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A MONTHLY JOURNAL OF
THE CHAMBER OF TAX CONSULTANTS

THE CHAMBER'S JOURNAL

DECEMBER - 2013 VOL. II | NO. 3

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

PRIVATE TRUSTS

Our country has a long history of cases where properties are settled upon a person for the benefit of another. The ownership and possession of property coupled with the obligation to use the same or income thereof wholly or partially for the benefit of others is a situation which is familiar to Indians. When any property is transferred to a person with the obligation as aforesaid a trust comes into existence. The law relating to private trusts was codified by the Indian Trusts Act, 1882 which came into force on 1st March, 1882.

(Read further from page 17 onwards)

Taxation Aspects
FEMA aspects of Private Trust
Structuring thru trusts (Domestic and International)
Essential features of Trust Deed
Objectives of formation of Private Trust

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THE CHAMBER'S JOURNAL   TRANSFORMING INFORMATION INTO KNOWLEDGE   PRIVATE TRUSTS   DECEMBER - 2013 VOL. II | NO. 3

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meetings

Held on 30th October, 2013 on the subject "Deemed Dividend u/s 2(22)(e)".

CA Mayur Desai addressing the members.

Held on 8th November, 2013 on the subject "Practical issues on Domestic Transfer Pricing".

CA Karishma Phatarphekar addressing the members. Seen from L to R : CA Haresh Kenia, Chairman, Mr. Pratik Poddar, CA Yatin Desai, President, CA Dilip Sanghvi, Vice Chairman, CA Dinesh Shah, Convenor, CA Ashok Sharma.

Held on 11th November, 2013 on the subject "Bench Marking of Domestic Transfer Pricing Transactions Using TP Database with Live Search".

Mr. Gaurav Agrawal, from Capitaline addressing the members.

Held on 4th December, 2013 on the subject "Deemed Taxation on Builders and Developers – Section 43A".

CA Reepal Tralshawala addressing the members.

Study Group Meeting held on 6th December, 2013 on the subject "Recent Judgments under Direct Taxes."

CA Sanjay R. Parikh addressing the members.

ALLIED LAWS COMMITTEE

Allied Laws Study Circle Meeting held on 18th November, 2013 on the subject "Provisions relating to Pvt. Ltd. Companies under Companies Act, 2013".

Shri S. D. Israni, Advocate, High Court chairing the session. Seen from L to R : CA Ashok Sharma, Chairman, CA Yatin Desai, President, CA Nilesh Vikamsey, Speaker, CA Ashok Manghnani, Convenor, CA Hemant Parab.

CA Nilesh Vikamsey addressing the members.

Half Day Seminar on Labour Laws jointly with Bombay Chartered Accountants' Society held on 23rd November, 2013.

Shri Ramesh Soni, Labour Law Consultant addressing the members.

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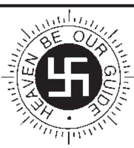

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Editorial

One more year has passed by and the last issue of the Chamber's Journal for the calendar year 2013 is in your hands. The year had begun with protests in the National Capital against the gruesome incident which had taken place on 16th December, 2012 and which has subsequently led to death of Nirbhaya. The protests have made the political class, to an extent, pretend, as if they have come out of their slumber. The approach of the Government establishments continues to be insensitive; but the end of year has become interesting with the outcome of the election results for the State of Delhi. This is a reflection of the society's angst against the corrupt and insensitive political system. The political scenario at Delhi is a quantum leap forward in the fight against corruption. This is just the beginning. The educated class of the society should ensure that this movement must evolve and never extinguish. The Professionals, especially Advocates and Chartered Accountants, have a special role to play in this scenario.

Friends please recall the Special Stories brought out during the calendar year 2013. I shall help you by providing a list of the same.

1.	January, 2013	NBFC
2.	February, 2013	Companies Bill, 2013
3.	March, 2013	Finance Bill, 2013
4.	April, 2013	The Maharashtra Co-op. Hsg. Society Part-I
5.	May, 2013	The Maharashtra Co-op. Hsg. Society Part-II
6.	June, 2013	Recent controversies in Income Tax Assessments
7.	July, 2013	Business Valuation
8.	Augus, 2013	Service Tax Voluntary Compliance Encouragement Scheme, 2013 and LBT – A Perspective
9.	September, 2013	Valuation under Indirect Tax law
10.	October, 2013	Domestic Transfer Pricing
11.	November, 2013	Estate and Succession Planning
12.	December, 2013	Private Trusts

This list shows that we have attempted to bring our Special Story on topics other than taxation issues. We have diversified the topics to allied issues. I request all the esteemed subscribers to give their feedback. Your feedback on the Chamber's Journal shall be of immense help to us in planning future issues of the Journal.

The Special Story for the current issue is on Private Trusts. Eminent Professionals have contributed to this issue. I thank them for the support.

K. GOPAL
Editor

From the President

Dear Members,

This year, on the Income Tax front, there were many new compliances introduced. Further, introduction of Transfer Pricing to domestic transactions kept the members on their toes. The members must have burnt mid night oil to comply with this new provisions. I am sure all the members could file returns on behalf of their clients on time i.e., 30th November, 2013 without much problem with the Income Tax Website. As usual at the Chamber, we tried to educate and assist our members to the provisions related to Domestic Transfer Pricing and make it possible for them to issue and upload transfer pricing reports. To achieve this, the Chamber organised full day Seminar, Study Circle meeting, Study Circle meeting on Benchmarking and made Transfer Pricing software available at the library at Aayakar Bhavan.

Voluntary Compliance Encouragement Scheme for Service Tax will end on 31st December, 2013. The Scheme has not evoked the response as expected by the Ministry. The Hon'ble Finance Minister P. Chidambaram is meeting various trade and professional bodies to promote the scheme. The scheme may be good for those who want to comply in future but probably it is announced at the time when economy and confidence of business community is low and therefore may have resulted in poor response.

In the four states of India, Vidhanssabha elections are concluded recently. By the time I am writing this, the results have started coming in. The results indicate that the people of India are looking for change. Not because one political party is better than the other, but probably because there is no hope from the present Government and they do not have a better choice. I would say that the people are ready to take chance and try other option. I personally feel that in doing so, there is nothing much to lose.

At Chamber, we are very happy to have good response from members to all our endeavours of disseminating knowledge. Our Residential

Refresher Course at Puducherry is fully subscribed almost before two and half months. Our 2nd RRC on Service Tax at Lagoona, Lonavala has also received good response and only few seats are left. For students, by the end of the month we will announce 'The Dastur Essay Competition'. I would request members to encourage their students to participate in the same. In the time of SMSs and Google, it is important to inculcate habit of writing.

The current issue of the Chamber's Journal is on Private Trusts. I acknowledge efforts of Shri Pradip Kapasi for providing basic design and Shri Haresh Chheda for co-ordinating the same.

As you are aware, apart from the programmes on professional interest, the Chamber also conducts SAS (Self Awareness Series). In SAS, prominent personality delivers lectures on subject close to life and not just profession. Recently, Shri Shailesh Sheth, Advocate delivered a lecture in Gujarati on the subject Karmo thi lay prapti. Shaileshbhai very nicely explained in a simple and lucid language how to achieve lay (rhythm) in life while performing various day-to-day task or action. In my view, this type of lectures take away stress from the life and teaches us how to live life effectively.

Before I end my write up, I cannot stop myself in paying homage to the great personality of the World, Mr. Nelson Mandela, the author of 'Long Walk to Freedom' who walked his final journey on Thursday, 5th December. Freedom fighter, Mr. Mandela, spent his entire life to campaign against racism, poverty and inequality.

Before I end, I wish all the members Merry Christmas and a very Happy New Year.

I end with an inspiring quote by Mr. Mandela,

> *"No one is born hating another person because of the colour of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite."*
>
> *— Nelson Mandela*

YATIN DESAI
President

The Chamber of Tax Consultants

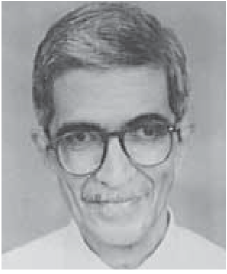
Vision Statement

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*

An Introduction to – Ved and Vedanta

After having some glimpses of Upanishads and of the philosophy and religion of Vedanta, let us move to Bhagavad Gita which is rightly characterised as Upanishad of Upanishads. As we have seen, the Upanishads themselves have culled out their philosophical conclusions from the Vedas. These findings relate to the relations between Brahma and the Soul, the Soul and the Jiva, and the Jiva and the nature and also as regards aims and objects of human life and also relating the science and art of living. These basic concepts are scattered over various places of Upanishads and it was the need of the day to codify and put in a systematic manner the various concepts underlining the Vedic religion and philosophy. It goes to the credit of the Bhagavad Gita that it has carried out the task of codifying and analysing them in a most magnificent manner. No doubt, Brahma Sutras did the same job of codifying these principles, but we find there is an absence of analysis or elaborate discussion about these principles by Brahma Sutras. In fact, to follow the Brahma Sutras will be as difficult as following the Upanishads themselves. At a time when Bhagavad Gita was propounded or to be more exact it was written, the Vedanta philosophy and Vedic way of life and religion were foreign to the common man, as if they were preserved in a treasure house meant for selected few. To the credit of Bhagavad Gita, that while codifying and analysing these concepts, it has used simple language which could be understood by common man. It analyses the various concepts which were propounded by the Upanishads. Undoubtedly, Bhagavad Gita does not claim any originality and it proposes to comment on these various doctrines. However, it must be accepted that under the guise of analysing these concepts of Upanishads from different angles. To follow the Upanishads, while they dealt with these very concepts, it was difficult to comprehend because there were cryptic and many times they were in the form of euphorisms and they lacked detailed discussion. It could be understood because analysis of these principles was meant for the students who were otherwise well trained and with higher level of understanding and they were not meant for public at large. It must go to the credit of Bhagavad Gita that it realised that these golden principles which basically dealt with science and art of life should be made available to the common man. And now because of Bhagavad Gita this Atma Vidya/ Self knowledge which is enunciated in the Upanishads, is available for all genuine seeker of truth. As such, the treasury of Vedanta philosophy was thrown open to the public for their use by Bhagavad Gita.

Another important aspect of the contribution made by this great work is that it does not reject or criticise any of the various philosophies then prevailing in ancient India. Apparently these

philosophies sometimes were contradictory to one another and each claiming superiority over the others. Rather, there was a competition between various theories and philosophies prevailing at that time. The beauty of Bhagavad Gita is that it does not reject any of these philosophies, whether it is Sankhya philosophy or Vedanta philosophy, and it brought a perfect synthesis among these various philosophies prevailing at that time. It goes to the credit of Bhagavad Gita that it picks up the best out of all these philosophies and synthesises them into one universal philosophy of life. Therefore, all these philosophies, find place in Bhagavad Gita, and they are co-ordinating rather than competing with each other.

Another important characteristic of Bhagavad Gita is that of its universality. There is absolutely no sectarianism in any of the discussions in Bhagavad Gita. It was not meant for any specific section of the public or for a particular religion. It was meant for all people who wanted guidance in their search for truth. The teachings are meant for all human beings irrespective of their faith and belief and the aim of the discussion was to see that the practice of these principles will lead to the welfare of the community as a whole and not a section of it. This universality of outlook is evident in all the ancient works of India, but more so in the case of Bhagavad Gita. If we consider any discussion in any part of the Bhagavad Gita, it would clearly be found that its teachings are addressed to all humanity and to all human beings who are struggling to realise the higher expression of the soul, the real goal of all philosophies and religion This aspect of Bhagavad Gita treatment of the subject is emphasised by the direct dialogue between the creator and its best creation, the human being represented by Lord Krishna and Arjun. Arjun here is representing the whole humanity and Lord Krishna, the Divinity. The whole discussion takes the form of the direct dialogue between the Divinity and the human being.

From many angles, Bhagavad Gita holds a very prominent place in the entire spiritual and philosophical literature of the world. The popularity and the prominence of Bhagavad Gita as a classic is basically because of its rationality and its universality. Undoubtedly, the Upanishads contain the sublime statement of Indian thought. Max Mueller refers to the boldness in thinking in ancient India, the build up of might edifice or philosophy led by the love of truth and reason and undeterred by any fear or blame or lure of fame. This tradition was well maintained by Bhagavad Gita.

After noting the certain features of Bhagavad Gita and before starting with the study of Bhagavad Gita, Chapter wise in January 2013 issue, we considered in brief the essence, and basic teachings and the message of Bhagavad Gita. We considered in brief the Yoga's Karma, Bhakti, Jnana and Dyana and noticed that all yoga's have a common goal of reaching ultimate end of self realisation and ultimately to merge oneself with paramathma.

The message of Bhagavad Gita –

The Bhagavad Gita, the "Son of the Lord", begins with the word Dharma and ends with the word mama. Together they mean `my dharma' or `my essential nature'. This phrase indicates the prime message of the Gita, that the ultimate purpose of life is to realise one's essential nature. To discover it within and become one with it. One's essential nature is the supreme Self within. It is God. The philosophy of the Gita guides one to the attainment of this supreme goal.

The goal of human existence is realisation of Atman, the supreme Self within. You realise Atman when you rise above your involvement with the good and the bad forces of the world. Goodness and badness are the result of either virtuous or vicious desire-ridden actions. When you perform actions without egocentric desires motivating you, your mind will be free from the influence of the good and the bad. Such a neutral state of mind is most conductive for graining knowledge of the Self within. Thus, Arjuna

receives the sermon of the Gita while poised in his chariot between the Pandava and the Kaurava armies, between the good and the bad.

The chariot in which the Gita was given also has a significance. It is an allegory taken from the Kathopanishad. The chariot and the horses represent the human body and its sense organs. The reins stand for the mind and the charioteer for the intellect. The rider is the individual (jiva). If the charioteer falls asleep, the reins become loose and the horses go out of control. This results in the destruction of both chariot and rider. So too, when a person's intellect is not alert his mind loses control of the senses. This leads him to disaster. The chariot, well-controlled individual. Such a person alone can understand and derive the benefit of spiritual instruction.

The theme of the Bhagavad Gita is that an individual's friend and enemy both the within him. They represent the higher spiritual aspirations and the lower sensual desires. You are advised to conquer your desires and regain your lost glory. Your glory is your essential nature. Your essential nature is the supreme Self within. Not your body, your mind or your intellect. The true Self in all beings in God. The knowledge in the Gita helps you to unfold the Self. It takes you to Self-realisation which is God-realisation. You become one with God.

The eighteen Chapters of the Gita can be divided into three sets of six chapters each. These three sets actually represent and elaborate the divine aphorism of the Vedas – Tat tvam asi – That thou art. The first six chapters explain tvam (thou), the middle six, Tat (that), meaning God and the last six, asi (art), the oneness of you and God. The Gita thus leads one to the ultimate state of spiritual enlightenment. Moreover, it presents a magnificent philosophy of life which can be translated into practical living in one's social, official and domestic lives.

The eighteen chapters flow into one another to form a beautiful sequence of thought. The verses of each chapter have been grouped into different topics which indicate the development of thought. The division helps one to gain a total picture of the message in each chapter. Each chapter has an introduction which briefly summarises its topics. Thus, the topics and the chapters telescope into each other to provide a panoramic view of life and its underlying Reality.

Bhagavad Gita can be said to be a dictionary of encyclopaedia on the subject of spirituality. The Gita specifically deals broadly with Brahmavidya i.e. knowledge of God and Yoga Shastra i.e. the art and way of achieving the Union of Atma with Paramatma. The essence of its teachings can be summarised as under:

As per Bhagavad Gita, its message to all human beings is "Know Thyself". You must know your true self and live as per your true self. As such, the search of your true self, the realisation of true self and the fulfilment of your true self is the object and purpose of your life as a human being. What is your true self will be known through the practice of Gnana Yoga. Realising your true self could be achieved by practice of Karma Yoga and fulfilment of your true self is through Bhakti Yoga. As such, the object and purpose of one's living in this world is to find out and live according to ones true self.

Now, according to Karma Yoga, the nature of a human being as such is that one cannot do without doing any work. Work is a MUST. One cannot run away from the work. As such, as per Bhagavad Gita, one cannot abandon the work itself and take shelter in a forest, by abandoning the universe itself. According to Bhagavad Gita, it is highly impossible for anybody to live even one moment without doing one work or the other. To do work is a part of one's nature as a human being. As such, you cannot abandon the work and one has to work. As such, Bhagavad Gita ordains that one has to do his work and one cannot run away from his work. If one has to do work which is a MUST according to Bhagavad Gita, what work should one do,

Bhagavad Gita does not specifically deal with what work one has to do. It only teaches the art of doing work. It is not what you do, but how you do a particular work is relevant. One can do any work, but the work must be done as per the dictates of Bhagavad Gita. One has to do whatever work one has to do without any attachment and without any expectation for the fruits of the work that one is doing. The twin requisites of doing Karma as per Karma Yoga are non attachment to the work and not expecting any fruit for that particular work. That in short is dealt by Bhagavad Gita in the famous Sloka 47 which says *"Karmanyeva Adhikaraste Ma Phalesu Kadachana Ma Karma Phalaheturbhuh Matus Sangats Karmani* meaning thereby, it is not your right, but duty to do work and you have no right to expect any fruits for the work you are doing. Do not have any expectations for the fruits of your work and you should work and not refrain from doing work. As such, Bhagavad Gita ordains that one has to work but work as a duty. One has no right either in the work or the fruits for the work done. As such, the art of doing work as per Karma Yoga is that one has to do the work as a duty and while doing this work as a duty, should have no attachment to the work and no expectation of the results of such work. If these two characteristics are kept in mind while doing the work, what work you do is immaterial i.e. each and every work that you are doing must be qualified by non attachment to the work and non expectation for the results of the work. Work for works sake and not for the results of the work. Now, for the work you are doing, results will follow, whether you expect them or not and then what is to be done to the results of the work. As per Karma Yoga of Bhagavad Gita, the fruits of the work you are doing must be surrendered by way of sacrifice to the Supreme Self. They should be offered to the Supreme Self. It is not just not expecting the fruits of the work, but positively the fruits are to be surrendered at the feet of the God. As such, to start with, one has to do selfless work by way of service, without any attachment to that work and not only not expecting the results of such work but the fruits of such work, one has to offer at the feet of the God. Thus non attached selfless service without expectation of fruits and offer of the fruits to the Supreme Self is the essence of art of doing Karma as per Karma Yoga.

As one progresses in the path of Karma Yoga, he would realise that what work one is doing is not, at his own instance, but the instance, at the command and as per the wishes of the Supreme Self. As such, whatever one is doing, one is doing as an agent of the Supreme Self. Here, one realises that all human beings and oneself are doing work at the instance of the Supreme Self and, as such, all the work is to be done for the Supreme Self and the same is to be offered to the Supreme Self. As such, not only the fruits, but the work itself is to be offered to the Supreme self. To start with, one has to start with offering the fruits and later on in the spirit of offering the fruits, one realises that one has to offer the work itself and, as such, one has to realise as a real Karma Yogi that the work itself is of the Supreme self and one is doing only his work. As such, in the advanced stage of Karma Yoga one would be doing the work of, work for and work with the Divinity. While doing the work of the Divinity in the spirit of Yagna, one has to always remember God, and act under his guidance and inspiration. That is what Bhagavad Gita says "At all times, remember me and work." As such, not only the work has to be Divine, but also the work to be done is for the Divine. One has to surrender the work itself and do the work as ordained by the Supreme Self. Then, comes the third stage where one gives up the authorship of the work. At this developed stage of doing the work as per Karma Yoga, one would not be claiming even the authorship of doing the work. One realises that the real work is done not by the individual but the work itself is done by the Supreme Self. Thus, one becomes the instrument or a medium through which the Universal Self works. One ceases to have the claim to the authorship of the work i.e. one is not doing the work at all. One is being used by the Universal Self as an instrument and as a medium

through which the Universal Self works. Then, as per Karma Yoga, one has to realise that one is not doing anything and that one cannot do anything without the Universal Self, but in the real sense one has become only an instrument in the hands of the Supreme Self. First one has to surrender the fruits of the work and then the work itself and lastly to surrender the authorship of the work itself, is the sum and substance of living as per Karma Yoga dictates, i.e. in short, one has to live without any attachment to the work one has to do and do the work as a duty in the spirit of sacrifice and one has to not only not expect any fruits, but surrender the fruits of the work to the Universal Self and then give away the authorship of the work itself, realising that one is nothing but an instrument in the hands of the Lord, and therefore, one surrenders the authorship of the work to the Divine Self and he ceases to do any work and just becoming an instrument in the hands of the Lord for the work to be done by Him. Then onwards, it is the Divine Self which works through him and he will cease do to any work by becoming an instrument in the hands of the Supreme Self. At the end of the Karma Yoga when it reaches its zenith, it results in one's sacrificing one's self and one surrendering one's separate existence. At the end, one sacrifices oneself to God. The sacrifice of the self `Ahankar' is the ultimate sacrifice that one has to make while following Karma Yoga and with such supreme sacrifice of one's self, one would achieve the goal of self of merging with the Universal Self, the Supreme Self. At that stage, one ceases to have any mind. One ceases to have any thoughts and one ceases to have any feelings and desires. In fact, one ceases to have any separate existence of one's own. One is perfectly united with the Universal Self and the original self being part of the Universal Self, such perfect union is the object and purpose of human existence.

With Gnana Yoga and Karma Yoga there must be a Yoga of devotion – Bhakti Yoga, Gnana Yoga teaches us the art of knowing oneself. Karma Yoga teaches us the art of living, but the ultimate crowning glory is the art of loving, the subject matter of Bhakti Yoga. As we have seen, there are three qualities of Universal Supreme Self. One acquires the quality of `Sat' by Gnana Yoga and the qualities of Chit by Karma Yoga and the last quality of Anand by Bhakti Yoga, the true fulfilment of ones existence can be acquired only by Bhakti Yoga. The art of loving and the art of devotion to the Almighty will make the art of living and the art of doing work more fruitful and comparatively easier and enjoyable. To put it in a different way, by Gnana Yoga, one would acquire the quality of Divinity in respect of one's intellect and one's thinking. By Karma Yoga, one would divinise one's senses, one's mind and one's work, but in addition to intellect, mind and senses there is a third aspect of the human being i.e. feeling which is governed by the heart. With intellect and senses, one has also to divinise one's heart. As such, divinising one's heart is a part and parcel of the total divinising of one's self before one achieves one's object in life of ultimate union with the Divinity. Divinising one's heart, is the subject matter of Bhakti Yoga, the way of devotion which is the total devotion to the Supreme self through the art of total unqualified love and devotion to the Universal Self. With Bhakti Yoga, Karma Yoga becomes not only very fruitful but very enjoyable, also Bhakti Yoga not only makes the following of Karma Yoga easier, but it makes it more purposeful and more enjoyable and more fruitful. In Bhakti Yoga, in the total devotion to the creator one always remembers and does everything for God in the spirit of love. A real Bhakta cannot live a single moment without his devotion to God. The total selfless love towards the Universal Self is the crowning glory of the human existence and it is a crown of Gnana and Karma. As such, the total divinising of oneself and living in one's true self is possible only if one adopts all the three yogas, Gnana, Karma and Bhakti to divinise oneself completely in all aspects and living totally in the spirit of Divinity and to achieve ultimate goal of complete union with the Universal Self. A stage will come when one has to go beyond

oneself and beyond one's nature beyond gunas. Even one would abandon the satvik qualities i.e. Divine qualities. That is what Lord Krishna ordained when he says *(Sarva Dharman Parityajya Mam Ekan Sharanam Vraja)* i.e. abandon all your nature, even your good works, good living and take complete shelter in me i.e. the total surrender of oneself to God is the ultimate message of Bhagavad Gita to achieve the perfect union with God.

It may be noted that Bhagavad Gita starts with the word "Dharma." The first verse starts with Dharma Kshetre and the Bhagavad Gita ends with the word "Mama". In essence Bhagavad Gita teaches what is Dharma of Mine. Mama Dharma means my Dharma i.e. what is right to me. It deals with Brahma Vidya, the knowledge of Brahma and Yoga Shastra, the science and art of uniting with God. The art of living the art and science of human existence in essence is the subject matter of Bhagavad Gita. Therefore, the message of Bhagavad Gita is "Know Thyself". Know your own true nature and come out of your false impression that you have a separate existence of your own. Realise that you are a part and parcel of the Universal Self. You are not jeeva but you are atma and as atma you are a part and parcel of the Universal Self which is all pervasive and all powerful and everything in the universe is a reflection of the universal Supreme Self and your whole existence is a part and parcel of the Universal Self and after realising one's true nature, the object and purpose of your existence one should live to one's true self doing Karma, as per your true self and offer one's total devotion to the Universal Self and ultimately offer your everything including yourself at the altar of the Supreme Self and - achieve the ultimate purpose of your existence i.e. union with the Supreme Self.

Relevancy of Bhagavad Gita's teachings

If we go through the background of Bhagavad Gita, it was delivered when there was total crisis in the society in all facets of political, social and religious fields and as a matter of fact there was total anarchy and crisis in all walks of human life. Religion itself was misused. Even the institution of Yagna was used for selfish purposes. All actions, forgetting the original teachings of Vedanta were self oriented and when there was suppression and oppression in all walks of life and at that stage to bring a total silent revolution in all walks of life, Bhagavad Gita was born. It was more than the spiritual need, a social need of such teachings contained in the Bhagavad Gita and it was the total anarchy in all walks of life which caused the birth of Bhagavad Gita. Its teachings were by way of medicine to all these evils. Now, coming to the present times, if one considers the total chaos and total anarchy and all round crisis in the human society in all walks of life, one would realise that Bhagavad Gita's teachings are not only relevant, but they are more than relevant in today's atmosphere. The crisis faced by the society today is hundred times more serious than one which was faced by the society when Bhagavad Gita was delivered. In short, today the human being has ceased to be a human being. He has become worse than animal. In fact, as I always say, today to compare a human being with an animal, would be a great insult to the animal. Undoubtedly, in the present day, the human being is more intelligent, more capable, more daring and more active and capable of achieving anything. In fact, by his sheer capacity, he has almost conquered the entire nature. Today, man has all sorts of comforts and luxuries, the whole science is at his feet, to make his life more comfortable and more luxurious, but man today is not at all happy with all the material comforts at his service; he is perhaps the most unhappy and is more unhappy than he ever was. Today's situation really establishes the theory propounded by the scriptures like the Bhagavad Gita, that happiness is internal and not external. Our forefathers, with less or no comforts and luxururies were certainly happier than what we are today with all the comforts. Tension rules everywhere. It is an age of tension. In human life there is tension everywhere. Everybody is seeking for pleasures, possession and power. Everything is price based and not value based.

All things are measured in the terms of money, in the terms price and values in life are at terrible discount. Man has become terribly selfish. He cares only for himself and none else, not even for his near relatives. The motto and purpose of life, is to acquire more and more wealth, more and more power and position to have more individual pleasures. Life is nothing but for the so-called enjoyment. To have the three deadly P's, Pleasures, Profit and Power or Position is the aim and object of one's living. While trying to acquire these, we mercilessly suppress and exploit others. Acquisition of wealth at any cost is a rule, and the means of its acquisition have become irrelevant. To acquire more and more wealth has become the mantra of today. The whole world is fast rushing towards total disaster. Concern for others, concern for society or social service, have practically disappeared.

For such malady, symptoms of total absence of sense of duty, sense of selfless work, sense of service and concern for others. In the present world the basic teachings of Bhagavad Gita is a real medicine to the various ills prevailing in the society. To do everything as a duty and duty is to be done in the spirit of sacrifice. You have no right but only obligation. Whatever you have to do, you have to do as a duty and not as a right – still less with a desire for fruits of such work. Life itself is duty based and not right based. The message of Bhagavad Gita could be used to solve most of the problems facing us. At this stage, I recollect an episode from the life of Mahatma Gandhi. When he was sent a copy of Charter of Human Rights proposed to be adopted, Mahatma Gandhi remarked "there is no need of universal human rights, but what is the need of today is universal charter of human duties. This is what you can expect from this great follower of Bhagavad Gita. Doing everything as a duty in the spirit of love, sacrifice and universal love, characterised the life of Mahatma Gandhi. Once, in a typical American style, a press reporter from USA asked Mahatma Gandhi a question as to what was the secret of his success that may be expressed briefly. Gandhiji as per the requirement of the reporter just uttered three words by quoting from the Upanishads renounce and enjoy. That is the sum and substance of the entire teachings of the Bhagavad Gita. In my opinion, the essence of Bhagavad Gita teachings regarding the art of living, is to do everything as a duty. You are here to serve. Life is for service and sacrifice and whatever you to, do it in the sprit of sacrifice. Give everything to the society by way of sacrifice. Nothing belongs to you. Live in this world with detachment, live the life of sacrifice and surrender. Bhagavad Gita teaches that we have to see ourselves in others and others in ourselves. This is one great and simple principle of one's living. It is the very basis of total harmony in society. If one considers that others are like oneself and oneself like others, what a great revolution it can bring. Instead of living for oneself, one should live for others. If I have a right to live, others also have equal right to live. It is the medicine which is prescribed by Bhagavad Gita and it is more relevant and more required in the present world which is governed by total selfishness, total exploitation, total suppression and total inequality if this one medicine suggested by Bhagavad Gita is adopted i.e. one has to see oneself in others and others in oneself and, as such, one has to live a life of sacrifice and service, it will completely transform the society. If this one principle is followed, it will solve all the problems which the society is facing today. As such, in my opinion, not only the teachings of Bhagavad Gita are relevant today, but they are most essential and they would go to solve all the problems facing the society today. Today, we require the real followers of Bhagavad Gita to have great individuals like Gautam Buddha, Maharshi Arabindo, Swami Vivekananda, Mahatma Gandhi, and Vinobha Bhave who in every sense lived as per the teachings of Bhagavad Gita and who were real Karma Yogis. We require more and more Karma Yogis of this model to save the present society from the crisis which it is facing today.

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CA Anil Sathe

Objectives of formation of Private Trusts

Introduction

The purpose of this article is to introduce certain concepts regarding trusts and discuss the various purposes for which trusts are formed. Ordinarily when one uses the word "trust", what comes to mind is a public charitable trust where either the general public or a section of the public are beneficiaries. However trusts are not necessarily public in nature and trusts have been formed and run for the benefit of individuals or other beneficiaries where the object is not charitable or philanthropic but to achieve the intent of the settlor or creator of the Trust.

Background

Our country has a long history of cases where properties are settled upon a person for the benefit of another. The ownership and possession of property coupled with the obligation to use the same or income thereof wholly or partially for the benefit of others is a situation which is familiar to Indians. When any property is transferred to a person with the obligation as aforesaid a trust comes into existence. The law relating to private trusts was codified by the Indian Trusts Act, 1882 which came into force on 1st March, 1882.

The law of trusts deals with the area of fiduciary relationships. Between the trustee and beneficiary the trustee ordinarily is only an owner and possessor in name and does not have a right of beneficial enjoyment. However between the trustee and the world the trustee is clothed with all the rights of ownership. A trust is based not on consideration but on the confidence reposed in the person holding the property. When the beneficiaries are the public and the purpose is charitable what comes into existence is a public charitable trust and where the beneficiaries are individuals or other entities with the purpose being specific to the settlor the trust is a private trust. In terms of the Indian Constitution the subject trust and trustees is in the concurrent list and therefore both the union and the legislature can legislate thereon.

Types of trusts on the basis of the manner of their creation

Broadly trusts can be classified into the following categories on the basis of their creation or formation

a) Express trusts which are created by the settlor expressing the intention to create a trust with certainty. When an instrument is executed clearly delineating the trustee/s and beneficiaries, setting out the powers of trustees, the extent of benefit of the beneficiaries the trust can be said to be an express trust.

b) An implied trust is a trust which can be inferred from the words of the instrument or the conduct of the parties. An implied trust is founded on a presumed intention of the parties. When property is bestowed, on a person by the settlor but the intent is that the benefit of the property should go to another person then an implied trust is created. To give an everyday example, if on the birthday of an ailing mother relatives give gifts to the son by cheques drawn in his name, since the old lady does not have a bank account, the son assumes the position of a trustee, with an obligation to hold the property and use it for his ailing mother. This is an example of the ownership of property vesting with one person with the obligation to use it for benefit of another. Another illustration could be that of a box which is kept at the counter of a restaurant in which tips for the waiters in the restaurant are expected to be dropped. Such a box would be in possession of the owner but he would hold it in trust for his employees. This is the case where the property is held as a trustee.

c) A constructive trust arises by operation of law. If a mortgagee disposes of property of the mortgage by way of sale and receives money is in excess of the debt owed to him by the mortgagor he would hold the balance money in trust for the mortgagee. Sections 86 to 93 of the Indian Trust Act lists such cases of constructive trusts. To illustrate receivers of property appointed by judicial authorities are referred to as receivers but they are in fact trustees for parties to the suit

Process of creation of trust

A trust is created when the settlor or author of the trust indicates with reasonable certainty by his words or actions.

a) an intention to create a trust

b) the purpose of the trust

c) identification of the beneficiaries

d) identification and settlement of trust property

A mere intention to create a trust is not sufficient, and such an intention must be followed by action on the part of the settlor to create the trust.

Parties to a trust

The following persons/entities are necessary for creation of a trust

a) settlor or author of the trust who reposes confidence in another

b) trustee is the person who accepts such confidence and property with an obligation to hold it for the benefit of another

c) a beneficiary who is the person for whose benefit the confidence is accepted by the trustee.

Persons eligible to create trusts

A trust may be created by

a) every person who is competent to contract

b) with the permission of a principal civil Court of original jurisdiction by or on behalf of a minor

Purposes of the trust

The objectives for which trusts are ordinarily created are discussed in the following paragraphs. The settlor may have any purpose but the same must be lawful. The purpose of the trust will not be lawful if

a) it is forbidden by law

b) is of such a nature that if permitted would defeat the provisions of law

c) is fraudulent

d) involves or implies injury to the person or property of another

e) is opposed to public policy.

If a trust the purpose of which is unlawful is created the same is void. If the trust is created for more a number of purposes one of which is unlawful then unless the two purposes can be segregated the trust would be void.

Property of the trust

The subject matter of the trust is property which is ultimately transferable to the beneficiary. Any property or interest and property which a person can transfer can be settled by him in trust. A mere chance of succession or possibility of future property coming to the hands cannot be transferred to create a trust

Objectives of private trusts

Having gone through the various concepts of a trust let us now consider what are the major objects for which private trusts are created

Gratuity/Superannuation/Provident Fund trusts

As employers, corporations or other business entities are under an obligation ensure welfare benefits to their employees in the form of Provident fund, pension gratuity and in some cases superannuation. These obligations are continuing obligations and are to be discharged on the occurrence of a particular event or the superannuation of an employee. Since these obligations would involve pay out of substantial funds to the beneficiaries it is common to create trusts their business entities make annual contributions to ensure that the obligations can be discharged when they arise. The objective of creation of these trusts is that if these funds are left at the disposal of the employers their utilisation may be subject to business exigencies or may not ultimately be available when the obligations arise on account of mismanagement. The law therefore mandates the creation of such trusts where trustees are nominated by employers and employees to ensure that intent of the settlor is carried out and the interest of the beneficiary is protected.

Trusts for the benefit of minors / persons not competent to contract/ where settlor does not have confidence in the ability of the beneficiary

One comes across many situations in life where the settlor of the trust holds significant amount of properties which he would like a minor beneficiary to enjoy. However he may not be in a position to manage the properties himself or for some reason believes that he may not survive the minority of the beneficiary. In such an event a private trust is created whereby during the period of minority or until the beneficiary attains a particular age the property is settled on a trustee. These types of trusts came into vogue in the early part of the 20th century and continue to be popular even today. Another situation would be when the beneficiary is unable to fend for himself even though he is a major. The said person may have a certain disability and therefore it is necessary for property to be held by another for his benefit. The third and a little uncommon situation would be in the case of a major beneficiary in whose ability or independence the settlor does not have confidence. Such a situation arises in the case of married daughters. When a daughter marries into another family, the parents would desire to settle property for her benefit, but do not trust the in laws particularly if the marriage has taken place recently. In such a case the settlor may settle property on a trustee for the benefit of the daughter. Some of my readers may not approve of this lack of confidence in their

daughters but one cannot ignore the realities of life.

Protection against unforeseen action by creditors/lenders

The third objective for which a trust is created is to protect property from creditors/lenders. In such a situation the purpose is a dual purpose. The settlor may not want to let go of the entire control of the property but at the same time fears that if he continues to own it in his name it may be attached in any action against him for recovery of debts. In such a situation the property is then settled on a trust with the beneficiaries being the family members of the settlor. It is extremely common among large industrial families to create trusts whereby shares which represent the controlling interest in their industrial empires are settled on a trust. In this manner through the instrument of trustees the settlors can continue to exert certain control over those companies while in the event that there is an unforeseen circumstance by way of action of a creditor/lender the shares stand protected as they are held in trust by trust for benefit of another. Needless to say such transfers are void if action by a creditor is imminent. The transfer/settlement of property must be genuine transparent and not sham. Therefore these trusts have to be created with proper legal advice.

Trusts to reduce tax incidence

At one point of time the creation of trusts for the purposes of tax planning was rampant. We had a time when large businesses were also organised through private trusts. A private trust was assessed as a distinct legal entity and a number of trusts were formed to take benefit of this situation. From the year 1985 with amendments to section 164 of the Income-tax Act, 1961 this loophole was plugged and such trusts are now charged to tax at the maximum marginal rate (MMR).

Thereafter we had a time of discretionary trusts where the beneficiaries were not specified. This left a lot of scope for tax planning. However the amendment to section 164 also takes care of this situation and discretionary trusts are also liable to tax at the maximum marginal rate.

The only exception to this provision of taxation at MMR is a single trust created through a will {proviso to section 164}. Therefore creation of trusts for reduction or avoidance of tax is now not feasible.

Protection against possible reintroduction of Estate duty

Estate duty was abolished in 1985. However it is now felt that as a revenue gathering measure this may be reintroduced in one form or the other. It is now felt that for protection from possible estate duty or any other form thereof a trust may become necessary. In my view, the introduction of Estate duty is unlikely in the near future. Further the law would probably take care of situations where the sole purpose of the creation of trusts is avoiding tax.

Conclusion

Like the law of public charitable trusts, the law in regard to private trusts also suffers from certain controversies. Assessment of beneficiaries directly, liability of a representative assessee “in a like manner and to the same extent “as the beneficiary, are still the subject matter of some debate. With electronic filing of TDS returns, IT returns and the computerised processing thereof, some problems have increased. It is thus clear that it is now not advisable to use a trust as a mere vehicle of tax planning. It is only if a settlor has objectives of the nature set forth on the foregoing paragraphs, should he embark on the exercise to create a trust.

CA Sanjay R. Parikh

Taxation of Private Trusts

Section 3 of The Indian Trusts Act, 1882 defines a "Trust" to mean an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. The person who reposes or declares the confidence is called the "author of the Trust", the person who accepts the confidence is called the "Trustee", the person for whose benefit the confidence is accepted is called the "beneficiary", the subject-matter of the Trust is called "Trust property" or Trust-money", the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the Trust-property and the instrument, if any, by which the Trust is declared is called the "instrument of Trust".

Trusts are created for varied purposes like religious purposes, charitable purposes, private Trusts, etc. In case of private trusts, unlike religious or charitable Trusts, the Trust is created for the benefit of a specific group, like sons, daughters, etc. Private Trusts are also created for the benefit of mentally or physically handicapped persons by their guardians to take care of the needs after their demise.

In this article, the taxability of private trusts is being dealt with.

Before going into the tax aspects of the Trust, one needs to recognise that for the purposes of taxation, private Trusts have been divided into two types of Trusts i.e. private specific Trust i.e. where the beneficiaries are known and their share in the income of the Trust is also known or determinate and indeterminate Trusts, where the beneficiaries are not known or the shares of the beneficiaries may be indeterminate or left to the discretion of the trustee to apportion the income in the way he feels free. There may be situations where the beneficiaries may keep on varying depending on the birth or death of a member in the family. This situation may arise where the trust is settled for a particular branch of the family say son, son's wife, son's sons and daughters, son's grandchildren, etc. In such a case, the Hon'ble Supreme Court has in the case of *CWT vs. Trustees of H. E. H. Nizam's Family (Remainder Wealth) Trust (1977) 108 ITR 555 (SC)* [hereinafter referred to as "Nizam's Trust"] held that the Trust cannot be considered to be indeterminate. As long as one is able to know the beneficiaries on the valuation date, the Trust was held to be determinate.

As regards the taxability of Trusts, as per clause (iv) of section 160(1), the trustee or trustees are considered to be representative assessees in respect of income which a trustee receives on behalf of or for the benefit of any person. Section 161 determines the liability of the representative assessee. Section 162 gives a right to a representative assessee to recover the tax paid by him. Section 164 deals with a situation where the share of beneficiaries is unknown. These sections are being dealt with hereunder in detail.

As per section 161(1), every representative assessee shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall be levied and recovered from him **in the like manner and to the same extent as it would be leviable and recoverable from the person represented by him**.

The Hon'ble Supreme Court has in the case of Nizam's Trust (supra) exhaustively dealt with the taxability of Trusts in the context of similar provisions under the Wealth Tax Act. The Hon'ble Supreme Court held that the primary liability to tax is that of the beneficiary and the right of the revenue to make a direct assessment on the beneficiary has not been taken away by the provisions of section 161. While dealing with the said aspect, the Hon'ble Supreme Court at page 594 held as under:

> "… The beneficiary would always be assessable in respect of his interest in the Trust properties, since such interest "belongs to" him and the right of the revenue to make direct assessment on him in respect of such interest stands unimpaired by the provision enabling assessment to be made on the trustee in a representative capacity…."

Clarifying further, the Hon'ble Supreme Court later held as under:

> "… The revenue has thus two modes of assessment available for assessing the interest of a beneficiary in the trust properties: it may either assess such interest in the hands of the trustee in a representative capacity under sub-section (1) or assess it directly in the hands of the beneficiary by including it in the new wealth of the beneficiary. What is important to note is that in either case what is taxed is the interest of the beneficiary in the Trust properties and not the corpus of the Trust properties. So also where beneficiaries are more than one, and their shares are indeterminate or unknown, the trusts would be assessable in respect of their total beneficial interest in the trust properties. Obviously, in such a case, it is not possible to make direct assessment on the beneficiaries in respect of their interest in the Trust properties, because their shares are indeterminate or unknown and that is why it is provided that the assessment may be made on the trustee as if the beneficiaries for whose benefit the Trust properties are held were an individual. The beneficial interest is treated as if it belonged to one individual beneficiary and assessment is made on the trustees in the same manner and to the same extent as it would be on such fictional beneficiary. …"

The Hon'ble Supreme Court has at page 595 explained the expression "in the like manner to the like extent" by holding as under:

> "It is also necessary to notice the consequences that seem to flow from

> the proposition laid down in section 21, sub-section (1) that the trustee is assessable "in the like manner and to the like extent" as the beneficiary. The consequences are three-fold. In the first place, it follows inevitably from this proposition that there would have to be as many assessments on the trustee as there are beneficiaries with determinate or known shares, though, for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the wealth of each beneficiary. Secondly, the assessment of the trustee would have to be made in the same status as that of the beneficiary whose interest is sought to be taxed in the hands of the trustee. This was recognised and laid down by this court in *N. V. Shanmugham & Co. vs. CIT [1971) 81 ITR 310 (SC).* And, lastly, the amount of tax payable by the trustee would be the same as that payable by each beneficiary in respect of his beneficial interest, if he were assessed directly. ..."

From the above finding, it is clear that the income with respect to each beneficiary has to be determined separately and for this purpose, the status of the representative assessee i.e., the trustee would be the same as that of the beneficiary. Accordingly, if the beneficiary is an individual, the status in which his share of income is to be assessed in the hands of the trustee would also be that of an "individual". If there are two beneficiaries say one being an individual and the other being a Hindu Undivided Family, the trustee would be liable to tax with respect to the share of the individual beneficiary in the status of "individual" and with respect to the share of Hindu Undivided Family in the status of "HUF". The trustee would be liable for the composite tax determined in this manner.

