportunity of two weeks to file his written statement. On 18-9-2017, the Court observed that despite the last opportunity having been accorded more than two months ago, no written statement had been filed. Nevertheless, the Court granted another final opportunity, subject to payment of ₹ 3,000 costs and the matter was posted for 11-10-2017. On this date, appellant sought multiple pass overs but his Counsel did not appear before the Court. After noticing that despite several opportunities (including one beyond the maximum period of 90 days) the appellant had failed to file any written statement or deposit costs and that the matter could not be adjourned repeatedly, the Civil Court thus closed the appellant's opportunity of filing written statement and struck off his defence. The Appellant claimed that he filed his Written Statement on 2-11-2017 but even on the next hearing on 3-11-2017, the appellant's Counsel did not appear or supply a copy of the written statement to the respondent, as noted in the Trial Court's daily order.

Aggrieved by the order of the Trial Court, the Appellant approached the High Court in revision, which noted how he had been granted repeated opportunities and yet the written statement was not filed within 120 days of notice and summarily dismissed the petition relying on the Coordinate Bench in ***Oku Tech Pvt. Ltd. vs. Sangeet Agarwal & Ors.***

Held by the Supreme Court that while all commercial disputes [as defined under Section 2(c) of the Commercial Courts Act, 2015] are governed by the provisions of the CPC as amended by section 16 of the Commercial Courts Act, 2015, non-commercial suits disputes fell within the unamended provisions of CPC. The ratio of the judgement in the case of Oku Tech Pvt. Ltd. was good law but its ratio regarding the mandatory nature of time limit prescribed for filing of the Written Statement and lack of discretion of Courts to condone delays is applicable only to commercial disputes. As regards non-commercial disputes, the time limit prescribed in Order VIII Rule 1 continues to be directory and does not do away with the inherent discretion of Courts to condone certain delays.

The Court observed that extreme hardship or delays occurring due to factors beyond control of parties despite proactive diligence, may be just and equitable instances for condonation of delay. Further held that Courts must act stringently to ensure that all proceedings are decided within reasonable time, and it is but the duty of the judicial system to cultivate a culture of respecting deadlines and time of the Court. On facts, the Court found that nothing prevented the Appellant from filing the Written Statement. However, taking a lenient view, the Court allowed the Written Statement claimed to have been filed on 2-11-2017 to be taken on record subject to payment of costs.

***Desh Raj vs. Balkishan (D) through Proposed LR Ms. Rohini* – Civil Appeal No. 433 of 2020 dated 20th January 2020.**

Conflicting claims of legal heirs – Whether can be decided in execution proceedings?

One Umadevi filed a suit for partition and separate possession in respect of the suit property as the successor-in-interest of one Manicka, her husband. Prior to Umadevi, he had earlier married one Valliammal and had a child one Munisamy. Manicka died in the year 1971 and Umadevi filed a suit for partition claiming half share in the suit property against Munisamy. The suit was decreed in 1989 which attained finality. Umadevi sought execution of the decree but passed away in July 1999. The Appellant who was the son of Umadevi's younger sister filed an application to execute the decree as her legal representative on the basis of a Will. The said application was allowed by the Executing Court on 29th March 2004.

The appellant filed an application under Order XXI Rule 35 of CPC for eviction of the respondent and to deliver vacant possession of the premises. The Respondent contended that the Will was forged. However, the Executing Court held that the Appellant, as legal representative of Umadevi, was entitled to execute the decree. This order was challenged by the Judgment Debtor by way of a revision under section 115 of the CPC. The High Court held that the Executing Court is the competent and proper Court to determine the validity of the Will as well as the legatee under a Will can be construed as a legal representative and come on record to seek execution of the decree. The High Court found that the execution of the Will was surrounded by suspicious circumstances.

