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A MONTHLY JOURNAL OF
THE CHAMBER OF TAX CONSULTANTS

THE CHAMBER'S JOURNAL

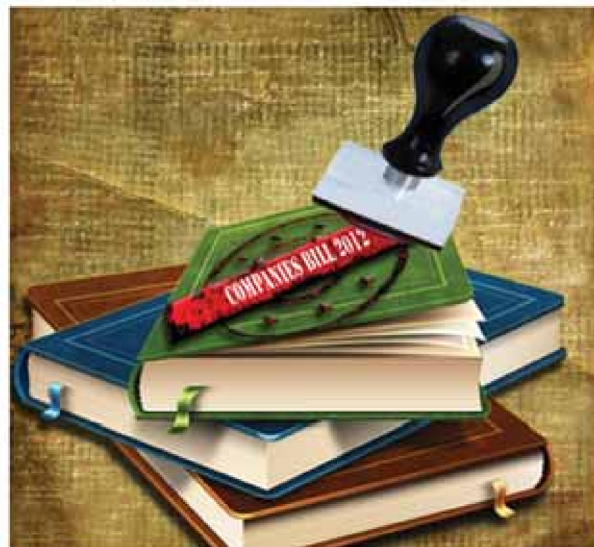
FEBRUARY 2013 VOL. I | NO. 5

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

COMPANIES BILL 2012

"The increased role, responsibilities, duties, powers and rights envisaged in the Bill for directors, shareholders, creditors, professionals such as company secretaries, cost accountants, chartered accountants, regulators, authorities, tribunals and courts would only show that the legislative attempt is seemingly aimed to protecting all the stakeholders...."

(Read further from page 13 onwards)



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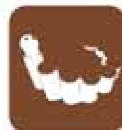
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THE CHAMBER OF TAX CONSULTANTS

THE CHAMBER'S JOURNAL
COMPANIES BILL 2012
FEBRUARY 2013 | VOL. I | NO. 5

TRANSFORMING INFORMATION INTO KNOWLEDGE

CMYK

INDIRECT TAXES COMMITTEE

1st Residential Refresher Course on Service Tax held on 4th to 6th January, 2013 at Silent Hill Resort, Manor, Palghar

CA Ashit Shah, Chairman welcoming the delegates at 1st RRC on Service Tax. Seen from L to R : CA Manoj Shah, President, CA A. R. Krishnan, Faculty, CA Yatin Desai, Vice President, CA Pranav Kapadia, Vice Chairman.

CA Manoj Shah, President inaugurating conference by lighting the lamp. Seen from L to R : CA Ashit Shah, Chairman, CA A. R. Krishnan, Faculty, CA Pranav Kapadia, Vice Chairman and CA Yatin Desai, Vice President.

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Faculties

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Shri Vipin Jain, Advocate

Shri K. Vaitheesvaran, Advocate

CA Rajiv Luthia

CA Sunil Gabhawalla

1st RRC on Service Tax – Group Photo

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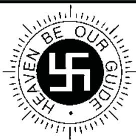

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Editorial

At last, it seems that the Companies Bill, 2012 might see the light of the day. As pointed out by one of the contributors to the Special Story of this issue – the Companies Bill, 2012, the need for an overhaul of the system established under the Companies Act, 1956 is longstanding; stakeholders have always felt the need for making it contemporary, efficient and free from red tape. In the long intervening period, the issue of need for change had been visited by various committees which blew hot and cold. The long wait and mismatch of issues that need to be addressed have together made the professionals gasp and say 'too little, too late', at the current effort of the Government in passing the Bill. I would say, – 'it's better late than never', of course, with the same gasp.

An important feature of the proposed Bill is the setting up of the National Company Law Tribunal (NCLT) which would strip both the Company Law Board and the High Court of their jurisdiction in its favour. I would concur with the oft repeated opinion that the success of the proposed bill depends upon the independence accorded to the NCLT. A live example of this is the Income Tax Appellate Tribunal which, since its inception in the year 1941, has successfully foiled several attempts by the Executive to strip it of its independence; the Executive should take a leaf from this experience and restrain itself from interfering with the functioning of the NCLT ; only such restraint would help create an autonomous judicial body.

A leading columnist on economic affairs in a leading Indian daily, chided the Hon'ble Finance Minister for creating 'illiterate dispute' by the 'tax illiteracy' of the tax officials, as such behaviour has vitiated the foreign investment atmosphere. However, it would be necessary here to note that such illiterate disputes and tax illiteracy had always been a burden on even the domestic investment atmosphere. I am aware of at least two Public Sector Undertakings which are facing recovery proceedings though they had been suffering losses for several years. Though training the tax bureaucracy and making it accountable for their arbitrary orders would partially straighten the wrinkle, what would put the house in order is a re-look at the unrealistic targets set by the Finance Ministry from time to time.

I thank Shri Janak Pandya for assisting the Journal Committee in coming up with the Special Story on Companies Bill, 2012. I thank all the contributors to this issue for sparing their valuable time and energy.

K. GOPAL
Editor

From the President

Dear Reader,

The Chamber is extremely pleased to have its Student's Essay Competition getting associated with Shri S. E. Dastur, Senior Advocate and Past President of the Chamber, by the name of 'The Dastur Essay Competition'. The objective of the Essay Competition is to ignite the writing skills coupled with creativity which is always there in every individual, probably hidden and waiting for opportunity to blossom. I request members' to encourage their children (who are students of Law & accountancy) and their article trainees to participate in the competition.

Lecture meeting on Companies Bill, 2012 held on auspicious day of Makar Sankranti 14th January, 2013, had overwhelming response. Speaker Shri Bharat Vasani's (Chief Legal & Group General Counsel – Tata Group) talk was highly informative and educative.

It was fun participating in Chamber Premier League (Cricket Tournament). Four teams by the name of Past President's XI, Presidents' XI, Vice-Presidents' XI, and Chairman's XI participated with sporting spirit. We had close encounters with ball and bat as all players played up to their potential. It was a sensational finish in the preliminary round as well as for 3rd position. CPL has surely left its marks on every professional who was amateur cricketer on 25th January, 2013.

'Study Course on Interpretation of Taxing Statutes' has taken off very well. Participation has exceeded our expectations. Designing of course has been very meticulously done to carve out relevant topics on Interpretation which are relevant for taxing statutes. Compliments to Direct Taxes Committee for conceiving the idea and ably executing it.

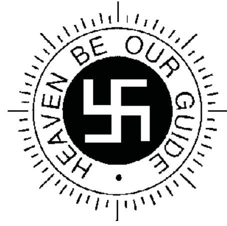
Delhi Chapter has taken initiative of organising a conference on 'Estate & Succession Planning', similar to one organised at Mumbai. I am happy to state that it was not only well attended but participants gained in terms knowledge as well as conference provided opportunity to many professionals to know Chamber and its activities closely.

World economy has started showing signs of exuberance. Reasons could be Europe's unity to save single currency, USA having avoided falling off the 'fiscal cliff' and improved stock prices may lead to boosting of consumption to further fuel production. However, one needs to tread this with caution as there could be gap between financial market optimism and economic reality. Europe's economic health is far from being stable, in fact IMF expects euro-zone's economy to shrink by 0.2% and USA may set to administer one more dose of short-term austerity but is still to doctor its long term fiscal problems.

Union Budget is round the corner and news floating around is re-introducing Estate Duty or taxing Super-Rich at higher rate. While there is no denial that economic liberalisation of last two decades have resulted in rapid growth of HNIs, and their wealth have grown substantially. However, before introducing either Estate Duty or substantially higher taxation for Super Rich, Government need to build Trust and Respect for tax-payers. Further, in the country where there is Estate Duty, majority of such countries have social security measures in place, which tempts a citizen to pay its taxes properly. Also the talk of introducing Estate Duty at this juncture may tempt Indian entrepreneurs to shift their base to countries which are far ahead in terms of ranking for 'Doing Business'. Say, Singapore stands at No.1 and India is at 135th position amongst tally of 185 countries. Also, Countries like Singapore are very well progressing despite having moderate tax regime, single point corporate taxation, no dividend distribution tax and far more business friendly taxation regime, such as carry backward of losses or setting of group company losses. Should India pause a while before introducing either Estate Duty or higher tax regime for HNIs or there is a need to mop up revenue, and hence such measures are needed – is a matter to ponder over. I leave you with this thought to ponder over.

With Best Regards,

MANOJ C. SHAH
President



The Chamber of Tax Consultants

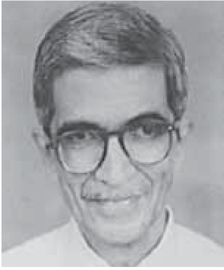
Vision Statement

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*

Ved and Vedanta

SWAMI VIVEKANANDA, HIS WORK, HIS TEACHINGS AND HIS MESSAGE TO THE HUMANITY

Thus said Swami Vivekananda

“1) Do everything, as a sacrifice or as an offering to `God'.

2) Be in the world but not of it, like a lotus leaf.

3) See God in every man, woman and a child.

4) Hold your money, merely as a custodian for what is God's.

5) Become a dynamo of spirituality.

6) It is our privilege to be allowed to be charitable.

7) To call another a sinner is the worst you can do to him.

8) Only persons who want nothing are masters of nature.

9) Unchaste imagination is as bad as unchaste action.

10) Cleanse the mind, this is all of religion.

11) Put God behind everything, men, animal food, work, make it a habit.

12) Never lose faith in yourself. You can do anything in the universe.

13) Man must love others because those others are himself.

14) Bhakti cannot be used to fulfil any desire, itself being the check on all desires.

15) “From highest Brahmin to the Yonder Wam to the Minutest atom.

Every where is the same God the all love

Friend offer mind soul body at their feet

These are his manifest forms before thee

Rejecting them where sleekest thou for God

Who loves all beings without distinction

He indeed is worshipping best his God”

16) As long as the millions live in hunger, and ignorance, I hold every man, a traitor, who having being educated at their expense. Pays not the least heed to them.

17) This is the gist of all worship, to be pure and to be good to the others. He who sees Shiva in others, in the meek in the diseased, really worships Shiva. He who wants to serve Shiva must serve his children.

18) Those who want to help mankind must take their own pleasures, pain name and fame, make a bundle of them and throw into the sea and come to God.

19) Swamiji blesses young persons 'How great I became my children (Indian Youth) must become 100 times more great. That is my great Wish".

12th January is a sacred date for we Indians, on that day of 1863, Mother `India' gave birth to her great Son' Narendra Datt and the world, knows him as Swami Vivekananda'. This year we are celebrating 150th Anniversary of Swamji's birth day ('Jayanti'). On that sacred event, let us recollect his great service to the humanity and his teachings and his immoral message to the world in general and to our Mother land in particular.

Our Mother land, as Swamiji and Maharshi Arvindo put it, is a God chosen Country, a sacred land where many `God's' Avatars have taken place, and many great saints, rishis scholars, Jyanis Bhaktas have born and made this country a leader of the Universe, both in spiritual and material fields.

Among these great souls in the modern India, Swami Vivekananda blessed this country by his birth and his work. The other to name of few, are Ramkrishna Parmahans, Maharshi Arvindo, and Mahatma Gandhi.

Swami Vivekananda was born on Maker Sankranti on 12th January 1863 and he entered Maha Samadhi on 4th July, 1902.

Swami Vivekananda inherited, great quality of charity from his father and the other great quality of `Renunciation' from his grandfather, who took `Sanyas' at a young age of 25 years, Narendra, in his childhood was known for his charity and renunciation Narendra (Swami Vivekananda) in his younger days was known for his keen and sharp intellect and for deep study. With his keen and inquisitive mind and sharp intellect, made deep a study of Indian philosophy, particularly, of Veda, Vedanta and The Bhagavad Gita.

At a very young age, he began searching God to see Him personally. After 4 years of search, as he did not meet God, he was deeply disappointed and became a reclusive person. At that time his teacher told him to go and meet great Saint Ramakrishna Paramahansa, as according to the teacher, that great saint has seen the God and he is God himself. Swamiji met him and directly asked him as to whether he has seen the God. The saint with a smile on his face answered `Yes I have seen God'. Then Swamiji asked him directly, as to whether he can show God to him. The saint asked him as to why he wants to see God Swamiji told him that he is too poor and he cannot maintain his widowed mother and his young brother, I am going to ask God to give sufficient money to maintain my mother and the brother. The saint asked him to come after a fortnight. Swami Vivekananda went and met him after a fortnight. He asked Swamiji to go to temple of Kali Mother and ask the Mother for money. When Swamiji went inside the temple, after witnessing the mother Kali Mata, in her all splendour forget to ask the boon he wanted to ask and came out. The saint asked him did you ask the boon you wanted? Swamiji told him that he forgot to ask. The saint asked him to go again and ask for the boon. This time also Swamiji forgot to ask his the boon and came out. The saint asked him to go again and ask his boon. Swamiji went again. This time after seeing the Mother Kali went in Narvikalpa Samadhi for some minutes and after coming out he asked the saint to give him the key to go into deep Samadhi, as he wants to go in Samadhi forever. The saint looking at him sharply rebuked why you want be so selfish? You are asking for your own mukti, instead of serving all the needy and poor people, you must ask for other's mukti and not for yours alone. You must pray and work for the mukti of others. Now I will keep the keys of mukti with me and only when you deserve

it, I will give them to you. Now go and serve the hungry and the poor of the country. You are born for that. Go and work for them. My blessing will be always with you".

Swamiji realised that he has to work for and serve others and not to desire for his own mukti. With a firm determination to serve, the poor and needy people of India he started to do that immediately. After some time he travelled with his Guru Bandus to see personally, the Indian poor and needy people, and travelled to all places in India and realising that poor people of India are living in inhuman conditions he determined to serve these people to the best of his ability.

Then, Swami Vivekananda went on delivering lectures in all the cities of India, to make Indians realise the great traditions of ancient – India, To quote by again.

"What is my plan then? My plan is to follow the ideas of the great ancient Masters. I have studied their work, and it has been given unto me to discover the line of action they took. They were the great originators of society. They were the great givers of strength, and of purity, and of life. They did most marvellous work. We have to do most marvellous work also. Circumstances have become a little different, and in consequence the lines of action have to be changed a little, and that is all. I see that each nation, like each individual, has one theme in this life, which is its centre, the principal note round which every other note comes to form the harmony. In one nation political power is its vitality, as in England, artistic life in another, and so on. In India, religious life forms the centre, the keynote of the whole music of national life; and if any nation attempts to throw off its national vitality – the direction which has become its own through the transmission of centuries that nation dies if it succeeds in the attempt. And, therefore, if you succeed in the attempt to throw off your religion and take up either politics, or society, or any other things as your centre, as the vitality of your national life, the result will be that you will become extinct. To prevent this you must make all and everything work through that vitality of your religion. Let all your nerves vibrate through the backbone of your religion. I have seen that I cannot preach even religion to Americans without showing them its practical effect on social life. I could not preach religion in England without showing the wonderful political changes the Vedanta would bring. So, in India, social reform has to be preached by showing how much more spiritual a life the new system will bring; and politics has to be preached by showing how much it will improve the one thing that the nation wants – its spirituality. Every man has to make his own choice; so has every nation. We made our choice ages ago, and we must abide by it."

They began to rouse particularly Indian youth, to work for India, to bring her back to her original glory. He particularly stressed on the great ideals of Vedanta of knowledge, renunciation and selfless service of all. In the words of Swamji `Work for Atma Mokshyaya and Para Hitaya Cha': He asked Indians to work hard for the upliftmen of the down troden, ignorant, and needy people of India. Wherever he went, he started `Ramakrishna Maths' for meditation and for service of the poor.

To quote Swamiji's again.

Let all other Gods disappear for the time being from our mind. Let us serve the God in human body. He who serves jiva serves God ideed. Liberation only for him who gives up every thing for others. Let us cultivate the vision of Swami Vivekananda who said I should see the God in the poor and it is for my salvation, that I go and worship them. The poor and the miserable are for our salvation so that we may serve the Lord coming in their shape. That it is the greatest privilege in our lives that we are allowed to serve the Lord in the shape of man".

When Swami Vivekananda went on to earnestly serve the poor and needy of India, he was really very ill. But he ignored his illness

and went on working, preaching Indians, the best of Indian philosophy and religion.

Swamiji till the end till his last breath went on serving Indian in all the possible ways and means. And the great life of one of greatest sons of India of all times came to an end on 4th July, 1902.

A striking quality of Swamiji was his devotion to his Guru Ramkrishna Parmahans and his selfless nature. He said once if by any idea, my work or if I have achieved something, it is because of blessings of my divine Guru and even if the country has to reform and to become great, it will be by his blessings. What an ideal pair of great Guru and Shishya Ramkrishna Parmahans and Swami Vivekanand. A great combination which is comparable to the pair of Bhagwan Ramchandra and the great Hanuman. Here also one may recollect an incident from Ramayana. When Shri Ram after his return to Ayodhya went on praising Shri Hanuman for the great work he did in the Ram Ravana battle. Shri Hanuman smiled, when Shri Ram asked him as to why he is smiling, Shri Hanuman replied `My Lord all the work is done by you, through me. It is all your work only, I was an instrument through whom you did the work.

The circumstance, which were prevailing, at the times of Swami Vivekananda are prevailing today in the Indian society, and in the whole country. In middle age, the ungrateful Indians forgot the teachings and the great work done by Munis, Rishis, great thinkers, scholars and fell into deep darkness, once again.

We Indians have forgotten the great teachings and the work done by great Indians like Swami Vivekananda of 19th Century and Mahatma Gandhi in 20th Century, who ceaselessly worked for the freedom and the upliftment of India till his last breath and we rewarded him with gunshot murder, what an end to a great Saint who was a great champion of `Ahimsa',

Now on this auspicious day (12th January, 2013) let us recollect the great work done by the great son of Mother India and let us take pledge to work like Swami Vivekananda of selfless service of the poor, exploited, down trodden and the needy Indians, who very unfortunately form a majority of our population.

Let us take inspiration from Swami Vivekananda and start working hard for the upliftment of our poor.

I am sorry to end this article on a melancholy note. It is reported that the 150th day celebrations hosted by our president was poorly attended. What you can expect from the Govt. and administration who are corrupt to the core and who are great exploiters of the poor and hapless Indians.

Let us forget the recent past as Swami Vivekananda advises and go with a Sankalpa and a firm determination, to put our mother land to her past glory. Let us imbibe the great spirit of self sacrifice, renunciation and of service of the poor and the ignorant people of India, to the best of our ability. That would be a fitting tribute to that great son of mother India, Swami Vivekananda.

Now even if one of my readers of our journal follows the advice of Swami Vivekananda, I will be satisfied with my tributary article on Swami Vivekananda, on his 150th Jayanti.

I pray God to bless all of us, and to give us the sudbudhi of living for Him and for others.

Dr. K. S. Ravichandran
KSR & Co., Company Secretaries LLP, Bengaluru, Chennai & Coimbatore

Companies Bill – Thrust on Promoting Good Corporate Governance Practices

Introduction

This write up is aimed to highlight only a few clauses of the Bill to show that the legislature regards that directors and auditors continue to be the most vital instruments in the corporate management system to protect the interests of all stakeholders and thereby promote corporate governance. The increased role, responsibilities, duties, powers and rights envisaged in the Bill for directors, shareholders, creditors, professionals such as company secretaries, cost accountants, chartered accountants, regulators, authorities, tribunals and courts would only show that the legislative attempt is seemingly aimed to protecting all the stakeholders. The entire approach seems to be a cautious one.

Role of Auditors

Clause 143 of the Companies Bill is one of the provisions that requires a loud thinking whether the provision is intended to introduce a lot of weight and responsibility upon the Auditors or to require the Auditors to do things which would be very difficult from a practical perspective given the kind of auditing practices usually followed while dealing with SME sector. A philosophical analysis of the role of Auditors would certainly prove that the Companies Bill places Auditors in an enviable position and expects them to perform their role in accordance with law.

Right of access at all times

The Auditors have a right to access at all times the books of account and vouchers of the company irrespective of where they have been kept. The Auditors have the right to require from the officers of the company, such information and explanation as may be necessary in order to perform their duties. Clause 143 further elaborates by clearly stating that the Auditors have the right of access of the records of all its subsidiaries so far as it pertains to consolidation of financial statements of the holding company with that of its subsidiaries.

Auditors have to make certain affirmative statements

In fact, it is a fundamental requirement of the law under Section 143 which makes it mandatory for the Auditors to make a statement affirmatively that they have sought and obtained all information and explanations which are necessary for the purpose of their audit and they have to state clearly the effect of such information on the

financial statements in relation to which they are supposed to give their report. Yet another affirmative statement the Auditors have to make is with respect to the books of account whereby the Auditors have to specifically state that proper books of account as required by law have been kept by the company.

Special reporting requirements

Under Clause 143 of the Bill, the Auditors have been entrusted with the onerous task of reporting to the shareholders, *inter alia*, on the following major aspects:

- Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company?
- Whether loans and advances made by the company have been shown as deposits?
- Whether personal expenses have been charged to Revenue Account?
- When shares have been allotted for cash, whether it could be seen from the books of account that the cash has been actually received by the company?

Resignation of Auditors and reasons

Clause 140 requires an auditor who has resigned to file with the Company and also the Registrar of Companies within 30 days from the date of resignation, a statement in the prescribed form indicating the reasons and other facts as may be relevant with regard to resignation.

Fraud on the company – Duty to report to Government

Under Clause 143 of the Bill, the Auditor of a company is duty bound to report the matter to the Central Government in case he has reason to believe that an offence involving fraud is being committed against the company by the officers/employees of the company. His task does not get diluted if he chooses to resign as he must disclose reasons and other facts leading to his resignation.

Non-audit Services

Under Clause 144 of the bill, an Auditor shall not provide the following services directly or indirectly to the company or its holding company or its subsidiary company:

a) accounting and book keeping services;

b) internal audit;

c) design and implementation of any financial information system;

d) actuarial services;

e) investment advisory services;

f) investment banking services;

g) rendering of outsourced financial services;

h) management services; and

i) any other kind of services as may be prescribed.

Contraventions and consequences

Under Clause 147 of the Companies Bill, it is stated that, if an Auditor causes any contravention of Clauses 139, 143, 144 or 145, he shall be punishable with fine which shall not be less than ₹ 25,000/- but which may extend to ₹ 5 lakhs. It will be interesting to see under Clause 147, a proviso states that if an Auditor has contravened any of the provisions of Clauses 139, 143, 144 or 145, knowingly or wilfully, with an intention to deceive the company or its creditors or the tax authorities, he shall be punishable with

imprisonment for a term which may extend to one year and a fine which shall not be less than ₹ 1 lakh but which may extend to ₹ 25 lakhs.

Under Clause 147, the Auditor not only faces the prospect of being prosecuted and punished for any contravention of any of the above provisions, but much more. If an Auditor is convicted of an offence under any of the above provisions, the following two consequences will follow:

- The Auditor is liable to refund the remuneration received by him.
- The Auditor is liable to pay damages to the company and to any statutory body or authority or to any other persons for loss arising as a result of any incorrect or misleading statement in his report.

Role of Auditors – Redefined

In the case of Auditors, the above provisions will highlight the enhanced responsibilities entrusted upon the Auditors. Read in conjunction with the other provisions of the Bill with respect to rotation of auditors as envisaged under Clause 139 of the Bill and those relating to the mandatory nature of compliance of auditing standards, it would be seen that auditors have to ensure that not only they do a diligent job as expected of a specially qualified professional but also they must keep proper working papers to show that they have done a good job.

Role of Company Secretaries enhanced

Over a period of time, ever since the amendments to the Companies Act, 1956 in 2000, it has almost become a usual practice to utilise the services of company secretaries for ensuring complete compliances of the procedural aspects of the Companies Act, 1956 in addition to their role in protecting and promoting corporate governance. One of the most important features of the compliance certificate issued by a company secretary in practice is with respect to the validity of the composition of the Board of Directors. The Bill aims to add much more and expects much more from these compliance specialists. The Bill seeks to introduce mandatory following of secretarial standards and mandatory secretarial audits which will go a long way in protecting the interests of all stakeholders. The icing on the cake is that the Clause 143 of the Bill applies to a company secretary in practice too and as such the role envisaged in the Bill is significant.

Duties of Directors – Disclosure of interest

Directors owe a duty to disclose their interest. This is a basic and most fundamental requirement of law. The concept as contained in the present Act has not been changed in the Bill.

Duties of Directors – Follow Articles of Association

As part of the duties of Directors, Clause 166 provides that a Director shall act in accordance with the Articles of Association of the Company. If this clause is read with Clause 10 of the bill which states that the Memorandum and Articles shall bind the company and the members thereof, it would be seen that Directors are bound to act in accordance with the Articles of Association of the company. This requirement is apparently on the premise that what binds the company should be binding on its directors too. Going further on the powers of the Board of Directors as set out in Clause 179 of the bill, it could be seen collectively the Board of Directors of a company is entitled to exercise all such powers and do all such acts and things as the company is authorised to exercise and

do. The proviso adds that while exercising such powers, the Board shall act subject to the provisions contained in the Companies Act, the Memorandum and Articles of Association including the regulations made by the company in General Meeting.

Duties of Directors – Protect company's interests and beyond!

A director is liable to act in good faith in the best interests of the company, its employees, and shareholders. Going further the law on the anvil would say the directors must act in the best interests of the community as well and they must protect the environment too. This clause cannot be understood to mean that the directors must do something more than what the company must do beyond the objects for which the company was incorporated. The requirement seems to be to tell the directors to ensure that in course of pursuing its objects, a company does not cause damage to the community and environment.

The Companies Bill requires the directors to exercise their duties with due and reasonable care, skill and diligence and shall exercise independent judgment. He should not be involved in a situation in which he may have a direct or indirect interest that conflicts or possibly may conflict, with the interests of the company. He should not attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

Related party transactions

Following are the three important provisions which have to be noted to understand the legislative effort in curbing the widely prevalent practices by diverting profits and business opportunities through related party transactions. The law on the anvil seems to convey the message that self-regulation mechanism contained in the Bill would work in a better way as compared to the approval mechanism contained in the present Act. In other words, while seeking to do away with the requirements for government approvals for related party contracts, the bill seeks to introduce a requirement for approval by shareholders.

In order to make it easier for the corporate boards, to carry on their business, the bill introduces an important provision whereby, related party transactions which are entered into by the company in its ordinary course of business on arm's length basis do not even require the prior approval of the company by a special resolution. It is sufficient if such contracts have the consent of the board of directors of the company.

A majority of related party transactions are expected to be in the ordinary course of business of the company and on arm's length basis. In respect of such transactions, the Companies Bill simply requires only the consent of the Board of Directors. At the board level, of course, a quorum of disinterested directors is definitely necessary in view of Clause 174 of the bill.

A look at the case of contracts which are not in the ordinary course of business or those which are not in the arm's length basis, it would be seen that the Clause 188 of the bill would need not only the prior approval of the share holders by a special resolution, but the bill goes one step further by providing that a member who is a related party shall not be entitled to vote on such special resolution. A controversial aspect of this new law is that the clause introduces a new class of members who shall be disentitled to vote on certain resolutions because they are related parties. This is a provision which clips voting rights. Secondly, it may be seen

that it is not only that related party who is part of the related party transaction for which the requirement for prior approval has arisen whose voting rights are clipped. A proper appreciation of the requirement of this clause would make it clear that in respect of any related party contract, the voting rights of every member who is a related party, whether or not such member is going to benefit from the contract in question, would stand forfeited in respect of the particular special resolution.

Non-cash transactions with Directors and connected persons

Clause 192 of the bill requires prior approval for certain non-cash transactions involving directors. The prior approval must be accorded by a resolution of the members duly passed in a general meeting. If a company intends to enter into an arrangement by which a director of the company or the holding or subsidiary or associate company or the company or any person connected with such director acquires or is to acquire assets from the company for a consideration other than cash or if the company acquires or is to acquire assets from such director for a consideration other than cash, such non-cash transaction requires the prior approval by a resolution of the members.

It may be noted that the director need not be a director of the company. He may be a director of the holding company or that of a subsidiary or an associate company of the company or it may simply be the transaction involving a person connected with such director. It is not clear how this connection should be established and at what point of time. It is of course clear that where the buyer is such director or a connected person, the seller must be the company and the property acquired must be that of the Company and where the seller is such director or connected person, the buyer must be the company.

Clause 192 of the Bill incorporates provisions for restitution of any money or other consideration which is the subject matter of any arrangement entered into by a company or its holding company in contravention of the provisions of this clause. The provision says that such contract is voidable at the instance of the company unless such restitution is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it. The language of this clause lacks clarity and is bound to lead to confusions. When it is said that the arrangement is voidable, it implies that the arrangement is not void. Further it says that it is voidable only if restitution is no longer possible and company has been indemnified by any other person. It would have been better if these matters have been left to be dealt with in accordance with the contract law as enshrined in the time tested Indian Contract Act, 1872 which succinctly deals with voidable contracts.

Conclusion

There seems to be a great thrust on promoting good corporate governance practices and it seems that the bill aims to achieve the same by introducing stringent mechanism as part of the substantive law for the directors and auditors to follow strictly. However there are a lot of clauses where drafting defects are noticed. In the course of time, these things will emerge and pose problems and remedial legislative action must be initiated at that time or from time to time as and when a problem surfaces

Kaushik Jhaveri, *Company Secretary*

Incorporation of various companies under Companies Bill, 2012

The Lok Sabha on 18th December, 2012 passed the Companies Bill, 2012. The Structure of Current Companies Act, 1956 and Companies Bill 2012 are as under:

Sr. No.	*Companies Act, 1956*	*Companies Bill, 2012*
1.	13 Parts	29 Chapters
2.	More than 750 Sections	470 Clauses (i.e., Sections)
3.	15 Schedules	7 Schedules

The current Companies Act, 1956 provides for incorporation of following types of the Companies:

1. Private Company
2. Public Company
3. To dispense with word "Limited" or "Private Limited" in name of Charitable or other Company – known as "Section 25" Company
4. Joint Stock Company – Known as "PART IX Companies"
5. Producer Companies - Part IX A of the Companies Act, 1956

Companies Bill, 2012 introduces following new concepts under Incorporation of Companies, namely:

(i) One Person Company (OPC)

(ii) Small Company

Chapter II of the Companies Bill, 2012 ("the Bill") deals with "Incorporation of Companies and Matters Incidental thereto".

Definition of Various Companies in the view of Companies Bill, 2012:

1. **One Person Company** : Clause 2 (62): "One Person Company" means a company which has only one person as a member;

2. **Private Company**: Clause 2 (68): "Private Company" means a company having a minimum paid-up share capital as may be prescribed, and which by its articles –

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred;

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purpose of this clause, be treated as a single member:

Provided further that –

(A) persons who are in employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,

shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the Company;

3. **Public Company : Clause 2 (71):** "Public Company" means a company which –

(a) is not a private company;

(b) has a minimum paid-up share capital of five lakh rupees or such higher paid – up capital, as may be prescribed:

Provided that a company which is subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its Articles:

4. **Small Company**: **Clause 2(85):** "Small Company" means a company, other than public company –

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or

(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to –

(A) a holding company or a subsidiary company,

(B) a company registered under Section 8 (i.e., Clause 8 of the bill – formation of companies with charitable objects etc.); or

(C) a company or body corporate governed by any special Act;

Formation of Company: Clause 3 (1): Minimum number of members:

Sr. No.	*Type of Company*	*Number of Members*
1.	Public Company	Seven or more persons
2.	Private Company	Two or more persons
3.	One Person Company (OPC)	One person company, that is to say private company

The memorandum of One Person Company shall indicate the name of the person who shall become the member of the company in the event of the subscriber's death or his incapacity to contract. A written consent of such person would be required to be filed with the Registrar at the time of incorporation along with the memorandum and articles. Such person can withdraw his consent in such manner as may be prescribed.

The name of such person can also be changed by the member at any time in such manner as may be prescribed. Any change in the name of the person nominated by the member shall be intimated to the Registrar within such time and in such manner as may be prescribed.

Any change in the name of the nominee shall not be deemed to be a change in the memorandum of the company.

Clause 4: Mandatory contents of the memorandum

The Memorandum of the Company shall state –

(a) The name of the company with the last word "Limited" or "private limited" in

case of a "public limited" and "private limited" company respectively.

Exemption: The clause is not applicable to a company registered under clause 8 - (Formation of companies for charitable objects)

(b) the State in which the registered office of the company is to be situated;

(c) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;

(d) the liability of members of the company, whether limited or unlimited, and also state –

Clause No.	*Type of Company*	*Liability Clause*
d (i)	Company limited by shares	Liability of its members is limited to the amount unpaid, if any, on the shares held by them,
d (ii)	Company limited by guarantee	the amount up to which each member undertakes to contribute (A) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and (B) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves.

(e) in the case of a company having a share capital –

(i) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and

(ii) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name.

(f) in the case of One Person Company, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

Unlike the Companies Act, 1956; the Bill does not require the objects clause in the memorandum to be classified as

(i) the main objects of the company

(ii) objects incidental to or ancillary to the attainment of the main objects and

(iii) other objects of the company

According to Section 149 (2A) of the Companies Act, 1956, companies should not commence any business to pursue "other objects of the company" which are not incidental or ancillary to the main

objects unless the following conditions have been complied with:–

- Commencement of business has been authorised by a special resolution passed by the company at a general meeting; and
- A declaration has been filed with the Registrar that the resolution has been passed or the Central Government in pursuance of an application made u/s 149(2B) has permitted the company to commence business. The declaration should be signed by one of directors or secretary

Where no such special resolution is passed but the votes cast (whether on show of hands and or, as the case may be, on poll) in favour of the proposal to commence any business continued in the resolution moved in that general meeting (including the casting vote, if any, of the Chairman) exceed the votes, if any, cast against the proposal, the Central Government may, on an application, made to it by the Board of Directors in this behalf, allow the company to commence such business.

The Bill omits the above provisions of Section 149(2A) of the Companies Act, 1956; As such it does not require classification of objects as main objects and other objects.

Reservation of name for proposed company [Clauses 4(4) and 4(5)]

Clause 4(4) and 4(5) of the Bill incorporates the procedural aspects of application for availability of name of proposed company or proposed new name for existing company. A person may make an application, in prescribed form and manner and accompanied by prescribed fee to ROC for the reservation of a name set out in the application as –

(a) the name of the proposed company; or

(b) the name of which the company proposes to change its name.

Upon receipt of the application for reservation of name as above, the ROC may, if he is satisfied that the name to be reserved is not the one which may be rejected on the grounds of undesirability in terms of clause 4(2)/ 4(3), reserve the name for a period of 60 days from the date of application.

At present, these procedural aspects are not covered in the 1956 Act.

Unlike the 1956 Act, the Bill provides that where after the reservation of names as above, it is found that the name was applied for by furnishing wrong or incorrect information, then –

(a) if the company has not been incorporated, the reserved name shall be cancelled and the person making the application for reservation of name shall be liable to penalty not exceeding ₹ 1,00,000/-; and

(b) if the company has been incorporated, the ROC may, after giving the company an opportunity of being heard –

  (i) direct the company to change its name within 3 months by passing an ordinary resolution; or

  (ii) make a petition for winding up of the company.

Articles of Association: Clause 5

Clause 5(3) of the bill provides that the article may contain provisions for entrenchment. Clause 5(4) of the bill provides that provisions for entrenchment shall be made either on formation of a company, or by amendment in the articles agreed to by all the members of the company in case of a private company and by special resolution in case of a public company.

As per Clause 5(5) provides that where articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

Formats of Articles: Clause 6

The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

Sr. No.	*Type of Company*	*Form prescribed for articles*
1.	Company Limited by shares	Table F
2.	Company limited by guarantee and having share capital	Table G
3.	Company limited by guarantee and not having share capital	Table H
4.	Unlimited company having share capital	Table I
5.	Unlimited company not having share capital	Table J

Incorporation of Companies

Clause 7 of the bill sets out the documents and information to be submitted for registration of a company, which are as follows:

(a) The memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed;

(b) A declaration signed by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company and by a person names in the articles as a director, manager or secretary of the company, that all the requirements of the Act and the rules made thereunder in respect of registration and matters precedent and incidental thereto have been complied with;

(c) An affidavit from each of the subscribers to the memorandum and from persons named as first directors, if any, in the articles that he is not convicted of any offence in connection with the promotion, formation or management of any company, or that he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under the Act to any previous company law during the preceding five years and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;

(d) The address for correspondence till its registered office is established;

(e) The name, surname or family name, residential address, nationality and such other particulars of every subscriber to the memorandum along with proof of identity as may be prescribed; and in case the subscribed is a body corporate, such particulars as may be prescribed;

(f) The name, surname or family name, director identification number (DIN), residential address, nationality and such other particulars including proof of identity as may be prescribed for every person mentioned in the articles as the first director of the company;

(g) The particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Where any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable under Clause 447 of the bill.

Where at any time after the incorporation of a company, it is proved that the company has been incorporated by furnishing incorrect or false information or representation or by suppressing

any material fact or information in any of the document or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making the declaration confirming compliance with the requirements of the Act, shall each be liable under Clause 447 of the bill.

Clause 447 of the bill deals with "Punishment for fraud" – Chapter XXIX

Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Explanation.— For the purposes of this section —

(i) "fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

(ii) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;

(iii) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

Formation of Companies with Charitable objects, etc.: [Clause 8]

Clause 8 of the Bill corresponds to Section 25 of the Companies Act, 1956. Clause 8 of the bill extends this facility in Section 25 to a person (since the bill provides for OPCs) or association of persons. Further, the objects may be promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, environment protection or any such other object. The words sports, education, research, social welfare and environment protection are not specifically mentioned in Section 25.

Hence, where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company –

(a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;

(b) intends to apply its profits, if any, or other income in promoting its objects; and

(c) intends to prohibit the payment of any dividend to its members,

the Central Government may grant a licence to that person or association of person to be registered as a limited company under this section without the addition to its name of the word "Limited" or "Private Limited" as the case may be.