The Hon'ble Supreme Court has also dealt with the issue as to how the status of the trustee could be "individual" where there are more than one individuals as beneficiaries. The Hon'ble Supreme Court has held that the word "individual" can also mean more than one person. In this regard, the Hon'ble Supreme Court held as under [at page 589]:

> "... the word "individual" in section 3 is wide enough to include a group of persons forming a unit...."

Accordingly, if all the beneficiaries are "individuals", the trustee would also be assessed in the status of "individual". However, if there are more than one beneficiaries, some of whom are individuals and some others being HUF, the trustee would be liable to tax with respect to the income of each beneficiary in the same status in which the beneficiary would be assessable. Accordingly, the trustee would have to compute the income of the individual beneficiary separately and determine the tax payable by such a beneficiary. Similarly, the trustee would have to compute the income of the HUF beneficiaries separately and determine the tax payable in case of such HUF beneficiaries. Thereafter aggregate of tax would have to be determined and paid. The exercise would be simple if the beneficiaries do not have any other independent source of income. However, if the beneficiaries also have their independent source of income, the trustee would have to consider the said income for computing the tax liability of the said beneficiary.

As per sub-section (1A), where any income of the Trust includes profits and gains of business, tax shall be charged on the whole of the income at the maximum marginal rate of tax. Accordingly, even if the Trust earns ` 1/- from profits and gains of business, the entire income of the Trust would be liable to maximum marginal rate of tax. However, there is a proviso to this sub-section which

provides that the tax would not be payable at the maximum marginal rate of tax if the Trust is created by Will exclusively for the benefit of any relative dependent on him for support and maintenance and such Trust is the only Trust declared by him by will. Accordingly, for being entitled to exemption, the Trust should be created by Will. Further, such trust should be for the benefit of a relative dependent on the settlor and lastly, the settlor has created only one trust by his Will.

An issue arose as to whether the trustees can be assessed as an AOP when they carry on business. It has been held that they cannot be assessed as an "AOP". In this regard, the Hon'ble Bombay High Court has in the case of *CIT vs. Marsons Beneficiary Trust and other cases (1991) 188 ITR 224 (Bom.)* held that the trustees do not have any authority from the beneficiaries to carry on any business as the receivers had in Shanmughan's case *[1971] 81 ITR 310 (SC)*. The trustees merely carry on business for the benefit of the beneficiaries. The Hon'ble Bombay High Court has thereafter held as under:

> "We do not see how the trustees who are authorised to carry on business under the terms of a deed of trust can be considered in the same position as the receivers in Shanmugam's case *[1971] 81 ITR 310 (SC)*. The beneficiaries have not come together with the object of carrying on business nor have they authorised the trustees to carry on any business, as was the case in the above decision. The trustees derive their authority to carry on business, not from the beneficiaries, but from the settlor under the terms of the deed of trust. They do not require, the consent of the beneficiaries for exercising their authority under the deed of trust. The authority is conferred on them by the settlor. The beneficiaries are mere recipients of the income earned by the Trust. They have not come together for a common purpose. They cannot, therefore be considered as an association of persons or a body of individuals in the same position as the erstwhile partners in Shanmugam's case *[1971] 81 ITR 310 (SC)*."

Accordingly, the trustees cannot be assessed as an AOP even if they carry on business.

As per section 162, a representative assessee who pays any sum under the Act is entitled to recover the sum so paid from the person on whose behalf it is paid or alternatively can retain any moneys that may be in his possession or which may come to him in his representative capacity.

As per section 164, where any income is liable to be assessed in the hands of a representative assessee or any part thereof is not specifically receivable on behalf or for the benefit or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part is receivable are indeterminate or unknown, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate of tax. It may be noted that the section talks of relevant income. Accordingly, if the Trust 90% of income is to be distributed to known persons and 10% of the income is indeterminate than only 10% of the income would be liable to tax at the maximum marginal rate of tax. It has been held that even in a case where section 164 is applicable, the Trust cannot be assessed as an AOP. In this regard, reliance can be placed on the following decisions:

a) *CIT vs. Deepak Family Trust (No. 1) (1995) 211 ITR 575 (Guj.)*

b) *CIT vs. Shri Krishna Bandar Trust (1993) 201 ITR 989 (Cal.)*

c) *CIT vs. S A E Head Office Monthly Paid Employees Welfare Trust (2004) 271 ITR 159 (Del.).*

Where the shares of the beneficiaries are indeterminate, the income cannot be assessed in the hands of the beneficiaries. Accordingly, the trustee would be liable to tax on trust income in his representative capacity.

There is proviso to the said section which provides that the provisions of this section would not be applicable if none of the beneficiaries has any other income chargeable under the Act exceeding the maximum amount not chargeable to tax. The exception would also apply where the relevant income or part thereof is receivable under a Trust declared by any person by Will and such Trust is the only Trust so declared by him and also to the income receivable under a Trust created before 1st March, 1970 by a non-testamentary instrument and the AO is satisfied that the Trust was created *bona fide* exclusively for the benefit of the relatives of the settlor or where the settlor is an HUF, exclusively for the benefit of the members of such family in circumstances where such relatives or members were mainly dependent on the settlor for their support and maintenance or income of a provident fund, superannuation fund, gratuity fund, pension fund or any other fund created *bona fide* person carrying on business or profession and the Trust is created exclusively for the employees. If the one falls within the exception of the proviso, tax shall be charged on the relevant income as if the income were the total income of an AOP. Accordingly, if one falls within the exception, the income or part of income would be liable to tax as an AOP.

Various practical difficulties arise in case of taxability of Trust. Section 161 provides that the representative assessee shall be liable to assessment in his own name in respect of the income represented. Accordingly, a trustee would be liable to tax on his own income as well as the income of the Trust in his own name. Unless the trustee obtains a separate PA No. for the trust income, it would now not be possible for him to file two returns i.e. one for his personal income and one for the Trust income. Further, assuming that the beneficiaries file their own return showing their share in the Trust, difficulty would arise in their hands to claim credit for TDS from the income of the trust. Further, the trustee is required to pay the tax in the like manner to the like extent as it would be leviable upon from the beneficiary. Difficulties would arise if the beneficiary refuses to give the details of his personal income to the trustee. In such a case, the trustee would have no option but to pay the tax considering the trust income as the only income of the beneficiary. Further, assuming that the Trust obtains a PAN No. and files its own return, there is no provision for giving proportionate credit of the taxes paid by the Trust in the hands of the beneficiary, especially when the beneficiary may also have his own separate income. These difficulties have compounded on account of e-filing of returns and the computerized processing of returns. These problems may have to be resolved by each Trust independently taking into consideration the totality of facts and situation.

With the reduction in tax rates and the complexity of private Trusts, private Trusts are preferred less these days. It is only in exceptional situations like provision for mentally or physically handicapped persons or similar situations, one should form private Trusts. One may look at private Trusts only when the practical difficulties are sorted out or resolved.

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Application of Section 56 of the Income-tax Act, 1961, while contributing funds to trust and distribution by trust

This article confines itself to discuss some of the issues concerning application of section 56(2)(vii) of the Income-tax Act, 1961 vis-a-vis private trusts. The discussion should, by no mean, be regarded as exhaustive or final opinion on the aspects discussed. This is because as such the legal concept of private trust has its unique and peculiar features and complexities, compounded by the provisions, or absence thereof, concerning private trust in the Income-tax Act, 1961. To top that, the relatively new concept of taxing 'gifts' under section 56(2)(vii) of the Act itself is besieged with many controversies. The larger and general issues concerning 56(2)(vii) that are applicable to all are not meant to be discussed here, as the scope is confined to discuss only the peculiar aspects concerning private trusts vis-a-vis this provision. The cases concerning the residential status of the settler, trustees and beneficiaries and their implications on section 56(2)(vii) of the Act are dealt with in other articles. In any case, the deadly combination of these two concepts – private trusts and 'gifts' under section 56(2)(vii) - poses unenviable challenge to the assessees, tax practitioners as well as the tax adjudicators. The law is yet to be fully evolved through judicial interpretation. Hence, the issues are open for discussion, debate, conflicting views and, more importantly, deeper analysis and controversies. The attempt here is to just scratch the surface.

1.1 Section 56(2) (vii) of the Income-tax Act, 1961 {hereinafter referred as "the Act"} – in so far as relevant for the scope of the present article – is reproduced hereinbelow for ready reference:

"Income from Other Sources
56.

(1) ....

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to the income-tax under the head "Income from Other Sources", namely:

(i) ....

(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009,—

(a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;

(b) any immovable property,—

(i) without consideration, the stamp duty value of which exceeds fifty thousand

rupees, the stamp duty value of such property;

(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

Provided ....

Provided further ....

(c) any property, other than immovable property,—

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided ....

Provided further that this clause shall not apply to any sum of money or any property received —

(a) from any relative; or

(b) on the occasion of the marriage of the individual; or

(c) under a will or by way of inheritance; or

(d) in contemplation of death of the payer or donor, as the case may be; or

(e) from any local authority as defined in the Explanation to clause (20) of section 10; or

(f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(g) from any trust or institution registered under section 12AA.

Explanation.—For the purposes of this clause,—

(a) ....

(b) ...

(c) ...

(d) "property" means the following capital asset of the assessee, namely:—

(i) immovable property being land or building or both;

(ii) shares and securities;

(iii) jewellery;

(iv) archaeological collections;

(v) drawings;

(vi) paintings;

(vii) sculptures;

(viii) any work of art; or

(ix) bullion;

(e) "relative" means,—

(i) in case of an individual —

(A) spouse of the individual;

(B) brother or sister of the individual;

(C) brother or sister of the spouse of the individual;

(D) brother or sister of either of the parents of the individual;

(E) any lineal ascendant or descendant of the individual;

(F) any lineal ascendant or descendant of the spouse of the individual;

(G) spouse of the person referred to in items (B) to (F); and

(ii) in case of a Hindu undivided family, any member thereof;

(f) ...."

In substance, as per section 56(2)(vii) of the Act {hereinafter referred to as "the provision" for the sake of brevity}, the following types of 'income' are taxable in the hands of the recipient, being an Individual or a HUF:

(a) Receipt of any sum of money exceeding ` 50,000/-, without consideration

(b) Receipt of any immovable property, whose stamp duty value is more than ` 50,000/-, without consideration or receipt of any immovable property for which the difference between the consideration and the stamp duty value is more than ` 50,000/- (inadequate consideration)

(c) Receipt of any property, other than immovable property, as defined in Explanation (d) to the provision and having fair market value more than ` 50,000/-, without consideration or such property for which the difference between the consideration and the fair market value {as defined in Explanation (b)} is more than ` 50,000/- (inadequate consideration)

{In view of Explanation (d) to this provision, it appears that the property referred above must be a capital asset in the hands of the recipient.}

1.2 Some of the relevant aspects of this provision [clause (vii)] – so far as the relevant to the present article - are as under:

(i) This provision is applicable only to two types of recipients/entities, namely, an individual or a Hindu undivided family. If the "status" – as commonly understood – of such recipient/entity is other than individual or HUF, this provision will not be applicable. Therefore, the very starting point to attract this provision is determination of 'status' of the recipient.

(ii) The second stage is to determine the concept of receipt, as the taxability is on the event when such assessee "receives" any cash, immovable property or movable property as enumerated therein. This concept has two sub-concepts for determination:

(a) In what capacity such person should 'receive' such property so as to get covered within this provision; and

(b) At what point of time such person can said to have received such property.

(iii) The third stage is to determine whether such receipt is without consideration or without adequate consideration, in terms of the yardstick provided in this provision.

It is only after crossing these three check posts and filtering such transaction through these three barriers that further probe will have to be conducted, namely, whether it is received from specified persons/at specified occasions/under specified circumstances. It is only after overcoming these hurdles that such receipt will be taxed as income under the head "Income from other sources" in the hands of the recipient.

Some of the above aspects are discussed briefly hereinunder.

I. As discussed, the first condition is to decide the "status" of the person who receives such property. Now, in the context of a private trust, a receipt takes place at two occasions:

(a) When the settler/author of the trust contributes/hands over property to the trust /trustees and when the latter receives any accretion thereto; and

(b) When the trustees distribute the trust properties among the beneficiaries, upon dissolution or otherwise.

The scope of the article is to cover the contribution by the author and the distribution upon dissolution. Now, so far as the second stage is concerned, there does not seem to be much complexity, as the recipient would be clearly an identified person vis-a-vis the 'status' under which he would be receiving, be it an individual, a HUF, a company, etc. However, an issue may arise to ascertain the 'status' when the trust property is handed over by the author of the trust / the settler to the trustees. In order to appreciate this, it may be appropriate to attempt to understand the concept of a private trust / trustees vis-a-vis the trust property and the beneficiaries, so far as relevant for the preset article.

A. WHAT IS TRUST?

(i) Though the word "trust" has a fairly popular and common sense meaning and is easily understood by laymen without any complexity, the term "trust", as a legal concept, has a unique and mystical position having its own share of myriad layers of complexities. Especially on the aspect of ownership, one needs to appreciate the concept of dual ownership as understood under the English law vis-a -vis existence of "legal" and/or "equitable" estate over the trust property. The concept of "trust" – even as a legal concept – has a fairly long history in India, right from 17th century. The present Indian Trusts Act, 1882 was enacted to consolidate various laws and amendments and orders relating to private trust and trustees as prevailing then.

(ii) A trust is a creature of law inasmuch as its validity, legal existence and functioning, etc. is subject to the provisions of the Indian Trusts Act, 1882; it is governed by the provisions of the said Act. The trustees, though legal owner of the trust property, hold and deal with the properties of the trust on behalf of and for benefit of the beneficiaries of the trust. The trustees are the custodians/managers/administrators of the trust properties. They stand in a fiduciary capacity with respect to the beneficiaries and are accountable to them for any lapse on their part. "Trust" is defined in section 3 of the Indian Trusts Act, 1882 {"the Trusts Act"} as under:

"A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner".

This definition encompasses the very essence and the basic concepts regarding a trust. Further, for a trust to be validly created, certain conditions prescribed under the Trusts Act are to be fulfilled. From analysis of various provisions of the Trusts Act, it can be said that a trust is an abstract, which however has a legal recognition inasmuch as its valid and legal existence depends on the fulfilment

of the conditions of, and as regulated by, the law governing trusts. However, there is no uniformity in recognising a trust as an independent legal entity; in many cases, a trust is represented by and through its trustee/s. One may have regard to the positions under the allied laws, like SEBI, FEMA, etc. An issue may arise as to how far reliance can be placed on the position under general law or other fiscal laws.

B. POSITION UNDER THE INCOME TAX ACT, 1961

(i) Under the Income-tax Act, 1961 {"the Act"}, the term 'trust' is not separately defined, although extensively referred, and recognized, as a separate entity in various sections of the Act; except in Explanation 1 to section 13A of the Act, where it is provided that "For the purposes of sections 11, 12, 12A and this section, "trust" includes any other legal obligation.......". For example, securitization trust, Credit Guarantee Fund Trust, Venture Capital Fund - under a trust deed, electoral trust, trust under sections 47 (iii), 49 (1) (iii) (d), 62, 160, 161, pre-amended 194C, etc., apart from, of course, charitable and religious trusts as mentioned in sections 11 to 13 and 80G of the Act. However, it is not clarified under what category of "person" a trust falls or under what "status" a trust is to be recognised/assessed. As per the charging section 4 of the Act, income tax is levied on every person. The term 'person' is defined in section 2(31) of the Act. As such, for the very applicability of the charging section to trusts, it is essential that the trusts fall within the definition of 'person'. Now, this definition of 'person' is an inclusive one and includes an individual, a Hindu Undivided Family, a company, a firm, an association of persons (AOP) or a body of individuals (BOIs), a local authority and every artificial juridical person, not falling within any of the preceding entities. Explanation added by the Finance Act, 2002 provides that for the latter four categories, it is not essential that there should be any income earning or profit motive. As such, the term 'person' as defined in the Act has a very wide meaning and can take within its ambit various forms of legal persons. Different legal persons and various combinations thereof have resulted in various litigations, and conflicting views have been expressed by various courts on the subject of "status of a person" under the Act. The relevance of determining the status/entity of the assessee under the Act is that there exist separate/unique provisions/rules for each of the entities enumerated; be it for charging provisions, for exemption provisions, for procedural provisions, etc. It is important to note that the legislature has not added 'a trust' in this definition of 'person'. In other words, a trust is not regarded as a separate or independent entity in the definition of 'person' under the Act; it has to be covered under any of the seven entities enumerated in this definition. Corollary to this, under section 160 read with 161 and 164 of the Act, a trust is not made taxable directly in that status; instead, the trustees are made liable to be assessed with respect to the trust income, in representative capacity. Interestingly, though, there are certain provisions under the Act that tend to deal directly with a trust as an entity; for example, Venture Capital Funds, etc.

(ii) Under the Act, one special inclusion in the definition of 'person' is an Artificial Juridical Person. An artificial juridical person is a person who does not fall under any of the other sub-clauses specified in the definition of 'person' u/s 2(31). The courts have time to time held different legal entities as falling within the meaning of "Artificial Juridical Person". Generally, an artificial legal person takes its identity from the statute governing it. Can a trust be one such legal person? For example, in US Model of Double Tax Convention, the term "person" specifically includes "trust".

(iii) While there can be little doubt that a 'trust' falls within the definition of 'person', it is interesting to note that the capacity/ status of a private trust under the Act is still not very clear and there exist conflicting opinions of various courts on this issue. The issue is what factor/s are determinative to decide the 'status' of a private trust; whether the status of the beneficiaries or the status of the trustees, whether the number of beneficiaries or the number of the trustees, whether the nature of the activities carried on by the trust, that is, business income or non-business income, whether the trustees /beneficiaries can said to have voluntarily joined together for a common purpose or not, whether the trust is discretionary or otherwise, whether the trust is revocable or otherwise, whether the trust is specific or otherwise, whether the individual share of the beneficiary is identified/determinate or otherwise, whether the trust is testamentary or otherwise, that is, created through will or otherwise, etc. It is to be noted that under general law, all or any of the three key players, viz., the settler, the trustees or the beneficiaries, can be either individual, HUF, company, etc.; except for any specific provisions to the contrary. Certain judgments tend to hold that under the tax laws, if the context so requires, the term 'individual' does not necessarily and invariably always refer to a single natural person, it is wide enough to include a group of persons forming it. Further, certain sections of the Act, like sections 160, 161, 164 and 166, determine who shall be liable to represent the trust under the Act and what will be the extent of his liability in such representative capacity. While section 160 mandates the trustee of a trust to be a representative assessee vis-a-vis the income received or entitled to receive on behalf of or benefit of the beneficiary, section 164 postulates that in respect of such income, such trustee shall be subject to the same duties, responsibilities and liabilities as if such income were income received by him beneficially and shall be liable to assessment in his own name in respect of such income. However, such assessment shall be deemed to be made upon him in his representative capacity only and the tax shall, subject to other provisions of Chapter XV, be levied upon and recovered from him in like manner and to the same extent as would be leviable upon and recoverable from the beneficiary. An issue may arise whether these provisions really determine the status under which such a trust is to be assessed or merely provide the manner of computing the income and the tax rate thereon.

(iv) Though there are conflicting judgments on this issue, the predominant view appears to be that such a trust is to be assessed in the status of an individual, on the basis of the status of the trustee as such, while certain decisions indicating otherwise, including indicating that such a trust is to be assessed as an AOP. However, as this specific issue is already being covered in the earlier /other articles of this Special Story, this aspect need not be repeated herein again. This is because, in terms of section 160 read with 164 read with section 2(24)(xv) of the Act, the liability and the status of a "representative assessee" vis-a-vis the income received by the trust as enumerated therein may also be applicable for section 56(2)(vii) and there is nothing to indicate the contrary legislative intention or any such requirement in the context.

(v) Therefore, a private trust if assessed or assessable in the status of an individual / HUF, it would be covered by this provision. However, if on facts it is concluded otherwise, that the trust is assessable as a company, an AOP/BOI or an Artificial Juridical Person, then the section will not be attracted and, accordingly, nothing would become taxable in the hands of the trust / trustees under this provision. Ultimately, perhaps, the Assessing Officer will have the last laugh, as the argument of many of the assessees would be contradictory; for the assessment u/ss 160, 161, 164, etc. the status of 'individual' is claimed, while for section 56(2)(vii), the status other than individual may be claimed.

II. Having decided the 'status' of the person receiving the property in the context of section 56(2)(vii) of the Act – and, consequently, the exigibility or otherwise of such person – the second stage is to decide in what capacity such person has received the property, within the meaning of the term 'receives' as contained in the provision. Apart from the fact that the word "receive" is not defined, it poses difficulties in understanding vis-a-vis its setting; more particularly, in the context of an immovable property. A person may receive a property only temporary, say, as a caretaker, or may be under a mortgage, pawn, licence, etc. It is quite certain that an act of simple receipt of a property, without regard to the nature of the receipt or the capacity in which the recipient is receiving the property, is not enough to tax the recipient under this provision. The issue is whether he has received the property as full and free legal owner thereof or otherwise. Further, even in case of legal ownership, whether simple and bare legal ownership (shell right) over the property is enough or is it that beneficial ownership thereon is also relevant. Whether the person is free to exercise and enjoy his right (of whatever nature) over the property (of whatever nature) independently. This aspect is very crucial as well as complex. However, for the limited purpose of the present article, one need not go deep into the aspect. This is because in so far as receipt of the trust property by a beneficiary upon dissolution of the trust is concerned, he would be receiving the property as his fully own and in personal capacity (subject to any specific term in that regard in the Trust Deed, if any) and, as such, there does not arise much complexity. However, an issue may arise when a trustee receives trust property for an on behalf of the trust/beneficiary. It is now a very well settled legal position that though such trust / trustee can be regarded as owner in a strict legal sense, the trustee holds the property in a fiduciary capacity, for and on behalf and for benefit of the beneficiaries. In fact, as per section 8 of the Trusts Act, the subject matter of the trust must be property transferable to the beneficiary. It has been held that in terms of the scheme of the Trusts Act and, more particularly, in terms of section 56 thereof, the beneficiaries are the ultimate masters of the trust who are entitled to have the intention of the author of the trust specifically executed, to the extent of the beneficiaries' interest, provided the same does not conflict with the intention of the settler. As such, keeping in mind this peculiar nature of "receipt" in the hands of the trustee, it may be possible to take a view that such receipt is not contemplated u/s. 56(2)(vii) of the Act. It may be relevant to note that in Explanation (d) to this provision, the term 'property' is defined as:

"property" means the following capital asset <u>of the assessee</u>, namely, …….

As such, the contextual setting of the provision suggests that the recipient should receive the property as his own, over which he can exercise full and independent right and control, including the right of enjoyment of the benefits of the ownership. As against that, a trustee receives the trust property, neither as his own nor does he exercise independent right or control over such receipt. It may be that such cases are not contemplated at all to be covered by this provision or such a transaction is not to be regarded as receipt within the meaning of the term 'receives' as contained in the provision.

A view may be forwarded that if the trustee cannot said to have 'received' the property, at least the beneficiary can said to have "received" the property, if not directly but through the trustee, at that time; specially in cases of definite or determinate or non-discretionary trusts and the beneficiary is income as well as corpus beneficiary. If one goes by the intent and the spirit of the law, it may be difficult to defend the exigibility; however, the language and the setting may fall short for this. Without going into the complex issues of actual receipt vis-a-vis symbolic/constructive receipt, such a view may not find favour with judiciary, keeping in mind the context and the setting; though the issue throws many challenges.

III. The third stage is to ascertain whether such receipt, at the either stage, is without consideration or without adequate consideration in terms of the criteria laid down in the provision. It is important to note that the provision, or for that matter the entire Act, is silent on this term 'consideration'. As such, one may have to have regard to the meaning given to this term under general law, like Contract Act, etc. Indian Control Act, 1872

defines "consideration" in section 2(d) thus: "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise". Under the Act, this term 'consideration', used in the context, when applied to a private trust creates peculiar situation. One view can be that, in the context, this term signifies a situation where the property received would/could have been otherwise available to the recipient on payment of some consideration, that too, measurable in terms of money and comparable with the criteria laid down in the provision. If it is not, either such transaction is not contemplated to be covered by this provision or, in such a case, the machinery provision fails and as the machinery and the charging provisions are integrated, the charging provision also fails. Can the present transactions be regarded as of such type?

So far as receipt by the trustee is concerned, in view of the above discussion and in view of the unique position of the trustee vis-a-vis the trust property and the beneficiaries and his duties and obligations towards the both, it is possible to take a view that the receipt by him is not without consideration, not even without adequate consideration. In so far as receipt by the beneficiary upon dissolution of the trust is concerned, the position is little difficult. A view being canvassed is that it cannot be said that the beneficiary received the property without consideration, much less with inadequate consideration. The beneficiary receives the property in terms of the trust agreement / trust deed and the specific obligation cast upon the trustee to do so and, more importantly, in terms of the specific interest in his favour already created earlier. The distribution is nothing but crystallisation of such interest already bestowed upon him earlier. A parallel can be drawn with the case of distribution of HUF property among the coparceners/members upon partition or distribution of partnership property by a firm among its partners upon its dissolution. The case may be on a stronger footing if the distribution is out of the trust income that has already suffered tax earlier. However, this aspect need not detain one further, as there are already certain decisions in support of this proposition; some of which are as under:

(i) *Ashok C. Pratap vs. ACIT – [(2012) 139 ITD 533 (Mum.)]*

(ii) *Smt. Sudha V. Iyer vs. ITO – [(2011) 48 SOT 173 (Mum.) (URO)]*

(iii) *Punitaben Karsanbhai Patel Oral Specific Deferred Family Trust* vs. ITO – [(2006) 103 ITD 175 (Ahd.) (SB)]*

As such, this vital condition fails in the case of private trusts. However, the legal position is yet to be tested by higher authorities and minutely.

In substance, it can be concluded that so far as exigibility of the provision is concerned, broadly, the trustees can considered to be in 'safe zone' while the beneficiaries can considered to be in 'danger zone' – but not out of the game for the time being; until of course, the issues are fully and finally considered, analysed and adjudicated by the court.

IV. In so far as rest of the conditions are concerned, that is, receipts from specified persons or under specified circumstances or upon specified events – as provided in the second proviso to section 56(2)(vii) read with Explanation (e) thereto, these are really exemption provisions in nature. If a given case falls, as a matter of fact and in the context, within such exemption provisions, the receipt would be saved from the rigour of the provision to that extent. For example, if vis-a-vis the beneficiary, the settler (not the trustee) is a 'relative' within the meaning of Explanation (e), as may be the case in many of typical small Indian private family trusts, the receipts of the trust property by the beneficiary upon the distribution will not be taxable, assuming such receipt has managed to pass through the above discussed filtering process. Similar will be the case of testamentary trust, that is, a trust by will, if it can be proved that, even otherwise, the property received was under a will or by way of inheritance.

As I have stated in the beginning, this is only scratching the surface, sensing only a tip of the iceberg. Again, other provisions of the Act and other special enactments concerning private trusts as well as contrary provisions in a particular trust deed/ agreement may pose further challenge, 'trust' me!

CA Naresh Ajwani

FEMA Aspects of Private Trusts

Part A – Relevant factors and background for discussion

1. Preface and general observations

1.1 The subject of private trust is amongst the most complicated subjects. It is not so just under FEMA but also under other laws. There are several reasons for it.

One of the issues which gives rise to complexity is – **is trust a contract or a person?**

Under the Indian trust law, a trust is a contract /arrangement. Trust is not a person.

However many a times, trust is referred to as a person – not only in general parlance but also under some laws. For example, under SEBI laws mutual fund and venture capital fund is registered as a trust under the Indian Trust Act. However investors can "invest" in it. It is accepted that each law has its own purpose. Treatment under one law may not apply for another law. Therefore it is alright for a trust to be considered as an arrangement under trust law and a person under another law.

For Indian tax purposes, a trust is not considered as an entity. A trustee is taxed as representative assessee.

Under FEMA, there is no clarity on trusts – private or otherwise. Therefore there are many issues. For some purposes (discussed later), a trust is considered as an entity. See para 4 for discussion.

These differences create controversies and at times regulatory arbitrage.

It is acknowledged by the Government too that a trust is an unregulated entity. As the ownership and control can be easily altered, approval for foreign investment in a trust (Venture Capital Fund) is given on a case by case basis. Wherever issues are not clear, approval is not given. (See Annexure A for an extract of the FIPB review report.)

1.2 Another issue which creates difficulties is – ownership of assets and income. A trust creates **"split ownership".** A trustee is a "legal owner" and beneficiary is a "beneficial owner". This is one of the unique features of the trust.

The trust deed lays down the powers, rights and obligations of the trustee and beneficiary. When deciding on an issue, should one consider the status of a trustee or the beneficiary or both?

1.3 A private trust can be used for several purposes. One of the important purposes is holding of assets, and transfer of assets to the next generation (estate planning).

Today assets are held cross border. Foreigners hold assets in India and vice-versa. This gives rise to FEMA issues.

Trust is used for other purposes also like asset protection from undesirable elements, family

holding over business, etc. I have discussed the FEMA issues considering the transfer of assets to the next generation.

1.4 For the sake of clarity, the parties involved in a trust are stated below –

Settlor – Person who makes a settlement in a trust (forms a trust) by entrusting assets in a trust. (It refers to the person who wants to transfer assets into a trust. Settlor can be someone else like a professional who forms a trust with nominal funds. Donors are persons who transfer the assets to the trust. For the purpose of this article, "Donor" is a person who gifts funds to a trust. He may or may not be a settlor / trustee / beneficiary.)

(In this article, the words "settlor", "owner", and "donor" have been used inter-changeably.)

Trustee – Person whom the settlor trusts; and to whom the settlor transfers some funds or property to look after for the benefit of the beneficiaries. He is the "legal owner" of assets, is responsible for managing the trust assets and for legal compliance. (A trustee is like a custodian. He has a fiduciary relation with the beneficiary.)

Beneficiary – Person who is entitled to the income and assets of the trust as laid down in the trust deed. The beneficiary may be identified or not. Beneficiary may exist on the date of trust formation or may come into existence in future. (These are usually spouse and children of the settlor. At times the settlor is also the beneficiary.)

(In this article, the words "beneficiary" and "heir" are used interchangeably.)

Outside India, there is a concept of "Protector". A "Protector" is a person who is expected to protect the beneficiaries. He can ensure whether the trustee is performing as per the trust deed or not.

The settlor, trustee and beneficiary can be individuals or non-individuals.

The respective trust law can have a bearing on the rights of beneficiaries. For example, under the Indian law, the beneficiary has a right to demand his shares from the trustees in case of specific trusts. Whereas under the UK law, I understand that the beneficiary's rights are not that strong. One will have to consider the trust law as well as the trust deed.

1.5 A trust can be revocable or non-revocable. On formation of trust and revocation of the trust, FEMA provisions should be seen independently.

1.6 I have discussed legal issues in this article. This may appear technical. Therefore at the end, I have taken up some practical issues if persons want to form a trust.

2. Different factors for considering FEMA provisions

Various factors can affect FEMA provisions. Some of the important factors are as under:

2.1 Residential status of wealth owner, location of the wealth, and residential status of the heir / beneficiary

A table below briefly illustrates the different situations of owner, assets and beneficiaries.

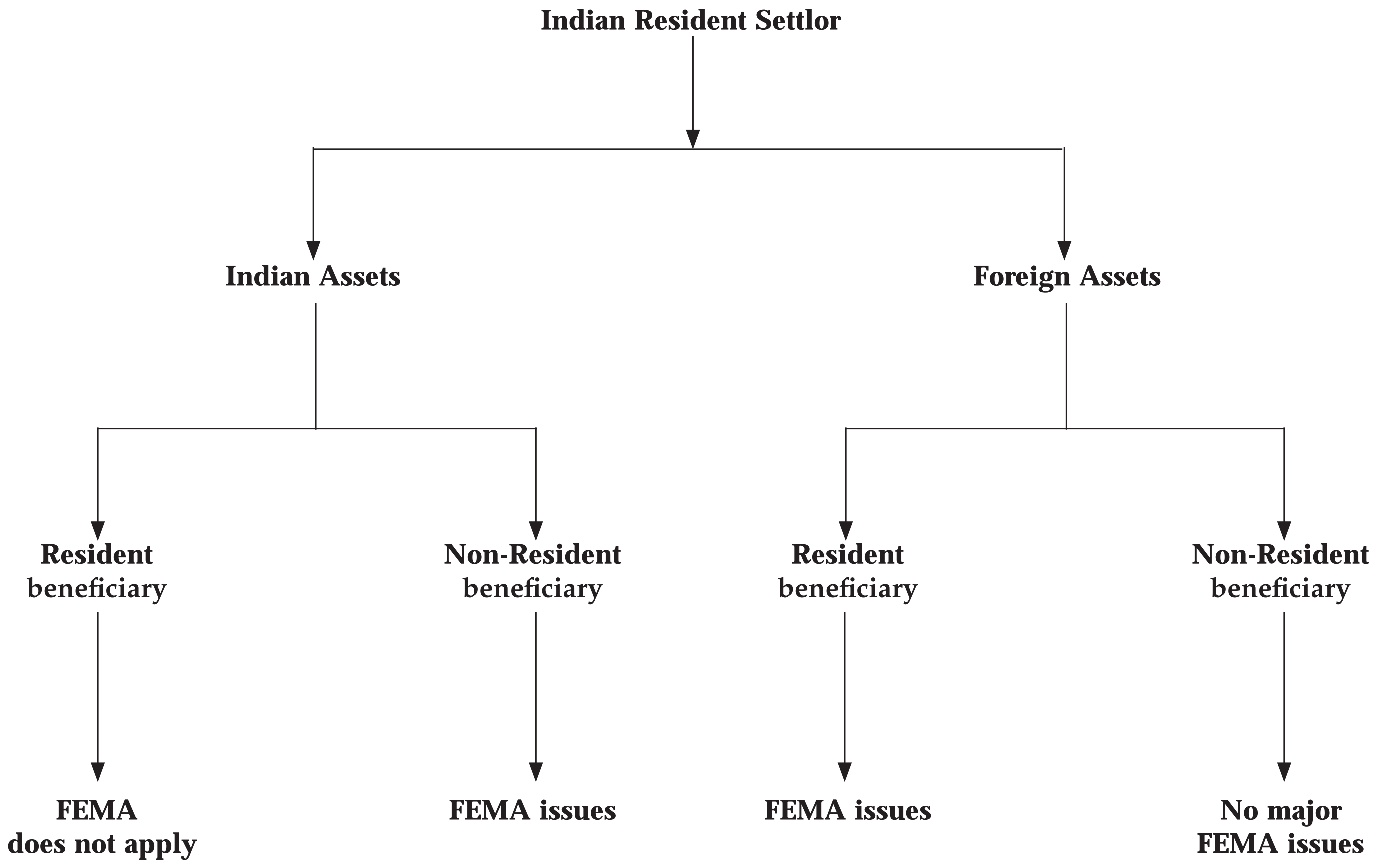
Wealth owner	Assets	Beneficiary / Heir
Indian resident	In and outside India	Resident and Non-resident of India
Non-resident of India	In and outside India	Resident and Non-resident of India

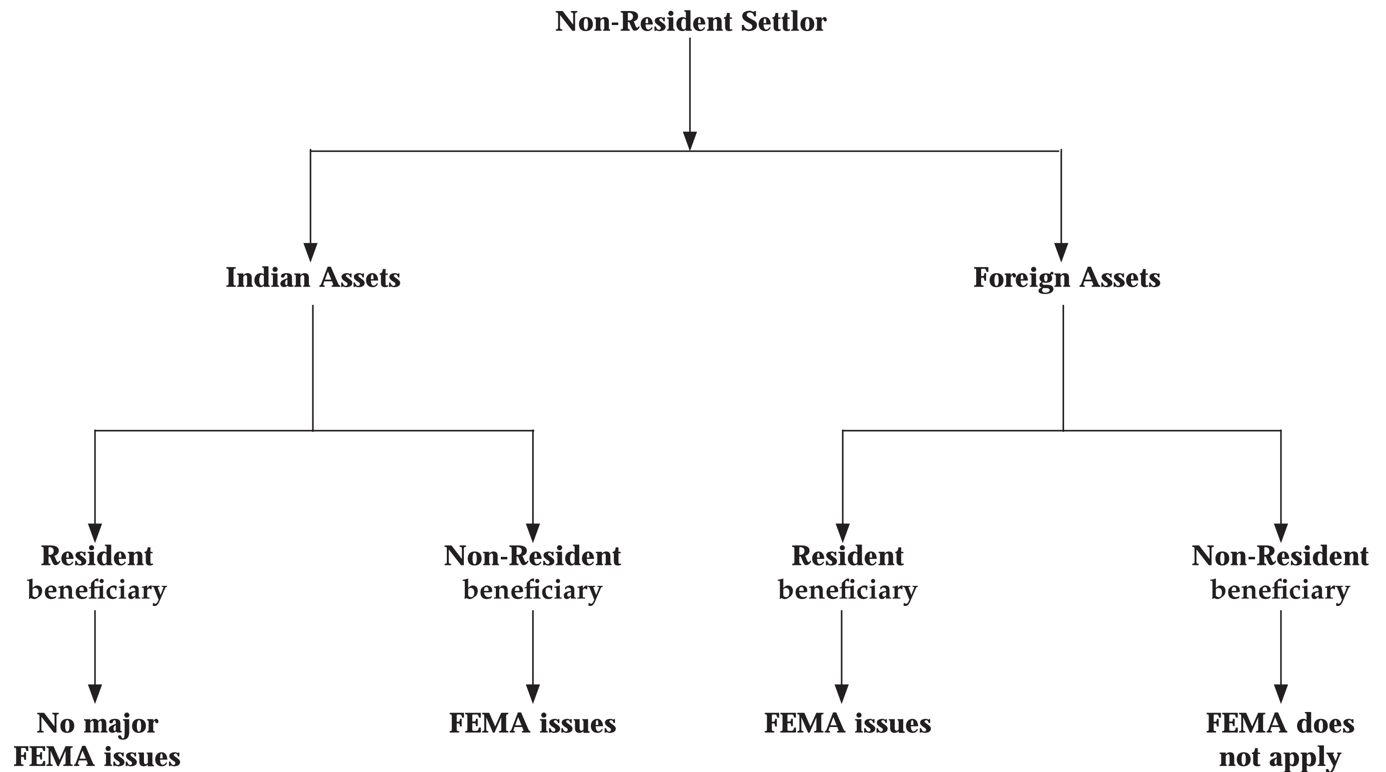
Individual status of a person – whether he is an Non Resident Indian (NRI) or non-NRI can also make a difference. It can also make a difference if the person has always been an Indian resident, or was a non-resident earlier and has now become an Indian resident (Returning Indian).

[A person may want to migrate outside India or into India (change of residential status). That can make a difference for considering future distributions from / dissolution of a trust.]

Permutation of situations

There can be some more permutations. To give an idea, permutations are given below in a chart.





2.2 Transactions

FEMA issues can arise for the following transactions:

– Settlement of trust.
– Earning of income in the trust.
– Distribution of the trust property – during lifetime of the trust, or on dissolution.

In case of income of a trust, if the settlement of assets is permitted, the consequent income is also permitted. If settlement is permitted, sale of investment normally is permitted. However there could be some restrictions such as on transfer of immovable property from NRI to non-resident.

If settlement is permitted, distribution also is permitted. There could be issues in case of distribution to NRIs. He may not be able to remit the funds outside India beyond US $ 1 mn. per year.

In the past, RBI has permitted distribution of income of the trust to NRIs in the NRO account, if the trust was formed through a Will.

2.3 Manner of distribution

Assets can be distributed to the next generation through different modes such as:

– Gift.
– Will.
– Insurance.
– Trust.

In this article, the focus is on Trusts. To some extent Will and gift issues are also considered to compare it with Trusts.

It should be noted that bequests by Will, is different from Trust. Even if the purpose may be same, legal implications are different. In case of a Will, there is an "inheritance" of assets. In case of Trust, it is a receipt of funds/gift/ distribution. There is no "inheritance".

2.4 Kinds of trust

While there are several kinds of trusts, the two main kinds being – specific trust (where beneficiaries' shares are specified), and discretionary (where the beneficiaries' shares are not specified). Depending of the kind of trust, there can be different FEMA implications.

A specific trust gives rise to some difficulties. Therefore many a times a discretionary trust is set up in an offshore centre. However with the changes in the Income-tax Act and some FEMA rules, discretionary trust gives rise to other issues. These are discussed at appropriate places.

2.5 Place of forming a trust

A trust can be formed in India or outside India. In this article, the discussion is more on Indian trusts. Some issues about foreign trusts which have implications under FEMA are also discussed. In case of foreign trust, some answers will depend on the trust law of that country.

2.6 Summary of different factors

Summary of the factors to be considered are as under:

Residential status of:

– settlor.
– beneficiary.
– trustee.

Personal status of (is it a person - an individual, corporate, etc.):

– settlor.
– beneficiary.
– trustee.

Personal status of individual:

– whether settlor is an NRI or Non-NRI.
– whether beneficiary is an NRI or non-NRI.
– whether the settlor wants to change his residential status in future.
– whether the beneficiary wants to change his residential status in future.

Assets:

– location.
– kind of assets – shares, immovable property, etc.

– whether assets are held on repatriable or non-repatriable basis.

Trust:

– location – in India or outside India.

– kind of trust – specific or discretionary.

2.7 Ground reality

While some transactions are permitted under FEMA, things on the ground could be different. For example, bank account will have to be opened in the name of the trust. Opening a bank account in name of the trust may be accepted by some banks. It may not be accepted by some banks. People have faced difficulties in case of Indian trusts even where all parties are Indian residents.

If the trustee of an Indian trust with Indian beneficiaries is a non-resident, can the bank account be opened in the name of the trustee?

One will have to consider the ground realities also.

2.8 Guiding principle

As discussed above, under FEMA, there are no clear rules for a trust. For some purposes, a trust is considered as a person. That however cannot be a guiding factor.

A peculiar feature of FEMA is that it is not drafted in specific legal language. If one tries to interpret FEMA, it leads to many difficulties. It is best to consider FEMA as a policy law. Try and understand the policy behind the rules and follow the same. If there are any doubts, it is safer to obtain an approval. What cannot be done directly, cannot be done indirectly. It is safer to be conservative.

At times FEMA rules can lead to illogical results. For example, if a person inherits foreign property from a resident who had acquired such a property while he was a non-resident (Returning Indian – see para 3.6), he can keep the same outside India. However if he inherits foreign property from a non-resident, he cannot keep it outside India.

The two sections which most often apply are 3 and 8.

Under section 3, without a general or specific approval from RBI, no person can deal in foreign exchange with anyone – except an authorised person (usually a bank). No person can make any payment to or for the credit of any non-resident in any manner. No person can receive any payment from a non-resident in any manner – except through banking channels.

Under section 8, if any person is entitled to any foreign exchange, he should bring it back to India within specified time.

RBI has permitted transactions under sections 3 and 8. However many permissions come with several conditions. If the transactions do not fall under general permissions, the same cannot be done – except without a specific approval from RBI.

In this article, some legal issues and controversies are discussed. A guiding principle to understand the issues can be – what is the ultimate effect of the transaction? Is that ultimate effect permissible under FEMA? If yes, the transaction may be all right. Otherwise, obtain an approval. Or avoid the transaction.

If all persons and assets of a trust – settlor, trustee, beneficiaries, assets and location are in India/resident in India – there is no difficulty under FEMA. Conversely if all persons and assets are outside India/non-residents, FEMA does not apply. If any of the persons or assets in India and the rest outside India, it may be advisable to obtain an approval from RBI.

