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A Monthly Journal of
The Chamber of Tax Consultants

The Chamber's Journal

August 2013

Vol. I | No. 11

Your Monthly Companion on Tax & Allied Subjects

Service Tax Voluntary Compliance Encouragement Scheme, 2013 and LBT - A Perspective

The Hon'ble Finance Minister in his budget speech lamented, "While there are nearly 17,00,000 registered assessees under the service tax, only about 7,00,000 file returns. Many have simply stopped filing returns. We cannot go after each of them. I have to motivate them to file returns and pay the tax dues. Hence, I propose to introduce a one-time scheme called "Voluntary Compliance Encouragement Scheme".

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STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Group Meeting held on 17th July, 2013 on the subject "Recent Judgement under Direct Taxes".

CA Pradip N. Kapasi, Past President addressing the delegates. Seen from L to R : CA Haresh Kenia, Chairman, CA Yatin Desai, President, Mandar Vaidya, Faculty CA Dilip Sanghvi, Vice Chairman and CA Dinesh Shah, Convenor.

DIRECT TAXES COMMITTEE

Intensive Study Group (Direct Tax) Meeting held on 11th July, 2013 on the subject "Recent Important Decision under Direct Taxes".

CA Kiran Kapadia addressing the delegates.

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CA Ashok Mehta addressing the members

CA Sanjay Chokshi addressing the members

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THE CHAMBER OF TAX CONSULTANTS
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The Chamber's Journal

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Editorial

The Companies Bill, 2012 which was passed by the Lok Sabha on 18th December, 2012, has been ratified by the Rajya Sabha also on 8th August, 2013. This bill will become Act as soon as it gets the assent of the President of India. This is a very positive development in the back drop of the free fall of the rupee against the dollar and the slowdown in the economy. This may be the beginning for the good things to start happening as far as reforms are concerned. Otherwise, in the prevailing atmosphere it is a mirage to expect governance taking precedence over petty politics and national interests above personal ambitions. Let the politics be what it is, we have no need to lose hope, we can take inspiration from the young girls from Jharkhand who played football in an international tournament organised in Spain and won medals without any support from the State. The junior girls hockey team has revived the hope that hockey still has a chance of survival in India by winning a Bronze in Girls' Junior Hockey World Cup. Last but not least, P.V. Sindhu is going to compensate for the loss of Saina Nehwal in Badminton World Championship.

The Special Story of this issue of the Chamber's Journal is on the Service Tax Voluntary Compliance Encouragement Scheme, 2013 and the latest addition to the taxing statutes 'Local Body Tax' (LBT). Mr. Rajkamal Shah has exhaustively covered the scheme including the latest circular issued by the Board – CBEC on 8th August, 2013. I thank him for accommodating CTC by considering the circular when the Journal was about go into print. Octroi, as a levy, was abolished in other States long ago. Maharashtra is the last State to fall in line. While doing so it has introduced LBT and raised several questions. Senior professional Mr. P. C. Joshi, in his article, has pointed out that except State of Maharashtra all other States have absorbed the Octroi in the levy of VAT. Then why the same procedure is not followed in Maharashtra also. On the question of rolling out GST the Union Finance Minister points a finger at opposition ruled State Governments. Maharashtra has introduced LBT which may be levy over and above GST and defeat the very basic object of introduction of GST. As professionals we shall continue to learn new laws (LBT) as well as unlearn and relearn the existing laws (Companies Act, 2012). Senior professionals have spared their valuable time to explain us the nitty gritty of the LBT.

I hope this issue of the Chamber's Journal will help the readers to understand the compliance scheme and LBT better. I thank all the professionals who have helped the Chamber in bringing out this issue.

K. GOPAL
Editor

From the President

Dear Readers,

Rupee is at its life time low, it hit a record low at 61.80 few days back. Half-hearted measures has not helped much to stem unprecedented fall of rupee during the past couple of months. Appointment of young RBI Governor, Mr. Raghuram Rajan, has been welcomed by falling rupee and economy. A lot is expected from the newly appointed RBI Governor.

Indian economy is also accompanying falling rupee. More alarming is that business sentiments are going down even faster than the economy. Unfortunately,Government's inaction is hurting the most. Also, there is no clear ideas for the revival of the economy and supporting business communities.

Latest fiasco on NSEL is further hurting the investor's sentiments due to failure of system. It is still not very clear as to how the debacle will be resolved and hard earned money of investors and general public will be saved.

Though general scenario is not very encouraging, scene at the Chamber is totally different. All the twelve Committees and Delhi Chapter have had their first meeting and chalked out their enthusiastic plan for the year. I am overwhelmed by the enthusiasm and commitment displayed by the chairmen and the 'Team Chamber'. With the support of the team, I see no goal difficult to achieve. During the next one month various important programs are planned by various committees such as Seminar on 'E-filing Issues under various laws', 'Intensive Study Course on Service Tax for Beginners', Lecture meeting on 'Immovable Properties – Recent Developments', 'Advance FEMA Conference' etc.I request members to take utmost benefit of the same. I also take this opportunity to appreciate efforts of Shri Ashit Shah, Chairman of Indirect Tax Committee for very well designing and co-ordinating the current issue of the Journal on 'Service Tax VCES 2012 and LBT'.

Month of August/September are the months of festivals. Eid-ul-fitr, Raksha Bandhan, Gokulashtami, Paryushan, Parsi New Year, Ganesh Chaturthi, etc., will be celebrated by our fellow members as per their belief in different faiths. Though the faith may be different, the ultimate lesson of each faith is the same i. e. compassion, humanity etc. Our brothers at Uttarakhand are facing life and death situation. Many NGOs and other private organisations have come forward to help rehabilitate the life at Uttarakhand. As mentioned, in my previous communication, we, at Chamber have formed a committee under the guidance of Past Presidents Shri Kishor Vanjara and Shri Sujal Shah to augment and utilise funds for Uttarakhand calamity affected people. An appeal in that respect has already been sent to you. I personally request you to support us in this noble cause of humanity.

For many of us, the season of filing the returns of certain non-corporate assessees which was scheduled to end on 31st of July must be hectic. With more and more requirements to be furnished in newly notified return forms and compulsory online filing of returns for certain assessees, have brought more pressure of the official website of the income tax during the last few days and the members experienced failure to connect the website. It was good on the part of the CBDT to extend the deadline of filing returns up to 5th August. I am sure many borderline cases of filing returns must have been filed due to extended time which otherwise would not have been filed. It is very encouraging that record number of assesses have opted for e-filing this year.

To rejunavate our members and their family members our Membership and EOP Committee and RRC and PR Committee have jointly organised a monsoon trekking on 15th August. Together, we will celebrate our 67th year of Independence in the behest of mother nature. I suggest all of you to participate and enjoy the fellowship. This will also help all of us to work with more vigour for our next hectic season of September.

Just when I was penning down this communication, I learnt that the Companies Bill which was before Rajya Sabha, has been passed. Let us hope the new law brings more transparency and accountability in the Companies and inculcates self-discipline as it is desired and expected from the new Act.

I wish all the members happy Independence Day and other festivals.

YATIN DESAI
Pesident

The Chamber of Tax Consultants

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre–eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

V. H. Patil, *Advocate*

Ved and Vedanta

THE YOGA OF KNOWLEDGE AND WISDOM

JNANA-VIJNANA YOGA

The real knowledge and the ways and method of its realisation.

Jnana, the knowledge of God, of self and the world and vijnana, the ways of realisation of one's self and to merge with super self (God).

A human being is an image of God and therefore he must learn to be like God, by intelligently transcending the Maya pervading in all spheres of nature, of one inside and outside human body.

We now enter the Seventh Chapter. In this, you will find bhakti, or love of the Personal aspect of the Impersonal-Personal God, coming in a big way; and in Chapters 8 to 12, it is all bhakti, strengthening this path of yoga, and enriching it in even sense of the term.

In Chapter seven, in Jnana-Vijnana yoga Lord Shri Krishna, tells through Arjuna to the entire humanity, to know the all pervading God in all the spheres of life, inside one's body and outside one's body, and observe all of them in the whole universe. He tells that with proper knowledge and the method of reaching one's self, through constant Bhakti towards God, fully relying on God and with constant practice one, with desireless Bhakti would ultimately merge with God.

Now let us deal with 7th Chapter of Bhagavad Gita.

The Seventh Chapter contains thirty shlokas. I is entitled Jnana Vijana Yoga, the Yoga of Knowledge and Wisdom. In the entire chapter Krsna uses the first person singular pronoun `Me' to mean the supreme Reality, Brahman, God. He explains the immanence and transcendence of Brahman. The vicious do not know or seek God while the virtuous worship Him in four different ways. Those deluded from the vision of the supreme Reality seek and gain limited goals in this world. Whereas, those free from delusion strive for liberation and unite with Brahman.

This chapter can be summarised into six topics:

		shlokas
I.	Two aspects of Brahman (God)	1 - 6
II.	How Brahman manifests Itself	7 - 11
III.	The Vicious do not know or seek Brahman	12 - 15
IV.	The four Virtuous types who worship God	16 - 19
V.	The Deluded seek and gain finite fruit	20 - 25
VI.	The Wise seek and gain Brahman	26 - 30

Sri Bhagavan uvaca:
Mayyasaktamanah Partha yogam yunjanmadasrayah asamsayam samagam mam yatha jnasyasi tacchrnu 1

The blessed Lord said:

1. O Partha, with the mind attached to Me, practicing yoga, taking refuge in Me, how you shall without doubt know Me fully, that you do hear.

Jnanam te'hamsavijnanamidam vaksyamyasesatah yajjnatva neha bhuyo'nyajjnatavyamavasisyate 2

2. I will declare to you in full this knowledge together with wisdom which having known nothing more here remains to be known.

Manusyanam sahasresu kascidyatati siddhaye yatatamapi siddanam kascinmam vetti tattvatah 3

3. Among thousands of men scarce one strives for perfection; of those who strive and succeed, scarce one knows Me in essence.

Bhumirapo'nalo vayuh kham mano buddhireva ca ahankara itiyam me bhinna prakrtirastadha 4

4. Earth, water, fire air, space, mind, intellect and also ego – such is the eightfold division of My prakrti (nature).

Apareyamitastvanyam prakrtim viddhi me pram jivabhutam Mahabaho yayedam dharyate jagat 5

5. This is the lower. But different from it, O Mahabaho, know my higher prakrti (nature), the life-element by which this universe is supported.

Etadyomini bhutani sarvanityupadharaya aham krtsnasya jagatah prabhavah pralayastatha 6

6. Know this to be the womb of all beings. I am the origin and dissolution of the whole universe.

I. Two aspects of Brahman (God) 1 - 6
In the first three verses Krsna encourages spiritual seekers on the path of yoga. That He will give them the knowledge and wisdom essential to reach the ultimate state of Brahman. The vast majority of human beings give in to the enchantments of the material and sensual world A rare one among the deluded masses emerges to strive for spiritual Enlightenment. And among those few who strive rarer still is the one who actually achieves spiritual Enlightenment.

The topic also indicates the omnipresent, omniscient and omnipotent nature of the supreme God, Brahman. Its lower and higher natures are manifest in this world. Transcending these two lies the unmanifest Reality.

Mattah parataram nanyatkincidasti Dhananjaya mayi sarvamidam protam sutre manigana iva 7

7. There is naught higher than Me O Dhananjaya; all this is strung on Me as rows of gems on a string.

Raso'hamapsu Kaunteya prabhasmi sasisuryayoh pranavah sarvavedesu sabdah khe paurusam nrsu 8

8. O Kaunteya, I am the sapidity in waters, radiance in sun and moon, pranava (syllable Om) in all the Vedas, sound in space, manhood in men.

Punyo gandhah prthivyam ca tejascasmi vibhavasau jivanam sarvabhutesu tapascasmi atapasvisu 9

9. I am the sweet fragrance in earth and the brilliance in fire, I am the life in all beings and the austerity in ascetics.

Bijam mam sarvabhutanam vidhi Partha sanatanam buddhirbuddhimatamasmi tejastejasvinamaham 10

10. O Partha, know Me as the eternal seed of all beings. I am the intelligence of the intelligent, the splendour of the splendid.

Balam balavatamasmi kamaragavivarjitam dharmaviruddho bhutesu kamo'smi Bharatarsabha 11

11. I am the strength of the strong devoid of desire and attachment, in beings I am desire which is not contrary to dharma (order of the Vedas), O Bharatarsabha.

II. How Brahman manifests Itself 7 - 11

In this portion Krsna declares Himself as Brahman manifesting as the quintessence of all sentient beings and insentient objects everywhere. Towards the end of the topic Krsna suggests subtly that one can locate Him in one's own ardent desire for the Supreme.

Ye caiva sattvika bhava rajasastamasasca ye
matta eveti tanviddhi na tvaham tesu te mayi 12

12. And whatever natures that are sattvika, rajasika and tamasika – these know as from Me alone; I am not in them but they are in Me.

Tribhirgunamayairbhavairebhih sarvamidam jagat
mohitam nabhijanati mamebhyah paramavyayam 13

13. Deluded by these natures composed of the three gunas (qualities), all this world does not know Me well, as above them and immutable.

Daivi hyesa gunamayi mama maya duratyaya
mameva ye prapadyante mayametam taranti te 14

14. Verily, this divine illusion of Mine, made of gunas (qualities) is difficult to cross over, those who seek Me alone cross over this illusion.

Na mam duskrtino mudhah prapadyante naradhamah
mayayapahrtajnana asuram bhavamasritah 15

15. The evil-doers, the deluded, the lowest of men do not seek Me, they whose wisdom is destroyed by illusion follow the way of the demons.

III. The Vicious do not know or seek Brahman 12 - 15

The three gunas (qualities) – Sattva (pure), Rajas (passionate) and Tama (indolent) – emanate from Brahman. But Brahman has no gunas. The gunas merely project an illusion on Brahman. The deluded, caught up in this illusion, have lost sight of the Reality. They do not seek Brahman. Instead they follow the demoniac ways of life.

Caturvidha bhajante mam janah sukrtino'rjuna
arto jijnasurartharthi jnani ca Bharatarsabha 16

16. O Arjuna, four kinds of virtuous people worship Me–the arta (distressed), the jijnasu (seeker of knowledge), the artharthi (seeker of wealth) and the jnani (wise), O Bharatarsabha.

Tesam jnani nityayukta ekabhaktirvisisyate
priyo hi jnanno'tyarthamaham sa ca mama priyah 17

17. Of them, the jnani (the wise), ever steadfast with single-pointed devotion excels; for, I am extremely dear to the jnani (the wise) and he is dear to Me.

Udarah sarva evaite jnani tvatmaiva me matam
asthitah sa he yuktatma mamevanuttamam gatim 18

18. Noble indeed are all these but the jnani (the wise) I deem as verily Myself; for, steadfast in mind, he is established in Me alone as the supreme Goal.

Bahunam janmanamante jnanavanmam prapadyate
Vasudevah sarvamiti sa mahatma sudurlabhah 19

19. At the end of many births, the man of wisdom reaches Me realizing that all is Vasudeva (Reality) Such a great soul is very difficult to find.

IV. The four Virtuous types who worship God 16 - 19

Four kinds of virtuous people worship God. They are-the Artharthi (seeker of wealth), Arta (distressed), Jijnasu (seeker of knowledge) and Jnani (wise). The first three approach God only for gaining limited goals in the world. The Artharthi seeks God's blessings for enhancing his material wealth. The Arta resorts to prayer to find solace to his distressed mind. The Jijnasu explores spiritual fields to satisfy his intellectual curiosity. Distinct from these three types of worshippers, the Jnani stands out with his self-oblivious, non-utilitarian worship. He has no desires for any worldly reward. His worship is wholly directed to Self-realisation. To reach Brahman. Krsna admits his deep love and admiration for the Jnani.

Kamaistaistairhrtajnanah prapadyante'nyadevatah
tam tam niyamamasthaya prakrtya niyatah svaya 20

20. Those deprived of wisdom approach other gods through various desires resorting to corresponding rites led by their own nature.

Yo yo yam yam tanum bhaktah
sraddhayarcitumicchati
tasya tasyacalam sraddham tameva vidadhamyaham 21

21. Whatever from a devotee seeks to worship with sraddha (faith) I make that sraddha (faith) of his unswerving.

Sa taya sraddhaya yuktastasyaradhanamihate
tabhate ca tatah kamanmayaiva vihitanhitan 22

22. Endowed with that sraddha (faith) he seeks the worship of that (form) and from it he fulfils his desires, these being verily ordained by Me alone.

Antavattu phalam tesam tadbhavatyalpamedhasam
devandevayajo yanti madbhakta yanti mamapi 23

23. Entire indeed is the fruit (accruing) to those who are of small intelligence. The worshippers of the gods go to the gods, likewise My devotees reach Me.

Avyaktam vyaktimapannam manyante
mamabuddhayah
param bhavamajananto mamavyayamanuttamam 24

24. The foolish think of Me, the Unmanifest, as having manifestation, not knowing My supreme nature, immutable, unsurpassed.

Naham prakasah sarvasya yogamayasamavrtah
mudho yam nabhijanati loko mamajamavyayam 25

25. Veiled by Yogamaya (illusion born of the union of the three gunas – qualities), I am not manifest to all. This deluded world knows Me not, the Unborn, the Imperishable.

V. The Deluded seek and gain finite fruit 20 - 25

The deluded, having lost sight of the transcendental Reality, entertain a variety of desires in this world. They seek and earn the fruits of their desires. The Reality, personified as Lord Krsna, functions in every being as Atman, Atman enlivens all activities, be they material or spiritual. Hence, Krsna states that He supports all actions of individuals pursuing their manifold desires.

Vedaham samatitani vartamanani carjuna
bhavisyani ca bhutani mam tu veda na kascana 26

26. O Arjuna, I know the beings of the past, present and future but no one knows Me.

Icchadvesasamutthena dvandvamohena Bharata
sarvabhutani sammoham sarge yanti Parantapa 27

27. O Bharata, by the delusion of the pairs of opposites arising from desire and aversion, all beings are subject to illusion at birth O Parantapa.

Yesam tvantagatam papam jananam
punyakarmanam
te dvandvamohanirmukta bhajante mam
drdhavratah 28

28. But those men of virtuous deeds whose sins have come to an end, they, freed from the delusion of pairs of opposites, worship Me with firm resolve.

Jaramaranamoksaya mamasritya yatanti ye
te brahma tadviduhkrtsnamadhyatmam
karma cakhilam 29

29. Those who strive or liberation from old age and death, taking refuse in Me, they realize the whose—Brahman, Adhyatma (individual Self) and all karma (action).

Sadhibhutadhidaivam mam sadhiyajnam ca ye viduh
prayanakale'pi ca mam te viduryuktacetasah 30

30. Those who know Me with adhibhuta (above elements), adhidaiva (above gods) and adhiyajna (above sacrifice) even at the time of death, they, steadfast in mind, know Me.

VI. The Wise seek and gain Brahman 26 - 30

Speaking as Brahman, the pure Consciousness, Krsna declares He knows

the past, present and future. While beings deluded by the pairs of opposites which bind this world, do not recognise the underlying Reality. But the wise, striving for liberation, free themselves from this delusion and reach the supreme Brahman. They realise the whole – the play of Brahman, the individual and the world.

The whole teaching of Bhagavad Gita on the topics covered by Chapter VII can be summarised as under:

In the previous chapter Krsna asked Arjuna to become a devoted Yogi who is superior to everyone else. To give an integral knowledge of God, along with His attributes and glories, so as to enable one to practise the various methods of devotion and to fix the mind constantly on Him, Krsna tells Arjuna that He will reveal to him the knowledge of God. After knowing this, nothing more would remain to be known. Among thousands of men scarcely one strives for perfection, and of those who thus strive, only one perchance knows Him in truth, says Lord Krsna.

He first reveals the two Natures viz. Apara (lowere) and Para (higher) Nature (Prakriti). The lower Nature is divided eightfold viz., Earth, Water, Fire, Air, Ether, Mind, Intellect and Egoism. And the Higher Nature is the life-principle with which the entire universe is sustained. All beings are evolved from this twofold Nature and God is its source, for creation, preservation and destruction.

The Lord says that God Himself is the sole cause and ultimate support of the entire creation. The entire universe is the manifestation of God and is pervaded by God. Like a cluster of gems strung on a thread, this universe is strung on God. Krsna says, "I am the taste in the waters, I am the light in sun and moon, I am the syllable. `OM' in all the Vedas, sound in either, and manliness in men." He declares to Arjuna that He is present in all the things in the universe, visible or invisible and is the root cause for the entire creation. Because of the veiling power of Maya the World fails to recognise His presence. Those who take refuse in Him alone can cross over this divine Maya. The Lord is not visible to those who are deluded by the three Gunas, – Sattva, Rajas and Tamas,- and the pairs opposites. Maya veils the understanding of worldly-minded people Maya is the union of the three qualities of Nature. The ignorant whose knowledge is destroyed by illusion forget to worship God. They feel that the world and the visible objects are alone real. They follow the ways of demons and suffer through the series of births and deaths.

Four types of virtuous persons worship Him, viz., the man in distress, the seeker of knowledge, the seeker of wealth and the man of wisdom. Among these, the man of wisdom, whose devotion is single-minded, is the dearest to God. After many births, deaths and sufferings, one realises that the Eternal Krsna or the Supreme Self alone is real. Such a one is, indeed, very difficult to find in the world.

Certain types of devotees whose wisdom has been carried away by various desires prompted by their own nature worship other deities and follow the prescribed rites mentioned in the scriptures. All forms are the forms of the One Lord. According to one's individual temperament, faith and ideal of life, one obtains the fruit of one's worship. The result gained by these people of little understanding is finite, because they forget the omnipresence of the Lord and worship Him with their limited consciousness. The deity or object of worship is only a means to make the mind one-pointed, but one should not take this itself as the goal. By one-pointed mind one must continuously meditate on the chosen object. Gradually the thoughts will cease, and one will experience the all-pervasive consciousness of the Supreme Being.

In this Consciousness, all names and forms, and the individuality, will cease, and only the Reality will remain. The Lord appears with names and forms to remove the ignorance of beings, to divinise humanity and to make them reach perfection, which is their real nature.

Krsna says to Arjuna that He knows about all beings, whether of the past, present and future, but no one knows Him. By the delusion of pairs of opposites, Raga (attraction) and Dvesha (repulsion), pleasure and pain, heat and cold, happiness and misery, joy and sorrow, success and failure, honour and dishonour, born out of desire and hatred, all beings fall under the clutches of Maya. They forget the presence of the Lord, and suffer due to birth and death. Those who fully surrender themselves and take refuge in Him know. His Integral Being, i.e., Brahma, Adhyatma, Karma, Adhibhuta, Adhidaiva and Adhiyajna, Krsna explains these in detail in the next chapter.

A human being who fails to know and remember God throughout his life will not remember Him even at the time of death. If he repeats the name of the Lord or thinks about the Divine Personality, at the time of death, even then he will reach the Supreme Imperishable. But, unless one remembers the Lord throughout one's life, one will find it difficult to remember Him at the time of death.

This Chapter teaches that God is the Cause of the function of three Gunas viz., Sattva, Rajas and Tamas. Due to ignorance, all human beings are deluded and identify themselves with the products of these Gunas-mind, senses and body. The entire universe exists and is governed by the interplay of the three Gunas. God has given man the power of discrimination (intellect) with which he can go beyond the clutches of these Gunas (Nature) and realize their Cause (God), Lord Krsna says, devotion is the means to union with God, without one's identifying oneself with any product of Nature viz., mind, senses and body. The aspirant should not be oblivious of the Supreme Consciousness which is like the string supporting the beads in a garland or necklace. Even in an individual all the limbs are moved and connected by a single consciousness. Similarly, the entire universe exists because of the all-pervasive consciousness of God. The Lord says that this Supreme Consciousness can be invoked through any means according to one's temperament and one can merge in and attain Supreme Happiness. Those who understand that sufferings arise from birth, disease, old age and death and realise that God alone is the Supreme Goal and the culmination of all human pursuits, and act with faith and wisdom attain Him and are not born again.

CA Rajkamal Shah

Voluntary Compliance Encouragement Scheme, 2013

Over a period of years, India has acquired a status of pre-dominance in the service sector in the world. Before independence, the country which was predominantly an agriculture based economy is now one of top five service providing nations in the world. The share of service sector in the GDP has increased from 30.5% in 1950-51 to 63.4% in 2009-10 and the growth of this sector is around 10% in last four years. Tax on services which had taken birth in 1994 with modest revenue collection of ₹ 407 crores has now grown with estimated collection over ₹ 1,24,000 crores in F.Y. 2012-13. The era of selective levy ended in the year 2012, and an all encompassing negative list based taxation was introduced from 1-7-2012.

The journey over the period of years has been marred with lot of complexities and controversies arising out of the leviability of service tax, classification disputes, multiplicity of taxes, exemptions, valuation and other issues including availment and utilisation of CENVAT credit. Compliance with the law has become more complicated with the requirement of monthly payment of taxes, difficulties in adjustment of excess tax paid, set off of CENVAT credits, poorly managed refund and rebate mechanism, high handed attitude of the department and half-hearted, half-backed clarifications issued by the Board. The disputes have piled up at various forum of judiciary. Not to forget that the service tax payers are largely uneducated or unorganised lacking in the administrative and infrastructure back up including the legal niceties.

The controversies and complications along with unfriendly attitude of the department might have its own share in lesser compliance as revealed by the Hon'ble Finance Minister in his budget speech when he lamented, "While there are nearly 17,00,000 registered assessees under the service tax, only about 7,00,000 file returns. Many have simply stopped filing returns. We cannot go after each of them. I have to motivate them to file returns and pay the tax dues. Hence, I propose to introduce a one-time scheme called "Voluntary Compliance Encouragement Scheme".

In retrospect, we had Service Tax Dispute Resolution Scheme in 2008, which covered payment of tax dues involved in certain litigation with certain immunities. Now in the backdrop of this admission that the Government not having resources to systematically enforce compliance in face of rampant and the large scale non-compliance, the Service Tax Voluntary Compliance Encouragement Scheme, 2013 is announced to encourage defaulting assessee to pay the tax dues for the period prescribed in the Scheme with immunity from interest, penalties and other consequences of such non-payment.

For this purpose, the Finance Bill, 2013-14 introduced Chapter VI in the Finance Act, 2013-14 and promulgated the Voluntary Compliance Encouragement Scheme by incorporating S.104 to 114 to effectuate what is popularly known as "VCES". Further, Notification No. 10/2013 – ST dtd. 13-5-2013 was issued to notify the Service Tax Voluntary Compliance Encouragement Rules,

2013. The Government also issued a Circular No. 169/4/2013-ST dtd. 13-5-2013, to clarify certain issues pertaining to the Scheme.However, many more issues remained unresolved creating doubts in tax payers mind.

Purpose of this article is to discuss the salient features of the scheme to help the tax paying community to come out clean by paying the tax dues without bothering about payment of interest and liability of penalty or other consequences of non-payment. Attempt is also made to address certain important issues pertaining to application of the scheme some of which might have some solution and others may still need to be clarified by the Government. These issues are appended as an annexure to the article.

Salient features of the scheme

Person who may make declaration of tax dues (S. 106):

Any person who is liable to pay tax dues for the period from 1-10-2007 to 31-12-2012, but has not paid the same till 1-3-2013 and is not otherwise ineligible as per S. 106. This would include a service receiver who is liable to pay service tax under reverse charge mechanism.

Person who is not eligible to make declaration of tax dues:

- any person who has filed the returns disclosing his true liability but not paid service tax dues as per the return;
- if the unpaid amount pertains to subsequent period on the same issue for which a notice is served or order is passed for the previous period;
- any such enquiry or investigation in respect of service tax not levied or not paid or short levied or short paid has been initiated and pending as on 1st March, 2013 by way of,
  - search;
  - issuance of summons u/s.14 of CE Act;
  - when production of accounts, documents or other evidence is required by the department;
  - initiation of audit

In case of pendency of an inquiry or investigation or audit as on 1st March, 2013, the designated authority shall reject the declaration for reasons to be recorded in writing. The scope of the above provisions is explained in CBEC Circular No. 169/4/2013 – ST dtd. 13.5.2013 and 170/5/2013-ST dtd 8.08.2013, that such inquiry or investigation or audit should be pending for non-payment or short payment of service tax by the declarant (himself). That no other communication from the department would attract the provisions of S. 106(2)(a)(iii).

Benefits under the scheme

Scheme grants immunity from penalty, interest and any other proceedings under chapter V of the Finance Act, 1994 for the declared amounts.

The declaration made shall become conclusive upon issuance of acknowledgement of discharge of such tax dues, however, subject to the power of reopen the declaration being "substantially wrong" as contained in S. 111.

Further, no matter shall be reopened thereafter in any proceedings under the Act before any authority or court relating to the period covered by such declaration [S. 108(2)].

Important terms

- "Tax Dues"means the service tax due or payable under the Chapter and amounts collected under section 73A
- Includes Education and Secondary & Higher Education Cess.
- "Chapter"means Chapter V of the Finance Act, 1994;
- "Declarant" means any person who makes a declaration of tax dues in a manner prescribed u/s 107(1). Such declaration mustbe submitted to the designated authority on or before 31st December, 2013.
- Period covered under the scheme:

  VCES is applicable in respect of tax dues for the period 1-10-2007 to 31-12-2012 but not paid as on 1st March, 2013. It is to be noted that, for the tax dues pertaining to period after 31-12-2012, normal provisions of the Act

are applicable and shall not be covered under the Scheme.

- "Designated Authority" means any officer not below the rank of Assistant Commissioner of Central Excise as notified by the Commissioner of Central Excise for the purpose of this scheme.

  [In Mumbai for both the jurisdiction of Mumbai I and II, The Service Tax Commissionerate has designed the Asst. / Dy. Comm. of Service Tax (Technical) Room No. 303, New Central Excise Building, 115, Maharshi Karve Road, Churchgate, Mumbai – 400 020. Refer Trade Notification No. 4/2013 – ST dtd. 27-5-2013].

Tax dues declared but not paid

In case of tax dues declared but not paid, such dues along with interest liability shall be recovered from the declarant under the normal recovery proceedings under the Act, i.e. by applying garnishing provisions as provided u/s. 87.

Failure to make true declaration

As per S. 111, if the Commissioner of Central Excise has reasons to believe that declaration made under the scheme was "substantially false", he may after recording the reasons in writing, serve notice requiring the declarant to show cause why he should not pay tax dues not paid or short paid. However, no such notice shall be issued after the expiry of one year from the date of declaration.

Such show-cause notice shall be deemed to be issued u/s.73, or as the case may be u/s. 73A of the Chapter.

Procedure and manner of payment of declared dues

- Person who is not registered under service tax, he should get registered;
- File declaration in prescribed form (VCES-1) with designated authority on or before 31-12-2013 along with computation of such dues, return period wise and service wise, as prescribed in S. No. 3F(I) of Form ST-3 or Part B of the return form as existed during the relevant period;
- Designated Authority to acknowledge receipt of application in Form VCES-2 within 7 working days of filing of declaration;
- The designated authority u/s 106(2), by an order, and for reasons to be recorded in writing, may reject a declaration if any inquiry/investigation or audit was pending against the declarant as on the cutoff date, i.e., 1-3-2013. However such an order under this section shall be passed within one month from the date of declaration following the principles of natural justice.
- Deposit at least 50% of the tax dues declared by 31-12-2013;
- Remaining tax dues are to be paid on or before 30-6-2014;
- Any amount remaining pending from the dues payable on or before 30-6-2014, should be paid by 31-12-2014 along with interest from 1-7-2014 as prescribed u/s. 75
- On submission of details of full payment of service tax (and interest thereon, if applicable) along with a copy of acknowledgment, the designated authority shall issue an acknowledgment of discharge of such dues in form No. VCES-3. Such acknowledgment of discharge shall be issued within seven working days from the date of furnishing the details of payment of tax dues (and interest, if applicable) as prescribed in the Notification No. 10/2013 – ST dtd. 13-5-2013.

[The rate of interest in case of late payment of amount declared would be as prescribed in S. 75 i.e. if the value of taxable services in any financial year is upto 60 lakhs then rate of interest applicable is 15% and in other cases 18%. The value of taxable service shall include all taxable services including whatever already declared earlier, if any.]

Other provisions

- CENVAT credit shall not be utilised for payment of tax dues under the scheme.
- Amount paid under the scheme is not refundable under any circumstances.

Powers to Central Government

S. 113 provides for power to remove any difficultyin giving effect to the scheme which is not inconsistent to the scheme,within a period of two years from the date of the scheme coming into force. S. 114 contain powers to make rules. However, every such order or rule shall be laid before both the Houses of Parliament within the prescribed period and besubject to their approval.

Evaluation of the scheme

The Voluntary Compliance Encouragement Scheme, 2013 appears to have been framed in half hearted – half baked manner with the sole objective of collecting the revenue. The difficulties and / or apprehensions expressed in many quarters are as follows:

1. The persons who have declared the dues truthfully in service tax returns but not having been able to pay the same are discriminated against the persons who has not declared and not paid any tax liability.

2. Payment of service tax is to be made in cash only and not by use of CENVAT credit which is against the principle and the provisions of the law. The persons having service tax liability and also CENVAT credit used for providing that service will be saddled with the accumulated credit notbeing eligible to set off the same which is otherwise provided under the CENVAT Credit Rules. Such carried forward of credit would be meaningless if the person is having no service tax liability in future. This provision may become challengeable in court.

3. The provision relating to non opening of any matter of the period of declaration after one year of date of declaration needs to be clarified.

4. The "non filers" of service tax returns on whose basis the scheme is formulated as declared by the Hon'ble Finance Minister on the floor of Parliament while presenting the budget have been left in lurch if there are no dues as the levy of late fees would always loom large on them.

5. There is no provision for filing returns for the periods for which the dues are declared which would result in non updation of the records and may create an anomaly in future between the department and tax payer.

6. The provision as regards to finding of the declaration as "substantially false" is totally vague and can lead to endless litigation even after the recent circular.

Lest it be forgotten that the scheme is against the undertaking given by the then Finance Minister to the Hon'ble Supreme Court that The immunity of interest and penalty granted being against the principles of natural justice and discriminatory against regular tax payers, and in the face of observations made by the Hon'ble Supreme Court in 1998 that no such scheme discriminating against the honest tax payers shall be brought in future. The following Hon'ble Supreme Court's observations in this regards are quite startling. It would be interesting to know that if challenged in the court, whether mere change in the name from "amnesty" to "voluntary compliance encouragement scheme" would make any difference.

- *R.K. Garg vs. UOI (1982) 133 ITR 239 (SC) (Bearer Bond Scheme)*

In the above case, the constitutional validity of special bearer bonds was challenged mainly on the grounds of inequality under article 14 of the constitution. Although as per the majority view of the 5 member bench, the Public Interest Litigations (PIL) filed were dismissed rejecting the challenge, the extract from the observation made by the dissenting judge justice Gupta in the context of bearer bonds in *E P Ruyappa vs. State of Tamil Nadu & Anr.,* is worth looking at. He observed "In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law is therefore violative of Article 14"

- *AIFTP vs. UOI (1998) 231 ITR 24 (SC) 98 Taxman 446 (SC) (97 Amnesty)*

In the above case Hon'ble Supreme Court had insisted on an affidavit from the Finance Minister that in future there will be no amnesty schemes. The immunity of interest and penalty granted being against the principles of natural justice and

discriminatory against regular tax payers, (who are not eligible under the scheme) and in terms of observations made by the Hono'ble Supreme Court in AIFTP (supra), it is possible that Courts could strike down the scheme, if challenged.