On appeal before the Supreme Court, the Court held that the Appellant produced an attesting witness and the scribe of the Will. The witnesses had deposed the execution of the Will by Umadevi in favour of the Appellant and no one else had come forward to seek execution of decree as the legal representative of the deceased decree holder. In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, the High Court was not justified in setting aside the order of the Executing Court, when in terms of Order XXII Rule 5 of the Code, the jurisdiction to determine who is a legal heir is summary in nature. The Court further held that Order XXII of CPC was applicable to the pending proceedings in a suit, but the conflicting claims of legal representatives could be decided in execution proceedings in view of the principles of Order XXII Rule 5. An order passed by a subordinate court could be interfered with only if it exercised its jurisdiction, not vested in it by law or had failed to exercise its jurisdiction so vested or had acted in exercise of jurisdiction illegally or with material irregularity. The mere fact that the High Court had a different view on the same facts would not confer jurisdiction to interfere with an order passed by the Executing Court. Consequently, the order passed by the High Court was set aside and that of the Executing Court was restored.

Varadarajan vs. Kanakavalli & Ors., **dated 22nd January 2020 – Supreme Court**

Delay in intimating insurance company incident of vehicle theft – Whether fatal to the claim?

The question before the Supreme Court was whether delay in informing the occurrence of the theft of the vehicle to the insurance company, though the FIR was registered immediately, would disentitle the claimant of the insurance claim.

The Appellant had got his tractor insured with the Respondents-insurers on 19-6-2010. On 28-10-2010, the tractor was stolen and an FIR was lodged on the same day. However, the claim was submitted to the insurers on 15-12-2010 which was rejected on the ground that intimation was given belatedly after 52 days. The Appellant therefore, approached the District Consumer Disputes Redressal Forum which allowed the complaint and directed the insurers to pay a sum of ₹ 4,70,000/- being the declared insured value of the vehicle to the complainant within one month from the date of receipt of copy of the order, failing which, the respondents were made liable to pay interest at the rate of 12% per annum from the date of order till payment.

The State Commission dismissed the insurers' appeal. However, the National Commission allowed the Revision Petition filed by the insurers and set aside the orders passed by the District Forum and the State Commission. Taking note of conflicting decisions of the Supreme Court on the issue before it, the matter was referred to a Larger Bench.

The condition in the insurance policy was that *"In case of theft or criminal act which may be the subject of a claim under this policy the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender."*

Held, a perusal of the above terms of the insurance policy would reveal, that it provides that in case of theft or criminal act which may be the subject of a claim under the policy, the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender. The object behind giving immediate notice to the police appears to be that if the police is immediately informed about the theft or any criminal act, the police machinery can be set in motion and steps for recovery of the vehicle could be expedited. In a case of theft, the insurance company or a surveyor would have a limited role and it is the police, who acting on the FIR of the insured, will be required to take immediate steps for tracing and recovering the vehicle. The surveyor of the insurance company, at the most, could ascertain the factum regarding the theft of the vehicle. In the event that after the registration of the FIR, the police is able to recover the vehicle and return the same to the owner, there would be no occasion to lodge a claim for compensation. The registration of the FIR regarding the theft of the vehicle and the final report of the police after the vehicle is not traced would substantiate the claim of the claimant that the vehicle is stolen. Not only that, but the surveyors appointed by the insurance company are also required to enquire whether the claim of the claimant regarding the theft is genuine or not. If the surveyor appointed by the insurance company, upon inquiry, finds that the claim of theft is genuine then coupled with the immediate registration of the FIR, in our view, would be conclusive proof of the vehicle being stolen. While assessing the 'duty to co-operate' for the insured, the Court should *inter alia* have regard to those breaches by the insured which are prejudicial to the insurance company. Usually, mere delay in informing the theft to the insurer, when the same was already informed to the law enforcement authorities, cannot amount to a breach of 'duty to co-operate' of the insured. If the claimant is denied the claim merely on the ground that there is some delay in intimating the insurance company about the occurrence of the theft, it would be taking a hyper technical view. It would not be fair and reasonable to reject genuine claims which had already been verified and found to be correct by the investigator. The Consumer Protection Act aims at protecting the interest of the consumers and it being a beneficial legislation deserves pragmatic construction. Therefore, the Court held that when an insured has lodged the FIR immediately after the theft of a vehicle occurred, when the police after investigation have lodged a final report after the vehicle was not traced and when the surveyors/investigators appointed by the insurance company have found the claim of the theft to be genuine, then mere delay in intimating the insurance company about the occurrence of the theft cannot be a ground to deny the claim of the insured.