3. Some FEMA and Income-tax rules which are relevant to understand the FEMA issues for a private trust

3.1 Payment to a non-resident by an Indian resident:

An Indian resident cannot make any payment to a non-resident or for his credit, unless the payment is permitted under the FEMA rules. [section 3(b)]. This restriction affects the following transactions:

Gift

i) While giving a gift is a current account transaction, there is a restriction on the same under the Current Account Rules. An Indian resident is permitted to remit up to US $ 75,000 per year under the Liberalised Remittance Scheme (See paragraph 3.3 below). Under the scheme, an Indian resident can make a gift to a non-resident in foreign exchange through bank transfers. Gift can also be given in rupees to a close relative who is an NRI by depositing the funds in his NRO account. Gifting of movable and immovable property is not permitted under LRS.

ii) If he wants to give a gift of securities of Indian company to an NRI close relative, an approval is required to be taken from RBI. Up to 5% of the total issued securities can be given as gift per year limited to a value of US $ 50,000. [Regulation 10.A.(a) of FEMA notification no. 20].

iii) An Indian resident can give a gift of immovable property to an NRI. [Regulations 3 and 4(b) of FEMA Notification No. 20 read with master circular].

This restriction will affect the following transaction:

– Settlement of assets by Indian residents in an Indian or foreign trust with non-resident beneficiaries. (The effect of the transaction is that a non-resident is entitled to property.)

3.2 Creating an interest in favour of a non-resident

An Indian resident cannot create an interest in favour of a non-resident. (Section 2(e) – Capital Account Transaction). Thus if an Indian resident wants to create a trust wherein non-residents are beneficiaries, it requires an approval of RBI.

This restriction will affect the following transactions:

– Settlement of assets by Indian residents in a discretionary trust with non-resident beneficiaries.

– Settlement of some foreign assets in foreign trust with non-resident beneficiaries.

3.3 Liberalised Remittance Scheme

Liberalised Remittance Scheme (LRS) has been formulated for Indian residents to remit funds outside India for almost any purpose. Under this scheme, an Indian resident can remit an amount of upto US$ 75,000 (earlier US$ 2,00,000) per annum. It should be noted that under this scheme, funds can be paid. Assets in kind cannot be paid.

Under the LRS, several Indian families have invested outside India in immovable properties, shares and other assets. (There are some issues regarding investing in shares of a foreign company. However in this article, these are not discussed.)

This facility permits creation of foreign trusts by Indian residents by sending funds from India. It will help non-resident beneficiaries. However resident beneficiaries will benefit in a limited way as long as funds are not distributed.

3.4 Receipt of funds:

If an Indian resident becomes entitled to any sum abroad, he is required to remit the same to India within a specified time (generally 180 days). He cannot retain the same abroad. [Section 8 – Notification No. 9 – Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000].

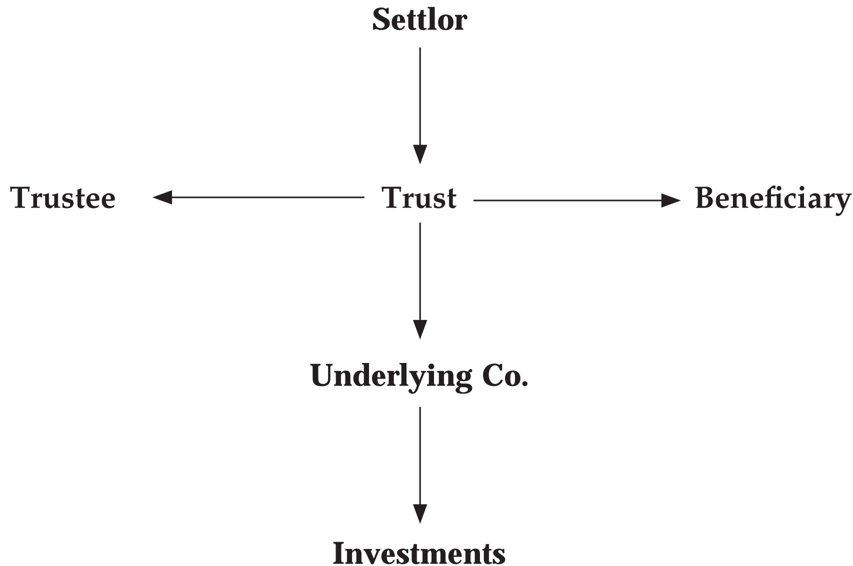
There are exemptions available in a limited manner. For example, if an Indian resident inherits foreign assets from a Returning Indian, the assets can be kept abroad. [Section 6(4)]. (See paragraph 3.6 for meaning of Returning India.)

This provision affects distribution of assets from foreign trusts to Indian residents.

3.5 Eligible investor

A non-resident can invest in India. An individual can of course invest in India subject to Foreign Direct Investment policy. An entity can invest only if it is an incorporated entity.

Unincorporated entity cannot invest in India. Assuming that a trust is a person, it is an unincorporated person. It is not eligible to invest in India. [AP Circular No. 14 dated 16-9-2003. Also see Annexure A for discussion on trust.] Therefore a non-resident cannot invest through his private trust in India. One can of course take care of this requirement by having an underlying company. The underlying company can invest in India. This is explained by a chart below:



This provision will affect non-resident settling shares of Indian companies in a foreign trust.

3.6 Returning Indian

"Returning Indian" is not a legal term. It refers to a person who was a non-resident under FEMA, but has returned to India and is now an Indian resident. As the provisions are designed for people of Indian origin who want to return to India, these are loosely referred to as provisions for "Returning Indians". The provisions were introduced in 1992.

A person who was a non-resident of India and had acquired assets outside India without any contravention of FEMA rules, can continue to retain the assets abroad. He does not have to remit the funds back to India. [Section 6(4)].

He can continue to retain the income on these assets outside India. He can sell the assets and reinvest the proceeds outside India. He can gift the assets to anyone or bequeath the same to anyone.

An Indian resident who inherits such foreign assets from a Returning Indian (assets acquired while the Returning Indian was a non-resident including assets out of incomes and conversions into new assets), can also enjoy the same benefits as a Returning Indian. For example, a father acquired immovable property in the USA while he was working there. After him, the property is inherited by his daughter who was always an Indian resident. The daughter can also hold the property and dispose of the same as she desires. (If the daughter's children inherit the property (while they are Indian residents), they cannot keep the property abroad.)

It should be noted that if the Indian resident receives property as gift, he has to bring it to India. If he receives as inheritance, he can keep it abroad.

This provision will affect the following transactions:

- Settlement of foreign assets by Returning Indians in a foreign trust.
- Settlement of foreign assets by Indian residents in a foreign trust.
- Distribution from foreign trust to Indian beneficiaries.

3.7 Foreign Direct Investment (FDI) in an eligible Indian entity

Under the FDI policy, non-residents investing in India can invest only in companies, LLPs (with prior approval from FIPB), and Venture Capital Fund (which is a trust) (with prior approval from FIPB). Investment in trust is not permitted.

This will affect the following transactions:

– Settlement of assets in India owned by Indian resident in an Indian trust with non-resident beneficiaries.

– Settlement of assets in India owned by non-resident in an Indian trust with non-resident beneficiaries.

RBI has generally taken a view that as long as beneficiaries or trustees are non-residents, the trust should not undertake any activities which is prohibited for non-residents.

3.8 Appointment as a trustee

It should be noted that appointment as a trustee by itself is all right. A trustee is like a manager and a custodian. An appointment as a trustee should not be considered as a transfer of assets to the trustee. However in case of discretionary trusts, there could be difficulties. Generally RBI has considered that appointment as a trustee on an Indian trust is permitted under FEMA. In any case, as long as trustee is a non-resident, the trust should not undertake any activities which are prohibited for non-residents. See para 4 for discussion on status of a trust.

Some variations

A trustee is a legal owner. If a trust is formed, and a trustee is appointed, it can be considered as a transfer to a trustee. If the trustee is a non-resident, it may affect the transfer of Indian assets. Correspondingly, if the trustee is an Indian resident, it can affect the transfer of foreign assets.

However if there are already some trustees, and one more trustee is appointed, it should not be considered as "transfer" of some assets from existing trustees to a new trustee.

3.9 Distribution from a discretionary trust

Income-tax issues are dealt with in separate articles by various authors. Here I have discussed only one issue. Under section 56, any person who receives any sum without payment of consideration or inadequate consideration, is taxable in the hands of recipient. Receipt from relatives is not liable to tax.

If a beneficiary receives any amount from a discretionary trust, is it taxable in the hands of the beneficiary?

In a specific trust, the beneficiary has clear interest in the assets and income of the trust. Income is taxable in the like manner and to the same extent as it would be in the hands of the beneficiary. Once the income is taxed, then if the beneficiary receives the same, it is not taxable. One of course has to consider section 56 at the time the settlor/donor gifts assets to the trust.

In a discretionary trust, the beneficiary does not have any right in the assets of the trust. One cannot say that a beneficiary has a vested/specific interest in the assets which he receives. Further, a trustee is not a relative. Hence a distribution from a trust cannot be said to be received from a relative. Here section 56 is to be applied at the time of distribution and not on settlement/gift to a trust.

In such a situation, will the distribution from discretionary trust be taxable under section 56?

Is that the intention? Perhaps not. However the language is clear. In the case of Ashok Pratap (23 taxmann.com 347), Mumbai ITAT has held that distribution on dissolution cannot be considered as "without consideration". Hence section 56 cannot apply. However the matter is not settled.

The correct position should be that if the beneficiary receives any distribution from the trustees, where the assets were contributed by the relatives, then such a distribution should not be taxable. This will be in line with the spirit of section 56, where gift from relatives is not liable to tax.

As on today, this is a serious risk factor which one should consider.

Thus this provision will affect distribution from discretionary trust.

Part B – Legal discussion

4. Status of a trust

4.1 Personal status

4.1.1 As discussed above, there is no clarity under FEMA about trusts. Foreign investment policy does not permit non-resident investment in a trust – except VCF. In following situations, a trust is considered as an entity – not because of law, but by way of practice.

Where Indian entity is a trust

i) Venture capital fund.

ii) Mutual fund.

Where foreign entity is a trust

i) A trust formed by process of law (e.g. charitable trust).

ii) Foreign Institutional Investor (FII) (will be known as Foreign Portfolio Investor under SEBI) – pension funds, etc. which can be trusts.

4.1.2 Legal analysis

What is a status of a trust under the FEMA law? Section 2(u) defines a "person" on the lines of income-tax law. It includes several persons including agency, office and branch of a person. However a trust is not considered as a person.

A trustee is considered as a legal owner under the trust law. Can the status of the trust be considered according to the status of the trustee? A trustee operates in dual capacity. One is in his personal capacity. His personal transactions and status is independent of status as a trustee. As a trustee, he is in fiduciary capacity in relation to the beneficiaries. In this capacity he is acting as a custodian and manager of the funds. The beneficial owners are the beneficiaries. Hence in my view, a trustee's status cannot be considered.

The transactions in a trust are undertaken for the benefit of the beneficiary. If immovable property is acquired, the beneficiary gets a beneficial right in the property. If at all, the transaction should be considered considering the status of the beneficiary.

However if the trust is a discretionary trust, does it make any difference as the beneficiary's share cannot be identified? In such a situation, one should consider trustee as the owner. However the trust does not get the status of a person due to trustee's status.

4.1.3 Can a trust be considered as an Association of Persons (AOP) or Body of Individuals (BOI)? FEMA does not define these terms. We can take guidance from the Income-tax Act and General Clauses Act.

Under the General Clauses Act, a person "shall include any company or association or body of individuals, whether incorporated or not". If a law refers to a person but has not defined it, one may rely on the General Clauses Act. "Association or body of individuals" has not been defined. AOP and BOI are juristic persons. These terms take their meaning from the law in which these are referred to. Under different laws, a family, managing committee and other kinds of groups have been considered as persons. These terms have been explained by the courts.

Under the income-tax law, person includes an AOP and BOI. Here also, AOP and BOI have not been defined. The courts have explained these terms. AOP requires a voluntary coming together of persons to carry out some activities jointly. (The purpose of "deriving income" has been done away with in the Income-tax act.).

BOI is a body of individuals. It is similar but not the same as AOP. If individuals happen to be together with a common purpose, they may be considered as BOI. The requirement of BOI is less strict compared to AOP. Holding investments and receiving income jointly cannot make the group a BOI. There should be some unity and common purpose. If the persons come together to trade in investments or manage assets jointly, it will be considered as BOI.

The courts have held that one has to see the totality of facts and decide whether a group is an AOP or BOI.

Who should be considered for the purpose of considering a group – trustees or beneficiaries?

For Income-tax Act, the courts are unanimous in their view that trustees are representatives only. Even if there are co-trustees, they cannot be considered as AOP of BOI. One has to look at the status of the person represented – i.e. the beneficiaries. If beneficiary is an individual, co-trustees will be assessed as an individual. If the beneficiaries are BOI or AOP, even a single trustee will be assessed as BOI or AOP.

As far as beneficiaries are concerned, can they be considered as AOP / BOI? It depends on the situation. If the trust has only investments and the income is being received for the benefit of all beneficiaries, it cannot be considered as BOI. Merely holding investment and receiving income for the joint benefit of the beneficiaries is not considered as sufficient to hold the group as BOI. Even if the trustee looks after the business for the joint benefit of beneficiaries, it will not be a BOI.

Can it be considered that beneficiaries have a common purpose for which they have grouped together? It is difficult to say that beneficiaries have come together to form a BOI. Beneficiaries are specified by the trustees. They do not come together to do some activity. The assets of a trust are being managed for the beneficiaries, not by the beneficiaries. However, under some situations, say if the beneficiaries come together and want the trustee to manage the assets for the joint benefit of the beneficiaries, it may become a BOI.

Thus it is very difficult and perhaps rare that a trust for passively managing the assets for the beneficiaries will be considered as BOI. Trust cannot have an independent status of its own. In practice, for some purposes, a trust is considered as a person.

If the trust is considered as a person, it will have different implications. If the trust is an Indian trust, then any non-resident interest will be considered as a capital in the trust. Correspondingly, in a foreign trust, if a resident has any interest, it will be considered as his capital. FEMA rules will apply accordingly.

4.2 Residential status

4.2.1 The residential status of a trust is relevant only on the assumption that a trust is a person. If it is considered as a contract or an arrangement, there can be no residential status of a contract.

Assuming that a trust is a person, how does one determine the residential status. There is no provision under FEMA which helps in this matter. Section 2(v) which defines "person resident in India", discusses the situation only in case of an individual; a person or body corporate which is registered or incorporated and branch, office or agency.

In case of unincorporated person, there is no definition. Even if the trust is considered as AOP or BOI, the definition does not apply.

4.2.2 In case the document of trust settlement is registered with the sub-registrar's office, will it be considered as sufficient to claim that a trust is an Indian resident? In my view the use of word "registered" means a person which comes into existence due to the process of law. For that process, there may be a registration required. However registration of a document for procedure or administration reasons cannot be considered as sufficient for a person's residential status.

4.2.3 If there is no definition, one will have to consider the facts and situation and then attempt to determine the residential status. For example, in case of mutual fund or a venture capital fund registered with SEBI, clearly it will be considered as an Indian resident trust.

If a foreign pension trust is investing in India, clearly it is a foreign trust / person incorporated outside India.

4.2.4 However in case of private trusts, there can be difficulties. Which factors should be considered for determining the residential status:

- Residential status of settlor.
- Location of assets.
- Residential status of beneficiaries.
- The governing law as stated in the trust deed.

- Residential status of trustee.
- Place of effective management (or similar criteria.)

For determining the residential status of a trust, one can safely say that location of settlor is not relevant as once he settles the trust, his role is over.

The location of assets also cannot be considered.

As far as beneficiaries are concerned, they could be located in different countries. Further, they do not play a role in management of the trust. Hence *prima facie* their status cannot be considered.

A good starting point could be the governing law as stated in the trust document. If a trust is formed in India with an Indian address, quite likely it is an Indian trust. If a trust has Indian trustees, it could again be considered as an Indian trust. However, if the management of the trust is in a different country compared to the country of governing law, it will be unfair to consider only the governing law.

The trustee's status could be considered to determine prima facie residential status. The trustees also could be located in different countries. Even if there is one trustee (say in UK), but the beneficiaries, governing law and assets are in another country (say India), it is difficult to consider only the trustee's status as the sole factor.

Place of effective management can be considered to determine the residential status. The place from where trustees manage the trust may be considered.

This in short, there is no test for determining the residence of a trust. It may be prudent to avoid controversies. It is advisable to state in the trust document itself that the trust will be considered as resident of XXX country. It will be governed by the law of XXX country.

One should consider the ultimate impact and then decide (para 2.8).

4.3 To summarise

Thus in short, there is no clarity on the status of the trust. One may keep debating and there will be no solution. It will be advisable to consider the following:

4.3.1 In case of specific trust, beneficiaries have a clear right. Hence for any transaction, one should consider as if the transaction is with the beneficiary. Thus if an Indian resident wants to settle an Indian trust with non-resident beneficiaries, it should be considered as Indian resident giving a gift to a non-resident. FEMA rules will apply accordingly. Even if it is considered that trust is a person, it will have non-resident interest. FEMA rules will apply accordingly.

4.3.2 If the non-resident wants to transfer assets in an Indian specific trust where he himself or some non-residents are beneficiaries, *prima facie* it appears that this is permitted transaction. However the FDI policy states that non-resident cannot invest in a trust (except VCF). Practically such a trust will be considered as an entity with a non-resident share. It is not permitted without FIPB approval.

This is where there is confusion between trust being considered as a person and trust being considered as a contract.

A better policy will be to obtain an approval from RBI for any Indian trust where there is a non-resident interest.

4.3.3 If the trust is discretionary trust with Indian assets, and the trustee is a non-resident, it can be considered as if the non-resident is the owner. One should consider FEMA provisions accordingly. For example, if the trust has immovable property as its assets and the trustee is a non-resident, it would be considered as if a non-resident owns property. That is not permitted. Even if beneficiaries are residents or NRIs, it would not be permitted.

Even for a specific trust, if a trustee is a non-resident, it will be better to obtain RBI approval. If primarily the trust is an Indian trust with Indian trustees and a non-resident is appointed as one of the trustees, it should be alright. (see Para 3.8 also).

4.3.4 In case of foreign trusts, if an Indian resident has any interest, it will be considered as

his property and accordingly, FEMA will apply. Under section 8, he has to bring the assets back in India.

4.3.5 A foreign trust will not be able to invest in India as it is considered as unincorporated entity and is ineligible to invest.

4.3.6 Finally, consider the effect of a transaction (see para 2.8 on guiding principle).

Let us consider some issues of an Indian trust and foreign trust.

5. Transactions relating to trust where there can be FEMA implications

Mathematically, if we consider four factors – i) Place of trust (India or foreign); ii) residential status of owner (Resident or non-resident); iii) Location of assets (in India or outside India) and iv) residential status of beneficiaries (resident of non-resident) – it gives 16 permutations!

We can add further factors like discretionary / specific trust, intention of owner and beneficiary to remain in India or become NRIs, etc. There can be umpteen number of situations. This just gives an idea of the complexities.

In the paragraphs below (5.1 and 5.2), I have covered most common and practical situations. These situations are where Indian assets are to be transferred to an Indian trust and foreign assets are to be transferred to a foreign trust.

The remaining situations are those which involve settling Indian assets in a foreign trust and foreign assets in an Indian trust. These remaining situations out of the 16 permutations, have been covered in a table in Annexure B at the end of this article.

In this article, it will be useful to consider following two illustrations so that practical aspects can be better understood.

Illustration A

Mr. IR is an Indian resident under FEMA.

He has assets in India - shares, immovable properties, mutual funds, bank accounts, etc.

He also has assets abroad – immovable properties, mutual funds and bank accounts, shares.

He may migrate abroad in future.

His children are in India and abroad.

Illustration B

Mr. NR is a non-resident of India under FEMA. He is of Indian origin (NRI).

He has assets abroad – shares, portfolio investment, immovable properties, bank accounts, etc.

His Indian assets are - shares, bank deposits, mutual funds, etc.

He may return to India in future.

He has children in India and abroad.

Issues which Mr. IR and Mr. NR may consider

i) They would like to transfer the assets to their children. They would like to keep a discretion to give funds as per their requirement and not equally.

ii) They would like to maintain flexibility of location of assets. If assets are abroad, they should be able to keep it abroad. If these are in India, they would like to take it out to the extent permitted.

iii) Other people / relatives should not be able to challenge the bequests. In case of a trust, if the assets have been transferred and are lying in the trust for a few years, the chances of it being challenged are less compared to a Will. A discretionary trust gives maximum flexibility.

They have thought of making trusts in India for Indian assets, and trusts abroad for the assets outside India.

A specific trust and discretionary trust can have different implications.

In this situation, what can be the FEMA issues?

[As may be relevant, M/s. IR and NR are referred to in this article as settlor, or donor, or owner of assets, or the persons who want to transfer their assets to the next generation.

It may noted that these are simplified facts. There can be umpteen permutations and combinations. Several personal issues have to be considered. For example,

the company could be in India but has assets located abroad and vice-versa; children in India may want to migrate abroad and vice-versa. One has to see complete picture and then decide.]

5.1 Indian resident settlor – Mr. IR

5.1.1 Mr. IR proposes to settle Indian assets in an Indian trust where beneficiaries are residents and non-residents.

i) Resident beneficiary:

As long as beneficiaries are Indian residents, FEMA provisions do not apply. It is a transfer of assets from one Indian resident to another Indian resident.

ii) Non-resident beneficiary

If an Indian resident settles Indian assets where non-residents are beneficiaries, it is like a gift in favour of a non-resident. Up to a certain limit (US $ 75,000), an Indian resident can make a gift to a non-resident. The gift however has to be in cash and not in kind. Settlement of property in a trust would not be in line with FEMA (see para 3.3).

Under the LRS, gift can be given in rupees by transfer to the NRO account of the NRI relative. If a gift is given to a trust, it may not be a transfer to a relative. Can one consider that if the beneficiary in the trust is a NRI relative, the effect is that a gift is given to a relative and hence it is permitted! It is doubtful. The funds have to be transferred to the NRO account of the relative.

Any interest sought to be created by an Indian resident in favour of a non-resident requires an approval from RBI (see para 3.2 and 3.7). There are no guidelines. However considering the requirement of estate planning, RBI may consider the application.

If however a trust comes into existence through a Will of an Indian resident, in that situation, a non-resident can become a beneficiary in a trust. In such a situation, an approval is not required from RBI.

iii) It will not make any difference whether the trust is specific or discretionary. The issues remain the same. In some specific situations, there may be some issues. For example, Mr. IR wants to make discretionary trust, but wants to make his NRI brother as a trustee. Will a transfer of assets be considered as a transfer from resident to non-resident? It will be better to obtain an approval from RBI (see para 4.2 also).

iv) One has to consider the implications of distribution of funds from the trust. If a non-resident receives any distribution from a trust, the funds can be deposited in an NRO account of the non-resident. Subsequently he can deal with the funds as may be permitted. This is subject to the condition that non-resident has become a beneficiary as permitted by RBI (see clause (i) and (ii) above).

5.1.2 Mr. IR proposes to settle foreign assets in a foreign trust where beneficiaries are Indian residents and non-residents.

This situation is a bit complicated. Let us consider this situation first from the angle of Indian resident settlor (Mr. IR). It would depend in the manner in which he has acquired assets.

i) Indian settlor

a) Assets acquired by Mr. IR under Liberalised Remittance Scheme (LRS)

Indian residents can acquire almost any foreign assets under the LRS. There are some restrictions. If the IR has acquired assets which are not permitted under LRS, settlement of those funds will have difficulties. However I will not get into more details on this situation.

Funds can be directly sent from India into the foreign trust.

Assets acquired under LRS can be dealt with in any manner. In other words, the assets can be settled in the trust. The trust can be specific or discretionary.

If Mr. IR has invested in shares under FEMA Notification no. 120 (Regulation 20A), he will not be able to transfer those shares in a trust.

Where the trust is discretionary, it may be considered as gift for section 56 of Income-tax Act. Even if the trust is specific, and any non-resident beneficiary is not a relative, there could be a tax exposure.

b) Assets inherited by Mr. IR from a Returning Indian

Assets inherited from a Returning Indian can be dealt with in the same manner as could be dealt with by a returning Indian. i.e. It can be settled in a trust [Section 6(4)].

c) Assets inherited by Mr. IR from a non-resident

There could be property inherited from a non-resident that cannot be kept outside India. It leads to an absurd situation where assets inherited from an Indian resident who had acquired assets when he was a non-resident, can be kept abroad and dealt with in any manner. However assets inherited from a non-resident, cannot be kept outside India. Hence their bequeathing them can have difficulties.

ii) Non-resident beneficiary

As a non-resident, *prima facie* FEMA does not apply to such a person. He can become a beneficiary if Mr. IR can transfer assets to the foreign trust.

There is no problem in receiving the funds on distribution.

iii) Resident beneficiary

This situation is tricky. If the trust is discretionary, on settlement there is no impact on the resident beneficiary. He does not have a right in the trust funds. Hence he is not required to do anything.

If the trust is specific, then there are issues. In a specific trust, a beneficiary has a clear beneficial right. A resident who receives any asset or income, is required to bring in the funds within the specified time.

Can an Indian beneficiary be required to bring in the funds in which he has a beneficial interest? Probably yes. It would depend on the trust deed. For example, if as per the trust deed the beneficiary can withdraw the funds only after a certain age, then even though he may be entitled to the funds, he cannot bring the same in India. However if he has a right to withdraw the funds, he will have to bring in the funds in India.

If the trust law is on the lines of Indian law, an adult beneficiary can demand that he be paid his share of funds. In such a situation, he will have to bring in the funds.

There could be practical difficulties. For example, if the asset in the trust is a share in immovable property, it may be difficult to sell and bring the funds.

Such a person should ideally take approval from RBI to hold on to such right outside India.

Let us compare this situation against inheritance.

Inheritance

An Indian resident who receives an inheritance from a returning Indian, can keep the assets outside India. He need not bring the funds back to India. He can also deal with the assets the way he wants. He can sell the same, reinvest, etc.

If he receives an inheritance from a non-resident, he is required to bring back the funds into India.

In case of assets of Returning Indians, one needs to balance the issue of flexibility of a trust, *vis-a-vis* keeping the assets abroad by the resident beneficiary.

5.2 Non-resident settlor – Mr. NR

A non-resident wanting to settle a trust can have implications under FEMA in following situations:

5.2.1 Mr. NR proposes to settle Indian assets in an Indian trust where some beneficiaries are residents and some are non-residents.

i) Resident beneficiary

If the beneficiaries are Indian residents, for all practical purposes, the residents have beneficial interest in the assets of the trust. It is like a gift from a non-resident to an Indian resident. The trustees may be residents or non-residents. Trustees are like administrators. However beneficial ownership is of Indian residents. There should be no difficulty under FEMA.

For assets like shares and immovable property, there is a specific permission for residents to accept gifts from non-residents. However for some assets like debentures or loans, there is no specific approval. Despite this, as long as an Indian resident is receiving a gift, there should be no difficulty under FEMA.

It will not make any difference whether the trust is specific or discretionary.

However if the trustee is a non-resident, legally he is the owner. FEMA provisions may apply accordingly. The problem is more in case of discretionary trust. The beneficiaries do not have clear right in the trust assets. (See paras 3.8 and 4.) It may be best to avoid such a situation.

ii) Non-resident beneficiary

If the beneficiaries are non-residents, the situation is similar to a situation of transfer from one non-resident to another non-resident.

A transfer from a non-resident to another non-resident is normally a permitted transaction. However there could be some transactions which are not under automatic route. In such a case a prior approval from RBI will be required.

If the asset is an immovable property in India, the beneficiary should be a person eligible for holding the property. An NRI can hold immovable property. However a non-resident (who is not of Indian origin) cannot hold immovable property. If the property is an agricultural property, even an NRI cannot hold the same.

If the assets are shares of an Indian company, transfer of shares from an NRI to a non-resident (non-NRI), requires prior RBI approval.

Further a trust with non-resident interest is not permitted. Hence it will be better to obtain RBI approval.

Thus one cannot generalise that if the settlor and the beneficiary are non-residents, the trust can be made. One needs to look at complete facts.

5.2.2 Mr. NR proposes to settle foreign assets in a foreign trust where beneficiaries are residents and non-residents.

i) Non-resident beneficiary

If the beneficiaries are non-residents, then FEMA does not come into picture. A non-resident wanting to give foreign assets to a non-resident can do so freely (one will of course have to check the other country's laws).

ii) Resident beneficiary:

If the beneficiary is an Indian resident, then there are some issues. In essence, a non-resident is giving a gift to an Indian resident by giving him a right in the benefits of a trust. All issues discussed in paragraph 5.1.2 will apply here also.

The Indian resident who receives a gift will have to bring in funds into India.

There are however some exceptions. If an Indian resident receives gift of foreign shares, he can retain the same. There is no need for him to sell the shares and bring back the funds. [regulation 22(1)(i) of FEMA notification no. 120].

If he receives gift of foreign shares from an Indian resident, he is required to bring the same back to India.

If foreign shares are received as inheritance (whether from an Indian resident or a non-resident), the same can be retained. [regulation 22(1)(iii)].

The situation is different in case of discretionary trusts. As long as there is no distribution, the resident cannot be asked to bring in the funds. If the trustee distributes any funds, the same will have to be brought into India.

Part C – Some practical steps

As seen in Parts A and B, there are several legal issues. There are several permutations. It becomes a difficult exercise to capture all issues. And at the end, one may still be confused as to what exactly is permitted and what is not. Therefore in this part, some practical steps which one may consider are discussed.

6. Practical steps

6.1 For Indian resident

i) For Indian residents, settling Indian assets in an Indian trust where non-resident are beneficiaries, requires an approval from RBI. This is because creating an interest in assets in favour of non-residents is like a gift. It does not fall under automatic route. If assets are bequeathed, a non-resident can inherit assets without any difficulty.

It will be prudent to apply to RBI and take an approval for settling assets in a trust where non-resident are beneficiaries.

ii) If he has non-resident heirs, it may be better to bequeath it through a Will.

Alternatively, a trust can be created so that it comes into existence through a Will. Such a trust with non-resident beneficiaries does not require an approval from RBI.

iii) Appointing non-resident trustees on Indian specific trusts should be permitted under FEMA as long as the assets are in India and beneficiaries are Indian residents. However in case of discretionary trusts, it may lead to a situation where the legal owner of assets becomes a non-resident. It may be better to take an approval from RBI (see para 3.8).

iv) Foreign assets can be settled in a foreign trust. However where Indian residents are beneficiaries, they may have to bring the assets back to India even during the lifetime of a trust. A discretionary trust can help keeping the assets abroad till dissolution of the trust. Distribution from a discretionary trust has risks of section 56 of Income-tax Act. If the beneficiaries are likely to migrate outside India, discretionary trust may be better.

6.2 For non-resident

i) A non-resident wanting to transfer Indian assets to Indian trust has issues similar to an Indian settlor. If the trust has resident beneficiaries, there is no difficulty.

If there are non-resident beneficiaries, it amounts to an Indian trust with non-resident interest. An approval from RBI should be obtained.

ii) For foreign assets, a foreign trust can be settled without any approval. If there are resident beneficiaries, they may have to bring the assets into India. If the trust has sufficient restrictions for withdrawal of funds, the resident's shares of assets can be continued outside India till the trust is dissolved or assets are distributed. Alternatively, the trust can be discretionary.

If the non-resident is planning to return to India, he may consider a Will so that the resident beneficiary can keep the assets abroad on inheritance.

7. Summary

Trust issues are complex. It will be best if Government or RBI can clarify situation at the earliest.

Annexure A

FIPB review 2009, pages 27 and 28

3.1.2 Ownership and Control of a Trust

14. DIPP had the occasion of examining the issue of ownership and control for a trust in the context of Press Note 2 of 2009 with respect to the proposal of M/s. India Rizing Fund. As per the proposal, M/s. India Rizing Fund is a trust formed under the Indian Trusts Act and is also a Domestic Venture Capital Fund registered with SEBI. The fund has obtained FIPB approval for receiving foreign contribution in the form of units for launching a Defence SME Scheme. This approval was subject to certain conditions applicable to the Defence Sector, as incorporated in para 7 of the approval letter. The said para stipulated that all the investments to be made by the trust are subject to adherence to the sectoral caps of the FDI Policy in Defence Sector.

15. M/s. India Rizing Fund requested for deletion of the para 7 on the following grounds:

(i) Domestic Venture Capital Funds and other mutual funds in India are structured as trusts and so is the Fund. The Fund anticipates foreign as well as domestic investors to subscribe to the units issued by the fund from time to time. These units are rupee denominated. Since, the Fund is issuing "units" and not "equity shares" to its foreign and domestic investors, such units cannot partake the functionalities of the equity shares and therefore neither foreign investors nor domestic investors will have ownership or any other rights in the Fund. For example, by investing in a unit of SBI Mutual Fund, the unit-holder does not have any rights, either ownership or control, on the operations of the mutual fund or in the companies where downstream investments are made by the mutual fund.

(ii) The fund has also furnished undertaking to the Indian Government that it shall maintain necessary registration as a Domestic Venture Capital Fund under the SEBI (Venture Capital Funds) Regulation 1996, and comply with all applicable provisions of the SEBI (Venture Capital Funds) Regulations, 1996.

16. The DIPP responded as follows:

i. It is seen that the control of trust can be at any of the 4 levels viz. the Settlor, Board of Trustees, Asset Management Company (AMC) and the unit holders. Trusts are essentially largely unregulated bodies and the trust deed and *inter-se* agreements between the unit holder and other entities decide the control. In this proposal ` 550 crore is to be sourced from international investors, through issue of units, but the Settlor of the Trust, the Board of Trustees and the AMC (which is controlled by resident India citizen settlor) are all Indian owned and controlled. Since the unit holders' investment is equity-like, with a desire for high returns, even though the other three entities are fully Indian owned and controlled, the unit holders exercise tremendous influence over all fiduciary decision making.

ii. The regulatory control of SEBI over the trust structure is minimal and there are no norms for diversified unit holding, limits on individual unit holding etc. As such, trusts remain unregulated entities for all practical purposes. Thus, until and unless proper regulations are made to exercise control over such entities, it will not be appropriate to permit them to invest in sectors where there are FDI caps and conditionalities. Alternatively the entire downstream investment should be taken as indirect foreign investment as per Press Note 2 of 2009.

iii. In view of the above, it is extremely difficult to clearly define the ownership and control of the trust in the way it is defined for a company and, therefore, the analogy for trusts, on the pattern of Press Notes 2, 3 and 4 of 2009, is extremely difficult to lay out.

17. DIPP, therefore, recommended that the conditions incorporated in para 7 of the approval letter should continue and not be deleted.

Annexure B

Trusts – Various permutations
(Refer para 5. It excludes situations covered in paras 5.1 and 5.2)

Sr. No.	Location of assets	Location of Trust	Residential status of beneficiary	Comments
1	Indian resident settlor / donor:			
1.1	In India	Foreign Trust	Non-Resident	Funds can be transferred under LRS to a foreign trust. That is discussed in para 5.1.1. Other assets cannot be transferred to a foreign trust.
1.2	In India	Foreign Trust	Resident	Funds can be transferred under LRS. However no purpose will be served. Only if it is a discretionary trust, with a foreign trustee, legally there can be saving of taxes on incomes. However there is a risk of section 56 of Income-tax Act. Theoretically, the assets can be settled in the foreign trust as residents are beneficiaries. So in effect there is a transfer of assets from one resident to another resident. However it will be nearly impossible to administer such a trust. How will one register the assets in the foreign trust's name? Again no purpose will be served.
1.3	Outside India	Indian Trust	Resident	The trustee or the beneficiary may be asked to bring back the assets to India. People would not like to undertake such a transaction.
1.4	Outside India	Indian Trust	Non-Resident	Practically no one would like to undertake such a transaction. An Indian trust with non-resident beneficiary will require RBI approval. It will not be approved. Hence practically it is not workable.
2	Non-resident settlor / donor:			
2.1	Outside India	Indian Trust	Resident	This would be all right. However the assets will have to be brought back to India. Further, people would not like to undertake such a transaction.
2.2	Outside India	Indian Trust	Non-Resident	Practically no one would like to undertake such a transaction. An Indian trust with non-resident beneficiary will require RBI approval. It will not be approved. Even if in substance, it is a transfer of foreign asset from one non-resident to another, there will be difficulties. Hence practically it is not workable.
2.3	In India	Foreign Trust	Resident	This will be an academic exercise. In substance assets remain with residents. However it will be nearly impossible to administer such a trust. If NRIs have funds in India, they can repatriate upto US$ 1 mn. in a foreign trust. However assets cannot be transferred.
2.4	In India	Foreign Trust	Non-Resident	RBI will not permit a transfer of assets to a non-resident. If trust comes into effect through a Will, it may be workable. However there will be several practical difficulties

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CA Vishal Gada

Structuring through Private Trusts

1. Introduction

1.1 The present article attempts to present some common and interesting structuring possibilities involving private trusts. One of the key reasons, why a trust vehicle is popular in tax or commercial structuring is due to the fact that it is not a legal person, but rather an obligation, annexed to the ownership of the property[1]. This precise attribute of a Trust gives it the flexibility required from a commercial perspective and the transparency required from a tax perspective. Also, it is interesting to note that unlike the various taxation or corporate laws, the Private Trust law contained under the Indian Trusts Act, 1882 has been generally consistent and has not been tempered with by the legislature. This track record also gives certainty and some hope of consistency regarding the manner in which a Trust Structure would provide effect to the overall business, personal or tax objective in future.

1.2 The following paragraphs would deal with few possibilities, wherein Trust structuring could be immensely helpful. Due to paucity of space, the ideas have been described in brief and it is expected that the reader would bring its own variations to these fundamental ideas, in a tax efficient, regulatory compliant and legally tenable manner. A brief summary of Trust law existing in select foreign jurisdictions is provided in the Annexure for academic reading.

2. Trust as an investment holding vehicle

2.1 The importance and efficiency of Trusts being used as investment holding vehicle is significant. In recent times, post introduction of Dividend Distribution Tax and Minimum Alternate Tax on Companies and the uncertainty (hopefully, temporary) prevailing on the taxation of partnership firms and LLP vis-à-vis earning of exempt income and consequent distribution of share of profits[2], it has become almost mandatory, in substance, to transition the investment wealth (especially of flagship companies) under a Private Trust.

1. As per Section 3 of the Indian Trusts Act, 1882, "A Trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner:"

2. Recently, in few cases, the Indian Tax Office has taken a view that if a partnership firm or LLP has been earning exempt income, then a consequent distribution of share of profits to partners involving such income cannot be given exemption under Section 10(2A). The controversy emerges from a very technical and narrow interpretation made in respect of Section 10(2A) which gives exemption to share of profit in the "total income" of the firm. The author's view is that this interpretation is incorrect and against the legislative intent of a single point taxation in the hands of a firm, as distinct from its partners.

2.2 While on first blush, it would be tempting to proclaim a Trust as protected from the rigours of Dividend Distribution Tax and Minimum Alternate Tax impact, it needs to be appreciated that it would depend upon the Status of a Trust, which is derived from the Status of its beneficiaries[3]. In other words, the Trust is an ideal vehicle to act as an investment holding entity, only as long as its beneficiaries are non-corporate entities.

2.3 The added advantage for a Trust acting as an investment holding vehicle is the tax efficient treatment of income upstreaming and asset upstreaming. The transfer of income by the Trust to its beneficiaries should not result in any additional taxation in the hands of the said beneficiaries. Similarly, the transfer of asset by the Trust to its beneficiaries should also not have any tax implications. Arguably, the distribution of income or asset by the Trust to beneficiaries cannot be said to any sum of money or asset received without consideration. It can be strongly contended that such distribution is in consideration of "working out of the rights" of the beneficiaries vis-a-vis the obligations cast by the Settlor on Trustees under the Trust deed and hence, ought not to give rise to any adverse tax implications under Section 56(2)(vii) of the Income-tax Act, 1961.

3. Trust for holding treasury shares

3.1 The term 'Treasury shares' is tagged to those shares of a company, which are owned by the same company. For instance, when a Company ABC Ltd. owns a portion of its own shares, it is known as Treasury shares. The concept of Treasury shares is especially important in the context of listed shares, where a listed company would own its own shares for strategic reasons. The reasons would normally be ensuring that the promoter's shareholding is not diluted (in substance), thereby tiding away any takeover threat which the company may face. For instance, if in a listed company ABC Ltd., the promoter shareholding is 45% and the said company owns around 6% of its own shares (via a Trust, the beneficiary of which is the company itself), then effectively, the promoter is able to effectively exercise control over 51% of the voting rights (viz. 45% through itself and the balance 6%, through the board of directors of the company).

3.2 Interestingly, *vide* Circular dated January 17, 2013, the Securities & Exchange Board of India has prohibited purchase of Treasury shares through secondary market in the context of Employee Stock Options administered through Employee Welfare Trusts. This restriction was subsequently postponed by SEBI in response to representations made by the industry and the said restriction would now apply from July 1, 2014 onwards.

4. Trust as a financing vehicle

4.1 Frequently, Private Trusts are used as financing vehicle for the benefit of group concerns and sometimes the financing is also extended to third parties. An interesting issue which arises for consideration is whether such a Trust, whose major activity is that of financing can be covered under the definition of "non-banking financial company" under Section 45-I of the RBI Act. It may be noted that a Trust is not a legal person and as outlined under Section 3 of the Indian Trusts Act, 1882, a Trust is merely an obligation annexed to the Trust Property. To the extent, the Trustees / beneficiaries of such Trusts are non-corporate entities, a better view is that the said Trust, not being in the status of a company, should not be covered under the definition of "NBFC" under Section 45-I of the RBI Act.

4.2 As regards the Trust, where the Trustee /beneficiary is an individual, it needs to be analysed as whether the activity of the said Trust is covered under the restriction outlined under Section 45S of the RBI Act. As per

3. Refer *CIT vs. Kamalini Khatau (209 ITR 101) (SC)*

Section 45S, no person, being an individual or firm or an unincorporated association of individuals, shall, accept any deposit, if its business wholly or partly includes any of the activities specified in clause (c) of Section 45-I of the RBI Act, which includes financing and investing activities. However, as per the proviso to the said restrictions provided under the section are not applicable to the receipts of the deposits from specified relatives. It may be noted that the restriction under Section 45S is only on acceptance of deposits and it does not refer to any restriction on how and where the said deposits are to be utilised. In the instant case, the Trust, being in the status of an individual (considering that the Trustee/beneficiaries are individuals) would be covered under the provisions of Section 45S of the RBI Act. However, as far as the Trust is accepting loans and deposits from its relatives, the bar under Section 45S of the RBI Act should not apply. In one sense, a Trust, not being a legal person, has no relatives. Hence, a better view should be that the relatives of the Trustee/beneficiaries need to be considered for the purpose of evaluating as to whether the case falls under the exception under the proviso to Section 45S.

5. Trusts and Domestic Transfer Pricing

5.1 The scope of transfer pricing has been expanded to include domestic related party transactions within its purview by introducing Section 92BA under the Income-tax Act, 1961, with effective AY 2013-14 and onwards.

5.2 Such domestic transfer pricing, *inter alia*, covers "any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of Sub-Section (2) of Section 40A." Accordingly, transactions undertaken with related parties covered under Section 40A(2)(b) of the Act are governed by transfer pricing provisions if the aggregate of transactions defined under Section 92BA exceed a sum of Rupees five crores.

5.3 Let us take a case study, wherein there is a trust in which beneficiary interests are held by all the family members. However the beneficiary interest of the family members is not determinate in the family trust, i.e. the trust is a discretionary family trust. This discretionary family trust has substantial shareholding in Domestic Company 1 and Domestic Company 2.