Where licence is revoked, the Central Government may take the following further actions if it is satisfied that it is essential in the public interest:

- Direct that the company be wound up; or
- Direct the amalgamation of the company with another company registered under this clause had having similar objects, to form as single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

The Central Government has no such powers to direct winding up or amalgamation as above presently under the Companies Act, 1956 when

licence is revoked. Under the Bill, license can be revoked not only where the company contravenes any of the above requirements in (a)/(b)/(c) or any of the conditions subject to which a license is issued but also where the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest. Presently, the Central Government is not empowered to revoke licence where the affairs of the company are conducted fraudulently or in any manner violative of the objects of the company or prejudicial to public interest.

Commencement of Business: [Clause 11]

Clause 11 of the Bill correspondence to Section 149 of the Companies Act, 1956. Clause 11 provides that a company having a share capital shall not commence any business or exercise any borrowing powers unless:

(a) a declarations is filed by a director with the Registrar, stating that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and that the paid-up share capital of the company not less than five lakh rupees in case of a public company and not less than one lakh rupees in case of a private company on the date of making the declarations; and

(b) the company has filed with the Registrar a verification of its registered office within thirty days of incorporation in the prescribed manner. [Clause 12(2)]

Clause 11 of the Bill, unlike the Companies Act, 1956 empowers ROC to initiate action for the removal of the name of the company from the register under Chapter XVIII, if the following conditions are satisfied:

- No declarations has been filed with the Registrar as referred in point (a) above within 180 days of the date of incorporation of the company; and
- The Registrar has reasonable cause to believe that the company is not carrying on any business or operations

Unlike the provisions of extant Section 149 of the Companies Act, 1956, even private company having share capital will have to submit the declarations as prescribed under Clause 11 of the Bill. However, there is no requirement either to hold a statutory meeting or to submit statutory report and statement –in-lieu- of prospects even for a public company.

Registered office of the Company: Clause 12

A company shall, on and from the fifteenth day of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. [Clause 12(1)]

The company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such other manner as may be prescribed. [Clause 12(2)]

Every company shall paint and affix its name, the address of registered office, and keep the same painted and affixed, on the outside of every office or place in which its business is carried on, in a conspicuous (noticeable) position, in legible letters and if the characters employed therefore are not those of the language or of one of the languages generally used in that locality then also in the characters of that language or of one of those languages. [Clause 12(3)(a)]

Every company shall print on all its business letters, billheads, letters, papers and all its notices and other official publications its name, the address of registered office, the Corporate Identity Number (CIN) along with telephone number, fax number (if any), e-mail and website addresses, if any. [Clause 12(3)(c)]

The words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is painted, affixed or engraved.

Conclusion

From the above it is clear that it is possible for the SMEs to register themselves as one Person Company. The persons involved in the formation of companies in shady deals may not be able to float the new companies. Ministry of Corporate Affairs has realised from the past experience and plugged the loopholes.

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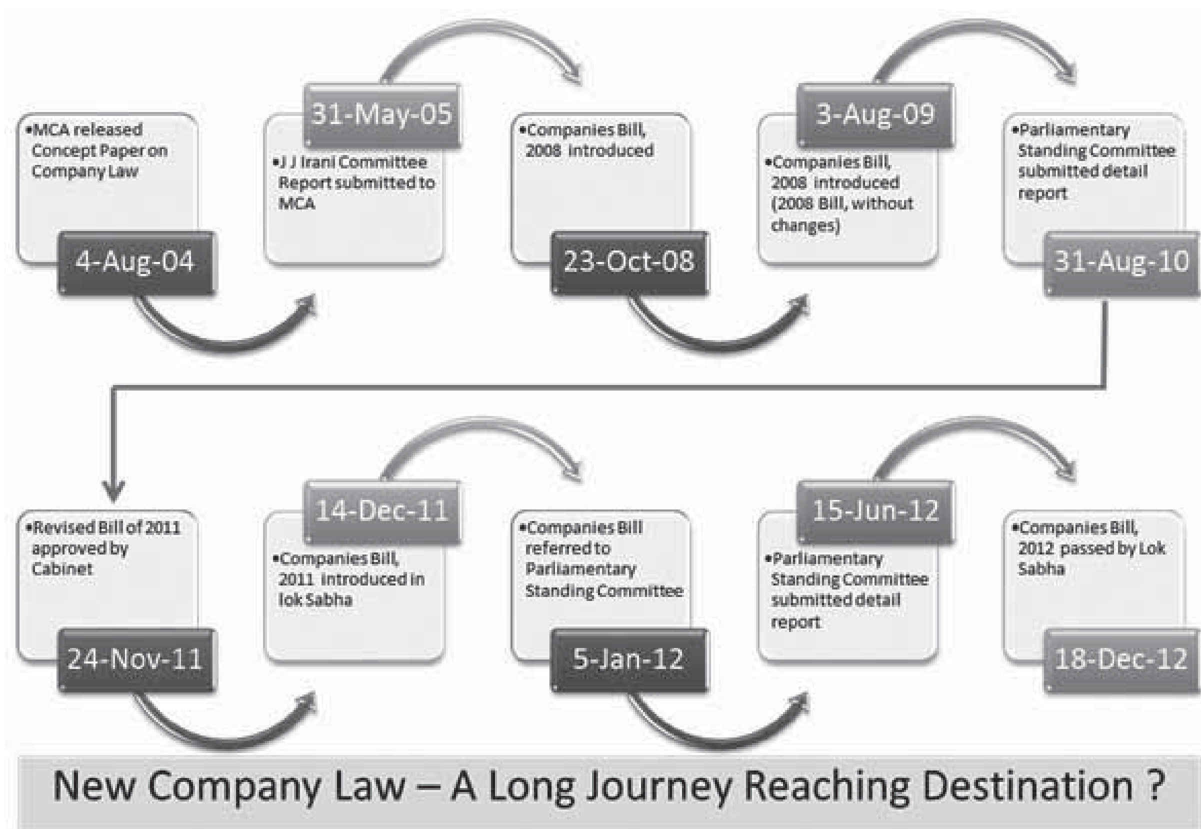
Issue of Securities through IPO and Private Placement – Significant Moves under the Companies Bill, 2012

The Companies Act, 1956 has been in effect for about fifty-five years and amended 25 times since enactment. However, the basic framework of this important legislation needs overhaul, considering changing business dynamics and paradigm shift in national and international economic and regulatory fronts.

Various attempts have been made to revamp the Indian Company Law from time to time, and the hopes of this long-awaited revamp have revived with the Lok Sabha passing the Companies Bill, 2012 ('the Bill'), on 18th December, 2012.



The number of companies has increased from about 30,000 in 1956 to nearly 8 lakhs companies functioning as of date. Capital markets in India has also evolved with the times requiring a more progressive legislation facilitating India Inc. on growth-path and at the same time, protecting stakeholders' interest. Issue of securities through public offers and private placements bears importance in that context. The Bill seeks to effect several changes to the legal framework for issue of securities through public offers and private placements. A comprehensive code is proposed to be introduced for private placements, which is likely to have far-reaching implications.

In this backdrop, this article analyses provisions governing public offers and private placements with greater focus on private placements.

Private Placements

Private Placements – Under The Companies Bill, 2012

- Chapter III of the Companies Bill 2012 covers private placements
    - Part II deals exclusively with private placements
    - Clause 42 read with clause 23 contain the relevant provisions
    - Rules to be prescribed
- Term 'private placement' defined specifically
- Unlike the existing Companies Act, a complete code of provisions dealing with private placements is incorporated under the Companies Bill, 2012
- The provisions apply to all companies including private companies and small companies

Background

The Companies Act, 1956 does not contain specific provisions for private placements, except the private placements provisions embedded under section 81 dealing with authorization for issue of securities to persons other than the existing shareholders.

However, the norms governing private placements have been codified through the Rules which are issued by MCA from time to time. Recently, drastic changes were introduced *vide* The Unlisted Public Companies (Preferential Allotment) Amendment Rules, 2011.

Existing Framework – Liberal or Hollow ?

Fundamentally, the law permits private placement of securities to less than 50 investors, beyond which the requirements of public offer and listing on recognized stock exchanges get attracted (Section 67(3) of the Companies Act, 1956). However, the existing provision is plagued with inadequacy and ambiguity, and the same has been grossly misused. The limit of maximum 49 investors has been linked per issue and transactions have been conducted in staggered style, completely vitiating the spirit of law.

Further, unlike offer document in a public offer, there is no requirement of preparing a private placement offer document. Even, preferential allotment by listed companies does not require a placement document, unlike in the case of an institutional placement under a QIP issue.

Thirdly, there is no provision on receipt and use of share application money and no timeline prescribed for allotment of securities post application money receipt. It is not unusual to come across companies deploying share application money for years without making

allotment, filing return of allotment and meeting any requirement whatsoever. This lacuna has now been plugged to a certain extent *vide* the aforesaid amended rules.

Sahara Ruling[1] – Setting the Context

Two unlisted Sahara group companies had, between 2008 and 2011, raised about ₹ 17,000 crores ($3.18 billion) from 22 million small investors through Optionally Fully Convertible Debentures ("OFCDs"). They circulated an information memorandum/Red Herring Prospectus with the Registrar of Companies but no document was filed with SEBI. They took a view that issue of OFCDs was to a group of people – described in an extremely broad manner and the same did not amount to an issue to public. They, however, appointed about 10,00,000 agents, opened 2,900 branches and offered OFCDs to crores of people, and finally issued OFCDs to some 66 lakhs investors (it appears actual figures may be even higher).

While Sahara group had argued that the fund-raising was a private placement not governed by the rules for public issues, SEBI had directed them to repay the money raised alongwith interest @15% p.a. on the premise that they had violated the rules, since a private placement should be limited to a maximum of 49 investors. The Apex Court upheld the rulings of SEBI and SAT and directed the group to repay along with the interest. The Apex Court laid down guiding principles of interpretation of section 67(3) of the Companies Act, which is worth reading.

This landmark judgment has set the direction for private placement code and the Bill draws heavily out of the principles enunciated by the Apex Court and contained in the amended Rules based thereon.

Clause 42 of The Companies Bill, 2012 on Private Placement – Major Moves

The legal regime for private placements is sought to be tightened under the Bill, as stated above. Some of the major conditionality proposed to be attached to private placements include the following :

- **Offer to More Than 50 Persons – Deemed Public Offer** : The Bill mandates that any private placement offer can be made to a maximum of 50 investors (or such higher number as may be prescribed) in a financial year. Any one or more offer(s), made in one or more tranches, to more than 50 potential investors in a financial year would need to comply with the provisions applicable to a public offer.

  It is specified *vide* Explanation I to Clause 42(2) of the Bill that, if any company makes any offer or invitation or allotment of securities to more than 50 persons in a financial year, it shall be deemed to be a public offer and all the compliances attendant with public offers would get attracted. Moreover, even an agreement to allot securities to more than the maximum number of persons would be deemed to be a public offer, irrespective of receipt of payment for the securities.

  The maximum number of persons to whom private placement can be made would be exclusive of the following :

  – Qualified institutional buyers ('QIBs')

  – Employees of the company being offered securities under a scheme of employee stock option ('Stock Options')

  Excluding QIBs and Stock Options from the cap of investors would mean that companies would be able to offer and make allotment of securities to QIBs and employees even if the number of investors exceeds 50 in any financial year. Under the Companies Bill, 2011, the exclusions were not specified. Subsequently, based on the

[1] *Sahara India Real Estate Corpn. Ltd. vs. SEBI [Civil Appeal No. 9813 of 2011*

public comments and recommendations made by the Parliamentary Standing Committee, the above exclusions are proposed under the Bill, 2012 and rightly so.

Enabling companies to offer and allot securities on private placement to QIBs would help companies raise growth capital at the time of need, without compelling them to go through the public offer route. This framework would facilitate increased private equity investments and similar transactions.

Similarly, stock options to employees regardless of their numbers would help companies in talent retention. From a technical perspective, the clause covers 'employees of the company' and I am of the view that even employees of the subsidiary companies should also be covered under the exclusion and the same is an unintended shortcoming.

- **Concept of Private Placement Offer Letter Introduced** : Clause 42(1) of the Bill requires that every private placement would need to be made by way of an offer letter. Further, sub-clause (7) lays down the following requirements :
  - Offer could be made only to those persons whose names are recorded by the company prior to the invitation to subscribe;
  - Offer could be made to the persons by name;
  - A complete record of offers would need to be kept by the company; and
  - Complete information about the offer would be filed with Registrar of Companies within 30 days of circulation of relevant private placement offer letter.
- **No Unallotted Share Application Money**: Sub-clause (3) of Clause 42 requires that a fresh private placement offer can be made only when there is no application pending allotment. Further, all securities under private placement would be allotted within a period of 60 days from the receipt of application money, else the application money would need to be refunded within a period of 15 days from completion of the 60 days' time. Like in case of public issues, if the company fails to repay the private placement application money within the said period, it would be liable to pay interest @12% p.a.

  It is worthwhile to note that monies received under any private placement would be required to be kept in a separate bank account with a scheduled bank and the same could not be utilised for any other purpose other than the following :

  - for adjustment against allotment of securities; or
  - for the repayment of monies where the company is unable to allot securities.

  Under the aforesaid regime, companies would not be able to receive share application money without following the process of private placement offer and the monies so received shall not be kept as such beyond 60 days. The proposed regime aims to streamline the private placement framework, especially for unlisted companies, and deter wrong-doings that could be possible otherwise.

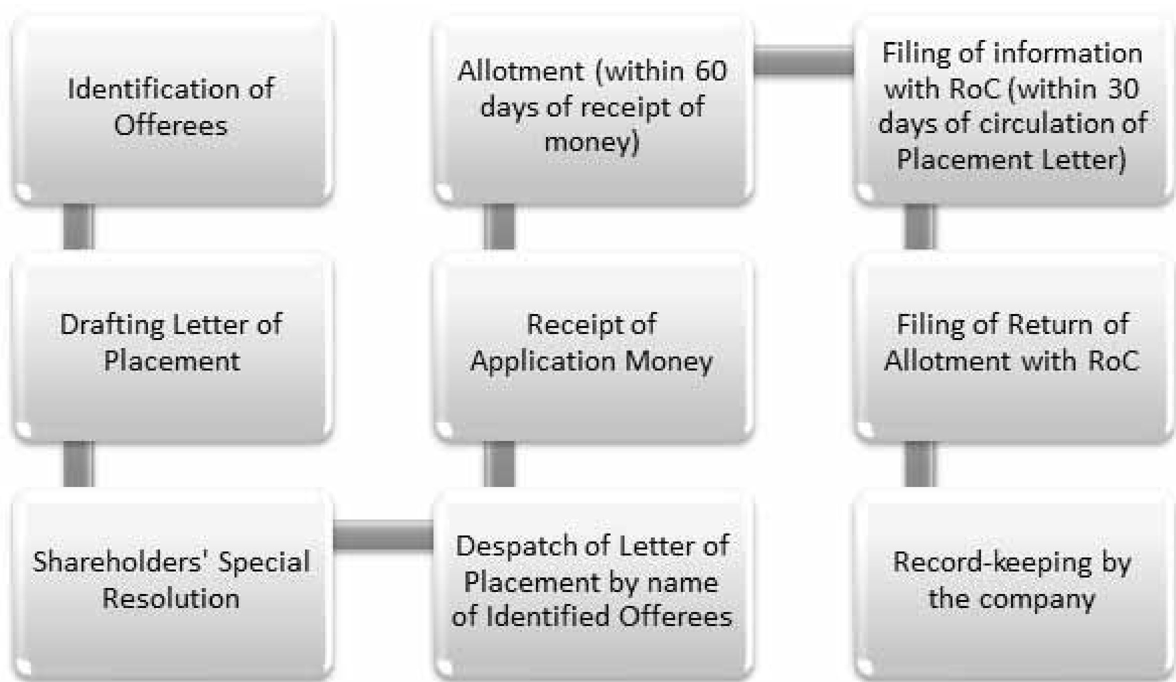
Other Compliances

Besides above, private placement would also be subject to the following compliances :

- Shareholders' special resolution would be required authorising issue of shares to persons other than the existing shareholders [Clause 62(1)(c)]

- All monies payable towards subscription of securities under private placement would need to be paid through cheque or demand draft or other banking channels. Cash subscription is sought to be curbed. [Clause 42(5)]
- The companies offering or inviting subscriptions under private placement cannot release any public advertisements or utilise any media, marketing or distribution channels or agents to inform public at large about such an offer. [Clause 42(8)]
- Return of allotment would be required to be filed with the Registrar along with the complete list of all security-holders with their names, addresses, number of securities allotted and such other relevant information as may be prescribed. [Clause 42(9)] The time-limit for filing of the return is not specified under the Bill and the same would be prescribed by the Ministry.

Private Placement – Process Flow



Notes :

(1) The above is an indicative process flow capturing major milestone activities and does not cover all activities involved in a private placement, exhaustive.

(2) Activities arising out of SEBI (ICDR) Regulations applicable to listed companies are not captured.

Concluding Remarks

Explanation II (ii) to Clause 42(2) of the Bill defines the term 'private placement' in terms of which every offer of securities other than public, rights or bonus offer amounts to a private placement. Further, Sub-clause (4) specifically provides that any offer or invitation not in compliance with the provisions of Clause 42 of the Bill (private placement norms) would be treated as a public offer attracting the requirements of the Bill, the Securities Contracts (Regulation) Act, 1956 and the SEBI Act, 1992, as applicable to a public offer.

Further sub-clause (10) contains the penal provision in terms of which if a company makes an offer or accepts monies in contravention of Clause 42, the company, its promoters and directors shall be liable for a penalty up to the amount involved in the offer or ₹ 2 crore, whichever is higher, and the company shall refund all monies to subscribers within 30 days from the order imposing the penalty.

All the norms under the amended rules are sought to be incorporated under the Bill itself. Needless to mention, the Sahara ruling (supra) has also influenced the legislature while codifying the norms for private placements. The principles enunciated by the Apex Court in Sahara ruling are sought to be enshrined under the Bill. The proposed provisions, if enacted in this form, would bring a paradigm shift in private placements, especially in unlisted company space.

Public Offers

Public Offers – Under The Companies Bill, 2012

- Chapter III of the Companies Bill 2012 covers public offers
  - Part I deals exclusively with public offers
  - Clause 23 through Clause 40 contain the relevant provisions
  - Rules to be prescribed
- Information to be provided in an offer document covered under the Bill
- Class action, disgorgement provision, high penalty introduced to curb fraudulent malpractices

Background

The Companies Act, 1956 does contain framework for public offers including initial as well as follow-on public offers.

The overall framework of public offers is sought not only to be continued but also strengthened under the Bill. Certain changes were also made in the Bill based on public comments and recommendations of Parliamentary Committee including giving of exit option to dissenting shareholders in case of variation in terms of contracts or objects in prospectus.

Key Changes

- **Detail Disclosures** : The detail disclosures to be made in offer document / prospectus are specified under the Bill. [Clause 26]
- **Exit Offer on Variation of Terms:** Clause 27(3) provides that the dissenting share holders who do not agree to the proposal to vary the terms of contracts or objects referred to in the prospectus, would need to be given an exit offer by promoters or controlling share holders. The regulations containing price, manner and conditions of such an exit offer would be made by SEBI. Though the exact norms would be clear on prescription of rules, but undoubtedly, this change would be a major one.
- **Offer For Sale by Existing Shareholders [Clause 28]** : The Bill contains enabling provisions for offer for sale of shares, in whole or part, by the existing share holders to public. The procedure for the same would be prescribed through rules. The offer document in respect of such sale would, for all purposes, be deemed to be a prospectus within the meaning of the Bill.

  While the above provision seeks to enable offer for sale by the existing share holders to public, the same is already covered under the SEBI (ICDR) Regulations. In practice, the above provision may not have any new implications as such, unless the rules to be prescribed would contain any new procedural aspect(s).
- **Stricter Penal Provisions** : The Bill proposes stringent penal provisions to deter instances of frauds and protect

investor interest. Some of the changes proposed in this direction include the following:

- **Personal liability, without limitation,** of those who intends to defraud the applicants [Clause 35(3)]
- **Class Action** : The Bill seeks to introduce class action by affected persons in case of misleading prospectus and fraudulently inducing persons to invest money. [Clause 37]
- **Fraud to obtain credit facility punishable** : Fraudulently inducing another person to enter into or to offer to enter into any agreement for or with a view to obtaining credit facilities from any bank or financial institution is sought to be punishable under the Bill.[Clause 38]
- **Disgorgement** : The Bill seeks to introduce disgorgement provision in terms of which, if a person gets convicted of any offence under Clause 38 (i.e., for making of application in fictitious name, multiple applications, and the like), the Court may order disgorgement of gain made by and seizure and disposal of securities in possession of such person. The amount received through disgorgement would be required to be credited to the Investor Education and Protection Fund.
- **High Penalty** : Higher penalty of imprisonment for minimum 6 months but extending up to 10 years and a fine of ranging from the amount involved in fraud to three times thereof. If the fraud involves public interest, the minimum imprisonment period shall be 3 years. [Clause 447]
- **No Compounding** : Misstating facts in the offer document and fraudulently inducing people to invest would be non-compoundable offences.

Concluding Remarks

It could be observed from past IPOs that the shares of a vast number of companies took a beating immediately post IPO, eroding investor wealth. As per media reports, an internal analysis by SEBI showed that 72 out of 117 issues from 2008 to 2011 were trading below the issue price after six months of listing. Of these, the share price of 55 companies had fallen more than 20%. Many companies diverted the IPO proceeds.

The changes sought to be made in IPO framework under the Bill aims to curb the malpractices and ensure increasing protection to investor wealth. Some of the concepts like exit option on variation of terms and class action did not find place in earlier versions of the Bill but incorporated during the consultative process and the same could be proved effective. On the flip side, those provisions are prone to be misused and the same should not become a handle to blackmail corporate management or controlling shareholders. The true essence would lie in implementation and effective administration of the new provisions, and much would depend on the rules to be prescribed by the Ministry.

The views expressed herein are personal views of the author.

CA P. N. Shah

Companies Bill, 2012 – Accounts and Audit Provisions

The existing Companies Act was enacted in 1956 with the object to consolidate the law relating to corporate sector and to regulate its activities. This Act is in force for the last over 56 years and has been amended several times. In view of changes in national and international economic environment and growth of our economy, the Government has decided to replace the Companies Act, 1956, by a new legislation. Originally Companies Bill, 2009 was introduced in the Lok Sabha in August, 2009 and was referred to Parliamentary Standing Committee. The Government received several suggestions from various stakeholders. After due consideration of various recommendations, a fresh Companies Bill, 2011 was introduced in the Lok Sabha and again referred to the Parliamentary Standing Committee. Finally, Lok Sabha has passed this Bill as Companies Bill, 2012 on 18th December, 2012. Now, this Bill will have to be passed by the Rajya Sabha before it is enacted into law. Sections 128 to 133 and 138 to 148 of this Bill deal with Accounts, Audit and Auditors. These provisions will have far reaching implications for the Audit Profession. In this article some important provisions contained in the Companies Bill, 2012 are discussed.

Maintenance of Accounts

New section 128 of the Companies Bill, 2012 provides for books of accounts to be maintained by the company. This section is similar to the existing section 209 of the Companies Act,1 956. The new section provides that every company shall prepare and keep at its registered office and at its branches such books of account and other relevant papers as may be prescribed. The company can maintain such books and records in the electronic mode. It is clarified in the section that the books of account should be kept on accrual basis and according to the double entry system. The section also provides that the company shall retain the books of account with the relevant vouchers and relevant other financial records for a period of 8 financial years.

It may be noted that for the first time new section 2(41) defines the term "Financial Year" to mean the period ending on 31st March of every year. Therefore, every company will now be required to maintain accounts from 1st April to 31st March which is the accounting year to be adopted for Income tax purpose. There is only one exception to this rule in the case of a holding company or subsidiary company incorporated outside India which is required to maintain its accounts for a financial year which is different from April to March. In such a case, different financial year can be adopted by getting approval of the National Company Law Tribunal (Tribunal). Further, if any existing company is adopting different financial year it will have to fall in line with the new provision within a period of two years from the date on which the new Companies Act comes into force.

Financial Statements

New section 129 provides for preparation of financial statements. The term 'Financial Statement' is defined in the new section 2(40) to include balance sheet, profit and loss account/ income and expenditure account, cash flow statement, statement of changes in equity and any explanatory note annexed to the above. New section 129 corresponds to existing section 210. It provides that the financial statements shall give a true and fair view of the state of affairs of the company and shall comply with the accounting standards notified under new section 133. It is also provided that the financial statements shall be prepared in the form provided in new Schedule III.

It may be noted that in the new Schedule III the provisions for preparation of balance sheet and statement of profit and loss have been given which are on the same lines as in the existing Schedule VI. Further, in the new Schedule III detailed instructions have been given for preparation of consolidated financial statements as consolidation of accounts of subsidiary companies is now made mandatory in section 129.

It may be noted that for the first time a provision has been made in the new section 129(3) that if a company has one or more subsidiaries it will have to prepare a consolidated financial statement of the company and of all the subsidiaries in the form provided in the new schedule III. The company has also to attach along with its financial statement, a separate statement containing the salient features of the financials of the subsidiary companies in such form as may be prescribed by the rules. It is also provided that if the company has interest in any associate company or a joint venture the accounts of that associate company as well as joint venture shall be consolidated. For this purpose "associate company" has been defined in new section 2(6) to mean a company in which the reporting company has significant influence i.e. it has control of atleast 20% of the total share capital of the company or has control on the business decisions under an agreement. The Central Government has power to exempt any class of companies from complying with any of the requirements of this section and the rules made under the section.

New section 136 provides for right of members to get copies of audited financial statements, auditors' report, Board Report, etc. at least 21 days before the date of AGM. In the case of a listed company it will be sufficient if a statement containing the salient features of such documents in the prescribed form is sent to the members at least 21 days before the AGM. Further, new section 137 provides for filing of the financial statement etc. with ROC. These provisions are similar to existing sections 219 and 220.

Reopening of Accounts

New sections 130 and 131 provide for the manner in which a company can reopen or recast its books of account or financial statements. This is a new provision made in the company legislation for the first time. At present, the authorities are of the view that the accounts once adopted by the members of the company at the AGM cannot be reopened or recast.

New section 130 provides that if it is found that (i) the accounts for a particular year were prepared in a fraudulent manner or (ii) the affairs of the company were mismanaged during the relevant period casting a doubt on the reliability of financial statements, an application will have to be made by the Central Government, the Income Tax Authorities, the SEBI, any other statutory regulatory body or authority or any concerned party to a competent Court or Tribunal. On receipt of the order of the Court/Tribunal the company will have to reopen its accounts or recast its financial statements in conformity with the order. The accounts so revised or recast shall be considered as final.

New section 131 provides for voluntary revision of financial statements or Director's Report. Under this section, if it appears to the directors that (i) financial statement or (ii) report of the Board of

Directors for a particular financial year does not comply with the provisions of the new section 129 or 134, they can revise the financial statement or director's report in respect of any of the three preceding financial years. For this purpose the directors have to make an application to the Tribunal in the prescribed manner and obtain its order. Before giving such an order the Tribunal has to give notice of hearing to the Central Government and the Income Tax Authorities. It is also provided that such revised financial statement or report of directors shall not be prepared more than once in any financial year. Further, detailed reasons for such revision will have to be disclosed by the directors in their report to the members in the relevant financial year in which revision is made.

The Central Government has been authorised to make Rules about the procedure for such voluntary revision of financial statements and director's report. These Rules will also provide for reporting requirements applicable to the auditors of the company.

Accounting and Auditing Standards

New sections 132, 133 and 143(10) provide for issue of Accounting and Auditing Standards. Existing sections 210A and 211(3A) to (3C) deal with notification of Accounting Standards on the advice of National Advisory Committee on Accounting Standards (NACAS). It may be noted that NACAS is now replaced by a new authority called National Financial Reporting Authority (NFRA) with very wide powers.

New section 133 provides that the Central Government will prescribe the Standards of Accounting or any addendum to such standards as recommended by the Institute of Chartered Accountants of India (ICAI) in consultation with and after examination of recommendations made by NFRA. These Accounting Standards will be binding on the companies as well as their auditors. New section 143(10) provides that the Central Government will prescribe standards of Auditing or any addendum to such standards in a similar manner. It is also provided that until such auditing standards are notified by the Government, the existing Auditing Standards issued by ICAI will be binding on the auditors.

New section 132 provides for constitution of NFRA, its functions and powers. Briefly stated these provisions are as under.

(i) The Central Government will constitute NFRA consisting of a chair person, who shall be a person of eminence and having expertise in accounting, auditing, finance or law and such other full-time or part-time members, not exceeding 15, as may be prescribed.

(ii) Terms and conditions and the manner of appointment of chairperson and members of NFRA and other related matters shall also be prescribed.

(iii) The functions of NFRA shall be :

- (a) to recommend to the Central Government about formation of Accounting Standards and Auditing Standards for adoption by companies and their auditors.
- (b) to monitor and enforce the compliance with the accounting and auditing standards in such manner as is prescribed in the Rules.
- (c) to oversee the quality of service of the profession associated with ensuring compliance with such standards.
- (d) to suggest measures required for improvement in the quality of service by the professionals (i.e., chartered accountants, cost accountants and company secretary) and such other related matters as may be prescribed.
- (e) to perform such other functions relating to the above matters as may be prescribed by the Rules.

(iv) The powers which NFRA can exercise are as under.

(a) Power to investigate, either on its own or on a reference made by the Central Government, in cases of such bodies corporate or persons, as may be prescribed, into the matters of performance or other misconduct committed by a Chartered Accountant or a Firm of Chartered Accountants. Once NFRA initiates this investigation, ICAI will have no authority to initiate or continue any proceedings in such matters.

(b) NFRA shall have the same powers as vested in a civil Court under Code of Civil Procedure, 1908. In other words it can issue summons, enforce attendance, inspect books and other records, examine witness, etc.

(c) If any professional or other misconduct is proved, NFRA can impose penalty as under.

- In the case of an Individual CA. minimum penalty of ₹ 1 lakh which may extend to 5 times of the fees received by the Individual.
- In the case of a C.A. Firm, minimum penalty of ₹. 10 lakhs which may extend to 10 times the fees received by the Firm.
- NFRA can debar any Chartered Accountant or a CA Firm from practice for a minimum period of six months or for such higher period not exceeding 10 years.

(v) Any person/firm aggrieved by any order of NFRA can file appeal before the Appellate Authority. The Central Government has been empowered to appoint such Appellate Authority consisting of the chairperson and not more than two other members. The qualifications of those constituting the Appellate Authority and all other related matters will be prescribed by the Rules.

The above provisions in new section 132 will over ride any provisions contained in any other statute. This will mean that the council of ICAI will not be able to exercise its powers relating to disciplinary action against auditors of companies. Even powers to formulate auditing standards, ensure quality of audit etc. are now vested in NFRA. To this extent the autonomy conferred on ICAI under the C.A. Act, 1949, is partially taken away.

Rotation of Auditors

ICAI had successfully objected to the introduction of the system of Rotation of Auditors for the last over six decades. Several Commissions and Parliamentary Committees had agreed that rotation of auditors is not in the interest of the Accounting Profession and the corporate sector. In spite of this, provision for rotation of auditors has now been introduced by enactment of new section 139 in the Companies Bill, 2012.

The provisions of new section 139 dealing with appointment of auditors and rotation of auditors can be briefly stated as under.

(i) After incorporation of a company the first auditors (Individual or Firm of CA) should be appointed by the Board of Directors within 30 days. If the Board does not make such appointment, an extraordinary general meeting of members will have to be called within 90 days for appointment of auditors. The first auditors shall hold office upto the conclusion of first AGM.

(ii) At the first AGM, the auditors will have to be appointed for a period of 5 years i.e. from conclusion of the AGM to the conclusion of the sixth AGM. This appointment will have to be ratified by the members every year at each AGM during this period of 5 years.

(iii) Before appointment, the auditors will have to give their consent in writing along with a certificate in accordance with the prescribed conditions. The auditor has also to give a certificate that the criteria for his appointment

given in new section 141 is satisfied.

(iv) After such appointment, the company will have to file a notice with ROC within 15 days and also inform the auditors.

(v) The system of Rotation of Auditors has been introduced in the case of Auditors of listed companies and other class of companies (specified companies) as may be prescribed by rules. This system is provided in new section 139(2) as under.

(a) If the auditor is an Individual, he cannot be auditor of such a company for more than 5 consecutive years.

(b) If a firm/LLP is auditor, it cannot be auditor of such a company for more than two terms of 5 consecutive years (i.e., 10 years)

(c) In the case of an Individual who has been auditor for one term of 5 years, he cannot be reappointed by the company for the next 5 years. In the case of a firm/LLP who has been auditors of such a company for 10 years cannot be reappointed by the company for the next 5 years. It may be noted that any firm/LLP which has one or more partners who are also partners in the outgoing audit firm/LLP cannot be appointed as auditors during this 5 year period.

(d) After the Companies Act, 2012, comes in force, every existing listed or specified company will have to comply with the above provisions relating to Rotation of Auditors within 3 years from such commencement. From the wording of second proviso to section 139(2) two views emerge about applicability of the principle of Rotation. These alternative views are as under.

- **Alternative - 1** : ABC Ltd. (listed company) has XYZ & Co. as its auditors for more than 10 years when the new Companies Act comes into force (say 1-10¬2013). ABC Ltd. will have to change its auditors at the any one AGM held during the period 1-10-2013 to 30-9-2016. In other words, XYZ & Co. cannot hold office as auditors of ABC Ltd. after the conclusion of AGM held on or before 30¬9-2016. XYZ & Co. or its associate firm cannot be appointed as auditors for 5 years after XYZ & Co. has ceased to be the auditors of ABC Ltd.

- **Alternative – 2** : ABC Ltd. (Listed company) has XYZ & Co. as its auditors for more than 10 years when the new Companies Act comes into force (say 1-10-2013). ABC Ltd. can appoint XYZ & Co. as its auditors at any of the AGMs held between 1-10-2013 and 30-9-2016 for 5 years. If this appointment is made at AGM on 15-9-2016, XYZ & Co. can continue as Auditors for 5 years. Thereafter, ABC Ltd. can reappoint XYZ & Co. as Auditors for another term of 5 years in AGM to be held on 15-9-2021. Thus, XYZ & Co. will be able to continue as Auditors up to conclusion of AGM to be held on 15-9-2026.

  As the intention behind the wording of the above proviso is not clear, ICAI will have to obtain clarification from the Government and clarify the legal position so that the audit firms can advise the companies in which they are auditors to comply with the above provision.

(e) The Central Government can make Rules to prescribe the manner in which companies shall rotate their auditors.

(vi) New section 139(3) provides that the members of any company can resolve at any AGM that the audit firm/LLP

appointed by it shall rotate the audit partner and his team at such intervals as specified in their resolution.

(vii) It may be noted that section 139 specifically provides that the term 'Firm' shall include a Limited Liability Partnership (LLP). Section 141 also states that a body corporate will not include a LLP. In other words, any company can appoint LLP wherein majority of the partners are practicing chartered accountants, as auditors of the company.

(viii) In the case of Government companies, the C & AG has been given power to appoint auditors within the specified time limit. Provisions have also been made for filling up casual vacancy in the office of the auditors in Government companies as well as private sector companies. There are also provisions to deal with contingencies where retiring auditors are not be reappointed. It is also provided that in the cases of private sector companies where Audit Committees are constituted, the appointment of auditors can only be made by the Board/AGM after consideration of the recommendation of the audit committee. These procedures are on similar lines as provided in the existing Companies Act with minor modifications

Since the C.A. Act permits Chartered Accountants to form LLP for professional practice and the new Companies Act permits such LLP to render service as auditors of companies, it is necessary to suggest to the Government for amendment of section 47 of the Income tax Act. At present, section 47 (xiiib) provides for exemption from capital gains tax when a company is converted into LLP, subject to certain conditions. There is no similar exemption given on conversion of firm into LLP. Unless this exemption is given by amending section 47 of the Income tax Act, it will be difficult for existing C.A. firms to convert into LLP for rendering audit service. Let us hope that council of ICAI will make suitable representation to the Central Government for amendment of Income tax Act.

Removal of Auditors

New section 140 provides for Removal, Resignation, etc. of Auditors. The procedure given in this section is more or less similar to the existing procedure in section 225 with the following difference.

(i) Under new section 140 an auditor can be removed from his office before the expiry of his term only after obtaining the previous approval of the Central Government and after passing a Special Resolution by the Members. For this purpose the company will have to comply with the prescribed rules.

(ii) If an auditor resigns from his office, he is required to file, within 30 days, a statement in the prescribed form with the company and ROC. In the case of a Government company, this form is also required to be filed with C& AG. In this statement the auditor has to give reasons and other facts relevant for his resignation. For failure to comply with this requirement, the auditor is punishable with a minimum fine of ₹ 50,000/- which may extend up to ₹ 5 lakhs.

(iii) If the auditor is found to have, directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by the company or any of its officers, the Tribunal can, on its own or on an application by the company, Central Government or any concerned person, direct the company to change the auditors. In the case of such an application by the Central Government for change of Auditors, the Tribunal can, within 15 days, pass an order that the auditor shall not function as such and the Central Government will be able to appoint another auditor. The auditor who is removed by the Tribunal cannot be appointed as an auditor of that company for 5 years. Further, under the new section 447 the auditor who is guilty of fraud will be punishable with imprisonment for a minimum term of six

months which may extend to 10 years and shall also be liable to pay a minimum fine of an amount involved in the fraud which may extend to 3 times the said amount. If the fraud involves public interest the minimum period of imprisonment will be 3 years.

Eligibility and Qualification of Auditors

New section 141 deals with eligibility, qualifications and disqualifications of Auditors. This section is similar to the existing section 226 with the following modifications.

(i) A firm of Chartered Accountants can be appointed as auditors of a company only if majority of its partners are partners practicing in India.

(ii) As stated earlier, a LLP can be appointed as auditors of a company. However, in such a case only those partners of LLP who are chartered accountants in practice can be authorised to act and sign on behalf of the LLP.

(iii) It is provided that no Individual or Firm of chartered accountants can be appointed as auditors of a company if the Individual, his partner or partner of the firm or any relative of such persons hold any shares in the company, its holding or subsidiary or associate company. However, a relative of such persons can hold shares of the F.V of ₹ 1,000/- or such higher amount prescribed by the rules.