Gurshinder Singh vs. Shriram General Insurance Co. Ltd. & Anr. **– Civil Appeal No. 653 of 2020 dated 24th January 2020 – Supreme Court**

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Gentleness, self-sacrifice and generosity are the exclusive possession of no one race or religion.

– Mahatma Gandhi

That man has reached immortality who is disturbed by nothing material.

– Swami Vivekananda

TAX ARTICLES FOR YOUR REFERENCE

Kishor Vanjara,
Tax Consultant

Articles published in Taxman, The Bombay Chartered Accountant Journal (BCAJ), The Chamber's Journal (C J), The Chartered Accountant Journal (CAJ), All India Federation of Tax Practitioners (Indirect Tax) (AIFTP Indirect Tax), Income Tax Report (ITR), Goods & Sales Tax Practitioners Association of Maharashtra (GSTPAM), Times of India and Economic Times for the period December 2019 to January 2020 has been arranged and indexed topic-wise.

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Analysis of the Provisions of Inspection, Search & Seizure under the GST	Manoj Nahata	AIFTPJ (Indirect Tax)	Vol-1/Part-11	5

Topic	*Author*	*Magazine*	*Volume*	*Page*
E-Invoicing : Striving for the "Perfect Invoice"	Abhay Singla	AIFTPJ (Indirect Tax)	Vol-1/Part-11	23
An overview of Inspection, Search, Seizure & Arrest under Goods and Service Tax	S. Venkataramani, Siddheshwar Yelamali	AIFTPJ (Indirect Tax)	Vol-1/Part-11	30
Exporters of Goods & Services – Beware of GST Provisions	P. V. Subba Rao & P. Viswanath	AIFTPJ (Indirect Tax)	Vol-1/Part-11	40
Way Forward	Upender Gupta	CAJ	68/No.7	921
Refund of Tax under GST Law – An update	Kashish Mittal	CAJ	68/No. 6	780
Rule 36(4)-Matching under ITC	Sunil Gabhawalla, Rishabh Sanghvi and Parth Shah	BCAJ	51-B/Part 4	77
Records and their Maintenance	Sunil Gabhawalla, Rishabh Sanghvi and Parth Shah	BCAJ	51-B/Part 3	67
GST Gyan – Rule 36(4)-Imposing the Impossible?	Kush Vora	C J	Vol. VIII/ No. 3	170
GST Gyan – Transferable Development Rights 2.0 – After 29th March 2019	Adit Shah	C J	Vol. VIII/ No. 4	102
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Offences and Prosecution under GST Laws	R. V. Shah	GST Review	Vol. 2/No. 4	13
Summary of GST Rates Relating to Job Work Process w.e.f. 01-10-2019	Navesh Totlani	GST Review	Vol. 2/No. 4	21
CBIC notifies provisions to implement GST e-invoice and QR Code	Vasudev Mehta	GST Review	Vol. 2/No. 4	25
Final Call on Transition for Builders before GST Audit	Monarch Bhatt	GST Review	Vol. 2/No. 4	31

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Section 16(2) of CGST Act, 2017 – Payment to supplier within 180 days – Draconian Law!	Satish Bajaria	GST Review	Vol 2 / No 5	36
Taxman may get to block doubtful Input Tax Credit	Sachin Dave & Saloni Shukla	Economic Times	18/12/2019	13
Gifts				
Taxation of Gifts Made to Non-Residents	Mayur B. Nayak, Tarunkumar G. Singhal & Anil D Doshi	BCAJ	51-B/Part 3	62
GAAR				
GAAR ambiguity clouds corporate revamp	S. R. Patnaik & Bipluv Jhingan	Economic Times	23/01/2020	12
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Insolvency and Bankruptcy Code				
Salient Features of Insolvency and Bankruptcy Code, 2016	Arpit Mathur	AIFTPJ (Indirect Tax)	Vol-1/Part-11	81
Immovable Properties				
Taxation issues of Redevelopment of Residential and Commercial Property (in a society)	Jagdish Punjabi	C J	Vol. VIII/ No. 4	9
Income from House Property	Ketan Vajani	C J	Vol. VIII/ No. 4	29
Exemptions	Vijay Mehta, Harsh Kapadia & Dharan Gandhi	C J	Vol. VIII/ No. 4	36
Period of Holding – Date of Acquisition	Shailesh Bandi	C J	Vol. VIII/ No. 4	56
Section 50C	Kinjal Bhuta	C J	Vol. VIII/ No. 4	63