Conclusion

At the time of writing this article, it appears that the scheme has received lukewarm response from the tax paying community on account of various apprehensions, some of which are discussed above. To allay the fears of tax payers the Government has issued circular No. 170/5/2013-ST dated 8th August 2013 which clarifies most of the issues debated upon. Let us hope that the scheme would now generate confidence and encourage the non-filers, non-payers, to come clean with payment of tax which is unpaid or short paid thus far. Desirably, the scheme could have covered pending disputes in various courts like the one in 2008 to offer peace to the tax payers and garner more resources by reducing litigation. By making the scheme as a part of the Finance Act, it is almost impossible to carry out necessary amendments without amending the Act that needs approval of both the Houses of the Parliament.

Annexure to Article on VCES

The following are the issues collated by the writer from different sources and his own experience in the practice. The answers are the writer's personal views and should may be regarded as thought provoking and under no circumstance as final answer. Each issue should be viewed on the basis of the facts of the case and may need detailed examination or professional help.

1. Can a person file Form VCES-1 by declaring NIL tax dues?

No. A person cannot file Form VCES-1 if there is mere Nil tax dues. To file VCES-1 Form there has to be some amount of tax dues.

2. Whether a declarant shall get immunity from payment of late fee/penalty for having not taken registration earlier or not filed the return or for delay in filing of return?

No, except in case of the period in relation to which the tax dues are declared. Even as per CBEC Circular No.170/5/2013-ST dtd. 8th august 2013 - The immunity from interest and penalty is only for "tax dues" declared under VCES.

3. Is service recipient eligible to take CENVAT credit of the tax paid under VCES scheme by the service provider?

As per CBEC Circular No.170/5/2013-ST dtd. 8th august 2013 the admissibility of CENVAT credit will be determined in accordance with the provisions contained in rule 9(1)(bb) and 9(1)(e) respectively of the CENVAT Credit Rules. In my view, service recipient is eligible to avail CENVAT Credit of the tax paid under VCES scheme because no restriction has been imposed for availing CENVAT credit for the tax paid under the scheme. R. 9 of CENVAT Credit Rules, 2004 prohibits CENVAT credit on amount recovered from the manufacturer, importer or service provider by reason of fraud, collusion, wilful mis-statement, suppression of facts on contravention of any provisions of the Act or rules made with intention to avoid payment of duty or tax. In case of VCES, payment of dues cannot be said to be partake character of such recovery.

4. Would wrong utilisation of CENVAT credit in the ST-3 return eligible for declaration?

As per CBEC Circular No. 170/5/2013-ST Any service tax that has been paid utilizing the irregular credit, amounts to non-payment of service tax. Therefore such service tax amount is covered under the definition of "tax dues".

5. Can amount payable under Rule 3(5), Rule 3(5A) and under Rule 6(3) of CCRbe treated as 'tax dues' for the purpose of VCES? If yes, can benefit of waiver of penalty u/r 15 of CCR be availed under VCES?

No, these payments cannot be regarded as tax dues.

6. If a person has tax dues for the period 1-10-2007 to 31-12-2012 but he declares tax dues only for the period 1-10-2008 to 31-12-2012 by a declaration dated 26-10-2013. Since the period of five years from relevant date for demand for period up to 30-9-2008 is over

on 25-10-2013, he did not declare or pay any service tax for the period 1-10-2007 to 30-9-2008. Can his declaration be treated as substantially false and can recovery be made by Commissioner in terms of powers conferred by section 111 of the Finance Act, 2013?

May be yes, but the consequence is issue of SCN by the Commissioner for the period which is time barred as per S. 73. Hence, in my opinion, no action can be taken in respect of such dues.

7. Mr. A has paid tax by challan on 01.05.2013 before the VCES is operational. He filed application on 11.06.2013 and the payment made by him on 9-5-2013 is treated as payment against this declaration. Can he do so? Is there any requirement that the payment against tax dues need to be made on or after 10-5-2013 or on or after filing declaration?

Not in my opinion. The person cannot be treated as "declarant" in terms of S. 107 and the procedure prescribed therein viz. filing of VCES issue of acknowledgement in VCES – II have to be complied with. This view is confirmed by the CBEC Circular (supra). It has been further clarified that if any "tax dues" have been paid prior to the enactment of the scheme, any liability of interest or penalty thereon shall be adjudicated as per the provisions of Chapter V of the Finance Act, 1994 and paid accordingly.

8. Does the assessee need to file the return of ST for the dues declared under the scheme?

The scheme does not provide for filing of ST-3 Returns of past periods, however, this may create complications in future in reconciling the tax dues paid with the returns filed. The declarant may declare such payment in the return as payment of other dues in the period relevant to the payment. It is desirable that a clarification is issued by the Government.

9. What tax calculation details to filed with VCES – 1? Is it advisable to make declaration for the entire period of the scheme even though the dues pertain only to a particular period within the scheme?

It is advisable to do so. But the department may insist on acceptance of declarations only for the period pertaining to the tax dues.

10. As per S. 107, the designated authority on receipt of declaration "shall" issue an acknowledgment in Form VCES – 2 within a period of seven working days from the date of receipt of such declaration. The question is that if the designated authority does not issue an acknowledgment within seven working days, whether the declarant should assume that his declaration is accepted and start making payment of the tax dues as prescribed under the scheme.?

Yes, as the word used is "shall" though not clear from the scheme.

According to CBEC Circular No. 170/5/2013 - Department would ensure that the acknowledgement is issued in seven working days from the date of filing of the declaration. It further states that the payment of tax dues under the Scheme is not linked to the issuance of an acknowledgement and the declarant can pay tax dues even before the acknowledgement is issued by the department.

11. What about short payment of true liability for the period October to December 2012, for which the return is not yet prescribed and due.

Such short payment can be made under VCES and then shown as payment in the return as and when prescribed.

12. A declarant made a declaration of true tax dues in respect of one taxable service. However, due to controversy in the law for which conflicting decisions are available or difference of opinion on valuation of works contract, or on account of difference in valuation of free issue of material, the tax dues in respect of another taxable service is not correctly declared. Please examine whether the Commissioner can regard the declaration in such case as substantially false and issue notice for that undeclared service u/s. 111. Whether

the declarant would be entitled to the immunity prescribed u/s. 108(2) in respect of the declaration made and tax dues paid for which the discharge certificate is already issued u/s. 107(7).

In my opinion, no controversial issue can be regarded as "Substantially false". In any case, the power to the Commissioner is only to issue SCN for nonpayment / short payment of tax dues. At that time the matter can be explained. Immunity as regards to declared dues for which discharge certificate is issued should be available.

13. As per S. 108(2) r. w. s. 111(2), no matter shall be re-opened thereafter in any proceedings under Chapter V of FA 1994, before any authority or court relating to period covered by such declaration. It means that the declarant making declaration for the entire period of October 2007 to December 2012 (though he may be having tax dues for only a single return period), would get permanent immunity for any proceedings under the Act for the declaration period after the expiry of one year from the date of declaration.

Yes, in my opinion if such declaration is accepted and discharge certificate is issued, no matter pertaining to that period can be re-opened as per S.108.

14. If department calls for information or books of account of entity 'X' in connection with investigation/inquiry into affairs of 'Y' whether 'X' is eligible for scheme?

Yes, this view is confirmed by both the clarifications issued by the Board with regards to VCES so far. As per the CBEC Circular (supra) the unit that has not been issued a show cause notice shall only be eligible to make a declaration under the Scheme.

15. Whether simple visit by service tax officials to service provider's premises debar the assessee from applying for the scheme?

No. As simple visit by officials to the service provider's premises does not account to investigation or inquiry.

16. Audit of the assessee was conducted in February, 2013 and NIL audit report dated 7-3-2013 is issued to this assessee. This assessee wants to pay service tax for the period 1-4-2008 to 30-9-2012 which was not paid by it and the audit party could not detect such non-payment or short payment of service tax. Can this assessee get benefit of VCES?

Yes, as per the CBEC Circular (supra).

17. Can assessee on whom search was initiated on 1-4-2013 take benefit of this scheme?

Yes, for the dues pertaining to the scheme period.

18. The audit is initiated in 2010 by issuance of a letter calling for information which is also submitted. However, no audit has commenced so far. Whether such person is eligible for making a declaration under the scheme?

Yes, as per the CBEC Circular No. 170/5/2013 - For the purposes of VCES, the date of the visit of auditors to the unit of the taxpayer would only be taken as the date of initiation of audit. A register is maintained of all visits for audit purposes.

19. Sometimes an assessee is asked to furnish certain records as prescribed in R. 5A of STR to ascertain that whether the assessee is liable to pay any service tax. Whether a general enquiry without any specific charge or indication would be sufficient to disentitle the assessee from making a declaration? S. 106(2) appears to cover on the cases of specific enquires only It is to be noted that, every enquiry refers to S. 14 of CE Act.

An enquiry of roving nature from potential taxpayer regarding their business activities without seeking any documents from such person or calling for his presence would not disentitle the tax payer to enter into the scheme as clarified by the CBEC Circular (supra).

20. What are the consequences of failure on the part of declarant to pay 50% tax on or before 31-12-2013?

According to CBEC Circular No. 170/5/2013 One of the conditions of the Scheme [section 107 (3)] is that the declarant shall pay atleast an amount equal to 50% of the declared tax dues under the Scheme, on or before the 31-12-2013. Therefore, if the declarant fails to pay at least 50% of the declared tax dues by 31st Dec, 2013, he would not be eligible to avail of the benefit of the scheme.

21. What if the tax liability for the period Oct-Dec'12 is not paid till the date?

If the tax dues pertaining to the period Oct - Dec'12 is not yet paid then such person is eligible to avail the benefits of VCES scheme as per the scheme.

22. Having declared tax dues u/s. 107(1), whether the declarant shall be eligible for immunity if he fails to make full payment within the prescribed period and the remaining payment is recovered from him in accordance with S. 87 of the Act?

Not free from doubt but it appears from S. 108 that such person shall be eligible for immunity for the payment made. Even S. 110 provides for power of recovery only but the scheme nowhere provides for withdrawal of immunity.

23. Whether the service receiver who is required to make payment under reverse charge can opt for VCES for non-payment of tax dues?

YES, this has been conformed by the CBEC Circular (supra).

24. Whether any kind of document / supporting is required to be attached with the declaration form or if the declarant attached any document / supporting, the same would be accepted and entertained?

The details as required to be filed in terms of Serial No. 3F (I) of new ST-3 or part B of old ST-3. No other supporting or documents seems to be acceptable to the department.

25. Whether rejection of application is quasi judicial function. Whether principles of natural justice will be followed. Whether such rejection is appealable?

According to CBEC Circular (supra), the Scheme does not have a statutory provision for filing of appeal against the order for rejection of declaration under section 106 (2) by the designated authority.

26. ABC Ltd. has there different premises in Ahmadabad, Rajkot and Jamnagar respectively. ABC Ltd. is providing services from each office and such offices are separately registered with respective service tax range. Further, it has received a show -cause notice dated 25-2-2013 in respect of some alleged short payment of service tax for Ahmadabad office but has not received any such notice or any communication for Rajkot or Jamnagar offices. Can Rajkot and Jamnagar branch take benefit under VCES for any tax dues relating to those places?

As per the CBEC Circular (supra), two separate service tax registrations are two distinct assesses for the purposes of service tax levy. Therefore, eligibility for availing of the Scheme is to be determined accordingly. The unit that has not been issued a show cause notice shall be eligible to make a declaration under the Scheme.

27. Section 111 prescribes that where the Commissioner of Central Excise has reasons to believe that the declaration made by the declarant was 'substantially false', he may serve a notice on the declarant in respect of such declaration. However, what constitutes a 'substantially false' declaration ?

According to CBEC Circular (supra), the Commissioner would, in the overall facts of the case, taking into account the reasons he has to believe, take a judicious view as to whether a declaration is 'substantially false'. It is not feasible to define the term "substantially false" in precise terms. The proceeding under section 111 would be initiated in accordance with the principles of natural justice.

To illustrate, a declarant has declared his "tax dues" as ₹ 25 lakh. However, Commissioner has specific information that declaration has been made only for part liability, and the actual "tax dues" are Rs 50 lakh. This declaration would fall in the category of "substantially false".

28. Whether upon filing a declaration a declarant realizes that the declaration filed by him was incorrect by mistake? Can he file an amended declaration?

According to CBEC circular. (supra) - The declarant is expected to declare his tax dues correctly. In case the mistake is discovered *suo motu* by the declarant himself, he may approach the designated authority, who, after taking into account the overall facts of the case may allow amendments to be made in the declaration, provided that the amended declaration is furnished by declarant before the cut off date for filing of declaration, i.e., 31-12-2013.

29. Whether a party, against whom an inquiry, investigation or audit has been initiated after 1-3-2013 (the cutoff date) can make a declaration under the Scheme?

Yes, As per the CBEC Circular (supra) there is no bar from filing of declaration in such cases.

30. In a case where the assessee has been audited and an audit para has been issued, whether the assessee can declare liability on an issue which is not a part of the audit para, under the VCES 2013?

Yes, as per the CBEC Circular (supra) the declarant can declare the "tax dues" concerning an issue which is not a part of the audit para .

31. A person has made part payment of his 'tax dues' on any issue before the scheme was notified and makes the declaration under VCES for the remaining part of the tax dues. Will he be entitled to the benefit of non-payment of interest/penalty on the tax dues paid by him outside the VCES, i.e., (amount paid prior to VCES)?

No, as per the CBEC Circular (supra) The immunity from interest and penalty is only for "tax dues" declared under VCES.

32. A declarant pays a certain amount under the Scheme and subsequently his declaration is rejected. Would the amount so paid by him be adjusted against his liability that may be determined by the department?

As per the CBEC Circular (supra) the amount so paid can be adjusted against the liability that is determined by the department.

33. Whether the CENVAT credit is admissible on the inputs/input services used for provision of output service in respect of which declaration has been made under VCES for payment of any tax liability outside the VCES?

As per the CBEC Circular (supra), the VCES Rules 2013 prescribe that CENVAT credit cannot be utilized for payment of "tax dues" under the Scheme. Accordingly the "tax dues" under the Scheme shall be paid in cash.

The admissibility of CENVAT credit on any inputs and input services used for provision of output service in respect of which declaration has been made shall continue to be governed by the provisions of the Cenvat Credit Rules, 2004. In other words, CENVAT Credit can be carried forward if otherwise eligible.

34. Whether declarant will be given an opportunity to be heard and explain his cases before the rejection of a declaration under section 106(2) by the designated authority?

Yes, it has been clarified in the CBEC Circular (supra), that the designated authority, if he has reasons to believe that the declaration is covered by section 106 (2), shall give a notice of intention to reject the declaration within 30 days of the date of filing of the declaration stating the reasons for the intention to reject the declaration. For declarations already filed, the said period of 30 days would apply from the date of this circular.

The declarant shall be given an opportunity to be heard before any order is passed by the designated authority.

P. C. Joshi, Advocate

LBT – In the Scheme of the Constitution of India

The Constitution of India is the fountain source of all the legislative powers conferred upon both the Parliament as well as the State Legislatures.

Article 246 provide for subject matter of laws that may be enacted by either of the law framers. While the Parliament possess the exclusive power over the matters specified in List I i.e. Union List, List II i.e. State List contain the matters for the State Legislatures. Both the Lists I and II form part of 7th Schedule appended to the Constitution along with List III which is known as Concurrent List.

The power to levy tax is provided only under List I and II while the concurrent lists have no matter relating to tax. As far as the List I and II are concerned, both are mutually exclusive. In other words if the tax is levied on a matter by the Parliament under its plenary powers, the State cannot provide for such a levy. Similar is the position for matters in List II over which Parliament cannot levy tax. The topical example of that nature is the levy of sales tax by States and services by Parliament. The GST could not be implemented only because of the aforesaid limitations.

While considering the legislative competence of a particular enactment, the doctrine of 'pith and substance' is normally applied by the courts. In other words the effect of the enactment and the true nature and character of the levy, would govern the proper legislative area.

Article 265 provide that the tax levied and collected have to be by the authority of law i.e. the law framed by the appropriate legislative forum.

Another aspect to the matter while considering the scope of an enactment is its impact on fundamental rights contained in Articles 14, 15 and 19. In case any law is found to be inconsistent with any of the fundamental rights, the same can be declared to be *ultra vires*.

The Constitution also provide for other restrictions through Article 286 which provide that the State will not be competent to levy tax on transactions of sale or purchase which take place outside the State or in the course of import/export or in the course of inter-State trade or commerce.

In exercise of the powers provided in Article 269 (3), the Parliament enacted the Central Sales Tax Act, 1956 providing for the principles governing the aforementioned categories of transactions in the nature of inter-State trade/import export.

Under Article 251 any law framed by the State legislature cannot be inconsistent with the provisions of the Constitution as well as the law made by the Parliament. Article 254 expressly treats the law made by the State legislature as void to the extent of its repugnancy to the Parliamentary law.

With the above Constitutional background we may safely conclude that under the Constitution, the power of framing a law is with either the Parliament or the State legislature. In other words the Municipal Corporations have no power to levy any tax on its own.

By 74th amendment to the Constitution, Part IX A was inserted w.e.f. 1st June, 1993. The said part provide for the matters relating to Municipalities and its Constitution in each State. Article 243-X provide for the authorisation by a law framed by State legislature, to Municipalities to levy collect and appropriate such taxes, duties, tolls and fees in accordance with the rules framed by the State Government. Such a power of levying tax have to be exercised subject to the Constitutional restrictions and limitations. In other words the levy of tax by a Municipal Corporation cannot provide for levying tax on transactions that take place in the course of import or in the course of inter-State trade or commerce.

In India except the State of Maharashtra all other States absorbed the octroi with the levy of VAT. The State of Maharashtra however enacted the Local Body Tax (hereinafter referred to LBT) without repealing the levy of entry tax by a separate enactment. Entry 52 of State list, applicable to LBT as well as Entry tax (List II) read as under:

'Taxes on the entry of goods into a local area for consumption, use or sale therein'. In juxtaposition with that entry, entry 54 enable the State legislature to levy tax on the sale or purchase of goods subject to the provisions of entry 92 A of List I. That entry in List I provide for the Parliamentary power in respect of transactions in the course of inter-State trade or commerce.

The nature of the entry tax have been the subject matter of several matters before the High Courts as well as the Supreme Court. The courts have uniformly considered the parameters of the levy, by considering as to whether the entry tax happens to be compensatory or regulatory. While Entry Tax levy by some of the State enactments have been held to be ultra vires; wherever the State was able to establish the compensatory nature its legality was upheld. As far as the State of Maharashtra is concerned the Bombay High Court in the case of *Eurotex Industries and Export Ltd vs. State of Maharashtra & Ors. 135 STC 25* struck down the validity of the entry tax. Along with the said case the case of another petitioner M/s. Tata Power Co. Ltd., was also tagged. The facts in Tata Power case involved the import of certain goods from other country and not from other State.

The Maharashtra Act 27 of 2009 w.e.f. 31st August, 2009 inserted Chapter XI B to the Bombay Provincial Municipal Corporation Act, 1949. Under the said Chapter section 152T empowered the State Government to make rules for the purpose of levy of local body tax and accordingly by notification dated 23rd March, 2010 various rules were framed so as to provide for levy of LBT within the State of Maharashtra.

The Municipal Labour Union, Pune and Others challenged the legality of those rules on various grounds. Though the said Writ Petition No. 2720 of 2013 (on Appellate Side) have been admitted, no ad-interim relief have been granted by observing that the alternative system of levying LBT was introduced in lieu of octroi in the Municipal Corporation areas as per the persistent demand from the traders.

While we await the final disposal of the said Writ Petition, it can safely be concluded that the LBT cannot be levied on goods imported from other country or from other States, being contrary to Article 286 of the Constitution. Secondly the term 'importer' as defined in section 28A cannot cover an importer of goods from other countries.

The term 'goods' in section 27 *inter alia* include animals however the definition of the said term in Article 366(12) would prevail. According to that definition the term includes all materials, commodities and articles; in other words it does not cover livestock. Therefore to that extent the definition under LBT would be *ultra vires*.

Rest of the provisions under LBT follow the Scheme of MVAT Act, therefore the professionals will have a very wide scope for expanding their area of practice. I wish all my younger Brothers and Sisters will keep themselves abreast with the developments in that regard.

CA Dilip Phadke

Important Definitions applicable to LBT and Exemptions

Definitions

There are 8 definitions in LBT rules and 76 in Maharashtra Municipal Corporation Act, 1949 (MMCA). Wherever applicable the definitions in main Act are copied from MVAT Act, 2002, by making necessary changes as per requirement of LBT. All the definitions in Act are not relevant for LBT.

Following are the definitions applicable to LBT from MMCA.

(5A) "Business" includes, –

(a) Any trade, commerce, profession, consumption or manufacture or any adventure or concern in the nature of trade, commerce, profession, consumption or manufacture whether or not such trade, commerce, profession, consumption, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, profession, consumption, manufacture, adventure or concern and whether or not there is any volume, frequency, continuity or regularity in such trade, commerce, profession, consumption, manufacture, adventure or concern;

(b) Any transaction in connection with, or incidental or ancillary to, such trade, commerce, profession, consumption, manufacture, adventure or concern, whether or not such transaction is in respect of capital assets and whether or not it is effected with motive to make gain or profit and whether or not any gain or profit accrues from such transaction, and whether or not, there is any volume, frequency, continuity or regularity in such transaction;

(c) Any occasional transaction in the nature of such trade, commerce, profession, consumption, manufacture, adventure or concern involving import, purchase or sale of goods in the City, whether or not there is any volume, frequency, continuity or regularity to such transaction and whether or not such transaction is effected with a motive to make gain or profit and whether or not any gain or profit accrues from such transaction;

(d) Any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, profession, consumption, manufacture, adventure or concern, whether or not such transaction is effected with a motive to make gain or profit and whether or not any gain or profit accrues from such transaction.

Explanation. – For the purposes of this clause, the activities of raising of man-made forests or rearing of seedlings or plants shall be deemed to be business

Comments

The definition of business is important because if you are not doing business you cannot be a dealer and if you are not a dealer you have no liability to pay tax on your transactions. You will be called as person doing the business if you do any of the following with intention of making profit

a) Trade i.e. buying or selling of goods.

b) Commerce i.e. business related services like publicity, marketing, etc.

c) Profession i.e. persons who are expert in their field and give expert advice in the matter of their subject like doctors, C.A., advocates.

d) Consumption i.e. using it in manufacture, selling, processing or finishing it in any other manner.

e) Manufacture i.e. processing where there is change in the form of the product.

f) Adventure i.e. undertaking involving risk.

g) Concern i.e. interest in business.

It is not necessary that you will always get profit out of such activity, and some times you might incur loss, this will not convert the activity into non-business activity. To decide whether any activity is business it is not necessary to take in to consideration volume, frequency, continuity or regularity of the transactions.

Business will also include any transaction in connection with, or incidental to or ancillary to business including purchase of any asset. It is felt that business starts when you start manufacturing or selling the goods, but when you do anything incidental to business or you purchase asset, your business starts and you have to pay LBT on material imported from that point of time.

It is not necessary that there should be continuity or regularity in the business transactions even if you do one occasional transaction it is sufficient to constitute business

If any transaction is done for starting or closing the business it will be treated as business transaction, e.g. if after closing the business a machinery is sold VAT will be payable on the said transaction & if you import anything LBT will be payable as it is a transaction for closure of business.

The explanation says that if you are doing business of nursery i.e. rearing of seedlings or plants or growing forest manually it will be treated as business. This explanation is necessary to understand that if you purchase any product for it you will be liable to pay LBT on the same and it is not exempt from tax as agricultural produce.

Business includes any trade, commerce, profession, etc. It is to be seen if the practitioners like doctors, C.A., lawyers do the business and are dealers. In the case of AF Ferguson & Co. vs. State of Maharashtra WP 1232 of 1995 on 5-5-2006 under Bombay Shops & Establishment Act it was decided by Bombay High Court that the office of chartered accountant is not business premises and are not doing business. The reference can also be made to case of B.G. Sabne WP 1256 OF 1992 on 12-9-2006 by Bombay High Court which has pronounced that Advocates, Doctors & C.A. are learned professionals. Similarly in Bengaluru in a case filed by 41 doctors it was held by tribunal under Karnataka VAT that dispensing medicines by doctors is not sale and they are not liable for tax. i.e. doctors are not sellers of the medicines.

(16A) "Dealer" means any person who whether for commission, remuneration or otherwise imports, buys or sells any goods in the City for the purpose of his business or in connection with or incidental to his business, and includes,

(a) a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, and whether or not of the same description as hereinbefore specified who buys, sells, supplies, distributes or imports any goods in the City, belonging to any principal or principals whether disclosed or not;

(b) an auctioneer, who sells or auctions goods in the City, belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;

(c) the Central Government or any State Government which (whether or not while carrying on business) buys, sells, supplies, distributes or imports goods directly or otherwise, for commission, remuneration or otherwise;

(d) a society, club or other association of persons (whether incorporated or not) which, whether while carrying on business or not, imports, buys, sells, supplies or distributes goods whether for or on behalf of its members or not, for cash or for deferred payment or, for commission, remuneration or otherwise.

Explanation.– For the purposes of this clause,-

(A) A manager or agent of a non-resident dealer residing in the City who imports, buys, sells, supplies or distributes goods in the City or acts on behalf of such dealer as –

(a) a mercantile agent as defined in the Sale of Goods Act, 1930, or

(b) an agent for handling of goods or documents of title relating to goods, or

(c) an agent for the collection or the payment for the sale price of goods shall be deemed to be a dealer or as a guarantor for such collection or payment.

(B) Each of the following persons and bodies who disposes of any goods including goods as unclaimed or confiscated or an unserviceable or as scrap, surplus, old, obsolete or discarded material or water products whether by auction or otherwise directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything contained in clause (5A) of any other provisions of this Act, be deemed to be a dealer, namely:

(a) Port Trusts;

(b) Municipal Corporations, Municipal Councils, Zilla Parishads and other local authorities;

(c) Railway administration as defined under the Indian Railways Act, 1890;

(d) Shipping, Transport and Construction Companies;

(e) Air Transport Companies and Airlines;

(f) Transporters, holding permit for transport vehicles granted under the Motor Vehicles Act, 1988 which are used or adapted to be used for hire or reward;

(g) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporations Act, 1950;

(h) Customs Department of the Government of India administering the Customs Act, 1962;

(i) Insurance and Financial Corporations or Companies, and Banking Companies;

(j) Advertising agencies;

(k) Any other Corporations, Company, Body or Authority owned or set-up by, or subject to administrative control of, the Central Government or any State Government.

Exception.– (i) Any individual who imports goods for his exclusive consumption or use and a department of State or Central Government not engaged in business shall not be a dealer;

(ii) An agriculturist who sells exclusively agricultural produce grown on the land cultivated by him personally shall not be deemed to be a dealer within the meaning of this clause.

Comments

Dealer definition almost resembles with Maharashtra Value Added Tax Act, 2002 (herein after called MVAT). The person (all types like individuals, firms, limited companies, H.U.F., trust, society, clubs, banks etc.) who buys or sells any goods in the local area of corporation for business for a price or otherwise is dealer.

The dealer will include any type of agent appointed by principal to buy, sale, import, supply or distribute goods in local area on behalf of principal (disclosed or undisclosed)

An auctioneer conducting auction on behalf of some body else will be a dealer.

The Central or State Government or their departments buying or selling goods for a price or otherwise will be dealer. But if these departments are not engaged in business they shall be excluded from definition of dealer.

Persons and bodies who disposes of any goods including goods as unclaimed or confiscated or an unserviceable or as scrap, surplus, old, obsolete or discarded material or waste products for a price will be deemed dealers.

There is an exception that if an individual imports any goods for his exclusive own use he will not be a dealer.

If an agriculturist is selling the produce of the land cultivated by him personally will not be treated as dealer and no LBT will be payable by him on goods brought by him in local area.

(25) "Goods" includes animals:

Comments

The definition is too short and it is very important definition as LBT will be chargeable on the items covered by this definition. There is no reference to movable property, transfer of property Act. The method and point of taxation of intangible goods is not clear. There are no specific exclusion for items like newspapers, actionable claims, money, stocks ,shares etc. as given under MVAT Act.

(28A) "Importer" means a person who brings or causes to be brought any goods into the limits of the City from any place outside the area of the City for use, consumption or sale therein.

Comments

Importer means a person who brings the goods in to local area from a place outside local area. It is not necessary that he should bring it himself if the goods are sent to him by a person from a place outside local limits that is also sufficient to make the person importer. It is important to note that it is not necessary that the person has to purchase the goods. The goods are taxable under LBT in the other cases like goods sent to dealer from its head office as branch transfer, sent to him from outside for processing, etc. The goods sent shall be for business for use or consumption.

The definition of importer is important because, first the turnover limit for registration is less if you are importer than if you are non-importer & second when you bring in any goods (import) in the local limits then only you have to pay LBT.

(70C): Value of the article in relation to the goods imported into the city, where "octroi" or "cess" is charged on such goods on *ad valorem* basics, shall mean the value of the article as mentioned in the original invoice, and include the shipping dues, insurance, custom duties, excise duties, counter vailing duty, sales tax (if any), Value Added Tax (VAT), transport charges, vendor freight charges, carrier charges and all other incidental charges.

Comments

The value of the goods on which the LBT will be charged is the value mentioned in the original invoice (including excise) plus all charges and expenses incurred till the goods reach its destination. It will include shipping charges, insurance, VAT, transport charges, and other incidental charges.

It was necessary that taxable event also should have been defined which is not finding any place in rules or the main Act, MMCA. The taxable event is goods crossing the border of local area of the corporation or municipality. The LBT is payable on the value of the goods which cross the border of local area provided they fall in Schedule A at the rates specified against them.

RULES

Rule 2. Definition

(1) In these rules, unless the context otherwise requires:

(a) "Act" means Bombay Provincial Municipal Corporations Act, 1949 (Bom. LIX of 1949); (The Maharashtra Municipal Corporations Act, 1949 (LIX of 1949)

(b) "Appointed day" means the day notified by Government, in the Official Gazette, to be the day from which the levy of local body tax is to commence in the area of a Corporation.

Comments

The State Government has the authority to implement the LBT in the municipalities. It takes the decision from what date the LBT will be applicable in lieu of Octroi. Such date is published in Official Gazette. From the said date the octroi is replaced. The LBT is implemented by the local body i.e. corporation or municipality. It is not a date of commencement of levy of LBT, but date of commencement of LBT in that municipal corporation in lieu of Octroi.

(c) "Designated Bank" means the bank authorised by the Corporation, to accept the payment of local body tax on its behalf.

(d) "Form" means a Form appended to these rules.

(e) "Section" means a section of the Act.

(f) "Schedule A", in relation to a Corporation, means a Schedule as notified by the State Government in the Official Gazette, under the provisions of section 99B enumerating goods on which and the rates at which local body tax is leviable under the provisions of the Act, in the area of such Corporation.

Comments

The commodities on which tax is payable and the rate at which tax is to be paid is given in Schedule A. In many cases the tax rate prescribed by different municipalities for same commodity are different. Therefore whenever you have to pay the tax you have to find the rate applicable to that local area. This hampers the possibility of one combined return and payment for an organisation having multi municipalities' location. Such organisations have to take separate registration in every municipality and pay the taxes and file the returns separately. Another problem is finding out commodity in the schedule. In some municipalities the schedule runs in 15 to 16 pages and in some it runs in 618 to 636 pages giving the rates in the format of HSN code.

(g) "Schedule B", in relation to a Corporation, means a schedule as notified by the State Government in the Official Gazette, under the provisions of section 152Q enumerating goods on which no local body tax is leviable under the provisions of the Act, in the area of such Corporation.

Comments

Schedule B gives the list of goods on which no tax is payable on their entry in local area. As per requirement of the local area the items in the list change. Mostly these include items of daily necessity, like milk, vegetables, books, live trees, etc.

(h) "Notified day", means the day on which the Government publishes a notification in the Official Gazette directing a Corporation to levy in lieu of Octroi, cess or as the case may be, local body tax, in its area.

Comments

This is the date from which the local body has to start levy and collection of LBT in place of octroi or cess as the case may be, in the local limits.

EXEMPTIONS

Rule 28. Exemption in certain cases

(1) No local body tax shall be levied on the goods imported into the City by State or Central Government, on production of a certificate from an officer empowered by the Government concerned in this behalf, certifying that the goods so imported belong to the Government and are imported for public purpose and are not used or intended to be used for the purpose of earning profit.

(2) No local body tax shall be levied on the goods imported into the limits of the City on behalf of, or on account of State or Central Government, on production of a certificate from an officer empowered by the Government concerned in this behalf, within a period of six months from the date of importation, certifying that the goods so imported belong to the Government and are imported for public purpose and are not used or intended to be used for the purposes of earning profit.

(3) If any goods held by a dealer or a person in the City are moved outside the City for carrying out the processes enumerated in the explanation to this rule, and are re-imported without effecting any change in condition or appearance, as also the ownership of the goods, the value of the goods moved out, shall be allowed to be deducted from the total value of processed goods re-imported and local body tax shall be leviable only on the value added i.e. processing charges, transfer charges, etc :

Provided that, the goods are re-imported within a period of six months from the date of export outside the City and the dealer furnishes the information of such export in the returns for the relevant periods.

(4) If any dealer in the City imports any goods from any place outside the City for carrying out any of the processes enumerated in the explanation under this rule, on job work basis and proves to the satisfaction of the Commissioner that the goods processed have been exported within a period of six months from their importation, to the same person outside the City and there had been no change in the ownership and in the Form of the goods at the time of export, no local body tax shall be levied subject to the following conditions, namely:-

(i) that dealer shows the value of such goods in the return of the relevant period;

(ii) the dealer pays security deposit, as a guarantee, as may be determined by the Commissioner in this behalf. However, a dealer importing the goods for processing on regular basis, may make a deposit as standing deposit as may be fixed by the Commissioner from time to time.

Explanation: - For the purpose of sub-rules (3) and (4) processing shall include —

(i) Grinding, dyeing, bleaching, painting, printing, finishing, stentering, embroidering, doubling, twisting, metallising and electroplating;

(ii) Building and mounting of bodies over chassis of vehicles of all kinds Deleted*[and shall also include such other processes as may be approved by the Commissioner, from time to time.]

(iii) Any other process as may be approved by Commissioner, from time to time

The decision of the Commissioner in this respect shall be final.

(5) When any good held in the City are sold and exported outside the City are received back due to rejection of goods by the purchaser, no local body tax shall be levied on such goods, provided that the goods are received back in the City within a period of six months from the date of their export and the dealer proves to the satisfaction of the Commissioner that the sale of such goods was disclosed in the return of the relevant period.

(6) The registered dealer who is exporting the goods outside the territory of India shall be exempt from the levy of the Local body Tax in respect of the value of the goods used for the purpose of such export.

Comments

The first exemption from payment of LBT is when the goods are brought in local area by the Central or State Government for public purpose and not to be used for a purpose of earning profit. For claiming such exemption an empowered government officer has to issue a certificate that goods are to be used for public purpose and not to earn the profit.

The second exemption for payment of LBT is when the goods are brought in to local area on behalf of the Central or State Government. For claiming such exemption an empowered government officer has to issue a certificate within six months that goods

belong to the Government and are to be used for public purpose and not to earn the profit.

The third exemption is available if following conditions are fulfilled:

1) The goods shall be held by a registered dealer in local area
2) Such goods are moved out of the local area
3) A process mentioned in the explanation is carried out in outside area
4) Such processed goods are brought back in the local area without effecting any change in condition, appearance & ownership
5) Such goods are brought back within six months from the date of export
6) The dealer shows the figure of such export in return for relevant period

The exemption or deduction is allowed in respect of the value of the goods sent for processing from the value of processed goods so that LBT is charged only on processing or transfer charges and not whole value of material.