(iv) A person whose relative is a director or is in employment of the company as a director or key managerial personnel cannot be appointed as auditor.

(v) A person who is associated with any entity which is engaged in consulting and specialized services as specified in the new section 144 cannot be appointed as auditor.

Powers and Duties of Auditors

New section 143 provides for powers and duties of Auditors. This section is similar to existing section 227. In the Auditor's Report on the financial statements, apart from the existing reporting requirements, the auditor has to state (a) the observations or comments on the financial transactions or matters which have any adverse effect on the functioning of the company and (b) whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls.

New section 143(8) provides for appointment of Branch Auditors. This section is similar to the existing section 228. At present if the statutory auditor is not to conduct the audit of the branch members can appoint branch auditors at AGM or authorise the Board of Directors to make such appointment. New section provides that the Branch Auditors will have to be appointed by the members in AGM as provided in new section 139. From this provision it is evident that the Branch Auditors will have to be appointed for a consecutive period of 5 years. Similarly, it appears that the Branch Auditors will be subject to the system of Rotation of Auditors u/s 139(2) in the audit of a listed company or a specified company as stated to above.

As stated earlier, the auditors will have to comply with the Auditing Standards while conducting Audit of any company as provided in new section 143(10).

It is also provided in section 143 that if an auditor, during the course of audit, has reason to believe that an offence involving fraud is being committed by the officers/employees against the company, the auditor will have to report to the Central Government in the prescribed manner. If the auditor fails to comply with this reporting requirement, without reasonable cause, he shall be punishable with minimum fine of ₹ 1 lakh which may extend to ₹ 25 lakhs.

It may be stated that under new section 143(14) it is provided that the provisions of this section shall apply to a Cost Accountant conducting cost audit u/s 148 and to a Company Secretary conducting

Secretarial Audit u/s 204. Both these professionals will be subject to the provisions of reporting requirements and will also be subject to provisions contained under this section.

It maybe noted that a chartered accountant having at least 10 years experience in company matters can now be appointed as a Company Liquidator as provided in new section 275. Under this section it is provided that when a company is being wound up by the Tribunal, it can appoint a professional i.e. Chartered Accountant, advocate, company secretary, cost accountant or such professional whose name is on the Panel maintained by the Central Government in the prescribed manner as a liquidator. Such liquidator has to perform duties of Liquidator as provided in the Act.

Auditor not to render non-audit services

New section 144 provides that Auditor of a company shall render only such other services to the company as may be approved by the Board of Directors or the Audit Committee. However, it is specifically provided that the auditor shall not render, directly or indirectly, other services such as (a) accounting and book keeping services, (b) internal audit, (c) design and implementation of any financial information system (d) actuarial services, (e) investment advisory services, (f) investment banking services, (g) rendering of outsourced financial services, (h) management services and (i) any other kind of services as may be prescribed.

It may be noted that this is a new provision and there is no restriction of this type in the existing Companies Act. Therefore, if any auditor is rendering any such non-audit service to the company before the new Act comes into force, he will have to comply with this provision of new section 144 before the end of the financial year after the new Act comes into force.

It is also provided in this section that the prohibited non-audit services cannot be rendered by the following associates of the auditor.

(i) If the auditor is an Individual :-The Individual himself, his relative any person connected or associated with him, or any entity in which the Individual has significant influence or control or whose name or trade mark/brand is used by the Individual.

(ii) If the auditor is a firm or LLP :-Such firm/ LLP either itself or through its partner or through its parent, subsidiary or associate or through any entity in which the firm/ LLP or its partner has significant influence or control or whose name, trade mark or brand is used by the firm/LLP or any of its partners.

From the above it appears that under this section the auditor can render non-audit service such as tax audit, direct or indirect tax advice, company law advice, tax or company law representation before appropriate authorities, FEMA matters and other related services.

Penalty Provisions

New section 147 provides for punishment for contravention of the provisions of new sections 139 to 146. These penalty provisions are as under.

(i) If a company contravenes any of the provisions of new sections 139 to 146 it shall be liable to pay minimum fine of ₹ 25,000/- which may extend to ₹ 5 lakhs. Further, every officer who is in default shall be punishable with imprisonment up to one year and minimum fine of ₹ 10,000/- which may extend to ₹ one lakh or with both.

(ii) If an auditor of a company contravenes any of the provisions of sections 139 and 143 to 145, the auditor shall be punishable with minimum fine of ₹ 25,000/- which may extend to ₹ 5 lakhs. If it is found that the auditor has contravened those provisions knowingly or willfully with the

intention to deceive the company, its share holders, creditors or tax authorities, he shall be punishable with imprisonment for a term up to one year and with a minimum fine of ₹ one lakh which may extend up to ₹ 25 lakhs.

(iii) If any auditor is convicted of an offence as stated in (ii) above, he shall be liable to (a) refund the remuneration received by him to the company and (b) pay for damages to the company, statutory bodies / authorities or to any other persons for loss arising out of incorrect or misleading statements of particulars made in his audit report.

(iv) In the case of audit of a company which is conducted by an audit firm, if it is proved that any partner or partners of the audit firm have acted in a fraudulent manner or abetted or colluded in any fraud by the company, its Directors or officers, the civil or criminal liability, as provided in this Act or any other law, for such act shall be joint and several of the firm and each of its partners.

(v) New section 148 provides for audit of cost records in specified companies. This section is more or less similar to existing section 233B with some modifications. It may be noted that the above penalty provisions contained in new section 147 are applicable to the company as well as the Cost Auditor in the same manner as stated above.

To Sum Up

The above provisions relating to accounts and audit contained in the Companies Bill, 2012, will have far reaching impact on the companies and auditors. It appears that these provisions are being made with a view to curb the present day tendency on the part of some companies to manipulate accounts with a view to benefit those in management or with a view to reduce tax. Some of these provisions are very harsh and they are likely to affect the development of the corporate sector and the profession of Chartered Accountants.

This Bill as passed by the Lok Sabha will curtail the autonomy of the Institute of Chartered Accountants of India to issue Accounting Standards and Auditing Standards. These standards will now be notified by the Government in consultation with NFRA. This is a new national authority to be appointed by the Government with very wide powers. This National Authority will be able to take disciplinary action against erring auditors and award punishment to them. Therefore, the autonomy of ICAI to take disciplinary action against its members will be curtailed to this extent. It appears that the Central Government is now losing the confidence reposed in the Council of ICAI for the last over 6 decades and started transferring this important function of regulating the C.A. profession to other Government controlled agencies. It is surprising that the Council of ICAI has not taken general membership into confidence and no public protest has been made when such legislation was being made by the Lok Sabha.

Considering the responsibilities being placed on the auditors and the penalties that can be awarded by NFRA and the Tribunal it appears that small and medium size audit firms will find it difficult to continue in audit practice. No such audit firm will be able to undertake such responsibilities with threat of litigation in the event of unintended and genuine mistakes. The provisions relating to restrictions on number of years one can continue to remain auditor of a company and restriction on rendering other services will also impact the ability of such small and medium size firms to continue in audit practice. Let us hope that the provisions for removal of auditors, awarding punishment and other harsh provisions will be implemented by the Government and other authorities in a reasonable, sympathetic and fair manner.

Harshita Srivastava & Alap Yadav, *Advocates*

Mergers and Amalgamations : The stance of the Companies Bill, 2012

The much awaited Companies Bill, 2012 ("Bill") has been passed by the Lok Sabha on December 18, 2012, thus forming a part of the wave of reforms sought to be brought to the economic laws in India by the Central Government. The need to bring in new provisions and to amend certain old provisions of the Companies Act, 1956 ("Act") were felt in view of the changes in the national and international economies. Additionally, such a change was required in order to address the important issue of expansion of our economy as well as the regulatory and compliance mechanisms to ensure investor protection and adherence to the sacrosanct principles of corporate governance. The Bill once enacted will replace the Act and will bring several changes to the 56 year old legislation thus achieving the object sought to be achieved by the Expert Committee on Company Law constituted by the Government in 2004.

While the Bill has introduced several changes to the procedural provisions of the Act including *inter alia* additional disclosures to be made while making applications for compromises, arrangements and amalgamations, it has also introduced new concepts such as class actions, one person company, independent directors and so on. The Bill is divided into 29 Chapters with 470 Clauses and 7 Schedules as against 658 sections and 15 Schedules under the Act. Unlike the Act, where the provisions pertaining to a particular subject matter were scattered across the Act, the Bill seeks to logically re-arrange and assimilate various provisions of law by categorising all applicable provisions under one particular section/chapter of the Bill. It is pertinent to note that the Bill provides wide ranging powers to the Central Government, by allowing it to administer the provisions of the proposed Act by way of rules to be framed by it, which rules are yet to be released.

In comparison with the Act which administered the process of reconstruction/amalgamation of companies under sections 391 to 394, Chapter XV of the Bill consisting of Clauses 230 to 240 incorporates a more comprehensive set of rules to be followed while effecting compromises, arrangements or amalgamations. The concerns addressed in the Bill manifest that a more holistic study of the anomalies and procedures involved during mergers and acquisitions has been conducted based on which regulatory review has been strengthened and the Tribunal has been vested with additional responsibilities. The clauses that address the eligibility of persons who may raise objections to a scheme of arrangement, the requirement of filing an auditor's report along with a petition for the seeking approval of the scheme, the applicability of the Securities and Exchange Board of India ("SEBI") (Substantial

Acquisition of Shares and Takeovers) Regulations, 2011 and the applicability of the buy-back provisions separately provided for in the Bill are good examples of the same.

The provisions of the Bill with respect to mergers and amalgamations include new provisions in addition to the provisions contained in the Act. Apart from the procedural formalities that govern mergers and acquisitions, the Bill addresses cross border mergers and squeeze out provisions for acquisition of minority shareholding in these transactions.

This Chapter deals with the key changes brought about by the Bill in relation to mergers and amalgamations:

Additional Disclosures

The Act required certain disclosures to be made at the time of making an application to the High Court for seeking sanction to a scheme of arrangement, which included the latest financial position of the company, latest auditor's report on the accounts of the company and the status of any pending investigations against the company.

In addition to the documents required under the Act, the Bill provides that the following disclosures should also be made:

- Reduction of the share capital, if any, in the scheme of arrangement;
- Any scheme of corporate debt restructuring consented to by not less than 75% in value of the secured creditors including *inter alia* (i) a creditor's responsibility statement, (ii) safeguards for protection of secured and unsecured creditors, (iii) valuation report of the shares and property of the company.

Under the provisions of the Act, every notice of meeting to be sent to members/ creditors was required to be accompanied with the scheme of arrangement and an explanatory statement. Though the notice stipulated that certain essential documents in connection with the scheme shall be kept open for inspection at the offices of the company, yet those documents were not as a matter of practice attached to the notice.

However with the introduction of Clause 230 of the Bill, every notice of meeting to be sent to shareholder/creditor/debenture holder of a company shall also disclose the valuation report, if any, explaining its effect on (i) creditors; (ii) key managerial personnel (as defined under the Bill) promoters; (iii) non-promoter members; and (iv) debenture holders and the effect of compromise on any material interests of the directors of the company or the debenture trustees. Also, such notice is required to be served on the Central Government, income tax authorities, the Reserve Bank of India ("RBI"), SEBI, Registrar of Companies ("RoC"), respective stock exchanges, official liquidator, Competition Commission of India ("CCI") and other such authorities which are likely to be involved in regulation of such scheme of arrangement. Such notice, when served, shall require the concerned authorities to make their respective representations (if any) within a period of thirty (30) days from the date of the receipt of such notice, failing which it shall be presumed that they have no representations to make on the scheme.

From the aforesaid, it appears that the Bill aims to augment the role of statutory authorities (including CCI, Central Government, RBI, SEBI etc.) in terms of allowing them to provide their comments to the scheme of arrangement submitted to them by the companies under the provisions of Clauses 230-240. Though the Bill provides for a specific time limit within which the authorities are obligated to retort, it remains largely to be tested whether the timelines will actually be adhered to in practicality. For instance, section 6(2A) of the Competition Act, 2002 permits two hundred and ten (210) days to CCI for passing an order in case of a combination, however the Bill prescribes a timeline of thirty (30) days within which CCI needs to provide its comments to the scheme of arrangement. To that extent, the Bill does not seem to be consistent with the extant provisions of the Competition Act, 2002

and therefore may need suitable modification for the purposes of CCI.

Simplified procedure for small companies/group companies

The Bill has proposes a fast track, simplified alternative for mergers and amalgamations between:

- two or more small companies; or
- holding company and its wholly owned subsidiary; or
- certain prescribed classes of companies

Under the provisions of the Act, companies were required to follow the cumbersome and detailed process of merger, even if the arrangement was *inter-se* amongst group companies.

The Bill, however with a view to simplify the process of group company arrangements, prescribes separate provisions for the merger or amalgamation between certain companies. Such companies may now have an option to be governed either by the specific provisions provided under Clause 233 or by the rules of a normal merger as provided elsewhere in Chapter XV of the Bill.

The proposed new process of merger/ amalgamation of small companies or group companies involves the following:

- Advance notice to be given to the RoC and OL who may give comments, if any, to the scheme of arrangement within thirty (30) days;
- Approval of shareholders holding at least 90% of the shares of the company is required;
- Filing of a 'declaration of solvency' with the RoC, by both the transferor and the transferee company;
- Approval of the majority representing 9/10th in value of creditors;
- Approved copy of the scheme to be filed with the Central Government, OL and RoC.
- If RoC and OL have no further comments to the scheme, they can communicate the same to the Central Government;
- The Central Government can communicate its decision to the RoC, who is required to register the scheme and issue a confirmation thereof.

Hence the requirement of making an application to the National Company Law Tribunal ("NCLT"), which is mandatory in other cases, is done away with in case of group company arrangements. Further as a safeguard, approval of 90% of the shareholders is made mandatory in place of the 75% majority required under the Act. It is also interesting to note that the Bill provides flexibility to companies to follow the normal route, if they so intend instead of the new process.

Meetings of share holders and creditors

As far as the share holders and creditors consent to a scheme of arrangement is concerned, the Act provided majority in number holding 3/4th in value of the creditors/members, present and voting (either physically present or voting by proxy) at the meeting must agree to the scheme of arrangement and the scheme shall, if sanctioned by the courts be binding on all the creditors and members of the company.

Whilst the Bill has retained the abovementioned requirement, it has added an exception to the effect that the NCLT may dispense with the requirement of holding a meeting of creditors, where such creditors, having at least 90% value, agree by way of an affidavit, to the scheme of arrangement. Under the Act, it was possible to seek approval of dispensation of the meeting of creditors, from the High Court, based upon consent letters received from the creditors. As against that, the Bill now imposes a stringent obligation on the companies seeking such dispensation in terms of getting their creditors to file an affidavit. With the introduction of this new provision, it may now be difficult for companies to seek dispensation of the meeting of creditors if

90% in value of the creditors do not collectively agree on the filing of an affidavit.

In terms of voting, the Bill has further simplified the process by providing that the resolution for approval of a scheme of arrangement can also be passed through postal ballot.

In a seminal development, the Bill introduces a new provision whereby any share holder who holds less than 10% of the shares or creditor who has an outstanding debt of less than 5% of the total outstanding debt of the company as per the latest audited financials, shall not be eligible to raise any objection to a scheme of arrangement or compromise. This amendment seems to be brought forth in light of the prevalent practice where shareholders having miniscule shareholding or creditors with miniscule outstanding raise frivolous objections to the scheme both during the court convened meeting and the final hearing before the court, thereby making the process more time consuming and administratively difficult for companies to handle.

Cross Border Mergers

The Bill in clause 234 permits Indian companies to merge into companies located in specific foreign jurisdictions (to be notified) and *vice versa* which indeed would be very relevant considering the volume of foreign investment in India. The Act allowed only the merger of a foreign company into an Indian company; however such flexibility was not available to the Indian companies for doing an outbound merger. The new provisions in this respect may be notified by the Central Government from time to time after consultations with the RBI. Prior approval of the RBI is required in respect of a merger of a foreign company with an Indian Company and *vice versa*. In such a case the scheme may apart from other things provide for payment of consideration to the share holders of the merging company in cash, or in Indian Depository Receipts, or partly cash, or in Indian Depository Receipt, or partly in cash and partly in Indian Depository Receipts, as the case may be.

The said change is a progressive step which will facilitate cross border mergers, open options to restructure firms, however, it remains to be seen whether the RBI will permit such cross border mergers under the automatic route. Accordingly, in order to achieve the objective of the Bill and proper implementation of the aforementioned provisions, appropriate changes would have to made in other laws including Foreign Exchange Management Act, Income-tax Act, stamp duty laws, SEBI regulations as well as accounting standards.

Squeeze out provisions

As per the provisions of the Bill, the acquirer has a statutory right to squeeze out the minority if such acquirer becomes the registered holder of 90% or more of the issued equity share capital of the company or where any person or group of persons become 90% majority or holds 90% of the issued equity share capital of a company by virtue of an amalgamation, share exchange, conversion of securities or any other such reason. The price at which the shares have to be sold will be pre-determined on the basis of valuation by a 'registered valuation expert'. The process of valuation and purchase of shares will have to be done in accordance with the rules prescribed by the Government.

Amidst the numerous safeguards in respect of interests of minority shareholders of a company, the Bill brings a breather by giving them a right to offer to the majority share holders to purchase the minority equity share holding. However, the Bill does not provide any specific language wherein the majority shareholders are obligated to accept such an offer. One may draw some comfort from the language where the majority share holders have been casted with an obligation to deposit the purchase price for the offered shares in a separate bank account and accordingly it may be interpreted that once the offer is made by the minority share holders the majority share holders will have to purchase the offered shares.

For protecting the interest of the minority share holders the Bill requires that such bank account

to be opened for one year and the disbursements to the minority share holders shall continue for a period of one year where disbursement had not been made within a period of 60 days.

Further, the Bill incorporates an umbrella provision wherein the minority share holders will continue to avail the benefits of this provision till such time they do not get exit.

Some more changes...

- The Bill prohibits creation of treasury stocks. Now a transferee company shall not, as a result of the arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished.

- In case of a merger of a listed company and an unlisted company, the NCLT can order that the unlisted transferee company shall continue to be unlisted. This will hamper reverse listing transactions which worked as an effective alternative for backdoor listing in comparison to listing of a company through an initial public offering.

- The current provisions of the Act are such that a person/company may have to address their concerns to the Company Law Board, the High Court or the Board for Industrial and Financial Reconstruction. The need has been felt for the introduction of one quasi-judicial body that will be the sole authority to be approached for matters relating to the law governing companies in India. Therefore, to remedy this, the Bill, in Chapter XXVII thereof, provides for the constitution of the NCLT which will exercise such powers and functions that may be conferred on it by the Bill. In effect, the NCLT will have to be approached for addressing matters relating to mergers and amalgamations, insolvencies and default of various provisions of the law in force. However, one cannot comment upon the efficacy of the provisions in the Bill that introduces NCLT and define its powers, composition and functions at this stage. It is only after the implementation of these provisions regarding the NCLT and after its practical operation that one will be able to discern the benefits of such introduction.

The Bill seeks to make mergers and acquisitions transparent, efficacious and all encompassing. While it introduces additional disclosure requirements in an attempt to make the process of mergers and acquisitions transparent, the Bill has also made the procedure more cumbersome by requiring companies to seek approvals from varied statutory regulators. However, transactions are less likely to be prolonged due to such regulatory compliance requirements (barring the CCI) as the Bill has expressly provided that not more than thirty (30) days shall be spent by the concerned authorities on the same. With the introduction of simplistic routes for companies seeking approval on *inter-se* group arrangements, the Bill helps expedite the procedure required to be followed otherwise for mergers and acquisitions. Also, the Bill by addressing mergers with foreign companies has brought the statutory merger provisions in tune with the trend of foreign investment that has already gained momentum.

In short, the Bill makes the law governing mergers and acquisitions in India more comprehensive and adaptable to the prevailing trends and circumstances. The Bill once passed by the upper house of the Indian Parliament will be lined up for Presidential assent and will subsequently become the new comprehensive legislation that will govern mergers and acquisitions in India.

The authors are attorneys at Nishith Desai Associates and the views expressed here are personal.

Vaidhyanadhan Iyer, AZB Partners

Class Action & Corporate Governance

Is India ready for class action suits?

The onset of this year has witnessed commencement of few major shareholder class action suits including those against U. S. Century Bank[1], Hewlett – Packard Company[2], Longwei Petroleum Investment[3] and the former auditors of TierOne Corporation[4]. While such class actions have predominantly been a US phenomenon and has not, so far, found its way in India, the Companies Bill[5] seeks to introduce class action as a measure to protect the interest of minority shareholders and to intensify the accountability of the company and its management.

What is a class action suit?

Class action is a collective action by large number of stakeholders, as one group, to claim relief from an identified set of defendants.

A class action suit provides a number benefits to the share holders including:

(i) Reduction of multiplicity of suits arising out of the case cause of action;

(ii) Seeks to concentrate the efforts of the otherwise scattered minority share holders and to provide them a platform to stand, as one group, against the defaulting management / company;

(iii) Provides better chance of moving a successful claim, as a group, as compared to a large number of fragmented claims in multiple courts; and

(iv) Results in reduction of costs of litigation

The proposed Clause 245 of the Companies Bill, 2012 ("Companies Bill") authorises initiation of class action suits if the management or conduct of the affairs of the company are prejudicial to the interest of the company or its members or depositors.

1 Source: South Florida Business Journal

2 Source: www.bizjournals.com/sanfrancisco/prnewswire

3 Source: Nasdaq.com

4 Source: Shareholdersfoundation.com

5 Note: The Companies Bill, 2012 seeks to replace the existing Companies Act, 1956. The said bill has been passed by the Lok Sabha on December 18, 2012 and is pending approval of the Rajya Sabha. Please note that the provisions of the Companies Bill, 2012 outlined in this article are merely proposals and are yet to be legislated.

Who can initiate a class action?

Under the Companies Bill, a class action can be bought before the National Company Law Tribunal ("NCLT")[6] by either the shareholders or the depositors of the company who represent[7]:

(i) in case of shareholders, (a) by a minimum of 100 share holders or not less than such percentage of total number of share holders as may be prescribed[8], whichever is less, or (b) share holders holding such percentage of issued share capital of the company as may be prescribed; and

(ii) in case of depositors, (a) by a minimum of 100 depositors or not less than such percentage of total deposit holders as may be prescribed, whichever is less, or (b) depositors holding such percentage of aggregate deposits as may be prescribed[9];

The term share holders include both equity and preference share holders. However, it seems from the Companies Bill that debenture holders and holders of other convertible securities like depository receipts or FCCBs may not be entitled to claim any relief under this provision until conversion of such convertible securities into underlying equity shares.

Further, banking companies have been provided immunity from such class action suits.

Upon NCLT admitting a class action application, all similar applications prevalent in any jurisdiction shall be consolidated into a single application and two class action applications for the same cause of action shall not be allowed.

Who can be sued for damages?[10]

The Companies Bill seeks to attach personal liability on the company, directors, auditors and advisors for wrongdoings and enables the share holders to make a claim for damages. Share holders / depositors can bring a suit for claiming damages or compensation against[11]:

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

A plain reading of Clause 245 seems to imply that a claim for damages or compensation can be brought by the share holders against all the directors of the company including (independent directors and non executive directors). Clause 149 of the Companies Bill provides that notwithstanding anything contrary in the Companies Bill, an independent director and a non-executive director (not being promoter or key managerial personnel), shall be held liable, only in respect of such acts of omission or

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6 It is proposed to constitute NCLT under the Companies Bill to takeover the roles and functions discharged by the Company Law Board and High Courts under the existing Companies Act, 1956

7 Clause 245(2) of the Companies Bill

8 To be prescribed by Central Government by notifying separate rules

9 Applicable in case of a company limited by shares

10 In addition to a suit for damages or compensation, class action suits can provide additional reliefs, amongst others, like restraining the company from committing an act which is *ultra vires* the charter documents or declaration alteration of charter documents as void if such alteration was effected by suppression of material facts or by misstatement, restraining the company from doing acts which are contrary to the provision of the Companies Bill or any other law for the time being in force.

11 Clause 245(1)(g) of the Companies Bill

commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Hence, a harmonious reading of Clause 245 (Class Action) and Clause 149 (Immunity to independent/non-executive directors) suggest that such claim for damages or compensation may not be maintainable against independent / non executive directors (other than promoters and key managerial personnel), except on account of omission or negligence or their connivance as set out above. It remains to be seen how this provision, when enacted, clearly differentiates the liability of promoters and executive directors vis-a-vis independent and non-executive directors.

In the event the shareholders or depositors seek any damages or compensation from or against an audit firm, the audit firm as well as of each partner who was involved in making any improper or misleading statement or who acted in a fraudulent, unlawful or wrongful manner, shall be liable for payment of such damages or compensation.

Criteria for claiming damages under the Indian Contract Act

We need to also consider the principles of awarding damages under the Indian Contract Act, 1872 ("Contract Act") while evaluating a class action suit for claiming compensation or damages.

Section 73 of the Contract Act provides for damages in the event of a breach of contract or an obligation resembling those created by a contract. A party shall be entitled to claim compensation (damages) from the other party who is in breach, for any loss or damage caused to him as a result of such breach. No compensation can be claimed for any remote or indirect loss or damage. The burden of proof is on the person claiming the damage and it needs to be proved that (a) the person claiming damages suffered a loss, (b) such loss flowed naturally and in the usual course of things from the breach or was within the reasonable contemplation of the parties at the time of making the contract.

It should also be noted that the damages awarded for a breach is compensatory in nature, assessed according to plaintiff's actual loss, and are not punitive in nature. Hence, it is likely that a share holder may not be able to recover any compensation in excess of the actual damage / loss suffered by such share holder.

Is India ready for class action suits?

As it is rightly said, with great power comes the greater risk of abuse of power. The big question which one needs to consider is whether the benefits of class action will outperform the risks and drawbacks associated with it. It is not uncommon and corporate India is ripe with stories of few minority share holders grossly misusing the system to further their vested interest.

It is proposed that while considering class action application and to prevent misuse, NCTL shall take into account, amongst other factors, good faith of share holders, ability of the share holder to pursue the suit in his own right rather than a class action suit and also seeks to award a cost on frivolous application for an amount not exceeding INR 100,000. However, the question which we need to ask ourselves is whether these measures are enough to prevent the misuse of this right?

One needs to balance, the need to have a robust regulatory systems to prevent systemic failures, but at the same time provide adequate flexibility and regulatory authority to promote a healthy and strong corporate set up that can play a key role in development of the Indian economy. The constant threat of huge class action suits and frivolous litigations can severely impair the decision making ability of the management, dampen entrepreneurial capabilities, shackle corporate freedom and significantly curtail the growth of the companies.

So, is India ready and mature enough to judicially handle class action suits? – Time will tell.

Corporate Governance – Roles and Responsibilities of Independent Directors

Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society." – Sir Adrian Cadbury, UK, Commission Report: Corporate Governance 1992.

Globally corporate governance norms are established to mitigate conflicts between external stakeholder groups (such as share holders, lenders, trade creditors) and internal stakeholders (such as promoters and board of directors). While good governance was always considered to be a prerequisite for a healthy business, the tremendous increase in the scale and the size of the enterprises over last few decades and their role in the growth of the economy have augmented the need to have a set of far more robust standard of governance.

Corporate governance is based on two key principles – Transparency and Accountability. Transparency is about sharing all the information which a reader would want to assess the health of a company and being truthful about the way a company is being governed. It seeks to establish a level playing field amongst various stakeholders. It is said: Sunlight is the best disinfectant. On the other hand, accountability seeks to make the management responsible for their actions. High power comes with a higher degree of accountability and it is rightly said that board room practices defines the future of the company.

While the existing Companies Act, 1956 provides the basic corporate governance framework that needs to be followed by all the company, a higher standard for corporate governance including disclosure obligations are imposed on publicly listed companies in India under the listing agreement entered into by the companies with the stock exchanges[1]. The Companies Bill[2] attempts to achieve two fold objectives (i) augment the current governance standards and impose more accountability on the management and intermediaries, and (ii) bridge the gap between the governance norms prescribed for listed companies and governance norms as applicable to unlisted companies.

There are number of measures proposed by the Companies Bill towards better governance standards, however this article shall focus on the roles to be played by and expectations from independent directors.

Why an independent director?

The role of independent directors in good governance is becoming more and more crucial by the day. Independent directors are expected to exercise effective scrutiny and control over the management in an objective manner and discharge their roles and responsibilities without any conflict of interest.

While all listed companies are mandated under the listing agreement to appoint independent directors, detailed provisions relating to appointment of independent directors and their roles and responsibilities are proposed to be introduced for the first time under the new

1 Clause 49 of the listing agreement provides for certain corporate governance standards to be mandatorily followed by all the companies in India.

2 The Companies Bill, 2012 seeks to replace the existing Companies Act, 1956. The said bill has been passed by the Lok Sabha on December 18, 2012 and is pending approval of the Rajya Sabha. Please note that the provisions of the Companies Bill, 2012 outlined in this article are merely proposals and are yet to be legislated.

Companies Act. The Companies Bill provides that all listed companies shall have at least 1/3rd of the total number of directors as independent directors. In addition to listed companies, Central Government may prescribe mandatory independent directors for such class unlisted public companies.

An independent director shall mean a director other than a managing director or a whole-time director or a nominee director who satisfies the following criteria[3]:

(a) is a person of integrity and possesses relevant expertise and experience;

(b) who is or was not (i) a promoter, or (ii) a relative of the promoter or director, of the company or its holding, subsidiary or associate company;

(c) should not have any pecuniary relationship with the company, its holding, subsidiary or associate company, or its promoters / directors, during the prescribed term;

(d) none of his relatives should have or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters / directors, amounting to 2% or more of its gross turnover or total income or INR 50,00,000 or such higher amount as may be prescribed, whichever is lower, during the prescribed term;

(e) should not hold (either singly or with affiliates) 2% or more of the equity stake of the company;

(f) is a Chief Executive or director, of any non profit organisation that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the equity stake of the company;

(g) is or has been a key managerial personnel / an employee of the company or its holding, subsidiary or associate company in any of the three preceding financial years;

(h) shall not be related[4] (either himself or with relatives), in any of the preceding 3 financial years, with:

(A) a firm of auditors or company secretaries or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company, amounting to 10% or more of the gross turnover of such firm;

Are nominee directors independent?

Nominee director means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

The listing agreement currently provides that any nominee director appointed by a public financial institution, which has either invested in or lent to the company, shall be deemed to be independent director. Under the Companies Bill, however, all nominee directors including those nominated by financial institutions, share holders or central government shall not be regarded as independent directors on the assumption that such nominee directors

3 In addition to the criteria set out above, the Central Government may prescribe additional conditions for appointment of the independent directors.

4 Such independent director should not be either an employee or proprietor or a partner of such firms set out above.

would act primarily to protect the interest of the share holder / financial institution which has nominated them and this could possibly dilute their independence. The exclusion of nominee directors from the definition of independent director was also previously suggested by the Narayana Murthy Committee Report on corporate governance and J. J. Irani Committee on Company Law. However, what is not clear is whether a director will cease to be an independent director if his name is merely proposed for appointment by a promoter / significant share holder. While such an interpretation can result in absurdity since one cannot assume that such independent directors will only represent the interest of promoters / significant shareholder, the interpretation of this provision by the regulators is yet to be seen.

Term of office of an independent director

Currently, there are no restrictions under the Companies Act, 1956 or the listing agreement on the maximum term for which a director can hold the office of an independent director. The Companies Bill provides that an independent director shall hold office for a term of up to 5 years, but can be reappointed for one more term of 5 years. In other words, independent directors cannot hold office for more than 10 consecutive years.

In case of independent directors already holding office as on the effective date of the Companies Bill, the calculation of 10 years would be made with reference to the date of enactment of the Companies Bill.

Enhanced roles and duties of an independent director[5]

The roles and duties of an independent Director have been increased significantly under the Companies Bill. While discharging their roles and duties, the independent directors shall, amongst others, ensure the following:

(1) Help in bringing an independent judgment on the Board's deliberations especially on issues of strategy, performance, risk management, resources, key appointments and standards of conduct;

(2) Bring an objective view in the evaluation of the performance of board and management and scrutinise the performance of management in meeting agreed goals;

(3) Satisfy themselves on the integrity of financial information, financial controls and risk management;

(4) Safeguard the interests of all stakeholders and balance the conflicting interest of the stakeholders;

(5) Determine appropriate levels of remuneration of executive directors, key managerial personnel and senior management and, where necessary, recommend their removal;

(6) Seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company;

(7) Where they have concerns about the running of the company or a proposed action, ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting;

(8) Ensure that adequate deliberations are held before approving related party transactions and assure themselves that the same are in the interest of the company;

5 The roles and duties set out in this section are inclusive in nature. Companies Bill provides for additional roles and duties in addition to those set out above.

(9) Ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of whistle blowers are not prejudicially affected on account of such use;

(10) Report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy.

In addition to above, every listed company and such other class of companies which are mandated to appoint independent directors, is required to hold at least one meeting of all independent directors in a year for:

(a) reviewing the performance of non-independent directors and the Board as a whole;

(b) reviewing the performance of the chairperson of the company, taking into account the views of executive directors and non-executive directors; and

(c) assessing the quality, quantity and timeliness of flow of information between the company management and the Board that is necessary for the Board to effectively and reasonably perform their duties.

Can independent directors be regarded as officer in default?

An officer in default is an officer who shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise upon default on the part of the company.

The term officer in default has been unacceptably broadened under the Companies Bill to include every director (which term also includes independent director) who is aware of such contravention by virtue of receipt by him of any proceedings of Board or participation in board meetings proceedings, without objecting to the same, or where such contravention had taken place with his consent or connivance;

As mentioned above, the term officer in default includes all directors of the company including independent and non-executive directors. Such directors shall be liable if they fail to object to the contravention during the board meetings. In the event the independent directors / non executive directors have not attended the board meeting, they should record their objection to the proposed contravention in the concerned board meeting minutes, failing which they will also be punishable under the new Companies Act as an officer in default.

However, since the independent and non executive directors are not involved in the day-to-day operations of the company, the Companies Bill provides certain general immunities to such directors and states through a non obstante clause that an independent director or a non-executive director (not being a promoter or key managerial personnel), shall not be held liable for any defaults or omissions by a company. However, this immunity provision should be read along with the term 'officer in default' and such immunities will be granted to independent / non-executive directors only so long as such acts of omission or commission by a company had not occurred with his knowledge, attributable through Board processes, and was without his consent or connivance or where he had not acted diligently.

The Companies Bill provides for class action suit by share holders including against the directors of the company. While it seems that a claim for damages or compensation can be brought by the share holders against all the directors of the company including (independent directors and non-executive directors), a harmonious reading of Clause 245 (Class Action) and Clause 149 (Immunity to independent / non-executive directors) suggest that such claim for damages or compensation may not be maintainable against independent / non-executive directors (other than promoters and key managerial personnel),

except on account of omission or negligence or their connivance as set out above. It remains to be seen how this provision, when enacted, clearly differentiates the liability of promoters and executive directors vis-a-vis independent and non-executive directors.

Are the rewards commensurate with the obligations?

It is proposed that other than receiving sitting fees for attending board / committee meetings, reimbursement of expenses and profit related commission, as may be approved by the share holders, an independent director shall not get any remuneration from the company including by way of employee stock options. It should be noted that there are no prohibition under the current Companies Act, 1956 or under the listing agreement in granting stock options to independent directors[6].

While the primary objective of this restriction seems to be to reduce conflict of interest, one should also bear in mind that there is already an increasing shortage of qualified independent directors with specialised knowledge and skills sets in India.

Independent directors bring in a good mix of expertise, industry knowledge and best practice on the board of the companies and their contribution is imperative for robust corporate governance. While the significant increase in the role of an independent director to reinforce the governance standards is commendable, can one conclude that the immunity, remuneration and incentives offered to independent directors are commensurate with the significantly higher roles and responsibilities expected of them?... Probably not!!

6 It needs to be seen whether the stock options already granted to independent directors before the enactment of the Companies Bill, but which are yet to be exercised, would be grandfathered.

Tell me not in mournful numbers
Life is 'but an empty dream !'
For the soul is dead that slumbers
And things are not what they seem

— *Longfellow*

Life is a tragedy for those who feel, and a comedy for those who think.

— *La Bruyere*

S. D. Israni, Advocate & Fellow of ICSI, Sr. Partner, SD Israni Law Chambers (UK)

Role of NCLT under the Companies Bill, 2012

Background

The Companies Bill, 2012 has had a chequered history. Since the advent of economic liberalisation in the year 1991, there was a need felt for changing the company law as it contained several very restrictive provisions. There was a view that the entire Companies Act, 1956 (the Act) needed to be replaced by a new company law. However, even as the discussions were going on, it was realised that enacting a new law will be a long and time consuming process, while the corporate sector as also foreign investors were demanding certain immediate changes in the Act.

Therefore, to meet the needs of the situation, the Act was amended in the year 1988. Later, attempts were made to create a new law, but due to various reasons these attempts did not succeed and in spite of the fact that twice bills were brought to Parliament and approved by the Lok Sabha, they did not go further. Once again recourse was taken to amending the Act during the years 2000 and 2002 by effecting some important changes.

However, the Central Government had not given up the hope of enacting a new company law and after the round of various Committee reports it came out with the Companies Bill, 2008, which later became Bill of 2009, still later the Bill of 2011, finally being adopted the Lok Sabha on 18th December 2012 as the Companies Bill, 2012 (the Bill / the new law). When this Bill is approved by the Rajya Sabha, which is expected to happen during the coming Budget session and than assented by the President of India, it will replace the existing Act.

Constitution of National Company Law Tribunal

The Bill contains several important provisions including the constitution of a new National Company Law Tribunal that would replace the existing Company Law Board (the CLB). Here it would be pertinent to note that when the Act was amended during the year 2002, the Act provided for the constitution of the NCLT and that is what was mentioned in the newly introduced section 10FB, as under:

10FB. "The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force".