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Section 56(2)(x) – Taxation issues with respect to Immovable Properties (from personal taxation point of view)	Abhitan Mehta	C J	Vol. VIII/ No. 4	70
Sole Proprietory Business	Haresh Chheda & Amit Sawant	C J	Vol. VIII/ No. 4	75
International Taxation				
Taxation of the Digital Economy	Vivek Raju P.	CAJ	68/No.6	788
Tax Challenges of the Digitalisation of Economy	Mayur B. Nayak, Tarunkumar G. Singhal & Anil D. Doshi	BCAJ	51-B/Part 4	71
Insolvency				
Striking Equilibrium among Creditors in IBC	Badri Narayanan	CAJ	68/No.6	770
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Pre-Budget				
Budget 2020 : Income-tax cuts, slabs rejigs on table	Deepshikha Sikarwar	Economic Times	26/12/2019	1
10 ideas for the Union Budget 2020	Babar Zaidi	Times of India	23/12/2019	16
Simplify Tax Laws, Dispute Resolution	Himanshu Parekh & Ravish Kotadia	Economic Times	21/01/2020	9
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Rural Agricultural Land				
Purchase of rural agricultural land and its implication on section 56(2)(x)	Pushp Deep Rungta	Taxman	179	43
Reverse Merger				
Tax implications of a reverse merger in India	Mayank Udhwani	Taxman	268	1

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Chasing Front Runners : SEBI Gets Better at the Game	Jayant M. Thakur	BCAJ	51-B/Part 4	87
New Rules for Independent Directors : Hasty, Slipshod and Burdensome	Jayant M. Thakur	BCAJ	51-B/Part 3	82
Startups				
Startups seek clarity on key tax issues	Sachin Dave	Economic Times	19/12/2019	13
Startup & make a wishlist for Fin Min for next year	Alnoor Peermohamed	Economic Times	26/12/2019	6
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Tax Audit				
Tax Audit – Certain Aspects	Paras K. Savla	AIFTPJ	22/No.5	34
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Charitable Trust's must not exert Corporate Control	Swaminathan S. Anklesaria Aiyer	Times of India	05/01/2020	17
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Calibrate Tax Reform	Hema Ramakrishnan	Economic Times	23/01/2020	14
'V'				
VAT				
Principles of Natural Justice *vis-à-vis* Assessment under MVAT/CST Acts	G. G. Goyal & C. B. Thakar	BCAJ	51-B/Part 3	72

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THE CHAMBER NEWS


CA Ketan L. Vajani & CA Haresh P. Kenia,
Hon. Jt. Secretaries

Important events and happenings that took place between 1st January, 2020 to 31st January, 2020 are being reported as under:

I. ADMISSION OF NEW MEMBERS

1) The details of new members which were admitted in the Managing Council Meeting held on 17th January, 2020 are as under:-

Type of Membership	No. of Members
Life Member	05
Ordinary Member	04
Student Member	04
Associate Member	01

II. PAST PROGRAMMES

1. DIRECT TAXES COMMITTEE

A Seminar on Litigation under Direct Tax Law was held on 18th January, 2020 at Terrace Hall, West End Hotel. The seminar was inaugurated by Hon'ble Shri Pramod Kumar, Vice-President, ITAT Mumbai. The seminar was addressed by Mr. Manoj Kumar, Accountant Member - ITAT, Mr. Ravish Sood, Judicial Member – ITAT, Dr. K. Shivaram, Senior Advocate, Mr. K. Gopal, Advocate, CA Ketan Vajani, Mr. Paras S. Savla, Advocate and CA Karishma Phatarphekar.