The fourth exemption is applicable if following conditions are fulfilled:

1) The goods are brought into local area from outside place (imported) to carry out any process enumerated in the explanation.
2) The goods after carrying out process are re-exported within six months from date of import.
3) There is no change in the form or ownership of the goods i.e. goods are sent back to same person.
4) The dealer shows value of such goods in return for relevant period.
5) Dealer pays security deposit, as a guarantee determined by Commissioner. In case of dealers who are doing job work on regular basis may make a permanent deposit as may be fixed by Commissioner.

For the purpose of exemption (3) and (4) processing shall include —

(i) Grinding, dyeing, bleaching, painting, printing, finishing, stentering, embroidering, doubling, twisting, metallising and electroplating;
(ii) Building and mounting of bodies over chassis of vehicles of all kinds.
(iii) Any other process as may be approved by Commissioner, from time to time. The decision of the Commissioner in this respect shall be final.

Comments: The processes which are mentioned are so less that they mainly include the processes where there is no change in form of the material. The processes which are mentioned mainly belong to textile industry. There are many processes which are treated as labour according to excise and MVAT but under LBT when there is change in form the tax will be payable. It is further going to create problem when the material has to pass through chain of processes done by different processors. The goods can't go directly from one processor to another. In case of grinding and printing there will be change in form and whether LBT is chargeable will be disputable point. In Form E-I there is no space provided to show the goods exported for process brought back within six months (now after amendment this form is not required to be filed by the dealer).

The fifth exemption is when the goods sold outside local limits are returned from outside area within six months from the date of sale. There is a condition that such sale should have been shown in the return of relevant period.

The sixth exemption is available to the exporter of the material out of India. Such exporters have not to pay LBT on the goods used for purpose of such export.

It is not clear from the rule how to calculate value of the goods used by a manufacturer for purpose of export of material out of India.

CA Vikram Mehta

Registration, Amendment and Cancellation of Registration Certificate

On slaught of indirect taxes and its adminstration has left the business community fuming. The controversies never seem to die and just as one tries to make peace with the ongoing legal terror under MVAT , the government has made a body blow on the business community in Maharastra. The acceptance and patience of the business community shall make them liable to pay LBT. Enlisted herein are the initiation process for the business who are saddled with the liability of LBT.

Taxable Event under LBT arises, when goods are imported into limit of city (Corporation Limit) for use, consumption or sale therein.

Taxable person (entity) under LBT is 'Dealer'.

The 'Dealer' is defined as under:-

- Any person who buys,sells imports any goods in the city for the purpose of business or incidental or in connection with business.
- Any broker, factor, agent / Society, club and association also Manager of non-resident dealer/ person who resides in the city.
- Agents for handling goods/ documents of title &/or for collection of payment/ guarantor for payment.
- All dealers registered under the MVAT Act are considered Deemed Registered dealer.

Casual Dealer

If a dealer or person does not carry a particular business in the city(Municipal area) on regular basis, but carries on business in the city in any year on temporary basis then he shall be termed as Casual Dealer.

The dealer will be liable to pay LBT on the goods specified in the schedule

Schedule A: Sec 99: Goods on which LBT is leviable.

Schedule B: Sec 152Q: Tax Free Goods

The Limits of turnover for registration by a dealer are as under (Rule 3)

The dealers are classified into two categories just as in VAT.

The Importer and Others Category.

Where population is less than 20 Lakhs as per 2011 census-

For Importer

Total sales/Purchases in a year – ₹ 1,00,000/- or more and

Value of goods imported- ₹ 5,000/- or more and

Value of taxable goods (Sch.A) purchases- ₹ 5,000/- or more.

For Others

Total sales/purchases in a year – ₹ 1,50,000/- or more and

Value of purchases of taxable goods; – ₹ 5,000/- or more.

And where population is 20 Lakhs or more as per 2011 Census-

For importer

Total Sales/Purchases in a year – ₹ 3,00,000/-or more and

Value of goods imported-5000/- or more and

Value of taxable goods (Sch.A) purchases – ₹ 5,000"/- or more

For others

Total sales/purchases in a year – ₹ 4,00,000/- or more and

Value of purchases of taxable goods;– ₹ 5,000/- or more

But if a dealer is casual dealer then notwithstanding anything contained in above provisions, he shall be liable for temporary registration under the provisions of the act and rules whether or not he is liable under above provisions.The commissioner may ask for the deposit in such cases.

Calculating the limit of turnover (Rule 4)

For this purpose turnover of Sales and purchases include following:

a) Turnover of all sales or purchases whether taxable under the provision of the act and rules or not.

b) All sales and purchases made by dealer on his own account and also on behalf of principals mentioned in his accounts.

c) In the case of auctioneer, in addition to a) and b), price of goods auctioned by him for his principal.

A non residential dealer or manager of non residential dealer residing in the city shall be liable for registration under the rules whether or not they are liable under this rule and any commission agent or an auctioneer shall be liable for registration whether or not his principal is dealer and whether or not the principal is liable for registration under the rules.

Rule 5,6,7 and 8 pertain to liability of persons in special circumstances to pay local body tax.

Registration (Rule 9)

Every dealer who is liable for registration under Rule 3, cannot carry on business unless he possesses a valid certificate of registration as provided under the rules. The provisions of this rule shall not be deemed to be contravened if the dealer carries on business pending disposal of his application for grant of registration, if the dealer had applied in the prescribed manner and time. Every dealer required under this rule to possess a valid certificate of registration shall apply for registration within the following mentioned period.

– Within 30 days from the date on which the turnover of all his sales or the turnover of all his purchases exceeds specified limit.

– In case of temporary business by a dealer, 15 days prior to commencement of such business with security deposit as determined by the commissioner.

– Every dealer who is registered under the provisions of the MVAT Act, 2002 on the appointed day, shall be deemed to be registered dealer under these rules from such day

Application for registration shall be made in Form A, to the commissioner along with the registration fee of hundred rupees. Following documents shall be submitted with Form A:

- A copy of PAN.
- Two Passports sized photo of signatory.
- Copy of Shop & Establishment Licence.
- MVAT TIN RC
- Memorandum/ Article of Association OR Partnership Deed OR Bye-Laws.
- Proof of residence of signatory (2).
- Proof of place of business (1).
- Details of purchases till the date of registration.
- B/Sheet & P&L A/c for previous year
- Property Tax Receipts

Every application of registration shall be made verified and signed, in the case of:

1. An individual, by the proprietor or person having due authority to act on behalf of proprietor;
2. A firm, by partner thereof;
3. A HUF, by Karta or an adult member;
4. A body corporate, including a company, a cooperative society or a local authority, by director, secretary, manager or principal officer or a person duly authorized to act on its behalf.

In the case of firm, every partner shall furnish a declaration as provided in Form A along with the application of registration. If such declaration not furnished with application, shall be furnished not later than 3 months from the date of making such application in Form A. The application shall also include the name and permanent residential address of applicant, the classes of goods in which applicant deals.

Certificate of Registration is granted in Form B.

The certificate of registration shall take effect from appointed day, but in case of temporary registration it shall take effect from the time when dealer's turnover first exceeded the limits specified in rule 3 and the application is made in prescribed time.

In case the application is made after the expiry of prescribed period, it shall take effect from the date on which application is made.

In case of deemed dealer(dealer having VAT Number), a certificate of registration shall be issued to him notwithstanding the fact that he has not applied for registration under the rules which will take effect from appointed day.

In case a dealer has two or more place of business, within the city, then the commissioner shall issue one copy of registration for each additional place (not being merely a warehouse) and such dealer shall display the certificate of registration or copy thereof at each place of business.

In case if a dealer opens a new place of business in addition to existing place which was in existence at the time of registration, the dealer can apply for additional copy of certificate of registration.

Amendments(Rule 14)

- If any dealer transfers his business or discontinues his business or changes the place thereof or opens up a new place of

business or changes the name or nature of business or effects any change in the classes of goods imported by him or enters into a partnership or other association in regard to his business then he shall inform the commissioner within 60 days of occurrence of any of above mentioned events. Along with such information the dealer shall deliver certificate of registration to the commissioner held by him for amendment.

- If any changes have been made either by way of amendment in relevant form or substitution thereof by new form after issue of certificate of registration to the dealer then within 60 days the dealer shall deliver certificate of registration to the commissioner.
- Above provisions do not apply in following circumstances (Rule 16):

  Where a registered dealer-

  a. effects change in the name of his business or,

  b. is a firm,and there is change in the constitution of firm, without dissolution thereof, or

  c. is a trustee of trust, and there is change in trustees thereof, or

  d. is a guardian of ward, and there is a change in the guardian.

Cancellation of Certificate of Registration (Rule 17)

Any business of dealer in respect of which a certificate of registration has been issued under the rules, has been discontinued or has been transferred or otherwise disposed of or neither the turnover of sale or turnover of purchase of a registered dealer, has, during any year exceeded the relevant prescribed limit then the dealer shall apply for cancellation of his certificate of registration.

The cancellation of registration shall not affect the liability of dealer to pay local body tax including interest and penalties if any for any period prior to date of cancellation of certificate. Such dealer whose registration is cancelled under this rule shall not be called as registered dealer from the date of cancellation of registration. If the commissioner is satisfied with the application, he shall cancel the certificate of registration and shall publish the name, address, registration number and date of cancellation of registration of such dealer on notice board of corporation. A copy of such order shall be delivered to dealer.

Date of Cancellation of Registration

– In case of discontinuance or transfer of business, the date of cancellation of registration shall be the date on which business is discontinued or transferred.

– In other case the date of cancellation of registration shall not be later than first day of month next following the date on which notice is published on notice board of corporation.

The application for cancellation of certificate of registration shall be made in 'Form C'. The Dealer shall surrender the Registration Certificate to the Commissioner within 15 days from the date of receipt of the cancellation order.

An effort has been made to enlist the basic provisions pertaining to the liability to register and pay LBT under the new enactment.

CA Rajat Talati

Valuation of Article and Rate of Tax

The Bombay Provincial Municipal Corporations Act, 1949 [BPMC Act] is amended and chapter XI-B is inserted in the Act w.e.f. 31-8-2009. However, levy of octroi, cess or LBT is mutually exclusive and hence any one of the three could only be levied by the Municipal Corporation.

1. In view of the powers sanctioned u/s. 127(3) of the BPMC Act, the State Government has notified Rules on 25-3-2010. These rules are known as the Bombay Provincial Corporation (Local Body Tax), Rules 2010 [BPMC/LBT Rules]. Rules 23, 24, 25, 27 and 28 are relevant for the purposes of this article.

A Rate of tax

As per the scheme of LBT, schedule A provides for the rate of tax applicable to such commodities listed thereunder. Schedule B refers to the list of goods on which LBT is not payable [exempted goods]. Thus, the rate of tax is the rate as is mentioned in the schedule against each of the listed goods/ commodities. Each Municipal Corporation will have to issue notification in respect of the goods covered by Schedule A and the rate of tax applicable thereto. It is observed that the rate of tax ranges from 0.1% to 7% of the value of goods brought in to the local area for consumption, use or sale therein. Municipal Corporations like Navi Mumbai, Pune have classified certain goods giving reference to the classification of such goods under MVAT Act. Thus they have resorted to the concept of 'referential legislation'. Items of industrial inputs and packing material, IT products, goods of intangible or incorporeal nature, textile and textile articles, etc. are part of such referential legislation. Therefore, one will have to refer to the MVAT Act for classification of such goods for purposes of finding out rate of tax applicable for levy of LBT.

B Valuation of articles

2. Rule 24 prescribes tariff value to be fixed in certain cases. This rule, I believe, is for the purposes of prevention of evasion of LBT by declaring lesser value of the goods which are brought in to the local area. Thus, if the Commissioner is satisfied that it is necessary to prevent evasion of LBT in respect of any taxable goods covered by Schedule A, he may display the tariff value in respect of such goods on notice board of the Corporation from time-to-time and fix such tariff value in respect of the said goods. Upon displaying such tariff value, the goods so listed out, the LBT will have to be paid based on such tariff value as are declared on their notice board without regard/ reference to the value shown in any document in relation to such goods. In view of the

powers that are given to the Commissioner; the transaction value/document value of such listed items will have no relevance and that the LBT is payable on the declared value. Unfortunately, the rules provides for displaying such tariff on notice board of such a corporation. Obviously, it is difficult for dealers to have updated knowledge of this. Moreover, the Commissioner may withdraw /add more commodities from time to time to the said list. One may appreciate if the same is made available on the website of the respective corporation. Still keeping track of such updated list notified/issued by various municipal corporations becomes a challenge.

3. Rule 25: Determination of fair market price

The definition of 'fair market price' is not available in the rules. The fair market price is to be applied/determined by the commissioner if:

(a) In the opinion of the Commissioner, the sale price or as the case may be, the purchase price of goods shown by dealer or a person, in respect of any transaction between related persons is less than fair market price;

or

(b) If the sale price or purchase price of goods is not ascertainable, or where the goods have not been obtained by way of sale or purchase.

The Commissioner will have to give reasonable opportunity to the concerned dealer before passing any order under this rule determining the fair market value.

4. Section 2(70C) of the BPMC Act provides for 'valuation of articles' in relation to the goods imported in to city where octroi or cess is charged on such goods on *ad valorem* basis. In such a case value of article as mentioned in the original invoice and it also includes the shipping dues, insurance, custom duties, excise duty, counter vailing duty, sales tax, VAT, transport charges, vendor freight charges, carrier charges and all other incidental charges. The definition does not refer to LBT for the purposes of 'value of article'. Thus, this may create legal complication if this definition which is specifically provided for 'value of articles' in respect of levy of cess or octroi duty is also applied in LBT. Here it would be appropriate to mention that Rule 2(7)(a) of the Mumbai Municipal Corporation (Levy) of Octroi Rules, 1965 also provide that for the purposes the valuation of the goods would also include all the incidental charges and duties. The Section 2(70 C) of the BPMC Act is based on such a definition.

5. Rule 28: Exemption in certain cases

1. No LBT is payable where imported goods in to the city by State or Central Government is made by such Government for public purpose and are not used or intended to use for the purposes of earning profit by the State or Central Government. The officer empowered by the Government has to issue such a certificate for claiming the exemption.

2. Similarly, when such goods are imported on behalf of or on account of State or Central Government on production of a certificate by a concerned officer of the Government no LBT is levied.

3. If the goods held by a dealer in the city are moved outside the city for carrying out the enumerated processes and are reimported without effecting any change in condition or appearance as also the ownership of the goods, the value of the goods moved out is allowed to be deducted from the total value of the processed goods reimported and LBT shall be levied only on the value added i.e., processing charges, transfer charges etc.

Provided that goods are reimported within a period of 6 months from the date of export outside the city and information of such export is incorporated in the returns filed for the relevant period.

4. Similarly, if any dealer imports any goods from any place outside the city for carrying out any processes enumerated in the explanation, on job work basis and proves to the Commissioner that the processed goods have been exported within a period of six months from the date of importation, to the same person outside the city, without being any change in ownership and in the form of the goods at the time of export, no LBT shall be levied. In this case also the dealer has to show value of such goods in return of the relevant period and that the dealer pays security deposit as a guarantee. A dealer regularly importing goods for processing may make a deposit as a standing deposit, as may be fixed by the Commissioner.

For the purposes of sub-rule 28(3) & (4), the explanation added defines the term 'processing to include:

(i) Grinding, dyeing, bleaching, painting, printing, finishing, stentering, embroidering, doubling, twisting, metallising and electroplating.

(ii) Building and mounting of bodies over chassis of vehicles of all kinds shall also include such other processes as may be approved by the Commissioner from time-to-time.

The decision of the commissioner in this respect shall be final.

5. Rule 28(5) provides for exemption from payment of LBT where goods held in the city are sold and exported outside the city are received back due to rejection by the purchaser provided that the goods are received back in the city within a period of six months. The original sale of such goods should have been disclosed in the return of the relevant period. The concept is similar to 'goods return' commonly understood under the VAT laws. Please note that this sub-rule provides for receiving back of the goods in the city and not mere intimation of rejection of material by the customer. Besides, it talks about rejection of goods by the purchaser of the goods. Therefore, it is likely that return of goods on account of stock transfers out of the city to other branches / consignment agent does not get covered by scope of the rule 28(5). This may cause economic loss under the given facts.

6. The registered dealer who is exporting goods outside the territory of India shall be exempt from the levy of LBT in respect of value of the goods used for the purpose of such export. It is likely that the phrase 'goods used for the purpose of such export' may require interpretation. Would such a phrase include raw material and other inputs, capital goods used in manufacture of goods which are exported? Surely, some clarification is required in this respect as this would have far reaching impact on the cost of goods exported. Moreover, unlike Rules 28(1)(2) to 28(5) which are applicable to a 'dealer', Rule 28(6) speaks only about the registered dealer. Thus, the benefit of Rules 28(1) to 28(5) can be claimed even by unregistered dealer under the LBT.

In this article attempt is made to discuss valuation of articles and rate of tax applicable under the LBT. It appears that these Rules require a lot of refinement and therefore, pending such amendment, clarificatory circular be issued by the State Government [instead of by each Municipal Corporation] so that avoidable litigation can be addressed.

CA Sujata Rangnekar

Payment of LBT including Composition Scheme and Interest

We have discussed about the Constitutional validity, charging provisions etc., in relation to Local Body Tax (LBT) so far in other articles. In this article, we propose to deal with some procedural aspects of the proposed LBT.

Maintenance of records

The charge of LBT is on the imports/purchases of goods into the limits of the city and therefore, it is utmost necessary to maintain proper records to arrive at the taxable turnover of such imports/purchases. Unlike MVAT Act, Rule 19 under the Bombay Provincial Municipal Corporation (Local Body Tax)Rules, 2010 provides for a specific format in which the import/purchase of the goods into the limits of the city shall be recorded. The prescribed format is form 'D' appended to the said rules. The columns provided therein are as follows:

1) Sr. No.

2) Name and address of vendor

3) Local Body Tax registration no.

4) Commodity

5) Purchase value of goods/processing charges chargeable to Local Body Tax.

The said form itself provides for following rules in respect of entry in such purchase register.

1) It should be chronologically maintained.

2) Entry of goods to be made as per date of receipt in the city.

3) Incorporate the detail of purchase /import viz.

   a) Invoice no. and date

   b) Name and address of selling dealer/ consignor

   c) If local R.D. the R. C. No.

   d) If not local, the place from where goods moved for sale by selling dealer.

   e) Purchase price in case of branch transfer means the value of goods.

The import of goods into the local limits of the city can take place either by import of goods from a foreign country or purchase of goods from other cities situated in the State or purchase of goods from other states or similar stock transfers. There is no other way by which the goods can be entered into the limits of the city. Therefore, there has to be either a purchase invoice or a stock transfer invoice or an import invoice corresponding to every entry of goods into the city. The registration no. under Local Body Tax needs to be entered only when the

goods are brought in the city from a local dealer registered within the State.

It must be borne in mind that mere entry of goods is enough to enter the same in the said register. One need not wait till the purchase of the goods is approved for payment, quality control etc. like under MVAT Act. The purchases under the MVAT Act are booked after the process of bill approval is done. It may take a long time. Such is not the case with LBT and entry in the aforesaid register can be made as soon as the goods received note is prepared.

Branch transfers received may be the commercial goods in which the dealer deals or may be other goods such as capital goods, business promotion items, samples or goods received for processing, job work, etc. In all such cases, the dealer is duty bound to enter the goods so purchased or imported in this register.

The stock transfer invoice many a times does not disclose the commercial value of the goods. In that case, it is provided in the said form that the value of goods should be considered. Therefore, the fair market price of the goods needs to be entered in case of stock transfers.

Although not required by the format of the above register in form D, the dealer is advised to maintain records in relation to goods exported within 6 months from the date of the import in the same form u/r. 32, goods exported for specified processing u/r. 28(4), goods imported for specified processing u/r. 28(3), goods exported out of the country out of the goods imported etc., to facilitate the filing of returns in form E-I and E-II.

Issuance of bills

Every dealer who holds the goods in the city sells or supplies such goods to any other dealer in the city has to issue bill, invoice or cash memorandum specifying the details as required u/r. 22 and containing the certificate prescribed in that rule. Thus, the issuance of the bill, invoice etc. is mandatory to all dealers whether registered or not under LBT.

The particulars required to be filled up in the bill, invoice etc. are full name and style of the business, full address of his business, number of seller's certificate of registration, particulars of the goods sold/supplied and sale price thereof. The details are almost similar to those required under section 86 of the MVAT Act r/w rule 77 thereunder. Therefore, the additional details required under rule 22 of LBT Rules can be incorporated under the same bill/tax invoice/ cash memo etc. These are R.C. Nos. under LBT Rules. Here, we have to bear in mind that there can be multiple nos. of LBT held by single dealer in different cities or local areas within the State and all of them will have to be mentioned on the said bills, invoices, etc. It may also be borne in mind that sale invoice/bill as the case may be, need not show the amount of LBT payable by the buyer/transferee like VAT amount. LBT has to be computed by the buyer based on his purchase register and pay the same to the local body concerned.

Further, the said rule also provides that bill, invoice, cash memo for more than ₹ 500/- has to mention the R. C. under LBT of the buyer as well. Thus, the dealer has to create the database for LBT Nos. of his buyers as well along with their TIN under MVAT Act.

Submission of returns

Rule 40 prescribes forms, periodicity of the returns to be filed. The registered dealers have to file the returns. They have been classified into two categories viz. the dealers who have opted for lump sum payment u/r. 27 and the dealers who have not so opted. The first category has to file an annual return in form E-II within 15 days from the end of the year.

The second residuary category has to file a six monthly return for the first half of the year in form E-I within 15 days from the end of such period and an annual return in form E-II within 15 days from the end of the year. Thus, dealers not opting for lump sum payment have to file two returns for first six months and then for the whole year respectively.

Notwithstanding anything in this rule, the Commissioner has the powers to specify in form G, different periods, dates for different dealers or unregistered dealers or persons for filing the returns. He also has the power to exempt any dealer or class of dealers to furnish returns for such different periods. He can also permit the dealer or any class of dealers to furnish a consolidated return relating to all or any of his places of business within the city. However, the permission to file consolidated return is not granted upon application.

The provision for revised returns is also made. In case any omission or incorrect statement is found in the return already filed, the dealer can file revised return within one month from the due date for filing original return.

The returns at present have to be filed manually and not on-line.

Payment of LBT

Before filing the returns, the payment of LBT has to be made in accordance with rule 40. The duty to make the payment is cast upon all registered as well as unregistered dealers and persons who are liable to pay LBT. However, there seems to be some inconsistency in the rule 29 providing for filing of return and rule 40 providing for making of payment. The returns, as we have seen, are either six monthly or annually whereas the payments have to be made on monthly basis. The expression used in the rule is "due and payable according to return" where return needs to be filed after the end of the period of six months or an year, as the case may be. Therefore, applying rules of rationality, it can be inferred that the payments have to be made based on self-assessment, every month before 10th of the immediately following month, and returns have to be filed six monthly/annually, as the case may be both by dealers paying lump sum amount in lieu of LBT and dealers paying LBT as per the provisions of law.

The Commissioner has right to issue directives for different dates of payment to different dealers or classes of dealers.

Rule 39 provides for rounding off of the amount of LBT and interest, penalty, forfeiture, fine etc. to the nearest rupee while making the payment. One has to bear in mind that such rounding off can be done at the end of the period after ascertaining the amount payable to the authorities for a month and not for each transaction of purchase/import.

Forms of Returns

Form E-I: It is a return cum challan which the dealers who have not opted for lump sum payment have to file for the first six months of the year. The form contains the usual preliminary information about the dealer such as LBT Registration no., name of the dealer, address & telephone no. Thereafter, the calculation of the Local Body Tax payable for the period has to be disclosed as follows:

A. Value of goods received for consumption, use or sale (inclusive of goods returned)

Commentary- The total value of goods imported/ purchased is to be mentioned here as per register D before claiming any deductions whatsoever.

B. Deduct

1. Purchase from Local Body Tax registered dealer

Commentary – Rule 20 provides that a RD can claim exemption in respect of purchases from another RD from the same area of the city if such RD furnishes a certificate prescribed u/r. 22 in the bill, invoice issued by him. We have already seen these provisions and deduction in respect of such purchases can be claimed by the purchasing dealer.

2. Exemption u/s. 152Q (Tax Free)

Commentary – The tax-free goods under LBT Rules are prescribed under Schedule B and they have to be deducted from the taxable turnover.

3. **Exemption u/r. 28 (goods for State/ Central Govt.)**
Commentary – Sub-rules (1) and (2) of rule 28 allow deduction in respect of import/purchase by the State/ Central Government or on behalf of such Governments duly certified by officer empowered by the Government on this behalf that the goods so imported are meant for public purposes and not for the purposes of earning profit. Such purchase needs to be deducted from this column.

4. **Value of goods imported for export u/r. 32**
Commentary – Rule 32 allows refund in respect of goods exported out of the city either by way of sale or by way of transfers, to the extent of 90% of the LBT paid on the original imports. There appears to be some mistake in the deduction provided here since the LBT needs to be first paid and then refund at 90% has to be ordered in form M. There is a separate column at sr. no. 8 for claiming the refund. Therefore, a clarification is required on this issue. Direct deduction in the return may be treated as not as per law if the order of refund is not passed . Calculation of Local Body Tax payable: The columns therein are as follows-

1) Commodity imported (Received)
2) Goods covered by schedule entry
3) Rate of LBT applicable
4) Value of goods liable for LBT
5) Amount of LBT payable

These particulars have to be filled up in this table and final liability of LBT is to be worked out.

5. Information regarding Goods imported for process(u/r28 : This rule provides for deduction in respect of goods sent out of the city for certain specific processing. These processes are enumerated in the Explanation below the rule. The deduction is available both for goods sent out and reimported for these processing and goods imported for such processing and then sent out to the original owners. The detailed discussion on these deductions can be found elsewhere in other articles. However, column 6 considers only goods received by the dealer for such processing as a job worker u/r. 28(4). The columns are as follows:

A) Opening stock at the beginning;

B) Value of goods imported for processing on job work during the half year;

C) Value of total goods for processing in premises till end of the half year. (A+B);

D) Value of goods processed and exported out of above during the half year;

E) Total balance left in premises at the end of this half year. (C-D).

The time limit of 6 months is applicable for such export u/r. 28(4). This column merely gives an account of goods received for specified processing.

6. Value of goods liable for LBT as not exported within 6 months. This is a deduction u/r. 28(4) in respect of goods sent out after specified processing work within 6 months from its import provided there is no change in the form and in ownership. If such export is not made within 6 months, the deduction is not available and such goods become liable to LBT. This value of goods needs to be shown here in column 7.

7. Less refund u/r. 32 : This rule allows refund at 90% of the LBT already paid if

the same goods are sent out of the city by way of sale or transfer, as the case may be, within a period of 6 months. The refund can be claimed only when the original import has already borne the tax. Therefore, the value of goods so imported for the purpose of export and liable to LBT should be first included in the taxable turnover. The refund can be claimed only thereafter. It must be borne in mind that refund in this column can be shown only when order in form M is passed by the authorities.

8. Total Local Body Tax payable: This is the amount arrived after claiming all deductions and refunds as above.

9. Interest for delayed payment: Interest needs to be calculated here as per the provisions of law and paid along with the return.

10. Amount payable: This is the total amount payable.

11. Amount paid with Local Body Challan: This amount needs to be mentioned in figures as well as in words.

12. Amount paid by cash/cheque no…….. dated…….

Bank Name……..Branch……

These are the details of payment made.

Thereafter, the return has to be signed by the dealer. It must be borne in mind that the return has to be filed physically and not on line.

Form E-II

This is a form of return which all dealers except those who have opted for composition or lump sum payment, have to file. It has seven parts from I to VII. This is a detailed return which has to be filed annually.

Part I

This requires the entire turnover of sales and purchases to be disclosed without any deductions. The turnover so arrived should match with the register and books of account.

Part II

This column requires value of goods received for consumption, use or sale. In short, this is the total turnover of purchases/imports which would have been ordinarily liable to tax but for the deductions under the rules. The three sources of purchases/imports have to be segregated viz. import, transfer and return of goods /rejection (whether within 6 months or otherwise).

The deductions provided thereunder are a) purchased from local RD; b) received by transfer within the city; c) returns/rejections within 6 months; d) exempt u/s 152Q i.e. under schedule; B. e) Exempt u/r 28.

The only difference between forms E-I and E-II in respect of these deductions is E-I provides for deduction u/r. 32 for goods imported for export and form E-II provides for deduction for inter-city transfers. Only these two deductions are uncommon in the two forms. We have already discussed the deductions earlier. Thereafter, the calculation of the LBT is to be made in the table provided below.

Part III

This part deals with rule 32 where refund is admissible when goods are exported within 6 months. The details such as opening stock, value of total goods imported for export, total of all such imports, value of goods exported within 6 months out of such total, value of goods not exported within 6 months and on which LBT is payable, balance of goods on which the period of six months is not over, refund admissible on goods exported within 6 months and then the calculation of LBT are required to be provided

here. It is advisable to keep the record of such activity although register in form D does not mandate the same.

Part IV

This part deals with the deduction u/r. 28(4) requiring detail of goods imported within the city for processing and sent back within the period of 6 months. The details are value of opening stock of goods imported for processing but not processed, value of goods imported for processing on job work basis during the year, total of such goods imported, value of goods processed and exported within 6 months (on which no LBT is payable), value of goods not processed and not exported within 6 months and value of goods processed but not exported within 6 months (both the goods are liable to LBT), balance of goods which are not processed or processed but not exported and the period of 6 months is not exhausted, balance turnover of goods on which LBT is payable as per the table below.

This part requires the dealer to maintain the records for the processing activity in detail although form D does not mandate the same.

Part V

This part deals with the deduction u/r. 28(3) for goods sent out of the limits of the city for processing. The details required are value of the opening stock as on 1st April of the year exported out for processing but not reimported, value of goods exported out for processing during the year, total of the two, value of goods exported out for processing and brought back within 6 months duly processed, processing charges thereon (liable to LBT being value addition), value of goods sent out but not reimported within 6 months, value of goods exported for processing and where the period of 6 months is not over, calculation of LBT on the processing charges and goods reimported beyond the period of 6 months.

The details required under this rule also need to be properly maintained although register in form D does not mandate the same.

Part VI

This is a table for calculating refund u/r. 32 at 90%. At the outset, the total value of goods exported within 6 months is to be quantified. The corresponding value of goods imported is to be mentioned in the table to arrive at the LBT borne on the same. This value can be exact one if records to that effect are maintained or it can be an estimated value. The form of return allows such estimation. The LBT computed on such corresponding import value is refundable to the extent of 90% as per rule 32.

Part VII

This part provides for calculation of LBT based on the liability disclosed in earlier parts of the form. There could be some overlapping in the calculations which needs to be taken care of. Refund amount is deductible from the liability.

Rule 46

This rule empowers the Commissioner to introduce composition schemes u/s. 152N of the Act subject to any conditions. So far, no composition scheme under this rule is declared.

This is in a nutshell the provisions relating to returns, payment of tax under LBT.

One day is worth two tomorrows.

— Franklin

C. B. Thakar, Advocate

Returns, Records to be maintained and Penalties under Local Body Tax

Returns

In any fiscal law there is scheme for self compliance. For that purpose, there are procedures for filing returns and making of payments as per returns, etc. In the account based system of LBT similar provisions are there for returns and payments. The provisions regarding returns can be examined briefly as under:

Rule 29 of the Bombay Provincial Municipal Corporations (Local Body Tax) Rules, 2010 (LBT Rules) provides for submission of returns.

Returns by registered dealers

As per rule 29(1) the returns are required to be submitted by the registered dealer.

There are two returns to be filed by the dealers. A dealer should file half yearly return in Form 'E1'. He should also file yearly return in Form 'E-II'.

There appears to be apparent mistake in making above rule. There will be duplication of turnover as the turnover disclosed in half yearly return, will again get reflected in yearly return. However, a dealer should comply with the requirement as it is.

Such returns in forms 'E1'/'E-II' should be filed within 15 days from the end of the respective period of respective return.

Composition dealers

There is separate provision for the dealer, who has opted for lump sum amount of payment of LBT (composition scheme). Such dealer should file annual return in Form 'E-II'. If the composition scheme starts in between the year than such return should be from the 1st day of the month from which the scheme become operative till the end of March. He should also continue to file annual return for the further periods also, till he is covered under the scheme. The return is required to be filed within 15 days from the end of the concerned year.

Returns as per specific order

As per rule 29(3) the Commissioner is authorized to specify different periods and dates for different dealers or classes of registered dealers or un-registered dealers and persons for the purpose of furnishing of the returns. The said authority is to be utilised by order in Form 'G'. Similarly, the Commissioner is also authorised to exempt the dealer from filing the returns or to direct to file consolidated returns for all the places of

business in the city.

Revised return

As per rule 29(4) a dealer is also entitled to file revised return before expiry of one month following the last date prescribed for filing the original return, to correct any omission or any incorrect statement in the original return. There is no prohibition for filing belated revised return and hence dealer can file revised return even belatedly also. There can be revision of revised return also, as there is no specific bar for such filing.

Returns by temporary dealers

Rule 3(2) provides for temporary registration by dealers, who are not doing business in the city on regular basis. Such dealers are required to submit returns as per rule 29(5). In such case, dealer should file monthly return in form 'E1' and it should be filed within 10 days from the end of respective month.

Form 'E1', certain aspects

This is a form for first six monthly returns. The form contains the usual preliminary information about the dealer such as LBT Registration no., Name of the dealer, Address & Telephone no. Thereafter, the calculation of the local body tax payable for the period has to be disclosed as follows:

A. Value of goods received for consumption, use or sale (inclusive of goods returned)

Here the total value of goods imported/ purchased is to be mentioned here as per register D before claiming any deductions whatsoever.

B. Deduct

1. Purchase from Local Body Tax registered dealer

Rule 20 provides that a RD can claim exemption in respect of purchases from another RD from the same area of the city if such RD furnishes a certificate prescribed u/r. 22 in the bill, invoice issued by him. The deduction in respect of such purchases can be claimed by the purchasing dealer here.

2. Exemption u/s 152Q (Tax Free)

The tax-free goods under LBT Rules are prescribed under Schedule B and they have to be deducted from the taxable turnover.

3. Exemption u/r. 28 (goods for State/ Central Government)

Sub-rules (1) and (2) of rule 28 allow deduction in respect of import/purchase by the State/Central Govt. or on behalf of such Governments duly certified by officer empowered by the Govt. on this behalf that the goods so imported are meant for public purposes and not for the purposes of earning profit. Such purchase needs to be deducted from this column.

4. Value of goods imported for export u/r. 32

Rule 32 allows refund in respect of goods exported out of the city either by way of sale or by way of transfers, to the extent of 90% of the LBT paid on the original imports.

It appears that this column does not match with relevant rule. The LBT needs to be first paid and then refund at 90% has to be claimed only thereafter. There is a separate column at sr. no. 8 for claiming the refund. Therefore, it would not be advisable to claim deduction here.

5. Calculation of Local Body Tax payable:- The columns therein are as follows-

1) Commodity imported (Received)

2) Goods covered by schedule entry

3) Rate of LBT applicable

4) Value of goods liable for LBT

5) Amount of LBT payable

These particulars have to be filled up in this table and final liability of LBT is to be worked out.

6. Information regarding Goods imported for process (u/r 28)

This rule provides for deduction in respect of goods sent out of the city for certain specific processing. These processes are enumerated in the Explanation below the rule. The deduction is available both for goods sent out and reimported for these processing and goods imported for such processing and then sent out to the original owners.

The column no. 6 considers only goods received by the dealer for such processing as a job worker u/r. 28(4). The columns are as follows:

A) Opening stock at the beginning

B) Value of goods imported for processing on job work during the half year

C) Value of total goods for processing in premises till end of the half year.(A+B)

D) Value of goods processed and exported out of above during the half year.