5.4 Shareholding pattern of Domestic Company 1 and Domestic Company 2 has been tabulated below:

	Discretionary Family Trust	Others	Total
Domestic Company - 1	75%	25%	100%
Domestic Company – 2	35%	65%	100%

5.5 The issue for consideration is whether the transaction between Domestic Company 1 and Domestic Company 2 would be covered under the provisions of domestic transfer pricing. The relevant provision to be examined for the issue is Section 40A(2)(b)(vi) of the Act. The relevant extract of Section 40A(2)(b)(vi) of the Act is as under:-

> *"any person who carries on a business or profession,-*
>
> *(A) …*
>
> *(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person."*

5.6 In the instant case, the directors and relative of such directors of Domestic Company 1 are beneficiaries of Discretionary Family Trust ('the trust'). The trust holds substantial interest in Domestic Company 2. However the shares

of beneficiaries of trust being indeterminate, it may be difficult to contend that the directors or their relatives indirectly hold substantial interest in Domestic Company 2 through the Trust. Hence, it is possible to argue that the provisions of Section 40A(2)(b) of the Act may not apply to transactions between Domestic Company 1 and Domestic Company 2 and accordingly, the provisions of domestic transfer pricing may not be applicable in the instant case.

6. Trust for Inheritance Tax Planning

6.1 Though there were whispers of the revival of the inheritance tax *vide* the budget 2013, erstwhile known as the estate duty tax, the same was delayed since the last budget kept a tight grip on introduction of any radical changes to increase the tax base of the country, including the levy of the inheritance tax.

6.2 However, with whole debate brewing on the possible reintroduction of estate duty as inheritance tax, its comeback cannot be overruled. An inheritance tax, to put it simply, is the tax levied on any person who inherits money or property. In other words, it is a tax on property passing off on death of an individual. It is thus a tax on the estate inherited by any person. In the past, the levy under the erstwhile estate duty law was as high as 85% over a threshold of ` 20 lakhs of property. South Africa has an existing estate duty tax of 20%, whereas in certain developed countries the like US and UK the levy ranges from 35% to 40%. Also countries like China are contemplating introduction of inheritance tax.

6.3 It is however possible to structure business and family assets under an appropriate entity so as to mitigate inheritance tax as it is passed onto generations. For example, one possible of mitigation could be through creation of an irrevocable discretionary trust which apart from preserving the value of business and sustaining future growth, also facilitates maintenance of required control of the promoters, easy management, efficient distribution of income and wealth, along with mitigation of inheritance tax on devolvement of assets. The idea is that since the assets or any determinate interest in a trust is not owned by an individual, there may not be any levy of inheritance tax on death of the said individual. Further nuances like safeguarding of personal assets, family wealth, daughters interest etc. specific to a situation and individuals can also be provided for. Further it is possible to carry out the entire migration procedure to such optimal structure can be effected in a tax efficient manner.

7. Trust for Insolvency Planning

7.1 The individual insolvency framework in India consists in two statutes. The application of these enactments is split geographically; while the Presidency Insolvency Act, 1909 is applicable to the Presidency Towns – Calcutta, Bombay and Madras, the Provincial Insolvency Act, 1920 pertains to the whole of India except these towns. The body of the law as laid down in the two Acts is almost similar. The term insolvent refers to a "person who cannot or does not pay his debts in full or has committed an 'act of insolvency' and has been adjudged an insolvent by an Insolvency Court."

7.2 Trust is again a very important vehicle to safeguard assets for the benefit of one's family from a potential insolvency in future, provided that the planning is made well in advanced and is not with the intention of defrauding one's creditors.

8. Trust for minors

8.1 Creating a Discretionary Trust for Minors could also be an efficient tool of tax planning. Apart from availing slab benefits, a key objective is to conserve assets till the minor reaches an appropriate age and is competent enough to manage the assets independently.

8.2 The relevant provisions regarding taxation of a Private Discretionary Trust is exclusively dealt by Section 164(1) of the Income-tax Act. The provisions states that income of the Private

Discretionary Trust would be charged at the maximum marginal rate (without any benefit of basic exemption), i.e. 30% + applicable surcharge. However, it is possible to obviate such levy of tax at maximum marginal rate by taking refuge under of the below exceptions provided under the Act.

8.3 However, in the following cases, the Total Income of the Private Discretionary Trust would be charged as if though it is the Total Income of an Association of Persons :

Case 1 : None of the beneficiaries of the Private Discretionary Trust have any other Income chargeable under this Act exceeding the maximum amount not chargeable to tax in case of an Association of Person, and neither of the beneficiaries are a beneficiary under any other trust

Case 2 : The Income of the Private Discretionary Trust is receivable under a Trust declared by any person under a will, and such trust is the only one declared by the person.

8.4 In case the Total Income of the Private Discretionary Trust includes any "Business Income", the above exceptions to the taxation at the Maximum Marginal Rate of Income Tax would apply only in the case where the Income of the Private Discretionary Trust is receivable under a Trust declared by any person under a will exclusively for the benefit of any relative dependent on him for support and maintenance, and such trust is the only one declared by the person. Here, the term relative means any spouse, brother, sister, or any lineal ascendant or descendant.

8.5 Normally, it should be feasible to plan a discretionary trust for a minor, since it would easier to satisfy the conditions outlined in the aforementioned exceptions.

9. Offshore trusts

9.1 Frequently, offshore Trusts are used by returning non-resident Indians to block the levy of the Indian tax law to the wealth earned by them while they were living abroad. This is typically done by creating an offshore Trust before the NRI returns back to India and contributing the foreign wealth within that offshore Trust. Let us take one Case Study as under:

9.2 Mr. A is a resident of Dubai. He has substantial business interests in Gulf countries and in companies based in Mauritius, through which he has invested in ventures in India. Mr. A is contemplating to relocate himself to India, whereby, he would eventually qualify as a Resident and Ordinary Resident ('ROR') under Section 6(1) of the Income-tax Act, 1961. To accumulate funds abroad and to mitigate the Indian taxes on the off shore income, a Special Purpose Vehicle ('SPV') would be incorporated outside India. Mr. A would transfer his offshore assets to the SPV, and in consideration, acquire the shares of the SPV. The shares of the SPV would be settled to a private discretionary trust outside India. Designated service providers would be appointed as trustees, with Mr. A and his family as the beneficiaries of the trust. The SPV would have foreign directors and its day-to-day affairs would be managed from outside India.

9.3 As the SPV would be a foreign company, the affairs of which are wholly controlled and managed from outside India, the SPV should not be taxable in India in respect of income from offshore assets. The Trust would receive income by way of distributions from the SPV. The present case involves a private discretionary Trust, where the shares of the beneficiaries are indeterminate and accordingly in the absence of any distribution to the beneficiaries, it would not be possible to determine whether any resident Indian has earned income and is liable to tax in India. Further, even the beneficiaries should not be taxable for any income earned by the Trust.

10. Parting thoughts

10.1 In the coming times of increased legislation and complexity, an innovative use of a Trust vehicle is desirable, since it not only provides tax efficiencies, but also the flexibility

of a Trust structure also enables one to fulfil one's social objectives.

Annexure: Trust Law Primer in select foreign jurisdictions

Mauritius

Mauritius Trusts are regulated by The Trusts Act,2001, the Code Civil Mauritian and the common law relating to trusts. The types of trusts most frequently used in Mauritius can be broadly categorised into (i) private trusts (whether discretionary or fixed interest), (ii) charitable trusts, (iii) non-charitable purpose trusts and (iv) commercial trusts (e.g. pension and employee benefit trusts).

Mauritius has become a jurisdiction of choice for the creation and administration of trusts under the law of Mauritius, due to certain unique features. There is a strict duty of confidentiality on trustees – except where ordered by the Court in accordance with law, a trustee may not disclose information or documents to any person not legally entitled to it. The duration of a trust other than a purpose trust shall not exceed 99 years from the date of its creation. Trusts are not required to be registered with the regulatory authorities in Mauritius. However, a trustee may register the trust with the regulatory authorities to receive what is called a "date certaine" i.e. registering the date of creation. Only the trust deed is required to be filed with the Registrar General.

Various parties to private trust can be settlor, managing trustee, custodian trustee, protector and beneficiaries. The settlor is any person who transfers legal ownership of assets to the Trust. A Settlor shall not be the sole beneficiary of a trust of which he is a settlor. The terms of the Trust may provide for the appointment of a Managing Trustee. A Custodian Trustee may also be appointed, who shall be a firm, partnership or a body corporate, to hold the trust property and invest its funds and dispose of assets as the managing trustee may direct.

A resident trust is taxable in Mauritius on its chargeable income at the rate of 15% per annum. However, the resident trust, licensed as a Category 1 Global Business, is effectively taxed at 3% since it is allowed a credit for foreign tax on its overseas income.

The main advantage of a resident trust is its accessibility to the Double Taxation Avoidance Agreements (DTAA). A number of DTAAs to which Mauritius is a party now specifically include "trust" in the definition of "person" eligible to benefit from the DTAA.

A Mauritius offshore trust which elects to be treated as non-resident for income tax purposes pays no income tax on income derived outside Mauritius. A non-resident trust is exempt from tax and filing requirements in Mauritius. Non-resident beneficiaries of an offshore trust are exempt from income tax on the income derived from the offshore trust.

However, non-resident trusts do not benefit from Mauritius' network of DTAAs. A non-resident trust will be appropriate where the income of the trust is to be accumulated as for example in the case of a family trust.

Recently, the concept of a private trust company has evolved in Mauritius. A Private Trust Company (PTC) is basically a company that is incorporated in an offshore jurisdiction such as Mauritius for the purpose of acting as corporate trustee of a specific family trust or of a number of related trusts.

Indeed, through careful trust and corporate planning, Mauritius trusts and its network of DTAs are proving appealing to investors looking to invest in Africa, Europe and the US. In the current investment climate, migration of asset protection trust to Mauritius can prove beneficial.

Singapore

Singapore is rapidly emerging as a premier jurisdiction for establishing and operating various types of trusts. The governing trust legislation in Singapore includes the Trust Companies Act, Business Trusts Act, Civil Law Act and the Trustees Act.

A trust is a legal arrangement whereby the ownership of a property is divided between two parties, such that one person is entrusted with the legal title to the property (the trustee) whilst another person (the beneficiary) retains the beneficial (or equitable) ownership of the property. The original owner of the property who creates the trust arrangement (the settlor) would enter into this arrangement in order to allow the trustee the control to manage and administer the property, whilst being assured the economic benefits from the property will accrue to the beneficiary. The settlor and the beneficiary can be the same person.

Below are some of the key benefits that the Singapore's trust framework provides:

- No requirement for formal registration of Singapore trusts
- Strict confidentiality and banking secrecy laws
- Greater flexibility and effective control in managing the Trust
- Flexibility to appoint a 'Protector' to supervise the conduct of the trustees
- No estate duty or inheritance tax or capital gains tax
- Income tax mitigation for foreign trusts

The types of trust most frequently used in Singapore can be broadly categoried into (i) Private family trusts; (ii) Statutory trusts; (iii) Charitable trusts; (iv) Investment trusts.

Singapore trust law permits the formation of foreign trusts which qualifies for various tax benefits such as tax exemption on a wide range of trust income and exemption on tax on the distributions to beneficiaries of such trusts. To qualify as a foreign trust, every settlor and every beneficiary must not be a citizen or resident of Singapore (individuals or companies).

A private family trust is usually designed to help a High Net-worth Individual (HNI) preserve assets and facilitate the transfer of assets to future generations. In Singapore, Trusts created on or after 15th December 2004 can continue for a maximum period of 100 years.

A trust may be created by will, by deed or by declaration, and must generally possess certainty in relation to its intention, its subject matter and its objects. Generally, in order to create a trust, the settlor must execute a written document (the trust instrument).

In Singapore, the settlor is free to settle most types of property into the trust. Once the property is transferred to the trustee, the trustee manages the property in the best interest of the beneficiaries and according to the terms specified in the trust instrument.

A trust can be fixed trust or discretionary trust. A discretionary trust is usually preferred for long-term management of wealth and assets. A discretionary trust would allow the trustee to be flexible to accommodate any future requests by the settlor.

In case of a discretionary trust, usually at the time of set up the settlor also creates a 'Letter of Wishes', which provides guidance to the trustee for exercising the discretionary power. The settlor may also appoint a 'Protector' for the trust, to reserve some control over the trustees. The protector may be given a wide variety of powers, including the power to remove and appoint trustees, settle their remuneration or add discretionary beneficiaries.

The settlor can be any corporate entity or individual. The beneficiary can be any person or entity (i.e., a company, a charitable body or another trust). The trustee may be either a corporate entity or an Individual and the settlor may choose either a single or multiple trustees to manage and control the trust property. A third option, which is increasingly becoming popular especially among high net-worth families, is to use a Private Trust Company (PTC) as the trustee. The PTC itself is essentially a company incorporated for the sole purpose of owning and managing the settlor's one or more trust(s). PTC provides the settlor with a higher level of control, discretion and confidentiality over the trust.

Singapore continues to make itself the choice for wealthy individuals who wish to establish trust arrangements for their families. The country's reputation as a progressive international financial centre and its business-friendly environment has ensured that its wealth management and trust industry will see rapid growth in the coming years.

United States

A trust is a right in property held by one party for the benefit of another. The person setting up the trust is called the grantor, trustor or settlor; another party will hold the trust assets and is called the trustee. The property placed in the trust may be called by such names as the trust, trust assets, the trust fund or the trust estate. A trust can be created while the settlor is alive – an *"inter vivos,"* or "living" trust, or by will when the settlor dies – a "testamentary" trust. Typically a trust is created by transferring property subject to the provisions of a witnessed written document; an oral trust (without a document) is usually not permitted or in any event difficult to prove.

The trust contract establishes a fiduciary relationship under which the trustee agrees to manage and protect the trust property for the benefit of a beneficiary. The beneficiary can be a person or persons, or it can be an organisation, such as a charity. The beneficiary receives benefits or income from the trust property, although the grantor and beneficiary sometimes can receive benefits at the same time. The trust assets are transferred to the beneficiary or remain in further trust for continuing beneficiaries. Trusts are widely used to minimise estate, income and gift taxes, which can be extraordinarily costly.

Broadly, trusts fall into several categories, including living trusts and testamentary trusts, and revocable trusts and irrevocable trusts.

As its name suggests, a living trust is set up while the grantor is still alive. A living trust may be used to ensure that the grantor's financial obligations to his or her family are met in the event that the grantor is unable to provide for them, perhaps due to illness. A testamentary trust, on the other hand, is a trust created by a will, and property is transferred to the trust only after the grantor dies.

A revocable trust offers a high level of flexibility in that it can be changed, or revoked entirely, at any time by the grantor, as the grantor retains sole control of the trust. A revocable trust offers no current income tax advantages to the grantor, but the grantor can make principal and income withdrawals at any time. Such a trust offers a good opportunity to use the unified tax credit available under federal estate tax laws.

By contrast, an irrevocable trust cannot be substantially altered or revoked, and the trustee is given sole control of the trust. By relinquishing the opportunity to change the provisions of the trust, however, grantors can significantly reduce the taxes that will be owed by their beneficiaries when the assets are eventually passed on to them. This is accomplished by removing from the grantor's estate both the trust property and future income and appreciation that arise from the property. Some examples of irrevocable trusts include charitable trusts, dynasty trusts, and asset protection trusts.

Once a settlor creates a trust, the settlor ceases to have any legal relationship to the trust unless the settlor retains an interest in the trust. Without a legal relationship, the settlor cannot bring an action against the trustee for breach of fiduciary duty, nor can the settlor define what the beneficiary can do with the property (although sometimes the settlor's consent is required by law in order to modify the trust).

The settlor may retain an interest as a beneficiary, may become a trustee or co-trustee or may retain the power to revoke or amend the trust. The settlor can settle any kind of property, whether tangible or intangible, as long as the property is transferable.

A settlor, on transfer of property in trust, may be subject to US gift tax if the transfer of property in trust is a completed gift or US estate tax if the settlor retains a taxable power over the transferred assets or if the transfer was completed by releasing a retained right within 3 years of death. The extent of such taxes depends on whether the settlor was a US citizen or, if not a US citizen, on whether the settlor was domiciled in the United States. For a non-citizen not domiciled in the United States, taxation will depend on whether the transferred property had a US situs and, if gifted, was a transfer of tangible property.

The trust itself is not subject to US gift or estate tax when created. However, if the settlor does not pay any gift tax due upon creation of the trust, the trustees may be liable for the payment of the tax to the extent of the property received in trust. A trust beneficiary is not subject to US gift tax on the creation of a trust.

United Kingdom

With a history of trust law dating back centuries, a strong regulatory framework and professional support services, the United Kingdom is a popular jurisdiction for the management and administration of domestic and international trusts. The close access UK Trustees have to world class investment management and advisory services are one of the major benefits of locating a trust's administration in the UK.

UK insolvency law specifically provides that trust property is not available to creditors of a Trustee and the bankruptcy of a Trustee will not have any effect on the assets of a trust; those assets will continue to be available for the benefit of the beneficiaries.

A trust in English law is described as an equitable obligation that arises where property (which is called the trust property) is vested in a person or persons (who are called the trustees) where the trustee is bound to deal with the trust property for the benefit of persons (who are called the beneficiaries) any one of whom may enforce the obligation. In other words, trust involves various parties such as the 'settlor' (the person who puts assets into a trust); the 'trustee' (the person who manages the trust); the 'beneficiary' (the person who benefits from the trust).

English trust law allows for the following main types of trusts to be established:

- Bare trust
- Fixed Interest Trust
- Discretionary Trust
- Privileged Trust (including charitable trusts)

Trusts are set up for a number of reasons, including:

- for succession planning and management and control over wealth and assets;
- to mitigate inheritance tax liability;
- to control and protect family assets;
- to pass on assets while you're still alive;
- to pass on assets when you die (a 'will trust').

From an estate planning point of view, trusts are often used as a means of making lifetime gifts to enable the donor to place constraints on the donee. Property will normally be gifted at a time when it does not attract an inheritance tax (IHT) liability and any growth in value of assets held by the trust is outside of the donor's estate. Care needs to be taken when making gifts as this can attract a capital gains tax liability on any unrealised appreciation in the asset.

Income-tax on income from the trust is paid by the trustees – but the settlor is responsible for it. English trusts established by non-resident and non-domiciled settlors with non-UK assets will be treated as non-resident trusts and exempt from UK inheritance and capital gains taxes. This exemption applies to trusts administered in the UK by a professional UK Trustee.

CA Paresh P. Shah

Private Trusts – Essential Features of trust deed

1. Trust

1.1 In common law legal systems, a trust is a relationship whereby property is held by one party for the benefit of another. A trust is created by a settlor, (also called as Author) who transfers some or all of his or her property to a trustee. The trustee holds that property for the trust's beneficiaries. Trusts have developed since Roman times and have become one of the most important innovations in property law.

1.2 Normally in a Private Trust beneficiaries are defined or ascertained or ascertainable individuals however in a Public Trust, beneficial interest is vested in a class of persons who can not be ascertained as it is a class of persons which is fluctuating from time to time.

1.3 A Private Trust can be onshore or offshore. In case of onshore trusts, the Indian Trusts Act, 1882 is applicable whereas in case of offshore Trust, the Trust Laws of the foreign jurisdiction shall be applicable.

1.4 Section 1 of the Indian Trusts Act,1882 states that the provisions of the Act does not apply to the private or public religious or charitable endowments and that Trust Act applies to Private Trusts only.

1.5 Section 3 of the said Act defines the Trust as an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him (the owner) for the benefit of the another, or of another and the owner.

1.6 A trust can be created for any lawful purposes only as provided under section 4 of the Act.

1.7 The purpose may be treated as lawful if it is not forbidden by law or it should not defeat the operation of any law or it should not be a fraudulent or it does not involve or imply any injury to the property of another or it is not immoral or opposed to the public policy.

2. Basic concepts

2.1 The person who creates the trust is the settlor. The person who holds the property for another's benefit is the trustee. The person who is benefited by the trust is the beneficiary, or cestui que trust. The property that comprises the trust is the trust res, corpus, principal, or subject matter.

2.2 A fiduciary relationship exists in the law of trusts whenever the settlor relies on the trustee and places special confidence in her. The trustee must act in good faith with strict honesty and due regard to protect and serve the interests of the beneficiaries. The trustee also has a fiduciary relationship with the beneficiaries of the trust.

2.3 A trustee takes legal title to the trust res, which means that the trustee's interest in

the property appears to be one of complete ownership and possession, but the trustee does not have the right to receive any benefits from the property. The right to benefit from the property, known as equitable title, belongs to the beneficiary.

2.4 The terms of the trust are the duties and powers of the trustee and the rights of the beneficiary conferred by the settlor when he created the trust.

2.5 Thus, every private trust consists of four distinct elements: an intention of the settlor to create the trust, a res or subject matter, a trustee, and a beneficiary. Unless these elements are present, a court cannot enforce an arrangement as a trust.

3. Settlor and creation of the trust

3.1 This is the person who creates the trust. Trusts may be created by the expressed intentions of the settlor (express trusts) or they may be created by operation of law known as implied trusts.

3.2 A trust could be an oral or in a written form. However, a trust dealing with the distribution of the immovable property has to be declared in writing and signed by the settlor or the trustees and registered or by will of the settlor or the trustee (S. 5 of the Act). In case of the movable property, trust is valid only if it is declared or the property is transferred to the trustee/s.

3.3 Typically a trust can be created with essential required element/features as under:

i. a written trust instrument created by the settlor and signed by both the settlor and the trustees (often referred to as an *inter vivos* or "living trust");

ii. an oral declaration;

iii. the will of a decedent, usually called a testamentary trust; or

iv. a court order (for example in family proceedings).

3.4 In some jurisdictions certain types of assets may not be the subject of a trust without a written document. The instrument or the declaration as referred above must clearly specify,

i. The purpose and intention for which it is created

ii. Document may read in a manner that purpose is capable of executed and workable

iii. The administration by trustee may be clearly spelt out as to their appointment, succession and resignation or removal

4. Trustee

4.1 According to section 10 of Indian Trusts Act, 1882, "every person capable of holding property may be a trustee; but, where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract."

4.2 Anyone capable of taking physical possession of or legal title of the property can be a trustee. And there is no limit to the number of trustees to hold the position in one trust. Generally there are more than one trustee, the trustees, with respect to each other, are referred to as co-trustees, and when acting jointly as a collective body are referred to as the Board of Trustees. The trustee should be at least someone capable and fit for executing the powers and duties honourably.

4.3 Certain jurisdictions may require that the trustee should be stationed within the jurisdiction of the court where the trust is located, typical of the US Trust. But where the trust property is portable land, the trustee need not be stationed within any single jurisdiction. Non residency will not disqualify or preclude the trustee from carrying out his position; non-residents of the State in which the trust is to be administered can be trustees. State law determines whether an alien can act as a trustee.

4.4 A corporation may act as trustee or the trustees. However it may be mentioned that where trust involves the exercise of the discretion, it can be executed if corporation is competent to contract through a human intervention as provided in the Trust deed.

4.5 Main duties of trustees are as provided in Chapter III (Ss.11 to 49) of the Act may be summarised as under:

i. to act in the best interests of the beneficiaries of the trust

ii. to act in an even-handed manner between beneficiaries and between groups of beneficiaries

iii. not to use knowledge or influence gained as a result of being a trustee to advance the trustee's own position (except when the trustee discloses his or her personal interest to the settler of the trust and obtains the settler's informed consent)

iv. to act personally rather than delegating decisions to others (except if the trust document explicitly permits delegation)

v. to act honestly and with the level of skill and care that would be expected of the reasonable business person in administering the affairs of others

vi. to be thoroughly familiar with the terms of the trust in the trust deed (the main trust document), and with who the possible beneficiaries may be and what the assets and liabilities of the trust.

4.6 **Eligible trustee**

A corporation can act as a trustee

A corporation is capable of accepting the ownership of property with an obligation annexed to the ownership for the benefit of another which may be a class of persons, there can be no objection to a corporation acting as a trustee. This is a well-established proposition from the time of the decision of the Judicial Committee of the House of Lords in *Salomon vs. Salomon and Company Ltd.* which has been followed in India by the Supreme Court and it has held that a juristic person can carry on all human activities subject to such limitation as arise from its not being a natural person and the limitations imposed upon it activities by its own charter contained in the objects clause in the memorandum of association. A juristic person cannot marry and procreate, but it is certainly capable of owning property. It is also capable of owning property in its capacity as a trustee. Corporations carrying on the activity of becoming trustees and executors are not unknown. There can, therefore, be no objection to a corporation acting as a trustee provided its objects clause in the memorandum of association so permits. For example, a trust company is a bank that has been named by author of trust to act as trustee in managing a trust. A partnership can serve as a trustee if state law permits. An unincorporated association, such as a Labour Union or Social club, usually cannot serve as a trustee.

Alien can act as a trustee

An alien may be a trustee under English law. But in India the English law as to aliens is not applicable. Alien enemies residing in (British) India with the permission of the Governor General in Council and alien friends may sue in courts of British India, as if they were subjects of Her Majesty. But it is not competent to an alien enemy residing in British India, without such permission or residing in a foreign country to sue in any of such courts.

Married women can act as a trustee

A married women may be a trustee.

Infant can act as a trustee

As a life convict is capable of holding property, it follows that does not require the exercise of discretion and prudence. Thus an infant cannot exercise a discretionary trust for sale for he is not competent to contract. It has also been held

that a minor is incompetent to be a trustee of a public trust.

Convict can act as a trustee

As a life convict is capable of holding property, it follows that he may either be a trustee or a beneficiary.

Illegitimate can act as a trustee

In a decision of the Oudh Chief Court, it was held that mere fact of the illegitimacy of a person is not necessarily a disqualification for his being appointed as a trustee, when he is otherwise found to be fit.

Insolvent can act as a trustee

An insolvent is incapable of acting as a trustee. Firms who have been adjudicated insolvents are no longer under the Act fit to be trustee. They are liable to be removed from the office of trustee and fresh trustee should be appointed.

Beneficiary as trustee or the settlor

There is no provision in the Trust Act that a cestui que trust shall not be appointed a trustee. He is not as such incapacitated from being trustee for himself and other; but as a general rule he is not altogether a fit person for the office in consequence of the probability of the conflict between his interest and his duty. Therefore under the Indian Trust Act, a person may not act in all the three capacities namely as settlor, as trustee and as beneficiary, strictly speaking it is not prohibited if one can remove effectively the situations of the conflict.

4.7 Appointment of the trustee

Appointment of the trustee should be done formally, expressly in writing, even though it will always be implied "the individual will use the trust property, or performs any act to carry out the trust for the interest of beneficiaries". Once the acceptance has been tendered then no court of law can prevent the trustee from holding the office, except for the breach of trust or good cause dependent upon clear and lawful necessity.

The failure of author to appoint a trustee

The failure of author to name a trustee does not void a trust. The court appoints a trustee to administer the trust and orders the person having legal title to the property to convey it to the appointed trustee. If two or more trustees are appointed, they always hold the title to trust property in Joint Tenancy with the Right of Survivorship. If one of the trustees dies, the surviving trustee inherits the entire interest, not just her proportionate share

4.8 Resignation by a trustee

A trustee cannot resign without the permission of the court unless the trust instrument so provides or unless all of the beneficiaries who are legally capable to do so consent to the resignation. The court usually permits the trustee to resign if continuing to serve will be an unreasonable burden for the trustee and the resignation will not be greatly detrimental to the trust.

4.9 Rights, duties and liabilities of trustees are provided in S. 11 to 54 of the Act and the important ones may be summarised as under:

i. Trustee to execute trust

ii. Trustee to inform himself of state of trust property

iii. Trustee to protect title to trust property

iv. Trustee not to set up title adverse to beneficiary

v. Conversion of perishable property

vi. Trustee to be impartial

vii. Investment of trust money

viii. Liability for breach of trust

ix. No set off allowed to trustee

x. Several liabilities of co-trustees

xi. Indemnity of trustees

xii. Right of trustee to title deed

xiii. Right to reimbursement of expenses

xiv. Right to settlement of accounts

xv. Power to convey

xvi. Power to vary investment

xvii. Power to apply property of minors, etc. for their maintenance

xviii. Trustees cannot renounce after acceptance

xix. Trustee cannot delegate

xx. Co-trustees cannot act singly

xxi. Trustee may not charge for services

xxii. Trustee may not use trust property for his own profit

xxiii. Trustee may not buy beneficiary's interest without permission

In practice operations of the trust involves acceptance of the donations towards corpus or the voluntary contributions by a letter from the settlor.

Maintenance of the assets and Investments, Accounting, Taxation and preparing value due to each beneficiery in certain cases of fixed beneficiery.

Appointment of the assets for the purposes of distribution to the beneficiary by resolution of the trustees as per the object of the trust deed / letter of wishes with or without provisions of the consent from the protector if so appointed.

5. Beneficiaries

5.1 According to section-9 of Indian Trust Act 1886 "Every person capable of holding property may be a beneficiary. A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent there with. A beneficiary is the person or persons who are entitled to the benefit of any trust arrangement. A beneficiary will normally be a natural person, but it is perfectly possible to have a company as the beneficiary of a trust, and this often happens in sophisticated commercial transaction structures. With the exception of charitable trusts, and some specific anomalous non-charitable purpose trusts, all trusts are required to have ascertainable beneficiaries.

5.2 Generally speaking, there are no strictures as to who may be a beneficiary of a trust; a beneficiary can be a minor, or under a mental disability (in fact many trusts are created specifically for persons with those legal disadvantages). It is also possible to have trusts for unborn children, although the trusts must vest within the applicable perpetuity period.

5.3 Every private trust must have a designated beneficiary or one so described that his identity can be learned when the trust is created or within the time limit of the Rule of Perpetuity, which is usually measured by the life of a person alive or conceived at the time the trust is created. This rule varies from jurisdiction to jurisdiction and is designed to prevent a person from tying up property in a trust for an unlimited number of years. A person or corporation legally capable of taking and holding legal title to property can be a beneficiary of a trust. Partnerships and unincorporated associations can also be beneficiaries. Unless restricted by law, aliens can also be beneficiaries. Indian Law permits corporation and the firms as beneficiaries as they are capable of holding properties.

5.4 The beneficiaries of a trust hold their equitable interest as tenants in common unless the trust instrument provides that they shall hold as joint tenants. For example, three beneficiaries each own an undivided one-third of the equitable title in the trust property. If they take as tenants in common, upon their deaths their heirs will inherit their proportionate shares. If, however, the settlor specified in the trust document that they are to take as joint tenants,

then upon the death of one, the two beneficiaries will divide his share. Upon the death of one of the remaining two, the lone survivor will enjoy the complete benefits of the trust.

5.5 Who can be termed as beneficiaries

A class of persons can be named the beneficiary of a trust as long as the class is definite or definitely ascertainable. If property is left in trust for "children," the class is definite and the trust is valid. When a trust is designated for "family," the validity of the trust depends on whether the court construes the term to mean immediate family in which case the class is definite or all relations. If the latter is meant, the trust will fail because the class is indefinite. When an ascertainable class exists, a author may grant the trustee the right to select beneficiaries from that class. However, a trust created for the benefit of any person selected by the trustee is not enforceable.

If the author's designation of an individual beneficiary or a class of beneficiaries is so vague or indefinite that the individual or group cannot be determined with reasonable clarity, the trust will fail. The beneficiaries of a trust hold their equitable interest as tenants in common unless the trust instrument provides that they shall hold as joint tenants. For example, three beneficiaries each own an undivided one-third of the equitable title in the trust property. If they take as tenants in common, upon their deaths their heirs will inherit their proportionate shares. If, however, the author specified in the trust document that they are to take as joint tenants, then upon the death of one, the two beneficiaries will divide his share. Upon the death of one of the remaining two, the lone survivor will enjoy the complete benefits of the trust.

5.6 Categories of the beneficiary of a trust

There are two basic trusts with regards to the exercises of the Beneficiaries' rights:

i. Beneficiaries of a Bare Trust (as known as a Simple Trust) is where the Beneficiary is entitled to take actual ownership and control of the trust and has the right to the income and capital. The trustees, in this case, act in accordance with the beneficiaries' wishes.

ii. Beneficiaries of an Express Trust are Trusts where by the trustee is given additional duties and powers assigned in the Trust Deed. The Express Trust can be either an *Inter Vivos* Trust, which is a trust created during the life of the Grantor, or the Express Trust can be a Testamentary Trust, which is a Trust enacted after the death of the Grantor (as known as the Will Trust).

5.7 Two main types of beneficiaries

i. Fixed beneficiaries who simply have a fixed entitlement to the income and capital from the Grantor.

ii. Discretionary beneficiaries to whom the trustees have discretionary and decision-making powers to the entitlements some trust addition and removal of the benefits too.

5.8 Perpetuities

The provisions of the trust are normally restricted by the operation of the law relating to perpetual accumulation in the jurisdiction hence Trust Act is subject to law of perpetuity known as The Perpetuities and Accumulations Act, 1964.

The rule of law regarding Perpetuities, which varies from jurisdiction to jurisdiction, is designed to prevent a person from tying up property in a trust for an unlimited number of years. Under the rule, a future interest must vest within a certain period of time. This period is limited to the duration of a life or lives in being (the "measuring lives") at the time the interest in the property is transferred, plus twenty-one years.

The measuring lives, or life, are usually persons who are named in the instrument creating the

future interest, such as a trust. Frequently the person whose life is used as the measuring life also has a preceding interest in the property, such as a person who is given life estate. A large number of persons can be used as measuring lives, as long as the date of the last survivor's death can be learned without too much difficulty.

If the interest will not vest until after the expiration of the life or lives in being plus twenty-one years, or there is a possibility that the interest might not vest until after the expiration of such time, the transfer is void and fails completely.

5.9 Rights and Liabilities of the beneficiaries (Ss.55 to 69 of the Act) may be summarised as under:

i. Rights to rent and profits

ii. Right to specific execution/right to transfer of possession

iii. Right to inspect and take copies of instrument of Trust, accounts, etc.

iv. Right to transfer beneficial interest

v. Right to sue for execution of Trust

vi. Right to proper Trustees

vii. Right to compel to any act of duty

viii. Right against wrongful purchase by Trustee

ix. Following trust property into the hands of third person or into that which it has been converted

x. Right in case of blended property

xi. Wrongful employment by partner-trustee of trust property for partnership purposes

xii. Liability of beneficiary joining in breach of trust

xiii. Rights & liabilities of beneficiary's transferee

6. Protector

6.1 In trust law, a protector is a person appointed under the trust instrument to direct or restrain the trustees in relation to their administration of the trust.

6.2 Historically, the concept of a protector developed in offshore jurisdictions where settlors were concerned about appointing a trust company in a small, distant country as sole trustee of an offshore trust which is to hold a great deal of the settlor's wealth. However, protectors now form a part of mainstream tax planning in most jurisdictions which recognise trusts.

6.3 There are a number of reasons that a settlor may wish to appoint a protector in relation to a trust:

- protectors allow a great degree of flexibility when dealing with changes in circumstances, including both factual circumstances (death, premature divorce, previously unknown children) and legal changes (any legal changes, but most frequently changes to applicable revenue laws);
- the settlor may be concerned that the trustee may not pay sufficient attention to his wishes;
- the settlor wishes certain powers to be withheld from the trustees; or
- the settlor wishes a third party to act as a main point of contact, between the beneficiaries and the trustees.

6.4 The powers vested in the protector vary both according to the local law of the trust and the terms of the trust instrument. The powers may include:

i. power to remove and appoint trustees;

ii. power to approve a change of proper law;

iii. power to approve the addition or removal of beneficiaries;

iv. power to approve proposed trust distributions;

v. power to approve the appointment of an agent or adviser either generally or in relation to specific matters;

vi. power to approve investment recommendations;

vii. power to appoint replacement protectors; and

viii. power to terminate the trust or approve the termination of the trust.

6.5 Conceptually the idea of a protector undermines the role which in law has historically been fulfilled by the trustees. As protectors are a relatively recent innovation in trust law, case law is scant. Is it not even clear if as a matter a law a protector would owe fiduciary duties to the beneficiaries (although in practice, many trust instruments expressly state that they shall).

It is sometimes suggested that where the protector is too close to the beneficial interest in the trust (for example, if the protectors have power to confer benefits upon themselves, directly or indirectly) this may destroy the essential nature of the trust. If the protector has power to grant beneficial interests in the trust fund to the settlor, this may have disastrous tax consequences in some jurisdictions.

Under Indian Law here is no provision for the appointment of the protector by the settlor, however there is no bar if such a person is appointed by whatever name it may be called. One may explore the concept however it should not change the essential character of the trust from irrevocable to one that of revocable as it may amount to reservation of power by the settlor under certain circumstances.

7. Essential features of a Trust Deed

7.1 The trust is governed by the terms under which it was created. In many jurisdictions, this requires a contractual trust agreement or deed. A trust deed is thus a legal document that defines the trust such as the trustee, beneficiaries, settlor and appointer, and the terms and conditions of the agreement. Thus it could be an agreement or a declaration by the trustee. Salient features of such an instrument are as under:

i. Recitals

ii. Objects / Purpose

iii. Name of the Trust

iv. Nature of the Trust

v. Settlor to be named

vi. Trust Property

vii. Duration of Trust-Perpetuity law to restrict the duration

viii. Trustees – their duties & liabilities, rights & powers and disabilities, vacating the office, power to appoint new or additional trustees, meetings of trustees, resolution of difference of opinion amongst trustees, etc.

ix. Beneficiaries – their rights & liabilities and of their transferee, etc.

x. Protector – rights & obligations

xi. Application of income/property

xii. Accounts & management

xiii. Schedules

xiv. Tax efficient operation of the Trust

xv. Special provisions

7.2 Trust as company: Trust can also be structured in the form of the company where its director s can act as the Board of trustees. The beneficiaries may be shareholders with most of the provisions of the trust deed incorporated in the memorandum and the article of the association. This may work as more effective where protection of the assets from trustee is also a major concern.

7.3 Letter of wishes: Certain objectives of the trust deed may also be conveyed through a letter of wishes from the settlor without affecting the nature of the trust as irrevocable. Normally the structure of the letter of wishes is similar to the will but it incorporates the situations during the life time of the settlor also.

7.4 Purposes of the trust and the structure of the deed: Depending on the purpose or objects of the trust, the provisions and structure of the Trust Deed can vary significantly. e.g. the contents would vary depending on whether the Trust is private or public (religious/charitable/educational, etc.), testamentary or non-testamentary in nature or Employees Stock Option Trust, or Gratuity Fund Trust for employees or Investment Trust (e.g. Unit Trust of India), Trust for developing/maintaining Fine Arts or for promotion of Games & Sports, etc. Based on such material differences, provisions relating to Trustees, Beneficiaries, management of the Trust, etc. would also be quite different and specific to the requirements.

7.5 Tax considerations: Certain jurisdiction casts an obligation on the trustee to discharge the tax liability on the basis of the revocability or the non-revocability of the trust and the residential status of the trustees. In such a case trust structure my require a special reference in the trust deed as to avoid exposure to the situations which exposes trustees or the beneficiaries to a tax exposure.

eg. many trust deeds do provide:

a. A reference to the option granted to beneficiaries that they may not claim the benefits under the trust if they so decides upon distribution.

b. That the jurisdiction of the trust is India or other than Indian Law or other than the US law.

8. Regional variations

8.1 Trusts originated in England, and therefore English trusts law has had a significant influence, particularly among common law legal systems such as the United States and the countries of the Commonwealth.

8.2 Trust law in civil law jurisdictions, generally including Continental Europe, typically does not exist, but arises due to conflict of laws. Tax avoidance concerns have historically been one of the reasons that European countries have been reluctant to adopt trusts.

9. Conclusion

A trust deed can be drafted with above considerations under the trust laws applicable to the particular trust and the purposes for which a trust is created. The draft of the deed has been more or less similar for most of the jurisdiction so far as general features are concerned. It varies depending upon the provisions in the law as to attack on the assets by the creditor of the settlor, law of the perpetuity, protection from forced heirship in the the country of settlor, law relating to secrecy, definition of money laundering, enforcement of the Foreign judgment, power of the trustees under the trust laws, limitation on the power of the beneficiaries etc. One must consider the legal advise in drafting such deed as it is a complex subject where dual ownership is dealt with by various participants and the stakeholders.

"Suffering usually relates to wanting things to be different from the way they are."

— *Allan Lokos*

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B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

S. 133(6): AO empowered to launch fishing and roving enquiry with a view to detect tax evasion

Kathiroor Service Co-operative Bank Ltd. vs. CIT (Supreme Court) – Civil Appeal No. 7460 of 2013 (Arising out of S.L.P. (C) No. 3976 of 2010) dated 27th August, 2013

The ITO issued a notice u/s. 133(6) to the assessee-bank u/s 133(6) of the Act calling for general information regarding details of all persons who have made cash transactions and time deposits of ` 1,00,000/- and above for the period of three years between 1-4-2005 and 31-3-2008. The assessee-bank claimed that section 133(6) does not empower the ITO to conduct a roving or fishing enquiry into the affairs of the assessee or regarding the deposits made by its customers. It was also contended that the AO can only seek “case specific” or “area specific” information u/s. 133(6). The High Court dismissed the Writ Petition.

Dismissing the Special Leave Petition of the assessee-bank the Supreme Court held that the legislative intention behind sec. 133(6) was to give wide powers to the income-tax Department to gather general particulars in the nature of survey and store those details in the computer so that the data so collected can be made use of for checking evasion of tax effectively. It would not fall under the restricted domains of being "area specific" or "case specific." Section 133(6) does not refer to any enquiry about any particular person or assessee, but pertains to information in relation to "such points or matters" which the assessing authority issuing notices requires. This clearly illustrates that the information of general nature can be called for and names and addresses of depositors who hold deposits above a particular sum is certainly permissible. *[Karnataka Bank Ltd. vs. Government of India (2002) 9 SCC 106 followed; M.V. Rajendran vs. ITO 260 ITR 442 (Ker)* approved).

> "The best doctor gives the least medicines."
>
> — *Benjamin Franklin*

Ashok Patil, Mandar Vaidya & Priti Shukla
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DIRECT TAXES
High Court

1] Section 45(4) – Retiring partner takes only money towards the value of his share in the firm no distribution of assets – Provisions of section 45(4) are not attracted

CIT vs. Dynamic Enterprises (2013) 95 DTR (Kar.) (FB) 97

The firm was owning a plot of land, and the there were eight partners. In the instant case three partners retired from the firm, and the firm continued to exist, and the business of the firm was carried on by the continuing partners. There was no dissolution of the firm and there was no distribution of capital assets on the retirement of the partners, only cash was paid representing the value of their shares in the partnership. The AO was of the view that the land was purchased when there were two partners, then new partner were introduced and then the old partners retired, and the AO held that it was a devise to avoid to stamp duty and capital gains tax and held that there was a transfer of property from old firm to the new firm, within the meaning of section 2(47) of the IT Act. On appeal to the High Court by the department, the High Court while dismissing the appeal held that the property is owned by the firm, and when the retiring partners took cash and retired, they did not relinquish their interest in the immovable property but their share in the partnership, thus there was no transfer of capital asset and no capital gain or profit arose, and therefore section 45(4) has no application to the facts of the case.

2] Section 194H – Stamp paper sold at discount to licensed stamp vendors – Discount does not constitute commission so as to require deduction of tax

Chief Treasury Officer Agra vs. Union of India and Others (2013) 94 DTR (All) 246

The department held a survey at the office of the petitioner who sells general stamp paper and held that the petitioner ought to be deducting TDS on the 1% commission given to the vendors. The High Court while allowing the petition held that selling stamp paper to licensed vendors at discount does not constitute commission so as to require tax deduction, as the same constitutes sale on principle to principle basis, therefore the provisions of section 194H would not be attracted.