2. INDIRECT TAXES COMMITTEE

The 8th Residential Refresher Course on GST was held from 9th to 12th January, 2020 at Hotel Fairmont, Jaipur. The discussion papers were presented by Mr. Rohit Jain, Advocate and Mr. V. Raghuraman, Advocate. Presentation papers was presented by CA Parind Mehta and

Mr. Bharat Raichandani, Advocate CA A. R. Krishnan was the moderator for the panel discussion for which CA Sunil Gabhawalla and Mr. Binal Jain, Advocate were the panelists. The RRC received an overwhelming response from 332 members.

A Workshop on GST Law jointly with AIFTP (WZ), BCAS, GSTPAM, MCTC & WIRC of ICAI was held on 15th, 22nd, and 29th January, 2020 at GSTPAM, Mazgaon Library, 1st floor, Vikrikar Bhavan, Mazgaon. The workshop was addressed by Mr. Deepak Bapat, Advocate, CA JanakVaghani, Mr. Ratan Samal, Advocate, CA Sujata Rangnekar and CA Ashit Shah.

3. IT CONNECT COMMITTEE

A workshop on "Build your professional brand using LinkdIn" was held on 23rd January, 2020 at Kilachand Hall, 2nd Floor, IMC, Churchgate. The workshop was addressed by CA Jatin Lodaya.

4. MEMBERSHIP & PR COMMITTEE

An inter committee Cricket Tournament was held on 19th January, 2020 at Shree Chandulal Nanavati Vinay Mandir (Nanavati School), VP Rd, LIC Colony, Vile Parle West, Mumbai-400056. The winners were:

Winning Team: Student Committee

Runner-up Team: Direct Taxes Committee

Best Batsman: Mr. Riyan Shah,

Best Bowler: Mr. Dharan Gandhi

Best Fielder: Mr. Kunal Shah

5. STUDENT COMMITTEE

The Dastur Debate Competition, 2020 in association with H. R. College of Commerce & Economics was held on 16th & 18th January, 2020 at H. R. College. In all 32 teams from various Colleges and Firms participated in the competition. Judges for the final round were Mr. Deepak Trivedi, Chief General Manager, Securities and Exchange Board of India (SEBI) and CA Kamlesh Vikamsey, Partner – Khimji Kunvverji & Co. The winners were as below:

Winning Team –Bathiya & Associates LLP

1st Runner up Team – M. B. Nayak& Co.

2nd Runner up Team – Bansi S. Mehta & Co.

Best Speakers – Mr. SohamPanya (M. B. Nayak & Co.) & Ms. Freya Shah (Hinesh R. Doshi & Co. LLP)

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of February, 2020)

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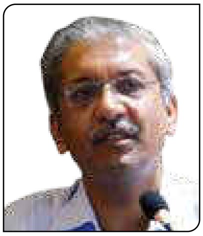
International Taxation Committee

FEMA SC on "Discussion on Master Direction on Deposits Regulations with Case studies and recent notification on Non-Debt Instruments" was held on 13th January, 2020 at CTC Conference Room



CA Naresh Ajwani, addressing the delegates

CA Nikki Shah, addressing the delegates

INT SC on "Amendments to definition and meaning of Permanent Establishment pursuant to BEPS Action 7" was held on 20th January, 2020 at CTC Conference Room

Ms. Ashwini Khothawade, addressing the delegates

Ms. Shaptama Biswas, addressing the delegates

Study Circle & Study Group Committee

Study Group Meeting on "Recent Judgments under Direct Taxes" was held on 16th January, 2020 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

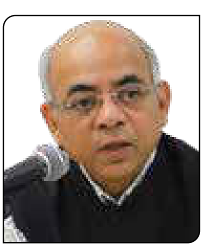
Mr. Vipul B. Joshi, Advocate, addressing the delegates

Study Circle Meeting on "Income Tax Settlement Commission – Worth Exploring !" was held on 30th January, 2020 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