E) Total balance left in premises at the end of this half year. (C-D)

The time limit of 6 months is applicable for such export u/r 28(4). This column merely gives an account of goods received for specified processing.

7. Value of goods liable for LBT as not exported within 6 months. This is a deduction u/r. 28(4) in respect of goods sent out after specified processing work within 6 months from its import provided there is no change in the form and in ownership. If such export is not made within 6 months, the deduction is not available and such goods become liable to LBT. This value of goods needs to be shown here in column 7.

8. Less refund u/r 32: This rule allows refund at 90% of the LBT already paid if the same goods are sent out of the city by way of sale or transfer, as the case may be, within a period of 6 months. The refund can be claimed only when the original import has already borne the tax. Therefore, the value of goods so imported for the purpose of export and liable to LBT should be first included in the taxable turnover. The refund can be claimed only thereafter. It must be borne in mind that refund in this column can be shown only when order in Form 'M' is passed by the authorities.

9. Total Local Body Tax payable : This is the amount arrived after claiming all deductions and refunds as above.

10. Interest for delayed payment : Interest needs to be calculated here as per the provisions of law and paid along with the return.

11. Amount payable : This is the total amount payable.

12. Amount paid with Local Body Challan- This amount needs to be mentioned in figures as well as in words.

13. Amount paid by cash/cheque no…….. dated…….

Bank Name……Branch……

These are the details of payment made.

Thereafter, the return has to be signed by the dealer. It must be borne in mind that the return has to be filed physically and not on line.

Form 'E-II', certain aspects

This is a form of yearly return for all dealers. It has seven parts from I to VII. This is a detailed return which has to be filed annually.

Part I

This requires the entire turnover of sales and purchases to be disclosed without any deductions. The turnover so arrived should match with the register and books of account.

Part II

This column requires value of goods received for consumption, use or sale. In short, this is the total turnover of purchases/imports which would have been ordinarily liable to tax but for the deductions under the rules. The three sources of purchases/imports have to be segregated viz. import, transfer and return of goods/rejection (whether within 6 months or otherwise).

The deductions provided thereunder are a) purchased from local RD b) received by transfer within the city c) returns/rejections within 6 months d) exempt u/s. 152Q i.e., under schedule B, e) Exempt u/r. 28.

The only difference between Forms E-I and E-II in respect of these deductions is E-I provides for deduction u/r. 32 for goods imported for export and form E-II provides for deduction for inter-city transfers. Only these two deductions are uncommon in the two forms. Thereafter, the calculation of the LBT is to be made in the table provided below.

Part III

This part deals with rule 32 where refund is admissible when goods are exported within 6 months. The details such as opening stock, value of total goods imported for export, total of all such imports, value of goods exported within 6 months out of such total, value of goods not exported within 6 months and on which LBT is payable, balance of goods on which the period of six months is not over, refund admissible on goods exported within 6 months and then the calculation of LBT are required to be provided here. It is advisable to keep the record of such activity although register in form D does not mandate the same.

Part IV

This part deals with the deduction u/r. 28(4) requiring detail of goods imported within the city for processing and sent back within the period of 6 months. The details are value of opening stock of goods imported for processing but not processed, value of goods imported for processing on job work basis during the year, total of such goods imported, value of goods processed and exported within 6 months (on which no LBT is payable), value of goods not processed and not exported within 6 months and value of goods processed but not exported within 6 months (both the goods are liable to LBT), balance of goods which are not processed or processed but not exported and the period of 6 months is not exhausted, balance turnover of goods on which LBT is payable.

This part requires the dealer to maintain the records for the processing activity in detail although form D does not mandate the same.

Part-V

This part deals with the deduction u/r. 28(3) for goods sent out of the limits of the city for processing. The details required are value of the opening stock as on 1st April of the year exported out for processing but not reimported, value of goods exported out for processing during the year, total of the two, value of goods exported out for processing and brought back within 6 months duly processed, processing charges thereon (liable to LBT being value addition), value of goods sent out but not reimported within 6 months, value of goods exported for processing and where the period of 6 months is not over, calculation of LBT on the processing charges and goods reimported beyond the period of 6 months.

The details required under this rule also need to be properly maintained although register in form D does not mandate the same.

Part VI

This is a table for calculating refund u/r. 32 at 90%. At the outset, the total value of goods exported within 6 months is to be quantified. The corresponding value of goods imported is to be mentioned in the table to arrive at the LBT borne on the same. This value can be exact one if records to that effect are maintained or it can be an estimated value. The form of return allows such estimation. The LBT computed on such corresponding import value is refundable to the extent of 90% as per rule 32.

Part VII

This part provides for calculation of LBT based on the liability disclosed in earlier parts of the form. There could be some overlapping in the calculations which needs to be taken care of. Refund amount is deductible from the liability.

Maintenance of records:– The charge of LBT is on entry of goods into the limits of the city (which can be referred to as import) and therefore, its utmost necessary to maintain proper records to arrive at the taxable turnover of such imports Rule 19 under the Bombay Provincial Municipal Corporation (Local Body Tax) Rules, 2010 provides for a specific format in which the import of the goods into the limits of the city shall be recorded. The prescribed format is form D appended to the said rules. The columns provided therein are as follows:

1) Sr. no..
2) Name and address of vendor
3) Local Body Tax registration no.
4) Commodity
5) Purchase value of goods/processing charges chargeable to Local Body Tax.

The said form itself provides for following rules in respect of entry in such purchase register.

1) It should be chronologically maintained.
2) Entry of goods to be made as per date of receipt in the city.
3) Incorporate the details of purchase / import viz:.
   a) Invoice no. and date
   b) Name and address of selling dealer/consignor
   c) If local R.D. the R. C. No.
   d) If not local, the place from where goods moved for sale by selling dealer.
   e) Purchase price in case of branch transfer means the value of goods.

The import of goods into the local limits of the city can take place either by import of goods from a foreign country or purchase of goods from other cities situated in the State or purchase of goods from other states or similar stock transfers. There will be practical difficulties in maintaining the above register as the same is to be maintainable qua each commodity, imported into city with its value and LBT payable on same. Therefore, there will be either a purchase invoice or a stock transfer invoice or an import invoice corresponding to entry of goods into the city. The registration no. under Local Body Tax needs to be entered only when the goods are brought in the city from a local dealer registered within the State.

It must be borne in mind that mere entry of goods is enough to enter the same in the said register. One need not wait till the purchase of the goods is approved for payment, quality control, etc.

Branch transfers received may be the

commercial goods in which the dealer deals or may be other goods such as capital goods, business promotion items, samples or goods received for processing, job work etc. In all such cases, the dealer is duty bound to enter the goods so purchased or imported in this register.

The stock transfer invoice many a times does not disclose the commercial value of the goods. In that case, it is provided in the said form that the value of goods should be considered. Therefore, the fair market price of the goods needs to be entered in case of stock transfers.

In addition to above and though not specifically mentioned in Rule, it is advisable for the dealer to maintain records for goods imported and explain the job work, export etc. for facility of filing return in Form E-I and E-II.

Issuance of bills:- Every dealer who holds the goods in the city sells or supplies such goods to any other dealer in the city has to issue bill, invoice or cash memorandum specifying the details as required u/r. 22 and containing the certificate prescribed in that rule. Thus, the issuance of the bill, invoice, etc. is mandatory to all dealers whether registered or not under LBT.

The particulars required to be filled up in the bill, invoice etc. are full name and style of the business, full address of his business, number of seller's certificate of registration, particulars of the goods sold/supplied and sale price thereof. The details are almost similar to those required under section 86 of the MVAT Act r/w. rule 77 thereunder. Therefore, the additional details required under rule 22 of LBT Rules can be incorporated under the same bill/tax invoice/cash memo, etc. These are RC Numbers under LBT Rules. Here, we have to bear in mind that there can be multiple numbers of LBT held by single dealer in different cities within the State and all of them will have to be mentioned on the said bills, invoices etc. It may also be borne in mind that sale invoice/bill as the case may be, need not show the amount of LBT payable by the buyer/transferee like VAT amount. LBT has to be computed by the buyer based on his purchase register and pay the same to the local body concerned.

Further, the said rule also provides that bill, invoice, cash memo for more than ₹ 500/- has to mention the R. C. under LBT of the buyer as well. Thus, the dealer has to create the database for LBT nos. of his buyers as well along with their TIN under MVAT Act.

Penalty

Non issue of bill/invoice etc.

Section 152G of the MMC Act provides that when registered dealer sells goods to another registered dealer or he sells goods exceeding ₹ 10 in the value to any person he shall issue a bill/cash memorandum etc., which are serially number, signed and dated. A counterfoil should also be preserved for not less than 5 years from the date of sale.

Rule 48(1) provides that if the dealer so fails to issue bill/invoice etc., Commissioner can levy penalty after hearing the dealer. The penalty quantum can be double the amount that would have been payable, if the goods sold had been imported by the selling dealer in the city for consumption, use or sale therein. The power to levy penalty is discretionary as to levy and quantum. Therefore, all the principles applicable for levy of penalty will also equally apply here.

Other penalties

Rule 48(2) provides penalties in following contingencies:

(a) Failure to apply for registration though required;

(b) Failure to respond to any notice;

(c) Failure to disclose entry of goods where LBT is leviable or claiming inaccurate deduction, refund or failure to disclose fully and truly all material facts necessary for proper and correct quantification of the LBT.

The quantum of penalty is specified as under:

In case of (a) not exceeding 10 times of the LBT payable during the URD period;

In case of (b) a sum not exceeding ₹ 10,000/-;

and in case of (c) a sum not exceeding 5 times of the LBT found payable under clause (c).

The penalty can be levied after giving hearing opportunity. The levy of penalty under this rule is discretionary as to levy and quantum and therefore all the principles as applicable to levy of penalty will apply here also.

Rule 48(4) provides penalty for the offence of knowingly producing bill/cash memorandum etc., which is not true by reason of which any goods imported in the city for consumption, use or sale are not liable to LBT or liable at lower rate of LBT. The penalty can be levied after hearing opportunity. The penalty should not exceed twice the amount of LBT due in respect of same goods, if it is first occasion. On the second and subsequent occasion, the penalty can be to the extent of 5 times of the LBT in respect of the same goods.

Similarly, rule 48(5) provides for penalty where a dealer or person furnishes declaration or certificate by reason of which LBT is not leviable or leviable at a lower rate and such dealer or person had knowledge or reason to believe that such declaration or certificate was false. The penalty can be levied after hearing opportunity and it is discretionary. The quantum is maximum up to 5 times of the LBT which would have been leviable on such goods.

Penalty for delayed filing of returns

If the return is not filed within the prescribed time then the delay will attract penalty up to ₹ 5000/- u/r. 48(6). The penalty is discretionary and can be levied after giving hearing opportunity. The Commissioner can grant exemption from above penalty to the class or classes of dealers as may be specified. This penalty is without prejudice to Rule 48(2)(c).

Penalty for non issue of cash memo/ bill, etc.

As per rule 48(7) if the dealer fails to issue cash memo/bill etc., as required under section 152G then he can be liable for penalty, not exceeding double the amount of cash memo/ bill for which it should have been issued or ₹ 100/- whichever is more. The penalty can be levied after giving hearing opportunity. There appears to be duplication of this penalty as similar penalty is also provided under Rule 48(1).

Penalty for non-maintenance of records

If dealer liable to pay LBT or to whom notice is issued by Commissioner to maintain accounts, fails to maintain accounts in manner prescribed or directed, he shall be liable to penalty under Rule 48(8) which can be up to ₹ 5000/- or double the amount of LBT payable, if there was no contravention, whichever is less.

Conclusion

In present days there is tendency to make the provisions for returns and penalties etc., automatic and mandatory. Therefore, timely compliance is the need of the day. I hope, my above article will be useful in grasping some of the integral issues dealt with in the article and will be useful in day-to-day practice of this new taxation law.

Nikita R. Badheka, Advocate & Notary

Assessments, Reassessments, Refunds and Appeals under the Local Body Tax Act

The mere mention of the above four legal events in any forum discussing any of the existing tax laws, would ensure prolix discussions on the existing precedents, plethora of landmark judgments and recent amendments in their respective taxation statutes. There would also be a good amount of skepticism and disgust about the day-to-day issues faced by the practitioners in their interaction with the respective Departments for the above-mentioned legal provisions.

Despite decades of experience, the state of affairs in the Departments is at best 'semi organised chaos'. It would not be difficult to imagine the complete chaos that waits to befall upon the dealers and subsequently the practitioners when Departments like Municipal Corporations with their wonderful record in handling their current affairs enter into an alien field of account based taxation along with the related legal proceedings. This brings us to subject matters of this article.

Assessment

On short perusal of the LBT Rules it is quite clear that the Assessment and Reassessment provisions are roughly analogous to the similar proceedings in the MVAT Act with procedural differences.

Although the rate of LBT on goods may differ from one local area to another local area, the procedural part will be governed by Maharashtra Municipal Corporations (Local Body tax) Rules. ("LBT Rules" or " Rules" for short).

Octroi was a spot assessment system generally, whereas under the new system the goods would be allowed to enter the local area without any hindrance and there will be book based periodical payment of tax, filing of return and assessment of tax like every other tax system for goods imported in the local area.

Rule 33 of the LBT Rules provides for Assessment of Local Body Tax. If the registered dealer is liable to pay any amount of Local Body Tax, he would be assessed separately for each period. The assessment will be qua return period and not for a year.

As per rule 33(2), if the Commissioner is satisfied that the returns furnished are correct and complete, he shall assess the amount of LBT due from a dealer on the basis of the return. The rules strangely do not provide for any format of acceptance like section 33(2) of BST Act for summary assessment. No time limit is also provided for the assessment under this sub-section.

The assessment u/r. 33(3) is for the dealer who being Registered Deale:

1) Has failed to file the returns or is irregular in furnishing the returns.
2) Or has filed incomplete returns and the Commissioner deems it necessary to require the further production of evidence in respect of the same.
3) Or has claimed Refund along with the returns.

4) Or has made Application for cancellation of his RC.

U/R 33(4): The Commissioner may assess any Person who is not an RD but is liable to pay LBT and has failed to apply for registration and/or has failed to take cognizance of any direction in Form G given by Commissioner to furnish returns.

The LBT Rule 33(5) enables the Commissioner to pass 'Best Judgment Order' in case the dealer fails to comply with the notice given U/R 33(3) and 33(4). The Commissioner may also pass 'Best Judgment Order' U/R 33(6) if he is not satisfied with the correctness or completeness of accounts of the dealer or the dealer has not been following a regular accepted method of accounting. Needless to add that the Commissioner is duty bound to give the dealer involved a fair opportunity of hearing. Commissioner also has power to levy interest and penalty as per Rule 48 of the LBT Act.

The limitation for passing Assessment orders u/r. 33(3),(4), and (5) is provided in Rule 33(7). As per this Rule The commissioner "may proceed to assess the dealer by serving on him notice in Form H, giving minimum 15 days time before the date of hearing . The words proceed to assess is interpreted by the Tribunal to mean that only notice should be given in five years time and there is no need to pass the orders in five years.

Assessment order would be in Form I (Rule 33(9)) and notice of demand will be in form J (Rule 33(11)). For every additional copy the assessee will be charged a fix sum of ₹ 25 per order of assessment (Rule 33(12)).

In terms of rule 33(10), the order to impose penalty or interest u/r. 48 or order of forfeiture of tax may be incorporated in an assessment order. The word May suggests there can be separate order for imposing penalty or Interest. The Commissioner has the power to call for any record relating to production of accounts or documents or furnish any information for the Assessment Proceedings.

A very interesting Rule 33(13) specifically provides that all papers relating to assessment shall be kept together and shall form part of assessment record. further these records shall be preserved for next 10 years. if any proceedings are commenced for a period then the records shall be preserved for three years next following the completion of proceedings. This is a welcome provision.

Reassessment

As per rule 34(1), If after the assessment of a dealer or person, for any reason, the LBT payable has escaped assessment and the Commissioner has documentary evidence to that effect on record, or the assessment is made at lower rate or deductions are wrongly allowed, or a claim has been wrongly allowed or refund has been wrongly granted:

The Commissioner may within 3 years of the date of communication of order, after recording reasons in writing, proceed to assess or reassess the amount of LBT due from such dealer or person. The notice shall be in Form K.

The proviso to this sub-rule, confirms that LBT shall be assessed at the rate at which it would have been assessed had there been no under assessment or escapement. The legally permitted deductions shall be allowed to be deducted.

The reassessment shall not apply to penalty provision under Rule 49. Disclosure of information u/r 52 shall not affect this proceedings.

Appeals

Appeals under LBT Rules have to be filed as per Sec. 406(6) of the MMC Act or erstwhile BPMC Act. The hierarchy of Appeals is as follows.

a. For demand raised by LBT Officer, Appeal lies to Deputy Commissioner;

b. For demand raised by Deputy Commissioner, Appeal lies to the Commissioner.

The appeal has to be filed within fifteen days from the date of demand notice along with the challan for payment as per Sec. 406(2)(e) of the MMC Act i.e., the total amount of tax which is disputed or total amount under disputed rate of tax has to be deposited by the Appellant to the Commissioner. This provision about full payment will act as a deterrent. Please mark, 15 days to be counted from date of order & not from the date of service of order

Various refund provisions

Refund of excess LBT payment

Rule 44 empowers the commissioner to refund to any dealer or any person any tax, interest or penalty paid in excess of what is due from him by an order in Form M. The amount can be either paid in cash or at the option of the dealer can be adjusted against amount of tax, interest or penalty payable under any other period. Needless to say refund due to dealer would be first applied towards recovery of any amount payable if any by the dealer.

Power to withhold refunds in certain cases

The Authority granting refund can withhold the refund if the order giving rise to a refund is subject matter of appeals or any other proceedings under the rule and if the Authority is convinced that such a refund would adversely affect the revenue, the refund can be withheld after approval of the Commissioner, till such time as Commissioner may determine.

Refund of tax in case of Export – Rule 32

This is one of the very important provision. Subject to conditions listed below, if the dealer occasions import of goods and subsequently exports the goods outside the city otherwise than under a Contract of Sale , or if such a person has sold the goods which results in export outside the city limits then the dealer is entitled to claim 90 per cent refund of the LBT paid while importing the same.

Conditions to avail such a refund:

(a) The details of goods imported are given in the relevant return, showing that goods are imported for export, and the return is furnished.

(b) The local body tax on the import is paid with the relevant return.

(c) The goods are exported out of the city within a period of six months of their importation.

(d) The person furnished the relevant return after export, claiming the refund.

(e) The person, when asked, proves to the satisfaction of the Commissioner, that the goods imported have been exported within the period specified, without making any change in the goods.

The Commissioner also has the discretion to allow any dealer who is importing and re exporting such goods outside the city limits on a regular basis , then he may after taking due declaration from such a dealer allow him to pay 10% of LBT while importing the same goods.

This is a very beneficial provision especially dealers who are distributors in small towns and mofussil areas having limited market . Such distributors can re-export the goods to dealers outside the city limits and avail a healthy abatement of 90% in the total LBT payable.

The dealers would be well advised to carefully collect and store the acknowledged declaration and other permissions granted by the Commissioner, while taking benefit of this provision to avoid evasion charges and unnecessary recovery problems.

Apart from the above-mentioned legal proceedings part of the LBT Rules, there are other rules for special mode of recovery of tax, attachment provisions, rectification of mistake, etc.

It would either take bravery or an absolutely obscene tax demand for dealers to initially enter into the turbid waters of the Appellate and other legal provisions, it would also require a befitting bold practitioner to initiate such proceedings. The initial teething problems would come directly from the fact that, the officers and their higher ups have no experience in judicial proceedings in account based taxation unlike the officers of other indirect taxes. LBT being a sort of a cess unique to Maharashtra, we are hard pressed at many legal precedents in the above legal matters. It is well advised to tread extra cautiously to ensure minimum hassles to the dealers, fortunately there are ample of legal precedents in Octroi, LBT is nothing but old wine (Octroi) in new bottle (New form of account based system).

Morality and Profession

Dhavnish Jagdip Shukla

One of the most basic and preliminary teachings that is imparted to any one of us in the childhood is that "Honesty is the Best Policy". While our elders taught us this proverb, they pointed out the importance of not only speaking the truth, but in a broader context to adhere to morals, ethics and protection of duties. Before speaking of 'Morals', it is necessary to understand what morals actually are. The Oxford Dictionary defines morals as: a subject concerned with the principles of right and wrong behaviour. This definition may leave us in a grey area, full of doubts and interpretations. To be clear, let's take an example. If Mr. A shoots a bullet on Mr. B is it moral? The answer that shall spring up is an obvious 'No'. But consider the same case with the only change that Mr. B is a cold-blooded criminal trying to kill Mr. A. Now doesn't the answer change! So, basically, what can be termed as right or wrong behaviour is a matter of fact and cannot be defined. This throws some light on the basic and inherent nature of Morals – they cannot be defined, but they can only be practised with an attitude of understanding and integrity. To be brief, morals are principles that enable an individual to protect rights of others and his own duties.

The scope of morality is as infinite as difficult it is to define the same. It covers every area possible in the human world; our professional life is no exception. Profession, generally used as a term to express the income generating activity of a person, is capable of doing so effectively only if it adheres to certain ethical norms. This idea was promoted by many great personalities of the history of mankind. The great scholar Chanakya has, in his epic Arthashastra, has given rules for moral behaviour which a king must follow for effective, just and righteous administration. A professional is no less than a king. His practice, his profession, his dealings all can be viewed as that of a king and thus the principles apply to a king and a professional alike. Chanakya has stated that a king (or a professional in our case) must overthrow his lust, anger, greed, vanity, haughtiness and over joy and perform his duties accordingly. Thus, in our context if a professional is able to restrain his anger, ego, greed and haughtiness and be true to his ethics, only then will he succeed. Mahatma Gandhi has developed a list of seven deadly sins that could destroy the socio-economic organisation and result in jeopardy, should they be prevalent in the society. These seven deadly sins are:

1. Wealth without work
2. Pleasure without conscience
3. Science without humanity
4. Knowledge without character
5. Politics without principle
6. Commerce without morality
7. Worship without sacrifice

If we take a look, all the above-mentioned actions are generally encountered by every Professional. But a close look reveals that there are three sins mentioned which makes it really relevant with the economic arena. 'Wealth without work' indeed is a very heinous economic crime from the social perspective. It has the effect of looting the people without giving something fairly adequate in return. Knowledge is considered to be the purest element in the world. However, when a person becomes blind in the ego of his own knowledge,

his character deserts him and so does success. Mahatma rightly points out that commerce without morality is detrimental to the society. It not only awards injustice to the fellow society members but also eats away the peace and character of those practising unjust practices.

Now, it is very difficult to explain morals with profession in the sense that the term Profession or Business itself means an activity which is meant for earning profit for oneself. But, the thin line of difference lies in the fact that while it is the right of a professional to earn his livelihood, he does not get a right to extract maximum wealth with the selfish perspective. This idea too was promulgated by Mahatma Gandhi when he promoted the idea of 'Trusteeship'. According to Gandhiji's idea of Trusteeship, a businessman has to act only as a trustee of the society for whatever he has gained from the society. Everything finally belongs to the society. Hence, it is not a crime to earn more, rather it is the duty of every professional to take care that he returns back to the society the same what he has received.

Manifestations of Morals in the Professional Arena

Professionals, knowingly or not, need to make decisions based on their moral quotient at every step. The current philosophy or culture of the business scenario is changing from 'Buyers-Sellers' to that of 'Service Providers-stakeholders'. With the concept of stakeholders gaining acceleration, every professional has to take due care to ensure that he fulfils the requirement of one and all – Clients, Employees, Government and the society at large.

A professional has to consider the following issues on moral grounds:

- **Quality Control & Competence:**

In the current competitive scenario, where globalisation is at its height, it is imperative that every professional has to be competent, technically well versed and must endeavour to provide quality in all his dealings. But, apart from being a necessity of this age, it should form a part of a professionals basic values to develop within himself, such competencies by virtue of which the standard of services provided by him can be maintained at a decent level. This is because, a large portion of the business community rely on the knowledge and capacity of professionals to make decisions. Professionals play an important role as consultants, advisors, auditors and trainers. It is the primary moral responsibility of a professional to be true to himself as to whether he is capable of forming a confident and concrete opinion bout a particular subject. If not it is his implied duty, not to continue further because one wrong word on the part of the professional whether intentional or not could play the role of a disaster that can have far reaching effects not only on the business of his clients but also to the society at large. Consider the following case:

A professional offered variety of business consultancy and financial services to his clients. However, one of his clients approached him for assessing whether a particular project in the area of Textile Manufacture was feasible or not. The professional had no experience with the textile industry. Also, he did not have the required base of technically sound staff to help him. In the greed of not letting the revenue go, he not only accepted the assignment but also promised the best possible outcome. All went well till then. But, in spite of using all his resources he was unable to obtain concrete information to form a view. He realised that the client had high hopes to setup the project he, without adequate homework, gave a positive opinion. The client invested huge sums just to see his money go down the drain within a short span. The results were far reaching. The professional not only ended up losing his goodwill but the creditors and lenders of his client also lost their money, employees lost jobs and huge amount of resources were wasted. Thus in such cases, incompetence in itself can be criminal and lead to disasters as was evident in Satyam's Case.

Chanakya, in his epic Arthashastra, has stated, "A man's ability is inferred from his capacity shown in work and in accordance in difference

in working capacity." The basic identification of a responsible and moral professional is that he shall be true to himself and others in terms of hard work, perseverance and shall never lie in terms of quality of work rendered. SA 200 "Objectives of an Independent Auditor and Conduct of Audit in accordance with Standards of Auditing" mentions Professional Competence and adherence to ethical requirements, a basic requirement to be followed by an Independent Auditor. Also, every Chartered Accountant in terms of the Chartered Accountants Act, 1949 has to follow the Code of Ethics issued by the Council, the Institute of Chartered Accountants of India.

- **Clients:**

A professional has to give a great deal of attention towards adherence of morals while interacting, servicing and managing clients. Several issues are involved while handling Clients. For example, charging fees, maintaining confidentiality, not supporting illegal activities, etc. A professional has to be true to himself that a particular client has been charged according to the services provided to him; neither more nor less. Charging more would definitely mean injustice to the Client but charging less would mean injustice to the profession. Also, a professional is not expected to lower his standards by entering into cheap price wars or charge unduly high amounts taking disadvantage of his superior position. This view is supported by SA 200, which promotes the idea of an Auditor's independence. In terms of SA 200, an Auditor should not be affected by fear or favour. Thus, fear of losing a client or undue favours from client should not affect a professional's behaviour towards clients.

Client should not be viewed as a gold mine offering it to be dug out. Henry Ford has once stated, "A business that makes nothing but money is a poor business." As a matter of fact human wishes are unlimited and in the true sense of word, 'Everybody wants everything'. But, it has to be understood that many of human wants are based on lust. And when lust takes over, a man stops applying his mind. All his knowledge, experience and intelligence become paralysed and he does only what he craves for. But then what is the difference between a human and an animal. Though technically speaking we all are animals but the basic line of difference is that we have been bestowed upon to rise above our requirements and maintain the balance of truth and virtues. So, it doesn't suit a person, especially who has undergone rigorous years of training from highly dignified institutions, to fall in for few pennies and forget the tradition of virtues and morals which a professional is expected to behold. Indeed, every professional activity is driven by the object to earn, but not at the cost of the character which is the very reason he is capable to take stable decisions helping the society to prosper economically.

Every professional has a moral as well as a legal liability to maintain confidentiality of information regarding the affairs of the Client gained during the engagement. A professional should disclose such information only when required under a law or statutory requirement. This rule should not be viewed as a statutory requirement which followed just because it is enforced. Rather it should be taken as a rule which must be adopted by the professionals voluntarily. Confidentiality is the basic principle that enables a person to place trust in a professional. This is essential for the reason that it is necessary for a professional to know each and every detail of a person to provide him efficient services. One common proverb one hears is 'Never hide anything from a teacher, lawyer and a doctor.' However, this is not confined to these noblemen these days. It extends to a wide range of professionals including Chartered Accountants, Company Secretaries, Tax Consultants, Portfolio Managers, etc. Without knowing the smallest detail of the Client there will stand a chance that the professional may be wrong in his decision making.

A partner in crime is no better than a criminal. Not deviating from the level of euphemism that is expected from a professional student let me be clear that the above proverb does not apply to professionals directly. Lord Krishna, the Protector of Justice has truly said that to bear injustice is a greater crime than to administer injustice oneself. So, if a professional has within his scope to refrain

from illicit activities it becomes his duty to do so, even at the cost of his practice. For example, a Tax Practitioner may be approached by a client to devise a scheme for tax avoidance or support him in tax evasion using his experience and knowledge. One may think how this is an ethical dilemma? It is an obvious no entry for a true professional. But, consider a case where such client contributes about 75% of your total revenue and denying him may lead to you losing the client. Even in such circumstances a true professional is not expected to kneel before fear or greed and be brave to support his values, profession and devotion towards the law. Swami Vivekananda has strongly supported this stand by firmly asserting, "Be a man and try to make those immediately under your care, brave and moral. No religion for you but for morality and bravery. No cowardice, no sins, no crime, no weakness; the rest will come by itself."

One thought so arises, especially in the field of Tax Planning, which is, "Is Tax Avoidance ethical?" Legally speaking, tax avoidance purely means that a person uses the provision of law to break the law. So, it can be stated that he, while breaking the intention of law, still remains within the ambit of legal provisions. It is a sham to protect one's *mala fide* intention. It can be debated on the point that since such an act does not violate the law, how it can exceed the ethical boundaries. But one must not forget that the law related to procuring revenue laid down by the constitutionalists is intended to maintain the economic stability in the society and obtain funds for the Government for carrying out social welfare projects. Hence, if a person is 'robbing' tax, he is actually robbing what belongs to the society. Thus, it is not wrong to term it as a crime and in no circumstances can we allow highly qualified professionals to let their talent used against the welfare of the society. GAAR is a very useful step in this direction though it has given a pinch of dissatisfaction to the corporate world. However, the fact that such rules have to be imposed is a sign of great failure for morals to operate in our world. It is necessary for professionals to pull back their support from the ill-minded entities whenever such a matter arises. Without the support of professionals like Chartered Accountants, Company Secretaries, Tax Consultants, Lawyers, etc. it is impossible for any entity to move forward towards injustice. This moral responsibility should be taken up also by those who are a part of the industry and have not engaged in independent practice.

- **Employees and associates**

Every professional has to deal with a lot of other associated people since success is not a one person task but requires team work. In case of employees a professional has to be just in providing remuneration and at the same time must provide strict guidelines so that the morals and standards required by him trickle down throughout the organisation. Better working conditions, scope for growth, training and development are a few of the measures which a professional can adopt to improve his employee base. It is simple to write this down, but many professionals forget their ethics while in practice and treat employees as machines to extract support. When a person comes down to this level, he degrades himself from the post of a professional. However, reprimanding on mistakes and maintaining strict discipline is also a requisite. SQC 1 and SA 220 require an Auditor to maintain such internal culture based on the recognition that quality is essential in performing engagements.

Partnership Firms are a common scenario in the field of Chartered Accountancy, Law and Tax Practice. In such cases, every professional should adhere to strict morals as to whether the persons or firms with which he is associated are morally, ethically and professionally strict. If not, he should not assist them in misdeeds. This is where true test of a professional lies.

As professionals it is our duty not only to remunerate the employees and associates but also to inculcate in them the professional competence, knowledge and to maintain a free flow of ideas so that there is quality addition within the organisation. It is very essential that professionals do not behave in a narrow minded

manner but in fact need to pass on synergies of experience so that the society can benefit from it. This point may seem to be very obvious and the necessity for it to be mentioned explicitly does not seem to be justified. But in fact, the so called practical world is full of feelings like jealousy and insecurity. Professionals, though being highly literate and trained, sometimes give in to low level office politics. Also, sometimes they try to reserve certain specific principles which they may have learnt through experience and not make the juniors acquainted with them. This not only mars the internal culture of the firm or organisation but is detrimental to the very development of the society in the sense that knowledge grows by knowledge itself and it ceases to grow when confined to one individual. Every professional should believe that his knowledge provides a source of energy that shall protect his respect, his image and hence should not fall in for jealousy or insecurity.

- **Social responsibility**

Every professional, in addition to being a loyal to the profession, has to contribute back to the society, that what he has received. Contributing to the society does not only mean donating money in schools or hospitals or to go a step further to organise charity programmes; rather it encompasses a wide range of duties essential for the well being of the society at large. The first step towards this aim is the vow that every professional should take to engage him in promotion of activities that could go a long way to bring far reaching impacts in the society. This could include creation of study circles to train the future generations in a particular area. Also, this could take form of advising clients to adhere to socially responsible norms. For example, a Chartered Accountant in the capacity of an Internal Auditor or Statutory Auditor can advise the Client to adhere to manufacturing practices that are less harmful to the environment or allocate funds out of huge surplus for creation of trusts for the welfare of the society at large.

The Government of India has taken a very positive initiative in this direction. Corporate social responsibility has been made a compulsory provision in the Companies Bill 2012. Clause 135 of the Companies Bill 2012 states that every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. The Corporate Social Responsibility Committee shall:

(a) Formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) Recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) Monitor the Corporate Social Responsibility Policy of the company from time to time.

Though this provision shall be applicable, to only some of the 'companies' it is like a stepping stone towards making economic entities more responsible towards the society. This makes India one of the pioneer countries in the world to introduce laws enforcing social responsibility on a mandatory basis rather than a voluntary good deed.

Although, of late a need of such law has been realised, it is a fact of great dishonour that such noble actions have not emerged voluntarily. Professionals, today, occupy a position in the thinking process of large corporate houses. Also, people working in-house belong to the same educational qualification and have undergone the same training which independently practicing professionals. Professionals thus can be believed to control the power resting with one of the most venerated beings of the modern world – The Company. A company today is a pool of maximum wealth of the economy which has the power to influence most of the economic and fiscal policies of the Government. Also, a company has the honour to provide a big horde of opportunities

to people in the form of employment. It is a well-known principle that two horses can together pull more load than the sum of their individual strengths. Now, I do not intend to deviate on explaining how beneficial a company is to the society neither do I want to start praises of team work, at least at this juncture. What I want to focus from the above points is that if an entity with an enormous power to influence the society is well within the control of professionals to the extent that they can influence every important decision of such bodies than it would not be an exaggeration to state that the professionals have an indirect control over the mass resources of the society. Being in such strategic position it becomes the moral responsibility of professionals to guide these resources in a manner which is not only beneficial to the society but also gives maximum benefit with the optimum use of resources. Kautilya in his Arthashastra has ascertained the principle of 'bahujana hitaaya, bhujana sukhaaya' which means the happiness of the maximum lies in the well being of the maximum. And well being lies on many factors of which economic stability is a very important factor. The concept of a company is being synonymous with that of a kingdom. There is/are a king/s with a council of ministers. They have a army and they have ministers and administrators for each function. Success of a kingdom depends on how fruitfully and productively it deploys its resources. To take these decisions they have a prime minister. In the same manner, modern day kingdoms in the form of companies have professionals in the form of CFOs, Financial Advisors, Legal Counsels, etc. to ensure that the resources are not only deployed optimally but also profitably. How ethically this profit is earned is the basis of deciding how successful a company or an organisation is for the society. Thus, a professional has to play a very important job and hence needs to view the society as the stakeholders who will be highly influenced by each and every decision taken by them. To give an example, if a company decides to invest a few hundred crores in a particular adventure, the company will consult financial professionals to decide the ideal amount of investment, sources of funding, geographical, legal and administrative implications. When a professional or a group of professionals apply their talent and years of experience to help optimise the quality of investment, it not only brings profit to the company, but has far reaching effects; employment levels increase, demand-supply gap reduces, standard of living of people improves and government receives more taxes. Consider that the decision goes wrong; everything will not only start reverting itself but may also make the social capital dwindle away. Each adventure entails the use of certain resources from the society. In case of wrong decisions, it will make these resources go waste and thereby increase the shortage of resources which means that increasing demand-supply gap shall lead to further inflation, poverty and loss of savings and investment. This is the way in which a professional can impact the society.