3] Section 80-I – Profits must be derived from industrial undertaking – Ownership of industrial undertaking is not a prerequisite

Krishak Bharti Co-operative Ltd. vs. DCIT [2013] 358 ITR 168 (Delhi)

There was an agreement between the assessee and the Government of India whereby the assessee maintained and operated a heavy water plant which was owned by the heavy Water Board and the ammonia plant of the assessee were integrated with each other. The manufacture of heavy water was dependent on the supply of synthesis gas enriched with deuterium which was a by-product of the assessee's urea/ammonia plant. The assessee received service charges from the Heavy Water Board and claimed the same to be exempt u/s. 80-I. The AO did not allow the claim of the assessee and the Tribunal also held in favour of the department, the main reason being the assessee was not the owner of the undertaking. On appeal to the High Court, the High Court while allowing the appeal held that, profits must be from industrial undertaking, ownership in not necessary, the assessee is entitled to deduction u/s. 80-I.

4] Sectiond 36; 37 – Land allotted – Payments to be made in instalments which included interest – There was no borrowed capital – Interest cannot be claimed as revenue expenditure

CIT vs. Career Launcher India Ltd. [2013] 358 ITR 179 (Delhi)

The assessee is in the business of education, and was allotted land by Greater Noida Authority, the same was to be paid in instalment including interest. The assessee capitalised the interest, but in the return of income claimed the same as revenue income. The AO disallowed the same and the was reversed by the CIT and ITAT also decided in favour of the assessee. On appeal to the High Court, the court while allowing the appeal held that the interest was paid to the Noida Authority not in respect of any capital borrowed from that authority, but the price of the plot remaining unpaid as per the provisions of the lease deed. There being no capital borrowed, the interest was not allowable as a deduction under section 36 nor 37.

5] Section 45 – Capital gains would be charged only on receipt of sale consideration after development of land; and not when agreement was signed for development of land

CIT vs. Smt. Najoo Dara Deboo [2013] 38 taxmann.com 258 (Allahabad)

The assessee was owner of a premise, entered into an agreement in 1994 with the builder for construction a multistory department. Thereby, the builder developed the land and constructed a complex. Thereby, the builder developed the land and constructed a complex. As per the agreement, builder was to give 35 per cent of the build up area to assessee and was to get 65 per cent of the build up area along with undivided 65 per cent interest on the land. The Assessing Officer held that since assessee had handed over the possession of the plot of the builder in pursuance of an agreement for transfer and, thus, transfer took place during previous year in view of section 2(47). The Assessing Officer made addition on account of long term capital gain. On appeal, the Commissioner (Appeals) and the Tribunal deleted the addition. On revenue's appeal in High Court, the Hon'ble

court dismissed the appeal of the Revenue and held that the Assessing Officer has passed an order under section 143(3)/144/148/251, as mentioned by the Commissioner (Appeals) in his order. But fact remains that if return was not filed, then assessment order could not have been passed ex-parte under section 144. If the return was filed, assessment order could have been framed only under section 143(3). Thus, the Assessing Officer has framed the assessment order under the contradictory sections, which cannot be held as a valid assessment order. So, the Commissioner (Appeals) has cancelled the assessment order. The Tribunal deleted the addition on merit. On further appeal in High Court, the court held that from the record, it appeared that the assessee has paid capital gain from the assessment years 1998-99 to 2000-01, as mentioned in the impugned order. It may be mentioned that the capital gain can be charged only on receipt of the sale consideration and not otherwise. How can a person pay the capital gain if he has not received any amount? The Court also held that the assessee has honestly disclosed the capital gain for the assessment years 1998-99 to 2000-01, when the flats/areas were sold and consideration was received. During the year under consideration, only an agreement was signed. No money was received. So, there is no question to pay the capital gain. No reason was found to interfere with impugned order passed by the Tribunal. The same are hereby sustained along with reasons mentioned therein. The answers to the substantial questions of law are in favour of the assessee and against the department.

6] Section 40A(3) – Payment made to government concern in cash in excess of amount prescribed under section 40A(3) would be allowable

Commissioner of Income-tax vs. Devendrappa M. Kalal [2013] 39 taxmann.com 16 (Karnataka)

The respondent-assessee filed return of income for the assessment year 2008-09 by order of assessment passed u/s 143(3) of the Act. The Assessing Officer disallowed certain expenditure and added ` 73,91,380/- on the ground that the assessee has made payment in cash in excess of ` 20,000/- in respect of a single transaction which is in gross violation of Section 40A(3). Aggrieved by the same the assessee filed an appeal before the Commissioner of Income Tax (Appeals) which appeal was to be dismissed. Challenging the concurrent findings of the Courts below the respondent-assessee filed an appeal before the Income Tax Appellate Tribunal. It was contended by the assessee that all the payments were made by him to purchase the scrap from the Railways, which is run by the Union of India. According to the assessee, in respect of the purchase of scrap made from the Railway, the payments were made and any payment made to the Government is required to be considered as a legal tender and the question of adding the same by deleting from the business expenses is an error committed by the Assessing Officer. Accordingly, the appeal came to be allowed by the tribunal. On revenue's appeal in High Court, High Court dismissed the appeal of the revenue and held that the revenue is not disputing that the assessee is a scrap dealer purchasing scrap from the Railways. Admittedly Railways is a concern of the Union of India. If any cash is paid towards purchase of the scrap the same cannot be disputed by the revenue since such payment has to be considered as a legal tender. If the revenue is of the opinion that no such payment has been made to the Railways, we could have considered their grievance.

7] No review petition if case was remanded by HC to get clarifications on certain matters

G.S. Tiwari & Co. vs. CIT [2013] 38 taxmann.com 259 (Allahabad)

The Review Petition was filed under section 114 CPC against the judgment and order dated 30-5-2013 passed by this Court in Income Tax Appeal No.5 of 2008 for the assessment year 2003-04. It was contended by the assessee's counsel that on 15-1-2008, this Court has admitted the appeal on two substantial questions of law mentioned in the order but the answer to both the substantial questions of law was declined and it was mentioned that the same will be answered in another appropriate case. Learned counsel further submits that when the questions were admitted, then this Court is bound to accept or reject by giving an answer. He further submits that on merit, the case of the assessee was fully covered by the decision of this Court in the case of *CIT vs. Raghvendra Pratap Singh [2009] 14 MTC 415;* and also *Indwell Constructions vs. CIT [1998] 232 ITR 776 (AP)* where it was held that when net profit is estimated after rejecting the books of account, no separate addition can be made in respect of any expenditure even though provisions of statute were violated. Counsel also submitted that the CIT(A) and ITAT have recorded a concurrent finding of the facts and this Court was bound by the said finding. Lastly, he made a request to recall the order dated 30-5-2013. Hearing the contention the court held that it appears that under the garb of review, order cannot be reopened. No re-hearing was permissible on merit. Scope of review is very limited. In the instant case, when the facts were not clear, then the matter was referred back to the Tribunal with a direction to dispose of the same within a period of three months as per law. The Tribunal is a final fact finding authority as per the ratio laid down in the case of *Kamala Ganapathy Subramaniam vs. Controller of Estate Duty [2002]] 253 ITR 692/121 Taxman 615.* When the facts were not cleared then the matter was referred to the Tribunal. So, the answer to the substantial question of law was declined. In the order dated 30-5-2013, there was no mistake apparent from the face of record. At the very outset, we may refer to the statutory grounds as provided under Order XLVII Rule 1 of the Code of Civil Procedure, 1908, for seeking review of a judgment or order passed by this court. They are: (a) that there is discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) that some important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) that there was some mistake or error apparent on the face of record or there is any other sufficient reason. It was also settled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Relying on the judgment of *Satyanarayan Laxminarayan Hegde vs. Mallikarjun Bhavanappa Tiruymale AIR 1960 SC 137* and further, that ratio was reiterated in the judgment of Hon'ble the Apex Court in *Parsion Devi vs. Sumiri Devi [1997] 8 SCC 715* where it was observed that a review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise. The aforesaid views were reiterated by Hon'ble the Apex Court also in a later judgment reported in *Haridas Das vs. Smt. Usha Rani Banik AIR 2006 SC 1634.* Similar views have also been taken in another judgment reported in *Inderchand Jain vs. Motilal Jain [2009] 14 SCC 663.* Relying on these judgments the court was of the view that there was no error/mistake apparent on the face of record. Therefore the review petition was dismissed.

Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

REPORTED

1. Capital gains – Investment in REC Bond prior to the sale of property out of advance money received – Entitled for exemption under section 54EC – A.Y. 2008-09

Subhash Vinayak Supnekar vs. ACIT (2013) 95 DTR (Pune)(Trib.) 5

The assessee sold a property on 5th April, 2007 for a total consideration of ` 16 crores. The assessee has claimed exemption under section 54EC of the Act by investing in Rural Electrification Corp. Ltd. on 2nd February, 2007. The A.O., by observing that the assessee has invested in REC bonds prior to the date of sale, rejected the claim of exemption under section 54EC of the Act. The First Appellate Authority confirmed the view of the A.O. The assessee being aggrieved by the order passed by learned CIT(A) carried forward the matter before the Hon'ble Appellate Tribunal. The Tribunal has allowed the claim of the assessee made under section 54EC of the Act by observing that Earnest Money or advance received by the assessee is a part of the sale consideration of the property sold by him and, therefore, assessee is entitled to exemption under section 54EC in respect of the amount invested by him in REC Bonds prior to the date of sale out of the advance money received by him against the sale of property on the basis of agreement to sell.

2. Business expenditure – Disallowance under section 43B – Employer's and employee's contribution towards PF and ESIC – Payments made before due date of filing return – No disallowance can be made under section 43B. A.Y. 2002-03

Mattel Toys (I) (P) Ltd. vs. DCIT (2013) 95 DTR (Mumbai)(Trib.) 100

The assessee during the course of assessment proceedings filed the details of payments made towards PF and ESIC. The A.O. from the details furnished by the assessee observed that some amounts of PF and ESIC were paid after the due date as per the provisions of section 43B(b) of the Act. The A.O. therefore made disallowance under section 43B with respect to the PF and ESIC payment made after due date. On appeal, the First Appellate Authority held that the payment made within the grace period has to be allowed under section 43B, however, the payments which have been made before the due date for filing return of income cannot be allowed. The assessee being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Mumbai. The Tribunal allowed the Appeal filed by the assessee by observing that no disallowance under section 43B

can be made where payment of employees' and employer's contribution to PF and ESIC is made before due date of filing return.

3. Penalty under section 271(1)(c) of the Act – Applicability of Explanation 5 – Amount surrendered during the course of search under section 132(4) – Not disclosed in original return – Same was disclosed in revised return – Penalty is not leviable. A.Y. 2007-08

JCIT vs. Bhagwan Das Garg (2013) 95 DTR (Chd.) (Tribunal) 45

The assessee was subjected to search action under section 132 of the Act. During the course of search action, the assessee disclosed an amount of ` 45 lakhs in his statement recorded under section 132(4) of the Act. However, the said amount was not disclosed in the original return of income. During the course of assessment proceedings, the A.O. confronted the assessee with the issue of non-disclosure of the amount surrendered under section 132(4) of the Act. The assessee realising its mistake filed revised return of income disclosing the amount surrendered during the course of search. The assessee further explained the A.O. that the non-disclosure of amount in the original return was due to unintentional mistake as the assessee has already paid the taxes and interest on the amount offered in the statement recorded under section 132(4) of the Act. However, the A.O. rejected the explanation of the assessee and levied the penalty under section 271(1)(c) of the Act by observing that the assessee disclosed the surrendered amount only after being confronted, therefore, immunity from concealment is not available to the assessee. On appeal, the learned CIT(A) considering the explanation of the assessee deleted the penalty levied by the A.O. with respect to the surrendered amount of ` 45 lakhs. The department being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Appellate Tribunal. The Tribunal dismissed the appeal filed by the department by observing that assessee having deposited advance tax on the income surrendered by him in the statement under section 132(4) during the course of search and filed cash flow chart and balance sheet before the A.O. reflecting the surrendered income, all facts regarding the surrender of income stood disclosed to the department and therefore, assessee is entitled to the benefit of Explanation 5(2) to section 271(1)(c) for inadvertent omission to disclose the said amount in the original return which has been later disclosed in the revised return.

4. Deduction under section 10AA – Production of handicraft goods after purchasing unfinished items – amounts to manufacture – Denial of claim of deduction is not justified. A.Y. 2009-10

ITO vs. Makers Mart (2013) 94 DTR (Jd)(Trib) 358

The assessee filed its return of income claiming deduction under section 10AA of the Act. However, the A.O. denied the claim of the assessee by observing that deduction under section 10AA of the Act is allowable to the unit set up in Special Economic Zone in respect of profit derived from export of articles or things manufactured by the Unit. The A.O. further observed that the assessee purchased and exported the handicraft items. Therefore, it was concluded by the A.O. that assessee has exported the articles or things not manufactured by it but exported trading items. The assessee being aggrieved by the order passed by A.O. preferred an appeal before the learned CIT(A). The First Appellate Authority allowed the appeal of the assessee. The department being aggrieved by the order passed by learned CIT(A) carried the matter further in appeal before the Appellate Tribunal. The Tribunal dismissed the appeal of the department by observing that assessee being engaged in production of handicraft goods after purchasing and processing unfinished items, and various Governmental and other authorities having issued certificates to the assessee recognising it as a manufacturing concern, deduction under section 10AA could

not be denied to the assessee on the ground that it was not engaged in manufacturing activities.

5. Capital gains – Transfer of immovable property – Section 2(47) of the Income-tax Act, 1961 – Allotter of the property failed to deliver property originally allotted to the assessee – Subsequently, registered alternate property in lieu of original property – Allottee's right to property became vested from date of original allotment and capital gain on transfer of property should be ascertained accordingly. A.Y. 2009-10

A. Suresh Rao vs. ITO – (2013) 94 DTR 1 (Bang.)

The assessee was allotted a site by virtue of an agreement executed between him and the Bangalore Development Authority ("BDA") in February 1988. The assessee not able to develop the site as the BDA was not able to deliver vacant possession of the site free from encumbrance to him. Finally, BDA allotted a alternate site to the assessee, BDA also registered sale deed in respect of the property in February 2008 in favour of the assessee and handed over vacant and peaceful possession of the same. After receiving the possession of the property the assessee sold the property in May 2008 and computed Long Term Capital Gain and offer the same for taxation.

The Assessing Officer in his assessment order held that the property which was ultimately sold and the property that was allotted in 1988 were different properties and therefore, he treated the gain on sale of property as Short Term Capital Gain.

On appeal the Tribunal held that the assessee had paid the entire consideration for the site originally allotted in 1988. The assessee was always willing to perform his part of the contract. It is only because of inability on the part of BDA, that the property could not be conveyed to the assessee. Thus, a vested right to get a site allotted by the BDA for value which has already been paid by the assessee, existed since 1988. It is this right which ultimately got crystallised in the form of sale by BDA of the property in February 2008. Therefore, the claim of the assessee that he held the property from the year 1988 has to be accepted and the gain on sale of property was assessable as Long Term Capital Gain.

6. Reassessment – Section 149 of the Income-tax Act – Validity of service – Notice under section 148 though dated within the period of limitation handed over to the postal authority beyond the limitation prescribed under the Act – Not valid – Reassessment – Section 147 of the Income-tax Act – Reason to believe – Reassessment on the basis of vague information received by the Assessing Officer by the investigation wing, that the assessee had dealt with a company which, was engaged in providing accommodation entries without providing any material to establish that the transactions entered into by the assessee were in the nature of accommodation entries – Not valid. A.Y. 2001-02

ITO vs. On Exim (P.) Ltd. – (2013) 94 DTR 140 (Del.)

Reassessment notice under section 148 of the Act for A.Y. 2001-02 dated 31-3-2008 was handed over to the postal authorities on 1-4-2008 that is, after 6 (six) years from the end of the relevant assessment year. The assessee objected to the same as being barred by limitation. The Tribunal holding that the notice was not valid as issued beyond the limitation period held that, the expression 'to issue' in the context of issuance of notices, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. Thus, date of

issue of notice under section 148 would be the date on which the same were handed over for service to the proper officer which, in the present case, were postal authorities, to whom, the notice was handed over on 1-4-2008 which was beyond the period of limitation of six years provided in section 149 of the Act.

Further, the Tribunal held that the reopening of the assessment was also bad in law as, the assessing officer had reopened the assessment merely on the basis of the vague information received from the Investigation Wing that the company with whom the assessee had entered into some commercial transaction was engaged in the business of providing accommodation entries. The assessment was reopened without indicating the nature of transaction entered into by the assessee and also without bringing on record any material or evidence to establish that the transactions entered into by the assessee were in the nature of accommodation entries.

7. Search and seizure – Section 132 of the Income-tax Act, 1961 – Authorisation – Reason to believe – If the condition of existence of reason to believe is in consequence of information in possession of the officer is not satisfied – There can be no authorisation and search conducted in pursuance thereto cannot be a valid search. A.Ys. 2001-02 to 2003-04, 2005- 06 and 2007-08.

Parma Ram Bhakar vs. Dy. CIT – (2013) 94 DTR 342 (Jd.)

A search operation under section 132 of the Act was carried out at hotel room, where the assessee was staying on the basis of the information received from CBI. Thereafter, the assessing officer issued notice under section 153A of the Act and completed the assessment. The assessee challenged the validity of search and submitted that search in the case of assessee was carried out only on the information from CBI, but no material or evidence on record was brought so as to show or establish the existence of the reason authorising a valid search. The assessee further submitted that merely stating that on information from other agencies, operation under section 132 of the Act was carried out was not sufficient, therefore, the search action was invalid.

On appeal the Tribunal held that the search was conducted only on the basis of the information received from C.B.I. that undisclosed cash being carried by the assessee, but no such cash or any other incriminating documents, books of account, money, bullion, jewellery or other valuable article or thing were found in the possession of the assessee. Therefore, the authorisation to conduct search based on reason under section 132(1) of the Act did not exist and accordingly, the search became invalid and consequently, the assessment order based on a invalid search also cannot stand and is liable to be set aside.

8. Capital gains – Exemption – Section 54F of the Income-tax Act, 1961 – Completion certificate for purpose of electrification issued by Local Panchayat before expiry of three years should be accepted for allowing deduction under section 54F. A.Y. 2007-08

Tony J. Pulikal vs. Dy. CIT – (2013) 145 ITD 172 (Coch.)

The assessee, along with his brother, had purchased 79.072 cents of land, which was sold during the year under consideration and the assessee claimed exemption under section 54F in respect of investment made for construction of a residential house. One of the grounds on which the assessing officer disallowed the assessee's claim for deduction under section 54F of the Act was that the assessee had not completed the construction of property with the period of three (3) years from the date of transfer of capital asset.

On appeal the Tribunal held that the assessee could not be denied the benefit of section 54F of the Act when the local panchayat has issued the

completion certificate under the Local Bodies Act, the same has to be accepted. The Tribunal also took note of the fact that the electricity supply would be provided only after completion of the construction. Before completion, no regular power supply will be provided by the electricity board.

9. Business expenditure – Section 9 read with sections 195 & 40(a)(i) of the Income-tax Act, 1961 – Export commission – Paid to foreign agent for procuring order and pursuing payment from foreign buyer – Not taxable as no services are rendered in India. A.Y. 2008-09

Allied Nippon vs. Dy. CIT – (2013) 145 ITD 81 (Del.)

The assessee an exporter paid the export commission to the non-resident who rendered the services outside India for the purpose of procuring the order and pursuing the payment from the foreign buyer. As no services were rendered in India, the income of the foreign agent to whom the commission was paid did not accrue or arise in India, the assessee did not deduct tax at source. The Assessing Officer disallowed the entire export commission invoking the provisions of section 40(a)(i) as no tax was deducted by the assessee while making payment to export agent.

On appeal the Tribunal following the decision of Delhi High Court in the case of, *CIT vs. EON Technology (P.) Ltd. – [(2012) 343 ITR 366 (Del.)*] held that export commission paid to foreign agent for procuring order and pursuing payment from foreign buyer did not accrue or arise in India as no services were rendered in India. Therefore, the payment of export commission could not be subject to tax deduction at source in terms of section 195 of the Act and consequently same cannot be disallowed invoking the provisions of section 40(a)(ia) of the Act.

UNREPORTED

1. Capital gains or Business income – Section 45 vis-a-vis 28 – Dealings shares – Assessee indulged in high frequency transaction and borrowed funds for making investment in shares this itself could not be ground to treat transaction in shares as business income. A.Y. 2007-08

Koradia Construction (P.) Ltd. vs. Dy. CIT - [I.T.A. No. 1074 / Mum / 2011; Order dated 27-9-2013, Mumbai Bench]

The assessee filed its return of income treating profit on sale of shares as capital gains. The Assessing Officer, during the assessment proceedings taking into account volume, frequency of transactions and also the fact that the assessee had utilised borrowed funds for making investment in shares, treated the income from sale of shares as business income.

On appeal the Tribunal directing the Assessing Officer to treat the income on sale of shares as capital gain held that, the assessee shows that the assessee had separately shown share trading profit, long-term capital gains on shares and profit from business. In the balance sheet, the assessee has shown shares under the head 'Investment'. The investment in shares has been valued at cost. Further, merely because the assessee was indulged in to high frequency transaction could not mean that trading activities have been carried out by it. A prudent investor always keeps a watch on the volatility of the market and makes sound investment decision in accordance with such market fluctuation and has the liberty to liquidate its investments in shares as and when necessary. As regards the allegations that the borrowed funds had been applied for investment in shares, the Tribunal following the decision in the case of, *Narendra Gehlaut vs. Jt. CIT - [(2012) 52 SOT 255 (Del)]* held that it cannot constitute a factor as in none of the case laws or CBDT Circular it has been held that borrowings will not be allowed in investment transactions.

CA Sunil K. Jain

DIRECT TAXES

Statutes, Circulars & Notifications

Notifications

Section 35(1)(ii) of the Income-tax Act, 1961 – Scientific Research Expenditure – Approved Scientific Research Associations/Institutions

The organisation(s) Indian Plywood Industries Research & Training Institute, Bengaluru, (PAN – AAAAI0707P) and M/s Haffkine Institute for Training Research & Testing, Mumbai, (PAN – AAATH1654B) have been approved by the Central Government for the purpose of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 from 1-4-2012 and 1-4-2013 respectively onwards, assessment year 2012-2013 and 2013-14 respectively, and onwards in the category of "University College and other Institution", subject to the conditions mentioned in the respective notifications.

(Notification No. 80-81/2013 both dt. 22-10-2013)

Section 94A of the Income-tax Act, 1961 – Special measures in respect of transactions with persons located in notified jurisdictional area – 'Cyprus' specified as notified jurisdictional area for purposes of section 94A

The Central Government specified 'Cyprus' as the 'notified jurisdictional area' for the purposes of section 94A of the Income-tax Act, 1961. The notification shall come into force with effect from the date of its publication in the Official Gazette.

(Notification No. 86/2013 dt. 1-11-2013)

Section 10(46) of the Income-tax Act, 1961 – Exemptions – Statutory body/authority/board/commission – Notified body or authority – Tripura State AIDS Control Society

The Central Government notified the Tripura State AIDS Control Society a body constituted by the Government of Tripura in respect of the specified income "Amount received in the form of grants-in-aid from the Central Government." arising to that Society. This notification shall be deemed to have been applied for the financial years 2011-12 and 2012-2013 and shall be applicable for the financial years 2013-14, 2014-15 and 2015-16. The notification shall be effective subject to the conditions mentioned in the said notification.

(Notification No. 87/2013 dt. 6-11-2013)

Section 80G(2)(c) of the Income-tax Act, 1961 – Deductions – Donations to certain funds, charitable institutions, etc. – Notified sports association or institution – Archery Association of India

The Central Government specified 'Archery Association of India', New Delhi as an association for the purposes of above clause for the assessment years 2013-14, 2014-15 and 2015-16 provided that the conditions specified in said rule 18AAAAA shall remain fulfilled.

(Notification No. 88/2013 dt. 6-11-2013)

Circulars

Section 139 of the Income-tax Act, 1961 – Return of income – Treating e-returns of A.Y. 2013-14 where unpaid self-assessment tax exists on the date of filing of return as deemed defective returns

The CBDT noted that a number of e-Returns have been submitted for A.Y. 2013-14 where unpaid self-assessment-tax existed on the date of submission of e-returns. As on 9-10-2013, total 1,46,495 e-Returns of A.Y. 2013-14 were submitted with unpaid self-assessment-tax of ` 100/- or more on the date of filing. The PAN-wise data for A.Y. 2013-14 for assessees who have not paid self-assessment-tax (` 100/- or more) on the day of filing of their e-returns is placed on i-Taxnet (http://10.152.2.10/) in the following path :

Resources → Downloads → DIT_SYSTEMS → Unpaid Self-Assessment-Taxes in e-Returns of A.Y. 2013-14

As per law, these e-Returns are deemed defective returns for AY 2013-14. The CPC at Bengaluru has already issued notices to such assessees. The Assessing Officers in respective regions have been directed to issue notices and follow-up these cases to ensure that unpaid-self-assessment tax is deposited by the assessee at the earliest.

(Letter [F. No. DIT(S)-III/CPC/2013-14/unpaid self-assessment tax], dated 22-10-2013)

Section 245 of the Income-tax Act, 1961 – Refunds – Set off of refunds against tax remaining payable – Data pertaining to notices issued under section 245 by CPC, Bengaluru where demand/refund is greater than ` 5,000

In pursuance to the decision of the meeting dated 21-8-2013, the CPC is allowed to issue refunds without adjustment of demand as an interim measure in cases where either the outstanding demand against the assessee was less than ` 5,000/- or claim of refund was less than ` 5,000/-.

A list of CCIT-wise cases where such refund/ demand in excess of ` 5,000/- exist, and notices under section 245 have been issued is available on i-Taxnet (http://10.152.2.10) on the following path:

Resources → Downloads → DIT_SYSTEMS → Notices issued under section 245 from CPC for confirmation of demands by AOs

The directions have been issued to the Assessing Officers under respective charges to make compliance of the aforesaid decision, perform necessary verification and correction following the procedure as per section 245 of the I.T. Act and communicate its findings on adjustable demand to CPC, Bengaluru, who will then process the refund and adjust the demand. The communication to CPC, Bengaluru, may also be given on its e-mail ld: cit.cpc.bangalore@incometaxindia.gov.in

(Letter [F. No. DIT(S)-III/CPC/2013-14/refund adjustment], dated 22-10-2013)

Timely issue of TDS Certificate to Customers

The Reserve Bank of India on noticing that, some banks are not providing TDS Certificate in Form 16A to their customers in time, which is causing inconvenience to customers in filing income-tax returns timely. With a view to protect interest of the depositors and for rendering better customer service, banks have been advised to provide to their customers from whose income tax has been deducted at source, TDS Certificate in Form 16A. Banks have also been advised to put in place systems that will enable them to provide Form 16A to the customers within the time-frame prescribed under the Income Tax Rules. Banks should avoid waiting till the last moment.

This advice is issued under section 36(1)(a) of the Banking Regulation Act, 1949 (10 of 19).

(Circular Dbod. No. Leg.BC.65/09.07.005/2013-14, Dated 6-11-2013)

Instructions

Section 142 of the Income-tax Act, 1961 – Procedure for Assessment –Inquiry Before Assessment – Standard Operating Procedure for cases under Non-filers Monitoring System (NMS)

The existing procedure for monitoring cases of 'Non-Filers of IT Returns' as identified by Director General of Income Tax (System) was examined by

the Board and felt that at present, cases of Non-Filers are not being uniformly monitored by the Assessing Officers due to lack of consistency in approach in dealing with such cases. Therefore, in order to streamline processing of such cases and to ensure consistency in monitoring NMS cases by the Assessing Officers, the Board, laid down the following Standard Operating Procedure:

1. The Assessing Officer should issue letter to the assessee within 15 days of the case being assigned in NMS, seeking information about the return of income flagged in NMS. Facility to generate letter has been provided in the NMS module of i-taxnet.
2. If the letter is delivered, the Assessing Officer should capture the delivery date in the NMS module.
3. If the letter is not delivered, the Assessing Officer should issue letter to the alternate addresses of the assessee available in the Online Monitoring System or any other address available with the Assessing Officer through field enquiries or otherwise. All addresses used in IT Return, AIR, CIB databases have been made available to the Assessing Officer in the Online Monitoring System to assist the field formations in identification of current address of the taxpayer.
4. If the return is received, the Assessing Officer should capture the details in AST within 15 days of filing of the return. If the assessee informs that paper return has already been filed which was not captured in AST, the details of return should be entered in the AST within 15 days of receiving such information. E-filed returns will be automatically pushed to NMS.
5. If no return is required to be filed in the case (non-resident, etc.), the Assessing Officer should mark "No return is required" and mention reason for the same in NMS which needs to be confirmed by Range head.
6. If the Assessing Officer is not able to serve the letter and identify the taxpayer, Assessing Officer should mark the assessee "Assessee not traceable" in NMS which needs to be confirmed by Range head.
7. In cases where the assessee has been identified and no return has been filed within 30 days of the time given in the letter, the Assessing Officer should consider initiation of proceedings u/s 142(1)148 in AST.
8. The cases will be processed every week by the Directorate of Systems and will be marked as closed in NMS if one of the following actions are taken for A.Yrs. 2010-11, 2011-12 and 2012-13:
   (a) Details of return are available in AST
   (b) Notice u/s 142(1) or 148 has been issued in AST
   (c) "No return is required" is marked by the Assessing Officer and confirmed by Range head.

(Instruction No. 14/2013 [F.No. 225/153/2013/ITA.II], dated 23-9-2013)

Section 10A, read with sections 10AA & 10B of the Income-tax Act, 1961 – Free Trade Zone – Direct Tax Benefits – Clarification on issues relating to export of computer software

A clarificatory Circular No. 01/2013, dated 17-1-2013 was issued by CBDT to address various contentious issues leading to tax disputes in cases of entities engaged in export of computer software which are availing tax-benefits under sections 10A, 10AA and 10B of the Income-tax Act, 1961. Instances have been reported where the Assessing Officers are not following the clarifications so issued and are taking a divergent view even in cases where the clarifications are directly applicable. The field authorities have now been advised to follow the contents of Circular in letter and spirit. It is also advised that further appeals should not be filed in cases where orders were passed prior to issue of Circular but the issues giving rise to the disputes have been clarified by the Circular.

(Instruction No. 17/2013 [F.No.178/84/2012-ITA.I], dated 19-11-2013)

CA Tarunkumar Singhal & CA Sunil Moti Lala

INTERNATIONAL TAXATION

Case Law Update

A] HIGH COURT JUDGMENTS

I. MAP invocation application under DTAA before US Competent Authority and furnishing Bank Guarantee to Department in India suspends assessment & collection of taxes in India – The word "admitted" by Indian Competent Authority in CBDT's Instruction No. 2 of 2003 only means that the Competent Authority in India has to admit i.e. acknowledge that the MAP proceedings have been invoked by tax payers through the Competent Authority in USA

UPS Worldwide Forwarding Inc. vs. UPS Jetair Express (P) Ltd. [2013] 38 taxmann.com 250 (Bombay) – Assessment Year: 2010-11

Facts

1. UPS Worldwide Forwarding Inc. ("the Petitioner"), a tax resident of USA, engaged in the business of International Express Delivery entered into an agreement with UPS Jetair Express Pvt. Ltd. ("UPS Jetair").

2. Under the agreement, Petitioner rendered services to UPS Jetair in respect of delivering documents/parcels outside India having originated in India, while UPS Jetair rendered services to the Petitioner in respect of documents /parcels to be delivered in India having originated outside India.

3. In accordance with Article 27 (Mutual Agreement Procedure ("MAP")) of the India – USA Double Taxation Avoidance Agreement ("the DTAA"), the Petitioner preferred an application before the competent authority of USA, seeking its assistance in respect of its stand taken in Return of Income filed in India that its income received from UPS Jetair in respect of services rendered for outbound documents was not taxable in India for Assessment Years ("A.Y.") 2001-02 to 2009-10.

4. On 3rd November, 2009, the Petitioner made an application for inclusion of AY 2010-11 in the pending MAP proceedings.

5. On 29th March, 2010, the Petitioner filed an application under section 197 of the Income-tax Act, 1961 ("the Act") and requested for issue of Nil Tax withholding order for AY 2010-11. It further pointed out that NIL Tax Withholding order/certificate were issued for earlier years and also that its application dated 3rd November 2009 to include AY 2010-11 in pending MAP proceedings.

6. On 30th March, 2010, the Petitioner submitted a bank guarantee of ` 6,07,55,238/- securing the Department in respect of its

legitimate tax dues in case the MAP proceedings fail in accordance with the terms of the MOU so as to enable an order under section 197 of the Act for the A.Y. 2010-11.

7. The AO passed an order under section 197 dated 15th December, 2010 rejecting the Petitioner's application for Nil Tax Withholding order/certificate on the ground that Petitioner's request for inclusion of A.Y. 2010-11 was not pending before the MAP authorities as informed by the Foreign Tax Division (“FTD”) of the Central Board of Direct Taxes (“CBDT”).

8. On receipt of a certificate confirming that Withholding tax application in respect of A.Y. 2010-11 is being considered under the MAP proceedings from competent authority of USA on 17th December, 2010, the Petitioner made an application to the AO on 28th December, 2010 seeking modification of the order dated 15 December, 2010 but no order was passed by the AO.

9. On 31st May, 2011, the Petitioner filed a Revision Application under section 264 of the Act before DIT (International Taxation) seeking revision of the order dated 15th December, 2010.

10. However, the same was rejected *vide* order dated 21st March, 2013 holding that no MAP proceedings for the A.Y. 2010-11 was pending at the time the Petitioner filed an application under section 197 nor when the order under section 197 was passed on the ground that MAP proceedings for A.Y. 2010-11 was admitted only on 21st September, 2012 as informed by the FTD. It further held that the entire period relevant to the AY 2010-11 has expired and in view thereof, allowing of the application now would be infructuous.

11. Aggrieved, the Petitioner filed a writ before the Hon’ble High Court.

Judgment

1. The Hon’ble High Court held that the contention of the Department that suspension of assessment and collection of taxes (including Withholding taxes) under MOU can only take place when the issue was admitted for consideration under MAP proceedings cannot be upheld since Article 27 of the DTAA read with the MOU, makes it clear that the suspension of assessment and collection of tax takes place, no sooner an application is made to the Competent Authorities to settle the dispute under MOU proceedings and the Department is secured by the tax payer furnishing a Bank Guarantee. There is no provision for a process of admission and thereafter final consideration provided either in Article 27 of DTAA or MOU and therefore, it was not open to read the same into it.

2. It further held that when the DIT was exercising jurisdiction under revision and did not dispute the fact that MAP proceedings for the AY 2010-11 had been admitted and were pending w.e.f. 21st September, 2012, it was obligatory on his part to have directed the grant of Certificate of Nil Withholding Tax.

3. Further, in instant case, notice was issued to UPS Jetair to deduct the tax only on 8th August, 2013. If the submission of the Department that grant of such Certificate of Nil Withholding Tax after the completion of the A.Y. 2010-11 would be an exercise in futility is accepted, then Article 27 of the DTAA providing for a period of three years to move the Competent Authority from the date of the receipt of the notice would be rendered redundant. This understanding is further supported by MOU which in clause 6 (iii) thereof, *inter alia*, provides that Withholding tax on income can be a subject matter of MAP for prior, current and future taxation years.

4. The Hon’ble High Court also held the word admitted by Indian Competent Authority in Instruction No. 2 dated 28th April, 2003 issued by CBDT only means that the Competent Authority in India has to admit i.e. acknowledge that the MAP proceedings have been invoked by tax payers through the Competent Authority in USA. It does not mean that the invocation of the

MAP proceedings by Competent Authority by the tax payer has been admitted for the future consideration by the authorities.

5. Accordingly, it quashed and set aside the revision order dated 21st March, 2013 passed by the DIT and the order under section 197 passed by the AO and directed the AO to issue appropriate Nil Withholding Tax order in respect of A.Y. 2010-11, upon the Petitioner giving an undertaking to keep alive the bank guarantee already furnished and to give a further bank guarantee, if necessary, to secure the Department of its dues (tax and interest).

II. Assessee having denied its tax liability, it seems unfair on the part of the assessee to expect the Indian payers to deduct tax from the remittances – When it does so, all consequences under the Act follow, including its liability to pay interest under section 234B since it would not have paid any advance tax

DIT (IT) vs. Alcatel Lucent USA, Inc [ITA Nos. 327/2012, 330/2012, 338/2012 & 339/2012 (Delhi High Court) Order dated 7th November, 2013] – Assessment Years: 2004-05, to 2008-09

Facts

1. The assessee, Alcatel Lucent USA, Inc., tax-resident of USA and part of the Alcatel Lucent Group supplied telecom equipments to customers in India.

2. On 27-2-2009, a survey under section 133A of the Act was conducted in the premises of Alcatel Lucent India Ltd., an Indian subsidiary of the assessee and which according to the Department constituted the permanent establishment ("PE") of the assessee in India. The Indian subsidiary provided marketing support services to the assessee.

3. Based on the materials found during the survey, the AO concluded that the assessee had a PE in India in terms of the Double Taxation Avoidance Agreement between India and USA ("the DTAA") and was liable to tax in India on the income earned therein.

4. Consequently, notices under Section 148 of the Act for the A.Ys. 2004-05 to 2007-08 were issued to the assessee. The assessee filed "nil" return of income for all the assessment years contending that the no income was chargeable to tax as the assessee did not have any PE in India.

5. The AO however, did not accept the assessee's stand and attributed 2.5% of the sale proceeds of the hardware as profit attributable to the PE in India. He also directed that interest under sections 234A, 234B and 234C shall be charged.

6. Before the CIT(A), the assessee only pressed the ground related to levy of interest under section 234B contending that its entire income was liable to TDS and hence interest under section 234B would not be applicable. The CIT(A) upheld the claim of the assessee.

7. On further appeal, the Hon'ble ITAT dismissed the appeal of the Department. Aggrieved, the Department filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court observed that the facts of the case were different from the facts in the case of *DIT vs. Jacabs Civil Incorporated / Mitsubishi Corporation*. Jacabs ruling dealt with situation where taxpayer admitted tax liability from beginning. However, in the present case, the assessee did not admit any income in the Return of Income ("ROI").

2. It further observed that only at the stage of the CIT(A), the assessee accepted its tax liability in India. It thus held that it would be incongruous, to hold that even though the assessee did not admit any tax liability in India while filing the ROI and even up to the stage of First Appeal, and correspondingly the payers were also not liable to deduct tax under

section 195(1), still it can take credit for the tax "deductible", though not deducted, by the Indian payers from the remittance made to the assessee.

3. It further observed that Hon'ble High Court's ruling in Mitsubishi Corporation (pronounced along with Jacabs judgment) was inaccurate, as facts in Mitsubishi were similar to Alcatel Lucent's case. It observed that Court would appear to have proceeded on the assumption that the facts of Mitsubishi Corporation were similar to those of Jacabs (supra).

4. It thus held that it is open to the assessee to deny its liability to tax in India on whatever grounds it thinks fit and proper. Having denied its tax liability, it seems unfair on the part of the assessee to expect the Indian payers to deduct tax from the remittances. It is also open to the assessee to change its stand at the first appellate stage and submit to the assessment of the income. When it does so, all consequences under the Act follow, including its liability to pay interest under section 234B since it would not have paid any advance tax.

5. It further held that an assessee who admits its tax liability right from the beginning can contend that it was the responsibility of the payers to deduct the tax and if they did not, even then the tax which ought to have been deducted by them should be set off against the assessee's advance tax liabilities and thus section 234B interest would not be attracted.

6. The Hon'ble High Court invoking the 'principles of equity' in tax law interpretation held that the assessee cannot be allowed to change stand at appellate stage and shift burden to Indian payers for TDS failure. Assessee must take responsibility for its "volte face". Tax laws and equity need not be sworn enemies at all times. The rule of strict interpretation may be relaxed where mischief can result because of the inconsistent or contradictory stands taken by the assessee or even the Department. Interest is compensatory in nature and the Department had been deprived of use of monies.

III. Section 195(1) can have application only if the payment is made to an income tax assessee in India. – Membership fees paid to International Press Institute ('IPI') are not subject to deduction of tax under section 195 as IPI is a non-resident body incorporated by a law in another country having no business or other connection in India

CIT vs. Malayala Manorama Co. Ltd. (ITA No 345 of 2009 – Kerala High Court Order dated 8th October, 2013) – Assessment Year: 1999-2000

Facts

1. Malayala Manorama Co. Ltd. ("the assessee") made payment to International Press Institute ('IPI') towards membership fee contribution.

2. IPI is a non-resident body incorporated by a law in another country having no business or other connection in India.

3. The assessee claimed exemption from deducting tax at source in respect of membership fee contribution which was rejected by the Assessing Officer ("AO").

4. On appeal, the Commissioner of Income Tax (Appeals) and Hon'ble Tribunal upheld the claim of the assessee.

5. Aggrieved, the Department filed an appeal to the Hon'ble High Court.

Judgment

1. The Hon'ble High Court observed that IPI, a non-resident body had no permanent establishment in India and therefore section 9(1)(i) of the Act would not apply. The said provision would apply only if there is any property, asset or source of income in India which belong to IPI and such source must be used for earning income in India. It thus held that any reference to section 2(24)(ii)(a) of the Act become superfluous and therefore

section 195 (1) of the Act would not apply to the payments made to the IPI.

2. The Hon'ble High Court further held that the provision of law under section 195(1) can have application only if the payment is made to an income tax assessee in India. In the instant case, the Hon'ble Tribunal found that the IPI had no permanent establishment in India and the assessee was not an agent of IPI. The assessee was only a member of IPI and by giving advertisement membership fee or other donation the assessee was not getting any monetary advantage. Thus the assessee was not liable to comply with the provisions of section 195 of the Act.

IV. Once the MAP application fulfils all the conditions of Article 27, the MAP proceedings are taken as pending and can be said to be "admitted" – No coercive recovery of stayed tax demands on grounds of expired bank guarantee when bank guarantee has "auto-renewal clause"

Motorola Solutions India P. Ltd. vs. CIT [2013] 38 taxmann.com 38 (Punjab & Haryana High Court) – Assessment Year : 2005-06

Facts

1. Motorola Solutions India P. Ltd. ("the assessee"), a company incorporated under the Companies Act, 1956 is a subsidiary of Motorola Solutions International Capital LLC, USA and Motorola Solutions Inc., USA.

2. The assessee invoked Mutual Agreement Procedure ("MAP") for A.Y. 2005-06 by filing an application before the competent authority in the USA. The invocation of MAP was brought to the notice of the Indian competent authority i.e. CBDT.

3. The assessee later filed an application for stay before the AO at Bengaluru which was accepted by the AO and the assessee was asked to pay 4 crores in 2 installments. The balance demand was stayed till the application filed before the CBDT is considered by the Board and on production of Bank Guarantee.

4. The proceedings were transferred to Gurgaon. The AO at Gurgaon issued notice under section 221(1) despite the stay order.

5. The notice issued by the AO stated that a MAP application has been filed before the CBDT but, it was not clear whether request for suspension of collection for outstanding tax under the Memorandum of Understanding ("MOU") has been "admitted" by the Indian Competent Authority in terms of paragraph 4 of Instruction No. 10/2007.

6. The assessee responded that the bank guarantee has been furnished for the balance amount and the same were valid. It further stated that in the past for A.Y 2003-04 and A.Y 2004-05, the Department had accepted the bank guarantees and had consequently accepted the company's claim that its demands for the captioned years be kept in abeyance as long as the bank guarantee were in force and its MAP application pending before the Competent Authorities of the two countries.

7. However, the AO at Bengaluru issued a notice to the assessee under section 226(3) of the Act for deposit of balance amount. Further it also issued notice to the bank which in turn issued demand draft of balance amount in favour of the Department.

8. Aggrieved by this, the assessee filed a writ petition before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court observed that the affidavit/reply filed by the Joint Secretary (Foreign Tax and Tax Research Division), Department of Ministry of Finance, and CBDT stated that once the MAP application fulfils all the conditions of Article 27 of the Double Taxation Avoidance Agreement ("the DTAA"), the MAP proceedings are taken as pending and

can be said to be "admitted". The affidavit also stated that collection of demand was required to be suspended on satisfaction of conditions, namely, furnishing of bank guarantee, and confirmation of pendency of MAP from the Foreign Tax and Tax Research Division of the Central Board of Direct Taxes.