Shri H.C. Jain, Advocate, addressing the delegates

Indirect Taxes Committee

IDT SC on "Analysis of Supreme Court Judgment of Calcutta Club and its Relevance and Implication under GST Regime" was held on 22nd January, 2020 at A. V. Room, Jaihind College, Churchgate

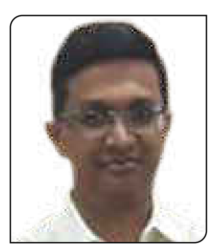


Mr. Shailesh Sheth, *Advocate*
Chairman of the session

Mr. Ishan Patkar, *Advocate*, addressing the delegates

Pune Study Group

Pune Study Group Meeting on "Detailed Analysis of New Reduced Corporate Tax Rates" was held on 11th January, 2020 at ELTIS, Plot No. 419 Model Colony, Gokhale Cross Road, Next to Atur Centre, Pune-411 016



CA Pramod Achuthan, addressing the delegate

Indirect Taxes Committee

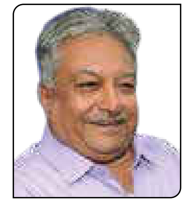
Workshop on GST Law jointly with AIFTP (WZ), BCAS, GSTPAM, MCTC & WIRC of ICAI was held on 15th, 22nd & 28th January, 2020 at GSTPAM, Mazgaon Library, Mumbai

Inaugural Session

Dignitaries on dais. Seen from L to R: CA Pranav Kapadia (Chairman – Indirect Taxes Committee, CTC), CA Viresh B. Shah (President – MCTC), CA Manish Sampat (President – BCAS), CA Vipul K. Choksi (President – CTC), Mr. Dinesh Tambde (President – GSTPAM), Ms Nikita Badheka (National President – AIFTP), CA Dilip Nathani and CA Rahul Thakkar (Convenors – GSTPAM)

Faculties

Mr. Deepak Bapat, *Advocate*



CA Janak Vaghani

Mr. Ratan Samal, *Advocate*

Direct Taxes Committee

ISG meeting on "Recent Important Decisions under Direct Taxes" was held on 23rd January, 2020 at CTC Conference Room

CA Nikhil Tiwari, addressing the delegates

Webinar on "Stay and Recovery Proceedings under Income Tax Act, 1961" was held on 22nd January, 2020

CA Jhankhana Thakkar

Membership & PR Committee

An Inter Committee Cricket Tournament was held on 19th January, 2020 at Shree Chandulal Nanavati Vinay Mandir (Nanavati School), V. P. Road, LIC Colony, Vile Parle West, Mumbai-400056

Winning Team: Student Committee

Runner-up Team: Direct Taxes Committee

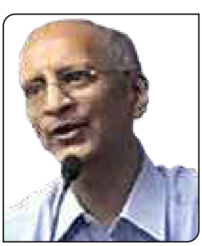
Best Batsman: Mr. Riyan Shah

Best Bowler: Mr. Dharan Gandhi

Best Fielder: Mr. Kunal Shah

Bengaluru Study Group

Bengaluru Study Group Meeting on “Tax Treaty - Saving Clause and its application & Tax Consolidation” was held on 28th January, 2020 at FKCCI, 3rd Floor, Bengaluru



CA P. V. Srinivasan, addressing the delegate

CA Cynthia Dalmaida, addressing the delegate

IT Connect Committee

Build your professional brand using LinkedIn was held on 23rd January, 2020 at Kilachand Hall, 2nd Floor, IMC, Churchgate

CA Maitri Savla welcoming the speaker and delegates

CA Jatin Lodaya addressing the delegates

Student Committee

The Dastur Debate Competition 2020 in association with H. R. College of Commerce & Economics was held on 16th & 18th January, 2020 at AV Room, 5th Floor, H. R. College of Commerce & Economics.