- **Government**

The professional fraternity has a very onerous task towards the government. In the India scenario, the Government has to maintain a constant balance between growth orientation and management of inflation. This makes it necessary to cross this tight rope walk, by consulting the professional bodies like the ICAI, FICCI, ASSOCHAM, CII, etc. Also, industry leaders and high level economists are given a chance to cast their opinion in order to assist the government in framing policies which are beneficial to the maximum mass of population. Professionals through their organised bodies, discussions, etc. can conduct concrete and responsible analysis of economic variables and their impact on the common public. Professionals are not only compliance enablers, but in the true sense are able to read the figures of economy, how the general public reacts to changes in policies, how the fiscal measures need to be taken keeping in mind the current state of the country, how changes need to be made in the compliance and administrative requirements to ensure smooth flow of activities and how the steps need to be taken to keep in line with the international

developments. The Ministry of Finance takes all the above decisions after considering the opinion of the aforesaid bodies.

The Government operates on the basis of the revenue collected from the subjects. It is very necessary that not only these funds are deployed properly but the disclosure of their utilisation is made available to the public at large. It is only transparency that can ensure faith in the Government and its policies. When the Government shows accountability and responsibility to disclose that each rupee received from the citizens is spent for their benefit that is the precise stage at which issues like tax evasion, tax avoidance and corruption will cease to exist on their own without any enforcement. To bring this stage it extremely essential that the independent accounting and legal institutions such as the C&AG (Comptroller & Auditor General of India) need to be extremely stringent in administering their policies and be strict on their ethics. It is the independence of these institutions that the entire accountability of public finance depends. Considering our country, in the F. Y. 2009-10 was a total of Rs. 370,439 crores from Direct Taxes and Rs. 241,939 crores from Indirect Taxes. This was only the tax revenue, not to consider amount received by way of fees and profits from government owned companies. This was the data some two years back. If such large amount is collected from the citizens of the country it is very essential that the government is transparent enough for every rupee spent. In the Indian context, it is quite common when one sees corruption in politics. It is very essential that the professionals through institutions of C&AG have to be alert and conscious to enable the public place their trust in the government machinery and to counter corruption at the macro-level. This is the moral role of professionals at the government level.

We have observed the manifestations of morals; how they appear in front of a professional and how they can seriously pose a threat to the society if not followed by the professionals. Therefore, together we need to devise measures that can enable the professionals to counter the immoral practices in the society and enable them to fight for virtues. As a simple matter of fact, there will be a very few professionals who are willing to opt for the 'black methodologies' to fulfil their ends. It is their internal weakness which makes them do so. Indian culture which is one of the most ancient cultures in the world has identified in the Vedas that a person has a basic six enemies: Kaama (carnality), Krodha (anger), Lobha (greed), Moha (charm), Mada (passion) and Matsar (jealousy). If a person can overcome these vices inherent in every human he can succeed as a virtuous being. The same applies even to a professional. A professional has to refrain himself from the carnality of costly lifestyle, maintain a pure character, avoid the greed, charm and passion for higher wealth and position, control anger and jealousy and thereby observe penance towards his knowledge, character and virtues in the protection of the society and its interests, This will be, in the true sense, a Moral Professional. In the paragraphs to follow we shall discuss a few methodologies in which we can strengthen the professionals to be stricter in following morals in the true sense.

To solve any problem it is of extreme importance that we understand the root of any problem. It is very necessary to understand the fact that by nature no person is inclined to engage in immoral activities. Especially, professionals who have undergone special training and education of the high order will find it really annoying to compromise their values on petty matters. Then forces them to commit actions unacceptable to moral values? It is the prevalent order of the society which forces them to do so. A common proverb goes, "When in Rome, do as the Romans do." Though this cannot be an acceptable ground to form moral rules, the fact is that people who do not follow the rule needs to face several difficulties in the course of his career. Earlier in this discussion, I have stated several times that a true professional does not give in his morals for a few materialistic benefits. But, as the fact appears from the present state of the society, such a professional will have to forgo a great deal of economic wealth

and hence will have to face severe problems even to sustain him, if not to grow. No euphemistic term exists in this world that can suitably wrap this bitter truth of life. For example, surrounded by everyone corrupt, a professional will be left alone to fight them all. And since this action proves dreadful to the immoral, who are larger in number, he may face the threat of being devastated by all the evil forces together. It is not that this is the dead end for professional morals. But it is definitely a tough time.

One excerpt from the great Indian Epic – Mahabharat is very appropriate at this juncture. Abhimanyu, son of the great hero Arjun, was an excellent warrior and had attained great capabilities while he was just about the age of 18. He had taken a heavy toll of the enemy forces during the war of Mahabharat. However, an infantry formation named 'Chakravyuh' (considered to be one of the formations impossible to break) was not completely known to him. Thus, he got stuck within the centre surrounded by all the majors and generals of the Kaurava Army. While Abhimanyu still survived by his expert skills, the enemy forces sensing danger forgot all rules and pounced on him all alone and unshelled. This led to the sad martyrdom of the great hero. It will not be necessary to explain the symbolism hidden in this great story. A professional is trained with the highest of skills, knowledge and experience. Even then while performing his duties he may have to deal with people who can reach any limit to fulfill their ambitions. When a professional gets surrounded by a horde of such people or qualities, it is a fact that he will also succumb to martyrdom fighting for his values. But is this the end?

Never! It is possible to fight. Considering the above epic, had Abhimanyu known completely how to break the Chakravyuh, the outcome could have been something different. Thus, in the present context, it is very essential that if a professional has to sustain himself on moral grounds it is not only necessary that he gains knowledge and competence through the Institutes which has bestowed education upon him, but also equip himself of various skills and experience in varied regions of practical profession. This includes human resource, communication skills, knowledge of history, current affairs etc. It is very necessary that a professional has to consider an alert mind which has to be open to various possibilities that can create hindrances in his achieving the goal of being a moral professional.

Even, the Institute of Chartered Accountants of India has adopted the logo "ya esha supteshu jagarti" which means a person who is awake in those that sleep. It clearly denotes the implicit mission of the ICAI along with its associated bodies to give to the society professionals of the high order who are capable enough to hold the torch of light high and firm continuously fighting darkness. While everybody plunges into the slumber of greed and fear it is a professional thus trained who remains alert and combats ill forces in the society without succumbing to any weakness and wins the battle. Remaining alert was also emphasized by Swami Vivekananda – "Awake arise and don't stop till thy goal is reached." As asserted by Swami Vivekananda, the first step to achieve once goal is to be awake. Hence, being awake is the first measure one has to take to sustain morals in practice.

Another important step that one needs to take is self evaluation. Once, the professional learns how to deal with illicit factors outside the body, he then has to concentrate that he does not allow immoral qualities to enter his mind. It is very essential that not only professionals but every person evaluates himself on a continuous basis to ensure that he has not taken up the wrong track even unconsciously. The best time to do this is bedtime. Five minutes just prior to falling asleep could be a worthy investment to protect one's own sleep of peace for several other years. One can never lie to himself. Thus, if we look into ourselves and ask ourselves a simple question, "Did I do justice with my profession and people to whom I am responsible?" Our conscience will spring up with the answer and guide us to uphold the truth. It then depends

on how brave we are hear the voice within. It is imperative that we don't allow our weaknesses to plug our ears thereby turning them deaf to the voice of our conscience. How will we ensure this bravery? It is simple. We just need to remember our ancestors, our traditions, our education, and our values as professionals. We need to remember on a constant basis how several people are affected by us how responsible our every action is to the society. We need to remember the terms on which the honour of being a professional was bestowed upon us. This realization of responsibility towards the society is the only way in which we can ward off the weaknesses and strengthen ourselves to be firm on our morals.

United we stand divided we fall. This basic thought inculcated in us from our childhood seems to fade away as we grow up in this complicated world. Since corruption is at its peak and morals have to face difficult times finding faces that can fight for them, a primary responsibility of every professional is to support those professionals who are taking even minor steps in combating unethical practices. In order to avoid being surrounded, it is very necessary that the 'good ones' also form an army. Through networking and forming groups the professionals need to combine their strengths to sustain themselves in their endeavour to follow a practice that is moral. On a lighter note, professional groups should not resort to road shows and rallies against corruption since we already have a lot of such processions only to fill the empty time slots and news spaces of the media. Such measures are enough to bring cheap publicity but not enough to uproot the ill elements from professional world. Hence, the true power of organization would be to support professionals economically and even in times when he faces consequences just because of his bravery to oppose the powerful corrupt.

One final measure which I would like to indicate is that it is only truth that can fight for truth. Sounds vague doesn't it? The basic foundation of our society is laid down by our educational institutions. Young minds are like raw clay ready to be shaped the way somebody shapes it. In future they behave, act and perform the way in which they are trained in their childhood. Hence, if truth is worshipped in their hearts since childhood, it is the same truth which will protect truth in the professional world in which he will step and assume role as an important persona of the economic machinery. The fabric of an economy is like a body. Professionals are like blood cells. They are born; they perform their role and finally disappear in oblivion. Educational institutes perform their roles as the bone marrow which gives birth to the professionals. Hence, if cells are found deficient in capacity, it is the bone marrow which also needs to be repaired. It is not that our professional institutes are deficient but more scope should be provided at the student level so that they come out as responsible professionals who voluntarily act as the Arjuna who stands up for truth, morality and virtues and who does not require laws to enforce ethics which are basic to the profession and the society as a whole.

To end with, morals and profession are not mutually exclusive, which is what I attempted to prove by way of this opportunity and voice my opinion on how morals and ethical structure is the very base on which classified professions are based upon. It only by virtue of these morals is that our society can function smoothly entrusting their hard earned wealth to the modern guardians – the Professionals.

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DIRECT TAXES
Supreme Court

1. Duty drawback is not a part of the net profit and therefore, not eligible for deduction u/s. 80-IA

CIT vs. Orchev Pharma (P.) Ltd. [2013] 354 ITR 227 (SC)]

While allowing the claim of deduction u/s. 80-IA in respect of duty drawback forming part of the net profit the Tribunal relied on the decision of the Gujarat High Court in the case of *CIT vs. India Gelatine & Chemicals Ltd. (275 ITR 284).*

The High Court dismissed the appeal of the Revenue *vide* its order dated 14th June, 2007 following the decision of the Gujarat High Court which was binding on it wherein it was held that the duty drawback is an integral part of the pricing of goods and part of the cost of the production of the industrial undertaking.

The Supreme Court allowed the Special Leave Petition of the Revenue following its decision in the case of *Liberty India vs. CIT (317 ITR 218)* wherein it was held as under:

"DEPB/Duty drawback are incentives which flow from the schemes framed by the Central Government or from section 75 of the Customs Act, 1962. Incentive profits are not profits derived from eligible business under section 80-IB: they belong to the category of ancillary profits of such undertaking. Profits derived by way of incentives such as DEPB/ Duty drawback cannot be credited against the cost of manufacture of goods debited in the profit and loss account and they do not fall within the expression "profits derived from industrial undertaking" under section 80-IB."

2. Excise duty should be excluded at the time of valuing closing stock if the assessee is following the net of exercise duty method

Asst. CIT vs. Torrent Cables Ltd. [354 ITR 163 (SC)]

In the instant case, the assessee was following the net method for valuing the closing stock namely, valuing the raw material at the purchase price minus excise duty paid (i.e., MODVAT Credit). The Tribunal held that the assessee was right in excluding the excise duty at the time of valuing the closing stock of the raw materials and work-in-progress at the end of the year. The High Court upheld the order of the Tribunal.

Dismissing the appeal of the Revenue, the Hon'ble Supreme Court followed its own decision in the case of *CIT vs. Shri Ram Honda Power Equipments Ltd. (352 ITR 481)* wherein the Supreme Court held that the decision of

the Bombay High Court in the case of *CIT vs. Indo Nippon Chemical Co. Ltd. (245 ITR 384)* which was affirmed by the Supreme Court, reported in 261 ITR 275, squarely applies as the present assessee followed the net method for valuing its closing stock.

3. The High Court must give reasons while dismissing the writ filed against the notice for reopening of the assessment

Parvez Nazir Hussein Jafri vs. CIT & Ors. [(2013) 354 ITR 235 (SC)]

The assessee had filed his return of income for A.Y. 2006-07 which was processed u/s. 143(1) of the I.T. Act, 1961 on 10th March, 2007. The said assessment of the assessee was reopened by issuing a notice u/s. 148 of the Act on 26th July, 2010. The said notice u/s. 148 of the Act was challenged by the assessee by filing a writ petition under Article 226 of the Constitution of India. In the course of the hearing of the writ petition, the assessee's counsel relied upon 26 Judgments of the High Courts of India as well as of the Supreme Court which are listed by the Hon'ble High Court in its order. Thereafter their Lordships of the Bombay High Court dismissed the writ petition observing as under:

> "We have perused the judgments cited before us, considered the submissions advanced. We find that the petitioner has raised the sole ground before this court in respect of validity of notice issued under section 148 of the Income-tax Act, 1961. The assessment year in this case is 2006-07.
>
> The notice under section 148 of the Act was issued on July 26, 2010. Considering the provisions of the Income-tax Act, as stated above, we do not find any error in the tax authorities in issuing notice under section 148 of the Income-tax Act, 1961.
>
> Another circumstances which is reflected from the order of the income-tax authorities is, that the income-tax return submitted by the petitioner for the assessment year 2006-07 was processed under section 143(1) of the Income-tax Act, 1961, on March 10, 2007, and the same was accepted. There is no merit in the petition. We do not find that the extraordinary writ jurisdiction of this court is required to be exercised in this writ. The writ is dismissed."

Allowing the Special Leave Petition of the assessee, their Lordships of the Supreme Court set aside the order of the High Court with a direction to *de novo* consider the writ petition in accordance with the law as the High Court has not given any reasons for not setting aside (quashing) the notice for reopening of the assessment.

The aim of civilisation is to make politics superfluous and science and art indispensable.

–– Arthur Schnitzler



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DIRECT TAXES
High Court

Reported

1. Sec. 148 – Notice would stand or fall depending upon the reasons prior to the issuance of notice u/s. 148 and not additional reasons recorded after the issue of such notice – A.Y. 2006-07

CIT v. Living Media India Ltd. (2013) 89 DTR (Del) 81

In the instant case the purported reasons recorded prior to the issue of notice u/s. 148 was with regards to bad debts. The AO recorded further reasons after the issue of notice u/s.148 with regards to unabsorbed depreciation and disallowance u/s.14A. The Hon'ble High Court held that notice u/s.148 would stand depending upon the reasons recorded prior to the issuance of notice u/s.148, and until and unless there was an addition on the basis of the original reasons, no other additions could be made in view of the expression 'and also' used in Expln. 3 to s. 147.

2. Sec 142(2A) – Order for special audit without examining the accounts with regards to complexity of accounts – liable to be quashed – A.Y. 2003-04 to 2009-10

Delhi Development Authority vs. Union of India (2013) 89 DTR (Del) 54

In the instant case the AO for A.Y. 2003-04 to 2009-10 did not call for to examine or consider the books of account or even test checked the accounts before passing an order u/s.142(2A). On writ to the High Court, the High Court while allowing the petition held that to arrive at a conclusion with regards to the complexity of accounts, the AO has to make a genuine attempt to understand the accounts and entries made therein, and details and questions to be made should be raised with regards to accounts and entries and only when the explanation offered is not satisfactory, or verification is not possible without that the help and assistance of special auditor, then only recourse to action u/s. 142(2A) could be initiated. In the instant case the AO having failed to do the same, the order directing special audit for the all the assessment years were held to be invalid.

3. Sec. 263 – For challenging against revisional order u/s. 263 of the Act – Remedy is by way of appeal in ITAT rather than filing Writ Petition in High Court

Meerut Roller Flour Mills Ltd. vs. CIT [2013] 35 taxmann.com 183 (Allahabad)

The assessee, a manufacturer of atta, maida and sooji, filed its return declaring nil income. Return was picked up for scrutiny and assessment was completed. He exercised his jurisdiction under section 263 and remanded matter to the AO for conducting proper enquiry regarding cash credits and trade creditors. The assessee filed writ petition

and submitted that the AO had applied his mind and merely because assessment order was brief, it could not be said that it was a case of total lack of enquiry. Further, the alternative remedy by way of appeal before the Tribunal was not adequate and efficacious as the Tribunal did possess only power to stay the recovery of tax, fine, penalty etc. but had no power to stay the proceedings consequent upon the order of remand. Dismissing the Writ Petition, the court held that it was incumbent upon the AO to have examined the cash credit entries appearing in the accounts of the petitioner in detail keeping in view the explanation furnished by the petitioner. Having failed to do so, it is but obvious that the assessment order is erroneous and prejudicial to the interest of the revenue. There is no application of mind by the assessing authority with regard to the genuineness of the credit entries including that of trade creditors. Reference was made by the respondents to the assessment order for the assessment year which is enclosed in the connected writ petition (has been dismissed on 15-5-2013 on the ground of availability of statutory remedy) wherein on examination, it was found by the assessing authority that the assessee was not able to prove the genuineness of certain cash credits. *Prima facie* findings have been recorded just to meet the argument of the petitioner. The court also held that time and again, the Apex Court has reminded the High Court, not to entertain writ petition against the assessment order or by-pass statutory remedy by way of appeal or revision in respect of fiscal statutes in particular. Having regard to what has been said above, there is no justifiable reason for the petitioner not to approach the Tribunal by way of statutory remedy of appeal or to invoke the extra-ordinary jurisdiction of this Court under article 226 of the Constitution of India.

4. Sec. 10(23C)(iv) – Fees received for providing coaching classes and campus placement of its students – Exemption under section 10(23C)(iv) allowable

Institute of Chartered Accountants of India vs. DGIT (Exemptions) [2013] 35 taxmann.com 140 (Delhi)

The petitioner institute was constituted under the ICAI Act with the object to regulate the profession of Chartered Accountants in India and to ensure that the standards of professional knowledge and skill are met and maintained. The point of issue in Writ Petition was whether fees received for providing coaching classes and campus placement of its students was entitled for deduction u/s. 10(23C)(iv) of the Act. Allowing the Writ, the court held that as per the provisions of the ICAI Act and the Regulations framed therein as well as various activities carried on by the petitioner, the court held that the petitioner institute does not carry on any business, trade or commerce. Assessee. (ICAI)'s writ petition was allowed and Department directed to allow exemption under section 10(23C)(iv) and held that the activities of providing coaching classes or undertaking campus placement interviews for a fee are in relation to the main object of the petitioner which as stated earlier cannot be held to be trade, business or commerce. Accordingly, even though fees are charged by the petitioner institute for providing coaching classes and for holding interviews with respect to campus placement, the said activities cannot be stated to be rendering service in relation to any trade, commerce or business as such activities are undertaken by the petitioner institute in furtherance of its main object which was held earlier are not trade, commerce or business.

5. A representative appearing before ITAT – no right to claim mandamus for restraining Members of ITAT from discharging functions entrusted to them by statute

Yoginder Kumar Sud v. President Income Tax Appellate Tribunal [2013] 33 taxmann.com 193 (Punjab & Haryana)

In this case one chartered acountant appearing on behalf of assessee filed writ petition seeking writ of mandamus against accountant and Judicial Member of ITAT on ground that he was facing lot of harassment at hands of those members as he had not been able to meet their expectations and illegal demands. The Court dismissed the writ petition and held that the petitioner could not establish details as

to when and how demands were raised. The court further held that not only writ petition was bereft of any material particulars but also petitioner had no right to claim mandamus for restraining an authority constituted under Act from discharging functions entrusted to it by statute.

6. Where assessee engaging in business of trading of shares, gold bullion and commodities and it claimed deduction of administrative and other expenses, which were relatable to both speculative and non-speculative activities, bifurcation of said expenses in ratio of 2:3 between speculative and non-speculative income was justified

Anjalee Exim (P.) Ltd. vs. DCIT [2013] 35 taxmann.com 374 (Gujarat)

Assessee-company was engaged in business of trading of shares, gold bullion and commodities. It filed return of income declaring total income and speculation loss. It claimed deduction of administrative and other expenses. AO having noticed that said expenses were relatable to both speculative and non-speculative activities bifurcated same in ratio of 2:3 between speculative and non-speculative income. CIT (A) upheld the order of AO. The Tribunal relying on the judgment of the Allahabad High Court rendered in the case of *Makhanlal Ram Swarup vs. CIT [1966] 61 ITR 214* bifurcated the aforesaid expenses amongst the three activities of the assessee, namely, (i) purchase and sale of shares, (ii) speculative loans of commodity transactions, and (iii) income from derivation of shares, in the ratio of their turnover. On further appeal in High Court, the Court upheld the order of Tribunal and held that the administrative and other expenses incurred by the assessee are found to be common for both the speculative and non-speculative businesses. As these expenses related to both the streams, allocation of expenses was not only necessary but inevitable. Moreover there has to be some rationale in bifurcating such expenses. When the authorities have done it on the basis of profit and volume of the business in the ratio of 2:3, no error is committed at all by the Tribunal warranting any interference. The Tribunal rightly applied the ratio of the case of Makhanlal Ram Swarup (supra). In view of the aforesaid, the instant appeal was liable to be dismissed.

7. For availing benefit under section 54EC – not necessary that one should first apply section 70(3) and thereafter only, the assessee could invest the capital gain arising from the long term capital asset under section 54EC of the Act

CIT vs. Vijay M. Mahtaney [2013] 35 taxmann.com 228 (Madras)

Assessee sold shares and made long-term capital gains. Assessee had also long-term capital losses from sale of shares and properties which he carried forward. AO accepted the above treatment of assessee in assessment under section 143(3). But CIT under section 263 held assessment as prejudicial to revenue. He held that the long-term losses should have first been set off against long-term capital gains and then deduction under section 54EC allowed. Assessee appealed to ITAT. ITAT decided in assessee's favour. On revenue appeal in High Court, the court dismissed the appeal of Revenue and upheld the order of ITAT and held that on reading of section 70(3) shows that the loss that has to be looked at first is not with reference to the loss arising in respect of any new capital asset, but in the totality of the loss suffered on the sale of capital asset chargeable to tax under section 45. Thus going by the scheme of the Act, for taking benefit under section 54EC, it is not necessary that one should first apply section 70(3) and thereafter only, the assessee could invest the capital gain arising from the long term capital asset to any specified bond as specified under section 54EC of the Act.


Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

1. Capital asset – Section 2(14) of the Income-tax Act, 1961 – Long term advance booking of a hotel suite, permanently reserved for assessee's use, which gave assessee perpetual right of possession and right to transfer, is a capital asset – Gain/profit accruing to the assessee on its transfer was taxable as capital gain after deducting indexed cost of acquisition. A.Y.: 2007-08

Asstt. CIT vs. Shabnam Sachdev – (2013) 89 DTR 293 (Del.)

The assessee entered into an agreement for long-term advance booking of a suite in a hotel complex. The suite was permanently reserved for use and benefit of assessee. The assessee sold her right in the suite for a consideration and offered the gain arising on its as long-term capital gain after reducing indexed cost of acquisition. Assessing Officer held that the long term advance booking was not tenancy right and, hence, not a capital asset and taxed it as income from other sources.

On appeal the Tribunal held that the assessee had perpetual right of possession of suite and was entitled to transfer the same. Therefore, long-term advance booking, by virtue of which assessee got right to possession, was 'capital asset' within the definition of section 2(14) and, therefore, gain accruing on transfer of the same was capital gain and as the asset was a long term asset the assessee was, also, entitled to reduce the indexed of cost of acquisition while determining the taxable long term capital gain.

2. Capital gains – Section 54F of the Income-tax Act, 1961 – Exemption – Investment in residential house – 'Residential house' context of section 54F cannot be construed as a singular nor, it is not necessary that all residential units should have a single door number allotted to it. A.Y.: 2007-08

Smt. V.R. Karpagam vs. ITO – (2013) 143 ITD 126 (Chennai)

Assessee had entered into an agreement with a developer, for development of a piece of land owned by her. As per agreement, assessee was to receive a certain portion of built up area after development which was

translated to five flats. Assessee filed her return claiming deduction under section 54F on value of five flats received by her from builder. Assessing Officer, however, restricted assessee's claim of deduction to one flat only.

On appeal the Tribunal held that the proviso which disables the assessee from claiming exemption under section 54F mentions at clause (i) that assessee concerned should not own more than one residential house, other than the new asset. Other clauses also restrict a claim under section 54F, if an assessee purchased a house or constructed any residential house other than a new asset. The term new asset is clearly defined in the substantive portion, to mean, a residential house. Thus, a residential house in the context of section 54F could not be construed as a singular. New asset defined in section 54F of the Act, as 'a residential house' has also to be understood in the plural and it is not necessary that all residential units should have a single door number allotted to it. Thus, the assessee was eligible for claiming deduction in respect of all five flats received by her in lieu of land she had parted with to the developer.

3. Deemed dividend – Section 2(22)(e) of the Income-tax Act, 1961 – For the purpose of computing deemed dividend accumulated profits do not include current year's business profit, as it accrues only at end of year – Deemed dividend assessable in any of earlier years has to be reduced from accumulated profits, even if it was not assessed in that year. A.Y.: 2007-08

P. Satya Prasad vs. ITO - (2013) 89 DTR 249 (Visakhapatnam)

The assessee an individual was holding about 38 per cent of shareholding in the company and was also entitled to a share of 50 per cent in a partnership firm. The company advanced money to the assessee and also to the partnership firm. The Assessing Officer held that provisions of section 2(22)(e) relating to deemed dividend were applicable with respect to amounts advanced by company to assessee and the firm. He accordingly, assessed the amount of the accumulated profit as on 31-3-2007 as deemed dividend in the hands of the assessee.

On appeal the Tribunal held that the accumulated profits for the purpose of computing deemed dividend does not include current year's business profit, as the same it accrues to the company only at the end of the year.

Further, the Tribunal held that the loan given by the company in the immediately preceding year, which, should have been assessed as deemed dividend in accordance with the provisions of section 2(22)(e) of the Act in that year. The deemed dividend so assessable in that year, even though not assessed as such is also liable to be deducted from the amount of, accumulated profits for the purposes of computing the deemed dividend for the year under consideration.

4. Income from house property – Section 24 of the Income-tax Act, 1961 – Deductions – Prepayment charges charged by the bank for closure of loan account which was taken for acquisition of a house property, is allowable under section 24(b) of the Act. A.Y.: 2006-07

Windermere Properties (P.) Ltd vs. Dy. CIT - (2013) 155 TTJ 1 (Mum.)

While computing income under the head Income from house property, the assessee

claimed deduction of towards interest u/s. 24(b) of the Act. The assessing officer while perusing the details of interest, noticed that it comprised the interest and also prepayment charges paid to the bank. The Assessing Officer while passing the assessment order held that the prepayment charges would not fall u/s. 24(b) of the Act and accordingly he disallowed the assessee's claim to that extent.

On appeal the Tribunal held that the definition of interest under section 2(28A) of the Act makes it clear that it has basically two components, namely, the amount with nomenclature of interest for moneys borrowed and the amount paid by whatever name called in respect of the money borrowed or debt incurred. The second category brings within its ambit the prepayment charge which is a charge paid for not utilising the credit facility. Therefore, it is partakes the character of interest and deductable under section 24(b) of the Act. The Tribunal further observed that by early repayment, the assessee managed to wipe out its interest liability in respect of the loan, which would have otherwise qualified for deduction under section 24(b) during the continuation of loan. Thus, the prepayment charges have live and direct link with the obtaining of loan which was availed for acquisition of property. The payment of prepayment charges therefore, cannot be considered as *de hors* the loan obtained for acquisition or construction or repair, etc. Thus, both the direct interest and prepayment charges being species of the term interest are allowable under section 24(b) of the Act.

UNREPORTED:

5. Additional depreciation – Section 32(1)(iia) of the Income-tax Act, 1961 – Machinery on which assessee becomes eligible for additional depreciation is required not only to be acquired but also to be installed after specified date of 31-3-2005. A.Y.: 2006-07

Lakra Fabrics P. Ltd. vs. Asstt. CIT – [I.T.A. No.: 505 / Chd / 2011; Order dated: 10-5-2013]

The assessee acquired some machines from a foreign company on 'CIF basis'. The machinery was invoiced by the exporting company on 23-2-2005 against the letter of credit which was opened in January, 2005. The bill of entry of the machine was stamped by Customs department on 11-4-2005. The assessee claimed additional depreciation under section 32(1)(iia) of the Act on the machine as the machine was acquired and installed after the specified dated that is 31-3-2005. The Commissioner initiated revision proceedings as according to him the machine had been acquired before 31-3-2005 as the letter of credit for purchase of machine was opened in January 2005 and exporter had issued invoice in February 2005, therefore, according to him assessee was not eligible for additional depreciation under section 32(1) (iia) of the Act.

On appeal the Tribunal allowing the assessee's claim of additional deprecation held that section 32(1)(iia) was inserted by the Finance Act, 2005 to grant further incentive, if any machinery, was acquired and installed after 31-3-2005. The Tribunal noted from the language of the section that machinery on which assessee becomes eligible for additional depreciation required not only the assessee to acquire but also install the machinery after a particular date, that is, 31-3-2005 as, between the words acquired and installed, the conjunction used is 'and', which means both the conditions, that is, acquisition and installation has to take place after the specific date for getting eligibility to additional depreciation. In the present case the Tribunal noted that as the bill of entry for showing date of entry

of goods in the country by the Customs department was after the specified date and this made it clear that machine could be installed only after that date, that is, 11-4-2005. Therefore, assessee was entitle to additional depreciation as per provisions of section 32(1)(iia) of the Act.

6. Capital gains – Section 54 of the Income-tax Act, 1961 – Exemption – Investment in residential house – Even after purchasing the residential house, if the assessee incurs *bona fide* construction expenditure – The additional expenses so incurred would be eligible for section 54 deduction. A.Y.: 2007-08

Shrinivas R Desai vs. Asstt. CIT - [I.T.A. Nos. 1245 & 2432 / Ahd / 2010; Order dated 28-6-2013]

The assessee sold his house property, the capital gains earned on the sale of property was invested in purchase of another property, the assessee also spent certain amount on its improvement. In his return of income while computing capital gain liability the assessee claimed deduction under section 54 of the Act with respect to the amount invested in purchase of property as well as of amount spent on its improvement. In the course of the assessment proceedings, the Assessing Officer was of the view that deduction claimed under section 54 of the Act for cost of improvement was not allowable as the assessee has purchased a readymade property and the expenses were claimed to have been incurred by the assessee after purchasing the house. Accordingly, the Assessing Officer rejected assessee's claim for deduction under section 54 of the Act with respect to the cost of improvement incurred by him on the new house property.

On appeal the Tribunal held that the use of words 'purchased' or 'constructed' in section 54 does not mean that the property can either be purchased or constructed and not a combination of both the actions. A property may have been purchased as a readymade unit but that does not restricts the buyer from incurring any *bona fide* construction expenditure on improvisation or supplementary work. As long as the costs are of such a nature as would be includible in the cost of construction in the normal course, even if the assessee has bought a readymade unit and incurred those costs after so purchasing the readymade unit, as per his taste and requirements, the costs so incurred will form integral part of the qualifying amount of investment in the house property and accordingly deduction under section 54 of the Act was allowable on such cost of improvement.

7. Capital gains – Section 54EC of the Income-tax Act, 1961 – Exemption – Section 54EC requires that investment should be made within a period of 6 months from the date of transfer of capital asset – If 6 months fall within two different financial years, assessee can make investment in two different financial years provided in each financial year the investment made does not exceed ₹ 50 lakhs A.Y.: 2008-09

I.T.O. vs. Ms. Rania Faleiro – [I.T.A. No.: 9 / Panaji / 2013; Order dated 18-4-2013]

The assessee had sold a property on 5-2-2008 and computed the capital gain on the same. She invested a sum of ₹ 50 lakhs out of the sale consideration in the Capital Gains Bonds on 31-3-2008. Thereafter she further invested a sum of ₹ 50 lakhs on 30-6-2008

in Capital Gains Bond. In the return of income for the assessment year 2008-09, she claimed exemption under section 54EC of the Act amounting to ₹ 1 crore. The Assessing Officer referred to the proviso inserted in section 54EC(1) by the Finance Act, 2007, and on the basis of the proviso took the view that the assessee could have made the investment only up to ₹ 50 lakhs in Capital Gain Bonds. Accordingly, he allowed exemption for ₹ 50 lakhs and made the disallowed the exemption with respect to the other ₹ 50 lakhs invested in bonds.

On appeal Tribunal held that the plain reading of section 54EC(1) as well as the proviso thereto clearly suggests that the limit of ₹ 50 lakhs as given under the proviso is per person per financial year. Restriction relates only to the investment made in any financial year by the assessee. The language of section 54EC is clear and unambiguous and it leads to the interpretation that the assessee can make the investment in two different financial years provided in a financial year the investment made did not exceed ₹ 50 lakhs. Accordingly, the assessee was entitled to claim deduction with respect to both the investments made by her in capital gain bond.

8. Penalty – Section 271(1)(c) of the Income-tax Act, 1961 – Concealment of income – Transaction of gift treated as unexplained and penalty levied under section 271(1)(c) of the Act – As the assessee had furnished particulars of gift in return of income filed by him and there was no finding of authorities below that any details filed in return were incorrect – Assessee had not furnished inaccurate particulars and, therefore, penalty was not leviable. A.Y.: 2004-05

Sushil Kumar Modi vs. Asstt. CIT - [I.T.A. No. 67 / Jp / 2013; Order dated 4-4-2013]

The assessee had received certain amount as gifts from two persons in name of his children. As there were cash deposits in the donor's account prior to the date of making the gift, the Assessing Officer doubted the creditworthiness thereof and treated the gifts as unexplained. The Assessing Officer also imposed penalty under section 271(1)(c) of the Act.

On appeal the Tribunal held that the assessee has furnished particulars of gifts in the return of income filed by him. Such particulars were not found false, further, no such satisfaction was recorded in the orders of the CIT(A) and the Assessing Officer. There was also no finding that the details supplied in the return are incorrect, erroneous or false. Therefore, it cannot be said that the assessee had furnished inaccurate particulars making him liable for penalty under section 271(1)(c) of the Act. Further, the Tribunal observed that, the assessee had furnished income tax particulars as well as declarations for making gifts from the donors along with their balance sheets furnished with the income-tax return. The Assessing Officer made no enquiry but merely imposition of penalty, as in the quantum proceedings the addition on account of gift was sustained by the Tribunal.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Notifications

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries – Bangladesh

The Protocol amending the Convention between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income was signed in February, 2013, and shall enter into force on the 13th day of June, 2013, being the date of the later of the notifications after completion of the procedures as required by the laws of the respective countries for the entry into force of the Protocol, in accordance with the provisions of Article 3 of the said Protocol.

Now in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 the Central Government directed that all the provisions of the Protocol annexed thereto shall be given effect to in the Union of India with effect from the 13th day of June, 2013.

(Notification No. 50/2013 dt. 4-7-2013)

Income-tax (Ninth Amendment) Rules, 2013 – Insertion of Rules 6DDC, 6DDD and Form No. 3BC

The Central Board of Direct Taxes made the rules further to amend the Income-tax Rules, 1962, namely which may be called the Income-tax (9th Amendment) Rules, 2013 and shall come into force on the date of their publication in the Official Gazette. Accordingly in the Income-tax Rules, 1962, in Part II, in sub-part C, after rule 6DDB, the rules 6DDC, 6DDD and also form No. 3BC have been inserted which specify the conditions that a recognised association requires to fulfil to be notified for the purpose of section 43(5). It also indicates conditions in respect of trading in derivatives.