Interestingly, due to various reasons including a stay by the Madras High Court on a PIL filed by some advocates, this provision was

never notified by the Central Government and as a result the provision for the constitution of the NCLT merely remained on paper. Finally, the issue came before the Supreme Court and after dithering eventually the Central Government accepted the changes suggested by the Apex Court. Now the proposed new company law contains a similar provision for creation of the NCLT, but duly revised keeping in view the observations of the apex court.

Nature of the body

Section 10FB has been now been replaced by new provision clause 408, as under:

408. "The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force."

As is evident from the new provision it has undergone a change as compared to the existing provision in section 10F as it now also incorporates a requirement for appointment of Judicial and Technical members. The section authorises the Central Government to constitute a Tribunal to be known as "National Company Law Tribunal" (the 'NCLT' or 'Tribunal' for short). This is a very important change that will usher in to the creation of a judicial body in the nature of a Tribunal with vast powers.

The Tribunal will be a statutory judicial body and it would enjoy all such powers as would be conferred upon it by virtue of the new law. In addition, as the section itself clearly mentions, the Tribunal will also enjoy such other powers as may be conferred on it, from time to time.

Constitution of the Tribunal

Section 10FB of the Act (Clause 408 of the Bill) itself did not constitute the Tribunal but has delegated the power to the Central Government to exercise the same at the appropriate time. The section, *inter-alia*, states that "the Central Government shall, by notification in the Official Gazette constitute a Tribunal to be known as the National Company Law Tribunal". In other words, the Tribunal cannot come into existence *ipso facto* with the commencement of the new Act, as it requires a separate notification be issued by the Central Government notifying the constitution of such a Tribunal.

Constitution of Appellate Tribunal

Clause 410 provides that the Central Government shall constitute an Appellate Tribunal to be known as the National Company Law Appellate Tribunal (NCLAT). It shall consist of a chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit. The NCLAT will come into effect from such date as may be notified.

Jurisdiction of the Tribunal

The proposed Tribunal will continue to handle all the matters presently being handled by the CLB. However, unlike the CLB, the proposed Tribunal will enjoy much wider jurisdiction in terms of the scope of the subjects that will be dealt by it as it will be vested with additional powers. The Tribunal will get jurisdiction in respect of certain matters which are presently being dealt with by the various High Courts across the country and the BIFR and these are:

1. Compromises, Arrangements and Amalgamations

2. Winding Up

3. Reduction of Share Capital

4. Revival and Rehabilitation of Sick Companies

Compromises, Arrangements and Amalgamations

Presently, it is the applicable state High Court that has to be approached for seeking approval for any matter involving any compromise, arrangement or amalgamation. However, pursuant to clause 230 of the Bill, after the constitution of the Tribunal the following matters instead of the High Courts will be dealt by the Tribunal:

(1) Where a compromise or arrangement is proposed —

  (a) between a company and its creditors or any class of them; or

  (b) between a company and its members or any class of them.

The clause clarifies that as far as this provision is concerned, arrangement would include a re-organisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

Sub-clause (2) states that the company or any other person, by whom an application is made, shall disclose to the Tribunal by affidavit —

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent of the secured creditors in value, including—

  (i) a creditor's responsibility statement in the prescribed form;

  (ii) safeguards for the protection of other secured and unsecured creditors;

  (iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

  (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

  (v) a valuation report in respect of the shares and the property and all assets,tangible and intangible, movable and immovable, of the company by a registered valuer.

The Tribunal will have power to order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, and it shall be called, held and conducted in such manner as the Tribunal directs.

Similarly, the Tribunal will have power under clause 230 of the Bill, after sanctioning a compromise or an arrangement to supervise the implementation of such a compromise or arrangement. The Tribunal will also be empowered to pass such orders and give such directions and make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.

The clause further provides that if the Tribunal is satisfied that the compromise or arrangement sanctioned by it cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up of the company and such an order shall be deemed to be an order made under clause 273 of the Bill.

Winding Up of Companies

The other major power that is sought to be transferred from the High Courts to the Tribunal is in respect of winding up of companies. Presently, the jurisdiction for winding up of a company is dependent upon the location of the registered office of the company. However, after the creation of the Tribunal, the rules will indicate as to which Bench of the Tribunal will have jurisdiction *vis-à-vis* the companies.

Clause 270 of the Bill provides the following two modes of winding up:

(1) The winding up of a company may be either —

  (a) by the Tribunal; or

  (b) voluntary.

So far as the procedure is concerned it will be akin to that followed by the High Court, but for exact details we have to await the notification of the rules that will happen after the Bill becomes a statute after completion of the legislative process.

Reduction of Share Capital

Presently, any company wanting to reduce its paid up share capital has to approach the High Court of competent jurisdiction by making an application / petition in terms of the provisions of section 100 of the Act. Corresponding clause 66 of the Bill provides that a company wishing to reduce its share capital will have to make an application to the Tribunal for the confirmation of reduction in the share capital of the company.

Revival and Rehabilitation of Sick Companies

As the readers would be aware that presently there is a separate enactment called, "Sick Industrial Companies (Special Provisions) Act, 1985, generally referred to as "SICA", dealing with industrial sickness. In fact, there is a separate body called 'Board for Industrial and Financial Reconstruction' (BIFR) dealing with cases of sick industries. Though the fact is that SICA was repealed in 2003, but the same has not been notified; this can be notified only after the constitution of the Tribunal. As a result, in effect there has been no change in the position with SICA being very much in force and the BIFR continuing to handle cases sick industrial companies.

However, once the Tribunal comes into existence and only then the Central Government will notify the repeal of SICA which will also result in the dissolution of the BIFR. All the cases pending before the BIFR on that date will stand abated. The SICA Repeal Act provides for an option in the case of pending references which will abate by virtue of the notification of the repeal act, to approach the Tribunal within a period of 180 days from the date of the commencement of the new Act. Similar provision has also been made in respect of appeals pending before the Appellate authority under the SICA.

A separate chapter XIX has been provided in the Bill encompassing all the provisions applicable to revival and rehabilitation of sick companies.

A very important point that needs to be noted is that the definition of a sick company stands changed under the proposed new company law. Sickness will no more be restricted to industrial companies as the Bill speaks of a sick company. Moreover, sickness will not be

ascertained with reference to the net worth of the company, but it will be concerned with the servicing of debt by a company. If secured creditors, representing more than half of the total outstanding amount of debt, ask the company to repay the same, failure to do so within 30 days of the demand will give a right to those secured creditors to move an application before the Tribunal for declaration of the company as sick company. This is bound to widen the scope of cases and there will be a spurt in the number of such cases before the Tribunal.

Composition of the Tribunal

The Tribunal will consist of a President and such number of Judicial and Technical Members, as the Central Government may deem fit. However, the maximum number of persons who can be appointed as members of the Tribunal, as stipulated in the section, cannot exceed sixty two. All these appointments will be made by the Central Government by notifying the same in the Official Gazette. There is no doubt that the Central Government is not going to appoint all the sixty two members at one go. Such appointments will be made from time to time, depending upon the need and the availability of proper infrastructure for setting up of the Tribunals.

Qualification

Clause 409 (corresponding to section 10FD) broadly prescribes three categories of qualifications required by persons for being appointed as the President / a member of the Tribunal.

The President of the Tribunal has to be a person who is either a sitting Judge of a High Court or who has been a High Court Judge for atleast five years. In other words, it is imperative that the person to be appointed as the President of the Tribunal has to be a sitting judge or a former judge of the High Court and he should have a minimum of five years standing as a Judge.

So far as the appointment of a Judicial Member is concerned, the Bill provides for several alternative qualifications as under:

He can be a person who —

(a) is, or has been, a judge of a High Court; or

(b) is, or has been, a District Judge for at least five years; or

(c) has, for at least ten years been an advocate of a court.

Clause 409(3) specifies the qualifications required by a person desirous of being appointed as a Technical Member. A Central Government or State Government Officer with 15 years experience as a member of the Indian Corporate Law Service or Indian Legal Service of which at least three years should be in the pay scale of Joint Secretary to the Government of India.

The other category of persons who can be appointed as Technical members are professionals like practising Company Secretaries, Chartered Accountants and Cost Accountants. They should have minimum 15 years experience in the field as a practicing professional to be eligible for appointment as a Technical Member.

The sub-section also provides a kind of a general category of persons who can also be appointed as Technical Members on the Tribunal. Persons in this category are required to have specialised knowledge and professional experience of at least 15 years in any of the following areas viz. Science, Technology, Banking, Industry, Law, Industrial Finance, Industrial Management, Economics, Industrial reconstruction, Administration, Investment, Accountancy, Marketing or matters relating to Industrial Finance.

A person who has been a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947, can also be appointed as Technical Member.

Term of office

According to clause 413 the section, the President, Judicial Member as also the Technical Member shall hold office for a term of 5 years at a time and thereafter, they can be re-appointed for another term of five years.

The clause also prescribes the age limit for the President as well as the Members of the Tribunal. Accordingly, the President can hold office up to the age of 67 years, while, in the case of any other member the maximum age is restricted to 65 years.

Selection of President, Members, etc.

Clause 412 of the Bill provides that the President of the Tribunal and the chairperson and Judicial Members of the Appellate Tribunal shall be appointed after consultation with the Chief Justice of India. While the Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of —

(a) Chief Justice of India or his nominee – Chairperson;

(b) a senior Judge of the Supreme Court or a Chief Justice of High Court – Member;

(c) Secretary in the Ministry of Corporate Affairs – Member;

(d) Secretary in the Ministry of Law and Justice – Member; and

(e) Secretary in the Department of Financial Services in the Ministry of Finance – Member.

The Secretary, Ministry of Corporate Affairs shall be the Convener of the Selection Committee.

Benches

Clause 419 provides for the creation of Benches to enable the Tribunal to exercise its powers and to discharge its functions efficiently as stipulated in the Act. The Central Government will decide the number of Benches that have to be constituted and the same will have to be notified by it in the Official Gazette.

The Principal Bench will be located at New Delhi and will be presided over by the President of the Tribunal. The other Benches comprising of a Judicial Member and the Technical Member shall be constituted at different places as the Government may deem necessary. However, in respect of certain classes or cases or such matters as may be specified by the President of the Tribunal, a single Member Bench will exercise the jurisdiction, powers and authority of the Tribunal. At the same time, at any stage, if a single Member Bench believes that the case or matter before it ought to be heard by a Bench consisting of two members, then the President may transfer the said matter to a two Member Bench.

Special Benches

One of the unique features of the chapter relating to NCLT is the provision for the constitution of Special Benches. The President of the Tribunal is empowered to constitute one or more Special Benches consisting of three or more members for disposing of a case relating to rehabilitation, restructuring, reviving or winding up, of companies. The President of the Tribunal has also been given power to constitute a larger Special Bench, if so required, depending on the facts and circumstances of the case. Special Benches can be constituted for the disposal of any case

relating to rehabilitation, restructuring or winding up of companies.

Each such Special Bench has to comprise of a majority of Judicial Members.

Benches' Decisions

In case of a difference of opinion amongst the Members of a Bench, the decision has to be decided according to the majority. However, if the Members are equally divided, then the point on which they differ has to be referred by the President of the Tribunal for hearing by one or more of the other Members of the Tribunal. Thereafter, such point or such points will be decided on the basis of the opinion of the majority of the Members including those Members who first heard it.

Rectification of Order of Tribunal

The Tribunal will have power to correct/ rectify any mistake that may be apparent from record. Any such rectification has to be carried out within a period of two years from the date of the order. The mistake has to be brought to the notice of the Tribunal by any of the parties. However, no amendment will be possible if an appeal against the said order has already been filed before the Appellate Tribunal.

Power to delegate

The Tribunal is authorised to delegate any of its powers, as it may deem fit, to any of its officers or employees or any other person to inquire into any matter connected with any proceeding before it. The manner of reporting by such a person will also be laid in the appointment itself.

Assistance of Chief Metropolitan Magistrate / District Magistrate

An interesting addition to the powers of the Tribunal, not available to the Company Law Board, is in respect of seeking assistance of the Chief Metropolitan Magistrate or the Chief Judicial Magistrate or the District Magistrate, as the case may be. The provisions of clause 429 have been specially designed to enable the Tribunal to take custody / control of any property belonging to a sick company or a company in winding up. On a written request by the Tribunal, the concerned Chief Metropolitan Magistrate or the District Magistrate is required by the Section to take control of such property and documentations belonging to a sick company located within its jurisdiction. It has to ensure that the said assets/properties are entrusted to the Tribunal.

An important point to note in this regard is that the actions of the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Magistrate, as the case may be, cannot be questioned by any court or authority whatsoever. In other words, if the Chief Metropolitan Magistrate or the Chief Judicial Magistrate or the District Magistrate acts in accordance with these provisions, his actions cannot be faulted with by any court of law or before any authority on any ground whatsoever.

Public servant

The President, Members, officers and other employees of the Tribunal shall be deemed to be public servants within the meaning of S. 21 of the Indian Penal Code (clause 427).

Actions protected

Any action of the President, Member or any other official or employee of the Tribunal that results in a loss or damage cannot be called into question when such action is done in good faith and is intended to discharge a function in pursuance of this Act. This protection also extends to a Liquidator or any other person authorised by the Tribunal (clause 428).

Applicability of Code of Civil Procedure

The Tribunal constituted under the Act is free to lay down its procedure and is not bound by the procedure laid down in the Code of Civil Procedure, 1908. However, the Tribunal has to be guided by the principles of natural justice and shall be subject to the other provisions of the act and rules, if any, made by the Government.

At the same time, the Tribunal shall enjoy the powers of a Civil Court under the Code of Civil Procedure, 1908 for the purposes of discharging its functions under this Act. Any order made by the Tribunal can be enforced by it in the same manner as if it were a decree made by a Court in a Suit before it. (Cl. 424)

Civil Court Jurisdiction Bar

Clause 430 places a blanket bar on every Civil Court from entertaining any suit or proceeding in respect of any matter, which the Tribunal or the Appellate Tribunal is empowered to determine under the Act. Moreover, any Court or any other authority is also barred from giving any injunction in respect of any action taken or proposed to be taken under the Act. This implies that every civil court, by virtue of this provision, inherently lacks the jurisdiction to hear any matter which comes under the jurisdiction of the Tribunal or the Appellate Tribunal.

Right to legal representation

Right to legal representation has been provided to practising Company Secretaries, Chartered Accountants, Cost Accountants and legal practitioners to appear before the Tribunal. This provision is similar to the one in Regulation 19 of the Company Law Board Regulations 1991, that permits the appearance by an advocate, practising Chartered Accountant, Practising Company Secretary and Practising Cost Accountant. Earlier these powers were vested by virtue of the regulations, whereas, now this authority has being provided in the Bill itself.

Right of Appeal

Any person who is aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal within 45 days from the date of receipt of a copy of the order.

Similarly, any person who is aggrieved by an order of the Appellate Tribunal may prefer an appeal to the Supreme Court within 60 days from the date of receipt of the order passed by the Appellate Tribunal.

Will NCLT be a Success?

Apart from the legal road map that is being provided by the Bill and the rules that will follow, there are a few basic pre-requisites for the NCLT to be a success. First and foremost the Central Government should ensure that proper physical infrastructure is made available for the NCLT keeping in view the enhanced needs of this body. Secondly, adequate number of Benches should be created in different parts of the country to dispense timely justice. Further and more importantly, the Government should ensure timely appointment / re-appointment of the President and Members of the Tribunal as also the Appellate Tribunal and this should be supported by the requisite manpower. Failure to meet any of the pre-requisites will not give the desired results. It would be interesting to note that since the creation of the CLB it has never had the full complement of nine members as provided in the Regulations. One can only hope that history is not repeated.

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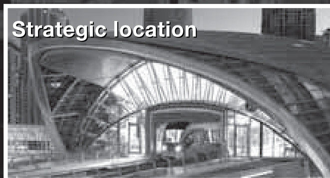

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B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Lessor being owner was entitled to higher depreciation as he was carrying on the business of giving the assets on lease, even though the assets were registered in the names of the lessees

M/s. I.C.D.S. Ltd. vs. CIT (SC) [(2013) 350 ITR 527 (SC)

The assessee company, a NBFC, is engaged in the business of hire purchase, leasing and real estate, etc. In respect of the A.Ys. 1991-1992 to 1996-1997, the assessee claimed depreciation at higher rate on the vehicles which were purchased by the assessee, but registered in the names of its customers (lessees), on the ground that the vehicles were used in the business of running on hire. The AO disallowed claims, both of depreciation and depreciation at higher rate on the ground that the assessee's use of these vehicles was only by way of leasing out to others and not as actual user of the vehicles in the business of running them on hire; and it had merely financed the purchase of these assets and was neither the owner nor user of these assets. On appeal, the CIT(A) allowed depreciation at the normal rate and not at the higher rate as claimed by the assessee.

Allowing the appeal of the assessee, the Tribunal held that the assessee, having used the vehicles for the purpose of business, was entitled to a higher rate of depreciation at 50% on the vehicles leased out by it. The revenue preferred an appeal to the High Court wherein the questions for consideration were whether the assessee was the owner of the vehicles which were leased out by it to its customers and whether the assessee was entitled to the higher rate of depreciation on the said vehicle. Allowing the appeal of the Revenue in respect of both the questions, the High Court held that in view of the fact that the vehicles were not registered in the name of the assessee, and that the assessee had only financed the transaction, it could not be held to be the owner of the vehicles, and thus, was not entitled to claim depreciation in respect of these vehicles.

On appeal, the Hon'ble Supreme Court observed that as per section 32 of the Act, for claiming depreciation, the asset must be "owned, wholly or partly, by the assessee and used for the purposes of the business". In respect of the issue related to the ownership of the vehicles, their Lordships, on the scrutiny of the relevant clauses of the lease agreement, held that the assessee was the exclusive owner of the vehicles at all points of time and in case of a default committed by the lessee, the

assessee would be empowered to re-possess the vehicle (and not merely recover money from the customer). Further, the assessee had the right of inspection of the vehicle at all times and at the conclusion of the lease period, the lessee was obliged to return the vehicle to the assessee. The argument of the Department that at the end of the lease period, the ownership of the vehicle was to be transferred to the lessee at a nominal value not exceeding 1% of the original cost of the vehicle, making the assessee in effect a financier, was also rejected by their Lordships by holding that as long as the assessee has a right to retain the legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law.

It was further, held that as per the mandatory requirement under the Motor Vehicles Act, 1988, the vehicle has to be registered, in the name of the lessee during the period of lease, and, on conclusion of the lease period, the vehicle be registered in the name of lessor as the owner. Thus, the fact that the vehicles registered in the names of the lessees is immaterial to determine the ownership of the legal title of the vehicle for the purpose of claiming depreciation. Further, as the assessee had used the vehicles for the 'purpose of business' it fulfilled even the requirements for a claim of a higher rate of depreciation, and hence was entitled to the same.

Further, rejecting the argument of the Revenue that the assessee was not entitled to claim depreciation as it did not use the said vehicles in the course of its business; it was held by the Hon'ble Supreme Court that the section 32 of the Act requires that the assessee must use the asset for the "purposes of business". It does not mandate usage of the asset by the assessee itself. It was held that in the instant case the assessee being a leasing company leased out vehicles to its customers and hence the income derived from leasing of the vehicles would be business income, or income derived in the course of the business. Hence, it also fulfilled the second requirement of section 32 of the Act viz., that the asset must be used in the course of business.

Return not filed till the due date – The income found during the search was "undisclosed" even though the Advance-tax & TDS was paid

ACIT vs. M/s A. R. Enterprises (2013) 350 ITR 489 (SC)

On 23rd Feb., 1996, a search operation was carried out u/s 132 of the Act, at the premises M/s A. R. Mercantile Private Limited, wherein, certain books and documents pertaining to the assessee firm were seized and it was detected by the AO that though the assessee firm had taxable income for A.Y. 1995-96, it had not filed a return for the said year and the due date of 31st October, 1995 was lapsed. Pursuant to notice u/s 158BD of the Act, though the assessee filed the return for the block period, it objected the action taken u/s 158 BD for the A. Ys. 1993-94 to 1995-96 on the ground that it had already filed returns for the A.Y. 1993-94 and 1994-95; and the Advance-tax had already been paid in respect of the A.Y. 1995-96, and hence, the income for that period could not be deemed to be undisclosed. Nevertheless, the AO computed total undisclosed income for the block period 1993-94 to 1995-96 (up to the date of search), treating the income returned by the assessee for the period 1995-96 as NIL, as stipulated in section 158BB (1)(c) of the Act.

On appeal, the Tribunal declared the said assessment, made u/s 158BD of the Act, as null and void by holding that having paid the Advance-tax, the assessee had made known to the Department its income for the year before the due dates and also before the date of search.

The Revenue preferred an appeal before the High Court on the ground that since return for the assessment year 1995-96 had not been filed by the assessee by the due date, by filing the return after the search, the assessee could not escape the consequences as stipulated in Chapter XIV-B of the Act. It was also contended that payment of Advance-tax by itself did not establish the intention to disclose the income. Dismissing the appeal, the High Court held that payment of Advance-tax itself necessarily implies disclosure of the income on which the advance is paid.

The Department preferred an appeal before the Hon'ble Supreme Court, wherein, the question for consideration was whether payment of Advance-tax by an assessee would by itself tantamount to disclosure of income for the relevant assessment year and whether such income can be treated as undisclosed income for the purpose of application of Chapter XIV-B of the Act?

Allowing the appeal of the Revenue, the Hon'ble Supreme Court observed that "undisclosed income" as defined in section 158B of the Act is a income "which has not been or would not have been disclosed for the purposes of this Act". The only way of disclosing income, on the part of an assessee, is through filing of a return, as stipulated in the Act, and therefore an "undisclosed income" signifies income not stated in the return filed. It was further observed that payment of Advance-tax may be a relevant factor in construing intention to disclose income or filing return as long as the assessee continues to have the opportunity to file return and disclose his income and not the due date of filing return. Therefore, there can be no generic rule as to the significance of payment of Advance-tax in construing intention of disclosure of income as the same depends on the facts of the case, and hinges on the positioning of the search operations *qua* the due date for filing returns. It was further observed that since the Advance-tax payable by on assessee is on estimate of his "current income" for the relevant financial year, it is not the actual total income, as defined in section 2(45) of the Act, to be disclosed in the return of income. It will be a misconstruction of the law to construe the undisclosed income for purposes of Chapter XIV-B as an "estimate" of the total income, which is assessable and chargeable to tax. Consequently, it was held that on failure to file return of income by the due date under section 139 of the Act, payment of Advance-tax *per se* cannot indicate the intention of an assessee to disclose his income. It was further held that in the instant case, since the assessee had not filed its return of income by the due date, the income found during the search was "undisclosed" even though the Advance-tax was paid. It was only after the initiation of block assessment proceedings, that the assessee filed its return for the said assessment year u/s 158BC of the Act, showing its total income as ₹ 7,02,768/-; and therefore, the AO was correct in assuming that the assessee would not have disclosed its total income.

In respect of C.A. No. 2580/2010, the Hon'ble Supreme Court held that since the tax to be deducted at source is also computed on the estimated income of an assessee for the relevant financial year, such deduction cannot result in the disclosure of the total income for the relevant assessment year. Subject to the monetary limit of the total income, every person is obligated to file his return of income even after tax is deducted at source. Hence, mere deduction of tax at source, also, does not amount to disclosure of income, nor does it indicate the intention to disclose income most definitely when the same is not disclosed in the returns filed for the concerned assessment year.

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DIRECT TAXES
High Court

1. Reassessment – Sections 147; 148 – on the basis of audit objection – Reassessment not valid – A.Y. 2004-05

Xerox Modicorp Ltd. vs. DCIT [2013] 350 ITR 308 (Delhi)

The reason for reopening were based on the basis of the revenue departments internal audit opinion, the reopening of the assessment was held to be invalid.

2. Interest – Sec. 234B – Amendment to section to calculate interest after giving MAT Credit is retrospective

CCIT vs. Gujarat Mitra (P) Ltd. (2013) 81 DTR (Guj.) 25

The amendment to the section 234B was to remove the ambiguity regarding the calculation of interest after giving effect of MAT credit was to bring about a clarification, therefore the amendment needs to be held as retrospective in nature.

3. Deduction – Sec. 80JJA – Profit from manufacturing of fuel briquettes from bagasse purchased from sugar factories – Allowable

CIT vs. Padma S Bora (2013) 81 DTR (Bom.) 99

The AO had disallowed the claim of the assessee that bagasse is not waste; not generated by local authorities; was not collected but purchased and the process does not involve treatment or recycling of waste. The CIT(A) and Tribunal allowed the assessee's appeals. The High Court while dismissing the appeal of the department held that bagasse is a waste product, the requirement of collecting waste u/s 80JJA is satisfied if such waste is collected on payment of consideration or without consideration, and therefore the profits from the manufacture of fuel briquettes from bagasse is an allowable deduction u/s 80JJA.

4. Expenditure – Bad Debts – Sections 28(I),36(1)(vii) – Non recovery of advances – Loss of inter corporate deposits was neither allowable as bad debt or business loss.

Bharati Televentures Ltd. vs. ACIT (2013) 81 DTR (Del.) 225

The main business of the assessee was of telecom services and allied activities, including mobile and cellular activities. The assessee during the year had utilised its funds efficiently by keeping them in inter- corporate deposits. The assessee did not receive some of the deposits back, and claimed the same as bad debts or in the alternative as business loss. The High Court held that the assessee was in the core business of telecom and the inter-corporate deposits was not a trade debt or a part of money lending business and therefore deduction was neither allowable as bad debt nor as business loss.

5. Block Assessment – 158BD – No satisfaction recorded that any undisclosed income belonged to the assessee – Entire proceeding without jurisdiction

CIT vs. Intercontinental Trading and Investment Ltd. (2013) 81 DTR (Del.) 314

In the instant case in the communication between the AO of the search person to the AO of the assessee, there was no recording of any satisfaction that any undisclosed income belonged to the assessee and therefore the entire proceedings under section 158BD are without jurisdiction.

6. Business expenditure – Section 37 – Operating fees paid by a cellular mobile service operator to its holding company is allowable as revenue expenditure

CIT vs. Evergrowth Telecom Ltd. [2013] 29 taxmann. com 273 (Bombay)

The assessee was appointed as an operator by a telecom company, 'J' for providing cellular mobile service. The Assessing Officer disallowed expenses claimed as licence operating fee on the ground that such expenses were not allowable in one year but had to be amortized over the life of the licence in view of section 35ABB of the act. The Commissioner (Appeals) following the order of Tribunal in assessee's own case for earlier years allowed entire expenditure under section 37(1). The Tribunal upheld the finding of Commissioner (Appeals). On further appeal in High Court the Court dismissed the appeal filed by department and held that the amount was paid by the assessee to 'J' as operating licence fee for the year under consideration. The court held that no enduring benefit was received by assessee so as to spread the expenditure beyond the period of one year in which the expenditure was incurred. The Court further held that section 35 AB of the act would have no application in this case but would apply in respect of the licence fee paid by 'J'.

7. Income from other sources – Sections 56; 22 – Where letting of building and letting of fixtures, fittings, air-conditioning plant, furniture, etc., were inseparable, rental income is to be assessed as income from other sources

Garg Dyeing & Processing Industries vs. ACIT [2012] 28 taxmann.com 287 (Delhi)

The assessee claimed deduction in respect of its rental income under the head 'Income from house property'. The Assessing Officer perused rent agreements and found that premises were let out on condition that the assessee would provide certain facilities like furniture and fixtures, plant and machinery, etc. He held that the letting out of the machinery, plant and furniture and the letting out of buildings being inseparable, the rental income be taxed under the head 'Income from other sources', which resulted in disallowance under section 24. On an appeal, Commissioner (Appeals) confirmed said order. The Tribunal held that the letting out of the plant, machinery or furniture and the premises constituted a single, composite and inseparable letting rental income be assessable as 'income from other sources'. On further appeal in High Court, the Court dismissed the appeal of the assessee and held that the Tribunal held that the letting in the present case was a composite one. The Court also held that in so concluding the Tribunal contrasted the terms under which the ground and first floors of the building were leased to Haldirams. What was let out to Haldirams was the bare space with only a right given to the lessee to use the common facilities such as lift, lobby, staircases, corridors etc. in order that the property can be enjoyed effectively; there was no letting out of machinery, plant or furniture to Haldirams. However, in the disputed cases there was a letting of the fixtures, fittings, air-conditioning plant, furniture etc., together with the building and both were inseparable. This is what the Tribunal has found. It further found that the intention of the parties was that there was to be a single inseparable letting as evidenced by a composite lease deed for which a consolidated lease rent was

fixed. In these circumstances, the court held that the substantial question of law has to be answered in the affirmative and against the assessee.

8. Investment – 54EC – Exemption is available even on short-term capital gains calculated as per Section 50 on sale of depreciable assets held for more than 36 months

DCIT vs.Himalaya Machinery (P.) Ltd. [2013] 29 taxmann.com 380 (Gujarat)

The assessee sold depreciable assets held for more than 36 months and calculated short-term capital gains as per section 50. The assessee claimed deduction under section 54EC by investing the gain in specified bonds. The Assessing Officer disallowed the exemption on the ground that it is available only in respect of long-term capital gain and not on any short-term capital gains. On appeal, the Commissioner (Appeals) deleted said addition on the ground that the deeming fiction created under section 50 with respect to depreciable assets would be confined for the purpose of mode of computation of capital gains contained in sections 48 and 49 and would not cover the exemption under section 54EC. The CIT(A) also held that the assets transferred were held for more than 36 months and thus, the requirements of section 54EC were fulfilled. On appeal, the Tribunal confirmed the decision of the Commissioner (Appeals). On further appeal in High Court the question of law involved was whether exemption under section 54EC is available in respect of short-term capital gain calculated under section 50 on sale of depreciable assets held for more than 36 months?. The Court dismissed the appeal of the revenue and upheld the findings of the Tribunal and held that in case of transfer of capital asset forming part of block of assets in respect of which depreciation has been allowed, mode of computation and cost of acquisition shall be as per modifications provided in section 50 and the special provision made for computation of capital assets in respect of which depreciation has been allowed is confined for the purpose of section 50 in relation to sections 48 and 49 only. The court further held that though u/s 54EC of the act, exemption would be available in case of transfer of long term capital assets. Therefore once such condition is fulfilled, by virtue of the fact that asset was such on which the depreciation was allowed and therefore, computation would be done as provided under section 50, by applying modifications in section 48 and section 49 would not change the nature of capital asset or availability of exemption as specified u/s 54EC of the Act.

9. Tax Recovery and Attachment – Sections 220(6); 226(3) – Where Assessing Officer did not pass a speaking order under Section 220(6), order of attachment under Section 226(3) was not justified

Lalit Wadhwa vs. CIT [2013] 29 taxmann.com 305 (Punjab and Haryana)

The assessment in case of the petitioner was completed at an income approximately four times the returned income and tax demand including interest under section 234B/C was raised. The petitioner's appeal under section 246 against that order was pending before the Appellate Authority. An application for stay of demand had also been filed by the petitioner, but the Assessing Officer, by a non-speaking order, simply rejected the stay application. The Assessing Officer had also issued notice under section 226(3) to the petitioner's bankers for attachment of various bank accounts and rental income. The petitioner filed the instant writ petition for quashing the order passed by the Assessing Officer. Allowing the writ petition the Court held that the petitioner's appeal against assessment order under section 246 of the Act was pending before the Appellate Authority. Against the declared income of ₹ 1,30,09,970/-, the Assessing Officer had assessed the income at ₹ 4,99,13,470/- and also charged interest etc. The petitioner had filed an application under section 220(6) of the Act before the Assessing Officer requesting that the entire demand was disputed in the appeal and since it was the first appeal, the demand may be stayed till the disposal of the appeal. Section

220(6) of the Act provides that where an appeal is pending under section 246, the Assessing Officer, in his discretion and subject to such conditions, would treat the assessee as not being in default till the pendency of the appeal. Under section 220(6) of the Act, where an appeal was pending against the assessment order, the assessee was not to be treated as an assessee in default in respect of the amount in dispute in appeal, in the discretion of the Assessing Officer on such conditions as he may think fit to impose. The Court further held that the Assessing Officer is, thus, required to pass a reasoned speaking order and the order passed by respondent no. 2 cannot be termed to be a speaking order in consonance with the requirements of Section 220(6) of the Act and the sole consideration which weighed with Assessing Officer was that the amount had not been paid and how to recover the same. In view of non-compliance of requirements of section 220(6) of the Act of passing a speaking order, the order passed by the Assessing Officer was liable to be quashed. The Assessing Officer was directed to pass a fresh speaking order in accordance with law within 15 days from the date of receipt of certified copy of the order after affording proper opportunity of hearing to the parties.

10. Tax Deduction at Source – Sections 194I; 194C – Warehousing charges paid to clearing and forwarding agents, tax is liable to be deducted under section 194C of the Act

CIT vs. Hindustan Lever Ltd. [2013] 29 taxmann.com 313 (Delhi)

The assessee being a well known manufacture of consumer goods such as detergent, soaps etc hired godowns on rent and also engaged C & F agents to manage them for various purposes. The Assessing Officer was of the view, that the assessee wrongly deducted tax at 2.2% under Section 194C from the amounts paid to the C & F agents. The Assessing Officer was of the opinion that the assessee ought to have deducted tax at the rate of 22% under section 194-I because they contain warehousing charges. Therefore, he treated the assessee in default of ₹ 78,43,252/- and charged interest of ₹ 25,29,448/- under section 201(1A) and made consequential demands. Later he also initiated penalty proceedings under section 271C. The assessee carried the matter in appeal; the CIT(Appeals) partly allowed the assessee's claims directing separation of some amounts after due verification. The assessee carried the matter in further appeal to the ITAT; the revenue too was aggrieved by the CIT (Appeals) order. It preferred cross objections. The ITAT disposed of the cross-appeals and supported the findings of the CIT(A) and held that section 194-I is not applicable in this case and tax is liable to be deducted u/s 194C of the act as section 194-I is applicable only in case when immovable properties are let out and in this case none of the heads of payments made to C&F agents by the assessee was a head of payment by way of rent. The Tribunal further held that Section 194-I is not a residuary clause. It has been enacted specifically for rent from immovable property. The Tribunal further held that there was no payment towards rent which could be covered by section 194I of the Act and in respect of premises used by the C & F Agents which were taken on rent by the assessee. TDS on rent was also deducted u/s 194I of the Act. On further appeal in High Court the Court dismissed the appeal of the revenue and held that the conclusions drawn by these authorities on the basis of such scrutiny were concurrent. Even otherwise, if the revenue was of the opinion that any consideration paid to the C & F agent comprised of some elements such as rent, such a conclusion ought to have been supported by facts. The court also held that what was discernable from the materials on record was that the assessee had rented premises from their landlords. Payments of rent were made after deducting the tax in terms of section 194-I. What the assessee paid to the c & f agents as warehousing charges was the consideration in terms of the agreement which was tax deductible under section 194C at 2.2. %. In this factual background it was for the revenue to have established how section 194-I could be attracted to the amounts or charges paid to the C & F agents in terms of the agreements.

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DIRECT TAXES
Tribunal

Reported Decisions

1. Business Income – Section 41(1) – Remission or cessation of trading liability – A.O. failed to prove with evidence that deduction or allowance has been allowed in earlier years – Addition not justified. A.Y. 2008-09

Victoria Roberts vs. Asstt. CIT (2013) 55 SOT 130 (Bang)

The assessee imported goods from a foreign company on credit basis. The assessee also aided the foreign company to procure orders for its goods / products in India on commission. A dispute arose between the foreign company and its Indian customers introduced by assessee, due to this the foreign company withheld commission payable to assessee. The assessing officer in the course of assessment found from the balance sheet of the assessee as on 31-3-2008, that a certain sum was outstanding in the name of foreign company, as sundry creditors since last year. The Assessing Officer called for the confirmation from the assessee, the assessee was not able to provide the same. Accordingly, the Assessing Officer concluded that, as the assessee has acted also as commission agent for the foreign company and the foreign party had not paid commission for the disputed transactions, the assessee has appropriated the amount due to the foreign company towards the commission receivable by it. Thus, the credit in the balance sheet ceased to exist as on 31-3-2008 and he added the amount under the provisions of section 41(1)(a) of the Act.

On appeal the Tribunal held that, there was no evidence on record to show that a sum which was admittedly, liability payable by the assessee to foreign company was adjusted towards the commission payable to the assessee by foreign company. More so, when the assessee had not written off the sum in the profit and loss account. Merely because no confirmation was filed from foreign company cannot lead to the conclusion that there was a cessation or remission of liability of the assessee to foreign company warranting invocation of provisions of section 41(1). The Tribunal held that section 41(1) is a deeming fiction and seeks to tax receipt or benefit which may not strictly be 'income'. Thus, the burden to prove that a particular benefit or receipt falls within the four corners of the provisions of section 41(1) lies upon the revenue and it is incumbent upon the Assessing Officer to prove with the material / evidences that a deduction or allowance has been allowed to the assessee in earlier years and after such deduction or allowance having been allowed, the assessee has obtained any amount or benefit in respect of the same for which deduction or allowance has been allowed. The Assessing Officer shall have to further prove that such benefit has been

obtained by the assessee in a particular year. If any, of the above ingredients of section 41(1) is missing, the Assessing Officer cannot invoke the provisions section 41(1) of the Act.

2. Reassessment – Sec. 147 – Assessee filed return after claiming exemption for entire income under Article 8 of Indo-US DTAA – Return was processed u/s. 143 (1) – Thereafter, Assessing Officer reopened the assessment stating interest income earned by the assessee was chargeable to tax – Held reopening was liable to be quashed as there was no material in possession of the Assessing Officer on the basis of which the assessment can be reopened. A.Y. 2001-02.

Delta Air Lines Inc. vs. ITO (2013) 81 DTR (Mum) (Trib.) 190

Assessee filed return of income declaring 'nil' total income after claiming exemption for the entire income under Article 8 of Indo-US DTAA. The said return was processed u/s. 143(1) of the Act. Subsequently, the Assessing Officer noticed from the perusal of the record that interest income earned by the assessee on fixed deposit was not connected with the operation of aircrafts and accordingly the assessee was not entitled for exemption under Article 8 of Indo-US DTAA in respect of the said interest income. Accordingly, the Assessing Officer on 26-10-2005 reopened the assessment by issuing notice under section 148 of the Act. The assessee challenged the validity of reopening of assessment on the ground that there was no new material that had come to the possession of the Assessing Officer till date of issue of the notice u/s. 148 on the basis of which assessment was reopened. This contention of the assessee was accepted by the Assessing Officer and the CIT(A) in appeal.