CA Vipul Choksi (President), giving his opening remarks. Seen from L to R: Ms Varsha Galvankar, Chairperson, Mr. Parag Thakkar, I/C Principal, H. R. College, Ms. Trisha Dutta, Professor, H. R. College

Ms. Varsha Galvankar (Chairperson), welcoming the participants. Seen from L to R: Mr. Parag Thakkar, I/C Principal, H. R. College, CA Vipul Choksi (President), Ms. Trisha Dutta, Professor, H. R. College

Mr. Parag Thakkar, I/C Principal – H. R. College of Commerce & Economics welcoming the Judges

Preliminary Round I Judges along with President & Chairperson

Preliminary Round II Judges along with Chairperson

Preliminary Round III Judges along with Participants

Semi-Final Round Judges Mr. Ajay R. Singh, Advocate & CA Pradip Kapasi along with Mr. Vipul K. Choksi (President), Ms. Varsha Galvankar (Chairperson) & Ms. Trisha Dutta (Prof) of H. R. College

Final Round Judges Mr. Deepak Trivedi, Chief General Manager – SEBI & CA Kamlesh Vikamsey

CA Kamlesh Vikamsey giving his comments to participants for the competition

Winning Team –Bathiya & Associates LLP

1st Runner up Team – M. B. Nayak & Co.

2nd Runner up Team – Bansi S. Mehta & Co.

Best Speakers – Mr. Soham Panya (M. B. Nayak & Co.) & Ms. Freya Shah (Hinesh R. Doshi & Co. LLP)

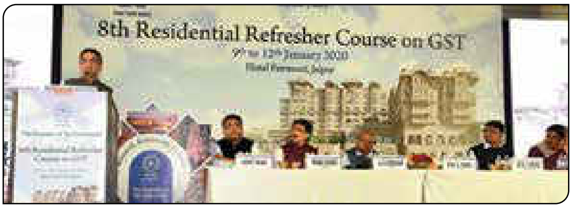
Group Photo of Judges & Winners. Sitting from L to R: CA Charmi A. Shah (Member), Ms. Varsha Galvankar (Chairperson), Shri Deepak Trivedi (Chief General Manager – SEBI), CA Vipul Choksi (President), CA Kamlesh Vikamsey, Mr. Parag Thakkar (I/C Principal) and Ms. Trisha Dutta (Prof.) H. R. College of Commerce & Economics.

Indirect Taxes Committee

Group Photo

Indirect Taxes Committee

8th Residential Refresher Course on GST was held from 9th January, 2020 to 12th January, 2020 at Hotel Fairmount, Jaipur



CA Vipul K. Choksi (President), giving his opening remarks. Seen from L to R: CA Ashit Shah (Member), CA Pranav Kapadia (Chairman), CA A. R. Krishnan (Advisor), CA Atul Mehta (Co-Chairman) CA Hemang Shah (Convenor)

CA Pranav Kapadia (Chairman) welcoming the delegates. Seen from L to R: CA Ashit Shah (Member), CA A. R. Krishnan (Advisor), CA Vipul K. Choksi (President) and CA Atul Mehta (Co-Chairman)

CA A. R. Krishnan (Advisor) welcoming the delegates

Dignitaries at the Inaugural Session

Mr. K. Vaitheeswaran, Advocate delivering his key note address.

Faculties

Mr. Rohit Jain, *Advocate*

Mr. V. Raghuraman, *Advocate*

Mr. Bharat Raichandani, *Advocate*

CA Parind Mehta

CA Bimal Jain

CA Sunil Gabhawalla

Direct Taxes Committee

Seminar on Litigation under Direct Tax Law was held on 18th January, 2020 at Terrace Hall, West End Hotel

Hon'ble Shri Pramod Kumar, Vice-President, ITAT inaugurated the seminar.

CA Vipul Choksi (President), giving his opening remarks

Mr. Devendra Jain, *Advocate* welcoming the delegates

Dignitaries at the seminar

Hon'ble Shri Pramod Kumar, Vice-President, ITAT delivering his key note address. Seen from L to R: Dr. K. Shivaram *Senior Advocate* (Past-President), Mr. Devendra Jain, *Advocate* (Chairman)

Faculties

Dr. K. Shivaram
Senior Advocate

Mr. Manoj Kumar,
ITAT

Mr. Ravish Sood,
ITAT

Mr. K. Gopal,
Advocate

Mr. Paras S. Savla,
Advocate

CA Karishma Phatarphekar

CA Ketan Vajani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