2. It held that the Indian Competent Authority having admitted pendency of MAP, puts at rest this part of the controversy thereby negating contents of the show cause notice, based upon failure to intimate "admission of MAP".

3. It further observed that the AO at Bengaluru had already accepted pendency of MAP while granting stay of recovery of demand whereas the AO at Gurgaon drew an artificial distinction between "pendency" and "admitted”. The assumption of jurisdiction by the later AO was in violation of the DTAA which was clearly erroneous and bordered on the *mala fide*.

4. As regards the Department’s contention that the bank guarantees were not valid, the Hon’ble High Court on perusal of documents observed that the bank would automatically renew the bank guarantee for another three years and in case the assessee does not renew the agreement between the assessee and the bank, it shall inform the Government 60 days prior to the expiry of the bank guarantee.

5. It thus held that the bank guarantee furnished by the assessee was valid and the Department's contention that the assessee furnished bank guarantee for assessment years 2003-04, 2004-05 but did not furnish a bank guarantee with respect to the bank guarantee, in dispute, was irrelevant in the absence of any intimation by the bank to the Department that the assessee has not furnished documents in favour of the bank regarding the bank guarantee. The bank guarantee, therefore, stood automatically renewed for a further period of three years.

6. Accordingly, it allowed the writ petition and on perusal of facts and circumstances of the case didn’t relegate the assessee to its alternate remedy. It further directed the Department to refund the amount to the assessee.

V. 'Equipment' includes ship, fee paid for use of ship to be considered as royalty under section 9(1)(vi) – Meaning of the word 'plant' as defined under section 43(3) would be relevant to determine meaning of the word 'equipment'

Poompuhar Shipping Corporation Ltd. vs. ITO [2013] 38 taxmann.com 150 (Mad.) – Assessment Years: 2002-03 to 2006-07

Facts

1. The assessee, a company owned by Government of Tamil Nadu was engaged in the business of moving coal from various ports in India to Chennai, Tamil Nadu. It entered into time charter agreement (“TCA”) with the foreign shipping companies (“FSCs”) having their vessels registered in different countries.

2. The assessee did not deduct tax at source while remitting charter payments (hire charges) to the FSCs. However, the AO held that the charges paid were on account of the use and hire of the ship and hence, it was royalty within the meaning of section 9(1)(vi) of the Act and Article 12 of the respective Double Taxation Avoidance Agreement (“the DTAA”).

3. Accordingly, he treated the taxpayer as ‘assessee-in-default’ for non-deduction of tax at source while remitting such charges. He further held the FSCs were the owners of the ship hired by the assesssee and there was an element of continuity of activity hence there was business connection between the FSCs and the assessee.

4. On appeal, the CIT(A) and the Hon’ble ITAT upheld the order of the AO. Aggrieved, the

assessee filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court observed that the consideration paid for use of the industrial, commercial and scientific equipment is 'royalty' in view of clause (iva) of Explanation 2 to section 9(1)(vi) of the Act. The word 'equipment' is not defined under section 9, however, the word 'plant' has been defined under section 43(3) which is wide enough to include even a ship. 'Plant' includes every tool, apparatus, equipment or machinery, not limited to machinery used in tool.

2. It held that in absence of any definition of 'equipment' under the Act and considering the business of the foreign enterprise, the definition of 'plant', as including 'ship' would be appropriate for understanding the scope of the expression 'equipment'.

3. It also observed that in fact, section 43 starts with an expression that 'unless the context otherwise requires'. Thus, when the context does not require 'otherwise', the meaning of the word 'plant' as defined under section 43(3) would be relevant to understand what 'equipment' means.

4. In context of section 9(1)(vi)(b), the presence of the word 'any' preceding the word 'equipment', clearly points out the need for construing 'equipment' widely, so as to embrace every article employed by the employer for the purposes of his business. 'Equipment', by whatever name called either as an apparatus or as plant or machinery, so long as they are employed for the purposes of one's income, the same shall stand covered by clause (iva) of Explanation 2;

5. It observed that under the Act and the tax treaties, royalty means consideration that is paid for 'use' or 'right to use'. So long as the taxpayer is given the right to its usage (with a right to put it into beneficial use for itself or to keep it idle, the right to sublet) and the lessee has access to the use of the vessel to its advantage economically, the consideration paid would be 'royalty'.

VI. Section 9(1)(vi) – Amended definition deems transmission by satellite cable, optic fibre or by any other similar technology, whether or not such process is secret as royalty and the said amended definition has to be applied irrespective of the constitutional validity and vires of the said amendments – Therefore amount paid by the assessee to Panamsat International was liable for deduction of tax by virtue of section 195 read with section 9(1)(vi)

DIT vs. TV Today Network Limited [ITA No. 600 of 2012 (Delhi High Court) Order dated 12th November 2013]

Facts

1. The assessee, TV Today Network Limited made payment to PANAMSAT/ Intel Corporation during the year under consideration.

2. The assessee placed reliance on the judgments of *New Skies Satellite N V vs. ADIT (12 Taxman 9 (Delhi)* and *Asia Satellite Telecommunications Company Limited vs. DIT [2011] 332 ITR 340 (Delhi)* which held that providing transmission services to its customers, the control of the satellite or the transponder always remained with the satellite operator and the customers were merely given access to the transponder capacity and since the customer did not utilise the process or equipment involved in its operation, the charges paid to the satellite operators were not covered within the meaning of Royalty under the Act.

3. The facts of the above cases being similar to those of assessee, the Hon'ble Tribunal

decided the matter in favour of assessee and held that since the payment didn't constitute royalty, no TDS was required to be deducted.

4. Aggrieved, the Department filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court on perusal of the amended provision of Section 9(1))(vi) of the Act along with Explanations 5 and 6 which were inserted by Finance Act, 2012 with retrospective effect from 1st June, 1976 held that the amended provision deems transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret as royalty and therefore tax under section 195 of the Act had to be deducted.

2. The Hon'ble High Court held that there was no requirement to consider the constitutional validity and vires of the said amendments. The amended provision has to be applied and in view of the same the reasoning given by the Hon'ble Tribunal had to be reversed.

3. It further held that the Hon'ble Tribunal had not referred to and examined the effect of the Double Taxation Avoidance Agreement ("the DTAA") between India and USA and whether the assessee was entitled to benefit or advantage under the said agreement and, therefore, payments made were not taxable in India in the hands of the recipient. Accordingly, to answer the said question, the matter is restored back to the Hon'ble Tribunal.

VII. Royalty – Assessee providing Indian customer an integrated communication system called International Private Leased Circuit ("IPCL"), part outside India is taken care of by the assessee while part inside India is done through VSNL, which cannot be dissected as two independent contracts having no bearing at all on each other – Bandwidth payments made by Indian party to non-resident for IPCL for providing end-to-end internet connectivity outside India is taxable as royalty under section 9(1)(vi) of the Act in view of retrospective amendments made by Explanations 5 & 6 as well as under the DTAA.

Verizon Communications Singapore Pte Ltd. vs. ITO [2013] 39 taxmann.com 70 (Madras High Court)

Facts

1. The assessee, Verizon Communication Singapore Pte Limited, a non-resident company and a part of the global telecommunication conglomerate of MCI, USA was engaged in the business of providing international connectivity services (bandwidth services or telecom services) in the Asia Pacific region including customers in India for transmission of data and voice.

2. International Private Lease Circuit ("IPLC") is an end to end managed dedicated bandwidth service that provides internet service to customers for various applications. The international leg of the telecom services provided outside India is provided by the assessee.

3. Since in India, under the Indian Telecom Regulations, only the licensed service provider could provide international long distance communication services on the Indian leg, and the assessee is not a licensed service provider under the Indian laws, Videsh Sanchar Nigam Limited ("VSNL") a public sector undertaking provides the Indian leg of the international service to the customers.

4. A customer interested in taking a lease connection between its office in India and an overseas location enters into an arrangement

with the assessee for the provision of international connectivity in the overseas leg and with VSNL for Indian half of the connectivity.

5. The assessee uses its telecom service equipment situated outside India in providing the international half circuit. It is stated that the gateway/the landing station in India used in transmitting the traffic within India belonged to VSNL and is used by VSNL for providing Indian end services pursuant to its contract with the customer.

6. The AO held that the payment received by the assessee in providing IPLC was taxable as 'royalty' under section 9(1)(vi) read with Explanation 2 clause (iva) for use of or right to use of commercial and scientific equipment and Article 12(3)(b) of the Double Taxation Avoidance Agreement between India and Singapore ("the DTAA").

Judgment

Observations on factual aspect

1. The Hon'ble High Court observed that the assessee had not disputed or made any argument on whether cable is an equipment and the only argument was that there was no use of any equipment and it merely provided services to the Indian customers.

2. The Hon'ble High Court observed that the agreement between the assessee and customer was for providing point to point private line so as to enable the customer to communicate between its offices that are geographically dispersed. It thus held that India and overseas leg of the circuit was only an imaginary segregation and the assessee was actually providing and responsible for the entire end to end circuit.

3. After analysing the contractual arrangement between the assessee, VSNL and customer, the Hon'ble High Court ruled that the contracts were part and parcel of one composite agreement split into separate agreement for sake of convenience. The ultimate objective of the different set of contracts is to provide a seamless point to point communication link and therefore cannot be seen separately.

4. It further observed that the end to end provisioning in one single circuit was assured by the assessee and if by reason of any regulatory laws of the country, it is unable to extend its service by itself, it arranges the services of another licensed provider. Such licensed provider does so only as a provisioning entity to make up for the gap caused by the statutory limitation. Thus it does not mean that these facilities are independent having no connection and relevance whatsoever to the connectivity offered by the assessee.

5. It held that the Indian customers economically exploited the network to transmit data for the purposes of their business and accordingly the consideration paid for the use of the equipment. Thus, the customer obtained an economic interest in the equipment which need not result in the ownership. It observed that the data going over the bandwidth was exclusively in the control of the customer and the assessee cannot see the data passing through the network dedicated for use of the customer. Thus, provision of Bandwidth services was not a service but involved leasing of equipments for use by customers.

Royalty under the Act

6. The Hon'ble High Court distinguished the decision of Delhi High Court in the case of *Asia Satellite vs. DIT (332 ITR 340)* and the AAR rulings in case of *Dell International Services (India) Pvt. Ltd., Cable and Wireless Networks India (P) Ltd. (2005) (305 ITR 37), Cable and Wireless Networks India (P) Ltd. (2009) (315 ITR 72)* on a simple fact that all the decisions were rendered prior to the insertion of Explanations 5 and 6 to section 9(1)(vi) of the Act.

7. Referring to the amendments made through insertion of Explanations 5 and 6 to

section 9(1)(vi) of the Act and relying upon its own decision in the case of M/s. Poompuhar Shipping Corporation Ltd. [2013] 38 taxmann.com 150 (Mad.), it held that the expression 'use or right to use' is intended to take its ordinary meaning and needs to be applied in the broader sense, to mean employing for any purpose. The retrospective amendments are clarificatory in nature and removes all doubts so far as the expression 'use or right to use' is to be understood in the context of possession, control or location of the equipment. It also observed that Verizon Singapore has not made any submission on meaning and import of "use or right to use".

Royalty under the DTAA

8. The Hon'ble High Court observed that the definition of 'Royalty' under the DTAA and the Act are in *pari materia.* Explanation 6 to section 9(1)(vi) of the Act defines 'process' to mean and include transmission by satellite (including uplinking, amplification, conversion for downlinking of any signal) cable, optic fibre, or by any other similar technology, whether or not such process is secret. Thus, the payment for the bandwidth amounts to royalty for the use of the process.

Permanent Establishment

9. As regards Permanent Establishment, it held that there was no substantial question of law raised by the assessee on this issue. However, the Hon'ble High Court made a passing reference to say that physical presence is not important and virtual existence is required to be seen in view of the technological advances.

B) Tribunal Decisions

VIII. Taxation of Management Services – Financial, sales and risk management services 'make available' technical knowledge, experience and skills and therefore taxable as Fees for Included Services under India-USA tax treaty

US Technology Resources Pvt. Ltd. vs. ACIT [2013] 39 taxmann.com 23 (Kochi - Trib.) Assessment Year 2007-08

Facts

1. The assessee is engaged in the business of providing software development services to the customers in India. The assessee entered into 'management service agreement' with the US company for obtaining management services.

2. In terms of the agreement, the US company would provide assistance, advice and support to the assessee in management, decision making, sales and business development, financial decision making, legal matters and public relations activities, treasury service, risk management service and any other management support as may be mutually agreed between the parties.

3. The assessee made payment to the US company towards management services without deduction of tax.

4. The Assessing Officer (AO) held that the payment made by the assessee to the US company would be in the nature of consultancy fees and, therefore, the assessee was liable to deduct tax under Section 195 of the Income-tax Act, 1961 (the Act). Accordingly, the AO disallowed the payment on account of non-deduction of tax.

5. The Commissioner of Income Tax (Appeals) upheld the addition made by the AO.

Decision

The Tribunal held in Revenue's favour as under:

1. On reference to the tax treaty, it indicates that the term 'managerial service' did not find place in Article 12(4) of the tax treaty. However, on a perusal of MOU under the tax treaty, it indicates that if technical or consultancy services are made available technical knowledge, experience, skill, etc., then it would

be considered as technical or consultancy services.

2. It was observed that consultancy services which were not of technical in nature cannot fall under the 'included services'. However, as per MOU of the tax treaty, the consultancy services which are technical in nature are to be considered as technical and consultancy services under the tax treaty.

3. On a perusal of management services agreement, it indicates that the US company provides highly technical services which were used by the assessee for taking managerial decision, financial decision, risk management decision, etc.

4. The managerial advice rendered by the US company has been used in the decision making process of management, financial and risk management, etc. Therefore, the knowledge which was accumulated through study, experience and experimentation with regard to management, finance, risk, etc. was nothing but a technical knowledge.

5. It is nobody's case that the US company is taking any decision on behalf of the assessee. On the basis of the input, advice, assistance and service provided by the US company, the management decision was taken by the assessee by selecting suitable solution after considering all the alternatives available.

6. The US company was giving training to the assessee's employees in making use of the inputs, experience, experimentation, assistance and advice rendered by them for taking a better decision in order to achieve the desired objectives. Therefore, the service rendered by the US company was in the nature of technical services and it cannot be said that advice received by the assessee is only a managerial advice and not technical advice.

7. The decision is taken by the assessee on the basis of service provided by US company. Therefore, the technical knowledge, experience, skill possessed by the US company with regard to financial and risk management was made available in the form of advice or service which was used by the assessee in the decision making process not only in management but also in financial matters.

8. Risk management service is a highly complicated one in the financial sector. Unless, the technical expertise and knowledge gained by the US company is made available to the assessee, they may not be able to analyse the situation to avoid risk in the business.

9. The Tribunal observed that apart from providing advice, the US company is also providing training to the employees of the assessee. Therefore, the services of technical input, advice, expertise, etc. rendered by the US company are technical in nature.

10. The Andhra Pradesh High Court in the case of *GVK Industries Ltd. vs. ITO [1997] 228 ITR 564 (AP)* has held that the advice given to procure loan to strengthen finances would be a technical or consultancy service. Even though India-USA tax treaty has not been discussed by the High Court, but the ratio laid down by the High Court clearly indicates that advice given to procure loan to strengthen the finance would be managerial or technical or consultancy services.

11. The decision in the case of *CIT vs. De Beers India Minerals P. Ltd. [2012] 21 Taxman.com 214 (Kar.)* is not applicable to facts of the present case since in that case the assessee was not being possessed with technical know-how to conduct the prospecting operation. However, in the instant case the experiment, knowledge was made available to the assessee and the assessee was facilitated to take a decision on the knowledge, expertise, experimentation which was made available by the US company.

12. The decision of the Mumbai Tribunal in the case of *Raymond Ltd. vs. DCIT [2003] 86 ITD 791 (Mum.)* is not applicable to facts of the present case as in that case the services of the managers for issue of Global Depository

Receipt (GDR) were utilised outside India for the purpose of carrying on its business in India. The decision to issue GDR was taken by Indian company without any assistance from managers. However, in the present case, the assessee is using of the technology, expertise of the US company in India for taking managerial, financial decision and risk management analysis and it remains with the assessee forever and it could be even used in future for the business of the assessee.

13. The Tribunal discussed the decisions in the case of *Wokhardt Ltd. vs. ACIT [2011] 10 Taxmann. com 208 (Mum.), Intertek Testing Services India (P.) Ltd. [2008] 175 Taxman 375 (AAR)* and *Sandvik Australia Pty Ltd. vs. DDIT [2013] 141 ITD 598 (Pune)* and held that they are distinguishable on the facts of the present case. Therefore, the expertise and technology which was made available by the US company is technical service under Article 12(4)(b) of the tax treaty.

IX. Transfer Pricing – Advertisement, Marketing & Sales Promotion (AMP) Expenses – Bright Line Test – No separate compensation necessary for excessive AMP when sufficient profits received by distributor as part of pricing of products – SB ruling in LG Electronics case distinguished

BMW India (P.) Ltd. vs ACIT [2013] 37 taxmann. com 319 (Delhi - Trib.) – Assessment Year : 2008-09

Facts

1. The assessee was primarily engaged in the import and sale of premium segment cars imported as completely built units ('CBU') in India. In addition to such distribution function, it also carried out assembly of completely knocked down ('CKD') kits for particular segments of cars, which tantamounted to value-added distribution function.

2. As per an inter-company agreement, the assessee was appointed as an importer and distributor of CBUs, CKDs and original automobile part accessories in India against payment of appropriate consideration. The agreement also stipulated that the assessee had to advertise, promote sales, establish and supervise an efficient distribution network in India.

3. The assessee had applied Resale Price Method (RPM) as the primary method for establishing the arm's length pricing of its imports from its foreign parent. During the transfer pricing (TP) assessment proceedings, the Transfer Pricing Officer ('TPO') alleged that the assessee had incurred excessive AMP expenses as a percentage to sales as compared to its comparables, which led to brand promotion activities and resulted in creating marketing intangibles for its foreign parent. The TPO was of the view that the assessee ought to have received reimbursement for the excessive AMP incurred by it along with a mark-up from its foreign parent.

4. The assessee, in its response, submitted an analysis of comparables with similar functional intensity based on the analysis, the assessee contended that it was earning higher margins both at gross margin and operating margin levels as compared to comparable companies. Thus, it was adequately remunerated by the foreign parent for its increased functional intensity and no further remuneration was required for its incremental AMP expenses.

5. The assessee also referred to relevant International guidance on marketing intangibles refers to OECD Transfer Pricing Guidelines, OECD's Discussion Draft on Intangibles (Chapter VI of the OECD Guidelines), and Australian Tax Office's Guidelines related to Marketing Intangiblesto corroborate that no separate remuneration was required for the AMP expenditure incurred by it when the same was embedded in the pricing of imported goods resulting in higher gross margins.

6. The Revenue primarily relied on the orders of TPO and DRP and SB Ruling in case of *LG*

Electronics India Private Limited vs. ACIT (2013) 29 taxmann.com.300 while presenting the arguments in favour of adjustment on account of excessive AMP spend of the assessee along with a mark-up. The Revenue also argued that the reliance placed by the assessee on OECD Guidelines was misplaced as the issue had to be decided on the basis of Indian laws and judgments and India was not a signatory as far as the OECD Guidelines were concerned, as the concerns and the interests of a developing country like India were very different from the concerns of developed countries

7. The Revenue contended that the SB Ruling had laid down the law on the various aspects of transfer pricing on the nature of AMP spend, holding it to be an international transaction and upholding the 'bright line' concept as a tool for calculating the arm's length price and such legal aspects of the SB Ruling applied equally to a licensed manufacturer and to distributors.

8. The assessee strongly contended that the assessee's facts are distinguishable from the facts in the case of *LG Electronics India Private Limited vs. ACIT (2013) 29 taxmann.com 300* since the assessee was predominantly a distributor of automobiles with value-added assembly functions, while LG Electronics operated as a licensed manufacturer. It was vehemently stated that the principles laid down by the SB Ruling on AMP do not address the facts of a distributor and thus, the assessee is not prohibited from bringing out the distinction between the Functional Assets Risks (FAR) analysis of a licensed manufacturer and that of a distributor.

9. In the light of international guidance on the subject of marketing intangibles, the assessee submitted that a distributor could be remunerated for the services/functions performed either by adjusting the pricing or by compensating the entity directly for excess marketing and advertisement expenditure or by applying residual profit split method. The Revenue could not compel payment of such remuneration only by way of direct reimbursement of the excess expenses along with a mark-up, since flexibility in the manner of conducting business was the assessee's prerogative and not the Revenue's, as explained by the OECD and the ATO guidelines.

Decision

After considering the Rival Contentions, the Tribunal held in assessee's favour as under:

1. In view of the binding precedents from the SB Decision as far as the legal transfer pricing aspects of AMP transactions were concerned, the Tribunal upheld the fact that AMP was an international transaction and 'bright line' was an accepted tool for calculating the arm's length price.

2. The Tribunal upheld the contention that a judgment or a decision considered as a binding precedent necessarily has to be read as a whole. To decide the applicability of any section, rule or principle underlying the decision or judgment which would be binding as a precedent in a case, an appraisal of the facts of the case in which the decision was rendered is necessary. The scope and authority of a precedent should not be expanded unnecessarily beyond the needs of a given situation.

3. The Tribunal acknowledged that transfer pricing litigation and adjudication is a fact-intensive exercise which necessarily requires due consideration of the assessee's business model, contractual terms entered into with the AEs and a detailed FAR analysis, so as to appropriately characterise the transactions and the business model. The Tribunal has also supported the fact that there can be no straitjacket to decide a transfer pricing matter.

4. The Tribunal has dwelt on this aspect and categorically acknowledged existence of a fine line of distinction between the FAR profiles of a manufacturer vis-à-vis that of a distributor. Consequently, the remuneration model and the transfer pricing analysis for one could vary from the other.

5. The Tribunal observed that the assessee had performed the function of sales promotion

and advertisement in order to make a dent in the market. It also held that the assessee was performing functions of greater intensity and consequently, it upheld the contention that AMP expenditure over and above those of comparables was non-routine and had assisted in promoting the brand of the foreign parent.

6. In view of the premium profits of the assessee at both, the gross and the net level, the Tribunal was convinced that compensation for non-routine brand building services by the assessee was embedded in the pricing of imported goods only, and therefore no separate compensation was required from the foreign principal.

7. The Tribunal further directed exclusion of account items like after-sales support, dealers' and salesmen's bonus, etc. in calculation of AMP expenditure of the assessee.

8. The Tribunal also upheld the contention that in the absence of any guidelines or any stipulations in the Indian Tax laws that run contrary to international guidance, there was, and can be, no bar to refer to OECD TP Guidelines and International Tax Practices Jurisprudence.

X. TDS u/s 195 – Disallowance u/s 40(a)(i) – Exclusion u/s 9(1)(vii)(b) – Leather testing charges payable to Non-Resident – Taxable as Fees for Technical Services under the Act as well as India-Germany tax treaty – Since payment was made before the retrospective amendment, it could not be disallowed under the Act – India-Germany DTAA

Metro & Metro vs. ACIT [2013] 39 taxmann.com 26 (Agra - Trib.) Assessment Year : 2008-09

Facts

1. The assessee, a partnership firm, was a manufacturer and exporter of leather goods. The assessee was 100% export oriented unit. During the year under consideration the assessee made payments to a German company, in respect of leather testing charges. The assessee did not deduct taxes from these payments.

2. The Assessing Officer (AO) held that testing charges are technical cum consultancy services and it is deemed to accrue or arise in India under the Act. Accordingly, the same would be taxable in India under the Act as well as under the tax treaty. However, since the assessee did not deduct the taxes on the same, it would be disallowed under section 40(a)(i) of the Act. The Commissioner of Income Tax (Appeals) upheld the order of the AO.

Decision

The Tribunal held as under:

A) Taxability of testing charges under the Act and the tax treaty

1. The tax treaties do not provide any taxation of income; tax treaties limit the taxing authority of the contracting states. The tax treaties are primarily instrument allocating between such contracting states, with or without conditions, rights to tax income which have adherence in more than one tax jurisdiction.

2. A tax treaty only enables a contracting state to levy tax. Once it levies tax, the domestic law of the tax jurisdiction which has been granted the right to tax comes into play which was subject to some restrictions.

3. A tax treaty cannot force a contracting state to levy a tax. The expression 'shall only be taxed' in the context of the tax treaties is used only in the sense of restricting the other state from levying taxes on such income. The use of expression 'shall' in such situations is not to levy any taxes, since tax treaties cannot impose any taxes but it only imply that taxability, and it is in the specified jurisdiction alone.

4. Perusal of Article 12 of the tax treaty, it indicates that a source state has the rights to tax FTS, but the tax so levied, shall not exceed 10%. Therefore, when a source state taxes the said income at 10% rate or less, the said levy

is in accordance with the scheme of allocation of taxing rights. However, when taxes levied exceed the specified rate, the extent to which such taxes exceed the specified rate, it will be contrary to the scheme of the allocation of taxing rights under the tax treaty and the taxability will be restricted in terms of the limited rights so allocated to the source state.

5. The Tribunal in the case of *Pooja Bhatt vs. DCIT [2008-TIOL-558- ITAT-Mum.]* held that an income cannot be taxed in the residence country unless it falls in the category where both the contracting states have the right to tax, which will be represented by expression 'may also'. However, question raised in the present case was different than the case of Pooja Bhatt. Therefore, the German company does not get any benefit of the tax treaty.

6. In the case of *Ashapura Minichem Ltd. vs. ADIT [2010] 131 TTJ 291 (Mum.),* the Tribunal observed that, in order to attract taxability in India, it was not necessary that, the services must also be rendered in India. The utilisation of services is enough to attract its taxability in India. Further, the Special Bench Tribunal's decision in the case of *ADIT vs. Clifford Chance [2013] 154 TTJ 537 (Mum.)* covers only the scope of section 9(1)(i) of the Act and the other segments of section 9(1) of the Act have not been dealt in the said decision.

7. The Supreme Court in the case of *GVK Industries Ltd. vs. ITO [2011] 332 ITR 130 (SC)* did not hold against the constitutional validity of section 9(1)(vii) of the Act. Perusal of the said decision indicates that the law enacted by the Parliament has a nexus with India, even if such laws require extra territorial operation. The laws so enacted cannot be said to constitutionally invalid and it is only when the 'laws enacted by the Parliament with respect to extra territorial aspects or causes that have no nexus with India' and such laws 'would be ultra vires'.

8. There is a nexus between the taxability of services rendered to residents of a tax jurisdiction with that jurisdiction itself. The Tribunal held that the assessee itself contended that the intention of introducing the source rule was to bring to tax interest, royalty or FTS by way of creating a fiction in section 9 of the Act, the source rule would mean that irrespective of the situs of services, the situs of assessee and the situs of utilisation of services will determine the tax jurisdiction.

9. There has to be reasonable nexus and it is nobody's case that there is no nexus between income in the hands of a person providing technical services to India.

10. The Tribunal relied on the decision of *ITO vs. Right Florists Pvt. Ltd. [2013] 154 TTJ 142 (Kol.)* and observed that when no human intervention is involved in any services, such services cannot be treated as FTS under section 9(1)(vii) of the Act. Further, the Tribunal relied on the decision of the Supreme Court in the case of *CIT vs. Bharati Cellular Ltd. [2010] 330 ITR 239 (SC).*

11. The Tribunal distinguished the decision of *Siemens Ltd. vs. CIT [2013] 142 ITD 1 (Mum.).* and held that the observations of the Tribunal in the case of Siemens Ltd. are erroneous and contrary to the law laid down by the Supreme Court in the case of Bharati Cellular Ltd.

12. Section 9(1)(vii)(b) of the Act has two distinct segments i.e. (i) in respect of services utilised in a business or profession carried on by Indian resident outside India, and (ii) in respect of services utilised in respect of earning any income from a source outside India.

13. No doubt whether an India based business is 100% export oriented unit or not, it is still a business carried on in India, and it cannot be covered by the first limb of exception envisaged in section 9(1)(vii)(b) of the Act.

14. Even if entire products are sold outside India, the fact of such export sales by itself does not make business having been carried outside India. Once the business is set up and carried on in India, irrespective of where the end consumers are, the business is carried on outside India.

15. The scope of second limb of this exception is rather narrow. In order to be covered by this exception, what is material is that, irrespective of where the business was situated, the services need to be used for earning income from any source outside India. A business outside India and a source outside India are used together in contrast, and can be viewed as reflecting relatively active and passive activities. The source of income, whether customers are inside India or outside India, continues to be business in India.

16. The services were required because of the foreign importers and that aspect itself was not decisive and sufficient for the purpose of exclusion from the scope of section 9(1)(vii) of the Act. The services should be for the purpose of earning an income from a source outside India. A customer is not the source of income, he is an important part of the business, which, in turn is the source of income.

17. In the case of *Havells India Pvt. Ltd. vs. ACIT [2011] 140 TTJ 283 (Del.)* not only the customers but also certain manufacturing facilities were located outside India. Once the manufacturing facilities are outside India and the customers are also outside India, such a situation will indeed be covered by the exception of section 9(1)(vii)(b) of the Act.

18. Just because the user of services is a 100 % export unit, it cannot be said that the technical services are used 'for the purpose of making or earning any income from any source outside India', and accordingly, outside the ambit of FTS under Section 9(1)(vii) of the Act.

19. In view of above discussion, the payments made to a German company were taxable in India and, it cannot be said that the assessee did not have obligation to withhold taxes from the remittances made to German company.

B) Disallowance under section 40(a)(i) vis-à-vis 40(a)(ia) of the Act

1. Section 40(a)(i) of the Act debars the deduction of 'any interest, royalty, FTS or other sum chargeable under the Act, which is payable outside India, on which tax has not been paid or deducted. In contrast with these words, section 40(a)(ia) of the Act used the expression 'payable to a resident'.

2. The scope of the words 'payable' in these two situations is materially different and the wordings detached from it may be, that the amount payable to a resident, in the context of section 40(a)(ia) of the Act, reflects amount remaining payable.

3. Provisions of section 40(a)(ia) of the Act does not apply to section 40(a)(i) of the Act and the assessee thus does not derive any advantage from the decisions in the context of section 40(a)(i) of the Act.

4. The provisions of section 40(a)(i) of the Act cannot be interpreted in such a manner so as to restrict the scope of section to only amounts remaining payable at the end of the year. Such an interpretation will make the section redundant.

5. The Bombay High Court in the case of *CIT vs. Sudhir Jayantilal Mulji [1996] 214 ITR 154 (Bom.)* has held that a judicial precedent is an authority for what it actually decides and not what may come to follow from some observations made therein. Therefore, judicial precedent cannot be relied upon.

6. In the case of *Channel Guide India Ltd. vs. ACIT [2012] 139 ITD 49 (Mum.),* the Tribunal has observed that the amount paid to the foreign entity was not taxable in India in view of the legal position prevailed during the period of time and it cannot be disallowed under the Act. In the present case also the taxability arises on account of amendment made by the Finance Act, 2010 in section 9(1) of the Act. Accordingly, following the decision of Channel Guide, the Tribunal held that the disallowance under section 40(a)(i) of the Act cannot be invoked.

CA. Hasmukh Kamdar

INDIRECT TAXES

Central Excise and Customs – Case Law Update

ER-1 RETURNS

Macleods Pharmaceuticals Ltd. vs. Commissioner of Central Excise, Vapi [2013(296) ELT 379 (Guj.)]

Facts in this case are as follows

The assessee was a manufacturer of pharmaceuticals goods falling under Chapter 30 of the Central Excise Tariff Act, 1985. During the relevant period vide Notification No. 2/2005-CE (NT) dated 7-1-2005, provisions of Section 4A of the Central Excise Act, 1944, were made applicable to PRP medicines. In terms of Section 4A, valuation for payment of excise duty on PRP medicines was to be arrived at with reference to retail sales price after eligible abatement at applicable rate. On scrutiny of records, it was noticed by the lower authorities, that the assessee had claimed quantitative discount and was not paying duty on free goods. The lower authorities were of the opinion that the assessee is liable to discharge duty on such free goods, as there are no provisions of granting of quantitative discount for the goods covered under provision of Section 4A of the Central Excise Act, 1944. A show cause notice was issued. The assessee contested the show cause notice on merits as well as on limitation. The adjudicating authority did not agree with the contentions of the assessee and holding against the assessee, confirmed the demands and also directed them to pay interest and also imposed penalties under various sections.

On behalf of the appellant it was submitted that:

a) On merits they are not challenging the confirmation of the demands as a Larger Bench decision is against them.

b) They contest the confirmation of the demand on ground of limitation. It is their submission that the appellants had been filing monthly returns with the authorities during the relevant period.

c) They had clearly indicated in their returns, information regarding the clearances of goods by claiming the quantitative discount claimed by them. The lower authorities did not at any point of time raise any question regarding the said clearances. In view of this, the demand is blatantly time barred.

d) The findings of the adjudicating authority on the question of limitation are incorrect as the appellants had always been indicating fact of clearance of free supply in their returns.

On behalf of Department it was submitted that:

a). The entire case of the assessee on the limitation is based upon the entries made by them in the RG-1 register and that the RG-1 register is never submitted to the range officer for scrutiny.

b) The returns which were submitted, had two quantitative clearances and there was one assessable value which would indicate that quantity cleared on the normal clearance and as quantitative discount and there was a composite consisting of the same value. If a specific product attracts more than one rate of duty then all the rates thereof should have been mentioned separately by the assessee which in this case was not mentioned.

c) The findings of the adjudicating authority are correct.

The Hon'ble Tribunal observed that:

The issue involved in this case is regarding the confirmation of the demand of the liability on the assessee on the goods cleared by claiming quantitative discount from the clearances affected by them as claiming reduction for discounts as enshrined in provisions of Section 4 of the Central Excise Act, 1944. Provisions of Section 4A of the Central Excise Act, 1944 do not adopt provisions of Section 4 for extending the benefit of any trade discount/further discounts, as the provisions of Section 4A and the notifications issued thereunder consider all the discounts and allow abatement from the retail sale price to an assessee. We find that on merits appellants do not have a case about non-discharge of duty liability on the quantitative discounts claimed by them during the period when the provisions of Section 4A of the Central Excise Act, 1944 was made applicable to the products manufactured by them.

The Hon'ble Tribunal further stated that the issue involved in this case is for the period January 2005 to October 2008 and January 2005 to July 2007. During the relevant period, it is undisputed that the appellant had been filing the monthly ER-1 returns to the lower authorities. It is also seen that the said monthly returns had a column which indicated 'removal from the factory without payment of duty' wherein the appellants herein had been filing the details and clearly indicating the quantity of PRP medicaments cleared were without payment of duty under quantitative discount. This ER-1 returns were accepted by the lower authorities and there is nothing on record to show that the lower authorities had sought clarification from the assessee as regards the quantity cleared under quantitative discount without payment by them. In the absence of any such correspondence, we find that the adjudicating authority has erred in holding against the assessee on the question of limitation. The adjudicating authority has erred on the point of limitation as the lower authorities had never questioned or sought clarification from the assessee as regards the quantitative discounts claimed by them on the products covered under Section 4A of the Central Excise Act, 1944.

In the absence of any such correspondence, it was held that the demand confirmed by the adjudicating authority against the appellants is blatantly hit by limitation and the assessee has not suppressed any material fact from the lower authorities.

Accordingly, the impugned orders were set aside on the ground of limitation and the appeals were allowed.

Nikita Badheka, *Advocate & Notary*

INDIRECT TAXES
VAT Update

A. News from Mahavikas official website of Sales Tax

Very few of you must have noticed an important announcement on the Mahavikas website. The State of Maharashtra has by announcement on the official website given last chance to the persons requiring C form for the period prior to 1-4-2008 up to 30th November, 2013. Unfortunately, there was no circular to this effect and many must have missed the last week of November when this permission was granted through web information. The last date as per website was 30th November, 2013. Considering that many legal issues are pending and each Dealer need to verify whether they would really need the C form or not, sufficient time is required for verifying the past transactions. Any way the date is over however the information is provided here for the purpose of record.

B. Other important details available on Mahavat

B.1 One announcement is about allotment of TIN to VAT officers. On account of the decentralisation or functional jurisdiction the State as well as the dealers faced many difficulties. Representation was repeatedly made to go back to single window system. However, as a matter of administrative decision now VAT officers are allotted to independent dealers. The list under website pertains 2,41,725 names of the dealers and the corresponding officer's name, e-mail and contact number. The Dealers are identified with the the exact work to be done by this officer is yet to be specified.

B.2 The pending C form application list is as usual lagging behind the ideal position. The CST declaration application weekly status as on 22-11-2013 is available on the website.

B.3 The instructions for uploading the TDS return in 424 is available on the website. For the URD employers, separate procedure is provided to validate the Form 424 through upload Form 424 URD – E Services.

B.4 The list of the dealers selected for issue based Audit is available on website for the years 2006-07, 2007-08, 2009-10 and 2010-11. The type of the Audit, location and division is mentioned along with the name and TIN No. of the dealer along with the officers name. The cases pertaining to LTU

refund cases, PSI cases and Investigation cases are not covered in this list. This list is of course with the right reserved with the department to amend, change or add list. Around 17,334 dealers from all over Maharashtra are selected for Issue Based Audit for the period 2006-07 the list is for each year separately.

B.5 The list of the Supreme Court and Bombay HC cases from 1 STC to 148 STC is available on record. The list of reference filed by the department up to February, 2013 is available on the website. This is going to be important for the auditors.

B.6 The latest template is available on website for uploading E-returns Annexure.

B.7 The Periodicity of the return for the period 2013-14 is available on the website.

B.8 The website highlight specially states under the Professional Tax registration late return fee is introduced from 1-8-2012 for the e-return filed after due date.

C. Correction of mistake while uploading refund application or miscellaneous return for excess rate of tax

Circular 7T of 2013 dated 21st November, 2013 is in continuation and modification of the earlier Circular No. 17 T of 2011 dated 25th November, 2013.

C.1 If the payment is made under wrong TIN, it is stated that the application for the correction be made by the dealer to the concerned Deputy Commissioner of Sales Tax, Returns and Recovery Branch. Along the application he has to submit the challan. Wherever applicable, a no objection certification as per Annexure A to the Circular be obtained from the dealer whose TIN was wrongly mentioned while making E-payment. An opportunity of hearing is to be allowed to the applicant and in eligible cases the necessary correction will be made by the concerned Deputy Commissioner of Sales Tax, Returns and Recovery Branch.

C.2 Payment made by mentioning wrong period or wrong Act. The application in writing is to be made by the dealer to concerned Return and Recovery Branch Officer or to the officer before whom any proceedings of the dealer is open. An opportunity of hearing will be given to the applicant and after due verification and confirmation from the concerned officer the DC, AC or STO, as the case may be, shall make necessary corrections.

C.3 In case the Department notices such incorrect data, entry then the concerned officer shall make the necessary corrections in the Mahavat Website. No authentication of the correction is to be made by the supervisory officers.

C.4 Double payment of taxes by the dealer, in this eventuality also the concerned dealer should make application for refund of excess amounts at the end of the year containing for the period for which the payment was made twice. This application is to be made to the Joint Commissioner of Sales Tax, Refund or concerned JC (VAT – ADM). Such application for miscellaneous refund will be taken up for disposal on priority.

C.5 Amount paid by the dealer but not available on website. If the physical challan is not available on Mahavikas then such challan will have to be certified by the concerned bank or as also the Treasury Bank i.e. RBI, etc. After confirmation from

such Treasury bank the details of the Challan will be uploaded by the concern officer with prior approval of immediate controlling supervisory authority.

C.6 Excess payment made by bank, if the bank has made mistake and make excess payment in a dealer's account, it is made clear that the bank will not get the refund but they will have to follow the procedure for refund of excess amount.

C.7 If the E-payment is remitted twice by the Bank to RBI then the bank should apply to Joint Commissioner of Returns and Recovery branch for NOC by the Department to be issued to the Pay and Account officer for refund of excess amount. The Joint Commissioner of Return and Recovery Branch shall confirm the fact and freeze the challan related to later of the two payments made in Mahavikas. Subsequently, NOC will be issued to Pay and Accounts officer for appropriate action.

C.8 Excess payment remitted by Bank to RBI, such excess payment would be refunded after approval of the Additional Commissioner of Sales Tax – Returns and Recovery Branch. The format of NOC is provided in the circular.

D. Circular 8T of 2013 dated 29-11-2013 – Applicability of set-off to developers of SEZ

(Resolution No. SEZ-2010/CR-534/IND-2 Industries, Energy & Labour Department Mantralaya, Mumbai – 400 003, dated 15th October, 2011. Read with Notification No.VAT-1512/CR 115/Taxation-1, dated 16th May, 2013 w.e.f 15-10-2011.)

This circular has reference to the new Rule 55 B introduced in MVAT Rule, 2005 w.e.f. 15th October, 2011. This is a Rule specifically for set off to Developers and Units in SEZ, it reads as follows :-

> "Nothing contained in Sub-Rule 6 of Rule 53, or as the case may be, Clauses (g) and (h) or Rule 54 shall be applicable to the Developers and the Units, in processing area of Special Economic Zone.
>
> ***Explanation*** :– For the purpose of this Rule processing area "shall mean the processing area as demarcated under section 6 of SEZ Act, 2005 (28 of 2005) but excluding Education Institution, Hospitals, Residential or Commercial Complexes, Leisure and Entertainment facilities or any other facilities allowed for authorised operations, as may be notified by the State Government, under section 50 of the said Act, for their operations and maintenance."

By Circular 8T of 2013 dated 29-11-2013 – The Commissioner has clarified that 55B Rule shall be applicable only to Developer and Units in processing area of SEZ. It is specifically stated in the circular that Co Developers are not covered by the scope of 55B and therefore they will not be eligible to claim set off as per rule 55B.

"Life is a tragedy of nutrition".

— *Arnold Ehret*

CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

1. Time limit prescribed for filing quarterly statement in Form No. A-3 by SEZ developers/units receiving taxable services without payment of input service tax

Notification No. 12/2013 ST dated 1-7-2013 allows SEZ developers/units to receive taxable services without payment of service tax subject to stipulated conditions such SEZ developers/units are required to file quarterly statement of services availed by them without payment of service tax. However, no time limit was prescribed for filing of such quarterly statement with service tax authority.

SEZ developers/units will now be required to file such quarterly statement within by 30th of the month following the particular quarter. For the quarter of July, 2013 to September, 2013, the said statement shall be furnished by the 15th of December, 2013."

(Notification No. 15/2013 – Service tax dated 21-11-2013)

2. Lowering the threshold for electronic payment

Presently the service provider whose annual gross service tax liability of immediately preceding year was rupees 10 lakhs or more is obliged to discharge his service tax liability electronically. The service provider within this threshold amount is allowed to make service tax payment manually i.e., otherwise than e-payment.

Above referred threshold of ` 10 lakhs is reduced to ` 1 lakh with effect from 1st January 2014 by amending Proviso to Rule 6(2) of Service Tax Rules, 1994.

On or after 1st January, 2014, assessee having service tax liability of ` 1 lakh or more for financial year 2012-13 will have to discharge his service tax liability electronically, through internet banking.