(Notification No. 51/2013 dt. 4-7-2013)

Income-tax (Tenth Amendment) Rules, 2013 – Insertion of Rules 6AAF, 6AAG, 6AAH and Form Nos. 3CQ & 3CR

The Central Board of Direct Taxes made the rules further to amend the Income-tax Rules, 1962, which may be called the Income-tax (10th Amendment) Rules, 2013 and shall come into force on the date of their publication in the Official Gazette.

In the Income-tax Rules, 1962 after rule 6AAE, the following have been inserted:

'6AAF. Guidelines for approval of skill development project under section 35CCD.

6AAG. Conditions subject to which a skill development project is to be notified under section 35CCD.

6AAH. Meaning of expressions used in rule 6AAF and rule 6AAG, for the purposes of rule 6AAF and rule 6AAG.

"Form No. 3CQ relevant to rule 6AAF –Application form for approval under sub-section (1) of section 35CCD of the Income-tax Act, 1961

Form No. 3CR relevant to rule 6AAF – Form for notification of skill development project under sub-section (1) of section 35CCD of the Income-tax Act, 1961

(Notification No. 54/2013 dt. 15-7-2013)

Section 194LD of the Income-tax Act, 1961 – Income by way of interest on certain bonds and government securities – notified rates of interest on rupee denominated bond of an Indian Company

The Central Government notified the following rates of interest in respect of rupee denominated bonds of an Indian company (i) in case of bonds issued before the 1st day of July, 2010, the rate of interest shall not exceed 500 basis points (bps) over the Base Rate of State Bank of India as on the lst day of July, 2010. (ii) in case of bonds issued on or after the 1st day of July, 2010, the rate of interest shall not exceed 500 basis points (bps) over the Base Rate of State Bank of India applicable on the date of issue of the said bonds.

(Notification no. 56/2013 dt. 29-7-2013)

Circulars

Clarification on issues relating to applicability of Chapter IV of the Act and Set Off and carry forward of Business Losses – Section 10A, read with Sections 10AA & 10B of the Income-tax Act, 1961 – Free Trade Zone

THE CBDT noticed that the provisions of 10A/10AA/10B/10BA of the Income-tax Act, with regard to applicability of Chapter IV of the Act and set off and carry forward of losses, are being interpreted differently by the Officers of the Department as well as by different High Courts. The two sections 10A and 10B of the Act were initially placed on statute in 1981 and 1988 respectively, and continued with some modifications and amendments till 31-3-2001. Section 10A was inserted by Finance Act, 1981. Similarly section 10B was inserted by Finance Act, 1988.

Vide Finance Act, 2000 sections 10A and 10B of the Act were substituted. The effect of the substitution of sections 10A and 10B of the Act has been elaborated in Circular No. 794 dated 9-8-2000 which clearly provides that the new provisions provide for deduction in respect of profits and gains derived by an undertaking from export of articles or things or computer software. Sub-section (6) of sections 10A and 10B were amended by Finance Act, 2003 with retrospective effect from 1-4-2001. Circular No. 7/2003, dated 5-9-2003 explains the amendments brought by Finance Act, 2003. The relevant paragraph is reproduced below:

Providing for carry forward of business losses and unabsorbed depreciation to units in Special Economic Zones and 100% Export Oriented Units. Under the existing provisions of sections 10A and 10B, the undertakings operating in a Special Economic Zone (under section 10A) and 100% Export Oriented Units (EOU's) (under section 10B) are not permitted to carry forward their business losses and unabsorbed depreciation. With a view to rationalise the existing tax incentives in respect of such units, sub-section (6) in sections 10A and 10B has been amended to do away with the restrictions on the carry forward of business losses and unabsorbed depreciation. The amendments have been brought into effect retrospectively from 1-4-2001 and have been made applicable to business losses or unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years."

From the above it is evident that irrespective of their continued placement in Chapter III, sections 10A and 10B as substituted by Finance Act, 2000 provide for deduction of the profits and gains derived from the export of articles or things or

computer software for a period of 10 consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such article or thing or computer software. The deduction is to be allowed from the total income of the assessee. The term 'total income' has been defined in section 2 (45) of the IT Act and it means the total amount of income referred to in section 5, computed in the manner laid down in the Income-tax Act.

All income for the purposes of computation of total income is to be classified under the following heads of income and computed in accordance with the provisions of Chapter IV of the Act:

- Salaries
- Income from house property
- Profits and gains of business and profession
- Capital gains
- Income from other sources

The income computed under various heads of income in accordance with the provisions of Chapter IV of the IT Act shall be aggregated in accordance with the provisions of Chapter VI of the IT Act, 1961. This means that first the income/ loss from various sources i.e. eligible and ineligible units, under the same head are aggregated in accordance with the provisions of section 70 of the Act. Thereafter, the income from one ahead is aggregated with the income or loss of the other head in accordance with the provisions of section 71 of the Act. If after giving effect to the provisions of sections 70 and 71 of the Act there is any income (where there is no brought forward loss to be set off in accordance with the provisions of section 72 of the Act) and the same is eligible for deduction in accordance with the provisions of Chapter VI-A or sections 10A, 10B etc. of the Act, the same shall be allowed in computing the total income of the assessee.

If after aggregation of income in accordance with the provisions of sections 70 and 71 of the Act, the resultant amount is a loss (pertaining to assessment year 2001-02 and any subsequent year) from eligible unit it shall be eligible for carry forward and set off in accordance with the provisions of section 72 of the Act. Similarly, if there is a loss from an ineligible unit, it shall be carried forward and may be set off against the profits of eligible unit or ineligible unit as the case may be, in accordance with the provisions of section 72 of the Act.

The provisions of Chapter IV and Chapter VI shall also apply in computing the income for the purpose of deduction under sections 10AA and 10BA of the Act subject to the conditions specified in the said sections.

(Circular No. 7/DV/2013 dt. 16-7-2013)

Extension of due date for filing returns of income required to be furnished by 31-7-2013 to 31-10-2013 in respect of assessees residing or assessed in State of Uttarakhand

Considering the large-scale devastation due to recent natural calamity in the State of Uttarakhand, the Central Board of Direct Taxes, extended the 'due-date' for filing Returns of income required to be furnished by 31st July, 2013 to 31st October, 2013, in respect of income-tax assessees residing or assessed in the State of Uttarakhand.

(Order [F. No. 225/117/2013 dt. 23-7-2013)

Section 119 of the Income-tax Act, 1961 – Income-tax Authorities – instructions to subordinate authorities – Extension of due date for filing returns of income from 31-7-2013 to 5-8-2013

The Central Board of Direct Taxes, in exercise of powers conferred under section 119 of the Income-tax Act, 1961, hereby extends the 'due date' for filing Returns of Income from 31-7-2013 to 5-8-2013.

(Order [F. No. 225/117/2013 dt. 31-7-2013)


CA Tarunkumar Singhal & CA Sunil Lala

INTERNATIONAL TAXATION
Case Law Update

A] AUTHORITY FOR ADVANCE RULINGS

I. Section 245N and Rule 19 – The Authority is not legally permitted to decide new questions which were not originally formulated or adjudicated the proposed question framed by AAR for determination can only relate to applicant's tax liability and it would be impermissible for AAR to determine tax liability of person other than the applicant

CTCI Overseas Corporation Ltd., In re [2013] 35 taxmann.com 391 (AAR)

Facts

1 The applicant, a company based in Hongkong, had formed a consortium with CINDA Engineering and Construction Pvt. Ltd. (in short CINDA), an Indian company, to execute a project awarded by the Petronet LNG Ltd.

2 Petronet awarded the contract for the project to the consortium which was amended and reinstated on 17-11-2009. As per the terms of the contract, the applicant was responsible for offshore supplies, offshore services and mandatory spares (for offshore supplies) and CINDA was responsible for onshore supplies, onshore services, construction and erection and machinery spares (for onshore supplies).

3 The applicant sought an advance ruling on taxability in India of the income received/receivable by the applicant for offshore supplies from Petronet LNG Ltd.

4 The Hon'ble AAR in its ruling dated 1 February 2012 ruled that income from offshore supplies received from Petronet by the applicant was not taxable in India in view of the Supreme Court decision in *Ishikawajima Harima Heavy Industries Ltd. [2007] 288 ITR 408 (SC).*

5 The Revenue filed an application for rectification of apparent mistake under Rule 19 contending that the contract was awarded to consortium (AOP) and not to applicant and ruling of Hon'ble AAR that applicant was not liable to tax was inconsistent with the finding that AOP was the assessing unit.

6 The Hon'ble AAR allowed the rectification application of the Revenue vide its order dated 27 August 2012 and posted the application for main hearing afresh on the question as to whether an AOP found to have come into existence is liable to be assessed on the income of offshore supplies.

Ruling

1 The Hon'ble AAR observed that though the Authority in its order while dealing with the application under Rule 19 had directed

reconsideration of some issues, it was not legally permissible to decide new questions which were not originally formulated or adjudicated. That would virtually mean reopening of host of issues in the manner suggested which could not be decided in view of the jurisdictional limitations inbuilt in Section 245N of the Act.

2 On merits, it observed that the Authority had jurisdiction to make a determination only in relation to the transaction which has been undertaken or proposed to be undertaken by non-resident applicant and it was not permissible to deal with hypothetical questions nor could it give a ruling that the applicant was not liable to be taxed and somebody else was liable to be taxed.

3 It would be impermissible for the Hon'ble AAR to determine tax liability of a person other than the applicant.

B] HIGH COURT JUDGMENTS

II. Transfer Pricing – Section 92 – Tribunals Finding with respect to selection of compareables are finding of fact – no substantional question of law.

CIT vs. Verizon India Pvt. Ltd., ITA 271/2003 and 277/2013 (Delhi High Court) Order dated – Assessment Years: 2004-2005 and 2005-06

Facts

1 The assessee, an Indian company, entered into a service agreement with its associated enterprise ('AE') in Singapore namely Verizon Communications Singapore Pvt Ltd.

2 The TPO compared the services provided by the assessee to its AE with four companies – Engineers India Ltd, RITES Ltd, TCE Consulting Systems Engineers Ltd and Water & Power Consultancy Services Ltd (hereinafter referred as 'comparables') and thereafter made the adjustment, which resulted in the AO making the additions in respect of both the years.

3 On appeal, the Hon'ble Tribunal examining the four comparables selected by the TPO found that these four companies were not functionally comparable. It observed on facts that while the services rendered by the assessee were in the nature of marketing services, the services rendered by the four comparables were in the nature of engineering services.

4 Aggrieved, the Revenue appealed to the Hon'ble High Court.

Judgment

1 The Hon'ble High Court held that no substantial question of law arose for consideration and accordingly, dismissed the appeal filed by the Revenue.

2 It observed that the conclusion arrived at by the Hon'ble Tribunal on facts clearly demonstrated that the services rendered by the assessee to its AE were in the nature of marketing services which were entirely different to the set of services in the nature of engineering services rendered by the four comparables.

III. Transfer Pricing – Tribunal was correct in excluding Infosys a giant company with high risk profile from list of comparables to the assessee, a captive unit of the parent company having low risk.

CIT vs. Agnity India Technologies Pvt. Ltd., [ITA 1204/2011] (Delhi High Court) Order dated Assessment Year: 2006-2007

Facts

1 The assessee, a wholly owned subsidiary of Bay Packets Inc., USA was engaged in the business of development of software for the parent company in the field of telecommunication. During the year under consideration, the assessee had undertaken international transaction with the AE.

2 On reference to the TPO, the TPO opined an adjustment of ₹ 3,73,74,985/- by taking the ratio of operating profit to total cost at 27.08%. The TPO in his final analysis took Satyam Computers, L&T Infotech and Infosys Technologies having operating

profit to total cost ratio 30.07%, 11.11% and 40.08% respectively as comparables.

3 The DRP removed Satyam Computer Services Ltd. from the list of comparables and accordingly, reduced the proposed addition to Rs. 1,24,01,451/- by taking the ratio at 25.6%.

4 On appeal, the Hon'ble Tribunal observed that the assessee was not comparable with Infosys Technologies Ltd. as it was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the assessee was a captive unit of the parent company and assumed only a limited risk.

5 Aggrieved, the Revenue appealed to the Hon'ble High Court.

Judgment

1 The Hon'ble High Court observed that the Revenue had not been able to controvert or deny the data and the differences mentioned by the Hon'ble Tribunal for excluding Infosys Technologies Ltd.

2 It observed that the TPO had taken three companies, namely, Satyam Computer Services Ltd., L&T Infotech Ltd. and Infosys Technologies as comparable to work out the mean. The Hon'ble Tribunal for valid and good reason had pointed out that Infosys Technologies Ltd. could not be taken as comparable in assessee's case and also confirmed that Satyam Computer Services Ltd. should not be taken in consideration. Thus, only L&T Infotech Ltd. remained whose margin was 11.11% which was less than the figure of 17% margin as declared by the assessee. Further, the mean of the comparables as selected by the assessee worked out to 10% as against margin of 17% shown by the assessee.

3 Accordingly, it held that no substantial question of law arose and dismissed the appeal filed by the Revenue.

IV. India – Thailand DTAA – Residual clause article is triggered when item of income is not Covered by any specific provion of DTAA – Hence Royalty & FTS do not attract Article 22 – In the absence of PE additional attendance fee could not be taxed as FTS being business profits under article 7 –

Bangkok Glass Industry Co. Ltd. vs. ACIT [2013] 34 taxmann.com 77 (Madras) Assessment Year: 1991-1992 to 1995-1996

Facts

1 The assessee, a company resident in Thailand, entered into technical assistance know-how agreement on 19th March, 1990 with M/s Mohan Breweries & Distilleries Ltd. (MBDL.

2 Article I of the agreement stated that the assessee agreed to transfer the knowhow to the Indian company during the layout planning and erection stage. Article II of the agreement deals with technical advice in transferring all its present methods of manufacture relating to packing materials and containers. Article III and IV dealt with technical assistance at various stages and technical training.

3 The assessee received technical know-how fees for five years, which was treated as not taxable as per article 12 of DTAA between India and Thailand.

4 The AO took a view that what was transferred was sharing of knowledge and not know-how, and therefore, consideration received was not covered by definition of Royalty under Article 12 of the DTAA. Further, since there was no direct nexus between the income and activities of business of the assessee, it could not be taxed as business profit under Article 7. Therefore, he held that consideration was to be taxed under the residual clause i.e. Article 22 of DTAA.

5 On appeal, the CIT(A) held part amount to be taxable as royalty under Article 12 and remaining amount representing additional attendance fee was held taxable under Article 7, subject to the condition that assessee had a permanent establishment in India.

6 On further appeal, the Hon'ble Tribunal held that the portion of fees for technical services was not taxable under Article 7 but under article 22, as per section 9(1)(vii).

7 Aggrieved, the Revenue and the assessee both appealed to the Hon'ble High Court.

Judgment

1 The Hon'ble High Court observed that the services rendered by the taxpayer covered transfer of know-how as well as giving, technical assistance and technical advice. The technical advice given related to resolving the issues in the actual working of the transferred knowledge and there was no transfer of technical know-how to fall for consideration under the head 'Royalty'. It held that the entire payment was to be classified between payment for royalty and payment for rendering technical advice.

2 The Hon'ble High Court held that as per facts of the present case, the assessee had not rendered consultancy services through its employees for a period more than 183 days and hence the assessee did not have a PE in India under Article 5(2)(j) of the DTAA and accordingly, provisions of Article 7 would not apply. Thus the income which would fall under Article 12 of the DTAA would only be taxable and nothing beyond that.

3 On perusal of clauses of the agreement between the taxpayer and the MBDL, the Hon'ble High Court observed that the entire payment could not be considered as royalty under the DTAA.

4 Accordingly, in the absence of any material on record on the part of Revenue, it held that the Hon'ble Tribunal was correct in concluding that a part of the payment would be classified as royalty under Article 12 of the DTAA and the other part was to be assessed as technical services. However, since the assessee did not have PE in India, the technical services could not be brought to tax under Article 7 of the DTAA.

5 The Hon'ble High Court further held that the technical services which falls under Article 7 of the DTAA could not be taxed under Article 22 of the DTAA since the said income does not fall under miscellaneous income under the DTAA.

C) TRIBUNAL DECISIONS

V. Income from live telecast of races cannot constitute royalty u/s 9(1)(vi) of the Income-tax Act

Delhi Race Club Ltd. vs ACIT TS-276-ITAT-2013 (Del)
Assessment Year: 2007-08

Facts in brief

1 The assessee was engaged in the business of horse racing and derived income from betting, commission, entry fee, stall charges etc. During the year under consideration, the assessee paid royalty to other race clubs whose races were displayed in assessee's club. As per the assessee, the activities for which royalty is paid to other clubs in India, does not fall within the ambit of royalty, as per Explanation 2 to Section 9(1)(vi) of the Act and therefore, tax was not deducted on such payments.

2 The Assessing Officer (AO) held that when a assessee pays any amount for getting rights/ license to telecast any event which is a copyright of a particular person (i.e. no one can copy it for direct telecast or deferred telecast) then the amount so paid is to be treated as royalty and it is covered under Section 9(1)(vi) of the Act. Accordingly, the AO held that the provisions of Section 194J of the Act are applicable and since the assessee has failed to deduct tax on such payments, by virtue of Section 40(a)(ia) of the Act such amount is disallowed.

Issue

Whether the sharing of income generated from betting ?on the basis of live telecast is taxable as royalty under the Act?

Decision

The Tribunal held in assessee's favor as under:

i) The live telecast viewed by various persons cannot be said to be a work, as word 'work' is defined under Section 2(y) of the Copyright Act, 1957 to mean (a) a literary, dramatic, musical or artistic work; (b) a cinematograph film; and (c) sound recording.

ii) In the case of *DIT v. Neo Sports Broadcast (P) Ltd. [2011] 133 ITD 468 (Mum).*, the Mumbai Tribunal held that the existence of work is a pre-condition and must precede the granting of exclusive right for doing of such work. This proposition became clear on perusal of the definition of copyright in case of cinematograph film which inter alia refers to make a copy of the film including a photograph of any event and forming part thereof and once the event is gathered then the question of making its copies arises.

iii) Further the Mumbai Tribunal held that as the meaning of copyright under Section 14 of the Copyright Act, 1957 (Copyright Act), in the context of cinematograph film refers to make a copy of the film and not its original recording. The broadcast of live telecast cannot be equated with the copyright of such film.

iv) Further the Mumbai Tribunal held that live telecast of a match or any other event cannot be considered as transfer of copyright since in the case of live telecast of the match no work is said to have come into existence. A cinematograph film depicting live events like sporting events cannot infringe any copyright because there is no copyright in live event.

v) Further the Mumbai Tribunal held that definition of royalty under the Act does not include any consideration for live coverage of any event which was sought to be broadened by Direct Taxes Code 2010 by bringing it distinctly within the purview of royalty.

vi) The facts and circumstances of the present case are similar to the case law of Neo Sports Broadcast (P) Ltd. In the present case, there is no creation of any work, as income was generated from betting on the basis of live telecast and the same was being shared on reciprocal basis and cannot be termed as royalty under the Act. Therefore, such amount was not liable for tax deduction at source and consequent disallowance under Section 40(a)(ia) of the Act.

VI. Tax is not required to be deducted from reimbursements of salary costs of the employees of a foreign company deputed to work for the Indian company – India USA DTAA

ITO vs M/s CMS (India) Operations & Maintenance Co. Pvt. Ltd. 2013-TII-95-ITAT-MAD-INTL
Assessment Year: 2007-08

Facts in brief

i) The assessee was engaged in operation and maintenance of power plant and was a subsidiary of CMS Resource Management Company (CMS) based in USA.

ii) CMS deputed some of its employees (the expatriates) to India to work for the assessee. The expenditure for the deputed employees incurred by CMS were reimbursed by the assessee. The assessee claimed such expenditure under the head 'Reimbursement of manpower cost'.

iii) The assessee deducted tax on the payments made to CMS. Subsequently, the assessee approached the Commissioner of Income-tax (Appeals) [CIT(A)] under Section 248 of the Act for a ruling that there was no necessity for deducting tax at source relying on the decision of the Tribunal for the AY 2002-2003 to 2006-2007 in the assessee's own case [2012] 135 ITD 386 (Chennai).

iv) The Assessing Officer (AO) took a view that the assessee had not deductedtax at source as stipulated under Section 195 of the Act and therefore, disallowed the payments under Section 40(a)(i) of the Act.

Issue for consideration
Whether the CIT(A) erred in accepting the appeal of the assessee that no tax was required to be deducted on reimbursements made to a foreign company for the salary costs of the employees of the foreign company deputed to work for the assessee in India?

Decision
The Tribunal held in favour of the Assessee as follows:

i) Section 248 of the Act enables a assessee to file an appeal even after deduction of tax at source, claiming that no tax was required to be deducted at source since such appeal is only for a declaration regarding tax liability, if any. Therefore, the CIT(A) was correct in entertaining such appeal of the assessee.

ii) In so far as merits of the case are concerned, the matter stands covered in favour of assessee by virtue of the earlier order of the Tribunal which held as follows:

a) The Tribunal held that the expatriates were not employees of the assessee. The expatriates had filed their income-tax returns in India and CMS deducted tax at source on payment of salaries to these persons who were on their rolls.

b) Accordingly, the expatriates could only be considered as employee of CMS and therefore, the assessee was not bound to deduct tax at source under Section 192 of the Act on such payments.

c) As per the India-USA tax treaty (the tax treaty) and its Memorandum of Understanding (MoU), in case of FTS, the technical service shouldbe made available to the service recipient.

d) The agreements between the assessee and CMS show that no technical know-how was made available to the assessee. Accordingly, the assessee could be justified in reaching a bona fide impression that payments made by it to CMS were not sums on which tax was chargeable in India.

e) The assessee did not default with respect to the withholding tax provisions and therefore, the payments were not warranted for disallowance under Section 40(a)(i) of the Act.

iii) The above order of the Tribunal was on disallowance under Section 40(a)(i) of the Act however, there is a clear finding in favour of the assessee that no tax was required to be deducted on payments made by it to CMS.

VI. Amount received by an Indian branch for commercial services rendered to the head office in USA is taxable in India – Article 7 of India-USA DTAA

Wellinx Inc. v. ADIT [2013] 35 taxmann.com 420 (Hyderabad – Trib.) Assessment Year: 2006-07

Facts in brief
i) The assessee was a company incorporated in USA and had a branch office in India which commenced its operations during the financial year under consideration. The assessee was engaged in the business of medical transcription and software development related to health care. The branch in India was opened after obtaining permission from RBI. In relation to the year under consideration, the assessee filed its return of income declaring a loss.

ii) The Assessing Officer (AO) noticed that though the assessee has a permanent establishment (PE) in India, it has not offered any tax on the ground that it was providing its services to its Head Office (HO) which cannot be subjected to income-tax as per Article 7(3) of the tax treaty.

iii) The AO held that as per Article 5(1) of the tax treaty, the branch office in India was a PE of the tax payer in India. Referring to Article 7(2) of the tax treaty and Rule 10 of the Income-tax Rules, 1962 (the Rules), the AO estimated the assessee's income at cost plus 15 % mark-up.

Issues for consideration
Whether the receipt arising on account of the services rendered to the HO in USA is a taxable income of the PE in India?

Decision
The Tribunal held in Revenue's favor as follows:

i) Article 7(3) of the tax treaty is in two parts. The first part of the said Article relates to the activity carried on by the branch office which is commercial and business in nature whereas the second part relates to the activities which are not commercial in nature and relates to specific services performed by the branch office.

ii) As per Article 7(3) of the tax treaty, in case of services performed by the branch office on account of outsourcing of commercial activities by its HO, the income arising out of such services rendered would be taxable under Article 7(3) of the tax treaty, whereas if some non-commercial activities are specifically assigned by the HO to its branch office, then income arising out of such activity would not be taxable.

iii) Based the on permission granted by RBI, the branch office was involved in the activities of customer care and medical transcription services. Thus, the branch office was also rendering services of commercial nature which has been outsourced by the HO.

iv) Perusal of the order of the CIT(A) indicates that the assessee was carrying out only the normal commercial activities of the HO i.e., a part of medical transcription work and software development. The assessee had not brought on record to establish the fact that the activities carried on by it was non-commercial and in the nature of specific services as per the instruction of the HO.

v) of the Tribunal rejected the arguments of the assessee relying ADIT v. Credit Agricole Indosuez [2013] 33 taxmann.com 441 (Mum),and in Sumitomo Mitsui Banking Corpn. v. DDIT [2012] 19 taxmann.com 364 (Mum)(SB) and observed that the facts are totally different in the present case, since the Indian PE has received certain amount from the HO for carrying out the commercial activities of HO outsourced to the Indian PE. Hence, there cannot be any mutuality.

vi) The Tribunal, further observed, that the principle laid down in ADIT v. Oman International Bank [2013] 55 SOT 31 (Mum), the transactions between the HO and branch can not apply to the facts of the assessee's case as there is no transaction of similar nature between the Indian PE and it's HO. On the contrary, the Indian PE is carrying out a commercial activity outsourced by the HO.

vii) Mere nomenclature of 'reimbursement' is not relevant. The assessee is required to lead evidence to show that the expenses incurred are equal to the amount recovered. The decision in case of *Societe Generale vs. DDIT [2013] 32 taxmann.com 174 (Mum)* is also factually distinguishable.

viii) The assessee's contention, that the HO has suffered loss and hence there cannot be any profit to the branch office, is not acceptable as profit of the branch office has to be computed as per the income earned by it.

ix) Accordingly, the income earned by the assessee from the activities carried on by it is taxable in India. Based on the facts on record, the assessee has not provided any basis for computing the profit. The order of the CIT(A) which had determined the profit at 10 percent was reasonable.

VIII. Export Commission paid to non-resident agents is not taxable in India – No adverse impact of withdrawal of Circular No.23 of 1969

Gujarat Reclaim & Rubber Products Ltd vs. ACIT [TS-153-ITAT-2013(Mum)] Assessment year: 2008-09

Facts in brief

i) The assessee, a company incorporated in India, made commission payments to non-resident agents for marketing and distribution of various grades of reclaim rubber in foreign countries. The commission was paid to the non-resident agents without deducting taxes, on the basis that since the foreign agents did not have any business connection in India, the payment made to them was not taxable in India.

ii) The Assessing Officer (AO) disallowed the payments in the hands of the assessee under Section 40(a)(i) of the Act on the basis that tax was required to be deducted from the payments made to the non-resident agents.

Issue

Whether the commission payments to non-resident agents were taxable in India?

Decision

The Tribunal observed and held in assessee's favor as follows:

i) The withdrawal of Circular No.23 of 1969 does not affect the taxability of commission payments as the services were rendered/ used outside India, payments were made/ received outside India and the non-resident agents did not have a business connection or a PE in India.

ii) Accordingly, the assessee was not liable to deduct tax on payments made to the agents.

IX. IT enabled customer management services provided by a foreign company results in a PE in India – Attribution of Profit to the PE.

Convergys Customer Management Group Inc. vs ADIT [2013] 34 taxmann.com 24 (Delhi – Trib.) Assessment Years : 2006-07 & 2008-09

Facts in brief

i) The assessee, a company incorporated in and a tax resident of USA is engaged in the business of providing IT enabled customer management services. In order to service its customers, the assessee had procured certain IT enabled call centre / back office support services from its subsidiary company in India (Indian subsidiary). The Indian subsidiary also made payments to the assessee towards reimbursement for link charges and license charges (for use of software).

ii) The AO held that the assessee had various forms of PE in India such as Fixed place PE, Service PE and DAPE and attributed huge profits to the PE in India. The AO also held the link charges / license charges to be taxable in India as Royalty u/s 9(1)(vi) of the Act and Article 12 of the India- USA tax treaty.

Issue

The issue for consideration before the Tribunal, inter alia, was whether the assessee had a PE in India and whether the link charges / license charges are in the nature of royalty.

Decision

The Tribunal observed and held as follows:

A) Re: Permanent Establishment

i) The assessee had a fixed place PE in India on the following account:

a) The employees of the assessee frequently visited the premises of the Indian subsidiary to provide supervision, direction and control the operations of the Indian subsidiary and such employees had a fixed place of business at their disposal.

b) Indian subsidiary was practically the projection of assessee's business in India and it carried out its business under the control and guidance of the assessee, without assuming

any significant risk in relation to its functions and

c) Certain hardware and software assets were provided by the assessee to the Indian subsidiary on a free of cost basis.

ii) The Indian subsidiary did not constitute a DAPE of the assessee in India as the conditions provided in Article 5(4) of the India-USA tax treaty were not satisfied.

iii) The Tribunal also outlined the manner in which the profits were to be attributed to the PE so created in India.

B) Re: Taxability of link charges/ license charges

i) Relying on the decision of the Mumbai Tribunal in the case of DDIT vs B4U International 2012-TII-122-ITAT-MUM-INTL and the decision of the Delhi High Court in the case of DIT vs Nokia Networks OY (2012-TII-49-HC-DEL-INTL), the Tribunal held that the amendment to Section 9(1)(vi) of the Act does not affect the provisions of the tax treaty in any manner.

ii) Purchase of software would fall within the category of copyrighted article and not towards acquisition of any copyright in the software and hence the license charges are not in the nature of royalty.

iii) With regard to the taxability of the link charges, the Tribunal held that since neither the assessee nor the Indian subsidiary had any control or possession over the equipment, link charges do not quality as equipment royalty in terms of Article 12 of the tax treaty and hence are not taxable in India.

X. Payments for bio-equivalent studies do not make available technical skill, knowledge or expertise, etc and therefore are not taxable as FTS under India-USA and India-Canada DTAA.

DCIT vs. Dr. Reddy's Laboratories Limited [2013] 35 taxmann.com 339 (Hyderabad – Trib.) Assessment Years : 2003-04 & 2004-05

Facts in brief:

i) The assessee was engaged in the business of manufacturing, trading and exporting of bulk drugs and pharmaceuticals. It was also engaged in research and development of bulk drugs and pharmaceuticals. In order to market its products in USA and Canada, the assessee was required to get approval from the respective regulatory authorities.

ii) For this purpose, the assessee was required to get its products tested through certain specialised organisations in USA/Canada which were called as Contract Research Organisations (CRO). The testing process was called 'bio-equivalence study'. During the bio-equivalence study, the CROs do clinical research and analyse the impact of the drug on human beings.

iii) After conducting bioequivalence studies, the CROs submit a report to the assessee, which contains the findings of the study. This report was then submitted to the regulatory authorities and if the regulatory authorities are satisfied, then the patents are registered.

iv) For conducting the bio-equivalence studies, the assessee has made the payments to the CROs without deducting tax at source. However, the AO held that the assessee should have deducted tax at source at 15 % of the amount or at least should have obtained non-deduction certificate at the time of remittance of the amount.

Issue

Whether payments for bio-equivalent studies are taxable under India-USA and India-Canada tax treaty?

Decision

The Tribunal held in assessee's favor as follows:

i) Even though the AO considered that the payments were made by way of FIS as per Article 12 of the tax treaty, the same is taxable in the source country only if such services make available any technical knowledge, expertise, etc. or there is transfer of technical plan or design.

ii) The Tribunal held that the CIT(A) was correct in holding that the assessee was conducting clinical trials through the CROs to comply with the regulations therein and the CROs who were experts in this field were only conducting studies and submitting the reports in relation thereto.

iii) There were neither transfer of technical plan or technical design nor making available of technical knowledge, experience or know-how by the CROs to the assessee.

iv) Since there was no making available of technical skill, knowledge or expertise or plans or designs in the present case, the amounts paid by the assessee do not fall under Article 12, but come within the purview of Article 7 of the tax treaty.

v) Therefore, the amounts paid are to be considered as business receipts of the said CROs and in absence of CRO's PE in India, there was no need to deduct tax at source.

XI. Sponsorship payments for international cricket events do not constitute royalty

Hero Motor Corp Ltd vs. ACIT 2013-TII-127-ITAT-DEL-TP – Assessment Year: 2007-08

Facts in brief

The assessee, an Indian company, was appointed as one of the partner for cricketing events organised by the International Cricket Council (ICC). It made payments to two Singapore companies viz., Global Cricket Corporation Pte Ltd (GCC) and Nimbus Sports International Pte Ltd (Nimbus), for getting certain sponsorship rights i.e. the right to advertise on billboards at the venue, color advertisement space in the official brochure/website of the ICC etc. The AO disallowed the payments in the hands of the assessee under Section 40(a)(i) of the Act on the basis that the payments made to GCC and Nimbus were in the nature of royalty and accordingly tax was required to be deducted from these payments.

Issue

The issue for consideration before the Delhi Tribunal, inter alia, was whether the payments to GCC and Nimbus were in the nature of royalty.

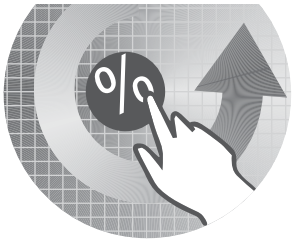
Decision

The Tribunal observed and held in assessee's favor as follows:

i) Relying on the decisions of the Delhi High Court in the case of *DIT vs. Sheraton International Inc [2009] 313 ITR 267 (Del HC), DIT vs. Sahara India Financial Corporation [2010] 189 Taxman 102 (Del HC)* and the decision of the Delhi Tribunal in the case of Nimbus Sports International Pte Ltd [2011] 145 TTJ 186 (Del), the Tribunal held that the payment by the assessee to Nimbus and GCC was purely for advertisement and publicity of the brand name of the assessee.

ii) The payment was not in the nature of royalty as it was not for the use of any trade mark or brand name. The use of the ICC's logo was only incidental to the main services obtained by the assessee; and

iii) As GCC and Nimbus did not have any Permanent Establishment in India, the payments were not taxable in India and consequently there was no requirement for deduction of tax at source on such payments.



CA Janak Vaghani

INDIRECT TAXES
VAT Update

1. Compounding of Offence – Late or Non-Filing of Returns

Trade Circular No. 5T of 2013, dated 24-7-2013

The Commissioner of sales tax has issued above referred circular to provide guidelines for institution of prosecution for not filing the returns within the prescribed date without sufficient cause u/s 74(3)(f) and compounding of offences u/s 78 of the MVAT Act. In paras 2 and 4 of the above circular following instructions are issued:-

(a) Where a dealer has filed a return late and made the payment of taxes due as per return along with the late fee provided under section 20(6), then, in such case prosecution show-cause notice shall not be issued.

(b) In case, where dealer has failed to file return within prescribed time and the departmental authority has issued a show-cause notice for prosecution, then, the offence may be compounded at the request of the dealer subject to the condition that the dealer has filed the return for the period under default along with payment of tax due as per return and late fee.

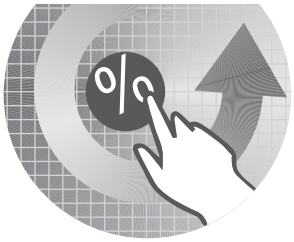
(c) In cases, where complaint has already been filed before the Judicial Magistrate, then such offences shall be compounded subject to the grant of permission by the concerned Judicial Magistrate.

The compounding amount for each offence stated above shall be fixed as given in Table below:

Table

Sr. No.	*Category*	*Compounding amount for each offence (in ₹)*
1	Dealers liable to file Six-monthly returns and newly Registered dealers	Double the amount of tax or ₹ 5,000/- whichever is less
2	Dealers liable to file Quarterly returns	Double the amount of tax or ₹ 15,000/- whichever is less
3	Dealers liable to file Monthly returns	Double the amount of tax or ₹ 25,000/- whichever is less

"Readers please take note that utility of filing of ST-3 return for the period October 12 to March 13 is now available on ACES. The last date to submit the return is 31-8-2013."



CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Advertising Service

1.1 CCE, Chandigarh vs. Facinate Advertising & Marketing 2013 (31) STR 77 (Tri-Del.)

The Tribunal in this case held that, incentive received for appreciating performance is not liable to tax as the same is not known whether payable or not while providing service. It is further held that, there is no logic in inclusion of discount in value of service, as the same was not received and therefore, not liable to tax.

Works Contract Service

1.2 Vistar Construction (P) Ltd. vs. UOI 2013 (31) STR 129 (Del.)

The High Court in this case held that, CBEC Instruction F. No. 545/6/2007-TRU, dated 28-4-2008 stipulating that, for works contract service tax was chargeable on receipt of payment, irrespective of whether or not services were performed, and rate applicable was one in force at time of Service Tax had become chargeable, and date on which services where agreed to be provided was irrelevant was wrong and invalid in view of Apex Court decision in *Association of Leasing & Financial Service Companies 2010 (20) STR 417 (SC).* It is held that, taxable event for Service tax was rendition of service and hence rate of tax applicable was one on the date on which services were rendered and not the date on which payments were received.

Clearing & Forwarding Agent's Service

1.3 Suresh Kumar & Company vs. CCE, Jaipur-I 2013 (31) STR 146(Del.)

The appellant in this case engaged in sale of tea received from principals under their own invoices and also paid sales tax on such invoices. The department sought to tax them under C&F Agent service. The Tribunal after relying on decision in *D. R. Polymer 2013 (29) STR 536 (Tri.)*, held that assessee in not C&F Agent.

Cargo Handling Service:

1.4 JAC Air Services Pvt. Ltd. vs. CST, Delhi 2013 (31) STR 155 (Tri-Del.)

The appellant in this case had agreement with AAI for Cargo Handling Services at Delhi International Airport. They pleaded that, since tax is paid by main contractor they are not liable to pay any tax. The Tribunal observed that, various circulars and trade notices clarifying separate duty liability not to be carved out against assessee where principal service provider has discharged duty liability on entire value. It is held that, second time confirmation of duty cannot be upheld and therefore demand is set aside.

Sponsorship Service

1.5 Hero Honda Motors Ltd. vs. CST, Delhi 2013 (31) STR 162(Tri.-Del.)

The appellant in this case sponsored T-20 Cricket League matches to be held under auspicious of BCCI. The sponsorship agreement conferred participative and associative rights in relation to IPL events likely to contribute to augmentation of assessee's business. The Tribunal held that, service in relation to sports event has been specifically excluded from the definition of sponsorship service and the said clause admits no ambiguity, grammatical, syntactical or contextual. There is no restriction incorporated by legislature by enacting exclusion inapplicable to sport event for commercial purpose. In absence of limiting works or phrase in provision, adjudicating authority not to ingraft own policy choices and preferences to legislatively conferred immunity. The fundamental premises of adjudicating authority are misconceived and unsustainable and therefore, the Order-in-Original needs to be set aside.

2. Interest/Penalties/Others

2.1 CCE vs. Dineshchandra Agrawal 2013 (31) STR 5 (Guj.)

In this case, there was failure to pay service tax dues for two years, however, entire amount paid prior to issuance of SCN and since the assessee was providing services to Central Excise assessee, service tax paid was available as CENVAT credit and hence, payment of tax was revenue neutral. It is held that, there was no deliberate intention to evade tax and penalty is set aside by invocation of section 80.

2.2 CCE&C, Surat-I vs. ABG Shipyard 2013 (31) STR 11 (Guj.)

The assessee in this case, claimed refund of commission paid/payable to commission agent located outside India not declared it in shipping bill, but deposited service tax on time. It is held that, it was only a technical error, and there was no effort to defraud revenue, hence exporter was entitled for its refund in terms of Notification No. 41/2007-ST.

2.3 BNP Paribas Equities India P. Ltd. vs. CST, Mumbai 2013 (31) STR 22 (Tri.-Mumbai.)

In this case, the penalty under section 76 has been revised and confirmed at ₹ 200/- per day or 2% of Service tax per month, whichever is higher. The Tribunal held that, it is well settled law that, punishment to be given on the basis of provisions of law prevailing at the time of occurrence of offence. During April, 2002 to September, 2002 penalty is leviable at ₹ 100/- per day which may extend to ₹ 200/- per day and adjudicating authority levied penalty at ₹ 100/- per day. Therefore, the Commissioner cannot go beyond provisions applicable at the time of occurrence of offence.

2.4 Spark Engg. P. Ltd. vs. CCE, Ghaziabad 2013 (31) STR 71 (Tri.-Del.)

The appellant in this case filed refund claim under Notification No. 41/2007-ST of service tax on GTA services and export commission payment after expiry of limitation period of 60 days of export. The service tax was also deposited subsequent to exports on demand by Revenue. The appellant pleaded that, limitation of period of one year from date of deposit prescribed under section 11B to be adopted. The Tribunal rejected the said plea on the ground of inability of Courts working within parameters of Excise Law to extend limitation period specifically prescribed by Notification No. 41/2007-ST.

2.5 Greenspan Agritech Pvt. Ltd. vs. CCE, Pune-I 2013 (31) STR 229 (Tri.-Mumbai.)

The department in this case rejected refund claim for the period October, 2007 to February, 2008 filed on 18-11-2008 under Notification No. 41/2007-ST as time barred. The Tribunal observed that, the time limit of two months period provided in the said Notification has been amended to six months by Notification

No. 32/2008-ST dated 18-11-2008 and further amended to one year by Notification No. 17/2009-ST dated 7-7-2009. It is held that, refund is time barred as it was beyond six months and one year time limit provided by Notification No. 17/2009-ST, dated 7-7-2009, did not have retrospective effect.

3. CENVAT Credit

3.1 CC&CE, Guntur vs. Cholayil (P) Ltd. 2013 (31) STR 29 (Tri.-Bang.)

The Tribunal in this case held that, Group Insurance and health insurance of employees, Rent-a-cab service, Air Travel Service, etc. are covered under the definition of Input service and hence, credit is admissible. In case of Sodexo passes issued to employees which are exchangeable for purchase of food items and other household items, CENVAT credit is not admissible as nexus required to provide services is not established.

3.2 Cadmach Machinery Co. (P) Ltd. vs. CCE, Ahmedabad 2013 (31) STR 33 (Tri.-Ahmd.)

The Tribunal in this case allowed CENVAT credit of service tax paid on outdoor catering service, valuation of immovable property, consulting engineer service, travel agent service, business exhibition, repair charges, photography service, labour charges, etc. as the said services are related to manufacture. Further, in case of food services amount paid by workers/ staff to assessee to be treated as exclusive of service tax and after deducting the said amount balance amount of service tax paid available as credit.

3.3 CCE, Visakhapatnam vs. Aurobindo Pharma Ltd. 2013 (31) STR 38 (Tri.-Bang.)

The Tribunal in this case observed that, though appellate authority has not discussed service-wise nexus between input service and manufacturing activity, nexus reasonably established from very description of input service. It is held that, CENVAT credit is admissible on service tax paid on annual maintenance contract, Rent-a-cab service for transportation of employees, journal and periodicals acquired for research and information and outdoor catering service.

3.4 Sharavathy Conductors Pvt. Ltd. vs. CCE, Bengaluru-I 2013 (31) STR 47 (Tri.-Bang.)

In this case, CENVAT credit of service tax was wrongly availed by one unit but utilised by two units reversed in wake of audit objections. The department sought to charge interest on the said reversal. The Tribunal observed that, intention to evade duty by Unit-I was not proven as both units owned by assessee and credit reversed undisputedly available to Unit-II. It is held that as per view taken in *Gokaldas Images Pvt. Ltd. 2012 (28) STR 214 (Kar.)*, if CENVAT credit in question is reversed, it amounts to not taking of credit at all. Hence no interest is imposable.

3.5 M. K. Industries vs. CCE, Daman 2013 (31) STR 59 (Tri.-Ahmd.)

The department in this case, denied credit for service tax paid for commission agent services as not having nexus with manufacture and clearance of goods from place of removal. The Tribunal relying on Coca Cola India Pvt. Ltd. – 2009 (15) STR 657 (Bom.) and Ultratech Cement Pvt. Ltd. 2010 (20) STR 577 (Bom.) held that, sales promotion is necessary part of business activity and therefore credit is admissible.

3.6 Precision Wires India Ltd. vs. CCE, Vapi 2013 (31) STR 62 (Tri.-Ahmd.)

The appellant's manufacturing unit availed credit prior to ISD registration by Head Office. The department sought to deny the credit. The Tribunal observed that, there is no dispute regarding receipt of input service at HO and credit is admissible in view of decision in *Jindal Photo Ltd. 2009 (14) STR 812 (Tribunal)* and *Samita Conductors Ltd. 2012 (278) ELT 492 (Tri.-Ahmd).*

3.7 Welspun Maxstel Ltd. vs. CCE, Raigad 2013 (31) STR 64 (Tri.-Mumbai)

The appellant in this case denied CENVAT credit of service tax paid on security services at pump house for pumping water from river, required as coolant in manufacturing operations. It is held that, pumping water was integrally connected to manufacturing process, and security services used therein were input service in term of rule 2(l) of CCR, 2004. It is further held that, it is not necessary to receive input service in factory premises and the only condition is that, they should be integrally connected with manufacturing activities.

3.8 BCH Electric Ltd. vs. CCE, Delhi-IV 2013 (31) STR 68 (Tri.-Del.)

The Tribunal in this case held that, service tax paid on car parking services and club membership of IEEMA is admissible as CENVAT credit and Membership to India International Club is not an input service as unrelated to business activity. It is further held that, all ER-1 returns have been filed regularly and Excise Officers were within powers to call for and examine records and there is no suppression of information, hence only normal period of limitation is applicable.

3.9 CCE, Daman vs. Paras Motor Mfg. Co. 2013 (31) STR 81 (Tri.-Ahmd.)

The Tribunal in this case after relying on decision in Cadila Healthcare Ltd. 2013(30) STR 3(Guj.) held that, service tax paid on commission paid to commission agent for sale of goods is ineligible for availment of CENVAT credit.

3.10 3M India Ltd. vs. CCE&ST, LTU, Bengaluru 2013 (31) STR 110 (Tri.-Bang.)

The appellant is registered under LTU. The department sought to recover CENVAT credit of service tax paid on management consultancy service received by corporate office of LTU without obtaining ISD registration and allotted to other registered manufacturing units under cover of challans. The Tribunal observed that, Rule 12A(4) of CCR, 2004 is applicable to LTU and permitted them to transfer the CENVAT credit from one registered unit to another registered unit under issue of transfer challans. It is held that, provisions governing ISD are inconsistent with Rule 12A of CCR, 2004 hence not applicable to LTUs and therefore the impugned order is required to be set aside.

3.11 Everest Industries Ltd. vs. CCE, Meerut-I 2013 (31) STR 189 (Tri.-Del.)

The appellant in this case claimed refund of service tax paid on inputs/input services used in final product supplied to SEZ unit. The Tribunal held that, Rule 5 of CCR, 2004 provides for refund of credit taken on final products cleared for export and supplies to SEZ not be treated as export for purpose of Rule 5 and therefore, the appellant is not entitled to claim refund.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case law No. 1.

[2013] 179 Comp Cas 133 (Mad.) – In the Madras High Court. – Kumbakonam Mutual Benefit Fund Ltd. vs. S. Kalyanasundaram and Others – L. Meiyappan and Others vs. S. Kalyanasundaram and Others

The combined reading of section 173(1)(a) as to notice of general meeting and section 186 of the Companies Act, 1956 reveals that appointment of director in place of retiring director shall be made only in Annual General Meeting and not in Extra-ordinary General meeting.

Brief facts

Two petitions were filed under section 10F of the Companies Act, 1956 (Act). One petition by Kumbakonam Mutual Benefit Fund Ltd. ("Company") and one by its directors – cum – shareholders. These appeals were filed against the Company Law Board ("CLB"), Chennai Bench order. The petitioners were the respondents in petition before CLB.

The petitioner in CLB petition, who is also the Managing Director of the Company, had convened the AGM of the Company. However, there were apprehensions that the rival group, who are respondents in the petition filed with CLB may take over the Company. The petitioners therefore had filed writ petition with the High Court for police protection for the smooth conduct of the meeting. Both sides had filed police complaints. Petitioners claimed that they did not attend AGM for the fear of being arrested. They contended that the rival group had taken over the AGM proceedings. Further, with their support, members moved the agenda for the removal of petitioner, i.e. the Managing Director and other directors and substituted them with new Managing Director and other directors in their place due to casual vacancy caused.

The petition before the CLB was seeking order for;

a. Validity of the AGM conducted and appointment of new directors.

b. Directing the Company to call for an EGM under sections 186(1) (a) and (b) of the Act, facilitate the same and appointment of any retired Judge as Chairman.

c. To consider the authenticity in the appointment of respondents as the directors of the Company.

d. Appointment of directors in place of removed/disqualified directors.

Petitioners has also mentioned that they are holding less than 10% of share voting required for making requisition for convening an EGM and hence they are approaching the CLB based on the circumstances of facts.

The CLB order was under section 186(1) of the Companies Act, 1956 ("Act"). As per the said order, CLB had directed the Company to conduct an Extra Ordinary General Meeting (EGM) to

consider the authenticity of the appointment of certain directors (respondent in this appeal). The said order was to be implemented within 30 days from the date of CLB order.

CLB has observed that in the notice of AGM, there were no agenda for the removal of petitioners and appointment of new directors. Further, minutes of AGM does not contain any such resolution for the removal of petitioner as director.

The questions before the Court are:

1. Whether CLB is right in its conclusion that in absence of petitioner not having requisite shares for requisitioning EGM, amounts to impracticability of holding EGM, where Company is regular in holding its general meeting?
2. CLB has power to go beyond the provisions of section 186?
3. Whether CLB was right in passing the order.
4. Whether CLB is right that removal of director is only through special resolution under section 284 of the Act?
5. Whether CLB has jurisdiction in authenticity of directors appointed in previous AGM for petition made under section 186 of the Act?
6. Whether a petition under 186 is itself maintainable on appointment of directors in concluded general meeting?

Decision and reasoning

Court has answered all questions in favour of the petitioner by setting aside CLB order.

On the first question of maintainability of petition, under section 10F of the Act as to whether it involves any questions of law for determination by this court. Court has rejected the said appeal and noted that on merits, this is a serious issue.

Court has noted the submission by the respondent in Supreme Court judgment reported in AIR 1959 SC 57 *(Deity Pattabhiramaswamy vs. S. Hanymayya)* and High Court judgments in *[2008] 144 Comp Cas 619; Palanisamy vs. Milka Nutrients P. Ltd.*

As per the above judgments, Second Appeal under section 100 of the Code of Civil Procedure, 1908 (CPC) and under section 10F of the Act to High Court confined to determination of substantial questions of law and not on erroneous facts. However, Court has observed that above judgment is not applicable in current case as it is on CLB's jurisdiction under section 186 of the Act.

On CLB's conclusion as to its impracticability of holding the EGM was based on one sided findings and has not considered the allegation raised against each other. Court has referred the judgment of Madhya Pradesh High Court in AIR 1961 MP 340; [1962] 32 Comp Cas 896 – Pasari Flour Mills Ltd. In this judgment, it has been held that under section 186(1) of the Act, it is quite unnecessary to consider which of the parties are responsible for the dispute and who is acting in high ended manner. The court has also interpreted the meaning of the word impracticable which should not be construed as impossible. It has referred the case of *Shrimati Jain vs. Delhi Flour Mills Co. Ltd. [1974] 44 Comp Cas 228* wherein it is concluded that impracticable should be considered from a reasonable point of view. Court has also rejected the arguments that it is not practicable that respondent company is not responding. Court has also observed that both the parties had asked for police protection and when the same was given, the petitioner (in CLB petition) cannot be permitted to contend that they are prevented from attending the meeting.

On relief sought by the petitioners, Court has referred the Supreme Court judgment in *R. Rangachari vs. S Suppiah, [1975] 45 Comp Cas 641; AIR 1976 SC 73* to ascertain the maintainability of the same under section 186(1). As per said judgment, power of the Court under section 186(1) is for three purposes, i.e. calling, holding and conducting the meeting. The relief sought was only for conducting the meeting and not for calling and holding meeting and findings given regarding impracticability is for different purposes.

On non-appointment of the petitioners as directors in the AGM, court has observed that there were few other directors who had been appointed in casual vacancies but they were not part of the petition. Further, with regards to other directors, whose vacancies are filled up and have any grievances against their disqualification. Court has also observed that the delay in filing petition from the date of AGM till this period, petitioners had not raised this issue or through other shareholders to convene an EGM. Court has referred various judgments of High Court in civil suit where similar situation exists. Court has also observed that parties approach the CLB during pendency of civil suits. The right to directorship is an individual right and any interference in the same is invasion of such independent civil right. The Madhya Pradesh High Court Judgment in re., Pasari Flour Mills Ltd., concludes that agenda for the "Appointment of Directors" cannot be transacted in the EGM.

Court has also analysed the various provisions of the Act and observed that combined reading of section 173(1)(a) as to notice of General meeting and 186 reveals that appointment of director in place of retiring director shall be made only in Annual General Meeting. Thus, Court has ruled that calling EGM to discuss the authenticity of the appointment of respondents is not maintainable.

On CLB, observation of provisions of section 284 for the removal of a director by special resolution, court has noted that section 284 deals with vacation of directors under specific circumstances and that also by ordinary resolution. Thus findings of CLB are contrary to law.

Court has concluded that CLB order is not maintainable and same is beyond the jurisdiction of it.

Case Law No. 2

[2013] 179 Cas 36 (Bom.) – In the Bombay High Court – Shah Pulp and Paper Mills Ltd. and Others vs. Pravinchand Hirji Shah and Others.

CLB powers and ambit under section 402 of the Companies Act should consider the interest of the company vis-a-vis the shareholders and while granting the relief, same must be uppermost.

Brief case

The appeal was filed under section 10F of the Companies Act, 1956 ("Act), challenging the order of the Company Law Board Bench, New Delhi ("CLB"). The appellant, which is a company (respondent before CLB), along with other appellants who are the promoters, shareholders and directors of the company submitted that the order by the CLB were on the ground of oppression and mismanagement of minority shareholders (Respondents in this application).

Initially, the appellant company was incorporated and run by the other appellants who are the promoters, shareholders and directors. The respondents, staying outside India had invested in the company and acquired 20% share capital. From time to time, respondents made further investments and thus increased there shareholding to 40%. During these periods, the management continued to remain with the appellants. During these periods, two of the respondents were also appointed as directors. However, they had never attended a single board meeting and had not taken any interest in the workings of the company. During these periods, none of the parties had raised any issue related to the management of the company. Further, respondents had never provided any personal guarantee for the company. One of the respondents, who was appointed as the director did attend the meeting and also provided a signatory to the company's accounts for few years. He resigned subsequently, but continued to work for the company on monthly salary.

Due to business requirement, it was proposed to either go for further expansion or sell the company. The general meeting of the company was called for after due notice to all. The respondents objected for giving personal guarantee as well as pledging of their shares for loan. Thus, resolution for expansion failed. The second resolution for sale of undertaking was objected by the respondents on the grounds that they should get an opportunity for higher bidding. Subsequently the sale of

undertaking was approved with a rider that same should not be less than paid-up capital of the company. The committee formed for sale of undertaking had started its process and also invited the bid from respondents, however they failed in it and instead, filed petition under sections 397 and 398 of the Act.

The allegations made by the respondents before CLB were (a) They have not received share certificates (2) One of the directors was removed without resolution, which they came to know much latter (3) No notices served to them except EGM notice for sale of undertaking (4) Balance sheet for certain years were not provided (5) Appellants sought further investment from them for some expansion, but they were not interested (6) No interest or dividend have been paid, etc. (7) Disputes as to sale of shares and undertaking and price, which respondents had rejected (8) Appellants are running the company being in majority, contrary to the mandate of law and articles of association.

In their petition before the CLB, respondents had sought for various reliefs.

Based on claims and counter claims from both the sides, CLB has passed the following order against the appellant.

a. To modify and alter its memorandum and articles of association for giving proportional representation to the respondent.

b. Two members of the respondent group should attend board meeting till the alteration of articles of association and for valid quorum, one member from respondent group must be present.

c. To include one member of the respondent as signatory of the bank accounts.

The questions before the Court are as follows:

a. Can CLB give order as to whether relief sought by the respondents is only for reinstatement of their nominee on the board and does not want to pursue other relief as ordered by the CLB?

b. CLB's power and scope under section 402 of the Act.

c. Can CLB ignore the submission of the parties while giving order for disputes between the parties even though no material to prove was placed before it?

Decisions and reasoning

Court has allowed the appeal on all the three questions placed before it. It has observed that respondent's petition before CLB was based on false and frivolous allegations and without merit.

In case of Question No. 1, Court has observed that this direction is totally unjustified and untenable in the absence of any specific allegation of financial irregularities and in absence of such relief sought in the petition. By doing so, CLB has created a deadlock in the affairs of the company where none existed earlier.

As to CLB power under section 402 of the Act, Court has observed that the said power are wide in nature, however, there must be some nexus between the complaint made and relief granted. The appellants have demonstrated that alleged case of "oppression" was false and untenable. No other circumstance exists for such drastic direction from CLB. Further, before CLB, the respondents had given up for all relief except for appointment of one of his nominees as director.

Court has analysed the powers and ambit of CLB under section 402 of the Act. It has referred to the Supreme Court's Judgment in *Sangramsinh P. Gaekwad vs. Shantadevi P. Gaekwad [2005] 123 Comp Cas 566; 11 SCC 314.* The interest of the company vis-a-vis the shareholders must be uppermost in the mind of the court while granting a relief.

Court has also noted that the circumstances warranted that respondents be directed to sell their shares and appoint a valuer for the same.



CA. Mayur Nayak, CA. Natwar Thakrar &
CA. Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent changes in FEMA through RBI circulars:

A. RBI CIRCULARS

1. Foreign Investment in India – Guidelines for calculation of total foreign investment in Indian companies, transfer of ownership and control of Indian companies and downstream investment by Indian companies

The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India has issued guidelines for calculation of total foreign investment, i.e., direct and indirect foreign investment in Indian companies and for establishment of Indian companies/ transfer of ownership or control of Indian companies from resident Indian citizens to non-resident entities, in sectors with caps.

The regulatory framework comprises:

(A) Definitions;

(B) Concept of direct and indirect foreign investment;

(C) Method of calculation of total foreign investment;

(D) Guidelines for establishment of Indian companies and transfer of ownership or control of Indian companies, from resident Indian citizens and Indian companies to non-resident entities, in sectors with caps;

(E) Downstream investment by an Indian company which is not owned and/or controlled by resident entity/ies.

Any foreign investment already made in accordance with the guidelines in existence prior to February 13, 2009 would not require any modification to conform to these guidelines. All other investments, after the said date, would come under the ambit of these new guidelines.

As regards investments made between February 13, 2009 and the date of publication of the FEMA Notification, Indian companies shall be required to intimate, within 90 days from the date of this circular, through an AD Category-I bank to the concerned Regional Office of the Reserve Bank, in whose jurisdiction the Registered Office of the company is located, detailed position where the issue/transfer of shares or downstream investment is not in conformity with the regulatory framework now being prescribed. Reserve Bank shall consider treating such cases

as compliant with these guidelines within a period of six months or such extended time as considered appropriate by RBI in consultation with Government of India.

[A.P. (DIR Series) Circular No. 01 dated 4th July, 2013]

2. Risk Management and Inter-Bank Dealings – Liberalisation of documentation requirements for the resident entities in the Indian Forex Market

It has now been decided that AD banks, while offering hedging products under the contracted exposure route to their customers may obtain an annual certificate from the statutory auditors to the effect that the contracts outstanding with all AD category-I banks at any time during the year did not exceed the value of the underlying exposures at that time. It is reiterated, however, that the AD bank, while entering into any derivative transaction with a client, shall have to obtain an undertaking from the client to the effect that the contracted exposure against which the derivative transaction is being booked has not been used for any derivative transaction with any other AD bank.

[A.P. (DIR Series) Circular No. 02 dated 4th July, 2013]

3. Deferred Payment Protocols dated April 30, 1981 and December 23, 1985 between Government of India and erstwhile USSR

The Rupee value of the special currency basket was indicated as ₹ 75.705663 effective from June 5, 2013, however, further revision has taken place on June 10, 2013 and accordingly, the Rupee value of the special currency basket has been fixed at ₹ 78.374512 with effect from June 13, 2013.

[A.P. (DIR Series) Circular No. 03 dated 4th July, 2013]

4. Exim Bank's Line of Credit of USD 10 million to the Government of Seychelles

The Credit Agreement under the LOC is effective from June 10, 2013 and the date of execution of Agreement is December 18, 2012.

[A.P. (DIR Series) Circular No. 04 dated 8th July, 2013]

5. Deferred Payment Protocols dated April 30, 1981 and December 23, 1985 between Government of India and erstwhile USSR

The Rupee value of the Special Currency Basket was indicated as ₹ 78.374512 effective from June 13, 2013, however, a further revision has taken place on June 20, 2013 and accordingly, the Rupee value of the Special Currency Basket has been fixed at ₹ 80.972091 with effect from June 25, 2013.

[A.P. (DIR Series) Circular No. 05 dated 8th July, 2013]

6. External Commercial Borrowings (ECB) Policy – Non-Banking Finance Company – Asset Finance Companies (NBFC – AFCs)

Non-banking financial companies (NBFCs) are allowed to avail of ECB under approval route from multilateral financial institutions, reputable regional financial institutions, official export credit agencies and international banks with minimum average maturity of 5 years to finance import of infrastructure equipment for leasing to infrastructure projects. Further, NBFC – Infrastructure Finance Companies (IFCs) have been permitted to avail of ECB for on-lending to infrastructure sector both under automatic and approval routes subject to certain terms and conditions.

It has now been decided to allow NBFCs, categorised as Asset Finance Companies (AFCs) by the Reserve Bank and complying with the

norms prescribed in the Mid-Term Review of the Annual Policy 2006-07 (Circular DNBS. PD. CC. No. 85/03.02.089/2006-07 dated December 6, 2006) of the Bank, as amended from time-to-time, to avail of ECB subject to following conditions:

i. NBFC-AFCs are allowed to avail of ECB under the automatic route from all recognised lenders as per the extant ECB guidelines with minimum average maturity period of five years in order to finance the import of infrastructure equipment for leasing to infrastructure projects;

ii. In cases, where the NBFC-AFCs avail of ECB in the form of Foreign Currency Bonds from international capital markets, such ECBs will be permitted to be raised only from those international capital markets that are subject to regulations prescribed by the host country regulator in a Financial Action Task Force (FATF) member country compliant with FATF guidelines;

iii. Such ECBs (including outstanding ECBs) under the automatic route can be availed up to 75 per cent of owned funds of NBFC-AFCs, subject to a maximum of USD 200 million or its equivalent per financial year;

iv. ECBs by AFCs above 75 per cent of their owned funds will be considered under approval route by Reserve Bank; and the currency risk of such ECBs is required to be hedged in full.

[A.P. (DIR Series) Circular No. 06 dated 8th July, 2013]

(This is a welcome step which will allow NBFCs categorised as Asset Finance Companies (AFCs) to raise funds abroad at a cheaper rates to finance the infrastructure projects in India)

7. Risk Management and Inter Bank Dealings

It has now been decided that AD Category – I banks should not carry out any proprietary trading in the currency futures / exchange traded currency options markets. In other words, any transaction by the AD Category – I banks in these markets will have to be necessarily on behalf of their clients.

[A.P. (DIR Series) Circular No. 07 dated 8th July, 2013]

8. Overseas Investments – Shares of SWIFT

Earlier the proposal of acquisition of the shares of SWIFT, Belgium by the resident bank was considered by the Reserve Bank on case-to-case basis under the approval route.

It has now been decided to grant general permission to a bank in India, being licensed by the Reserve Bank under the provisions of the Banking Regulation Act, 1949, to acquire the shares of SWIFT as per the bye-laws of SWIFT, provided the bank has been permitted by the Reserve Bank for admission to the 'SWIFT User's Group in India' as member.

[A.P. (DIR Series) circular No. 08 dated 11th July, 2013]

(It's a welcome decision from RBI, which would help Banks to speed up their business operations worldwide by exchanging standardised financial messages with other members of SWIFT)

9. Trade Credits for Imports into India – Review of all-in-cost ceiling

The all-in-cost ceiling of trade credit as specified below will continue to be applicable till September 30, 2013.

Maturity period	All-in-cost ceilings over 6 months LIBOR*
Up to one year	350 basis points
More than one year and up to three years	
More than three years and up to five years	
* for the respective currency of credit or applicable benchmark	

It has also been decided that for availment of trade credit, the period of trade credit should be linked to the operating cycle and trade transaction. AD banks may ensure that these instructions are strictly complied with.

[A.P. (DIR Series) Circular No. 9 dated 11th July, 2013]

10. External Commercial Borrowings (ECB) Policy – Refinancing / Rescheduling of ECB

Presently, the borrowers desirous of refinancing an existing ECB are allowed to raise fresh ECB at a higher all-in-cost/reschedule an existing ECB at a higher all-in-cost under the approval route subject to the condition that the enhanced all-in-cost does not exceed the all-in-cost ceiling prescribed as per the extant guidelines.

It has been decided that the above will continue to be applicable till September 30, 2013.

[A.P. (DIR Series) Circular No. 10 dated 11th July, 2013]

11. External Commercial Borrowings (ECB) Policy – Review of all-in-cost ceiling

The all-in-cost ceiling in respect of External Commercial Borrowings (ECB) as specified below will continue to be applicable till September 30, 2013.

Average Maturity Period	All-in-cost over 6 month LIBOR*
Three years and up to five years	350 bps
More than five years	500 bps
* for the respective currency of borrowing or applicable benchmark	

[A.P. (DIR Series) Circular No. 11 dated 11th July, 2013]

12. External Commercial Borrowings (ECB) Policy Repayment of Rupee loans and/or fresh Rupee capital expenditure – USD 10 billion scheme

Indian companies in the manufacturing, infrastructure sector (as defined under the extant ECB policy) and hotel sector, which are consistent foreign exchange earners, are allowed to avail of ECB for repayment of outstanding Rupee loan(s) availed of from the domestic banking system and/or for fresh Rupee capital expenditure under the Approval Route.

It has been decided to extend the benefit of USD 10 billion scheme to Indian companies in the aforesaid sectors which have established Joint Venture (JV) / Wholly Owned Subsidiary (WOS) / have acquired assets overseas in compliance with extant regulations under FEMA, 1999 subject to the following conditions:

1. ECB can be availed of for repayment of all term loans having average residual maturity of 5 years and above/credit facilities availed of by Indian companies from domestic banks for overseas investment in JV/WOS, in addition to 'Capital Expenditure';
2. ECB can be availed of within the scheme based on the higher of 75 per cent of the average foreign exchange earnings realised during the past three financial years and/or 75 per cent of the assessment made about the average of foreign exchange earnings potential for the next three financial years of the Indian companies from the JV/WOS/assets abroad as certified by Statutory Auditors/Chartered Accountant/Certified Public Accountant/ Category I Merchant Banker registered with SEBI/an Investment Banker outside India registered with the appropriate regulatory authority in the host country;
3. ECB availed of under the scheme will have to be repaid out of forex earnings from the overseas JV/WOS/assets.

The past earnings in the form of dividend/ repatriated profit/other forex inflows like royalty, technical know-how, fee, etc from overseas JV/WOS/assets will be reckoned as foreign exchange earnings for the purpose of US $ 10 billion scheme.

[A.P. (DIR Series) Circular No. 12 dated 15th July, 2013]

(This is a positive step for Indian multinationals who can replace their high cost domestic borrowing with cheaper ECBs for funding capital expenditure incurred by their wholly owned subsidiaries/joint ventures abroad)

13. Exim Bank's Line of Credit of US D 35 million to the Government of the Republic of Ghana

The Credit Agreement under the LOC is effective from June 27, 2013 and the date of execution of Agreement is December 14, 2012.

[A.P. (DIR Series) Circular No. 13 dated 17th July, 2013]

14. Export of Goods and Software – Realisation and Repatriation of export proceeds – Liberalisation

In terms of A.P. (DIR Series) Circular No. 52 dated November 20, 2012, RBI had extended the enhanced period for realisation and repatriation to India, of the amount representing the full value of goods or software exported from six months to twelve months from the date of export. This relaxation was available up to March 31, 2013.

Further, in terms of A.P. (DIR Series) Circular No. 105 dated May 20, 2013, RBI reduced the above stated realisation period from twelve months to nine months from the date of export, with immediate effect, valid till September 30, 2013.

RBI has now clarified that the time period for realisation and repatriation of export proceeds from April 1, 2013 onwards till September 30, 2013, shall be reckoned as nine months from the date of export and not from the date on which A.P. (DIR Series) Circular No 105 dated May 20, 2013 was issued.

The provisions in regard to period of realisation and repatriation to India of the full export value of goods or software exported by a unit situated in a Special Economic Zone (SEZ) as well as exports made to warehouses established outside India remain unchanged.

[A.P. (DIR Series) Circular No. 14 dated July 22, 2013]

15. Import of Gold by Nominated Banks /Agencies/Entities

Vide A.P. (DIR Series) Circular No. 103, 107 and 122 dated May 13, June 4 and June 27, 2013 respectively, RBI had imposed the following restrictions on the import of various forms of gold by nominated banks/nominated agencies/ premier or star trading houses/SEZ units/EoUs:

- All imports of gold by Nominated Banks/ Agencies to be necessarily done on Documents against Payment (DP) basis and no longer permitted by Documents against Acceptance (DA) basis.
- Letters of Credit (LC) to be opened by Nominated Banks/Agencies for import of gold under all categories only on 100 per cent cash margin basis.
- These restrictions were not applicable to import of gold to meet the needs of exporters of gold jewellery.

RBI has now issued revised instructions as follows:

- All nominated banks/nominated agencies have to ensure that at least one-fifth of every lot of import of gold (in any form/ purity including import of gold coins/

Dore) is exclusively made available for the purpose of export.

- They will be required to retain 20 per cent of the imported quantity in the customs bonded warehouses.
- They are permitted to undertake fresh imports of gold only after the exports have taken place to the extent of at least 75 per cent of gold remaining in the customs bonded warehouse.
- A working example of the operation the scheme envisaged as above is given in Annex to this Circular.
- Any import of gold under any type of scheme, shall follow the 20/80 principle set out as above.
- The extant instructions, as regards import of gold on consignment basis, LC restrictions, etc. stand withdrawn.
- Entities/units in the SEZ and EoUs, Premier and Star trading houses are permitted to import gold exclusively for the purpose of exports only.

[A.P. (DIR Series) Circular No. 15 dated 22nd July, 2013]

(These revised instructions are aimed at reducing the Current Account Deficit of India by linking the import of gold (including for domestic use) to exports actually made. Therefore, unless particular level of exports is not attained out of imports of gold, further import of gold would be restricted. This could also inevitably lead to higher prices of gold in domestic market if exports do not lift up as envisaged by RBI. Further, also the earlier condition of import on 100% cash margin basis has been withdrawn since imports have been subjected to 20/80 calculation principle.)

16. Exim Bank's Line of Credit of USD 19 million to the Government of the Republic of Senegal

The Credit Agreement under the LOC is effective from June 26, 2013 and the date of execution of Agreement is December 19, 2012.

[A.P. (DIR Series) Circular No. 16 dated 23rd July, 2013]

17. Risk Management and Inter – Bank Dealings – Reporting of Unhedged Foreign Currency Exposures of Corporates

In terms of Section B paragraph 1(i)(h) and Section G Para (ii) of A.P. (DIR Series) Circular No. 32 dated December 28, 2010 on "Comprehensive Guidelines on Over the Counter (OTC) Foreign Exchange Derivatives and Overseas Hedging of Commodity Price and Freight Risks" and C.O. Circular FE.CO.FMD. 7472/02.03.075 (Policy)/2012-13 dated October 5, 2012, AD Category – I banks are required to submit a quarterly statement in prescribed format (Annex V), on foreign currency exposures and hedges undertaken by Corporates based on bank's books.