On appeal before the Tribunal held that even where only an intimation had been issued u/s 143(1)(a) of the Act, it is essential that the Assessing Officer should have some material before him to justify his reason to believe that income had escaped assessment. In the present case, it was clearly evident from the reasons recorded by the Assessing Officer, there was no new material coming to the possession of the Assessing Officer on the basis of which assessment completed u/s. 143(1) was reopened. Accordingly, the initiation of reassessment proceedings and the reassessment completed in pursuance thereof by the Assessing Officer was held to be bad in law and liable to be quashed being invalid. *{Telco Dadajee Dhackjee Ltd. vs. Dy. CIT – I. T. A. No. 4613 / M / 2005; Order dated: 12-5-2010 followed}*

3. Re-assessment – Section 147 – absence of material or rational belief – Merely because assessment has been completed under Section 143(1) per se cannot be a good ground to reopen the assessment – Re-assessment quashed. A.Y. 2005-06 & 2006-07.

Meheria Reid & Co. vs. ITO (2013) 81 DTR (Kol.) (Trib.) 386

The A.O. issued notice under section 148(1) within four years from the end of the relevant Assessment Year after recording a reason that there is a discrepancy in the professional income shown as per the Profit & Loss Account and as per the TDS certificates. The matter travelled up to Hon'ble Appellate Tribunal. The Appellate Tribunal quashed the re-assessment proceedings by observing that the original assessment proceedings were completed under section 143(1) and the re-assessment proceedings are initiated within four years but that does not, as is the settled legal position, imply, as has been indirectly suggested by the Departmental Representative, that assessment proceedings can be revisited even in the absence of legally sustainable reasons for formation of *prima facie* belief that income has escaped assessment. In other words, irrespective of whether or not the

original assessment has been completed under scrutiny assessment or summary assessment, it is necessary that conditions precedent for invoking section 147 have to be satisfied. Even, when the original assessment is under section 143(1) and reassessment proceedings are initiated within a period of four years, it is still necessary that there should be reasons to believe that income has escaped assessment and such reasons are subject to judicial scrutiny. There is nothing in the reasons to indicate that there is an escapement of income, but, at the most, need to verify that the reasons of discrepancy between income from profession as per return of income *vis-à-vis* as per the certificates of TDS. Therefore, re-assessment quashed.

4. Allowability of expenses for drug trial – Section 35(2AB)(1) – expenditure incurred outside the in-house research facility – Allowable [A.Y. 2007-08]

Cadila Healthcare Ltd. vs. ACIT [2013] 29 taxmann.com 229 (Ahmedabad - Trib.)

The assessee was engaged in the business of manufacturing and trading of medicines, pharmaceutical formulations, bulk drug etc. It had set up an in-house research and development facility. The assessee during the previous year relevant to the impugned assessment year incurred expenditure on clinical trials which had been got conducted from outside agencies as the assessee did not have the facility for the same in the in-house R&D centre. The assessee while filing the return of income claimed deduction under section 35(2AB) on the expenditure incurred on clinical trial outside the in-house R&D center. The A.O. while passing the Assessment Order disallowed the same. On appeal, the First Appellate Authority confirmed the action of the A.O. The assessee, being aggrieved, filed further appeal to the Hon'ble Appellate Tribunal. The Appellate Tribunal, allowed the appeal of the assessee by observing that carrying out drug trial is essential for approval of the drug in question to be sold in the public. Hence, clinical drug trial cannot be carried out inside an in-house research facility i.e. usually the laboratory. Hence, Explanation to Section 35(2AB)(1) does not require that these expenses which are included in this Explanation are essentially to be incurred inside an in-house research facility because it is not possible to incur these expenses inside in-house research facility. Since, it is not possible to incur such expenditure on clinical drug trial within the in-house research and development facility , one cannot lay down an impossible condition of incurring the expenditure within the in-house research and development facility.

5. Exemption – Section 10B – Allowed in the initial Assessment Year – Cannot be disallowed in the subsequent Assessment Year [A.Ys. 2003-04 & 2004-05]

DCIT vs. Tyco Valves & Control India (P) Ltd [2013] 81 DTR (Ahd.) (Tribunal) 48

The A.O. disallowed the claim of the assessee under section 10B of the Act by observing that the assessee's unit has more than 20 per cent of the value of the plant and machinery consisting of old machinery used earlier for business purposes. Hence, the assessee has violated the condition of section 10B that requires that the industrial unit should not be formed by the transfer of previously used machinery. The assessee, being aggrieved, filed an appeal before the Ld. CIT(A). The Ld. CIT(A) allowed the claim of the assessee by observing that the A.O. himself has allowed assessees claim in the earlier years and the impugned Assessment Year is the fifth Assessment Year for claiming the exemption. The department, being aggrieved by the order of the Ld. CIT(A) preferred an appeal to the Hon'ble Appellate Tribunal. The Tribunal dismissed the appeal of the department by observing that the starting point of the limitation for claiming the benefit flowing from section 10B would commence from the year of

manufacture or production of the undertaking. If the conditions prescribed in the section are not satisfied in the year of commencement of production, it would not be able to claim such deduction in the subsequent years, unless the said initial test on the date of the starting point has been satisfied. Section 10B therefore does not give any indication that in each year of claim its eligibility should be newly established, because the relevant of the phrase "newly established undertaking" is only to identify initial year of period for which assessee is eligible for claim of exemption under section 10B.

6. Revision – Section 263 – Assessment Order passed after conducting enquiries – Every loss of revenue as a consequence of an order of the A.O. cannot be treated as prejudicial to the interest of the revenue – Revision bad in law. [Assessment Years 2004-05 to 2008-09]

Parminder Singh vs. ACIT [2013] 81 DTR (Asr) (Tribunal) 321

A search and seizure action was carried out the residential premises of the assessee and thereafter, a survey action was carried out at the business premises of M/s. Kapurthala States Pvt. Ltd. and M/s. Kapurthala Promoters & Developers Pvt Ltd. The assessee filed return of income in response to the notice issued by the A.O. The A.O. after making due enquiries finalised the Assessment Order under section 143(3) /153A of the Act. The Ld. CIT (Central) issued show cause notice under Section 263 stating that investment has been made in various immovable properties in the form of land in the name of Jeetu Keshi and Mithilesh Kumar who are migrant labourers and were working as Office Boys with the above two companies. The Ld. CIT passed the order u/s 263 and set aside the assessment of the assessee and of the above two companies for the reason that the Assessing Officer has not conducted proper enquiries. The assessee, being aggrieved by the order passed by the Ld. CIT, preferred an appeal before the Hon'ble Appellate Tribunal. The Tribunal quashed the revision order passed u/s 263 by holding that the Assessment Order have conducted enquiries in respect of property transactions carried out by Jeetu Keshi and Mithilesh Kumar by raising queries during the assessment proceedings in the case of the assessee and Jeetu Keshi and Mithilesh Kumar have admitted that all the property transactions were carried out by them on their own account and these transactions were already assessed in their cases. Therefore, the Ld. CIT was not justified in invoking the provisions of section 263 in the case of assessee, more so, when the CIT has not concluded in whose hands the said transactions are to be taxed and which transactions are to be taxed. Therefore, the twin conditions laid down under section 263 have not been met as the Assessing Officer while framing the assessment conducted all enquiries.

Unreported Decisions

1. Capital Gain – Exemption – Sec. 54 F – Assessee is entitled for exemption under Section 54F in respect of the capital gains relatable to the full value of consideration taken by the Assessing Officer invoking the deemed provision of section 50C – A.Y. 2008-09

Raj Babbar vs. ITO [I.T.A. No. 6497 / Mum / 2011; Order dated: 2-1-2013]

Assessee purchased a plot of land in 1984 and sold the same during the year for a consideration of ₹ 8 lakhs and worked out long term capital gains ('LTCG') of ₹ 5,84,837. after reducing the indexed cost of acquisition. As the assessee had applied / invested ₹ 17,65,752 in construction of a residential property he claimed exemption under section 54F in respect of LTCG earned however, the claim was restricted to the capital gain worked out on sale of land. During the course of assessment proceedings the assessing

officer invoked provisions of section 50 C of the Act as market value of the plot as per Stamp Duty Authorities was ₹ 16,87,000, the AO accordingly, recomputed LTCG at ₹ 14,71,837. The Assessing Officer also denied deduction under section 54 F to the assessee as according to him the assessee owned more than one house and also because assessee invested the said capital gains prior to two years before the transfer of asset. Before the CIT(A), the assessee contested that the sale proceeds were utilized in the construction of additional two floors on the existing residential Bungalow. The CIT(A), confirmed the action of the Assessing Officer in invoking the provisions of section 50C and computation of LTCG at ₹ 14,71,837, but held that the assessee was eligible for exemption under section 54F of the only on the capital gains computed by him that is ₹ 5,84,837, thus denying the exemption on the increased market value as per stamp duty valuation.

On appeal the Tribunal held that section 54F of the Act provides that if the cost of the new asset is more than the net consideration in respect of the original asset sold by the assessee, then no capital gains is chargeable under section 45. In the instant case, as the cost of the new asset was ₹ 17,65,752 and 'net consideration' received by the assessee is ₹ 16,87,000 as per section 50C and ₹ 8 lakhs as per the sale deed, considering the provisions of section 54F(1) of the Act, the assessee would be entitled for exemption under section 54F in respect of the capital gains relatable to the deemed full value of the consideration worked out invoking the provisions of section 50C of the Act.

2. Depreciation – Sec. 32 – Assessee, a share broker, had purchased entire retail clientele business of its sub-broker for a lump sum consideration – Purchase of clientele business by assessee from sub-broker was a right which could be used as a tool to carry on business – Therefore, assessee was eligible to claim depreciation under section 32 on payment made to sub-broker. A.Y. 2006-07

India Capital Markets (P.) Ltd. vs. Dy. CIT [I.T.A. No. 2948 / Mum / 2010, Order dated: 12-12-2012]

The assessee, a share broker, purchased entire retail clientele business of its sub - broker for a lump sum consideration under the Deed of Assignment of Business. The assessee booked these expenses as purchase of goodwill and claimed depreciation thereon. The assessee contented that it had purchased an intangible asset in the form of clientele business of sub - broker and, therefore, eligible for depreciation under section 32(1)(ii). The Assessing Officer held that the case of the assessee did not fall in any of the category to make it eligible for depreciation under clause (ii) of section 32(1). The depreciation was allowable only to assets which were kept depreciating over a period of time due to damage, wear and tear and obsolescence. The clients did not depreciate and moreover they were tangible. Therefore, according to him the assessee was not eligible for depreciation.

On appeal, the Tribunal held that, the provision of section 32(1)(ii) enumerate certain intangible assets on which depreciation could be claimed viz, know-how, patents, copyrights, trade marks, licenses, franchise or any other business or commercial rights of similar nature. This expression 'any other business or commercial rights of similar nature' would include such rights which can be used as a tool to carry on the business. In the present case it is not disputed that purchase of the clientele business by the assessee from its sub-broker is a right which can be used as a tool to carry on the business. Therefore, assessee was eligible for depreciation on payment made to sub-broker for purchase of clientele.

3. Deduction – Sec. 80P – Assessee a Regional Rural Bank – Profit on sale of investment held to be eligible for deduction under section 80P as income from banking operations. A.Y. 2004-05

Asstt. CIT vs. Bundi Chittorgarh Kshetriya Gramin Bank [I.T.A. No. 859 / Jp. / 2011; Order dated: 15-3-2012]

Assessee a Regional Rural Bank while computing its income for the year claimed deduction under section 80P of the Act on the Profit on sale of investments. The Assessing Officer during the course of assessment proceedings disallowed the claim as he was of the view that the said income was not eligible for deduction u/s. 80P as according to him deduction u/s. 80P is available only against the banking operational income of the assessee.

On appeal the Tribunal considering the Apex Court decision in the case of, the *Totgar's Co-op. Sale Society Ltd. vs. ITO [(2010) 322 ITR 283 (SC)]* held that according to section 5(b) and 6(1)(a) of the Banking Regulation Act, 1949 investment of the deposits accepted from the public, or on its own, forms part of the banking business thus, selling or realising those investments should also be an integral part thereof. Accordingly, the Tribunal held that assessee eligible for deduction under section 80P of the Act on the profits earned by it on sale of investments.

4. Income from House Property – Annual Letting Value (A.L.V.) – Sec. 23 – Property not covered by Rent Control Act – A.L.V. to be determined on the basis of actual rent received and not on the basis of fair rental value of the property prevalent in the market. A.Y. 2004-05

ACIT vs. Mrs. Smita M. Modi [I.T.A. No. 8405 / Mum / 2010; Order dated: 18-1-2013]

During the year the assessee gave her property on Leave & License basis to a listed public limited company. The assessee worked out income from house property on the basis of actual monthly rent received by her and offered the same for taxation under the head 'Income from House Property'. As the rent actually received by the assessee exceeded the municipal rateable value, the assessee offered income chargeable to tax under section 23(1)(b) instead of section 23(1)(a) of the Act. However, the Assessing Officer was of the view that as the rent actually received by the assessee was much less than the prevalent market rent and the computation of income chargeable to tax was to be made under section 23(1)(a) being an amount equivalent to the prevalent market rent. Accordingly, the Assessing Officer estimated the annual value at 8.5% of the total investment made by the assessee in the flat after allowing certain deductions therefrom. The CIT(A) allowed the appeal of the assessee and directed the Assessing Officer to adopt the actual rent received by the assessee as the 'annual letting value' following the order of the Tribunal in the assessee's own case for a earlier year. Before the Tribunal the revenue citing the decision of jurisdictional Tribunal in the case of, Deepak Vaswani (ITA No.352/M/2008) contented that if the property is not covered under the Rent Control Act, the ALV u/s.23(1)(a) has to be determined on the basis of fair rental value in the market after considering all relevant facts.

The Tribunal directed the Assessing Officer to adopt the actual rent received by the assessee as the 'annual letting value' as against the fair rental value estimated by him following the decision of the Tribunal in the assessee's own case for earlier year. The Tribunal followed the decision in the assessee's own case for earlier year even though it was prior to the Tribunal order in the case of, Deepak Vaswani's, as the CIT(A) while deciding appeal had relied on the order of the Tribunal in the assessee's own case for earlier year and also because in the present year the Dispute was with respect of the same property.

5. Search – Assessment – Sec. 153 A – Where the assessment had been completed under summary scheme under Section 143(1) and time limit for issue of notice under Section 143(2) had expired on the date of search – There was no assessment pending at the time of search – Thus, there was no question of abatement and, addition could be made only on the basis of incriminating material found during search. A.Ys. 2001-02, 2002-03 and 2004-05

Mr. Vikram Khandelwal vs. Dy. CIT [I.T.A. Nos. 1976 1977 & 3896 / Mum / 2009; Order dated: 18-1-2013]

Assessee filed his return of income declaring income for A.Ys. 2001-02, 2002-03 and 2004-05. Subsequently, there was search conducted on 10-11-2006. However, no incriminating material was found during the search pertaining to the assessee. Thereafter, notices were issued by the Assessing Officer under section 153A for six preceding years for assessment/reassessment, in response to which the assessee filed his returns of income declaring the same income as declared in the original return. The Assessing Officer made certain additions and disallowances in the assessment for various on the basis of information / material available in the returns of income and framed assessment under section 153A read with section 143(3). The assessee challenged the validity of assessment framed under section 153A of the Act before the Tribunal on the basis that the additions in the assessments made under section 153A read with section 143(3) could be made only on the basis of incriminating material found during the search as held by the Hon'ble Special Bench in the case of, *Alcargo Global Logistics Ltd. vs. Dy. CIT [(2012)137 ITD 287(Mum.)(SB)]*

The Tribunal held that, under the provisions of section 153A inserted from 1-6-2003 the Assessing Officer is under obligation to issue notice to the person searched requiring him to furnish the return of income for six (6) years immediately preceding the year of search and all the assessment which are pending on the date of initiation of search abates. The Assessing Officer retains the original jurisdiction as well as jurisdiction under section 153A in cases where the assessments has been abated and the Assessing Officer can make additions in the assessment, even if no incriminating material has been found. But, in cases where assessment are not pending additions under section 153A can be made only on the basis of incriminating material which is found in the course of search and undisclosed income or property disclosed during the course of search. Thus, in cases where, the assessment had been completed even under summary scheme under section 143(1) or time limit for issue of notice under section 143(2) had expired on the date of search, there was no assessment pending and in such case, there was no question of abatement of assessment, therefore, addition in such cases could be made only on the basis of incriminating material found during search. In the present case as the Assessing Officer had made the assessment only on the basis of information/material available in the returns of income and he had not referred to any incriminating material found at the time of search while making additions and as all the assessment had attained finality at the time of search. The Tribunal held that the Assessing Officer could make addition only on the basis of incriminating material found at the time of search.

Alcargo Global Logistics Ltd. vs. Dy. CIT [(2012)137 ITD 287(Mum.)(SB)] followed

CIT vs. Anil Kumar Bhatia [(2012) 211 Taxman 453 (Del.)]

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Section 80-IA, Sub-Clause (III) of Sub-Section (4) of the Income-tax Act, 1961 – Deductions – In respect of Profits and Gains from Industrial Undertakings, or enterprises engaged in infrastructure development, etc. – Notified undertakings

The Central Government notified the undertaking, being developed and being maintained and operated by M/s. iLABS Hyderabad Technology Centre Pvt. Ltd., Hyderabad, and M/s. Ganesh Housing Corporation Ltd. having its registered office at 1st Floor, "Samudra", Near Klassic Gold Hotel, C.G. Road, Ellisbridge, Ahmedabad-380 006, as an industrial park for the purposes of the said clause (iii) subject to the terms and conditions mentioned in the said annexure to the notification.

(Notification No. 55/2012 [F.No.178/49/2009-ITA-I], dated 28-12 2012 and Notification No. 1/2013 [F. No.178/02/2008-ITA-I], dated 8-1-2013)

Section 197A of the income-tax Act, 1961 – Deduction of tax at source – No deduction in certain cases – Specified payment under section 197A(1f)

The Central Government notified that no deduction of tax under Chapter XVII of the Act shall be made on the payments of the nature specified below, in case such payment is made by a person to a bank listed in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), excluding a foreign bank, namely:- (i) bank guarantee commission; (ii) cash management service charges; (iii) depository charges on maintenance of DEMAT accounts; (iv) charges for warehousing services for commodities; (v) underwriting service charges; (vi) clearing charges (MICR charges); (vii) credit card or debit card commission for transaction between the merchant establishment and acquirer bank.

The said notification shall come into force from the Ist day of January, 2013.

(Notification No. 56/2012 [F. No. 275/53/2012-IT (B)], dt. 31-12-2012)

Extension of time limit for filing ITR-V forms for A.Y. 2010-11, A.Y. 2011-12 and A.Y. 2012-13

The Director General of Income Tax (System) extended the time limit for filing ITR-V forms relating to Income Tax Returns filed electronically (without digital signature Certificate) for A.Y. 2010-11 [Filed during F.Y. 2011-12] and for ITRs of A.Y. 2011-12 [filed on or after 1-4-2011] till 28th February, 2013. In respect of returns filed for A.Y. 2012-13 for which ITR-V forms are yet to be received at CPC and time of 120 days has also

elapsed, time limit for filing of ITR-V is extended up to 31st March, 2013 or 120 days from the date of uploading of the electronic return data, whichever is later. The direction has been issued to mitigate the hardship and grievance of the tax payers who have been prevented by reasonable causes to file the ITR-V in time.

(Notification No. 1/2013 [F. No. DIT(S)-III/ITR-V Extension/2012-13] under CPR Scheme 2011, dated 7-1-2013)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Foreign Countries – Netherlands – Amendment in Notification No. GSR 382(E), dated 27-3-1989

A Protocol for amending the Convention between the Republic of India and the Kingdom of the Netherlands for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on Income and on Capital was signed at the Hague; the date of entry into force of the said Protocol would be the 2nd day of November, 2012, being the date of later of the notifications of satisfaction of all legal requirements and procedures for entry into force of the Agreement, in accordance with Paragraph 2 of Article 3 of the said Protocol; Now the Central Government directed that all the provisions of the said Protocol, as set out in the Annexure there to, shall be given effect to in the Union of India in respect of income and on Capital arising from the 2nd November, 2012.

(Notification No. 2/2013 [F. No.501/02/1983-FTD-I], dt. 14-1-2013)

Centralised Processing of Statements of tax deducted at source scheme, 2013

The Central Board of Direct Taxes made the scheme for centralised processing of statements of tax deducted at source. The scheme may be called the Centralised Processing of Statements of Tax Deducted at Source Scheme, 2013 and shall come into force on the date of its publication in the Official Gazette. Accordingly the Board may set up as many Centralised Processing Cells as it may deem necessary and specify their respective jurisdictions. A deductor shall furnish the correction statement of tax deducted at source in the form specified by the Director General at the authorised agency through electronic mode; or online through the portal. The correction statement referred to in sub-paragraph (1) shall be furnished under digital signature or verified through a process in accordance with the procedure, formats, and standards specified by the Director General.

The Cell shall process the statement of tax deducted at source furnished by a deductor in the manner specified under sub-section (1) of section 200A of the Act after taking into account the information contained in the correction statement of tax deducted at source, if any, furnished by the deductor before the date of processing. The Commissioner may (a) adopt appropriate procedure for processing of the statement of tax deducted at source; or decide the order of priority for processing of the statement of tax deducted at source based on administrative requirements. The notification gives procedure and details for Rectification of mistake, Adjustment against outstanding tax demand, Appeals, Service of notice or communication, and Power to specify procedure and processes. No personal appearance would be required at the Cell.

(Notification No. 3/2013[F.No. 142/39/2012-SO (TPL)], dated 15-1-2013)

Section 194-A of the Income-Tax Act, 1961 – Deduction of tax at source – Interest other than interest on securities – New institution notified

The Central Government has notified the National Skill Development Fund (PAN

AABTN5824G) for the purpose of section 194A (3) (iii)(f) of the Income-tax Act, 1961

(Notification No. 4/2013, dt. 24-1-2013)

Section 132, read with section 132A of the income-tax Act, 1961 – Search & Seizure – Assessment of preceding years in search cases during election period

As per provisions contained in sections 153A and 153C of the Income-tax Act, 1961, the Assessing Officer is required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.

The Central Government has amended the Income Tax Rules, 1962, to insert a new Rule 112F after the existing Rule 112E, specifying the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.

The amendment has been introduced with a view to reduce infructuous and unnecessary proceedings under the Income-tax Act, 1961 in cases where a search is conducted u/s 132 or requisition made u/s 132A and cash or other assets are seized during the election period, generally on a single warrant, and no evidence is available, or investigation required, for any assessment year other than the assessment year relevant to the previous year in which search is conducted or requisition is made. In such cases, the officer investigating the case, with the approval of the Director General of Income Tax, shall have to make certification on certain facts about conduct of search, assets seized and further evidence or investigation required. The said certificate of the investigating officer shall be communicated to the Commissioner of Income Tax and the Assessing Officer having jurisdiction over the case of such person.

(Circular No. 10/2012 [F. No. 282/22/2012-IT (Inv. V)], dated 31-12-2012)

Section 255 of the Income-tax Act, 1961 – Appellate Tribunal – Procedure of – Practice note for hearing appeals & Applications fixed before ITAT Allahabad Bench, Allahabad – Hearing through Video Conferencing

It has been directed that appeals and applications fixed before the Income Tax Appellate Tribunal [ITAT), Allahabad Bench, Allahabad will be heard through Video Conferencing by the Members of the ITAT as may be nominated by the President, ITAT from time to time sitting at ITAT, Delhi Benches, Delhi. This system of hearing through Video Conferencing will be referred to as 'E-Court'. For the purposes of E-Court, detailed Regulations along with Do's, Don'ts and Forms for use under these Regulations are framed and enclosed with the said direction for compliance by all concerned which include Regulations Regarding Hearing of Appeals by Video Conference:

There shall be no change in the present procedure of filing, scrutiny, hearing and disposal of appeals except modifications stipulated as regards, Notifying hearing of appeal by Video Conferencing, Procedure prior to hearing of appeal by video conferencing and Procedure at the Hearing of Appeal, various Miscellaneous Regulations, and Do's and Don's while arguing. (ITAT's practice note, dated 1-1-2013).

Section 90 of the Income-Tax Act, 1961 – Double Taxation Agreement – Agreement for Exchange of Information for Tax Purposes with Foreign Jurisdictions – Guidelines for Inbound and Outbound Requests : India has entered into

a number of Double Taxation Avoidance Agreements (DTAAs) and Tax Information Exchange Agreements (TIEAs) and has also joined the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and SAARC Limited Multilateral Agreement. These agreements contain the legal framework for receiving and providing information for tax purposes available with the other countries/ jurisdictions, which the tax authorities of a country cannot access using their own powers, as the information lies outside the territorial jurisdiction of the country.

The Income Tax Authorities entrusted with the administration of the Income-tax Act, 1961, may make requests for information in conformity with the relevant provisions of the DTAAs/TIEAs/Multilateral Agreements, if they are of the view that information received from a foreign jurisdiction would be helpful in assessment and determination of income, collection and recovery of taxes, investigation of tax matters or prosecution in relation to tax matters. The guidelines for making such requests have now been provided in the Manual on Exchange of Information *vide* these Instructions.

All correspondence relating to Exchange of Information, including requests for further clarifications, additional requests, interim or final reports, etc. should be made by the Commissioner of Income Tax/Director of Income Tax concerned, to the Competent Authority, i.e., JS (FT&TR-I) and JS (FT&TR-II) as the case maybe, ensuring that strict confidentiality is maintained. Any violation of confidentiality provisions may attract action under section 280 of the Income-tax Act, 1961, in addition to administrative actions. The guidelines for maintaining confidentiality as provided in the Manual are to be followed by all the officers concerned. The instruction herein comes into force with immediate effect.

The content of this Manual on Exchange of Information has been organised in the following manner. After Introduction, the legislative framework of Exchange of Information and other forms of Administrative Assistance under India's DTAAs and TIEAs have been explained in Chapter-II. Chapter-Ill provides the guidelines and the Proforma which the field formations should follow while making any specific request from foreign tax administrators. Chapter-IV provides the guidelines to be followed in case a request is received from abroad, which is equally important as all the tax treaties are bilateral and if India want to continue receiving assistance India must provide assistance to them timely and efficiently. Chapter-V provides the guidelines in case of requests made/received under the provisions of Assistance in Collection of Taxes while Chapter-VI discusses other forms of administrative assistance under the treaties such as Automatic and Spontaneous Exchange of Information, Tax Examination Abroad, Simultaneous Examination and Joint Audits. Chapter-VII provides guidelines for utilisation of information received from a foreign jurisdiction including providing of regular feedback while in Chapter-VIII, necessity to maintain strict confidentiality in all forms of Exchange of Information is explained.

(Instruction No. 1 of 2013 [F. No. 500/90/2007-FTD-1], dated 17-1-2013)

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

The Indian Software Industry has been the beneficiary of direct tax incentives under the provisions like sections 10A, 10AA & 10B of the Income-tax Act, 1961 in respect of their profits derived from the export of computer software. These provisions prescribe incentives to "units" or "undertakings", established under different schemes, which are/were deriving profits from export of computer software subject to fulfilling the prescribed conditions.

Since it has been represented by the software companies that several issues arising from the above-mentioned provisions are giving rise to disputes between them and the Income-tax authorities leading to denial of tax benefits and consequent litigation and, therefore, require clarification.

Various issues highlighted by the Software Industry have been examined by the Board and various clarifications have been issued by the board *vide* this circular.

1. The board clarified that the software developed abroad at a client's place would be eligible for benefits under the respective provisions, because these would amount to 'deemed export' and tax benefits would not be denied merely on this ground. However, since the benefits under these provisions can be availed of only by the units or undertakings set up under specified schemes in India, it is necessary that there must exist a direct and intimate nexus or connection of development of software done abroad with the eligible units set up in India and such development of software should be pursuant to a contract between the client and the eligible unit. To this extent, Circular No. 694, dated 23-11-1994 stands further clarified.

2. Further Explanation 3 to sections 10A and 10B and Explanation 2 to section I0AA clearly declare that profits and gains derived from "services for development of software" outside India would also be deemed as profits derived from export. It is therefore clarified that profits earned as a result of deployment of Technical Manpower at the client's place abroad specifically for software development work pursuant to a contract between the client and the eligible unit should not be denied benefits under sections 10A, 10AA and 10B provided such deputation of manpower is for the development of such software and all the prescribed conditions are fulfilled.

3. As per the practice prevalent in the software development industry, generally two types of agreement are entered into between the Indian software developer and the foreign client. Master Services Agreement (MSA) is an initial general agreement between a foreign client and the Indian software developer setting out the broad and general terms and conditions of business under the umbrella of which specific and individual Statement of Works (SOW) are formed. These SOWs, in fact, enumerate the specific scope and nature of the particular task or project that has to be rendered by a particular unit under the overall ambit of the MSA. The tax benefits under sections 10A, 10AA and 10B would not be denied merely on the ground that a separate and specific MSA docs not exist for each SOW. The SOW would normally prevail over the MSA in determining the eligibility for tax benefits unless the Assessing Officer is able to establish that there has been splitting up or reconstruction of an existing business or non-fulfilment of any other prescribed condition.

4. The definition of "computer software" stipulated under Explanation 2 to sections 10A and 10B includes "any customised electronic data or any product or service of similar nature, as may be notified by the Board,...". The CBDT had already issued Notification No. 890(E), dated 26-9-2000 specifying such items. The notification includes Engineering and Design but does not specifically include Research and Development activities related to software development in respect of which clarification has been sought. The services covered by the aforesaid Notification, in particular, the 'Engineering and Design' do have the in-built elements of Research and Development. However, for the sake of clarity, it is reiterated that any Research and Development activity embedded in the 'Engineering and Design', would also be covered under the said Notification for the purpose of Explanation 2 to the above provisions.

5. The vital factor in determining the above issue would be facts such as how a slump-sale

is made and what is its nature. It will also be important to ensure that the slump sale would not result into any splitting or reconstruction of existing business. These are factual issues requiring verification of facts. It is, however, clarified that on the sole ground of change in ownership of an undertaking, the claim of exemption cannot be denied to an otherwise eligible undertaking and the tax holiday can be availed of for the unexpired period at the rates as applicable for the remaining years, subject to fulfilment of prescribed conditions.

6. Since there is no requirement in law to maintain separate books of account, the same cannot be insisted upon. However, since the deductions under these sections are available only to the eligible units, the Assessing Officer may call for such details or information pertaining to different units to verify the claim and quantum of exemption, if so required.

7. This issue relates to cases where an eligible SEZ unit is shifted from one SEZ to another SEZ on account of commercial exigencies. This shifting is permissible under Instruction No. 59 (F. No-C-4/2/2010-SEZ) issued by Department of Commerce (SEZ Division), provided approval from the Board of Approvals (BOA) has been obtained. Doubts have been raised whether such shifting of an eligible unit would deprive the unit/undertaking of tax benefits, provided there is no splitting or reconstruction of an existing business.

8. The matter has been examined and it is clarified that the tax holiday should not be denied merely on the ground of physical relocation of an eligible SEZ unit from one SEZ to another in accordance with Instruction No. 59 of Department of Commerce (referred to above) and if all the prescribed conditions are satisfied under the Income-tax Act, 1961. It is further clarified that the unit so relocated will be eligible to avail of the tax benefit for the unexpired period at the rates applicable to such years.

9. Whether setting up of new unit/ undertaking in a location (covered by sections 10A, 10AA or 10B), where an eligible unit is already existing, would amount to expansion of such already existing unit is a matter of fact requiring examination and verification. However, it is clarified that setting up of such a fresh unit in itself would not make the unit ineligible for tax benefits, as long as the unit is set-up after obtaining necessary approvals from the competent authorities; has not been formed by splitting or reconstruction of an existing business; and fulfils all other conditions prescribed in the relevant provisions of law.

(Circular No. 1/2013 [F. No. 178/84/2012-ITA.I], dated 17-1-2013)

Heads of the Revenue of Brics Countries Identifies Seven areas of tax policy and tax Administration for Extending their Mutual Co-operation; joint Communique issued by the heads of Revenue of Brics Countries : Affirming the continued commitment to promote closer co-ordination and co-operation in the area of tax administration, the Heads of the Revenue of the BRICS Countries i.e. Brazil, Russia, India, China and South Africa, identified seven areas of tax policy and tax administration, for extending their mutual co-operation. This was contained in the Joint Communique issued by the Heads of Revenue of BRICS Countries. This mutual co-operation included contribution to development of international standards on International Taxation and Transfer Pricing taking into account the aspirations of developing countries in general and BRICS Countries in particular. The other areas of co-operation being strengthening the enforcement processes, sharing of best practices and capacity building, sharing of anti-avoidance and non-compliance practices and promotion of effective exchange of information.

The communiqué expressed the concerns of BRICS Countries at the erosion of the tax base by practices that involved abuse of tax treaty

benefits, incomplete disclosure of information and fraudulent claims and made a commitment to address these concerns by preventing the base erosion and profit shifting through mutual co-operation and expressed an agreement amongst BRICS Countries for working together towards capacity building, improvement of systems and sharing of resources, knowledge and best practices and emphasised the spirit of co-operation and solidarity that underlies the BRICS partnership and aims at extending it to the area of tax administration in a way that will benefit the people of BRICS Countries.

The Heads of Revenue of BRICS Countries discussed on issues relating to International Taxation, Transfer Pricing, Prevention of Cross-border tax evasion and avoidance, exchange of information, sharing of best practices in tax system administration and resolution of disputes and agreed to develop greater co-operation among their tax administrations on various issues of mutual interest and concerns. The communiqué recognises the importance of the economic and commercial links amongst BRICS Countries and the need to contribute to the strengthening of these links. The Joint Communique included matters relating Tax Administration Co-operation, Confronting Non-Compliance with the Tax Laws in an International Context, Capacity Building, Multilateral Co-operation and Governance Issues.

(Full details - Press Release, dated 18-1-2013)

Final Report of the expert committee on General Anti Avoidance Rules (GAAR) in Income-tax Act, 1961 – Recommendations for Amendments in the Act, Guidelines, and Clarifications through Circular

A number of countries have provided for General Anti Avoidance Rules (GAAR) in matters relating to taxation. While tax mitigation is recognised, tax avoidance is frowned upon. International literature describes tax avoidance as the legal exploitation of tax laws to one's own advantage and an arrangement entered into solely or primarily for the purpose of obtaining a tax advantage. The principle of GAAR was incorporated in the Direct Taxes Code which was introduced as a Bill in Parliament in August 2010.

Pending consideration of the Bill, the Income-tax Act, 1961 was amended by Finance Bill, 2012 to add Chapter X-A titled 'General Anti-Avoidance Rule'. It became part of the law when the Finance Bill was passed by Parliament. Draft GAAR guidelines were also published. Under the current provisions, Chapter X-A would come into force with effect from April 1, 2014. A number of representations were received against the provisions contained in Chapter X-A. Hence, in July 2012, an Expert Committee on GAAR to undertake stakeholder consultations and finalise the guidelines for GAAR was constituted. Accordingly, an Expert Committee was also constituted in July 2012 with broad terms of reference including consultation with stakeholders and finalising the GAAR guidelines and a roadmap for implementation.

The Expert Committee submitted its draft report in August 2012 which was placed in the public domain in September 2012. After examining the responses to the draft, the Expert Committee submitted its final report in September 30, 2012. The major recommendations of the Expert Committee have been accepted, with some modifications, and the following decisions have been taken by Government:

(i) An arrangement, the main purpose of which is to obtain a tax benefit, would be considered as an impermissible avoidance arrangement. The current provision prescribing that it should be "the main purpose or one of the main purposes" will be amended accordingly. (ii) The assessing officer will be required

to issue a show cause notice, containing reasons, to the assessee before invoking the provisions of Chapter X-A. (iii) The assessee shall have an opportunity to prove that the arrangement is not an impermissible avoidance arrangement. (iv) The two separate definitions in the current provisions, namely, 'associated person' and 'connected person' will be combined and there will be only one inclusive provision defining a 'connected person'. (v) The Approving Panel shall consist of a Chairperson who is or has been a Judge of a High Court; one Member of the Indian Revenue Service not below the rank of Chief Commissioner of Income-tax; and one Member who shall be an academic or scholar having special knowledge of matters such as direct taxes, business accounts and international trade practices. The current provision that the Approving Panel shall consist of not less than three members being Income-tax authorities or officers of the Indian Legal Service will be substituted. (vi) The Approving Panel may have regard to the period or time for which the arrangement had existed; the fact of payment of taxes by the assessee; and the fact that an exit route was provided by the arrangement. Such factors may be relevant but not sufficient to determine whether the arrangement is an impermissible avoidance arrangement. (vii) The directions issued by the Approving Panel shall be binding on the assessee as well as the Income-tax authorities. The current provision that it shall be binding only on the Income-tax authorities will be modified accordingly. (viii) While determining whether an arrangement is an impermissible avoidance arrangement, it will be ensured that the same income is not taxed twice in the hands of the same tax payer in the same year or in different assessment years. (ix) Investments made before August 30, 2010, the date of introduction of the Direct Taxes Code, Bill, 2010, will be grandfathered. (x) GAAR will not apply to such FIIs that choose not to take any benefit under an agreement under section 90 or section 90A of the Income-tax Act, 1961. GAAR will also not apply to non-resident investors in FIIs. (xi) A monetary threshold of ₹ 3 crore of tax benefit in the arrangement will be provided in order to attract the provisions of GAAR. (xii) Where a part of the arrangement is an impermissible avoidance arrangement, GAAR will be restricted to the tax consequence of that part which is impermissible and not to the whole arrangement. (xiii) Where GAAR and SAAR are both in force, only one of them will apply to a given case, and guidelines will be made regarding the applicability of one or the other. (xiv) Statutory forms will be prescribed for the different authorities to exercise their powers under section 144BA. (xv) Time limits will be provided for action by the various authorities under GAAR. (xvi) Section 245N(a)(iv) that provides for an advance ruling by the Authority for Advance Rulings (AAR) whether an arrangement is an impermissible avoidance arrangement will be retained and the administration of the AAR will be strengthened. (xvii) The tax auditor will be required to report any tax avoidance arrangement.