(Notification No. 16/2013 – Service tax and Instruction No. 137/116/2012 – Service Tax, both dated 22-11-2013)

3. Clarification on Voluntary Compliance Encouragement Scheme, 2013 (VCES)

Tax research unit, CBEC has provided following clarification in respect of VCES :

Sr. No.	Issue raised	Clarification
1	An instance was brought to notice wherein a declaration was returned probably on the ground that it was incomplete.	As has already been directed by the Board, *vide* the said letter dated 22-8-2013 (para 2.4 of the letter), the designated authority shall ensure that no declaration is returned. In all cases, declaration should be promptly received and duly acknowledged. Request for clarification should be dealt with promptly. Defects in the application, if any, should be explained to the declarant and possible assistance be provided in rectifying these defects. The effort must be to accept a declaration, as far as possible, and recover the arrears of tax.
2	An apprehension was raised that declarations are being considered for rejection under section 106(2) of the Finance Act, 2013, even though the "tax dues" pertain to an issue or a period which is different from the issue or the period for which inquiry/ investigation or audit was pending as on 1-3-2013.	Section 106(2) prescribes four conditions that would lead to rejection of declaration, namely, (a) an inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-paid has been initiated by way of, – (i) search of premises under section 82 of the Finance Act,1994 ; or (ii) issuance of summons under section 14 of the Central Excise Act, 1944; or (iii) requiring production of accounts, documents or other evidence under the Finance Act, 1994 or the rules made thereunder; or (b) an audit has been initiated, and such inquiry, investigation or audit was pending as on the 1st day of March, 2013. These conditions may be construed strictly and narrowly. The concerned Commissioner may ensure that no declaration is rejected on frivolous grounds or by taking a wider interpretation of the conditions enumerated in section 106(2). If the issue or the period of inquiry, investigation or audit is identifiable from summons or any other document, the declaration in respect of such period or issue alone will be liable for rejection under the said provision. Examples: (1) If an inquiry, investigation or audit, pending as on 1-3-2013 was being carried out for the period from 2008-11, benefit of VCES would be eligible in respect of 'tax dues' for the year 2012, i.e., period not covered by the inquiry, investigation or audit. (2) If an inquiry or investigation, pending as on 1-3-2013 was in respect of a specific issue, say renting of immovable property, benefit of VCES would be eligible in respect of 'tax dues' concerning any other issue in respect of which no inquiry or investigation was pending as on 1-3-2013.

		It is also reiterated 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 such reasons to reject the declaration. Commissioners should ensure that this time line is followed scrupulously.
3	Whether benefit of VCES would be available in cases where documents like balance sheet, profit and loss account, etc. are called for by department in the inquiries of roving nature, while quoting authority of section 14 of the Central Excise Act in a routine manner.	The designated authority/Commissioner concerned may take a view on merit, taking into account the facts and circumstances of each case as to whether the inquiry is of roving nature or whether the provisions of section 106(2) are attracted in such cases.
4	Whether the benefit of the Scheme shall be admissible in respect of any amount covered under the definition of 'taxes dues', as defined in the Scheme, if paid by an assessees after the date of the Scheme coming into effect, (i.e., 10-5-2013), but before a declaration is filed.	Yes, benefit of the Scheme would be available if such amount is declared under the Scheme subsequently, along with the remaining tax dues, if any, provided that CENVAT credit has not been utilised for payment of such amount. Example: A person has tax dues of ` 10 lakhs. He makes a payment of ` 2 lakhs on 15-5-2013, without making a declaration under VCES. He does not utilise CENVAT credit for paying this amount. Subsequently, he makes declaration under VCES on 1-7-2013. He may declare his tax dues as ` 10 lakhs. ` 2 lakhs paid before making the declaration will be considered as payment under VCES.
5	Whether declaration can be made in such case where service tax pertaining to the period covered by the Scheme along with interest has already been paid by the parties, before the Scheme came into effect, so as to get waiver from penalty and other proceedings?	As no "tax dues" is pending in such case, declaration cannot be filed under VCES. However, there may be a case for taking a lenient view on the issue of penalties under the provision of the Finance Act, 1994. In this regard attention is invited to section 73(3) and section 80 of the Finance Act, 1994.

(Circular No. 174/9/2013 – ST dated 25-11-2013)

CA. Bharat Shemlani

INDIRECT TAXES

Service Tax – Case Law Update

1. Services

Management & Consultancy Service

1.1 Bosch Chassis Systems India Ltd. vs. CCE, Pune-I 2013 (32) STR 301 (Tri.-Mumbai)

The appellant's Managing Director employed in same capacity on part time basis with other company paid salary through the appellant. The appellant credited the salary to MD's account without retaining any part thereof. The Tribunal held that, if advisory activity has been undertaken by MD, then service tax demand is to be made on MD and not on appellant. There is no evidence showing MD rendering consultancy/advisory services, hence the appellant is not liable to pay service tax.

Clearing and Forwarding Agent Service

1.2 Monsanto Manufacturers Pvt. Ltd. vs. CCE, Ghaziabad 2013 (32) STR 364 (Tri.-Del.)

The appellant in this case had agreement with HLL for providing cold storage of goods for storing and forwarding frozen products and they have to maintain specific temperature for storage before dispatch. In these circumstances, the Tribunal held that, storage of goods in cold storage indispensable part of Clearing & Forwarding Agent Service and therefore charges thereof to be added in taxable value of C&F Agent service. Further, the fact of non-payment of duty on cold storage known to department in 2002, hence extended period of limitation is not invocable.

Cargo Handling Service

1.3 CCE, Raipur vs. Gayatri Carriers Pvt. Ltd. 2013 (32) STR 367 (Tri.-Del.)

The Tribunal in this case, held that loading, unloading and handling of coal into tipper trucks and transportation from coal face surface to coal stock yard, is liable to service tax under Cargo Handling Service.

Sponsorship Service

1.4 Hero Motocorp Limited vs. CST, Delhi 2013 (32) STR 371 (Tri.-Del.)

The appellant in this case, sponsored GMR owned cricket team 'Delhi Daredevils' and claimed immunity from service tax as sponsorship of sports events not liable to service tax. The department sought to demand tax on the same. The Tribunal held that, several rights accruing under sponsorship agreement clearly indicates sponsorship of team in relation to participation in IPL T-20 Cricket Tournament. The agreement was for sponsorship of

T-20 sport event and not owner of Delhi Daredevils or BCCI-IPL and therefore squarely falls within exclusionary clause and the appellant is immune to service tax charge. Further, it is held that, it is settled principle of statutory construction that, phrase 'in relation to' is indicative of expansive intention.

Commercial Training or Coaching Centre Service

1.5 Great Lake Institute of Management Ltd. vs. CST, Chennai 2013 (32) STR 305 (Tri.-LB)

The Larger Bench of Tribunal in this case held that, the taxable service of "Commercial training or coaching service" occurs when any institute or establishment is engaged in the activity of imparting skill, knowledge or lessons on any subject or field (excluding sports) irrespective of whether such imparting of skill, knowledge or lessons is in respect of particular discipline or a broad spectrum of discipline/academic areas; irrespective of the nomenclature or description of the institute or establishment, as a coaching or training centre or an educational institution; regardless of whether an institute or establishment is incorporated by a or registered under any law; and irrespective of distinctions on the basis of curriculum, course content, teaching methodology, course duration or otherwise. Activities of imparting skills, knowledge, lessons on any subject or field or when provided by any entity, institution or establishment which is excluded by a specific and legislated exclusionary clause would alone be outside the fold of the taxable activity.

1.6 Cerebral Learning Solutions Pvt. Ltd. vs. CCE, Indore 2013 (32) STR 379 (Tri.-Del.)

The appellant in this case claimed benefit of Exemption Notification No. 12/2003-ST for value of course material supplied to students. The department relying on CBEC Circular No. 59/8/2003-ST dated 20-6-2003 providing for inapplicability of Exemption Notification where goods and materials sold as part of service which material does not answer description of priced standard textbook denied benefit of exemption. The Tribunal held that, documentary evidence indicating separate value of course material, therefore entitlement to exemption is undisputed. The clarification relied upon by the Department is misconceived, clearly illegal and contrary to Exemption Notification.

Business Auxiliary Service

1.7 Ace Credit vs. CCE, Mangalore 2013 (32) STR 407 (Tri.-Bang.)

The assessee in this case engaged in sale of Banks products by using infrastructure, staff and expertise to market impugned products. The Tribunal held that, Bank products are nothing but bank service and covered within "Promotion or marketing of services provided by client" under BAS w.e.f. 1-7-2003. It is further held that, limitation period can be invoked however, since registration and tax paid under "Extraordinary Taxpayer Friendly Scheme" benefit of section 80 extended to set aside penalties.

1.8 Indusind Media & Communications Ltd. vs. CCE, Delhi 2013 (32) STR 418 (Tri.-Del.)

The Tribunal in this case held that, carriage fee charges for providing desired frequency for broadcasting channels signals is covered under Business Auxiliary Service as the same facilitates better quality view of channels thereby enhancing viewership. The matter has been remanded back for examining aspect of invocation of extended period and imposition of penalty.

Works Contract Service:

1.9 Larsen & Toubro Ltd. vs. CST, Delhi 2013 (32) STR 410 (Tri.-Del.)

The Tribunal in this case, referred the matter to Larger Bench on following issue in view of conflicting decisions;

"Whether composite contracts involving transfer of property in goods and services of execution of works contract which become taxable only from 1-6-2007 under Works Contract Service or whether for period prior to 1-6-2007 such contract could be vivisected and service components subjected to tax under pre-existing taxable services such as Commercial or Industrial Construction service, Erection, Installation or Commissioning service or Construction of Residential Complex service?"

Commercial or Industrial Construction Service

1.10 Anand Construction Co. vs. CCE, Kolhapur 2013 (32) STR 451 (Tri.-Mumbai)

In this case, assessee constructed a hostel for boys and girls, who were getting education from one of the educational institutions. Demand confirmed as no evidence was produced to that effect. The Tribunal held that, since the building is constructed as hostel for the residence of students studying in medical institute and there being no allegation that, the building is being used for any other purpose and in view of CBEC Circular No. 80/10/2004-ST dated 10-9-2004, assessee is not liable to service tax.

2. Interest/Penalties/Others

2.1 Kone Elevator India Pvt. Ltd. vs. Secretary, Ministry of Finance 2013 (32) STR 262 (Mad.)

The appellant in this case applied for condonation of delay due to ill health of General Manager (Taxation)/Company Secretary on the basis of medical certificate of doctor attending dispensary in premises of the appellant as prescribed by law, diagnosing illness as Hepatitis and advising complete bed rest to him. The High Court held that, such medicate certificate cannot be rejected on the ground that, doctor who gave it was skin specialist. The CESTAT not being expert in examining medical certificate could not reject it.

2.2 CCE, Belgaum vs. Chadha Auto Agencies 2013 (32) STR 265 (Kar.)

The High Court in this case held that, High Court does not have jurisdiction to entertain a question that, whether the activity carried on by assessee falls within the Business Auxiliary Service or Business Support Service.

2.3 CC, CE&ST, Guntur vs. OTS Advertising Pvt. Ltd. 2013 (32) STR 303 (Tri.-Bang.)

The Department in this case contended that, section 73(3) providing for waiver of penalty is not applicable to habitual offenders. The Tribunal held that, section 73(3) does not differentiate between habitual and non-habitual defaulters, therefore, the departments contention is liable to be rejected.

2.4 Inox Air Products Ltd. vs. CCE, Pondicherry 2013 (32) STR 336 (Tri.-Chennai)

The Tribunal in this case held that, benefit of rule 6(3) of STR, 1994 is also available to service receiver as the assessee is defined in section 65(7) as person liable to pay service tax and recipient of service is a person liable to pay service tax.

2.5 Jollyboard Ltd. vs. CC&CE, Aurangabad 2013 (32) STR 337 (Tri.-Mumbai)

The department in this case defined refund of service tax paid on documentation charges under Notification No. 17/2009-ST on the ground that same are not taxable service. The Tribunal held that, suppliers invoice reveal discharge of service tax under "Clearing and Forwarding Agency Service" and denial

of refund of service tax on documentation charges is not sustainable in law. It is further held that, officer in-charge of factory receiver input service has no jurisdiction to deny service tax paid by service provider.

2.6 Professional Couriers vs. CST, Mumbai 2013 (32) STR 348 (Tri.-Mumbai)

The Tribunal in this case held that, as assessee has not collected service tax from recipient of services, entire consideration received has to be treated as cum-tax.

2.7 KPIT Cummins Infosystems Ltd. vs. CCE, Pune-I 2013 (32) STR 356 (Tri.-Mumbai)

The Tribunal in this case held that, refund of unutilised CENVAT credit used for export of exempt service is admissible as Rule 6(3) of CCR, 2004 is not applicable and there is no bar on availing full credit for such services during relevant period. The Exim policy of Government of India is to promote export of goods and not to place tax burden on such exports to render them uncompetitive.

2.8 Prakash Retail P. Ltd. vs. DCCT (Audit), Udupi 2013 (32) STR 388 (Kar.)

The appellant in this case a trading house held articles manufactured by other companies, whose price list specified that, prices were exclusive of installation charges and they have raised invoices by specifying that prices of goods were ex-showroom and transfer of title in goods happened at place of seller. The High Court held that, sale price of goods at ex-showroom price attracted sales tax and subsequent to transfer of title of goods at place of seller, the appellant has acted as agent of customer for transportation and installation of goods and charges for same did not become part of sale of goods. When transfer of title in goods is a place of buyer, then all charges incidental thereto like transport and installation and other expenditures incurred by seller would become part of amount for which goods are sold by seller to buyer. However, if transfer of title of goods is to be at place of seller then such charges do not form part of amount for which goods are sold. If the sale agreement specifies all obligations on the part of seller to transport goods as incidental to sale, then it becomes part of amount for which goods are sold.

2.9 C. C. Patel & Associates Pvt. Ltd vs. UOI 2013 (32) STR 392 (Guj.)

The appellant in this case deposited service tax on billing basis instead of actual collection. The adjudicating officer found that, on one hand assessee had paid excess service tax and on other hand short paid matching amount in following quarter and on that basis raised demand of short paid service tax. The High Court held that, assessee was entitled to refund of excess paid service tax as the adjudicating authority on artificial basis could not have held that he ought to have deposited same amount once all over again in following quarter. Otherwise also it would amount to collecting tax from assessee twice which is not permissible in law. Further, before raising demand, the adjudicating authority should have granted adjustment of service tax already paid by assessee towards their liability and limitation and doctrine of unjust enrichment is not applicable.

2.10 ICC Realty (India) Pvt. Ltd. vs. CCE, Pune-III 2013 (32) STR 427 (Tri.-Mumbai)

In this case, the appellant claimed deduction for reimbursement of electricity charges received from tenants. The Tribunal held that, electricity is goods and chargeable under Central Excise Tariff and under Schedule A-20 of MVAT Act, 2002, therefore amounts to sale of goods and supply of service. Further, Notification No. 12/2003-ST exempts value of goods supplied by service provider to service recipient. In view thereof reimbursement of electricity does not form part of assessable value.

2.11 Amrapali Barter Pvt. Ltd. vs. CST, Kolkata 2013 (32) STR 456 (Tri.-Kolkata)

The assessee registered with service tax department have not provided any service and also not filed ST-3 returns on time. The Department sought to levy fees for late filing of Nil returns. The Tribunal held that, in view of the Circular dated 23-8-2007 and Rule 7C of STR, 1994 this is a fit case to invoke the proviso to Rule 7C and waive the late fees relating to the Nil returns filed.

3. CENVAT Credit

3.1 CC&CE, Hyderabad-III vs. ITC Limited 2013 (32) STR 288 (AP)

The High Court in this case held as under:

- Maintenance of residential colony of employees by the assessee is input service as if accommodation is not provided by the assessee to its employees at remote location, then it would not be feasible for it to carry on its manufacturing activity. The staff colony provided by the assessee is directly and intrinsically linked to its manufacturing activity.
- Activity of distributing saplings to the farmers in the vicinity and buying back the fully grown trees from them cannot be said to be an activity unconnected with the manufacture of its final products. Plantation activity undertaken by the assessee for ensuring steady supply of raw material (wood) cannot be excluded from the definition of input service.

3.2 CCE, Vadodara-II vs. Plastichemix Industries 2013 (32) STR 383 (Tri.-Ahmd.)

The assessee in this case availed CENVAT credit in the month of March, 2005 on the basis of invoices issued by HO as Input Service Distributor which was not registered. The Tribunal held that, legal requirement for getting HO registered as ISD came into force in June, 2005, whereas assessee availed credit in March, 2005, hence departments objection is unsustainable. Further, the fact of availing credit has been disclosed in periodical returns filed with Department hence, extended period of limitation is not invocable.

3.3 Shree Cement Ltd. vs. CCE, Jaipur 2013 (32) STR 416 (Tri.-Del.)

The Tribunal in this case held that, CENVAT credit of service tax paid on commissioning, installation and manpower recruitment for construction of staff quarters, canteen and residence of Executive Director of company located outside factory premises is not admissible as the said services are not mentioned in list of activities eligible as input services.

3.4 Hindalco Industries Ltd. vs. CCE, Vapi 2013 (32) STR 433 (Tri.-Ahmd.)

The Tribunal in this case allowed CENVAT credit of service tax paid on courier service since same is used for sending documents to head office and customers and therefore definitely relatable to manufacture.

3.5 Cable Corporation of India Ltd. vs. CCE, Mumbai-IV 2013 (32) STR 434 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of service tax paid on management consultant service used for merger of firms.

3.6 Thiru Arroran Sugars Ltd. vs. CCE, Tiruchirapalli 2013 (32) STR 435 (Tri-Chennai)

The Tribunal in this case allowed CENVAT credit of Rent-a-cab service utilised to bring workers or executives to factory by observing that, if there is no management by corporate office, a manufacturing organisation cannot survive, finance cannot be procured, raw materials cannot be purchased, and

manufactured goods cannot be sold and so on. Further, in the matter of extending CENVAT credit to Rent-a-cab service, contract bus service and telephone service, no distinction can be made between the factory and corporate office going by the provisions of CCR, 2004. Also where the expenditure is incurred by the company in books of account there is presumption in favour of appellant that service is availed in relation to their business.

3.7 DCM Shriram Consolidated Ltd. vs. CCE, Jaipur 2013 (32) STR 440 (Tri.-Del.)

In the present case, the Tribunal allowed CENVAT credit of service tax paid on hiring of JCB/cranes used for uprooting trees for use and get charcoal required in manufacture of calcium carbide.

3.8 Golden Tobacco Ltd. vs. CCE, Mumbai-V 2013 (32) STR 474 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of service tax paid on mobiles/ telephones installed at the residence of Director or Senior employees as the same are having nexus with the manufacturing of company.

3.9 Bank of Rajasthan Ltd. vs. CCE, Jaipur 2013 (32) STR 475 (Tri.-Del.)

The Tribunal in this case observed that, RBI guidelines displayed at the branch disclose phone number to which customers can make call proving that the telephones were used for providing output service and therefore CENVAT credit is admissible thereon.

3.10 Telco Construction Equipment Co. Ltd. vs. CCE&C, Belgaum 2013 (32) STR 482 (Tri.-Bang.)

The Tribunal in this case held that, the expression "activities relating to business" requires integral connection between activity/ service and business of manufacturing of final product. Mere relation with business is not sufficient. The Bombay High Court decision in *Coca Cola India Pvt. Ltd. 2009 (15) STR 657 (Bom.)* did not analyse scope of this expression, whereas later decision in *Ultratech Cement Ltd. 2010 (20) STR 577 (Bom.)* did analyse the same and also clarified Coca Cola decision, and hence required to be followed as precedent.

3.11 Gujarat State Petronet Ltd. vs. CC&CE, Ahmedabad 2013 (32) STR 510 (Tri.-Ahmd.)

The appellant in this case adopted EPC model, for laying of oil and gas transmission pipelines and for this purpose they granted several turnkey contracts to various EPC contractors involving fabrication, assembly with equipments and devices, installation and commissioning of pipeline system for the movement of oil and gas. They have claimed CENVAT credit of duty paid on pipe supplied free of cost to contractors. The Tribunal held that, appellant had not used pipes for providing any output service but have supplied them for construction of pipeline to EPC contractors. Being a free supply material, if its value was not included in pipeline system by output service provider, question of availment of credit also could not arise. The appellant was not eligible for taking credit on pipes either as capital goods or inputs or input service.

3.12 Central Bank of India vs. CCE&ST, Coimbatore 2013 (32) STR 525 (Tri.-Chennai)

The Tribunal in this case held that, no time limit has been prescribed for taking credit either in CCR, 2004 or CEA, 1944, therefore the lower authority's observation that, credit to be taken within one year is incorrect and unacceptable.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2013] 181 Comp Cas 61 (Delhi) – [In the Delhi High Court] – Ashutosh Sharma vs. Torque Cables P. Ltd.

Winding up proceedings to be used as the last resort and only upon culmination of all other remedies as available under the Indian Companies Act.

Brief Facts

The petition for winding up is filed by the petitioner under section 433(f) read with section 439 (1) (c) of the Companies Act, 1956 ("Act"). The above sections are related to winding up of petition on "just and equitable cause" to be made by any contributories. The petitioner along with another person has promoted the Torque Cables P Ltd. ("Respondent Company" or "RC") and are the signatories to the memorandum and articles of association. They were also the first directors of the RC. Initially there were only two shareholders. Subsequently, petitioner sold his part of shares to the third person. The new shareholder along with another person was also appointed as the directors of the RC. All the 3 directors distributed the work related to the RC. Initially, the operations of the RC was doing well, however at later stage, RC started facing trouble for the various reasons. The RC had also mortgaged the factory land to bank for obtaining the loan. The financial burden on the RC was increasing with each new day.

As per the petitioner, he had requested the other two directors to maintain the proper statutory records as required under the Act. However, there was no response from the other two directors. Further, the petitioner was denied access to the RC's records and the factory premises etc. As claimed, the petitioner had submitted his resignation letter with the RC but the other two directors have not filed the prescribed form with the Registrar of Companies ("RoC") as required under the Act. The legal notice was also sent along with the resignation letter to the other two directors. Further, the books and records of RC had been shifted to some other places which are not made accessible to the petitioner. In short, the petitioner had claimed that he was kept out of RC's affairs and its management. The above circumstances lead to the current petition which is "just and equitable cause".

Judgments and Reasoning

The Court has rejected the admission of petition by stating that the same is premature and not maintainable. The Court has analyzed the section 433(f) as to what is meant by "just and equitable cause" for winding up. It states that same is not to be construed as ejusdem generis with the other clauses of the section. The Court has referred the Supreme Court judgment as cited in ***Rajamundry Electric Supply Coproration Ltd. V. A. Nageswara Rao [1955] 2 SCC 1066; [1956] 23 Comp Cas 91 (SC)*** and reiterated in ***Hind Overseas P. Ltd vs. Raghunath Prasad Jhunjhunwalla [1976] 46 Comp Case (SC).*** The Court has observed that the winding up proceedings are to be used as the last resort and if some another remedy is available then, such remedies should be availed first. Further, the fact of cases is more related to section 387 and 398 of the Act and that of oppression and mismanagement.

Case Law No. 2

[2013] 181 Comp Cas 111 (Delhi) – [In the Delhi High Court] – Shahi Exports P. Ltd. and Another vs. CMD Buildtech P. Ltd. (No. 1).

The date of signing a balance sheet which shows the debt due is nothing but the acknowledgment of the debt and as per settled legal position, the period of limitation starts from that date.

Brief Facts

This petition has been filed by M/s. Shahi Exports P. Ltd and Ms. Surabhi Sindhu (together known as "Petitioners") for winding up of M/s. CMD Buildtech P. Ltd. ("Respondent Company" or "RC"). The petition has been filed under section 433(e) read along with section 434 and 439 of the Companies Act, 1956 ("Act"). The main reason for filing the said petition is that the RC is unable to pay the debts allegedly amounting to payable to the petitioners. The loan was granted to RC by M/s. Sarla Fabrics P. Ltd. under the agreement and for obtaining two personal guarantees. Later on, M/s. Sarla Fabrics P. Ltd. was merged with the M/s. Shahi Exports P. Ltd., one of the petitioners. Initially the RC has agreed to pay some money and ask for some more time for repayment of the loan taken. The same was granted by this Court with a direction to pay some advance to the petitioners on next hearing. On more than one hearing, the RC had pleaded for some more time and had stated the manner in which the outstanding dues shall be repayed. During these hearings, the Court had passed an order restraining the RC not to transfer or create any charge on its properties. On such occasion, the petitioners have submitted that it is nothing but tactic used by the RC for delayed payment of the dues.

NOW, the RC has raised a preliminary objection on the maintainability of the winding up-petition. The two objections are as follows: (1) one of the petitioners, M/s Shahi Exports P. Ltd. is not competent to file this petition as loan was not given by it, but it was given by M/s Sarla Fabrics P. Ltd and (2) Debt is barred by limitation.

The RC has submitted various reasons for the limitation of debts. One of the reasons is that being share application money, it cannot be considered as debt. Further, the claim which became time barred during the pendency of a winding-up petition, same should not be considered as a case for winding up at the show cause notice stage.

Judgments and Reasoning

The Court has rejected both the objections raised by the RC. With regards to the petition filed by M/s. Shahi Exports, it was observed that M/s. Sarla Fabrics P. Ltd got amalgamated under order of this Court with M/s. Shahi Exports P. Ltd. and thus, all the assets and liabilities stood transferred to it.

On the objection related to the limitation for filing petition, the Court has observed that, based on the cheque for loan credited by RC bank as on August 13, 2009, under section 18 of the Limitation Act, the period of limitation for filing petition is extended up to August 12, 2012. The Court has also observed that as balance sheet dated March 31, 2010, duly signed by the directors and the chartered accountant as on September 1, 2010, shows the separate amount pertaining to loan as well as amount towards share application to both the petitioners. The Court also noted that no shares were allotted to the one of the petitioner. The Court has observed that: if the date of signing of balance sheet is taken as date of acknowledgement of the debt as per the settled legal position, then, the period of limitation gets extended up to August 31, 2013. The Court also took note of the letter dated May 19, 2011 from the RC to the petitioners with two cheques in lieu of earlier cheques issued for loan amount and requesting them to return the old cheques. As per this view, the period of limitation is extended up to May 18, 2014. Thus, the winding petition filed in November 2011 is well within the limitation period. Further, on November 8, when this court has issued an order taking note that of the fact that there is no disputse related to the principal amount, the authorized representative of RC has not objected to it. The RC also stated that it has arranged for funds for repayment of loan. The Court has stated this on more than one occasion where the loan amount was not disputed nor the period of limitation objection was raised by the RC. The Court has also refereed to case cited as ***Bhajan Singh Samra vs. Wimpy International Ltd. [2011] 185 DLT 428; 173 Comp Cas 455 (Delhi)*** which has all the relevant authorities on this issue including some of the judgments cited here.

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. Export Outstanding Statement (XOS) Online Bank wise Submission

Earlier AD Category-I banks were required to furnish to the Regional Office concerned of the Reserve Bank, a consolidated statement in Form XOS giving details of all export bills outstanding beyond six months from the date of export on a half-yearly basis as at the end of June and December every year.

RBI has now decided with effect from the half year ending December 2013 that XOS should be submitted online and should be bank-wise instead of the present system of branch-wise submission through the respective Regional Offices of Reserve Bank of India.

[A.P. (DIR Series) Circular No. 60 dated 1st October, 2013]

(This is a welcome move by RBI which will reduce substantial reporting burden of the ADs in compiling branch-wise details)

2. Overseas Foreign Currency Borrowings by Authorised Dealer Banks

In terms of Regulation No. (4)(2)(i) of Notification No. FEMA 3/RB-2000 dated May 3, 2000 as amended from time-to-time and A.P. (DIR Series) Circular No. 23 dated October 15, 2008, AD Category - I banks were allowed to borrow funds from their head office, overseas branches and correspondents and avail overdraft in the nostro accounts up to a limit of hundred per cent of their unimpaired Tier I capital as at the close of the previous quarter or US $ 10 million (or its equivalent), whichever is higher (excluding borrowings for financing of export credit in foreign currency and capital instruments).

RBI has now provided greater flexibility to AD Category-I banks in seeking access to overseas funds and amended the above regulation by allowing them to borrow funds from any other entity as permitted *vide* Notification No. FEMA.288/2013-RB dated September 26, 2013 published in the Official Gazette vide G. S. R. No. 668 (E) on October 1, 2013.

Further, such liberalisation to borrow from international/multilateral financial institutions is for a limited period up to November 30, 2013 and should be for the purpose of general banking business and not for capital augmentation and shall

be subject to the conditions stipulated in the A. P. (DIR Series) Circular No. 40, 2013 dated September 10, 2013. In addition, such borrowings shall be eligible for the concessional swap facility of RBI as per A. P. (DIR Series) Circular Nos. 40, 2013 dated September 10, 2013 and 54 dated September 25, 2013.

[A. P. (DIR Series) Circular No.61 dated 10th October, 2013]

(This step was taken by RBI to attract foreign fund inflows to augment forex reserves at a time when rupee saw high volatility and also to defend it in near future when some tapering measures are initiated by the US Federal Reserve)

3. Closing of Old Outstanding Bills : Export-Follow-Up-XOS Statements

In terms of A. P. (DIR Series) Circular No. 12 dated September 9, 2000 wherein AD Category-I banks were required to furnish to the Regional Office concerned of the Reserve Bank, a consolidated statement in Form XOS giving details of all export bills outstanding beyond six months from the date of export on a half-yearly basis as at the end of June and December every year.

RBI has now decided that an old export bill may be closed by AD banks as a onetime measure, provided that the case is not subject-matter of any pending civil suit/criminal suit; the exporter has not come to the adverse notice of the Directorate of Enforcement (DoE)/Central Bureau of Investigation (CBI)/Directorate of Revenue Intelligence (DRI) / any such other law enforcement agency; has no externalisation problems with the export recepient countries and the export bill falls under following categories:

i. With ceiling of US $ 1,00,000 and outstanding beyond 15 years as on December 31, 2012

ii. With ceiling of US $ 50,000 and outstanding for more than 5 years as on December 31, 2012, where customers not traceable subject to proof of non-traceability from competent authority and under bank's internal boards approved policy.

Report of closed cases should be submitted to concerned Regional Offices of Reserve Bank of India by AD banks in an excel sheet as per the format given in Annex to this circular.

After closing of cases, there will be no further follow up by ADs and these outstanding bills will not be reported in future Export Outstanding Statements (XOS).

[A.P. (DIR Series) Circular No. 62 dated 14th October, 2013]

(This is a one time measure taken by the RBI to reduce long list of old outstanding export receivables which are doubtful of recovery subject to prescribed conditions as stated in the said circular. This measure will greatly reduce reporting burden of the ADs)

4. Memorandum of Procedure for channelling transactions through Asian Clearing Union (ACU)

In terms of para 7 and para 8 of Annex to the A.P. (DIR) Series Circular No. 35 dated February 17, 2010, the ACU Board of Directors in the meeting held on June 19, 2013 has decided to include only transactions involving export/import of goods and services among ACU countries as eligible for payment under the ACU Mechanism.

All other instructions contained in the A. P. (DIR Series) Circular No. 35 dated February 17, 2010 shall remain unchanged.

[A. P. (DIR Series) Circular No. 63 dated 18th October, 2013]

5. Deferred Payment Protocols dated April 30, 1981 and December 23, 1985 between Government of India and erstwhile USSR

In terms of A. P. (DIR Series) Circular No. 55 dated September 26, 2013, the Rupee value of the Special Currency Basket was indicated as ` 86.903352 effective September 13, 2013.

Upon further revision, RBI has fixed the Rupee value of the Special Currency Basket at ` 83.819978 with effect from October 17, 2013.

[A. P. (DIR Series) Circular No. 64 dated 22nd October, 2013]

6. Exim Bank's Line of Credit of US $ 19.72 million to the Government of the Republic of Mozambique

The Credit Agreement under the LOC is effective from October 4, 2013 and the date of execution of Agreement is July 4, 2013.

[A. P. (DIR Series) Circular No. 65 dated 31st October, 2013]

7. Exim Bank's Line of Credit of US $ 149.72 million to the Government of the Republic of Mozambique

The Credit Agreement under the LOC is effective from October 4, 2013 and the date of execution of Agreement is July 4, 2013.

[A. P. (DIR Series) Circular No. 66 dated 31st October, 2013]

8. Exim Bank's Line of Credit of US $ 47 million to the Government of the Republic of Mozambique

The Credit Agreement under the LOC is effective from October 4, 2013 and the date of execution of Agreement is July 4, 2013.

[A. P. (DIR Series) Circular No. 67 dated 31st October, 2013]

9. Foreign Direct Investment (FDI) in India – Definition of 'group company'

As per the extant FDI policy, RBI incorporated the definition for 'group company' *vide* Press Note No. 2 (2013 Series) dated June 3, 2013 issued by Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India as under :

(i) Exercise twenty-six per cent, or more of voting rights in other enterprise;

or

(ii) Appoint more than fifty per cent, of members of board of directors in the other enterprise.

Reserve Bank has since amended the subject Regulations accordingly through the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Sixteenth Amendment) Regulations, 2013 which have been notified *vide* Notification No. FEMA.292/2013-RB dated October 4, 2013, *vide* G.S.R. No. 683(E) dated October 11, 2013.

[A. P. (DIR Series) Circular No. 68 dated 1st November, 2013]

(DIPP in 2010 restricted cash-and-carry companies from selling more than 25% goods to 'group companies'. DIPP however then did not clarify the meaning of the 'group company', leading to ambiguity as the definition varied under different laws and hence, despite introduction of such a regulation in the FDI Policy, the government was unable to decide whether Bharti Walmart and Bharti Retail were 'group companies'. Introduction of definition of the group company would assist in implementing the policy on Cash and Carry Wholesale Trading in its true spirit.)

10. Amendment to the "Issue of Foreign Currency Convertible Bonds and Ordinary shares (Through Depository Receipt Mechanism) Scheme, 1993"

In terms of A. P. (DIR Series) Circular No.11 dated September 5, 2005 regarding issue of American Depository Receipts (ADRs)/ Global Depository Receipts (GDRs) read with Paragraph 4 of Schedule 1 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 notified *vide* Notification No. FEMA.20/2000-RB dated May 3, 2000, as amended from time-to-time, stating that unlisted Indian companies which have not yet accessed Global Depository Receipts/Foreign Currency Convertible Bond route for raising capital in the international market were required to have prior or simultaneous listing in the domestic market.

RBI has now decided to allow unlisted companies incorporated in India to raise capital abroad, without the requirement of prior or subsequent listing in India, initially for a period of two years, subject to conditions mentioned below. This scheme will be implemented from the date of the Government Notification of the scheme, subject to review after a period of two years. The investment shall be subject to the following conditions:

(a) Unlisted Indian companies shall list abroad only on exchanges in IOSCO/FATF compliant jurisdictions or those jurisdictions with which SEBI has signed bilateral agreements;

(b) The ADRs/ GDRs shall be issued subject to sectoral cap, entry route, minimum capitalisation norms, pricing norms, etc. as applicable as per FDI regulations notified by the Reserve Bank from time-to-time;

(c) The pricing of such ADRs/GDRs to be issued to a person resident outside India shall be determined in accordance with the captioned scheme as prescribed under paragraph 6 of Schedule 1 of Notification No. FEMA. 20 dated May 3, 2000, as amended from time-to-time;

(d) The number of underlying equity shares offered for issuance of ADRs/GDRs to be kept with the local custodian shall be determined upfront and ratio of ADRs/ GDRs to equity shares shall be decided upfront based on applicable FDI pricing norms of equity shares of unlisted company;

(e) The unlisted Indian company shall comply with the instructions on downstream investment as notified by the Reserve Bank from time-to-time;

(f) The criteria of eligibility of unlisted company raising funds through ADRs/GDRs shall be as prescribed by Government of India;

(g) The capital raised abroad may be utilised for retiring outstanding overseas debt or for *bona fide* operations abroad including for acquisitions;

(h) In case the funds raised are not utilised abroad as stipulated above, the company shall repatriate the funds to India within 15 days and such money shall be parked only with AD Category-1 banks recognised by RBI and shall be used for eligible purposes;

(i) The unlisted company shall report to the Reserve Bank as prescribed under sub-paragraphs (2) and (3) of Paragraph 4 of Schedule 1 to FEMA Notification No. 20.

A copy of the Press Release dated September 27, 2013 issued by Ministry of Finance, Government of India and the Government Notification dated October 11, 2013 are annexed (Annexures 1 and 2, respectively) to this circular.

[A. P. (DIR Series) Circular No. 69 dated 8th November, 2013]

(This is a welcome move to provide a much needed relief to capital seeking unlisted companies to raise capital abroad without the requirement of prior or subsequent listing in India. This move will open doors for such eligible companies to raise cheaper funds abroad and in turn may also help RBI in reducing pressure on the Indian rupee)

11. Third party payments for export/ import transactions

In terms of FEMA Notification No.14 dated May 3, 2000 which deals with the manner of receipt & payment for trade transactions. As per the said notification, payment for exports has to be received from the overseas buyer named in the Export Declaration Form (EDF) by the exporter and the payment shall be received in a currency appropriate to the place of final destination as mentioned in the EDF irrespective of the country of residence of the buyer. Similarly, the payments for the import should be made to the original overseas seller of the goods and the AD should ensure that the importer furnishes evidence of import, such as, Exchange Control copy of the Bill of Entry to satisfy itself that goods equivalent to the value of remittance have been imported.

Considering the evolving international trade practices, RBI has further liberalised the procedure relating to payments for exports/imports as under :

EXPORT TRANSACTIONS

AD banks may allow payments for export of goods / software to be received from a third party (a party other than the buyer) subject to conditions as under:

a) Firm irrevocable order backed by a tripartite agreement should be in place;

b) Third party payment should come from a Financial Action Task Force (FATF) compliant country and through the banking channel only;

c) The exporter should declare the third party remittance in the Export Declaration Form;

d) It would be responsibility of the Exporter to realise and repatriate the export proceeds from such third party named in the EDF;

e) Reporting of outstandings, if any, in the XOS would continue to be shown against the name of the exporter. However, instead of the name of the overseas buyer from where the proceeds have to be realised, the name of the declared third party should appear in the XOS; and

f) In case of shipments being made to a country in Group II of Restricted Cover Countries, (e.g. Sudan, Somalia, etc.), payments for the same may be received from an Open Cover Country.

Note: Restricted Cover Group II country is country which experiences chronic political and economic problems as well as balance of payment difficulties.

IMPORT TRANSACTIONS

AD banks are allowed to make payments to a third party for import of goods, subject to conditions as under:

a) Firm irrevocable purchase order / tripartite agreement should be in place;

b) Third party payment should be made to a Financial Action Task Force (FATF) compliant country and through the banking channel only;

c) The Invoice should contain a narration that the related payment has to be made to the (named) third party;

d) Bill of Entry should mention the name of the shipper as also the narration that the related payment has to be made to the (named) third party;

e) Importer should comply with the related extant instructions relating to imports including those on advance payment being made for import of goods; and

f) The amount of an import transaction eligible for third party payment should not exceed US $ 1,00,000. This limit will be revised as and when considered expedient.

These instructions will come into force with immediate effect.

[A. P. (DIR Series) Circular No. 70 dated 8th November, 2013]

(This is a welcome and practical step by the RBI taken with adequate safeguards to facilitate international trade in the evolving scenario where several countries are facing regulatory/political hurdles. This move will greatly *help export/import trade practices.)*

12. Advance Remittance for Import of rough diamonds

RBI vide A.P. (DIR Series) Circular No. 21 dated December 29, 2009 permitted AD Category-I banks to make advance remittance without any limit and without Bank Guarantee or standby Letter of Credit, by an importer (other than Public Sector Company or Department/Undertaking of the Government of India/State Governments), for import of rough diamonds into India from nine mining companies, subject to certain conditions.

Based on the recommendations of the Gems and Jewellery Export Promotion Council (GJEPC), the names of the two mining companies listed in the above circular have been changed as indicated below:

i. De Beers UK Ltd. to De Beers Global Sightholder Sales Proprietary Ltd.

ii. BHP Billiton, Belgium to Dominion Diamond Marketing.

[A. P. (DIR Series) Circular No. 71 dated 8th November, 2013]

13. Foreign Direct Investment in Financial Sector – Transfer of Shares

In terms of Regulation 10(A)(v) of the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 notified *vide* Notification No. FEMA.20/2000-RB dated May 3, 2000, as amended from time-to-time and Para 2(B)(iv) of A. P. (DIR Series) Circular No. 43 dated November 4, 2011, for transfer of shares from Residents to Non-Residents where the investee company is in the financial services sector, No Objection Certificate (NOC) is required to be obtained from the respective financial sector regulator/regulators of the investee company as well as transferor and transferee entities and such NoC(s) are to be filed with the form FC-TRS to the AD bank.

RBI has amended the relevant Regulations and notified *vide* Notification No. FEMA.290/2013-RB dated October 4, 2013, notified *vide*. G.S.R. No.682(E) dated October 11, 2013 that the requirement of NoC(s) has been waived from the perspective of Foreign Exchange Management Act, 1999 and no such NoC(s) need to be filed along with form FC-TRS. However, any 'fit and proper/ due diligence' requirement as regards the non-resident investor as stipulated by the respective financial sector regulator shall have to be complied with.

[A. P. (DIR Series) Circular No. 72 dated 11th November, 2013]

(This is a practical relaxation as the requirement of obtaining NOC from the financial sector regulators of investor/ investee companies were time consuming leading to delays in transfer of shares and investments.)

14. Import of Gold by Nominated Banks/Agencies/Entities

In response to the representations received by the Government of India and the Reserve Bank of India related to Advance Authorisation (AA) / Duty Free Import Authorisation (DFIA), RBI has issued the following clarifications:

Any authorisation such as Advance Authorisation (AA) / Duty Free Import Authorisation (DFIA) is to be utilised for import of gold meant for export purposes only and no diversion for domestic use shall be permitted. For any AA/DFIA issued prior to 14th August 2013 the condition of sequencing the imports prior to exports shall not be insisted upon.

RBI has clarified that notwithstanding any of the foregoing directions, entities/units in the SEZ and EoUs, Premier and Star Trading Houses (irrespective of whether they are nominated agencies or not) are permitted to import gold exclusively for the purpose of exports only. Similarly, exports towards fulfilment of obligation under AA/DFIA scheme shall not qualify as export for the purpose of the scheme of 20:80.

[A.P. (DIR Series) Circular No. 73 dated 11th November, 2013]

15. Foreign Investment in India – Participation by SEBI registered FIIs, QFIs and SEBI registered long-term investors in credit enhanced bonds

At present, the limit for investments by FIIs, QFIs and long-term investors in Government securities and for corporate debt is US $ 30 billion and US $ 51 billion respectively. It has now been decided to allow SEBI registered Foreign Institutional Investors (FIIs), Qualified Foreign Investors (QFIs) and long term investors registered with SEBI – Sovereign Wealth Funds (SWFs), Multilateral Agencies, Pension/Insurance/ Endowment Funds, foreign Central Banks – to invest in the credit enhanced bonds, as per paragraph 3 and 4 of A. P. (DIR Series) Circular No. 120 dated June 26, 2013, up to a limit of US $

5 billion within the overall limit of US $ 51 billion earmarked for corporate debt.

[A. P. (DIR Series) Circular No. 74 dated 11th November, 2013]

(This is a welcome relaxation by the RBI to open US $ 5 billion window within overall US $ 51 billion window for corporate bonds for investment in credit enhanced bonds.)

16. Trade Credit for imports into India – Online submission of data on issuance of Guarantee/Letter of Undertaking (LoU)/ Letter of Comfort (LoC) by ADs

RBI has decided to shift the arrangement for reporting of data on issuance of guarantees/ LoUs/ LoCs by all AD banks in consolidated statement, at quarterly intervals, from manual submission (and in MS-Excel file through email) to eXtensible Business Reporting Language (XBRL) platform from quarter ended September 30, 2013.

[A. P. (DIR Series) Circular No. 75 dated 19th November, 2013]

17. Deferred Payment Protocols dated April 30, 1981 and December 23, 1985 between Government of India and erstwhile USSR

In terms of A. P. (DIR Series) Circular No. 64 dated October 22, 2013, the Rupee value of the Special Currency Basket was indicated as ` 83.819978 effective from October 17, 2013.

Upon further revision, RBI has fixed the Rupee value of the Special Currency Basket at ` 86.513657 with effect from November 18, 2013.