RBI has now decided to require AD Category – I banks to submit the above quarterly report as per the revised format online only from quarter ended September 2013 through the eXtensible Business Reporting Language (XBRL) system.

[A.P. (DIR Series) Circular No. 17 dated 23rd July, 2013]


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Debt, Financial and Monetary Laws – Infrastructural constraints faced by DRTs and DRATs, in terms of inadequacy of Tribunals, Members/Chairpersons, staff, physical infrastructure, etc. – Suggestions made by Solicitor General and amicus curiae for improving the administration of justice by these Tribunals. – High Court shall keep a watch on functioning of Tribunals: Article 227 of Constitution of India.

Various appeals arose out of the judgment in *Debts Recovery Tribunal Bar Assn. vs. Union of India* rendered by the High Court of Punjab and Haryana, whereby certain directions relating to provisions for adequate space for the smooth functioning of the Debts Recovery Tribunals at Chandigarh, had been issued. A Bench of DRT was established at Chandigarh by the Union of India in a rented building. Subsequently, a second Bench of DRT was established, which was supposed to function from another premises. However, both the Benches continued to function from the same premises where the earlier Bench was functioning. By a communication, UOI directed that the second Bench would function from the premises acquired for it. Thereupon, the respondent Bar Association made a representation to the Presiding Officers of both the Benches, requesting them to, *inter alia*, continue to function from the premises from where the first DRT was functioning. However, in the light of the aforesaid communication issued by UOI, the request of the Bar Association was not acceded to. Aggrieved, the Bar Association filed a Civil Writ Petition in the High Court of Punjab and Haryana, seeking directions to UOI, to *inter alia* provide adequate accommodation for the functioning of both DRTs; and to frame rules for recruitment/appointment of the Presiding Officer and the Recovery Officers. In light of the assurance on behalf of UOI that adequate space would be taken on lease for the smooth functioning of both the Benches at the same place, and that further, land was also being acquired for housing the DRTs, the writ petition was disposed of with a direction that the construction of the building shall be completed within three years from the date of its order. However, the High Court did not examine the other issues referred to above on the ground that they were unrelated to the inadequacy of office space needed by the DRTs. Having failed to get the said order reviewed, UOI filed appeal before the Supreme Court.

The Supreme Court has taken into account the suggestions from Additional Solicitor General and amicus curiae and its response of UOI. Thus the UOI agreed to provide adequate

infrastructure to DRTs/DRATs. Consider the feasibility of establishing more DRTs/DRATs and redefining the jurisdiction of some DRTs on the basis of data showing pendency of cases and existing workload of all the DRTs and DRATs. Fill all anticipated vacancies for the posts of senior officers, as and when they arise, with candidates who have already been selected according to the stipulated rules. Extend the facility of general pool of accommodation to Group A officers and Presiding Officers. Implement the "e-DRT Project" to automate and improve DRT services by building IT systems as expeditiously as possible. Carry out the recruitment of Recovery Officers by promotions, failing which, by deputation, in accordance with the eligibility criteria as defined in the recruitment rules of each DRT. Hold regular training programmes for Recovery Officers/Assistant Registrars/Registrars to give them minimum working knowledge of the procedures followed in DRTs, the provisions of the RDDBFI Act, the SARFAESI Act, the rules made thereunder, the provisions of Schedules II and III of the Income-tax Act, 1961.

The Supreme Court further held that the High Court are empowered to exercise their jurisdiction to superintendence under Article 227 of the Constitution of India in order to oversee the functioning of DRTs and DRATs. Section 18 of the RDDBFI Act leaves no scope for doubt in this behalf. It reads thus: "18. Bar of jurisdiction. On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17."

Article 227 of the Constitution stipulates that every High Court shall have superintendent over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. This power of superintendence also extends to the administrative functioning of these courts and tribunals and High Courts shall keep a close watch on the functioning of DRTs and DRATs, which fall within their respective jurisdictions. The High Courts shall ensure a smooth, efficient and transparent working of the said Tribunals.

Union of India and Others vs. Debts Recovery Tribunal Bar Association and Another (2013) 2 SCC 574.

2. Consumer protection – Prayer for condonation of delay – Rejected on a totally flimsy ground – Claimant was pursuing alternative remedies in other forums. Therefore, Court held that impugned order is legally unsustainable and is liable to be set aside : Consumer Protection Act, 1986 sec. 24A(2)

The appellant's husband Shri Jagbir Singh was employed with Mahanagar Telephone Nigam Ltd., Delhi. He suffered 85% burn injuries on his body due to sudden bursting of the transformer installed by respondent No. 1- U.P. Power Corporation Ltd. He succumbed to the injuries leaving behind the appellant and three minor children. The appellant claims to have made representation to the respondents for award of ₹ 25,00,000/- as compensation but they did not respond. Therefore, she filed Civil Suit in the Court of Civil Judge (Senior Division), Ghaziabad for payment of compensation of ₹ 20,00,000/-. The same was dismissed on account of non-payment of deficit court fees amounting to ₹ 1,50,607.50. Her plea for waiver of the court fee was also rejected by the trial Court. The appellant then filed a petition under Article 226 of the Constitution and prayed for issue of a mandamus to the respondents to pay compensation by alleging that her husband had died due to their negligence. The same was dismissed by the Division Bench of the High Court by observing that the appellant can avail remedy by filing Civil suit. SLP was filed by the

appellant against the order of the High Court was summarily dismissed by Supreme Court. Having lost battle in the Civil Court due to her inability to pay huge court fee and having failed to persuade the High Court and this Court to entertain her prayer for issue of a mandamus to the respondents to pay compensation, the appellant filed a complaint under Section 21 of the Consumer Protection Act, 1986 for award of compensation of ₹ 25,00,000/-. By an order, the Commission gave liberty to the appellant to amend the complaint. She availed that opportunity and amended the complaint. After hearing the counsel for the appellant, the Commission admitted the complaint. On notice, respondent No. 1 filed reply and the appellant filed rejoinder. She filed her evidence in the form of affidavit, paragraph 23 of which reads as under: "The Original Petition is within time as per S. 24-A of the Consumer Protection Act. The time gap between the death of my husband and the filing of the present Original Petition occurred because the complainant first approached the High Court and then the Supreme Court." In furtherance of the leave granted by the Commission, the appellant filed application for condonation of delay in filing the complaint.

In the application filed by her for condonation of delay, the appellant made copious references to the Civil Suit, the Writ Petition and the Special Leave Petition filed by her and the fact that the complaint filed by her was admitted after considering the issue of limitation. She also pleaded that the cause for claiming compensation was continuing. The National Commission completely ignored the fact that the appellant is not well educated and she had throughout relied upon the legal advice tendered to her. She first filed civil suit which, as mentioned above, was dismissed due to non payment of deficient court fees. She then filed writ petition before the High Court and special leave petition before this Court for issue of a mandamus to the respondents to pay the amount of compensation, but did not succeed. It can reasonably be presumed that substantial time was consumed in availing these remedies. It was neither the pleaded case of respondent No. 1 nor any material was produced before the National Commission to show that in pursuing remedies before the judicial forums, the appellant had not acted *bona fide*. Therefore, it was an eminently fit case for exercise of power under Section 24-A(2) of the Act. Unfortunately, the National Commission rejected the appellant's prayer for condonation of delay on a totally flimsy ground that she had not been able to substantiate the assertion about her having made representation to the respondents for grant of compensation. Therefore, Apex Court held that impugned order is legally unsustainable and is liable to be set aside. The appeal is allowed, the impugned order is set aside. The delay in filing of complaint by the appellant under section 21 of the Act is condoned and the matter is remitted to the National Commission for disposal thereof on merits.

Muneesh Devi ....Appellant versus U.P. Power Corporation Ltd. & Ors. .....Respondents

Supreme Court of India Civil Appeal No. 4075 of 2013 decided on July 19, 2013. (unreported)

3. Liability of insurer towards gratuitous passenger – "Gratuitous Passenger" – `Employees' – Only persons acting in course of employment when accident took place – Fastening of liability on insurer to pay injured and then recover same from vehicle owner – Legality. Motor Vehicle Act, 1988

The claimant was a heavy vehicle driver. He was employed with Respondent No. 2 as a driver in some other vehicle. The claimant was travelling in a good vehicle which was driven by another driver. In that vehicle, many other persons were also travelling. Due to rash and negligent driving of the driver the goods vehicle

capsized, as a result of which the claimant suffered fracture and injuries. The claimant remained under treatment for quite some time and the injuries that he sustained in the accident rendered him permanently disabled. In the claim petition filed by him before Motor Accidents Claims Tribunal, he claimed compensation of ₹ 3,00,000. The owner and insurer were impleaded as Respondent 2 and Respondent No. 3 respectively in the claim petition. The insurer filed its written statement and opposed the claimant's claim insofar as it was concerned. The Tribunal, after recording the evidence and hearing the parties, passed an award in favour of the claimant holding that he was entitled to a total compensation of ₹ 3,00,000. The liability of the insurer was made joint and several with the owner and driver. Being not satisfied with the award of the Tribunal, the insurer filed an appeal before the Kerala High Court.

The Division Bench of that Court by relying upon decisions of this Court in *New India Assurance Co. Ltd. vs. Asha Rani (2003) 2 SCC 223* and *National Insurance Co. Ltd. vs. Cholleti Bharatamma (2008) 1 SCC 423* allowed the appeal of the insurer. The High Court held that the insurer was not liable as gratuitous passengers travelling in a goods vehicle were not covered under the policy and the claimant shall be entitled to recover the awarded amount from the owner or driver of the vehicle. The claimant sought review of the order and the same was allowed by the Division Bench. Therefore, the appellant Insurance Company was in appeal before the Supreme Court.

The Hon'ble Court observed that in the present case, section 147 as it originally existed in the 1988 Act is applicable and, accordingly, the judgment of the Supreme Court in Asha Rani, (2003) 2 SCC 223 is fully attracted. The High Court committed a grave error in holding that Section 147(1)(b)(i) takes within its fold any liability which may be incurred by the insurer in respect of the death or bodily injury to any person. The High Court also erred in holding that the claimant was travelling in the vehicle in the course of his employment since he was a spare driver in the vehicle although he was not driving the vehicle at the relevant time but he was directed to go to the work site by his employer. The High Court erroneously assumed that the claimant was injured in the course of employment and overlooked the fact that the claimant was not in any manner engaged on the vehicle owned by M/s. P. L. Construction Company. The insured (owner of the vehicle) got insurance cover for other employee. There is no insurance cover for the spare driver in the policy. As a matter of law, the claimant did not cease to be gratuitous passenger though he claimed that he was a spare driver. The insured had paid premium for one driver and one cleaner and, therefore, second driver or for that purpose "spare driver" was not covered under the policy.

The Hon'ble Supreme Court further observed that the High Court misconstrued the proviso following section 147 (1) of the 1988 Act as well. What is contemplated by the proviso to section 147(1) is that the policy shall not be required to cover liability in respect of death or bodily injury sustained by an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923. The claimant was admittedly not driving the vehicle nor was he engaged in driving the said vehicle. Merely because he was travelling in the cabin would not make his case different from any other gratuitous passenger. Travelling with the goods itself does not entitle anyone to protection u/s. 147 of the Motor Vehicles Act unless it is proved that person travelling in the lorry along with the driver or the cleaner as the owner of the goods. The impugned judgment is founded on a misconstruction of section 147. The High Court was wrong in holding that the Insurance Company shall be liable to indemnify the owner of the vehicle and pay the compensation to the claimant as directed in the award by the

Tribunal. The Hon'ble Supreme Court allowed the appeal.

Manager, National Insurance Company Limited vs. Saju P. Paul and Another (2013) 2 SCC 41

4. Recovery – Sale of debtor's property – Sale of immovable properties of wound-up company to recover debts – Conduct of sale proceedings in fair and transparent manner to get proper price – Notice and after hearing official liquidator appointed by court – Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – S. 25 – Civil Procedure Code, 1908 – Companies Act, 1956, Ss. 446, 457, 529 and 529-A : A company by the name of Jay Electric Wire Corpn. Ltd. had a factory at Mysore situate on land in Industrial Area of Village Habal. The said company, which closed down had about 149 workers. As dispute arose between the workmen and the management because of termination, the matter was referred to the Industrial Tribunal at Mysore after the reference made under Section 10 of the Industrial Disputes Act, 1947 and the said Tribunal directed the employer to pay back wages to the workmen and to continue payment during the subsistence of the relationship of employer and employee between the parties. A recovery certificate was issued by the Deputy Labour Commissioner at Bengaluru for recovery of a sum of ₹ 4.44 crores towards the dues of the workmen under the award passed by the Industrial Tribunal. A proceeding was initiated before the Company Judge of the High Court of Bombay. Subsequently, on a reference made by BIFR under section 20(1)of the Sick Industrial Companies (Special Provisions) Act, 1985, the Company Court held that it was just and equitable for the company to be wound up. The Official Liquidator was appointed as provisional liquidator to take charge of the books, assets and business of the company and to exercise necessary powers under the Companies Act, 1956. The Official Liquidator was commanded to proceed in the matter in accordance with law to deal with the assets of the company in liquidation. ICICI Bank had instituted a suit before the High Court in its original side for recovery of its dues against the company. The Single Judge appointed a Receiver who was granted liberty to sell the assets by public auction or by private treaty and to apply the net sale proceeds as between ICICI Bank and Central Bank of India which was impleaded as the second defendant to the suit in satisfaction of the respective charges on the immovable property. The suit eventually transferred to DRT and DRT, by order allowed the application filed by ICICI Bank Ltd. for a sum of ₹ 1.12 crores together with future interest at 12% per annum. It was further directed that on failure on the part of the borrower to repay the amount within six months, the immovable property would be sold and the net sale proceeds would be paid to the applicant bank and Central Bank of India in proportion to their respective charges. A public notice was issued for sale of the movable and immovable properties of the borrower and notice for the proposed sale was published in the newspapers. Though the movables of the borrower came to be sold, yet no proper offer was received for the sale of immovable property. A letter was addressed by the Receiver to the Advocates of the Central Bank of India and Standard Chartered Bank/ICICI Bank Ltd. enclosing the report seeking the confirmation of sale and also asked to send expression of interest in the property from two parties. On receipt of the letter the Chief Manager of Central Bank of India visited the office of the Receiver and informed about the expression of interest of two other bidders who were willing to pay higher price. When both the bidders arrived at the office of the Receiver, they were informed that the sale had been confirmed in the morning. An application was filed by Central Bank of India for setting aside the sale. Many a procedural

irregularity was alleged including the one that it had no intimation of the proceeding until it received the letter of the Receiver stating that the property had been sold for a sum of ₹ 2.50 crores and the sale had been confirmed. The Official Liquidator had filed a report before DRT stating that an application had been received from the workers contending that the sale which had been confirmed in favour of the first and second respondents, the appellants before the Supreme Court was at a price which was neither fair nor reasonable. The Recovery Officer had set aside the confirmation of the sale holding that it was obligatory to ensure that a higher price was fetched for the property and the assets of the company in liquidation, if the sale price offered by an auction-purchaser was inadequate. He ultimately set aside the sale and directed for conduct of a fresh auction in the presence of secured creditors, the Receiver and the Official Liquidator after notice. A sale was conducted without making a fresh notification. The Recovery Officer noted that the original auction-purchasers did not participate in the fresh bidding process, but two bids were received by the Recovery Officer and the highest bid amounting to ₹ 6.45 crores was offered. The Recovery Officer directed the bid of highest bid of Umrah Developers to be accepted and to pay the purchase consideration. The successful bidder deposited full consideration of ₹ 6.45 crores. Being aggrieved by the said order, the first and second respondents therein preferred appeal before DRT which set aside the sale with certain direction as to publish public notice to determine as to whether offers higher than the bid of ₹ 6.45 crores could be realised. Being dissatisfied with the aforesaid, an appeal was preferred by the first respondent before DRAT which granted stay as a consequence of which the entire process of holding a fresh auction came to a standstill. At this juncture, an application was filed by Umrah Developers to permit it to withdraw the amount which it had deposited. The said application was rejected by DRT which compelled the company to file an application before the Tribunal to withdraw the amount and the company was allowed to withdraw 90% of the bid amount leaving the balance before the Recovery Officer. Eventually DRAT dismissed the appeal mainly on foundation that offer of ₹ 6.45 crores was higher than the offer of the first and second respondents.

The said order was challenged before the writ court and during the pendency of the writ proceedings, an application was filed by the Umrah Developers for refund of the balance sum which was allowed. The writ preferred by the first and second respondents was disposed of and the matter stood remanded back to DRAT. DRAT allowed the appeal and directed restoration of the confirmation of sale in favour of the first and second respondents. The said order of DRAT was assailed by the workers' union and the High Court remitted the matter to DRAT for fresh consideration. DRAT, considering the facts in entirety allowed the appeal and restored the confirmation of sale. The said order came to be assailed by the secured creditors and the workmen's union on the ground that the confirmation suffered from material irregularities. The High Court allowed the writ petition.

The Supreme Court held that in every case court has to satisfy itself that price offered is reasonable and based on prevalent market value. It further held that DRT is entitled to sell properties only after notice and after hearing Official Liquidator/Liquidator appointed by court. It further held that conducting of sale without participation of creditor Bank is contrary to basic concept of fairness and transparency. Therefore, High Court was right in setting aside said sale proceedings. In instant case, to conduct the auction proceedings in question by fair, competitive and transparent procedure, Supreme Court had monitored auction proceedings by giving directions at various stages. The appeal was disposed of.

Pravin Gada and Another vs. Central Bank of India and Others (2013) 2 SCC 101

5. Precedent – Judgment of Supreme Court – High Court has to accept it and should not in collateral proceedings write contrary judgment: Constitution of India Article 141

The hierarchy of the Courts requires the High Courts also to accept the decision of Apex Court, and its interpretation of the orders issued by the executive. Any departure therefrom would lead only to indiscipline and anarchy. The High Courts cannot ignore Article 141 of the Constitution which clearly states, that the law declared by this Court is binding on all Courts within the territory of India. As observed by the Court in para 28 of the *State of West Bengal and Others vs. Shivananda Pathak and Others reported in 1998 (5) SCC 513:-*

"If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to that judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment."

In the same vein it may stated that when the judgment of a Court is confirmed by the higher court, the judicial discipline requires that Court to accept that judgment, and it should not in collateral proceedings write a judgment contrary to the confirmed judgment. The Court referred to the observations of *Krishna Iyer, J. in Fuzlunbi vs. K. Khader Vali and another reported in 1980 (4) SCC 125:-*

".....No judge in India, except a larger Bench of the Supreme Court, without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio of the judgment of the Supreme Court."

Bihar State Govt. Secondary School Teachers Association vs. Bihar Education Service Association AIR 2013 SC 487.

CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

TOUGH TIMES FOR INDIA

The month of July was one of the worst months in the economic history of India. It was not only a difficult month for the Government and the policy makers in India but it was also difficult for the businesses and even the general public in the country. The biggest fear was the relentless slipping of the Indian Rupee against the US Dollar and correspondingly with other major currencies of the world. For the first time in history, Rupee breached the psychological barrier of 60 against one dollar and the breach was not a temporary phenomenon. The trade gap of the Indian economy is not under adequate control and imports have been far exceeding exports months after month and year after year. This gap was being bridged by inflow of funds from repatriation by non-resident Indians to India and also by foreign direct investment in the Indian businesses as well as by foreign portfolio investment in Indian debt and equity. The inflow continued for quite a number of years and Indian economy never felt the real pinch, especially over the last two decades. However, the recent hike in the prices of petroleum products as well as increase in the price of gold changed the scenario. Strengthening of the US economy added to the woes of India, like it did in many other developing countries. Since last few months, the foreign portfolio investors started withdrawing funds from the Indian markets by selling equity as well as debt and that created enormous pressure on the Indian currency. The currency slipped as much as ten percent over the last four months, which was probably one of the fastest slides of the Indian Rupee in its history. Unfortunately, circumstances are not indicating that the trouble is over. The Rupee continues to remain weak and volatile. It needs continuous policy support of the Government to even hold on to its current levels. This has created uncertainty in every sector of the Indian economy and it has badly affected the Indian businesses and even general public.

The Reserve Bank of India (RBI) has tried intervening in the currency market time and again but it has not met with the required success. Upon such intervention, the Rupee strengthens for a while but the trend of steady decline is not getting arrested. The monetary policy interventions by the RBI has created some unwanted ill-effects such as tightening of liquidity thereby slowing growth rate and increase in interest rates; and the economy is struggling to overcome the same. No clear solution seems to be emerging and the trial and error method apparently prevailing as of now, without definitive solutions to the problems in sight of the policy maker.

As an effect of tight monitory policy, even at the cost of growth, inflation has come under

control to an extent but it has not been decisively calmed down. The falling Rupee has on the contrary created a risk of inflation on the back of increased cost of inputs. The higher interest cost can also add to the risk of inflation. There is a promise by the finance minister to stick to the target of the budgetary deficit. However, it does not seem to be an easy task as currently, the deficit is accruing at a faster rate than the budgeted and there is no clear indication as to how it will be controlled and curtailed. The future of Indian economy is suddenly looking uncertain and growth prospects are looking weak and subdued. Now it appears that for the current fiscal year, the economy will grow only at the rate of five per cent though it is likely to achieve a better rate as per the official estimates of the Government. This rate is likely to be one of the lowest growth rate achieved by the country over the last number of years.

Though the current domestic economic situation is looking weak, the global scene is much more positive than before. The US growth rate is inching up and the current indicators are signalling that the worst is over for that country. The economy seems to have decisively revived, helped by the quantitative easing and it is likely to improve further in the days to come. There is a fear that as the revival is based on the quantitative easing, when it will stop in the near future, the economy may slip again. However, if the economy acquires a reasonable growth momentum, it may not get significantly affected by the discontinuation of the easing. The measure was a temporary medicine and it is not meant for indefinite continuation. It is inevitable that it will be withdrawn sooner or later, but by then the US economy will have enough strength to do without it and continue its progress. On the back of improved sentiments and due to high expectations the US stock markets are ruling at all time high levels and that clearly indicates that the mood of the economy is nothing but upbeat. It is expected that the tempo will continue for years to come and will bring cheer to the sagging world economic prospects and specially for Europe.

The outlook of Europe may not have sudden positive change, but the indicators are that things are progressing towards a better future. The German economy, which is the leader in Europe, is growing better and its sentiments are positive. Though the trouble in Europe are not over, especially in the weak economies of the region, the indicators are turning positive. The unemployment in Spain is getting under control and industries are improving in major European economies. The mood is hopeful and is likely to remain so, unless there are some political hiccups in the Euro zone. The worst seems to be over for the Europe.

The improvement in the Japanese economy continues and it is gathering strength. After a long time, Japan seems to be getting its things right and the country is quite hopeful about the near future. Many developing economies of the world and specially the economies of South American continent will have advantage of the emerging growth in the US and there is likely to be overall improvement in these economies, which will contribute to improved growth rate in the world in the years to come. This may result in a start of a new bull market across the world.

Though some improved statistics are recently delivered by China, the slowdown in China is likely to be a reality. The risk is that it may further persist and China may not be able to achieve its glorious double digit growth rate in the near future. The re-emergence of Japan will also affect China as the leading global supplier. The domestic demand of China is strong and it will remain so for a number of years to come. However, there will be a risk to export growth, which is emerging out of higher labour cost. The expectations and aspirations of the people of China are increasing and they will continue to increase as the affluence is increasing not only due to improvement in economy but also due to single child policy. The fast progress of China over the last few decades and its emergence as new economic as well as military power has also worried a number of countries. Though the

Chinese growth may be of economic interest to the world, it may not be in political interest of many countries. So slowing China many not get any external support and will have to solve its problems on its own. The global growth is likely to get affected in the years to come due to the slowdown of this economy.

In spite of improvement in the global economy and improved sentiments, the direction of the Indian economy has become quite uncertain, especially in the recent weeks. Earlier the economy was faced with the two major problems of a gradual slow down of growth and high inflation. Though the inflation is brought into control by tightening of liquidity, new problems have emerged in the form of weakening of the Indian Rupee. The weakening is very substantial and very quick. To make matters worse, it is not purely based on the internal factors which can be controlled by the Government. Many external factors, which cannot be in the control of the Government or which cannot be influenced by the Government are playing havoc. Improvement in the US economy and consequential improvement in the stock markets as well as increase in bond yields in that economy has triggered exodus of portfolio capital from Indian equity and debt markets, and has triggered the fall of the currency. The sharp fall has also resulted in an acceleration effect. The investors are getting uncertain and trying to exit in order to play safe. Inspite of a brave face by the Government, uncertainties are looming large; which have not only affected the foreign exchange reserves of the country but they have directly impact inflation and economic growth. The emerging economic data is giving new economic shocks. The actions of policy makers are increasing uncertainty in the minds of the investors. The default by promoters to pay up margins against their borrowings have triggered sell-offs in certain stocks. The debacle on the commodity exchange have generated sell-offs in the related stocks. The policies of the Government have badly affected the banks and many of the banks have lost substantial market capitalisation due to lowering of their stock prices. The uncertainties are numerous and solutions are not in sight. In such situations, investors need to play safe. By taking any action such as investing in stocks, properties, commodities or even foreign currency assets an investor may take larger risks as compared to the payout expected. Currently, some assets may appear to be cheap and they may be actually cheap, if the long term trend is considered. However, they may lose value in short term and therefore there can be loss of opportunities for the investors. In the circumstances, it may be safer to keep the surplus liquidity in the form of balance in saving account, short term bank fixed deposits and liquid schemes of mutual funds. Once the economy and the markets stabilise, more aggressive calls for investment can be taken.

Some of the mutual funds are coming up with fixed maturity plans for a period of more than 365 days, which can give reasonable returns between 9 and 10 percent and also give tax benefits due to cost indexation. Such schemes look attractive today because they are likely to generate superior post tax returns. However, it is essential to study their offer document to ensure that the funds collected are for investment in very safe bank papers and deposits. The investors who have risk taking ability may also look at investing in selected stocks after appropriate studies. It should be remembered that a stock does not become cheap because it has fallen substantially from its peak. It needs to have solid intrinsic value and growth prospects vis-a-vis its current price. Investors need to exercise caution in the current uncertain times than ever before.

V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Facts & Query

Q.1 A private limited company had entered into agreement for purchase of property from another company and made payment of 50% of the agreed consideration. The transaction went into dispute in the court of law. Thereafter, consent terms were reached in court whereby the court directed the purchaser company to acquire itself or thru its nominees the shares of the seller company (the property was the only asset held by the seller company). The company has following queries:

a. Whether the right to acquire the property by purchase of shares is immovable property as envisaged u/s 56?

b. Whether the payment made for the purchase of shares can be accounted as cost of property by the purchaser company?

Ans. Under S. 56(2)(vii), any transfer of a property, without consideration by an individual or an HUF is taxable as a gift. Here individual does not include a company. As such, if some shares of a company are transferred to another company, it is not covered by the said provisions of S. 56(2)(vii). As such the said provisions are not applicable to the querist's case, and in any case the transfer of the shares is for consideration and as such it is not a gift under the said provisions.

Coming to the second query, the purchase of shares of a company is for acquiring a building of the other company and as such the purchase value of the shares being for acquisition of an immovable property, the purchasing company can account the consideration paid as the cost of immovable property in its books account.

Q.2 A has taken personal loan of ₹ 20 lakhs and out of it ₹ 10 lakhs were applied towards purchase of new house property and rest were used for interior and some other personal expenses. Whether interest paid on this loan can be taken as deduction u/s. 24 under the "Income from house property" proportionately? In the confirmation of loan letter it is termed as personal loan and not as housing loan?

Ans. Once the loan taken is used, partly for the purchase of a House Property, to the extent of such loan is used for purchase of new house property it will be allowable as deduction. Only because the loan was taken for personal use, it will not make any difference as long as, the amount is used for purchase of a house property. As such, to the extent the loan amount is used for the purchase of the house property and for necessary internal decoration, to that extent of user of loan, the interest paid on such loan will be allowable and the remaining part used for personal use, to that extent it will be not be allowable. As such as the deduction of entire interest amount cannot be disallowed, only because part of it is used for personal purposes.

Q.3 Whether interest on housing loan is deductible out of house property income where it is partly applied towards some personal use?

Ans. While computing income from House Property, under S. 24, any interest paid on the loan borrowed for construction of the House Property will be allowed as deduction. Now even loan borrowed is partly used for construction for House Property the proportionate interest paid on such loan will be allowable as deduction. For example if the loan borrowed is 1 crore and 50 lakhs are used for construction and other 50 lakhs is used for personal purposes and if the interest paid on the loan is 20 lakhs, 10 lakhs will be allowed by way of deduction while computing house property income.

Q.4 Whether interest paid on borrowed amount invested in as capital of partnership firm is allowable u/s 36 (1)(iii)?

Ans Under General Law and even under taxation laws a partnership firm is not separate legal entity and even for tax purposes except for few purposes, it is not a separate taxable entity independent of its partners. The partnership firm's business and its assets collectively belong to its partners and their shares in the business and its assets are partners assets, they holding them in their profit sharing ratio (refer to Supreme Court decision in *Dhulichand Laxminarayan vs. CIT 29 ITR page 535 and page 540) also refer to 83 ITR page 211 CIT vs. Hind Construction Ltd. (SC), 106 ITR 292 CIT vs. R.M. Chidambaram Pillai, (SC)).*

As such, the business of the firm is also the business of each partner and therefore the share of a partner in the partnership firm is his business asset and the income is his business income and as such any interest paid by him for loan taken by him for investing in partnership firm will be business expenditure allowable while computing his business income, and as such it is allowable under S. 36(1)(iii) of the I.T. Act.

Q.5 Whether interest on loan deductible even though underlying asset not put to use u/s 36(1) (iii)?

Ans. Under S. 36(1)(iii) any interest paid on loan used for acquisition of in respect of capital asset such borrowal is for business purposes and as such it is allowable as is deductible expenditure while computing the income of the assessee.

Now once the asset purchased is meant for user of the business, the asset need not be put to user immediately it may be used for the purpose of the business, in the later years and as such if the asset is meant for user of business, the interest paid on the loan for purchasing the asset, will be allowable as deductible expenditure, therefore is allowable in the year of purchase of the asset.


Hitesh R. Shah & Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Important events and happenings that took place between 8th July, 2013 to 7th August, 2013 are being reported as under.

I. PAST PROGRAMMES

Details of programmes conducted by the Chamber are given below:

Sr. No.	Committee & Programme	Date & Subject	Speaker
1	**Direct Taxes Committee :** Intensive Study Group on Direct Taxes	**11th July, 2013:** Recent Important Decisions under Direct Taxes	CA Kiran Kapadia
2	**Study Circle & Study Group Committee:** i) Study Group Meeting	**17th July, 2013:** Recent Judgment under Direct Taxes	CA Pradip Kapasi
	ii) Study Circle Meeting	**6th August, 2013:** Taxation of builders and developers (continued)	CA Jagdish Punjabi

II. FUTURE PROGRAMMES

Details of future programmes of Chamber's are given below:

Sr. No.	Committee & Programme	Date & Subject	Speakers	Venue
1	**Allied Laws Committee:** Full Day Seminar	**17th August, 2013** E-Filing Issues under various Acts	• CS Kaushik Jhaveri • CA Avinash Rawani • CA Vijay Kewalramani • CA Pranav Kapadi • CA Dinesh Tejwani • CA Parag Mehta	All India Local Self Government, Andheri (West), Mumbai

Sr. No.	Committee & Programme	Date & Subject	Speakers	Venue
2	**Corporate Members Committee:** A training workshop (Jointly with IMC)	**11th October, 2013 & 12th October, 2013** Making of CFO	Eminent professionals with relevant experience will be the faculty.	IMC
3	**Direct Tax Committee:** 3rd Intensive Study Group	**8th August, 2013** Recent Important Decisions under Direct Taxes	CA Ashok Mehta CA Sanjay Chokshi	CTC Conference Room
	Immovable Properties	**23rd August, 2013** Recent Developments (Including Sections 2(1A), 2(14), 43CA, 56(2) (VIIB) and 194-IA)	CA Pradip Kapasi	IMC
4	**Indirect Taxes Committee:** Study Circle Meetings	**22nd August, 2013** Recent Judgment under Service Tax	Chairman : Mr. Prasad Paranjpe, Advocate Group Leader : CA Rajiv Luthia	IMC
		10th September, 2013: Applicability of VAT and Service Tax on Deemed Sales	Chairman : CA Bharat Shemlani Group Leader : CA Ankit Chande	IMC
	Study Course on Service Tax for Beginners – 2013	**21st, 24th, 26th, 27th, 28th, 30th and 31st August, 2013** 7 sessions of 3 hours	• Commissioner of Service Tax • CA A. R. Krishnan • CA S. S. Gupta • CA Sunil Gabhawalla • CA Bharat Shemlani • CA Naresh Sheth • CA Jimit Shah • CA Rajiv Luthia • Shri M. H. Patil, Advocate	City Point Hotel, Dadar (East).

Sr. No.	Committee & Programme	Date & Subject	Speakers	Venue
5	**International Taxation Committee:** (Jointly with BCAS) Advanced FEMA Conference	**31st August, 2013** FEMA Related issues	• CA Dilip J. Thakkar • Senior RBI Officials* • CA Anup P. Shah • CA Hitesh Gajaria	M. C. Ghia Hall
6	**Membership & EOP & RRC & PR Committee:**	**15th August, 2013** Monsoon Trekking	—	Kondana Caves, Karjat
7	**Study Circle & Study Group Committee:** Study Group Meeting	**19th August, 2013** Recent Decision under Direct Tax	Shri K. Gopal, Advocate	IMC

III. The Chamber's Journal – Journal Committee

The Chamber's Journal for the month of September, 2013 will cover topic on "Valuation under Indirect Tax Laws".

IV. Publications for Sale

A) International Taxation - A Compendium

Four hardbound volumes set containing approx. 4000 pages,

B) Study Material – 7th Residential Conference on International Taxation, 2013 held from 20th June, 2013 to 23rd June, 2013 at Bengaluru.

V. Renewal of Membership 2013-2014

The renewal fees for, Study Group and Study Circles meeting and Other Subscription for the financial year 2013-14 was due for payment on 1st April, 2013. Members are requested to renew their Membership.

P.S : Members who have not renewed Annual Membership and Subscription of The Chamber's Journal for the year 2013-14 will not be entitled to receive the journal from July 2013 onwards.

(For Enrollment and further details of all the Future Events, please refer to the August, 2013 Issue of CITC News or visit the website www.ctconline.org)

** Subject to confirmation*

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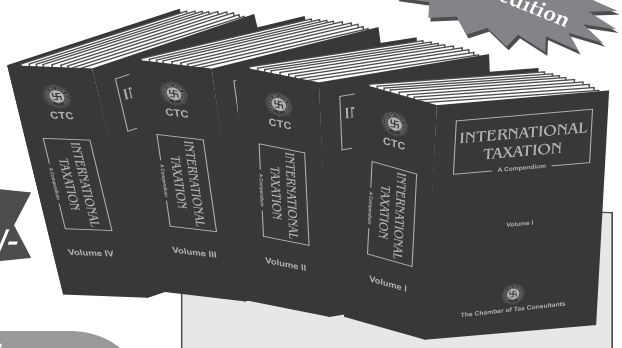

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THE CHAMBER'S JOURNAL

Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 15th & 16th August 2013

No. MA/MR/South-365/2013-15
R.N.I. No. MAHENG/2012/47041
Date of Publishing 12th of Every Month

Printed and Published by Shri. Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.