Further, having considered all the circumstances and relevant factors, Government has also decided that the provisions of Chapter X-A will come into force with effect from April 1, 2016 (as against the current provision of April 1, 2014). The final report of the Expert Committee has been put on the website of the Ministry of Finance.

(Press release, dated 14-1-2013)

CA Tarunkumar Singhal & CA Sunil Lala

INTERNATIONAL TAXATION
Case Law Update

A] HIGH COURT JUDGMENTS

I India-Germany DTAA – Whether the DTAA benefit with respect to lower rate of tax on royalties/ fees for technical services can be granted to a German limited liability partnership in view of a) fact that it has paid trade tax in Germany and b) TRC issued by German authorities? Held : Yes – Whether OECD Commentary cannot be relied to determine residence? Held : Yes

DIT vs. Chiron Bearing GmbH & Co. [TS-12-HC-2013 (Bom.)] Assessment Year: 2002-03

Facts

1 The assessee, Chiron Bearing GmbH & Co., a non-resident limited liability partnership in its return of income had claimed benefit of lower rate of tax under Article 12(2) of the Double Taxation Avoidance Agreement between India & Germany ("the DTAA") in respect of Royalties and Fees for Technical Services received by it in India.

2 The AO however, denied the benefit of the DTAA as claimed on the ground that the respondent assessee was not liable to tax in Germany being a limited partnership. This conclusion was reached on the basis of the OECD Publication "The Application of the OECD Mode Tax Convention to Partnership."

3 On appeal, the CIT(A) and the Hon'ble Tribunal accepted the claim of the assessee placing reliance on the Tax Residency Certificate issued by the German Tax Authorities and the fact that the assessee had paid Trade Tax in Germany which is paid on the profits of the business.

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

Judgment

1 The Hon'ble High Court on examination of the DTAA found that in terms of Article 2(3) thereof the trade tax paid in Germany is one of the taxes to which DTAA applies. Further, in Article 3(d) of DTAA person includes any entity treated as taxable unit in Germany. It also noted the term 'resident' in terms of Article 4 of the DTAA means "any person who, under the laws of Germany is liable to tax therein by reason of his domicile, residence, place of management or any criterion of a similar nature".

2 It further observed that both the CIT(A) and the Hon'ble Tribunal on examination of records had recorded a factual finding that respondent assessee was filing Trade Tax Return in Germany. Hence, the assessee was paying tax to which the DTAA applies. Further, the Tax Resident Certificate issued by German Authorities evidenced the fact that the respondent assessee was considered as a taxable unit under the taxation laws of Germany.

3 The Hon'ble High Court thus held that the DTAA was applicable to the assessee and the benefit of Article 12(2) could not be denied. Further, the Hon'ble High Court rejected the Revenue's submission that the assessee cannot be considered as a taxable entity in view of the OECD Commentary for the reason that the entire issue is governed by the DTAA on the basis of evidence led before the authorities.

4 As regards the levy of interest under section 234B of the Income-tax Act, 1961 ("the Act"), it held that the same is covered in favour of the assessee in view of the decision of the *Hon'ble Bombay High Court in DIT vs. NGC Network Asia LLC.*

II. Whether foreign allowances paid to seconded employees who are on payroll of other companies are not subject to deduction of tax under section 192 of the Act and therefore non deduction of tax on such payments would not invoke disallowance under section 40(a)(iii)? Held : Yes – Whether the benefit under section 91(1) of the Act cannot be denied even if the actual tax payment is made in the year other than the relevant previous year? Held : Yes

CIT vs. M/s Petroleum India International [TS-10-HC-2013 (Bom.)] Assessment Year: 1997-98

Facts

1 The assessee, Petroleum India International, an AOP consisting of nine public sector oil companies as its members, was engaged in doing business abroad and for that purpose deployed trained manpower to foreign companies at contracted rate. The trained manpower was drawn from the employees of its member firms.

2 During the year, the assessee claimed an amount of ₹ 3.93 crores as expenditure being the compensation paid to the employees of the oil companies seconded abroad. Further, the assessee paid taxes of ₹ 82 lakhs in Kuwait on the income earned in Kuwait and sought benefit of tax payable in India under section 91(1) of the Act.

3 The AO however, denied the claim of ₹ 3.93 crores paid to seconded employees on account of non-deduction of tax under section 192 of the Act and consequently disallowed the payment under section 40(a)(iii). Further it also denied the benefit of section 91(1) on the ground that the payment of taxes in Kuwait was not made in previous year relevant to the assessment year under consideration.

4 On appeal, the CIT(A) and the Hon'ble Tribunal allowed the claim of the assessee for payment made to seconded employees and benefit of 91(1) on taxes paid in Kuwait.

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

Judgment

1 The Hon'ble High Court observed that the seconded personnel continued to be the employees and were on the payroll of the member oil companies even during the period of secondment. Also, they continued to receive salary from the member oil company of which they were employees.

2 The Hon'ble High Court thus held that since the seconded employees were not the employees of the assessee, the amount paid as foreign allowances to the seconded personal was not liable for deduction of tax and consequently application of section 40(a)(iii) of the Act doesn't arise.

3 It further held that the object of section 91(1) of the Act was to give relief from taxation in India to the extent taxes paid abroad for the relevant previous year. This deduction /relief was not dependent upon the payment being made in the previous year and therefore the assessee cannot be denied benefit under section 91(1) for taxes paid in Kuwait considering the fact that the actual tax payment was made in another year.

III. Transfer Pricing – Whether the Hon'ble Tribunal's ruling deleting notional interest imputed on outstanding receivables from AE cannot be faulted in view of the fact that interest on overdue debtors was not charged from AEs as well as non-AEs and the delay in realisation of export proceeds was also similar in both cases? Held :Yes

CIT vs. Indo American Jewellery Ltd. [TS-3-HC-2013 (Bom.)-TP]

Facts

1 The assessee, Indo American Jewellery Ltd., had an outstanding balance amounting to ₹ 8.76 crores from Associated Enterprises which was outstanding for more than one year on which no interest was charged by the assessee.

2 The Transfer Pricing Officer ("TPO"), while determining the Arm's Length Price of international transactions, made an adjustment of ₹ 87.66 lakhs being interest receivable on above outstanding balance taking the rate of interest at 10%.

3 On appeal, the CIT(A) held that the total outstanding amount was ₹ 8.73 crores and out of which the amount outstanding from the Associated Enterprises was to the extent of ₹ 5.11 crores and the balance amount of ₹ 3.62 crores was outstanding from non Associated Enterprises. Relying on the Board Circular No. 12 of 2001, the CIT(A) further held that in the present case, the profit of one Associated Enterprise was negligible and the other Associated Enterprise had incurred losses and therefore it could not be said that the assessee had transferred any profit to the Associated Enterprises outside India by not charging interest on the outstanding payment which had been realised after the due date and accordingly deleted the interest charged on late realisation of the export proceeds.

4 On further appeal, the Hon'ble Tribunal upheld the order of CIT(A) holding that that interest income was associated only with the lending or borrowing of money and not in case of sale.

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

Judgment

1 The Hon'ble High Court did not express any opinion on the above reasoning of the Hon'ble Tribunal and kept that reasoning open for debate in an appropriate case.

2 It however held that in the present case the decision of the Hon'ble Tribunal in deleting the notional interest on outstanding amount of export proceeds realised belatedly cannot be faulted since there was a specific finding of the Tribunal that there was complete uniformity in the act of the assessee in not charging interest from both the Associated Enterprises and Non Associated Enterprises debtors and the delay in realisation of the export proceeds in both the cases was same.

B) Tribunal Decisions

I) Fees for technical services vs Business profits – Assessee, a US company, acted as a communication interface between its group concerns and group concerns' multinational clients – Assessee provided its services to one of its group concerns, EARPL, and received ₹ 75.66 lakh as creative fees, database cost and client co-ordination fees – Whether 'creative fees' and 'database cost' were in nature of 'fees for included services' as defined in article 12 and, therefore, were chargeable to tax in India at the rate of 15 per cent under Article 12(2)(a)(ii) – Held, Yes – Whether, however, 'client co-ordination fees' could be taxed as 'business profits' only and since assessee did not have a PE in India, same could not be taxed in India – Held,

yes – Partly in favour of assessee – India-USA DTAA

DDIT vs. Euro RSCG Worldwide Inc. [2012] 28 taxmann.com 176 (Mum.) Assessment Year 2010-11

Facts

i) Assessee was a US company who acted as a communication interface between multinational clients and assessee's various group concerns working in respective regions.

ii) Assessee set up a centralised group of persons who acted as a communication channel between local group entities and their clients. The said group of persons served as a common and centralised point of interaction for the clients in order to ensure that the work produced was of an international standard.

iii) Assessee incurred cost as salaries, overheads etc. and charged same to its regional group entities.

iv) Assessee provided its services to one of its group entities, EARPL, and incurred certain costs on behalf of EARPL and received a consideration of ₹ 75.66 lakh which included creative fees of ₹ 30.18 lakh, database cost of ₹ 17.85 lakh and client co-ordination fees of ₹ 27.63 lakh.

v) Assessee treated consideration of ₹ 75.66 lakh as its business profits under Article 7 of Indo-US treaty and since it had no PE in India, it declared 'nil' income in its return of income.

vi) Assessing Officer did not agree with assessee and held amount in question to be in nature of royalty and charged same to tax at the rate of 15 per cent.

vii) On appeal by the assessee, the Commissioner (Appeals) held that the amount received from EARPL towards client co-ordination fees was in the nature of business profits and since assessee did not have a permanent establishment in India, the question of taxability of impugned amount did not arise in the absence of PE as provided for in Article 7 of the DTAA. With reference to the creative fees and the database cost, the Commissioner (Appeals) was of the opinion that they were in the nature of fees for included services as provided under the DTAA and held that they were taxable in India.

viii) Revenue was aggrieved on the deletion of client co-ordination fee from taxing as royalty and for that reason preferred instant appeal.

Decision

i) The Commissioner (Appeals) held that the client co-ordination fees paid to the assessee cannot be termed as royalty because it is not a consideration for the use of right or to use any of the specified terms mentioned in the definition of royalty under Article 12 of Indo-US DTAA; the observation of Assessing Officer that the client co-ordination services rendered by the assessee involve the use of a plan, secret formula, or process by ERAPL is without any basis. The client co-ordination fees can be taxed as business profits only. Since the assessee admittedly does not have a permanent establishment in India, the question of taxability of the impugned amount in India would not arise in the absence of PE, as provided for in Article 7 of DTAA.

ii) Nothing was brought on record to counter the findings of the Commissioner (Appeals). Considering the nature of the payment the findings of the Commissioner (Appeals) is agreed with.

II) Non-Resident – Taxation of EPC Contract – Irrespective of whether the contract awarded to a non-resident is categorised as 'turnkey project' or is 'divisible into various revenue components', only so much of profits as are attributable to PE in India is liable to Indian taxation – India-UAE DTAA.

National Petroleum Construction Company vs. ADIT [2012] 26 taxmann.com 50 (Delhi - Trib.) Assessment Year 2007-08

Facts

i) The assessee, a tax-resident of UAE, was awarded a contract by ONGC on the basis of International Competitive Bidding process. The

contract had two distinct components – one, for designing, fabrication and supply of material to be carried out exclusively in Abu Dhabi and the other, for installation and commissioning of the erected platform in India. Thus, the assessee fabricated the platform in Abu Dhabi, got it certified by ONGC's approved surveyors and thereafter, it was brought to India with the help of assessee's barges and the possession was handed over to ONGC.

ii) For the A.Y. 2007-08, the AO computed the income of the assessee at ₹ 164,52,67,897 as against the declared income of ₹ 10,77,98,1661, which was duly ratified by the DRP despite serious objections from the assessee.

iii) The AO held that the assessee had a P.E. in India and the entire receipts even for the activities undertaken and completed outside India were to be taxed in India by estimating such income @25% of the gross value of supplies made from outside India. The AO also considered the project a 'turnkey project' which was not divisible.

Decision

The Tribunal held as follows:

i) Whether the assessee had PE in India

a) Project Office as PE

- It was held that the assessee itself had shown the Project Office as its PE in India in earlier years as well as in the year under consideration. The assessee had in its letter to RBI stated that the Mumbai Office was its Project Office for the project undertaken with ONGC. In fact, the Project Office had been approved by RBI to undertake the entire project.
- As per the Indo-UAE treaty, the Project Office is a PE unless it is involved in ancillary and auxiliary activity. The assessee had not produced any evidence, to stake its claim in the exclusionary clause of the Treaty's provision.
- Further, it was found that assessee was a non-resident and had entered into a contract which had lasted for approximately 2 years. It was not possible to execute a contract of this magnitude without having any fixed place of business in India. Thus, the project office in India was assessee's PE.

b) Agent of the assessee as PE

- The assessee denied Arcadia Shipping (AS) to be its agent but the finding of AO confirmed that AS was also a PE of assessee as it was actively involved in the project since pre-bidding meetings, hard core marketing and business development and till finalisation of the contract. Further, there was considerable cogency in the AO's arguments that AS was wholly and exclusively worked for the assessee, which is a precondition for dependent agent permanent establishment.

c) Assessee having installation PE

- The AO also observed that assessee had PE in terms of Article 5(2)(h) of Indo-UAE Treaty i.e. construction and installation PE. As per Article 5, PE includes a building site or construction or assembly project or supervisory activities in connection therewith but only where such site project or activity continues for a period of more than nine months. In the instant case project office had been established *vide* letter dated 24-1-2006. Further, the assessee had sub-contracted pre-engineering and pre-construction surveys. Thus, assessee's plea that PE existed only after barges landed in India was not correct and it was to be agreed that PE existed since the notification of award as the site was available to the assessee from that time onwards for surveys at various stages of work progress. In other words, the assessee had installation PE in India.

ii) Whether the contract awarded by ONGC was divisible

- Based on the facts and discarding the contention of revenue, it was to be held that the contract was not a turnkey project. Though it could be construed as an umbrella contract yet it was a divisible contract since

under the same contract, the consideration for various activities had been stated separately. Further, since as per the terms of the contract either party could withdraw or abandon the contract and also the company or the contractor had not to make entire payments or refund the amounts received, it could be concluded that it was not a turnkey contract.

- The terms and conditions revealed that ONGC had discretion to either take the platform erected at Abu Dhabi or terminate the contract without installation, in which case the assessee would not receive any amount towards installation and commissioning but would be entitled for the contract price attributable to the erection of fabricated platform. Similarly, if the assessee likewise abandoned the contract at any stage, it would not be bound to refund any amount so received from ONGC in respect of the work already executed by it. This was also an indication that it was not a turnkey contract.

- The scope of work under the contract involved sequential activities like design and engineering, material procurement, fabrication, transportation, installation and commissioning. The contract provided separate payments to the assessee on the basis of work of design, engineering, procurement and fabrication and it was noteworthy that all these operations had been carried out outside India.

- The insurance policy though was taken by assessee but ONGC was the joint beneficiary and in case a loss was suffered during transportation, the payee of the insured amount was also ONGC.

iii) Income attributable to PE in India

- It was to be held that income attributable to PE in India could not extend to the activities carried outside India and had to be therefore confined to incomes from activities carried in India.

- The segregation of the contract revenues into offshore and onshore activities was agreed upon between ONGC and the assessee at the stage of awarding the contracts and not afterwards. The bifurcation of revenues as 'inside India revenues' and 'outside India revenues' was also evident from the contract itself, invoices raised, insurance cover taken on the fabricated platform and surveyor's report issued at the time of load out of fabricated platform at Abu Dhabi port.

- As already noticed, the assessee had PE in respect of installation and commissioning but did not have a PE in respect of i.e. offshore supplier erection and fabrication of the platform in Abu Dhabi. Thus, the profits which could be attributed to the PE in India were only in respect of installation and commissioning activities and hence, profits attributable to the supplies i.e. erection and fabrication of the platforms at Abu Dhabi could not be brought to tax in India.

- Even if the contract was considered to be a turnkey contract, entire contract revenue could not be taxed in India but only so much of the profit as was attributable to the PE India was liable to Indian taxation.

III) Taxation of Shipping Profits – Benefit of DTAA with Netherlands was not available to Netherlands company in respect of freight where it chartered a ship from Iranian company which was substantial freight beneficiary

Marine Links Shipping Agencies vs. ADIT [2013] 29 taxmann.com 10 (Bang.) Assessment Year 2009-10

Facts

i) The assessee was an agent of a Netherlands based shipping company 'PV'. PV chartered a ship which was owned by an Iranian company. The

ship was engaged to carry granite blocks from Mangalore to Belgium and other places.

ii) The assessee filed the return of income under section 172(3) on behalf of 'PV' and claimed that 'PV' was the beneficiary of the freight and hence it was entitled to the benefit of India-Netherlands DTAA.

iii) The income tax authorities noted that as per the charter party document, the Iranian company was the owner of the ship whereas in the return, 'PV' was shown as the charterer and beneficiary of freight. It was concluded that the charterer, 'PV' acted only on behalf of its principal i.e., Iranian company and charged commission; therefore, the treaty with Netherlands could not be applied, since the owners of the ship were the beneficiary and not the charterers.

iv) It was further held that since the treaty with Iran did not provide taxation of income from shipping, the assessment was to be made as per the Income-tax Act.

v) The Commissioner (Appeals) held that the charterer could not be regarded as freight beneficiary as freight finally went to the account of the owner being the Iranian company; therefore, relief under the DTAA was not allowable to the Iranian company which was freight beneficiary.

Decision

The Tribunal in favour of the Revenue as follows:

i) The solitary issue that arises for consideration is, who is the freight beneficiary in the charter party executed by the owner of the ship (Iranian entity) and the charterer of the ship (Netherlands entity). If the charterer (Netherlands entity) is the freight beneficiary, the relief under DTAA between India and Netherlands is available, whereas there is no such benefit if the freight beneficiary is the owner of the vessel, the Iranian party. The dispute is to be resolved by reference to clauses 13 and 14 of the charter party executed between the owner of the ship and the charterer.

ii) Clause 14 clearly stipulates 100 per cent freight charges reduced by 3.75 per cent commission is payable within 4 banking days upon completion of last load port by the charterer to the owner's bank account. Out of commission of 3.75, 2.5 per cent goes to 'PV' (the charterer) and 1.25 per cent to the ship broker.

iii) Clause 13 stipulates minimum freight is to be paid to the owner of the ship (the Iranian party) at the rate of 46 Euros of minimum of 19,500 tonnes. Clause 13 further stipulates if the tonnage exceeding 19,500 m.tonnes; the additional freight is to be calculated depending upon the intake of the cargo. Thus, the owner of the ship (Iran entity) is not only entitled to freight of a minimum tonnes of 19,500 but also an additional freight depending on intake of the cargo. Therefore, the risk and liabilities undertaken by the charterer PV is only in the event of the tonnage being less than 19,500 tonnes.

iv) Raising of invoice by the charterer and charging 49 Euros per m.tonne is of no relevance, since substantial portion of the freight is paid to the owner of the ship namely, the Iranian entity. As stated earlier, the risk and liabilities undertaken by the charter 'PV', the Netherlands entity, is limited only to a situation where the tonnage carried by the vessel is less than 19500 tonnes.

v) Therefore, the substantial freight beneficiary is the owner of the ship, the Iranian entity and in view of this, the conclusion of the revenue authorities that relief under DTAA is not allowable is justified and in accordance with law and no interference is called for.

vi) In the result, the appeal filed by the assessee is dismissed.

IV) Force of attraction principle – India-UK DTAA – The categories (b) and (c) in Article 7(1) of UN Model Convention clearly incorporate a force of attraction rule as is embedded in Article 7 of the India-UK treaty; the basic philosophy underlying this rule is

that when an enterprise sets up a PE in another country, it brings itself within the jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country – wWhether the transactions are routed and performed through the PE or not

Linklaters & Paines vs ITO [2012] 28 Taxmann.com 250 (Mumbai - Trib.) Assessment Year 1995-96

Facts

i) The assessee, a partnership firm of solicitors and having its head office at London, carried out certain work on Indian projects, majority of which was done in U.K. and some of the work was done in India by persons who visited for short period of time.

ii) The AO taxed the entire income earned by the assessee from Indian projects although only a part of the services in relation to the said projects was performed in India.

iii) The Tribunal upholding the decision of AO that the assessee had a service PE in India, confirmed that the entire income earned by the assessee from Indian projects was taxable in India in view of the force of attraction principle embedded in Article 7 of the India-UK DTAA.

Case of the assessee

i) It was submitted that the Tribunal relied on Articles 7(1)(b) and 7(1)(c) of the UN Model Convention to decide the issue of attribution of profit holding that the said provisions are akin to the provisions of Articles 7(1) and 7(2) of the India-UK DTAA.

ii) However, the assessee submitted that there is no provision in Article 7 of UN Model Convention which is akin to the provision of Article 7(3) of India-UK DTAA.

iii) The assessee also submitted that the force of attraction principle contained in the UN Model Convention is completely different from the "direct and indirect attribution" principle contained in India-UK DTAA and the conclusion reached by the Tribunal relying on the force of attraction principle contained in UN Model Convention overlooking Article 7(3) of India-UK DTAA explaining what is indirectly attributable to a PE has given rise to a mistake apparent from record inasmuch as the entire income from the Indian projects is held to be taxable in India by the Tribunal irrespective of whether the activity is done in India or not which is erroneous being contrary to the scope of indirect income attributable to PE as expressly defined in Article 7(3) of the India-UK Tax Treaty.

iv) By this miscellaneous application, the assessee is seeking rectification of mistake alleged to have crept in the order of Tribunal.

Decision

The Tribunal held as follows:

i) The question, in the present case is whether the Tribunal could be said to have rendered its decision on the issue of computation of profit attributable to the PE of the assessee in India without considering Article 7(3) of the India-UK DTAA as alleged by the assessee. Article 7(3) of India-UK treaty, defines the taxability of profits which are indirectly attributable to PE in India.

ii) It is noted that after the issue was decided by AO against the assessee, the CIT(A) had accepted the contention of the assessee that only the income related to the services performed in India was attributable to the PE in India and only that portion of income ought to be charged to tax in India. Aggrieved by this relief, the Revenue went in appeal before the Tribunal.

iii) The Tribunal, after carefully considering the factual matrix of the case as also the applicable legal position, observed that none of the reasons given by the CIT(A) to give relief to the assessee on this issue was found to be sustainable in law.

iv) In Para 145 of its order, the Tribunal mentioned as under:

"145. Learned CIT(A) has apparently taken note of the profits of the work performed in the PE itself but he has not taken note of the position that it is (not) only in respect of the profits directly attributable to work done in the PE but it is in respect of profits "directly" or even "indirectly" attributable to the permanent establishment. The import of "directly or indirectly attributable to PE" has been clearly ignored. The inclusion of 'profits indirectly attributable to the PE' clearly incorporates a force of attraction principle in the India-UK tax treaty, but the CIT(A) has simply not taken note of that aspect of the matter. In this view of the matter, we cannot, and do not, approve the action of the CIT(A) in this respect."

v) In Para 146 of its order, the Tribunal, in respect of 'extension of taxability of profits of PE by including profits directly or indirectly attributable', stated that it is akin to the provisions of Articles 7(1)(b) and 7(1)(c) of the UN Model Convention, as under:

"146. The extension of taxability of profits of PE by including profits directly or indirectly attributable, is akin to the provisions of Articles 7(1)(b) and 7(1)(c) of the UN Model Convention which provides that in addition to the "profits attributable to the permanent establishment" the taxability of PE profits will also extend to "(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business carried on in that other State of the same or similar kind as those effected through that permanent establishment". In our considered view, the connotations of "profits indirectly attributable to permanent establishment" will extend to these two categories. These categories clearly incorporate a force of attraction rule. The basic philosophy underlying the force of attraction rule is that when an enterprise sets up a permanent establishment in another country, it brings itself within the jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country – whether the transactions are routed and performed through the PE or not."

vi) In Para 148 of its order, the Tribunal mentioned as under:

"148. In our considered view, therefore, the connotations of "profits indirectly attributable to permanent establishment" do indeed extend to incorporation of the force of attraction rule being embedded in Article 7(1). The way it needs to be implemented, on the facts of the present case, is like this. In addition to taxability of income in respect of services rendered by the PE in India, any income in respect of the services rendered to an Indian project, which is similar to the services rendered by the permanent establishment, is also to be taxed in India in the hands of the assessee – irrespective of the fact whether such services are rendered through the permanent establishment, or directly by the general enterprise. There cannot be any professional services rendered in India which are not, at least indirectly, attributable to carrying out professional work in India. This indirect attribution, in view of the specific provisions of India-UK tax treaty, is enough to bring the income from such services within ambit of taxability in India. The twin conditions to be thus satisfied for taxability of related profits are (i) the services should be similar or relatable to the services rendered by the PE in India; and (ii) the services should be 'directly or indirectly attributable to the Indian PE' i.e. rendered to a project or client in India. In effect thus, entire profits relating to services rendered by the assessee, whether rendered in India or outside India, in respect of Indian projects is taxable in India. That is precisely what the Assessing Officer had done."

vii) Keeping in view the relevant portion of the order of the Tribunal as above, and having regard to the material available on record, it is found that the controversy involved in relation to the issue was correctly understood by the Tribunal.

viii) As clearly mentioned by the Tribunal in its order, the legal position applicable to the issue was carefully considered by it which obviously included Article 7(3) of the India-UK treaty relied upon by the CIT(A) and after taking the same into consideration, it was held by the Tribunal that the provisions of Article 7(1) in India-UK treaty

included the same results as sought to be achieved by Article 7(1)(c) of the UN Model Convention.

ix) It cannot be said that the Tribunal had ignored or overlooked Article 7(3) of India-UK treaty while rendering its decision and that there was any mistake apparent from record in the order of the Tribunal on account of non-consideration of the said Article as alleged by the assessee.

x) As regards the contention of the assessee that the scope of Article 7(1)(c) of U.N. Model Convention is limited to activities carried on in India only, it is observed that the Tribunal has taken a considered view on interpretation of the said Article that the entire profit relating to services rendered by the assessee whether rendered in India or outside India, in respect of Indian project is taxable in India and it is not permissible to review the decision of the Tribunal in the guise of rectification u/s 254(2).

xi) Thus, the order of the Tribunal does not suffer from any mistake apparent from record as alleged by the assessee.

V) Assessee, a German company, was awarded a contract by State Government for renovation, modernisation and upgradation of a power house – Scope of work of assessee-company included supply of imported equipments and materials from Germany and supervision of erection, start-up and commissioning of power project – Revenue authorities held that amount received by assessee for rendering supervisory services in connection with erection, testing and commissioning of power project was to be taxed in terms of provisions of Article 7 of Indo-German DTAA, read with sections 44D and 115A- Held, yes - In favour of Revenue

Voith Siemens Hydro Kraftwerkstechnik GmbH & Co. KG vs DDIT [2012] 28 taxmann.com 282 (Delhi) Assessment Year 2007-08

Facts

i) The assessee was a non-resident company, having its principal place of business located at Germany. The assessee-company was awarded a contract by OHPC, a Government of Orissa Undertaking for renovation, modernisation, and upgradation of units of its Power House.

ii) The scope of work of assessee-company included supply of imported equipments and materials from Germany, supervision of erection, start-up and commissioning of power project and training of OHPC's personnel.

iii) During the relevant year, the assessee received payment of 10 per cent of contract value related to supervision and training activities. The assessee offered taxation of said amount at the rate of 10 per cent as per section 44BBB.

iv) The revenue authorities, however, held that amount received by assessee for rendering supervisory services in connection with the erection, testing and commissioning of the power project was to be taxed as 'business profit'.

v) The objections raised by assessee before the DRP were rejected.

Decision

The Tribunal held that there was neither any other contrary view nor the assessee brought on record any material controverting the findings of the Assessing Officer in this regard. Accordingly, the finding of the Assessing Officer that amount received by the assessee had to be taxed as business profits in terms of the provisions of Article 7 of the DTAA, read with section 44D and section 115A is confirmed and upheld.

CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

Pre-deposit

Star Paper Mills Ltd vs. Commissioner of C.Ex. & S.T. Meerut [2013 (287) E.L.T. 217 (Tri. – Del.) decided on 10-10-2012]

Brief facts of the case are as follows.

The appellant was manufacturer of paper and paper board. They availed the CENVAT credit in respect of number of inputs and in the course of manufacture, waste sludge emerged which was being sold by the appellant. Department was of the view that such waste sludge was an excisable item covered under sub-heading 382490 of the Central Excise Tariff Act but was exempted from payment of duty. The appellants did not maintain separate account and inventory of the Cenvated inputs used for manufacture of dutiable final product and exempted final product, i.e. waste sludge. The Department raised demand on clearances of sludge (exempted final product), equal to 10% of its sale value under the provisions of Rule 6(3) of CENVAT Credit Rules 2004. along with interest and also imposed penalty under Rule 15 of the CENVAT Credit Rules. On appeal to Commissioner (Appeals), the demand was upheld except for setting aside of penalty. Against the order of the Commissioner (Appeals), appellants preferred appeal before the Hon'ble CESTAT along with an application for stay.

On behalf of the appellants it was submitted that that the sludge emerging as waste in course of manufacture of paper and paper board is not an excisable product, that though the department holds that the same is exempted goods classifiable under 382490 of the Central Excise Tariff, no justification for the same has been provided, it was further submitted that the sludge emerges as an inevitable waste and it is not even possible to maintain separate account and inventory. Reliance was placed on the Hon'ble Bombay High Court judgment in the case of *Rallis India Ltd vs. Union of India [2009 (233) E.L.T. 301(Bom)]* wherein it has been held that in such situation the amount equal to 8% of the sale value cannot be demanded under Rule 57CC of the Central Excise Rules. The present Rules, 6(2) and 6(3) of CENVAT Credit Rules, 2004, are in *pari materia* with the Rule 57CC of the erstwhile Central Excise Rules, 2004 and, therefore, the ratio of Hon'ble Bombay High Court judgment in the case of *Rallis India Ltd vs. Union of India (supra)* would be squarely applicable to the facts of this case. It was therefore submitted that the appellants have a strong *prima facie* case and, hence, the requirement of pre-deposit of amount demanded under Rule 6(3) interest thereon and penalty, may be waived for hearing of the appeal and recovery thereof may be stayed, till the disposal of the appeal.

On behalf of the Department it was further contended that section 2(d) has been amended w.e.f. 10-5-2008 by introducing and explanation that the goods include any article, material or substance which is capable of being sold for some consideration and such goods shall be deemed to be marketable. It is pleaded that in view of the aforesaid amendment, the sludge cleared by an appellant on payment of duty squarely falls within the definition of 'goods' which being covered by sub-heading 3824.90 and being fully exempt from duty, are an exempted excisable goods. Reliance was also placed the Circular No. 904, dated 28-10-2008 issued by the department and also relied upon the judgment of Hon'ble Allahabad High Court in the case of *Hindalco Industries Ltd vs. Union of India [2009 (243) E.L.T. 481 (All).]* It was therefore submitted that this is not a fit case for waiver of pre deposit.

The Hon'ble CESTAT noted that in the case of *Rallis India Ltd. vs. Union of India (supra),* the Hon'ble Bombay High Court, where an identical issue was involved, has held that the payment of an amount equal to 10% of the sale value cannot be insisted in terms of Rule 57CC of the erstwhile Central Excise Rules, 1944 when in course of manufacture of a particular dutiable final product, an exempted final product also emerged as an inevitable and unavoidable by-product. The present Rules 6(2) and 6(3) of the Central Excise Rules, 2004 are in *pari materia* with the provisions of Rule 57CC of erstwhile Central Excise Rules. The Hon'ble CESTAT, therefore, was of *prima facie* view that ratio of Hon'ble Bombay High Court's judgment in the case of *Rallis India Ltd vs. Union of India (supra)* would be applicable to the facts of this case also. Further it was observed that *prima facie*, in a case like this where the waste sludge has emerged as in inevitable and unavoidable waste, it is impossible to maintain separate account and inventory of the inputs used in the manufacture of finished products and inputs used in the manufacture of exempted product – (waste), the provisions of Rules 6(2) and 6(3) cannot be invoked as lex non cogit and impossiblio is a well settled legal principle which is applicable in taxation matters also.

It was therefore held that the appellants have a *prima facie* case in their favour and the requirement of pre-deposit would cause undue hardship. The pre-deposit of the amount demanded under Rule 6(3), interest on it and penalty was waived for hearing of the appeal and recovery thereof was stayed till the disposal of the appeal. The stay application was allowed.

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INDIRECT TAXES
VAT Update

Circulars for the year 2013

A. Audit Report by Developers

By Circular No. 1-T of 2013 dtd. 4th January 2013 the Commissioner of Sales Tax has considered the representations made by the Developers and Association to extend the date for submission of 704 by developers from 30th Nov., 12 to 15th Jan., 13. However, rather than extending the date for filing audit reports for the past period by the developers till 15th Jan., 13, the Commissioner has conveyed the Government decision not to levy the penalty under section 61(2) of MVAT Act on the developers who filed the audit report in 704 for all the previous periods on or before 15th Jan., 2013. The developers are also advised to upload from Form 704 for all the periods up to 2011-12 electronically.

B. Clarification about last date for physical submission of Form 704 for 2011-12

By Circular 2T of 2013 dtd. 15th Jan., 13 the Commissioner of Sales Tax as confirmed that the last date for physical submission of 704 along with the required documents is 28th Jan., 2013. This is for the reason that the last date for submission i.e. 25th Jan., 13 was a holiday, 26th & 27th Jan., 13 were also a holiday.

C. Notifications

C.1 By Notification dtd. 4th Jan., 2013 the Commissioner of Sales Tax has in exercise of the powers conferred under Section 10(6) of MVAT Act delegated the powers and duties under sub-sections (3) & (4) of section 64 of MVAT Act and Rule 69 of MVAT Rule to the authorities specified in the said notification. It is also specified that the powers and duties delegated by this notification will have effect only for the period ending 31st March, 2013.

C.2 By Notification dtd. 1st Dec., 12 in exercise of the powers conferred by Section 41(1) of MVAT Act, the notification relating to the refund to diplomatic authorities and International bodies of organisation is amended. In the Schedule appended to the said notification in Part 2 relating to other organization entry 1 (XXI) referred to "Netherland". The word is now replaced by Kingdom of Netherlands. "Similarly, in condition VIII after Clause ''e'' the following clause is added as "f".

"f – in case of Kingdom of Netherland the price of goods purchased to a single invoice shall not be less than ₹ 15,500/-."

D. Insight to Some Internal Circulars by Commissioner of Sales Tax

The Maharashtra Government has uploaded Internal Circulars which are described as "restricted circular for office use only" on the Government website. Gist of some of the internal circulars is given hereunder.

D.1 1A/12 dtd. 1-2-2012 - This is about the Department examination.

D.2 2A/12 dtd. 18-2-2012 - This is also about the Government resolution for the officers Departmental Examination.

D.3 3A/12 dtd. 18.2.2012 - This Circular refers to waiver of penalty if E704 is uploaded on 1-2-2012.

Due to some uploading problems on the last date of uploading i.e. 31st Jan., 2012 some delay had occurred for uploading E704. The Commissioner has informed all Additional Commissioners and all Joint Commissioners that delay of 24 hrs in uploading E704 would be condoned and no penalty under 61(2) would be levied, for delay in uploading E704 by 24 hours.

D.4 4A/12 dtd. 2-3-2012 - This is about scope of Issue Based Audit. The Commissioner has informed the officers that compared to comprehensive Audit, issue based audit would be restricted only in respect of issues communicated by EIU (Economic Intelligence Unit). Separate divisions are formed for Issue Based Audit (IBA). Scope of IBA is as follows:-

a. Allotment of IBA shall be by EIU only.

b. The allotted cases will be bifurcated as cases with concrete information and the cases with Issue Based Pointer.

c. In case of cases of Concrete information EIU should clearly indicate the issue involved, exact liability in respect of such issues. The IBA Officer should issue notice in 603 to the dealer on the basis of communication received from EIU.

d. The cases with Issue Based Pointer should indicate the issue involved, probable tax liability and the point for verification. Joint Commissioner (IB) will decide the line of verification in such case.

e. Depending on the facts of the case, the IB officer may send intimation in 604 to the dealer.

f. In other cases, officer shall issue notice in 603 or may visit POB of the dealer. JC IB may direct to conduct the visit to POB.

g. Since the purpose is to recover taxes which are obvious and do not require much verification, the Verification/Audit in IB cases should be restricted to issue/pointers communicated by EIU.

h. If during IB Audit the Officer is of Opinion that detail Audit is required then, he should take permission from JC EIU to conduct detailed Audit after mentioning reasons for conducting detail audit.

i. While allocating the cases, EIU should clearly state whether to verify the issue for a given period or for earlier period as well. If the issue communicated by EIU is confirmed then it is necessary to verify the same issue for the earlier period also.

j. The IB Audit should be conducted as per manual of procedure and instructions given by Commissioner from time to time, that the manual of procedure is available on the website of department and all officer of IB Audit are directed to read the same carefully and follow scruposly.

k. IB Audit should normally be concluded within 3 months from initiation of proceeding.

D.5 5A of 2012 dtd 15-3-2012 – This is about the effective administration of Package Scheme of Incentive Branch.

To have effective control over PSI units, separate administrative division has been created. But in Pune District it is noticed that the Division is under control of J.C. (VAT Administration) & also J.C. (Refund Audit Division)

The Circular clarifies that wherever such situation has arisen, the cases of PSI units (both for BST & MVAT Era) would be monitored by separate Division so created and it will be under control of J.C. (Refund Audit Division).

D.6 6A of 2012 dtd 16-3-2012 – This is about Inspection Programme for the year 2012-13 by Additional Commissioner of Sales Tax (Professional Tax) Maharashtra State.