[A. P. (DIR Series) Circular No. 76 dated 19th November, 2013]

18. Overseas Foreign Currency Borrowings by Authorised Dealer Banks

In terms of A.P. (DIR Series) Circular No. 40 dated September 10, 2013 read with A.P. (DIR Series) Circular No. 61 dated October 10, 2013 AD Category I Banks were permitted to borrow from international/ multilateral financial institutions up to 100 per cent of their Tier-I capital subject to the conditions mentioned therein and also swap the borrowed amount with the Reserve Bank at a concessional rate as mentioned therein and the same were valid till November 30, 2013.

In view of the hardship faced by certain banks to adhere to the time limit of November 30, 2013, RBI decided that, if any bank is being sanctioned any loan from any international/multilateral financial institutions and is receiving a firm commitment in this regard on or before November 30, 2013, it will be allowed to enter into a forward swap under the first leg of which the bank will sell forward the contracted amount of foreign currency corresponding to the loan amount for delivery up to December 31, 2013. However, if the bank is not in a position to deliver the contracted amount of foreign currency on the contracted date, it would have to pay the difference between concessional swap rate contracted and the market swap rate plus one hundred basis points. The other terms and conditions for the swap will remain unchanged as notified earlier.

It is reiterated that the above relaxation is available only for the contracts entered into up to November 30, 2013 and not thereafter.

[A. P. (DIR Series) Circular No. 77 dated 22nd November, 2013]

(This is a welcome step by RBI which will help those banks who have already contracted their overseas borrowings but could not remit before the stipulated date of 30th November, 2013. This step is in line with RBI policy to augment forex reserves to reduce exchange volatility at a time when some tapering measures by US Federal Reserve are expected)

Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Compensation – Different heads of compensation – Courts and Tribunals should take liberal approach since law values life and limb in free country in generous scale – Section 168 – Motor Vehicles Act, 1988.

The claimant was alighting from bus, the conductor of bus blown the whistle without noticing him. Due to the sudden movement of bus, the claimant fell down and the rear wheel rammed over on his right leg and he sustained severe injuries on his head, right hand and chest. After treatment, his right leg below the knee was amputated. He made claim before the Motor Accidents Claims Tribunal for ` 21,00,000/- as compensation in the year 2007. The Tribunal awarded a sum of ` 9,42,822/-. Dissatisfied with the same the claimant went in appeal before the High Court for higher compensation. The High Court reduced the compensation from ` 9,42,822/- to ` 6,72,822/-. Therefore, the claimant approached the Hon'ble Supreme Court.

The Supreme Court observed that in *Ramesh Chandra vs. Randhir Singh and Others 1990 (3) SCC 723,* the Supreme Court had held that compensation can be payable both for loss of earning as well as disability suffered by the claimant.

The Supreme Court held that the determination of quantum in motor accidents cases and compensation under the Workmen's Compensation Act, 1923 must be liberal since the law values life and limb in free country in generous scales. The adjudicating authority, while determining the quantum of compensation, has to take note of the sufferings of the injured person which would include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned. Compensation under the head 'Permanent disability' cannot be denied on the ground that substantial amount had been fixed under the head 'Loss of earning' and 'Loss of earning capacity'. Thus the Supreme Court granted additional amount of ` 1.80 lakhs, total compensation of ` 8,52,822/- with interest @ 9% from date of claim petition till the date of deposit.

S. Manickam vs. Metropolitan Transport Corp. Ltd. AIR 2013 Supreme Court 2629

2. Transfer / Assignment of leasehold rights – Subletting permissible under contract between landlord and tenant – Official Liquidator entitled to encash capital asset and sell leasehold rights for payment of dues to creditors / contributories – Thus transfer / assignment of leasehold rights, proper- Section 108 – Transfer of Property Act, 1882

The appellant's predecessor-in-interest had executed two registered perpetual or permanent lease deeds. Subsequently the lessee transferred their rights in respect of the land in favour of a company New Commercial Mills Co. Ltd. The said transfer / assignment was accepted by the predecessors of the appellants. Ultimately by various transfers undertaken the land was sold/transferred to Continental Textiles Mills Ltd., the company under liquidation. In course of liquidation proceedings the official liquidator attempted to sell of the lease hold rights in the said land. The appellant who claim right, being inheritors of the original lessors, filed company application which was dismissed. Therefore, the Appeal was filed by the appellant in High Court.

The High Court held that leasehold rights of permanent nature are a capital asset and have market value, when they can be assigned or transferred to a third person unless there is a contractual or statutory bar/prohibition. S. 108 of Transfer of Property Act permits assignment. Such lease hold rights cannot be equated and treated as similar to limited or short-term tenancy rights, which are granted in favour of a tenant with a rider, bar or prohibition on further transfer/assignment or subletting.

The Hon'ble Court observed that under Section 15(1) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, subletting may be permitted under a contract between landlord and tenant and if there is a contract to said effect, subletting will not be unlawful and it is open to tenant to assign or transfer his lease hold rights to a third party. Assuming that Act and Part II thereof is applicable, it was clear that contracts in question i.e. the Registered Permanent Lease Deeds permitted and allowed the lessee to assign and transfer their rights. In fact, such transfer / assignments had taken place in past, without any objection from the lessors or their predecessors.

Since acquisition of lease hold rights in question by company under liquidation was for value and consideration paid to earlier lessee and official liquidator was entitled to encash capital assets and sell lease hold rights for payment of dues to creditors/contributories, transfer/assignment of lease hold rights, was held proper.

Ashok Kumar Krishnalal Patel & Anr. vs. Continental Textile Mills Ltd. AIR 2013 Delhi 166

3. Professional misconduct – Chartered Accountant found to have prepared incorrect balance sheet and profits and loss accounts of assessee held guilty of misconduct – Sections 21, 22, Schedule II Part I, Clauses. (7), (8) – Chartered Accountants Act, 1949

A reference by the Council of the Institute of the Chartered Accountants of India to the High Court was made under Section 21(5) of the Chartered Accountants Act, 1949. The respondent who is a Chartered Accountant had audited the accounts of the assessee for the assessment year 1998-99. The said firm along with its income-tax returns also submitted the audited balance sheet and profit and loss accounts for the year ending 31st March, 1998. The Income Tax Officer noticed various discrepancies in the balance sheet and profits and loss accounts of the said firm.

The High Court held that the balance sheet and profits and loss accounts of assessee prepared by Chartered Accountant were incorrect. Whether the mistake was *bona fide* or not is not very material. The Chartered Accountant has utterly failed to perform his duties as a tax auditor. Even if computer typist took the last year's closing stock figure and adjusted the cane payment dues account to tally the balance sheet, the Chartered Accountant was required to compare the closing figure with the closing balance in the books of account and the trial balance thereof. There is also no evidence that the Chartered Accountant cared to obtain confirmation from third parties regarding the amount due to them which would have demonstrated that the cane dues as mentioned in the balance sheet are incorrect. He simply signed the balance sheet, profits and loss account prepared by the computer operator

without verifying the correctness and authenticity of the facts and figures appearing therein. This is also evident from his own admission contained in the written representation wherein he stated that the mistake could not be detected "due to work pressure of tax audit being near last closing date". Signing of the balance sheet prepared by computer operator without cross checking the same, amounts to total abdication of his responsibility. He failed to exercise the professional skill which he possessed by acting in a totally perfunctory manner. Thus, there can be no escape from the conclusion that the C.A. acted in a grossly negligent manner and failed to obtain sufficient information to warrant the expression of opinion in the balance sheet and profits and loss accounts. Therefore, the finding of misconduct arrived at by the Council is proper.

Council of Institute of Chartered Accountants of India, New Delhi vs. Satish Chand Jain AIR 2013 Allahabad 170

4. Ex parte decree – Setting aside of – Presiding Judge, on leave on date of appearance of parties – Ex parte decree cannot be passed on said date – Ex parte decree, liable to be set aside – O. 34, Rr. 1, 7 Civil Procedure Code, 1908

Appellants/defendants filed miscellaneous appeal under Order 43, Rule 1 of the Code of Civil Procedure against the judgment and decree passed by District Court. The respondent No. 1 (plaintiff) filed a civil suit against the appellants and respondent Nos. 2 to 9, in the Court of the District Judge, Bilaspur for recovery of ` 4,71,798.05. Though it was a suit for recovery of the money but it was for enforcement of the mortgage, executed by the defendants in favour of the plaintiff for realisation of the loan given by plaintiff to defendants. The suit was contested by the defendants. On 4-4-1998 the learned District Judge, Bilaspur decreed the suit and passed a preliminary decree against defendants, jointly and severally.

Despite passing of the preliminary decree, the defendants did not ensure its compliance and therefore the plaintiff on 24-8-1998 filed an application for passing a final decree in terms thereof.

The order sheets dated 24-8-1998 showed that the application for passing final decree was entertained by the learned District Judge and accordingly he directed issuance of notice to all the defendants of the application made by the plaintiff. The case was then adjourned, awaiting service of notice of the application on the defendants on several dates.

The order sheet dated 22-10-1999 then records that on this date the District Judge directed issuance of fresh notice to the defendants for their appearance on 4-12-1999. The case was then adjourned for 4-12-1999. On this date it is noted that defendants are absent and further the Presiding Judge is on leave. The Court Reader thus gave a formal next date for 4-1-2000. Thus it was clear that on 4-1-2000 the District Judge, proceeded ex parte against the defendants

The proceedings thereafter continued ex parte against almost all the defendants and eventually on 21-2-2003 the final decree was passed against the defendants in the suit.

The Hon'ble Court observed that when the date is given by the Court Reader then it becomes a formal date and it cannot be regarded as "date of hearing" and hence it does not enable the Presiding Judge to proceed ex parte against the defendant on such date. It is only when the date is fixed by the Court then it becomes a date of hearing and on such date any order can be passed including the order to place defendants ex parte in the suit.

The matter can be examined from yet another angle. It is not clear from the order sheet dated 4-12-1999 that notices sent to the defendants were served upon them or not. At least, the order sheet dated 4-12-1999 is silent on this issue because it only records that "defendants are absent". The question of defendants being absent will arise

only when they are held served of the summons. On 4-1-2000, the learned District Judge did not examine and nor recorded any finding as to whether, the defendants were served and if so when, how and whether such service can be held good or not? and straightway proceeded to place the defendants ex parte on the basis of what was written by the Court Reader in the order sheet of 4-12-1999. In other words, neither in the order sheet of 4-12-1999 and nor of 4-1-2000, there is any discussion much less findings as to when and how the defendants were served.

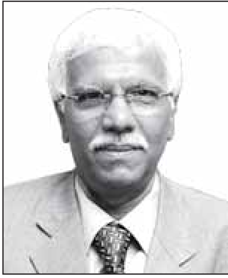
In these circumstances the ex parte decree, liable to be set aside.

Shobha Kateliha & Anr. vs. State Bank of India & Others AIR 2013 Chhattisgarh 151

5. Deficiency in stamp duty – Levy of penalty – Instrument, whether lease or licence – If contract is for exclusive possession and profits of land, it is lease and not licence, no matter in what nomenclature, rent is to be paid Stamp duty paid by considering it as deed of licence – Levy of penalty, held proper – S. 47-A – Stamp Act, 1899

A lease is a species of contract for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of parties, or a contract for the possession and profits of land, for a determinate period with the recompense of rent. Thus, a lease may be regarded as a conveyance or grant of an estate or interest in real property, for a limited term with condition attached. On the other hand, a licence is a right or permission granted by some competent authority to carry on business or to do an act which, without such licence, would be illegal. Regarding the property, a licence is simply the authority to enter the land of another and perform a specified act or series of acts without obtaining any permanent interest in the land. It is a permit or privilege to do what otherwise would be trespass, or tort or otherwise unlawful. If the instrument or agreement grants an interest or a right to use and occupy the land, it may not be construed as a mere licence, notwithstanding it is called a licence by the parties. A licence is also distinguished from a lease. As per "Corpus Juris Secundum", a licence generally provides the licencee with less rights in real estate than a lease. If the contract gives exclusive possession of the premises against all the world, including the owner it is a lease, but if it merely confers of a privilege to occupy the premises under the owner, it is a licence. Accordingly, a licence in a property is the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein, and is thus subject to management and control retained by the owner. As a further distinction between a licence and a lease, the latter conveys an interest in the land, requires a writing to comply with the statute of frauds, and transfers possession of another that without a licence would be trespasser, and conveys no interest in land. Further, a lease is corporeal and the licence an incorporeal and the absence of consideration is more indicative of a licence than a lease. If a contract is for the exclusive possession and profits of land, it is lease and not a licence, no matter in what nomenclature, rent is to be paid. Licence can be revoked at any time at pleasure of the licensor. Mere use of the words "licence" or "licencee" would not be sufficient to hold that the said instrument is licence. In the present case the instrument in question (MOU) is a tenancy agreement, especially by looking upon the length of the period of nine years, the same will have to be treated as tenancy/lease agreement. Since stamp duty was paid considering it as deed of licence, levy of penalty was proper.

M/s. Pantaloon Retail (India) Ltd. vs. The Chief Controlling Revenue Authority / Board of Revenue U.P. AIR 2013 Allahabad 146.



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TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxman, Current Tax Report (CTR), The Tax Referencer (TTR), Income Tax Review (I. T. Review), Sales Tax Review (S. T. Review), The Bombay Chartered Accountant Journal (BCAJ), The Chartered Accountant (CAJ), The Chamber's Journal (C J), SEBI And Corporate Laws (S & Co Laws), Company Case, Economic Times and Times of India for the period October to November, 2013 has been arranged and indexed topic-wise.

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CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

FLAVOUR OF THE SEASON - EQUITY

The month of November continued with the positive sentiments generated in the earlier months across the world. The US data continued to strengthen and many corporate results of the US companies for the quarter ended September 2013 turned out to be better than expected, adding to the positivity in the capital markets. The fear of tapering of the quantitative easing gripped the world in the initial part of the month and it resulted in a sell off in stock markets. Fortunately, the fear did not sustain for long. The statement of Ms. Janet L Yellen, who will be taking over as the FED chairperson from Mr. Ben Bernanke, regarding the continuation of quantitative easing, eased the fear of its immediate tapering. This made global markets bounce back. The reforms announced by China enhanced the possibility of improvement in the growth rate of that country and it improved the global sentiment. The outlook of the global investors regarding China took an upturn. If China can implement what it announced, the possibility of increase in investment in that country may improve substantially. It can give a fillip not only to the Chinese economy but will have a positive impact on the whole world. Due to these factors, the global economic outlook remains positive for the time being and no major hurdle is expected in the growth path in the near future.

The mood in the world now is quite upbeat. More and more positive news is flowing in and the clouds of uncertainty are gradually receding from the horizon of many underperforming economies. European economies have consolidated and apparently their risk is coming down due to the gradual improvement of the businesses and employment. There is a belief that the worst is over and an economic spring is about to emerge. Positivity plays a critical role in the development of an economy. It supports investments that generate more economic activity which in turn can create more employment and prosperity. The positive feeling across the world is getting more and more pronounced and that can be a major reason of the improvement in investments and employment in various economies, which will improve the growth rate of the world.

Another encouraging development of recent months is that the prices of the petroleum products are easing. The prices of many commodities are coming down, which can give boost to economic activities, wherein such commodities are used as raw

materials. Capacity utilisation across the industries is improving, thereby increasing the profitability of the companies and encouraging investment in manufacturing and services. Improved employment will give more consumable surplus in the hands of the people, which in turn will increase the demand and consumption, thereby supporting enhancement of economic activities. Global trade is likely to expand over the next few years, which will support improved economic activities. Change is emerging and this time it looks more sustainable.

In spite of encouraging global outlook, the economic data in India is still not looking great. In the first quarter of the financial year 2013-14, the GDP growth rate came down to 4.4%, which was one of the lowest in last many years. Therefore the sentiments in India were a bit subdued. On top of it, the uncertainty due to the forthcoming general elections, were also responsible for holding back the investments in India. Fortunately, this year the monsoon turned out to be quite good across India, which has increased the prospects of a bumper agricultural production, which may result in high growth rate in agriculture. As a consequence, it will increase the spending power in rural India, which augurs well for increase in consumption and consequential economic growth. The depreciation of the Indian Rupee, which was a menace, has turned out to be a blessing in disguise. As a fall out of heavy depreciation of the Indian Rupee, Indian exports surged, increasing the growth rate of manufacturing and the economy grew by 4.8% in the second quarter. This growth rate could have been better but for the slower growth of service sector during the quarter. Therefore, the outlook of the Indian economy has suddenly changed for better. Sentiments have taken a positive turn and it is expected that the Indian economy has bottomed out. Though the Government agencies are harping on an expected growth rate of more than 5% for the current fiscal year, it is likely that India will grow just about 5% or a bit less. If this growth rate is achieved for the year, it will be a clear indication that the economy has taken a 'U' turn and it has begun an upward march and will continue the same, especially if the global economies start doing better than earlier. A new concern emerging in India is slowing growth in the core sector. It has posted a negative growth in the month of October, which can be a dampener for achieving a growth rate of 5%.

India is slated for the general elections within the next few months and there is uncertainty due to the same. It is hoped that the new Government coming in power will be more decisive and it will encourage the process of reforms, which will give impetus to the growth story of India. The transparency in governance may improve and it will result in better administration and lesser hassles for enterprises. If that happens, it will be a great boon and the growth rate can bounce back to 7% and above in the next couple of years. India will re-emerge as one of the fastest growing economies and will start making a difference to the global economic environment.

The gradual improvement in business enthusiasm and expectations are very likely to contribute positively to the stock markets across the world. Today, the data flow is so quick and swift that the investors across the world have a tendency of over-reacting to the same. As a consequence, when just some green shoots started emerging in the US economy, the US stock markets touched all time high levels. Though the best is yet to come for the economy, the stock markets have already ventured into unchartered territory, which apparently has increased the risk of investment. Also as a corollary, this implies that before a visible slowdown

in any economy, the stock markets in that economy may start retreating as a prelude. Such a situation makes investment decisions more difficult for common investors. The current high level of stock prices in the US does not mean that the stock markets in US have reached their peaks. As the economy is doing better, it is likely that the markets will continue to surge for a while. How long this game will continue can be a million dollar question but it is likely that the markets have already discounted lots of good news. The upward movement will remain gradual and will not be in proportion to the positive economic data. Still there is a fair scope of making good money in the US markets in the months to come, as interest rates continue to remain low in that economy.

The European economy is gradually improving but its momentum is slow. The stock markets in the European region have bottomed out, but they have not appreciated much as is the case in the US. It is very likely that now onwards the European economy will steadily grow in a positive territory and get reasonable growth traction. This may result in good appreciation in the stock markets in the European region in the months to come. The going will be better for European multinationals as compared to the local companies as these multinationals will also benefit from encouraging growth in various parts of the world. There seems to be a reasonable value in the European stocks and informed investors can take advantage of the same.

The economies of Asia and especially of Asia Pacific region were having reasonable growth even during the bad times of the global slowdown over the last few years. Many of them benefited from the growth in China as the suppliers of raw materials and intermediate goods. However, as the economies of the developed countries will pick up over the next few years, these Asian economies may start slowing down. The stock markets in these regions were in good shape and had not declined greatly when the economic collapse in the developed world occurred. Since thereafter they have remained more or less in positive territory. As these markets have not depreciated much and their growth outlook may not improve substantially in the near future, the companies in these markets will give average returns. However, certain companies who are in the technology intensive industry can continue to clock above average growth and give better returns to the investors. Chinese and Japanese companies have better potential as compared to their regional peers due to encouraging economic outlook of Europe and US.

The current mood is upbeat in the Indian stock markets. The markets are ruling more or less at an all time high. This level was achieved in 2008 and it has been re-achieved now after a gap of about 5 years. The apparent interpretation of the situation is that the stock markets are currently booming. But this observation may not be fully correct. It may be appreciated that out of the index stocks, about one third stocks, mainly of multinationals and well managed Indian companies have more or less doubled in the last 5 years, but majority of the other stocks have either lost ground or have underperformed the Sensex over the said period. The gains and the losses have balanced out to give the current composition of the index. The companies which have appreciated substantially are those which are mainly patronised by Foreign Institutional Investors (FIIs). These FIIs have been the driving force of the Indian stock markets for the last few years. During this period, the retail investors have quietly dwindled. But for these FIIs pumping money, the stock markets could have been at much lower index levels. The improved economic outlook of India can increase the demand

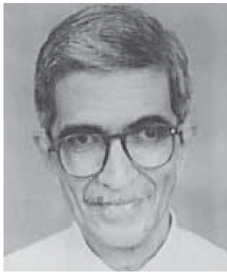
and consequentially the capacity utilisation of Indian companies resulting in much better financial results over the next few years. Therefore, there is good scope of appreciation, if investment is made in the stocks of well managed companies with medium term horizon. One essential element of the revival of economic growth of India is reduction of interest rates. If inflation gets controlled over the next few months, the interest rates may start reducing, and the Indian economy can bounce back resulting in very good returns to the investors. However, if inflation takes time to cool off, the economic recovery may not be expedited. In such an event, even the stock markets will move up gradually and the retail investors may continue to shun them.

Debt continues to remain a beneficial investment avenue. Due to tightening of liquidity in India, the interest rates continue to rule strong and it is likely that they may not weaken till the end of the current financial year. The continuing high inflation, in spite of bumper agricultural output is likely to hold-back the long awaited easing of interest rates. Currently, many of the Public Sector Units (PSUs) are coming out with issues of tax free bonds with tenures of 10, 15 and 20 years. They carry attractive interest rates which average around 8.5%. The retail investors are getting 0.25% additional interest from some such bonds. Considering the highest tax slab rates in India, the effective return on these investments work out to around 13% pre tax which is a very good long term return. These bonds are going to be listed on the stock markets but there may not be adequate liquidity on all such bonds as all of them may not be regularly traded. Therefore, it is essential that the investors should subscribe for bonds of such companies, which have earlier issued similar tax free bonds and such bonds are currently traded on the stock markets on a regular basis. The opportunity of investment in tax free bonds is quite attractive but it will not be available for long as the pipeline of such issues will get exhausted over the next few months. Therefore, such bonds are worth a consideration by the investors for securing low risk high post tax returns.

The global prices of gold continue to ease though the metal has not depreciated much in India. Considering the global outlook, it may not be worth investing in it at the current levels. Gold may further weaken in the international market and if the Rupee appreciates the much sought after metal may depreciate in the Indian markets.

Over the last few months, property prices are continuing to show weakness across most of the micro markets in the country. In best cases they have remained flat and in many markets they are gradually on the decline. The decline is more pronounced in the resale markets, which can be a better barometer of the market price. The property prices do not look very attractive for the immediate future in India. High interest rates and low rental yields currently prevailing in the Indian markets will further make the returns on such investments unattractive.

The mood in India is positive on the back of global sentiments though the country will need to do substantial catching up as its own economy is yet to show the required strength. The worst seems to be over for the businesses in India and therefore, there may be better days ahead for the equities. The asset allocation of equity in the portfolio of the investors may be increased as this asset class is likely to outperform other asset classes over the medium term.



V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Facts & Query

Q.1 ***We are partnership firm of CAs having four partners.***

Each partner of the firm has to pay membership fees to the Institute of Chartered Accountants of India (ICAI).

The firm is paying such fees to the ICAI and has claimed the same as expenses while preparing Income Tax Return, by debiting Income and Expenditure account.

The tax auditors of the firm says that since the fees are payable by individual partners, the above expenses are personal expenses of the partners and hence not allowable as expense in the hands of the firm and accordingly wants to report in tax audit report.

The firm contends that partners cannot practice without payment of such fees to ICAI and also cannot be a partner of practicing CA firm. Hence, such fee is not personal expense of partners which is borne by the firm and is allowable u/s. 37 of the Income-tax Act, 1961, in the firm's hand.

Please advise citing decided cases, if any.

Ans. The querist being a partnership firm of Chartered Accountants, its partners have to be qualified Chartered Accountants. Now under General Law and Taxation Laws, business or profession of the partnership firm and its partners is one and the same, a partnership firm being a name given to the business of its partners who have agreed to carry on business jointly.

There is no business of the partnership firm which is independent of its partners. As such any expenditure incurred by the partners in their capacity as partners to be qualified as partners is not a personal expenditure of the partners, but it is a business expenditure incurred on behalf of the partnership firm and as such, it being a business expenditure of the partnership firm, it will be allowable as business expenditure of the firm while computing the business income of the firm.

As such fees paid by the Chartered Accountant partner will be allowable as business expenditure in the hands of partnership firm.

Q.2 *In calculation of LTCG on sale of property for A.Y. 2011-12 the assessee has considered value u/s. 50C which was higher than the transaction value. Also value adopted as on 1-4-1981 was less than value as per Valuation Report.*

a. *Can the assessee during the course of assessment u/s. 143(3) substitute the figures of sale and value as on 1-4-1981, since the time-limit for filing of revised return is over?*

Ans. An apparent mistake committed in computing the income in the return of income can be corrected at any time before the assessment is completed under S. 143(3) of the Act.

In fact even at the stage of appeal or revision of the order it can be corrected. In case of the querist, as the claim made was not as per the provisions of S. 50C of the Act, it could be

corrected as per the provisions of said section, during the assessment proceeding even though no revised return was filed before time, allowed for filing a revised return.

Q.3 ***The assessee has sold commercial premises in** November 2010 and invested in residential property under construction in Dubai (UAE) claiming benefit u/s. 54F. The flat was booked in 2008 while **agreement was entered into at the same time. As per** the terms of the agreement the rights in the property would vest with the assessee on making full payment and on handing over of possession by the builder. Final payment and possession was done in October 2012. He has also invested in another residential property under construction in April 2010 for which construction is not yet completed and therefore the **possession is also not handed over.***

a. *Is his claim u/s. 54F valid?*

b. *Does it matter that he has booked another **house under construction and which is still** incomplete?*

Ans. A transfer of an immovable property is complete, when an unconditional possession of the property is given to the purchaser or when a final conveyance of the property sold is executed, which even is earlier. In the case of the querist an unconditional possession of the flat was given to the purchaser in October 2012, and the final payment was made in October 2012. As such the construction was completed within the time allowed under S. 54F. Therefore the querist can claim benefit of investment under S. 54F of the Act, the fact that the agreement to purchase a constructed flat was entered into in 2008 is not relevant, nor the flat that the querist has booked another flat is relevant.

As such the querist can claim benefit of investment u/s. 54F of the Act.

Q.4 *Is commercial property not used by the assessee for his own business but given on rent and income from which is taxable under the head Income from house property, chargeable to Wealth tax?*

Ans. Under General Law a house property would also include a property which can be used for commercial purpose and it need not be only for residential purpose.

As such even if a house property is used for commercial purposes like a shop, it would be a house property. I.T. Act u/s. 54 and S. 54F which deal with investment in house property specifically provide that it should have been used for residential purposes. In Wealth Tax Act no such restriction is made for such claim for exemption from wealth tax liability in respect of a House Property.

As such the querist can claim exemption under S. 5(vi) of the W.T. Act in respect of a building used for commercial purposes.

> "By cleansing your body on a regular basis and eliminating as many toxins as possible from your environment, your body can begin to heal itself, prevent disease, and become stronger and more resilient than you ever dreamed possible!"
>
> — *Dr. Edward Group III*

CA. Ninad Karpe

THE LIGHTER SIDE

When I retire…

Recently, the GOD of cricket retired and all of us in India took a collective pause and stopped thinking of anything else. When he made his 200th test match appearance in Mumbai and made an emotional speech at the end of the match, it must have created a world record in terms of viewership of retirement on television of any person. We all love Sachin and all the attention he got was well deserved.

This event set me thinking … what will happen when you retire? Indeed, what will happen when I retire?

All tax professionals are indeed, lucky. They don't retire – just fade away. They don't need to set a date for retirement – retirement catches up with them. And fortunately, the tax laws around the world ensure that the need for tax professionals is eternal.

Ultimately, retirement is a state of mind. You can go on and on, if your mind and body permits you. And now you see some of the advantages of being a tax professional.

However, I am not so unfortunate. I will have a finite date for retirement and unlike Sachin, I will have to quietly drive back home in the crowded traffic.

And since we have elections happening in many States, one should also think of retirement age for politicians. Isn't it ironical that in a country like India, which has 50 percentage of the population below the age of 25, a 60 year old politician is considered young? Shouldn't we have more representation in the political system from the young?

If Sachin, with all the talent and prowess at hand could consider retirement and step down, it is a sobering lesson that even though we believe we are at the peak of work and achievement, can make way for more talent to surface. Now that would be true satisfaction in remembering the greatest cricketer India and the world has known.

LETTER TO THE EDITOR

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The Editor,
The Chamber's Journal,
The Chamber of Tax Consultants,
Mumbai.

25th November, 2013

Dear Sir,

Re: China's reform road map has lessons for India

China seems to be on the march once again. It has found a strong and decisive leader, who seems to be committed to markets and improving governance. They have identified their constraints to growth and weaknesses in their prior economic model, and seem to have a game plan to address these short comings. Many economic analysts and observers feel comfortable underwriting 7 per cent economic growth for the country for the coming years.

The detailed document on reform decisions made at the Third Plenum of the Chinese Communist Party has been released. This document contains the details on proposed reforms. After the release of the "decisions taken" document, many economists and investment analysts feel this to be a clear indication that China's top leadership is serious about reforms. There seems to be a buzz around China and its long-term growth prospects after release of this reform road map.

The complete "Decision on Deepening Reform" document lays out a host of major initiatives, including a decisive shift towards free markets, relaxation of the one-child policy, elimination of re-education labour camps and reforms in land tenure, state owned enterprises, taxation and migrant worker rights. This reform road map and the surprisingly bold anti-corruption campaign show Xi Jinping as being a far more assertive and visionary leader than his predecessor. He has shown that he has a good grasp of China's structural economic and social ailments, and is putting in place a plan to address the country's deep rooted governance issues. He also seems to be putting in place the administrative machinery that will help him overcome deep seated resistance to change from SOEs, local government bodies, tycoons and other local officials.

These steps and announcements show that Mr. Xi Jinping has a strong vision for China and the political muscle to attempt change and to stand up to vested interests. He seems to want to move China in a more market-oriented direction than the growth trajectory of the past decade. Three major points emerge from the document.

Xi Jinping is targeting broad reform of Chinese governance and not just tinkering with economic policies. Mr. Xi's reforms seem to be targeting not just economic development and an improvement in economic efficiency, but a more basic re-write of the function and role of government. This means

pushing government agencies to stop direct intervention in markets and forcing them to focus on market regulation, public service delivery, "social management" and environmental protection. Improving governance, at both the central and local level, seems to be his main aim. This is important as most of China's economic problems – be they excess investment spending or local government debt and the shadow financial system – can be linked to poor governance (especially local governance). Presently, local bodies are rewarded for chasing GDP growth and not for delivering public services, and their fiscal set-up prevents them from prioritising social issues. Mr. Xi seems determined to focus more on social services and amend the local fiscal structures to enable greater focus on these issues.

The most important signal from the party was strong support for the private sector and markets. Referring to it as "non-public", the Party did pledge to "unwaveringly encourage, support and guide the development of the non-public economy". They also declared that property rights in the non-public economy may (equally with the state sector) not be violated. The document also says the party will "reduce Central Government management over micro-level matters to the broadest extent" and calls for an end to excessive Central Government intervention. The first section of the document is all about giving the markets a decisive role in resource allocation.

The clear goal seems to be to reduce the ability of the government at all levels to manipulate either the prices or allocation of natural resources. While China has mostly deregulated its product markets, government bodies still can interfere in markets in many ways: subsidised capital, energy or land for favoured companies, a maze of rules and regulations that make it hard to set up new business and formal or informal restrictions on private enterprises entering certain sectors. The clear intent of the document is to chip away at all these anti-market distortions. The document also mentions "property rights as being at the core of ownership systems" and calls for fair competition and free consumer choice. The party also promised to reduce the administrative hassles and bureaucratic hurdles to doing business. The document also talks of better protection of intellectual property rights and "the lawful rights and interests of investors", as well as a smoother bankruptcy process.

The main disappointment of the document has been the lack of aggressive state sector reform or a privatisation programme. China's declining productivity growth and rising debt levels are both linked to the bloated SOE sector which has been guzzling a disproportionate share of bank credit but delivers declining returns on investment. It is clear that while SOEs will not be privatised they will face much greater competition and tighter regulation. This approach seems to be in sync with the party's view that competition, more than private ownership is the key to economic dynamism and strong productivity.

The contrast between what China has just announced and demonstrated and the current situation in India cannot be starker. Neither do we have decisive leadership, nor do we seem to have clarity on how to get back to 7-8 per cent economic growth.

China's Reform Road-map has lessons for India; in fact, in many respects, it is equally relevant for India. We really need to get our act together and unveil a coherent road map to address our systemic weaknesses and show concrete action on the ground, more than just sound-bites, to meet the needs and aspirations of our increasing population. Otherwise, the existing huge gap between the economic, military and political might of China and India will swell further and India will find it impossible to bridge the gap.

Sincerely,

Tarun Kumar Singhal.

(Note: For the information on China's new reforms Road-map, I have relied upon the news and observations & analysis by various economic and investment analysts appearing in the media).

Hitesh R. Shah & Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Important events and happenings that took place between 8th November, 2013 and 8th December, 2013 are being reported as under.

I. Admission of New Members

1) The following new members, were admitted at the Managing Council Meeting held on 15th November, 2013.

Life Membership

1	Mr. Boob Satish Bhikulal	ITP	Nashik

Ordinary Membership

1	Mrs. Chandak Dipika Giriraj	CA	Mumbai
2	Mr. Malpathak Rajiv Jagadish	CA	Nashik
3	Mr. Modak Milind Chandrashekhar	CA	Nashik
4	Mr. Mehta Bhavesh Mulraj	CA	Mumbai
5	Mr. Vakharia Kantilal Bhagwanji	CA	Mumbai
6	Mr. Agrawal Mahesh Ranchhodas	Advocate	Indore
7	Mr. Enukondla Phalguna Kumar	CA	Tirupati
8	Mr. Kothawaoe Anil Shankar (Oct. 2013 to Mar 2014)	CA	Nashik

Student Membership

1	Mr. Satam Tanmay Jaising	Final CA
2	Mr. Shah Aman Rakesh	Final CA

II. Past Programmes:

Programmes details are given below:

Sr. No.	Programme Name / Committee/Venue	Date / Subject	Chairman / Speaker
1 A)	**Allied Laws Committee** *Study Circle Meeting* At Jaihind College	**18th November, 2013** Provisions relating to Pvt. Ltd. Companies under Companies Act, 2013	Chairman : Shri S. D. Israni, Advocate, High Court Speaker : CA Nilesh Vikamsey

Sr. No.	Programme Name / Committee/Venue	Date / Subject	Chairman / Speaker
B)	*Half Day Seminar on Labour Laws* at Gulmohar Hall, BCAS Jointly with BCAS	**23rd November, 2013** • Employees State Insurance Act, 1948 • The Payment of Bonus Act, 1965 • The Employees Provident Fund & Miscellaneous Provisions, 1952 • The Payment of Gratuity Act, 1972 • The Contract Labour and abolition Act, 1970.	Shri Ramesh Soni, Labour Law Consultant
2 A)	**Direct Taxes Committee** *5th Intensive Study Group (Direct Tax) Meeting* at CTC Office	**19th November, 2013** Recent Important Decisions under Direct Tax	Shri Ajay Singh, Advocate
B)	*Seminar on Search & Seizure and Survey* at West End Hotel	**7th December, 2013**	Dr. K. Shivaram, Advocate CA Sunil Talati CA Reepal Tralshawala Shri Vipul Joshi, Advocate
3 A)	**Indirect Taxes Committee** *Study Circle Meeting* at IMC	**20th November, 2013** Issues in CENVAT Credit	CA Sameer Kapadia
B)	*Study Circle Meeting* at Seminar Hall, All India Local Self Govt. Juhu.	**5th December, 2013** Intricate Issues in MVAT Audits	Group Leader : CA Prashant Vora Chairman : CA Rajat Talati
4 A)	**Membership & EOP Committee** *Self Awareness Series* at CTC Office	**25th November, 2013** Mediation as a Medicine for Healing the Mind.	Shri S. Kumar Singh (Psycho Neuro & Hypo Therapist)
B)		**3rd December, 2013** "કર્મોથી લય પ્રાપ્તિ" (Lecture in Gujarati)	Shri Shailesh P. Sheth, Advocate

Sr. No.	Programme Name / Committee/Venue	Date / Subject	Chairman / Speaker
5 A)	**Study Circle & Study Group Committee** *Study Circle Meeting* At IMC	**8th November, 2013** Practical issues on Domestic Transfer Pricing	CA Karishma Phatarphekar
B)	*Study Circle Meeting* At Jai Hind College	**11th November, 2013** Bench marking of Domestic TP Transactions using TP Database with live search	Mr. Gaurav Agrawal, from Capitaline
C)	*Study Circle Meeting* At IMC	4th December, 2013 43CA Deemed Taxation on Builders and developers	CA Reepal Tralshawala
D)	*Study Group Meeting* At IMC	**6th December, 2013** Recent Judgments under Direct Taxes	CA Sanjay R. Parikh

III. Future Programmes

Future programmes of the Chamber are as follows:

Sr. No.	Programme Name / Committee / Venue	Day / Subject	Speaker / Chairman
1 A)	**Direct Taxes Committee** *6th Intensive Study Group (Direct Tax) Meeting* at CTC Office	**23rd December, 2013** Recent Important Decisions under Direct Taxes	CA Natwar Thakrar
2 A)	**Indirect Taxes Committee** *2nd Residential Refresher Course on Service Tax* At The Lagoona Resort, Lonawala – 410 403.	**3rd January, 2014 to 5th January, 2014**	
		• Paper – I : Service Tax & VAT on Composite Transactions	Mr. P. K. Sahu, Advocate, Delhi
		• Paper – II : CENVAT Credit Mechanism for Service Providers	Mr. V. Raghuraman, Advocate, Bengaluru
		• Paper – III : Case Studies under Service Tax	CA Parind A. Mehta
		• Presentation : Prosecution, Arrest and Recovery provisions under Service Tax Legislations	Mr. V. Sridharan. Advocate

Sr. No.	Programme Name / Committee / Venue	Day / Subject	Speaker / Chairman
3 A)	International Taxation Committee *Workshop on Taxation of Foreign Remittances* at M. C. Ghia Hall	**13th, 14th, 20th & 21st December, 2013** The workshop will comprise about 13-14 sessions spread over three and half days	**Faculties** Mr. Chandrahas Gupta Mr. Milind Kothari Mr. N. C. Hegde Mr. Radhakrishan Rawal Mr. Rashmin Sanghvi Mr. Sanjay Sanghvi Mr. Shabbir Motorwala Mr. Sudhir Nayak Mr. Sushil Lakhani Mr. Vispi Patel ***Brains Trustees*** Mr. M. P. Lohia Mr. Sunil D. Shah
B)	5th International Tax Conference	**28th February & 1st March, 2014** 1. Permanent Establishment – Emerging Issues & Challenges 2. GAAR – Issues and Challenges in Practice (with Case studies impacting Inbound and Outbound Investments) 3. Transfer Pricing Controversies and Challenges – A way forward 4. TP Issues in Business Reorganisation 5. Case Studies on Service Tax on Cross border Transactions 6. Emerging International Tax Trends and India's Tax Treaty Policy 7. Case Studies on International Taxation and Transfer Pricing	**Detailed Announcement will be made in few days.**
C)	Transfer Pricing Study Circle at CTC office	**The Period January 2014 to December 2014** The Study Circle is aimed at in-depth analysis of Law, Procedure and Jurisprudence with case studies	**Mentors** Shri Samir Gandhi Shri Sanjay Tolia Ms. Karishma Phaterphekar

Sr. No.	Programme Name / Committee / Venue	Day / Subject	Speaker / Chairman
4 A)	**Residential Refresher Course & Public Relations Committee** *37th Residential Refresher Course* at Anandha Inn Convention Centre & Suites, Pondicherry	**13th February, 2014 to 16th February, 2014** • Reassessments / Revision / Rectification • Case Study under Direct Taxes • Case Study in Taxation of Real Estate Transactions [Secs. 2(1A), 2(14), 43CA, 50C, 50D, 56(2)(vii)(b), 145 & TAS and 194-IA) • Brains' Trust : Direct Tax	***Paper Writer :*** CA Mahendra Sanghvi ***Chairman*** : Shri Keshav Bhujle, Advocate ***Paper Writer :*** Ms. Anita Sumanth, Advocate (Chennai) ***Chairman:*** Shri S. N. Inamdar, Sr. Advocate ***Paper Writer :*** CA Pradip Kapasi ***Brains Trustee :*** Shri Arvind Datar, Sr. Advocate (Chennai)
B)	*2nd Chamber Premier League, 2014 (CPL)* RRC & PR Committee jointly with Membership & EOP Committee	**18th January, 2014**	The other details will be announced in few days.
5) A)	**Study Circle & Study Group Committee** *Study Circle on International Taxation Meeting* at CTC Conference Room	**17th December, 2013** Service PE – Basic Concepts and Related Issues	CA Kartik Badiani

IV. Forthcoming Journal by Journal Committee

The Chamber's Journal for the month of January, 2014 will cover special story on "Capital Gains".

V. Publications for Sale

A) International Taxation – A Compendium

Four hardbound volumes set containing approx. 4,000 pages.

(For Enrollment and further details of all the Future Events, please refer to the December, 2013 Issue of CITC News or visit the website www.ctconline.org)

DIRECT TAXES COMMITTEE

5th Intensive Study Group (Direct Tax) Meeting held on 19th November, 2013 on the subject "Recent Important Decisions under Direct Taxes".

Mr. Ajay Singh, Advocate addressing the members.

INDIRECT TAXES COMMITTEE

IDT Study Circle Meeting held on 20th November, 2013 on the subject "Issues in CENVAT Credit".

CA Sameer Kapadia addressing the members.

IDT Study Circle Meeting held on 5th December, 2013 on the subject "Intricate Issues in MVAT Audits".

CA Rajat Talati chairing the session.

CA Prashant Vora addressing the members.

MEMBERSHIP & EOP COMMITTEE

Self Awareness Series held on 25th November, 2013 on the subject "Mediation as a Medicine for Healing the Mind".

Mr. S. Kumar Singh
Psycho Neuro & Hypo Therapist
addressing the members.

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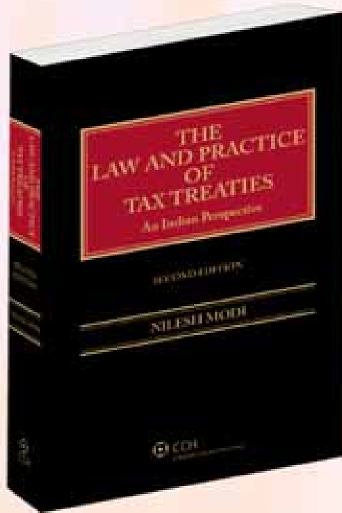
Mr. Shailesh P. Sheth,
Advocate
addressing the members.



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Article 2: Taxes Covered
Article 3: General Definitions
Article 4: Residence
Article 5: Permanent Establishment
Article 6: Income from Immovable Property
Article 7: Business Profits
Article 8: Shipping, Inland Waterways Transport and Air Transport
Article 9: Associated Enterprises
Article 10: Dividend
Article 11: Interest
Article 12: Royalties (includes the chapters on **"Fees for Technical Services" and "E-Commerce")**
Article 13: Capital Gains
Article 14: Independent Personal Services
Article 15: Dependent Personal Services
Article 16: Directors' Fees and Remuneration of Top-level Management Officials
Article 17: Artistes and Sportspersons
Article 18: Pension and Social Security Payments
Article 19: Government Service
Article 20: Students
Article 21: Other Income
Article 22: Taxation of Capital
Article 23: Methods for Elimination of Double Taxation
Article 24: Non-discrimination
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Article 29: Entry into Force
Article 30: Termination

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