D.7 7A of 2012 dtd 10-7-2012 – This Circular is about scrutiny of desk Audit Report in Form 704 filed under Section 61 of MVAT Act. This Circular gives the modified Committee for disciplinary action. The JC (704) shall after scrutiny submit the suitable cases before the above Committee. Whereas for the rest of the areas suitable case shall be selected by concerned desk Audit Cell (704) and forwarded the same to JC (704) Cell. JC (704) Cell in turn submit this cases before Committee referred to above.

D.8 8A of 2012 dtd 23-7-2012 – The Circular is about processing of refund against Bank Guarantee. In view of the representation and Bombay High Court Judgment in case of Whirlpool, some changes in the procedure for processing the Refund against Bank Guarantee are given.

In all refund cases, where the dealer furnishes BG, the verification as suggested by this Circular should be conducted before granting refund against Bank Guarantee.

a) The details of purchases uploaded with refund application in 501 should be verified for return filing status with Mahavikas / List of suspicious dealer.

b) ITC claim in respect of Hawala Dealers as displayed in the website, non filer of returns should be disallowed.

c) Entire purchase detail should be verified on Mahavikas ITC verification utility design for refund.

d) Any other verification with the Audit Officer [with the approval of JC (ADM)] thinks if necessary for grant of refund. However, it would not be necessary to verify the declaration under CST Act.

e) The time limit of 1 month for grant of refund should be strictly followed once BG is submitted.

f) As for custody of BG procedure given in manual of procedures under heading assessment be followed.

g) The cases in which period for which the due date of filing of Audit report is over then in addition to Instructions given herein above refund under BG may be granted after verifying the matching result of Form 704.

h) The matched ITC from Form 704 results and ITC in respect of suppliers not eligible to file Form 704 as verified from Mahavikas ITC Verification utility may be allowed.

i) Unmatched ITC and ITC claim from suspicious dealer to be reduced. This procedure to be followed irrespective of whether the dealer has filed BG or not.

D.9 9A of 2012 dtd. 31-8-2012 – This is regarding action plan after Bombay High Court Judgment in case of Mahalaxmi Cotton Ginning Judgment. The Commissioner had informed that during the course of hearing of the above matter the department has given assurance to the Hon'ble Bombay High Court regarding the actions that the department shall take against Hawala dealers, non filers of return, short filers of return and certain other steps. This Circular gives a detail branch wise action plan for effective monitoring. The Annexure A to this circular running to about 10 pages should be read carefully.

D.10 10A of 2012 dtd 5-10-2012 – This Circular modifies the Internal Circular given on 10th Feb., 2010 regarding instruction / guidelines for RPO (Refund payment Order) and Refund Adjustment Order issuing authorities under BST Act. It is stated here that in case of refund arising for the second time for the same dealer and same period on account of rectification order, appeal order or any other order then the refund proposal to be submitted to the next superior authority. This procedure led to delay in granting the refund and therefore as per the revise instruction in case a dealer becomes illegible for refund for the second time on account of rectification order or any other order then the proposal shall be sent to next superior authority. However, the refund arising after appeal order is excluded from this. It is also clarified that the above instructions are for Refund under the BST Act only.

D.11 11A of 2012 dtd 31-10-2012 – This is about pending recovery under BST Act. The old recovery were classified as available recovery and unavailable recovery. However, there were still great degree of misclassification while segregating the cases. The Commissioner had clarified that such misclassification of dealers will not absolve. The authorities of the responsibility for tracing this defaulters and getting the pending views.

Where the dealer has gone for insolvency or liquidation or BIFR or DRT, the officers are instructed to take a review of such cases pending, contact their respectful Assignee or Official liquidator and find out the status. The Authorities are instructed to take the review of such cases.

CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute update

Point of Taxation in respect of Life Insurance Sector

It is clarified that reminder/letter sent by Life Insurance companies to policy holders for paying renewal premiums is not an invoice and hence point of taxation does not arise on issuance of such renewal reminder/letter. It is further stated by CBEC that this clarification is only for Life Insurance sector.

(Circular no. 166/1/2013 – ST dated 1st January, 2013)

Transportation of milk by rail/vessel

It is clarified that clause 20(i) of Notification no. 25/2012 – ST dated 20-6-2012 exempting transportation of foodstuffs by rail /vessel also applies to the transportation of milk by rail/vessel as milk is a foodstuff.

(Circular no. 167/2/2013 – ST dated 1st January, 2013)

Recovery of confirmed demand during pendency of Stay application

CBEC has issued a controversial circular on above captioned subject rescinding all earlier circulars relating to recovery of demand. There has been a lot of hue and cry on this circular resulting into writ petitions in the courts. The interim relief has been granted by court to some petitioners.

The relevant extract of the circular is reproduced hereunder:

2) Henceforth, recovery proceedings shall be initiated against a confirmed demand in terms of the following order –

Sl No	Appellate Authority	Situation	Directions regarding recovery.
1	NIL	No appeal filed against a confirmatory order in original against which appeal lies with Commissioner (Appeals).	Recovery to be initiated after expiry of statutory period of 60 days for filing appeal
2	Commissioner (Appeals)	Appeal filed without stay application against a confirmatory order in original.	Recovery to be initiated after such an appeal has been filed, without waiting for the statutory 60 days period to be exhausted.

3	Commissioner (Appeals)	Appeal filed with a stay application against an order in original.	Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any specified, whichever is earlier.
4	NIL	No appeal filed against an Order in Original issued by the Commissioner.	Recovery to be initiated after expiry of statutory period of 90 days for filing appeal from the date of communication of order.
5	CESTAT	Appeal filed without stay application against an Order in Original issued by the Commissioner.	Recovery to be initiated on filing of such an appeal, without waiting for the statutory 90 days period to be exhausted.
6	CESTAT	Appeal filed with a stay application against an Order in Original issued by the Commissioner.	Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any, whichever is earlier.
7	NIL	No appeal filed against an Order in Appeal issued by a Commissioner (Appeals) confirming the demand for the first time.	Recovery to be initiated after expiry of statutory period of 90 days for filing appeal from the date of communication of order.
8	CESTAT	Appeal filed without stay application against an Order in Appeal confirming the demand for the first time.	Recovery to be initiated on filing of such an appeal in the CESTAT, without waiting for the statutory 90 days period to be exhausted.
9	CESTAT	Appeal filed with a stay application against an Order in Appeal confirming the demand for the first time.	Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any, whichever is earlier.
10	CESTAT	All cases where Commissioner (Appeals) confirms demand in the Order in original.	Recovery to be initiated immediately on the issue of Order in Appeal.
11	High Court or Supreme Court	Tribunal or High Court confirms the demand.	Recovery to be initiated immediately on the issue of order by the Tribunal or the High Court, if no stay is in operation.

3) It may be noted that a confirmed demand remains an order in operation till it is stayed. Mere preferment of appeal itself does not operate as a stay. Hon'ble Supreme Court in case of *Collector of Customs, Bombay vs. Krishna Sales (P) Ltd [1994 (73) E.L.T 519 (S.C)]* has observed that "As is well known, mere filing of an Appeal does not operate as a stay or suspension of the Order appealed against". Accordingly, the above directions are hereby issued for initiating recovery of the confirmed demands.

4) Instructions in CBEC's Excise Manual of Supplementary instructions on the above subject or any other circular, instruction or letter contrary to this circular stand amended accordingly.

(Circular No. 967/1/2013 – CX dated 1st January, 2013)

CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Construction Service

1.1 Narne Construction P. Ltd. vs. UOI 2013 (29) STR 3 (SC)

In this case the appellant was engaged in offering of plots for sale with assurance of lay-out approvals, development of infrastructure/ amenities, etc. as part of package of fully developed plot. The Supreme Court held that, this kind of transaction involved much more than a simple transfer of a piece of immovable property. It was not a case of mere sale of property with all advantages and/or disadvantages on "as is where is" basis and it is service within the meaning of section 2(1)(c) of Consumer Protection Act, 1986 and any deficiency/defect therein was amenable to jurisdiction of forum established thereunder.

Clearing & Forwarding Agent Service

1.2 CCE&C vs. Trade Tek Corporation 2013 (29) STR 23 (Guj.)

The High Court in this case held that, activity which neither involves clearing of goods nor forwarding of goods but purchase and sale of goods to customers on their own invoices not covered under the scope of Clearing & Forwarding Agent Service. Goods purchased availing quantity discount and not commission and then sold to customers on their own invoices under a contract on pre-decided prices but with embargo on charging higher prices, with liability to pay sales tax and reach a certain minimum turnover of such sales for renewal of contract cannot be equated to task performed by Clearing and Forwarding Agent.

Business Auxiliary Service

1.3 Aryan Coal Beneficiations Pvt. Ltd. vs. CST, New Delhi 2013 (29) STR 74 (Tri-Del.)

The Tribunal in this case after relying on decision in Spectrum Coal and Power Ltd. 2012 (28) STR 510 and Aryan Energy Pvt. Ltd. 2009 (13) STR 42 held that, service tax is not leviable on beneficiation of coal for period prior to 1-6-2007.

Further it is also held that, activities of loading, transportation, and unloading at washery are part of entire contract with customers and cannot be segregated or held different as Cargo Handling Agency service.

Franchise Service/Intellectual Property Rights Service:

1.4 Malabar Gold Pvt. Ltd. vs. CTO, Kozhikode 2013 (29) STR 119 (Ker.)

In this case the assesee transferred right to use Trade Mark to franchisees for use, against agreed royalty. The Court upheld, Tribunal's decision that it is deemed sale liable to tax under Kerala Value Added Tax Act, 2003. The Court rejected assessee's plea that VAT on

such transfer was illegal as they were paying Service Tax on royalty received and Service tax and VAT are mutually exclusive. It is held that, introduction of service tax on franchise agreement was inconsequential and legality of levy of service tax on royalty was not before the Court and had to be challenged in appropriate proceedings.

Legal Consultancy Service

1.5 Revenue Bar Association vs. UOI 2013 (29) STR 126 (Mad.)

The Court in this case granted interim injunction restraining Department from compelling Members of Revenue Bar Association from registering themselves with Service Tax Authorities under Legal Consultancy Service.

Commercial Training and Coaching Services

1.6 Chate Coaching Classes Pvt. Ltd. vs. CCE, Aurangabad 2013 (29) STR 138 (Tri. -Mumbai)

The assessee in this case claimed deduction for value of study material provided to students under Notification No. 12/2003-ST. The Tribunal observed that, CBEC Circular No. 59/8/2003-ST dated 20-6-2003 stating exemption applicable only if material is 'standard textbook' is not used in Notification and in the present case the study material was purchased from third party. In view thereof, it is held that, there is no reason to deny benefit under the said Notification.

Storage & Warehousing Services

1.7 Maersk India Pvt. Ltd. vs. CCE&C, Raigad 2013 (29) STR 170 (Tri. - Mumbai)

The Tribunal in this case held that, income from auction i.e. sale of uncleared/abandoned cargo by custodian is not liable to service tax in view of CBEC Circular No. 11/01/2002-TRU dated 1-8-2002 and decision in Mysore Sales International Ltd. 2011 (22) STR 30 (T) and India Gateway Terminal Pvt. Ltd. 2010 (20) STR 338 (T).

Air Travel Agent's Services

1.8 British Airways PLC vs. CST, New Delhi 2013 (29) STR 177 (Tri. - Del)

The appellant in this case collected levies and charges imposed by authorities but not paid any tax thereon. The Tribunal held that, impugned charges and fees form part of gross amount of air tickets and there is no provision to exclude charges from taxable value. Rule 5(1) of Valuation Rules, 2006 clearly stating that any expenditure or cost incurred by service provider in providing taxable service to be treated as consideration for taxable service.

It is further held that, service provider required to make tax payment on taxable service provided on or after 1-5-2006, when it was made taxable. At time of journey levy of Service tax is in force therefore tax payable on tickets sold prior to impugned date.

2. Interest/Penalties/Others

2.1 Intercontinental Consultants & Technocrats Pvt. Ltd. vs. UOI 2013 (29) STR 9 (Del.)

The High Court in this case observed that rule 5(1) of Valuation Rules, 2006 providing for inclusion of expenditure/cost, such as travel, hotel, stay, transportation, etc. incurred by service provider in the course of providing taxable service, purports to tax not what is due from service provider under charging section 66 of FA, 1994. The said rule is *ultra vires* the section 67, which quantifies the charge of service tax both before and after its amendment of 1-5-2006. In these sections phrase "for such service" is important. Such expenditure/costs cannot be considered as amount charged by Service provider "for such service" provided by him.

Power to make rules cannot exceed or go beyond section which provides for charge or collection of Service Tax. Apart from being *ultra vires,* the Rule 5(1) may also result in double taxation, if expenses like air travel tickets, had already been subjected to Service tax.

Harmonious reading of section 66 and 67(1)(ii) of FA, 1994 indicates that, valuation of taxable service is only a consideration paid as *quid pro qua* for service can be brought to charge.

In the present case, where assessee is Consulting Engineer expenditure/costs such as air travel, hotel stay, etc. incurred for service are not includible in gross taxable value of service and only value of service rendered as consulting engineer could be brought to charge.

2.2 *Hamdard (Wakf) Laboratories vs. State of UP 2013 (29) STR 99 (All.)*

The Revenue in this case, despite stay granted by Tribunal till disposal of appeal, acted in haste for recovering amount by coercive process. The High Court in this case held that, it was arbitrary action of authorities which would shake confidence of law abiding dealers and adversely affect development and industrial growth.

3. CENVAT Credit

3.1 *Shree Cement Ltd. vs. CCE, Jaipur-II 2013 (29) STR 77 (Tri. - Del)*

The department in this case denied CENVAT credit of service tax paid on debit notes. The Tribunal held that, three items i.e. invoice, bill and challan used in impugned rule and substance is more important than format and therefore there is no scope to deny relief if service tax realised through impugned notes deposited into treasury.

3.2 *Paramount Communication Ltd. vs. CCE, Jaipur 2013 (29) STR 146 (Tri. - Del)*

The Tribunal in this case allowed CENVAT credit of service tax paid on Outdoor Catering services for providing food to their employees and on running a cab service for transportation of employees from home to factory and back to home as they are input service.

STATEMENT AS PER PRESS AND REGISTRATION OF BOOKS ACT
FORM IV *[See Rule 8]*

THE CHAMBER'S JOURNAL

1.	Place of Publication	:	The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai 400 020.
2.	Periodicity of its Publication	:	Monthly
3.	Printer's Name & Nationality	:	Shri Kishor D. Vanjara, Indian,
	Address	:	3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.
4.	Publisher's Name & Nationality	:	Shri Kishor D. Vanjara, Indian,
	Address	:	3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.
5.	Editor's Name & Nationality	:	Shri Kishor D. Vanjara, Indian,
	Address	:	3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.
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I, Kishor D. Vanjara hereby, declare that the particulars given above are true to the best of my knowledge and belief.

KISHOR D. VANJARA
Date : 9-2-2013 Signature of the Publisher

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. I

[2012] 175 Comp Cas 475 (SC) – In the Supreme Court of India – Government of Pondicherry Tr. Addl. Sec. And Another.

The Article 254(2) of the Constitution provides that any law made by State relating to subject falls under Concurrent List which contains any provisions repugnant to the earlier law made by the Parliament or an existing law and if State has received the assent of President for the enactment of State Law, then the provisions of the State Law will prevail in that State.

Brief Facts

This judgment is pronounced for several special leave petitions (civil appeal) / writ appeals filed against the order of the Madras High Court.

M/s. New Horizon Sugar Mills P. Ltd ("Appellant") has taken loans from Indian Bank. The directors of the appellant stood as guarantors to the said loan and offered their personal properties as securities. As appellant defaulted in payment of loan, Indian Bank has declared said loan as NPA. Subsequently, lenders have initiated necessary action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") for enforcement of securities.

The appellant challenged the above process, which was dismissed by the court and directed the appellant to pay loan amount in three instalments. As default continues, under SARFAESI Act, bank took possession of assets and also proceeded for its sale and selected a successful bidder. The above sale was challenged by other banks, financial agencies, workers and employees to safeguard their interest. However, their petitions were dismissed.

A writ petition also filed by Pondicherry Nidhi Ltd. ("PNL"), depositors welfare association, who have claimed that the directors of appellant company were also the directors and shareholders of PNL and one depositor and they have misappropriated and diverted funds for their personal assets. However, they were directed to go under the RBI Act.

The Government of Pondicherry under the Pondicherry Protection of Interest of Depositors in Financial Establishments Act, 2004 ("PPIDFE") ordered the attachment of properties of the appellant. Due to this reasons, the successful purchaser in bidding process under SARFAESI Act could not get sale certificate of properties so purchased. The said purchaser also filed writ petition for quashing government order and registering the property in its name.

A single judge of Madras High Court has quashed the order of CJM along with various other writ petition filed by several parties. It has also lifted the attachment order and directed the sub-registrar to register properties in favour of purchaser and directed others to take necessary remedies in respective courts including approaching DRT for their claims.

The single judge has also dismissed the petition of the Pondicherry Government under PPIDFE stating that the same is applicable to unincorporated Institute only and not to the appellant being a company. There was also judgment by another single judge in *PNL Investors Welfare Association vs. Union of India,* giving direction to depositors under SARFAESI Act and workers under SICA and Industrial Disputes Act, 1947. Various judgments by single judges led to the case being refer to Division Bench, which has also agreed to the conclusion of single judge and asked depositors to approach Tribunal to protect their interest.

The main question before Supreme Court is validity of PPIDFE and order of the Pondicherry Government for the attachment of the appellant properties as the object of the PPIDFE is to protect the interest of the depositors in financial establishments in the Union Territory of Pondicherry.

The questions and submission made by the appellant is as follows:

a. Whether subject matter covered by the PPIDFE is under Entry Nos. 43, 44, 45 and 97 of the Union List or under Entry Nos.1, 30 and 32 of the State List under Constitution of India.

b. Whether the Supreme Court Judgment in *K. K.Baskaran vs. State [2011] 3 SCC 793* related to Tamil Nadu Protection of Interest of Depositors (In Financial Establishments) Act, 1997 ("TNPID") is treated as precedent for PPIDFE.

c. TNPID which was amended and now applicable to establishments such as " an individual, an association of individuals, a firm or a company registered under the Companies Act, 1956 ("Act") and in the business of receiving deposits under any scheme but not a society or a banking company". Thus, TNPID includes NBFC to whom the act is applicable but not other companies.

   Whereas PPIDFE is applicable to establishments such as "any person or group of individuals or a firm carrying on business of accepting deposits but does not include corporation or co-operative society, owned and controlled by government / state government or banking company.

   Whether the provisions of TNPID Act on applicability to various establishments as defined under the said act shall also apply to various establishments under the PPIDFE.

d. The reference was also made to the "Statement of Objects and Reasons" in the enactment of PPIDFE, which in particular referred to the applicability of the act to NBFC and other establishments which are not covered under the RBI Act for business of accepting deposits.

e. Whether the enactments by Parliament and by State covering the same field namely "investor's protection "are valid. In this regard, reliance was placed in the judgment of Full Bench of Madras High Court in *"Mrs. S. Bagavathy vs. State of Tamil Nadu [2007] 1 LW 892."* Thus, the scope of PPIDFE is challenged.

f. The Full Bench of Bombay High Court in *Vijay C. Puljal vs. State of Maharashtra [2005] 4 CTC 705* declared the Maharashtra Protection of Interest of Depositors (In Financial Establishment) Act, 1999 ("MHPID") to be *ultra vires* for want of legislative competency of State Legislature. The said judgment was based on Supreme Court Judgment in *Delhi Cloth and General Mills Co Ltd. vs. Union of India [1983] 4 SCC 166* on validity of section 58A (related to acceptance of deposits) under the Act.

The submission made on behalf of the Government of Pondicherry is as follows:

a. The litigation is proxy litigation by the appellant on behalf of other companies as companies which have received deposits are not litigating.

b. The PPIDFE enacted as per Entries 1 and 30 of List II and the question of repugnancy

of the Central legislation having overriding effects on State legislation did not arise.

c. Whether the PPIDFE is constitutionally valid being protected by the provisions of sections 18 and 21 of the Government of Union Territories Act, 1963.

d. Challenging the locus standi of the appellant on the ground that appellant is not an "establishment" under PPIDFE which has received the deposits in question and not being the one of the class of establishment as per section 2(d) of PPIDFE.

e. When both Central as well as State Legislatures were operating in the concurrent field, there was no question of trespass upon the exclusive jurisdiction vested on Central under entry 52 of List I.

f. The reference to judgment of Supreme Court in *Rustom Cavasjee Cooper vs. Union of India [1970] 3 SCC 539* was made, wherein the fine distinction between the regulation of the business activities and regulation of corporation made. It also stated that Sections 58A and 58AA of the Act and section 45S of the RBI Act, 1934 fall within scope of Entries 43 and 44 of List I.

g. By looking at the reasoning of enactment of PPIDFE, it will fall under Entry 1 (criminal law); Entry 8 (actionable wrong); entry 13(civil procedure) and entry 21 (commercial and industrial monopolies) of List II of the Seventh Schedule to the Constitution. Thus, the said act could not be traced to Entries 43 or 93 of List I. The reliance placed on decision of Supreme Court in *Greater Bombay Co-Operative Bank Ltd vs. United Yarn Tex P. Ltd. [2007] 6 SCC 236.*

h. The distinction was made as to the definition of Establishment in TNPID and PPIDFE for its applicability. PPIDFE has used the word "Person" in its definition, which is wider in term and includes even companies. The said word is absent in the definition given under TNPID.

i. The PPIDFE has received the President's assent; and thus, it would have effect irrespective of the Central Legislation.

Judgments and reasoning

Supreme Court has dismissed the appeal filed by the appellant and upheld the provisions of PPIDFE which are similar to TNPID for protecting the interest of depositors who lose their money due to diversion of funds.

a. On question of applicability of Seventh Schedule to Constitution as to Entries 43, 44 and 45 in List I and Entries in 1, 30 and 32 of List II and concluded that Entry 30 in list II is more appropriate similar to TNPID and MHPID related to business of unincorporated trading and money-lending. However, in view of constitutional conundrum for two views of Madras High Court and the Bombay High Court, the one which is more consistent with constitutional provisions need to be ascertained.

b. If, PPDIFE is related to Entries 43, 44 and 45 of List I then same be equally related to Entries in 1, 30 and 32 of List II. Thus, unless there is anything repugnant in the State Act in relation to the Central Act, the provisions of the State Act will have primacy in determining the list in the present case.

c. The article 254(2) of the Constitution also validates the PPIDFE, which provides that law made by State relating to the subject falls under Concurrent List which contains any provisions repugnant to the earlier law made by the Parliament or an existing law and if State has received the assent of President for the enactment of State Law, then the provisions of State Law will prevail in that State.

d. Court has accepted the submission made by the Pondicherry Government as to the purpose of enactment of law under Entries 1, 8, 13 and 21 partially. Court has also accepted the definition of Financial Establishment

under TNPID and PPIDFE for their respective applicability. According to the Court, the expression "any person" under PPIDFE is wide enough to cover both a natural person and also a juristic person including company under the Act. Thus, it would also be applicable to the appellant. Court has also compared the definition of person in section 11 of the Indian Penal Code which defines "person to include a company or association or body of persons".

e. Court has also observed that an attempt has been made by the appellant that was not the appellant company, which had accepted the deposits, but PNL, which had changed its name five times, also noted that funds have been collected from the public to invest in the projects other than those indicated by the front company.

Case Law No. 2

[2013] 176 Comp Cas 49 (CLB) – Before the Company Law Board – Chennai Bench. – Rajendra G. Patel vs. Sanghi Industries Ltd.

Inspection of statutory records of a company u/s 163 of the Companies Act is a statutory right and a mandatory provision and there is no need to disclose the purpose of inspection.

Brief Facts

The application is filed under section 163 (6) of the Companies Act, 1956 ("Act"). In this application, it is prayed to the Company Law Board ("CLB") to allow the petitioner to inspect all the registers and other documents of Sanghi Industries Ltd. ("Company").

The petitioner has submitted that he is a shareholder and member of the Company holding one hundred equity shares of ₹ 10/- each of the Company. Petitioner has visited the registered office of the company with the intent to inspect the statutory records of the company in terms of section 163 of the Act. It was also submitted that there was no display of name of the Company and he found difficult to locate the office and after lots of efforts, he could contact the company Secretary of the Company over phone. It was also submitted that several emails were sent to the company but no reply was received. In one of the Communication, company has asked the petitioner to provide the object and reason of his request for inspection.

Due to the above reason, the petitioner has applied to the CLB seeking direction to the company to provide for inspection as per the provisions of the law.

The reply filed by the company are as follows.

a. Petitioner has approached CLB with unclean hands.

b. He acquired shares recently and it appears that his intention is to harass the company by seeking several documents which are confidential in nature.

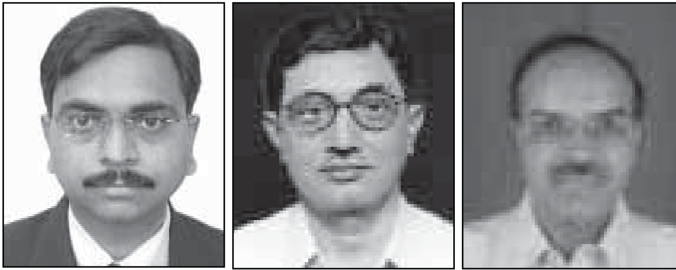
c. He has already inspected the records at the RoC office and now wants to collect the information as to beneficial ownership of the company.

d. The intention is to act against the interest of the company.

e. The rights under section 163(6) are neither absolute nor unqualified and are discretionary.

Judgments and reasoning

CLB has allowed the application. CLB has directed the company to allow the petitioner to inspect the statutory registers and records as prayed under section 163 of the Act. CLB has accepted the petitioner's claim that inspection of statutory records u/s 163 is a statutory right and there is no need to disclose the purpose of inspection. CLB has also rejected the company's stand that petitioner sought to inspect the records without mentioning the purpose is totally unjustified. CLB also observed that right to inspect the documents of the company is a mandatory provision.



CA. Mayur Nayak, CA. Natwar Thakrar &
CA. Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent changes to FEMA law brought about by RBI circulars:

1. Export of Goods and Services – Simplification and Revision of Softex Procedure at SEZs

It has now been decided to implement and make available the revised Softex procedure at all SEZs/EPZs/100%EOU/DTA along with immediate effect.

a) Earlier as per A.P. (DIR Series) Circular No.80 dated February 15, 2012, apart from all other terms and conditions mentioned in the circular, this new procedure was effective only in STPI Bengaluru, Chennai, Hyderabad, Mumbai and Pune. Since the revised procedure was running successfully at the 5 designated centres, it had been decided to implement the revised procedure in all the STPIs in India with immediate effect as per A.P. (DIR Series) Circular No. 47 dated October 23, 2012.

b) It was then adopted all over by all the STPIs and also SEZ/ EPZ/ 100% EOU/ EHTP/ DTA units and came into existence effectively from 1st January, 2013.

c) As per this revised procedure, a software exporter either under STPIs or SEZs/ EPZs/100%EOU/DTA, whose annual turnover is at least ₹ 1,000 crores or who files at least 600 SOFTEX forms annually on all India basis, will be eligible to submit statements in revised excel format sheets as per Annexure enclosed to the circular.

(A.P. (DIR Series) Circular No. 66 dated 1st January, 2013)

(Considering the spurt in the volume of software exports from India in recent times as well as the time-consuming process involved in the certification of SOFTEX forms, RBI in consultation with the various stakeholders had taken a welcome step in revising the procedure and making it more simpler and applicable to all STPIs in India vide earlier A. P. (DIR Series) Circular No. 47 dated 23rd October 2012. Since the revised procedure has been running successfully at all STPIs currently, it has also been extended to all SEZs/EPZs/100%EOU/DTA.)

2. KYC norms/AML standards/CFT /Obligation of Authorised Persons under PMLA 2002, as amended by Act, 2009 – Cross Border Inward Remittance under Money Transfer Service Scheme

a) In order to ease the burden on the prospective customers in complying with KYC requirements for doing money transfer activities under the Money Transfer Service Scheme, it has now been decided that : if the address on the document submitted for identity proof by the prospective customer is same as that declared by him/her, the document may be accepted as a valid proof of both identity and address. If the address indicated on the document submitted for identity proof differs from the current address declared by the customer, a separate proof of address should be obtained.

b) These guidelines would also be applicable mutatis mutandis to all Sub-Agents of the Indian Agents under MTSS and it will be the sole responsibility of the APs (Indian Agents) to ensure that their Sub-agents also adhere to these guidelines.

(A.P. (DIR Series) Circular No. 67 dated 2th January, 2013)

(Money Transfer Service Scheme (MTSS) is a quick and easy way of transferring personal remittances from abroad to beneficiaries in India. Receipt of cross-border inward remittance under MTSS is a transaction carried out on behalf of a remitter through an Overseas Principal located overseas by electronic means with a view to making an amount of money available to a beneficiary person at any of the outlets of APs (Indian Agents) and their Sub-agents in India. Customer Identification Procedure (CIP) is one of the key elements of the KYC policy mandated under the Prevention of Money Laundering laws. APs (Indian Agents) need to obtain sufficient information necessary to establish, to their satisfaction, the identity of each new customer, whether regular or occasional. Hitherto, separate documents had to be submitted for identity as well as address proof even though identity proof like Passport had the same address as declared for receiving remittance as that of address proof like Electricity Bill. This anomaly has been rationalised now.)

3. KYC norms/AML standards/CFT Obligation of Authorised Persons under PMLA 2002, as amended by PML Amendment Act, 2009 – Money changing activities

a) In order to ease the burden on the prospective customers in complying with KYC requirements for doing money changing activities, it has now been decided that: If the address on the document submitted for identity proof by the prospective customer is same as that declared by him/her, the document may be accepted as a valid proof of both identity and address. If the address indicated on the document submitted for identity proof differs from the current address declared by the customer, a separate proof of address should be obtained.

b) These guidelines are also applicable *mutatis mutandis* to all agents/ franchisees of Authorised Persons and it will be the sole responsibility of the franchisers to ensure that their agents / franchisees also adhere to these guidelines.

(A.P. (DIR Series) Circular No. 68 dated 2th January, 2013)

(Authorised Money Changers are persons authorized by RBI u/s 10 of FEMA, 1999 to deal in foreign exchange. KYC guidelines have been prescribed under the Prevention of Money Laundering Laws to prevent the system of purchase and / or sale of foreign currency notes /Travellers' Cheques by such Authorised Persons from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. Similar to the rationalization carried out under MTSS, the same has also been followed for money changing activities.)

4. External Commercial Borrowings (ECB) Policy – Non-Banking Financial Company – Infrastructure Finance Companies (NBFC-IFCs)

a) It has now been decided to enhance the ECB limit for NBFC-IFCs under the automatic route from 50% of their owned funds to 75% of their owned funds, including the outstanding ECBs.

b) NBFC-IFCs desirous of availing ECBs beyond 75% of their owned funds would require the approval of the Reserve Bank and will, therefore, be considered under the approval route.

c) It has also been decided to reduce the hedging requirement for currency risk from 100 per cent of their exposure to 75 per cent of their exposure.

d) Further designated Authorised Dealer banks should ensure compliance with the extant norms while certifying the ECB application both under the automatic and approval routes.

e) Designated AD Category-I banks shall also continue to certify the leverage ratio (i.e., outside liabilities/owned funds) of NBFC-IFCs desirous of availing ECBs under the approval route while forwarding such proposals to the Reserve Bank of India (as per A.P. (DIR Series) Circular No.70 dated January 25, 2012).

(A.P. (DIR Series) Circular No. 69 dated 7th January, 2013)

(RBI has enhanced the ECB limit for NBFC-IFCs in the hope to attract more investment into the infrastructure sector)

5. Anti-Money Laundering (AML) standards/Combating the Financing of

Terrorism (CFT) Standards - Money changing activities

Financial Action Task Force (FATF) has issued a further Statement on October 19, 2012 on the subject.

(A.P. (DIR Series) Circular No. 70 dt. 10th January, 2013)

6. Anti-Money Laundering (AML) standards/Combating the Financing of Terrorism (CFT) Standards - Cross Border Inward Remittance under Money Transfer Service Scheme

Financial Action Task Force (FATF) has issued a further Statement on October 19, 2012 on the subject.

(A.P. (DIR Series) Circular No. 71 dt. 10th January, 2013)

7. Uploading of Reports on FINnet Gateway

a) On the basis A.P. (DIR Series) Circular No. 42 dated October 12, 2012, advising all Authorised Persons to initiate submission of reports on the FINnet Gateway in 'Test Mode' from August 31, 2012, FIU-IND have now advised that the 'go-live' date is October 20, 2012 and that Authorised Persons may discontinue submission of reports in CD format after October 20, 2012, using only FINnet gateway for uploading of reports in the new XML reporting format.

b) Any report in CD format received after October 20, 2012 will not be treated as a valid submission by FIU-IND.

c) All Authorised Persons are accordingly advised to take action as required by FIU-IND and ensure that all reports are submitted in time as per the schedule.

(A.P. (DIR Series) Circular No. 72 dated 10th January, 2013)

(Hitherto, submission of reports in reporting formats viz. Cash Transaction Reports (CTRs) and Suspicious Transaction Reports (STRs) on the FINnet Gateway was in 'Test Mode'. Full transition to reporting via electronic mode to Financial Intelligence Unit-India would help reduce paper work and enable timely and

effective implementation of the Prevention of Money Laundering Laws in India.)

8. Uploading of Reports on FINnet Gateway

a) On the basis of A.P. (DIR Series) Circular No. 43 dated October 12, 2012, advising all Authorised Persons, who are Indian Agents under Money Transfer Service Scheme (MTSS) to initiate submission of reports on the FINnet Gateway in 'Test Mode' from August 31, 2012, FIU-IND have now advised that the 'go-live' date is October 20, 2012 and that Authorised Persons, who are Indian agents under MTSS may discontinue submission of reports in CD format after October 20, 2012, using only FINnet gateway for uploading of reports in the new XML reporting format.

b) Any report in CD format received after October 20, 2012 will not be treated as a valid submission by FIU-IND.

c) All Authorised Persons, who are Indian agents under MTSS are accordingly advised to take action as required by FIU-IND and ensure that all reports are submitted in time as per the schedule.

Further for any clarification/assistance regarding submission of reports, you may contact FIU-IND help desk at helpdesk@fiuindia.gov.in or telephone numbers 011-2410 9792/93.

(A.P. (DIR Series) Circular No. 73 dated 10th January, 2013)

(Similar to mandatory electronic reporting by Authorised Persons, from now on the Indian Agents under Money Transfer Service Scheme also have to upload reports electronically to FINnet Gateway too.)

9. Foreign Direct Investment (FDI) in India - Issue of equity shares under the FDI scheme allowed under the Government route

On the basis of A.P. (DIR Series) Circular No. 55 dated December 9, 2011, allowing issue of equity shares/preference shares under the Government route by conversion of import of capital goods, etc., subject to terms and conditions stated therein, RBI has amended certain conditions as given in the below Annex:

c.f. A.P.(DIR Series) Circular No. 74 dated June 30, 2011	Earlier condition	Revised condition
Para 3(I)	Import of capital goods/ machineries/equipments (including second-hand machineries)	Import of capital goods/ machineries/equipments (excluding second-hand machineries)
Para 3(I)(b)	There is an independent valuation of the capital goods /machineries / equipments (including second-hand machineries) by a third party entity, preferably by an independent valuer from the country of import along with production of copies of documents /certificates issued by the customs authorities towards assessment of the fair value of such imports	There is an independent valuation of the capital goods / machineries / equipments (excluding second-hand machineries) by a third party entity, preferably by an independent valuer from the country of import along with production of copies of documents /certificates issued by the customs authorities towards assessment of the fair value of such imports

All the other conditions contained in the A.P. (DIR Series) Circulars No. 74 dated June 30, 2011 and No. 55 dated December 9, 2011, shall remain unchanged.

(A.P. (DIR Series) Circular No. 74 dated 10th January, 2013)

(Pursuant to changes introduced vide Consolidated FDI Policy 2012 effective from 10th April 2012, RBI *vide* Notification No. FEMA. 242/2012- RB dated October 19, 2012 made consequential changes to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 to exclude issue of equity against second-hand machinery under approval route but complete reference was yet to be removed from Notification No. FEMA. 20 / 2000-RB dated 3rd May, 2000 since reference to second-hand machinery continued to remain in valuation norms for issue of shares against capital goods/ machineries / equipments. This anomaly has now been corrected.)

10. Exim Bank's Line of Credit of USD 37.90 million to the Government of the Kingdom of Swaziland

The Credit Agreement under the LOC is effective from January 03, 2013 and the date of execution of Agreement is October 1, 2012.

(A.P. (DIR Series) Circular No. 75 dated 15th January, 2013)

11. Reporting under Foreign Exchange Management Act, 1999 (FEMA)

a) FEMA bestows powers on RBI to direct any authorised person to furnish such information, in such manner, as it deems fit for the purpose of ensuring the compliance with the provisions of the Act or of any rule, regulation, notification, direction or order made there under. Accordingly, RBI has directed Authorised Dealers (ADs) to comply with the prescribed rules/ regulations for the foreign exchange transactions and reporting the same as per the instructions issued from time to time.

b) In the process of compounding it has been noticed on many occasions that the contraventions of the provisions of FEMA by corporates and individuals are due to the acts of omission and commission on the part of Authorised Dealers and some of the applicants have also produced documentary evidence in support of their claim. Such contraventions being dealt with by the Reserve Bank mainly relate to:

i) Draw down of External Commercial Borrowing (ECB) without obtaining Loan Registration Number (LRN) [Regulations 3 and 6 of FEMA 3/2000];

ii) Allowing draw down of ECB under the automatic route from unrecognised lender, to ineligible borrower, for non-permitted end uses, etc. [Regulations 3 and 6 of FEMA 3/2000]

iii) Non-filing of form ODI for obtaining UIN before making the second remittance to overseas WOS/JV for Overseas Direct Investment (ODI) [Regulation 6(2)(vi) of FEMA 120/2004];

iv) Non-submission of Annual Performance Reports (APRs) / copies of Share Certificates to the AD (and non-reporting thereof by the AD to Reserve Bank) in respect of overseas investments [Regulation 15 of FEMA 120/2004];

v) Delay in submission of the Advance Reporting Format in respect of Foreign Direct Investment (FDI) to the concerned Regional Office of the

Reserve Bank [paragraph 9(1)(A) of Schedule I to FEMA 20/2000];

vi) Delay in filing of details after issue of eligible instruments under FDI within 30 days in form FC-GPR to the concerned Regional Office of the Reserve Bank [paragraph 9(1)(B) of Schedule I to FEMA 20/2000];

vii) Delay in filing of details pertaining to transfer of shares for FDI transactions in form FC-TRS by resident individual/companies [Regulation 10(A)(b) of FEMA 20/2000];

c) Further it is observed that more than 70% of the total cases pertain to FDI within of which about 72% relate to delay in advance reporting/ submission of FCGPR. In the case of ECB, 24% of the cases received relate to drawdown without obtaining LRN. Similarly, 66% of the ODI cases relate to non-reporting of overseas investments online.

d) All the transactions involving Foreign Direct Investment (FDI), External Commercial Borrowing (ECB) and Outward Foreign Direct Investment (ODI) are important components of our Balance of Payments statistics which are being compiled and published on a quarterly basis. Any delay in reporting affects the integrity of data and consequently the quality of policy decisions relating to capital flows into and out of the country.

e) In this connection RBI has reiterated that in terms of section 11(3) of FEMA, 1999, it may impose a penalty on the authorised person for contravening any of its direction or failing to file any return as may be directed by it from time to time.

(A.P. (DIR Series) Circular No. 76 dated 17th January, 2013)

(Many a times, the Indian party had to undergo the compounding process due to contraventions attributable to the conduct of ADs mainly due to inadequately trained personnel with ADs. In this respect, business & professional fora had requested RBI time and again to ensure timely compliance by ADs in respect of submission of various returns as prescribed under FEMA to RBI as well as other procedural compliances. Vide this circular, RBI has cautioned ADs against such irregularities. It is a welcome change which will put some accountability on the part of ADs)

12. Exim Bank's Line of Credit (LOC) of USD 20 million to Nigerian Export-Import Bank

The Credit Agreement under the LOC is effective from May 10, 2012 and the date of execution of Agreement is November 15, 2011.

(A.P. (DIR Series) Circular No. 77 dated 18th January, 2013)

13. External Commercial Borrowings (ECB) Policy – Repayment of Rupee loans and/or fresh Rupee capital expenditure – USD 10 billion scheme

a) As per the extant guidelines, Indian companies in the manufacturing and infrastructure sector (as defined under the extant ECB policy), which are consistent foreign exchange earners, are allowed to avail of ECBs for repayment of outstanding Rupee loan(s) availed of from the domestic banking system and / or for fresh Rupee capital expenditure.

b) On a review, it has been decided to include Indian companies in the hotel sector (with a total project cost of INR 250 crore or more), irrespective of geographical location as eligible borrowers under this scheme that allows Indian companies in the manufacturing and infrastructure sector (as defined under the extant ECB policy), which are consistent foreign

exchange earners to avail of ECBs for repayment of outstanding Rupee loan(s) availed of from the domestic banking system and / or for fresh Rupee capital expenditure.

c) AD may certify the project cost at the time of forwarding the ECB application to the Reserve Bank.

(A.P. (DIR Series) Circular No. 78 dated 21st January, 2013)

(This is a welcome step from RBI which will benefit the hotel industry. RBI has prudently kept a floor of ₹ 250 crore and more towards project cost for availing ECB under this scheme in order to ensure that only those companies in the hotel sector which have capability to earn foreign exchange in the course of its ordinary business qualify under this scheme since repayment of such ECB is mandated only out of its foreign exchange earnings).

14. Exchange Earner's Foreign Currency (EEFC) Account, Diamond Dollar Account (DDA) & Resident Foreign Currency (RFC) Domestic Account.

a) Keeping in view the operational difficulties faced by the account holders and the Authorised Dealer banks, as a measure of rationalisation, it has been decided to dispense with the stipulation made in A.P. (DIR Series) Circular No. 124 dated May 10, 2012, that EEFC account holders henceforth will be permitted to access the forex market for purchasing foreign exchange only after utilising fully the available balances in the EEFC accounts.

b) The above instructions would also apply to the RFC (Domestic) and Diamond Dollar accounts.

(A.P. (DIR Series) Circular No. 79 dated 22nd January, 2013)

(It may be noted that although RBI has allowed EEFC account holders to access forex market for purchasing foreign exchange despite having balances in their EEFC account, it remains to be seen whether it may substantially benefit exchange earners since in anyway the balances in an EEFC account would have to be converted to Rupee balances on or before the last day of the calendar month succeeding the month of accrual.)

15. Foreign investment in India by SEBI registered FIIs in Government securities and corporate debt

- The present limit for FII investments in Government securities is USD 20 billion and for corporate debt is USD 45 billion including sub-limit of USD 25 billion for the bonds of the infrastructure sector.

- It has now been decided to implement the following changes:

(A) Government Securities

(a) The sub-limit of USD 10 billion for investment by FIIs and the long-term investors in dated Government securities stands enhanced by USD 5 billion, i.e., from USD 10 billion to USD 15 billion. Accordingly, the total limit for investment in Government Securities stands enhanced from USD 20 billion to USD 25 billion.

(b) The condition of three-year residual maturity of the Government securities at the time of first purchase for the above sub-limit shall no longer be applicable. Thus, residual maturity condition shall not be applicable for the entire sub-limit of USD 15 billion but such investments will not be allowed in short-term paper like Treasury Bills, as hitherto.

(c) A summary of revised position for Government Securities is given below:

Instrument	Limit	Investor	Conditions	Remarks
Government securities	USD 10 billion	FIIs	No conditions	-
Government dated securities	USD 15 billion	FIIs and SWF, Multilateral Agencies, Pension/ Insurance/ Endowment Funds, Foreign Central Banks	Investments in short term paper like Treasury Bills not permitted	No residual maturity requirement

(B) Corporate Debt

(a) The limit for FII investment in corporate debt in other than infrastructure sector stands enhanced by USD 5 billion, i.e., from USD 20 billion to USD 25 billion. However, the enhanced limit of USD 5 billion shall not be available for investment in Certificate of Deposits (CD) and Commercial Papers (CP). Accordingly, the total corporate debt limit stands enhanced from USD 45 billion to USD 50 billion with sub-limit of USD 25 billion each for infrastructure and other than infrastructure sector bonds. In addition, as hitherto, Qualified Foreign Investors (QFIs) shall continue to be eligible to invest in corporate debt securities (without any lock-in or residual maturity clause) and Mutual Fund debt schemes subject to a total overall ceiling of USD 1 billion in terms of A.P.(DIR Series) Circular No. 7 dated July 16, 2012. This limit of USD 1 billion shall continue to be over and above the revised limit of USD 50 billion for investment in corporate debt.

(b) The revised limit of USD 25 billion for corporate bonds for other than infrastructure sector shall be available for investment by FIIs and the long-term investors like Sovereign Wealth Funds (SWFs), Multilateral Agencies, Endowment Funds, Insurance Funds, Pension Funds and Foreign Central Banks registered with SEBI.

(c) As a measure of further relaxation, it has also been decided to dispense with the condition of one year lock-in period for the limit of USD 22 billion (comprising the limits of infrastructure bonds of USD 12 billion and USD 10 billion for non–resident investment in IDFs) within the overall limit of USD 25 billion for foreign investment in infrastructure corporate bond. The residual maturity period (at the time of first purchase) requirement for entire limit of USD 22 billion for foreign investment in infrastructure sector has been uniformly kept at 15 months. The 5 years residual maturity requirement for investments by QFIs within the USD 3 billion limit has been modified to 3 years original maturity.

- A summary of revised position for corporate debt limits is given below:

Instrument	Limit	Investor	Conditions	Remarks
(A) Non-Infrastructure Sector				
(i) Listed NCDs/ bonds, CPs	USD 20 billion	FIIs	Investment in CDs not permitted.	No lock-in period requirement; No residual maturity restriction; No original maturity restriction.
(ii) Listed NCDs/ bonds	USD 5 billion	FIIs, SWFs, Multilateral Agencies, Pension/ Insurance/ Endowment Funds, Foreign Central Banks	Investments in CPs and CDs not permitted	No lock-in period requirement; No residual maturity restriction; No original maturity restriction.
(iii) Security Receipts, Perpetual debt instruments, units of domestic mutual funds; "to be listed corporate bonds"	Within the total limit of USD 25 billion for non-infrastructure sector	FIIs	–	No Lock-in period, No residual maturity requirements; No original maturity restriction.
(B) Non-Infrastructure limit for Qualified Foreign Investors (QFIs)				
Listed NCDs, listed bonds, listed units of mutual funds debt schemes, "to be listed corporate bonds"	USD 1 billion	QFIs	–	No lock-in period and no residual maturity requirements; No original maturity restriction.
(C) Infrastructure Sector				
Listed NCDs/ bonds, NCDs/ bonds of NBFC-IFC and unlisted NCDs/ bond in infrastructure sector	USD12 billion (within the total limit of USD 25 billion)	FIIs	Indian companies in infrastructure sector – infrastructure as defined in the ECB guidelines and Non Banking Financial Companies (NBFCs) defined as IFCs	No lock-in period requirement; Residual maturity at the time of first purchase fifteen months; No original maturity restriction.
Corporate debt – non- convertible debentures/ bonds, non- convertible debentures/ bonds of NBFCs-IFC, Units of Domestic Mutual fund Debt schemes	USD 3 billion (within the total limit of USD 25 billion)	QFIs	NBFCs defined as IFCs - MF schemes that hold at least 25% of debt or equity or both in mutual funds in infra	No lock in period requirement. Original maturity of 3 years;

IDF – Rupee bonds/ units registered as NBFC or Mutual Funds	USD 10 billion (within the total limit of USD 25 billion) [investment by NRI not subject to this limit]	FIIs, NRIs, SWFs, Multilateral Agencies, Pension/ Insurance/ Endowment Funds, HNIs registered with SEBI, sub-account of FII or IDF	Infrastructure as defined in the ECB guidelines IDFs set up as NBFCs may invest in debt securities of PPP infra projects and should have completed one year of commercial operations; IDFs set up as Mutual Funds would invest 90% in debt securities of infra compan es/ SPV	No lock-in period requirement; Residual maturity at the time of first purchase fifteen months; No original maturity restriction.

(A.P. (DIR Series) Circular No. 80 dated 24th January, 2013)

(It seems RBI has liberalized the conditions for investment in debt markets with the hope to improve the balance of payment position as financial year end is approaching fast.)

16. Memorandum of Instructions for Opening and Maintenance of Rupee/ Foreign Currency Vostro Accounts of Non-resident Exchange Houses

RBI has brought about certain modifications in Items No. 7 & 8 under Part (B) Permitted Transactions of Annex-1 to the A.P. (DIR Series) Circular No. 28 [A.P.(FL/RL Series) Circular No. 2] dated February 6, 2008 and the said modified items may be read as under :-

a) Payments to medical institutions and hospitals in India, for medical treatment of NRIs / their dependents and nationals of Gulf Countries, Hong Kong, Singapore and Malaysia.

b) Payments to hotels by nationals of Gulf Countries, Hong Kong, Singapore and Malaysia / NRIs for their stay.

All other instructions issued *vide* A.P. (DIR Series) Circular No. 28 [A. P. (FL/RL Series) Circular No. 02] dated February 6, 2008, as amended from time to time will remain unchanged.

The directions contained in this circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law.

(A.P. (DIR Series) Circular No. 81 dated 24th January, 2013)

(Drawing arrangements with Exchange Houses are primarily designed to channel cross-border inward personal remittances. Hitherto, under Items No.7 & 8 under Part (B) Permitted Transactions of Annex-1 to the A.P. (DIR Series) Circular No. 28 [A.P.(FL/RL Series) Circular No. 02] dated February 6, 2008, nationals of solely Gulf countries were covered. *Vide* this circular, the scope of it has been extended to cover even nationals of Hong Kong, Singapore and Malaysia.)

Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Arbitration – Substitute Arbitrator – Appointment – Death of named arbitrator – Arbitration clause providing for resolution of dispute arising at any time between parties by named arbitrator – Has no nexus with life time of named arbitrator – Court can appoint another arbitrator on death of named arbitrator: Arbitration and Conciliation Act, 1996, Ss. 15, 11, 7

As per the relevant Arbitration clause in the agreement, question or dispute shall be referred either to Mr. N. A. Palkhivala or Mr. D. S. Seth, whose decision in the matter shall be final and binding on both the parties. The Petitioner submits that both Mr. N. A. Palkhivala and Mr. D. S. Seth are no more and therefore the arbitration clause in the agreement does not survive. Since the arbitrators are no more, the arbitration clause in the agreement has no life and hence there is no question of entertaining the application preferred under Section 11 of the Arbitration and Conciliation Act, 1996 filed by the Respondent.

The Respondent who was applicant before the High Court, refuted those contentions and submitted before the High Court that the arbitration clause in the agreement would survive even after the death of the named arbitrators and the parties can still resolve their difference or dispute by referring them to another arbitrator or move the court for appointing a substitute arbitrator whose decision would be final and binding on both the parties.

The Hon'ble Bombay High Court entertained the application preferred by the Respondent under Section 11 of the Act. The Court took the view that clause 21 of the Agreement did constitute an agreement to refer disputes to arbitration and also took the view that in the absence of any prohibition or debarment, there is no reason for the Court to presume an intent on the part of the parties to the effect that a vacancy that arises on account of a failure or inability of a named arbitrator to act cannot be supplied by the Court under Section 11. The Court took the view unless the parties have expressly precluded such a course being followed give effect to the policy of the law, which is to promote the efficacy of arbitration and the efficacy of commercial arbitration must be preserved particularly when business dealings are based on an agreement which provides recourse to arbitration. Legality of the High Court's order was under challenge before the Supreme Court.

The Hon'ble Supreme Court held that where the arbitration agreement provides for resolution of dispute by named arbitrator its survival beyond death of named arbitrator depends on the

intention of parties as expressed in arbitration clause. The legislative policy embodied in Sections 14 and 15 is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment to appointment of substitute arbitrator, the court has to keep its hand off and there is no question of persuading or pressuring the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the Court's duty is to give effect to the policy of law that is to promote efficacy of arbitration.

The arbitration clause in the instant case provides that any dispute arising between the parties "at any time" may be resolved by named arbitrators. The expression "at any time" expresses a time when an event takes place expressing a particular state or condition that is when the dispute or difference arises. It has no nexus with the life time of the named arbitrator. The expression "at any time" used in the arbitration clause has nexus only to the time frame within which the question of dispute or difference arises between the parties be resolved. Those disputes and differences could be resolved during the life time of the named arbitrators or beyond their life time. The arbitration clause therefore does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the Court for appointment of another arbitrator.

ACC Limited vs. Global Cements Ltd. AIR 2012 SC 3824

2. Writ – Court not debarred from entertaining question of facts – Constitution of India – Article 226

The Petitioner is a registered partnership firm which had developed a residential colony in Miramar, Goa known as La Campala residential colony. It is the case of the petitioner that after completion of the developmental work the residual land of the colony, including all open plots that were meant to be kept open as "vacant space", were transferred in favour of the petitioner under a registered deed. The petitioner claimed that the right, title and interest in the said open land undisputedly vested in the petitioner and the petitioner has exclusive right to develop the said open land which is to the knowledge of all concerned including the respondents in the present appeal. It was further claimed that sometime in the year 1981 the petitioner wanted to raise construction in an area of about 7,000/- sq. mtrs. out of the aforesaid open space which area would have been within the prescriptions contained in the existing Municipal Rules and Regulations. However, some of the purchasers of the plots who had constructed their buildings thereon and had formed a co-operative society i.e., Model Co-operative Housing Society, approached the Bombay High Court by way of civil suit claiming an easementary right in respect of the entire vacant/open space of 19,250 sq. mtrs. In these circumstances a decree of injunction was sought against the Petitioner from raising any construction on the land in question. The said suit was dismissed and decreed, but no issue with regard to the title of the petitioner to the land in question was raised. According to the Petitioner the compensation payable under the Award was paid to the petitioner who had also filed a Reference Application under Section 18 of the Land Acquisition Act, 1894 and had carried the matter in appeal to the High Court of Bombay. According to the State i.e. Respondent the open space in question was required to be kept free from any kind of construction under the planning laws in force and that the plot owners in residential colony have an easementary right on and over the open space which had been so declared by the High Court of Bombay. The High Court refused to interdict the development works undertaken

on the ground that the petitioner has an efficacious alternative remedy i.e., a suit for injunction.

The Supreme Court held that as a matter of prudence the High Court under Article 226 of the Constitution normally would not entertain a dispute which would require it to adjudicate contested questions and conflicting claims of the parties to determine the correct facts for due application of the law. However, there is no universal rule or principle of law which debars the Writ Court from entertaining adjudications involving disputed questions of fact. The writ court exercising jurisdiction under Article 226 of the Constitution is fully empowered to interdict the State or its instrumentalities from embarking upon a course of action to detriment of the rights of the citizens, though, in the exercise of jurisdiction in the domain of public law such a restraint order may not be issued against a private individual. This is not due to any inherent lack of jurisdiction but on the basis that the public law remedy should not be readily extended to settlement of private disputes between individuals. Even where such an order is sought against a public body the Writ Court may refuse to interfere, if in the process of determination disputed questions of fact or title would require to be adjudicated.

The Supreme Court dismissed the petition but given the option to claim compensation to the Petitioner.

M/s. Real Estate Agencies vs. Govt. of Goa AIR 2012 SC 3848

3. Passport – Renewal of passport – Incorporating therein name of adoptive father – Regional Passport Officer is not competent authority to adjudicate upon legality, or otherwise, of an adoption – Rejection of application not proper, Passport Act, 1967

The Petitioner has been adopted by Shri Karshanbhai Patel, as per the Registered Adoption Deed. According to the petitioner, the rituals of adoption have been conducted as per the customs of the community to which the petitioner belongs. The name of the adoptive father of the petitioner has been entered in the Ration Card, Driving Licence, and Election Card of the petitioner, as being the father of the petitioner. The grievance of the petitioner is that, on applying for renewal of his passport, the application has been rejected by the Respondent on the ground that the adoption of the petitioner has not been made in accordance with the provisions of section 10(iv) of the Hindu Adoptions and Maintenance Act. The Respondent took a stand that the adoption of the Petitioner has not been made in accordance with the provisions of the Adoptions and Maintenance Act as the petitioner has been adopted at the age of 34 years whereas, as per the Adoptions and Maintenance Act, the adoption cannot take place after the age of 15 years. It further stated that if the Petitioner is not satisfied with the decision rendered by the Respondent he may file an appeal to the Chief Passport Officer, Ministry of External Affairs, as per Section 11 of the Passport Act, 1967.

The High Court held that Passport Authority is vested with power to make an inquiry, upon receipt of an application, if it is considered necessary. After making inquiry, the Passport Authority can refuse to issue a passport or travel document, by making an order in writing. This is the extent of the power vested in the Passport Authority, while dealing with an application for issuance or renewal of a passport. The power of conducting an inquiry under sub-section (2) of Section 5 of the Passports Act cannot be stretched so far as to mean that it would include the power to pronounce upon the legality, or otherwise, of an adoption. That power can only be exercised by Court of competent jurisdiction in case where such adoption is under challenge.

Regional Passport Officer is not competent authority to adjudicate upon legality, or otherwise, of an adoption, while dealing with application for renewal of a passport, whatever may be impression regarding the provisions of law gathered by him. The Petition was accordingly allowed.

Patel Mukeshkumar Karshanbhai vs. Regional Passport Authority AIR 2012 Gujarat 188

4. Interest – Award – Application for Interest – Applicant would be entitled to interest as per S. 34 of Act of re-determined award from date of taking possession of property – Circular directing Authority to award interest from date of receipt of application under S. 28-A of Act, improper. Land Acquisition Act, 1894, Ss. 28-A, 34

The Petitioner has raised the challenge to the first respondent Deputy Commissioner's Circular directing the second respondent to award the interest only from the date of the receipt of the application under Section 28-A of the Land Acquisition Act, 1894. The said circular is issued as the awarding of additional interest is imposing a heavy burden on the government.

The High Court observed that Sections 28 and 34 of the said Act prescribe that the interest on the compensation be paid from the date on which the Collector (Deputy Commissioner) takes the possession of the land. The Apex Court in case of *Union of India & Anr. vs. Pradeep Kumari & Ors. AIR 1995 SC 2259* has held that Section 34 of the said Act would be applicable to the award that is made by the Collector under sub-section (2) of Section 28-A.

Section 28-A is intended and meant for the bus-missing parties, who on account of their poverty, ignorance, etc. have failed to take advantage of the right of reference granted under Section 18 of the said Act. The non-seeker of reference is put on par with the person who has sought the reference and who has got the amounts enhanced. Section 28-A applicant can claim parity not only in getting the compensation but also interest thereon, if a similarly situated land is covered by the Court award.

Section 28-A is to be interpreted liberally because it is the object of the legislation to give benefit of the award passed by the Court to persons whose property is covered by the same preliminary notification, but who did not opt for filing the application for reference under Section 18. The persons covered by the same notification were carved out to be a class for extending the benefits.

As the impugned circular runs contrary to the statutory provisions contained in Section 34. It was therefore quashed and set aside and the High Court directed the Respondent No. 2 to award interest from the day on which the petitioner was dispossessed from the property in question. The petition was allowed.

Ayyanna Siddegowda vs. Deputy Commissioner, Mandya District AIR 2012 Karnataka 190

5. Natural Justice – Appeal against - Officer who has passed order as inferior Court or authority cannot legally test correctness of his own decision while exercising powers of superior Court in appeal

An order was passed by the Collector, Meerut in a stamp case under Section 47-A of the Indian Stamp Act, 1899 determining deficiency in stamp duty in respect of the sale deed. Petitioners preferred an appeal under Section 56 of the Act against the said order before the Commissioner of the Division who exercises powers of the Chief Controlling Revenue Authority also. The appeal has been dismissed. The Petitioners have invoked the writ jurisdiction challenging both the orders.

The High Court observed that the object of providing a statutory appeal is to test the

correctness of the order and that too by a superior authority/Court. Officer who has passed the order as inferior Court or authority cannot legally test correctness of his own decision while exercising the powers of the superior Court in appeal, otherwise it would make the appeal illusory and nugatory frustrating the purpose of its filing. The appeal is conceptually different from a review. The review is reconsideration of the subject by the same Judge to cure an error which may be apparent on record while an appeal is re-hearing of the matter by a superior Court/authority to test correctness of the decision of the lower Court/ authority. Allowing the appeal to be heard by the same officer who has passed the basic order would tantamount to reducing the appellate jurisdiction into that of review. Therefore, also no person should normally hear the appeal against his own order.

One of the fundamental principles of natural justice is that no man can be a Judge in his own cause. The said principle would also be attracted in a case where a Judge may not be a party to the cause of action in any manner aforesaid but has delivered the order/judgment which is to be tested in appeal.

Veracity of the judgment ought not to be allowed to be tested by the same person in appeal rather it should be tested by another person.

Thus, deciding appeal in capacity as Commissioner against one's own passed as an inferior authority/Collector, held not proper being against settled principles of natural justice. The Petition was allowed.

Mohd. Chand Abdul Aziz & Anr. vs. State of U. P. & Ors. AIR 2012 Allahabad 190

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CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

BETTER DAYS AHEAD

The month of January has flashed mixed signals about global recovery. Though the initial sentiments were positive, some economic data is revealing that all is not well. Growth momentum in some of the economies is tripping and there is a risk of slippage of the rate of growth. The growth in recent times was achieved mainly on the back of economic stimulus. When it is withdrawn, there is a possibility that things may slip again.

Contrary to expectations, the growth in the US economy has suddenly stalled. For the quarter ending December 2012, it is 0.1% negative, falling suddenly from 3.1% positive, on an annualised basis compared to the earlier quarter. When many of the growth parameters were looking positive, this slippage is surprising and indicates that the fundamentals have not kept pace with the sentiment. It seems that the positive trends are the results of the stimulus; and fundamentals are yet to recover fully. It is possible that the Government might have stretched the stimulus in various forms for quite some time and there may be a fatigue. The US Fed will go all out to keep the economy on the right track. The reduction of consumption, especially in Europe, on account of austerity measures might be the cause of the slowdown. A cautious view has to be taken on the US economy, at least for the time being. Growth cannot be taken for granted.

Europe continues to struggle. The bad news is, Germany has slowed down. Its economy has contracted by 0.4% in the last quarter of 2012. There is a fear of it falling into a recession. After a good show in the third quarter of the year on the back of the Olympics, the economy of UK has contracted as well. These are not good omens for Europe. If the big and strong economies in the region slowdown, the smaller economies will surely suffer and the woes of Europe will prolong. This will not only affect the region but the whole world may have to bear its negative impact. The debt crisis in Europe seems to be persistent. High unemployment in the region is a great problem. Solutions are not simple and risks may be lurking around.

Japan seems to have suddenly improved its outlook. The Yen has weakened and that may lead to improvement in the Japanese exports, thereby giving good push to its stagnating economy. The Japanese Government is keenly watching the development and is not leaving any stone unturned for taking the economy out of stagnation and low growth. There is a fair chance that Japan may emerge out of the long stagnation and may clock reasonable growth, which will be very positive for the global economy.

Fortunately, China is showing good improvement in its economy over the last few

months and the trend is strengthening. Though some doubts were raised when positive signals suddenly emerged, they seem to be fading now. China is showing improvement in its manufacturing which should lead to higher economic growth not only in that country, but also in the region. Though the double digit growth may remain a far dream for China, its increased growth rate will improve the global outlook as it has become the second largest economy in the world.

The other major economies such as Brazil and Russia are not displaying any great promise for the near future. However, Australia and South Africa may grow better on improved mining outlook. There is an improvement in the outlook of the Middle East region. The economy of UAE is showing a positive trend and the region should catch up.

India may be slowing down but hopes remain high. The growth rate of India for the fiscal year ending 31st March, 2013 is likely to be less than 6% and will be one of the lowest in the decade. However, since the last six months, the reforms process has restarted in India on a serious note. The results of the same are likely to be visible in the months to come. The global rating agencies, who were threatening to down grade India, are admitting that the threat is receding due to the positive momentum of the reforms process. It seems that the Finance Ministry is serious about its business. All out efforts are being made to contain the budgetary deficit by mobilising resources as well as controlling expenses. Fair progress has been made in disinvestment of Public Sector Units (PSUs), which can help to fill up the budgetary gap and the disinvestment process seems to be gaining momentum. This will not only help to garner more resources by the Government in the next financial year, but it may go a long way to rein the budgetary deficit for the years to come. The Government has also taken bold steps regarding reduction of subsidies on petroleum products and especially on diesel. The decision to reduce the subsidies in this sector, which has a direct impact on inflation in the country, was politically very sensitive. However, the Government has taken a bold stand to bite the bullet. Though such a decision may create certain uncertainties in the near future, in the long run it will benefit the nation. For pushing ahead the reforms process, the Government is overcoming the pressure of political backlash and that is a good sign for the economic progress. Our country needs positive thinking and firm actions, which was lacking to an extent. Determination to do better seems to have gained ground in the ruling coalition and that should have a beneficial impact on the Indian economy in the years to come. The elections are not very far away and therefore there is a risk of slowing down of the reforms after a few months. However, remaining non fearful and pragmatic will help the nation.

Global stock exchanges have persisted with positive trends over the last few months. Though the momentum has slowed down a bit in a few markets, the major markets across the world have continued to show encouraging sentiments. The gains made by the stocks in the developed markets in the recent months are quite substantial. The stock markets in Japan, UK and many countries have given substantial returns in the last few months and the trend is likely to continue for some more time, unless some unfortunate event takes place. Though not all the news coming from various parts of the world are necessarily good, the sentiment is definitely better. Investors are in the mood to invest and take risks. Manufacturing is improving and the service sector will not be left behind. This will give an impetus to new investments, which will in turn push up the capital goods sector. Improvement in the capital goods sector will help the developed economies, which are the key suppliers of capital goods and the relevant technology. Such an improvement can be a trigger for the revival of the European economies, which contribute highly towards the technological betterment.

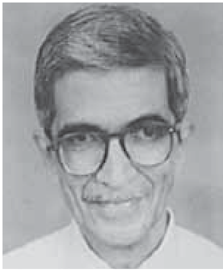
The Foreign Financial Institutions (FIIs) are pouring huge monies in the Indian stock markets over the last few months. The inflow continues even in the year 2013. Retail investors are still not active on the Indian stock market; and equity funds of mutual fund houses, mainly patronised by retail investors, still continue to remain net sellers. Most of the times, the retail investors are slow in recognising opportunities on the stock market and even this time, it may be the same story. Foreign funds have taken their positions and they are getting more and more aggressive. It will be unfortunate, if Indian investors keep on worrying about the growth rate and the situation around them, which may not be very bright today. Stock market investment is not about investing in past or the present. It is about investing in future. Time seems to be right to invest in the future of Indian businesses. Upside is high and downside risks seem to be low. Indian investors should have a serious look at their equity portfolio and improve allocation to equity. The growth may not be phenomenal, but it may be consistent. In the regime of falling interest rates, the returns will look attractive. The current investor friendly provisions of the Income-tax Act for capital gains earned on the stock markets will give probably the best post tax returns on the equity investments as compared to other classes of assets.

After a long wait, the Reserve Bank of India has yielded to the request of reducing the interest rates, though by quarter of a per cent. However, it seems that the ball has started rolling and it is expected that by the end of 2013, interest rates will be reduced by at least three quarters of a per cent. This development will help to improve returns of the bond holders as the bond prices will improve. It will also give better returns on debt schemes of mutual funds. Investors seeking safe and steady returns are advised to invest in long-term deposits, ranging from three to five years, to garner better returns. Interest rates on bank fixed deposits will surely come down and more so after 31st March, 2013, as by then the liquidity pressure will ease in the economy. Investors need to act before that to be able to secure better returns on their deposits.

There are newspaper reports that property prices have eased in the quarter ending December 2012. This easing is marginal and not in nature of correction. However, some experts do believe that a correction in the property market is round the corner. However, before forming a view, it is essential to assess the positive impact of lowering of interest rates in the economy, which can strengthen the property market or avoid correction in that market. Undoubtedly, there is a growing supply pressure in the property market, but lowering of interest rates can improve the demand and also increase the ability of the builders to hold on to their inventory thereby controlling the supply. Therefore, sizable correction may not be in the offing in the major markets, if the interest rates continue to decline for the next few years.

Gold prices are stagnating and they may come down, if the global economy improves. Though long-term rise in gold prices cannot be ruled out, the short-term price of gold may ease. If the rupee remains steady and maintains itself at the current level, gold can come below 30,000 mark. Silver and precious stones are likely to remain subdued in the near future.

The Indian currency has developed an inherent weakness. It can be corrected only by keeping control on deficit finance and also by controlling current account deficit. It is not easy to achieve both these goals as they have their political and social impacts. India needs a stable currency and good export growth. Efforts are needed in that direction, which should not be distracted by political agendas. Fiscal discipline is required for the long-term well being of India, which harbours great untapped potential. If this is inculcated, Indian equity investors are likely to have a good time in the years to come.



V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Facts & Query

Q.1 *Mr. X, a person of Indian origin returns to India for permanently residing in India on 1st April, 2000. He purchases assets as defined under section 2(ea) of The Wealth Tax Act out of the money in his NRE Account. He would be eligible for exemption of these assets u/s 5(v) of The Wealth Tax Act from AY 2001-02 to AY 2008-09. He availed the same, but due to certain reasons he had to go out of India for residing from 1st December 2006 onwards. Then:*

a) *Will he be eligible to avail the exemption u/s 5(v) for the remaining period till AY 2008-09?*

b) *What about the exemption taken by him for the AY 2001-02 to AY 2006-07. Will he be liable to pay tax and/ or penalty for the said years?*

Ans. We are herein concerned with W.T. Act and the relevant provisions for our purpose are ss. 3 read with ss.5 and 6 of the W.T. Act, the relevant parts of the same are as under:

S.5[(v)] in the case of an assessee, being a person of Indian origin [or a citizen of India (hereafter in this clause referred to as such person)] who was ordinarily residing in a foreign country and who, on leaving such country, has returned to India with the intention of permanently residing therein, moneys and the value of assets brought by him into India and the value of the assets acquired by him out of such moneys [within one year immediately preceding the date of his return and at any time thereafter] :

S.6 In computing the net wealth of an individual [who is not a citizen of India or of an individual] or a Hindu undivided family not resident in India or resident but not ordinarily resident in India, or of a company not resident in India during the year ending on the valuation date—

(i) the value of the assets and debts located outside India ; and

(ii) the value of the assets in India represented by any loans or debts owing to the assessee in any case where the interest, if any, payable on such loans or debts is not to be included in the total income of the assessee under [section 10] of the Income-tax Act;

shall not be taken into account.

Now under the said provisions under S.2(ea), if a non-resident of Indian origin purchases assets in India by bringing his money from abroad, such assets are not taxable under W.T. Act.

In our case a non-resident bringing money in foreign exchange has purchased the assets in

India. He came to India with an intention of settling down in India.

However, due to unavoidable circumstances he was to go out of India after staying in India for some time.

The issue raised by the querist is as to whether, he would lose the exemption under the W. T. Act.

Now, once the assets in India are purchased by the querist by bringing money in foreign exchange, they will continue to be assets purchased in India, even though he had gone abroad again for some time. As such he will not lose the benefit of exemptions under the W.T. Act.

Q.2 *Mr. B, purchased a plot of land. He got it surveyed & laid down a scheme of development. Then, he divided the said land into number of plots & sold the plots. Would he be charged to tax on the sale of individual plots or after the sale of all plots?*

Ans. The querist got surveyed a plot of land purchased by him for developing the same and he divided the land in various plots and sold them to the builders for further Development. The issue raised by the querist is as to whether he has to pay tax in every year, he sells one or more plots he has to pay tax in that year or when all the plots are sold, in the year when he sells the last plot, he has to pay tax.

Now as all the plots of land form parts of one scheme for the development of the land, the querist can pay the tax when all the assets are sold in the year when the last plot is sold. He need not pay tax every year.

Q3 *Company PQR Ltd. has applied for compounding of offences incurred under TDS provisions. PQR Ltd., being a company has to pay the same through e-payment. In the e-payment challan, under which section has the company to pay the same?*

Ans. The provision of S.139(4) of I.T. Act, provides, that every assessee has to file its return of income, in a form of return as prescribed by I.T. Rules. Under the rule 12, in case of a company Form No.6 is prescribed, for filing the return of income. The querist is a company. As such the querist has to file return in Form No.6 and pay the fees for compounding of offence u/s. 291 of the I.T. Act by e-mail.

Q.4 *Under the Wealth tax provisions, a debt owed by the assessee is allowed as a deduction while computing his net wealth. Does interest due on the debts also forms part of the debts due to be allowed as deductions for computing the net wealth?*

Ans. An obligation to pay the debt includes the obligation to pay interest, as it is part of the debt. It is like a calf of a cow and as such along with the debt, it forms part of the debt and as such along with, the debt the interest liability is also exempt from tax under W.T. Act.

Q.5 *Querist is a HUF having share trading income. All Coparceners are majors and doing Share Investments only resulting in Capital Gain, which is accepted by the Dept. in various Orders passed u/s 143(3) of the Act.*

Now there is TOTAL PARTITION of HUF and all assets are distributed among Coparceners. Shares held as stock-in-trade by HUF have gone into the hands of Coparceners who are Investors.

On stock of shares; HUF has received Bonus shares in one company in the ratio of 1:1. The HUF has valued original and bonus shares at average cost and has not claimed valuation loss on original shares and Bonus shares are also not valued at Nil cost, as these are stock-in-trade and not investment.

On Total Partition of HUF, the Original shares have gone to one Coparcener and Bonus to another in Equal proportion.

Now the Querist needs your opinion, on the following points:

1) *Shares received by the Coparceners, who are Investors be treated as investment in their Books and not as stock-in-trade ?*

2) *How to value shares by the Coparceners in the case where HUF was holding Original as well as Bonus shares?*

Ans. HUF is not a separate legal entity independent of the members of the HUF or the Joint Hindu Family. It is a collective name given to the members of HUF for the time being. As such business carried on by the HUF is the business carried on by all the co-parceners of the HUF, and a business of HUF collectively belongs to them, and they have no definite share unlike a partnership firm, in the business of the HUF.

A partition of HUF is only a process by which the indefinite shares become definite shares and the same does not amount to a transfer and on a partition whatever shares the Co-parceners get will have same nature as that of the HUF.

As such if there is a partition of the business of HUF, the nature of the share which a Co-parcener gets will be of business nature.

In view of the above position in law, when in the course of division of properties of HUF; the two erstwhile co-parcener of HUF A & B along with other assets are getting part of stock-in-trade of the business of dealing in shares carried on the HUF. They are getting the shares as stock-in-trade and these shares will continue to be stock-in-trade in their hands and as and when they sell part of this stock of these shares, they are receiving business income and not capital gain.

As such both A & B are holding shares, as stock-in-trade of business and are also holding as investors in shares. As such both of them have both capital gain income and business income for the purpose of taxation. As far as the method of accounting of stock-in-trade, in respect the income from sale of stock-in-trade, they have to follow method followed by the HUF for valuing stock in trade.

In view of the above discussion my answers to the queries raised by the querist are as under:

Q.5(1) *Shares received by the Coparceners, who are Investors be treated as investment in their books and not as stock-in-trade ?*

Ans. No, they have to reflect as stock-in-trade and not as investment.

Q.5(2) *How to value shares by the Coparceners in the case where HUF was holding Original as well as Bonus shares?*

Ans. As valued by the HUF, they have to value them.

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THE LIGHTER SIDE

GAAR, GAAR AWAY!

For the past year or so, there have been endless debates and discussions on the impact of GAAR in India. And now we are told that GAAR is far, far away. That's not fair!

After the GAAR proposal was announced, professionals scrambled to understand about GAAR and some were even gearing up to become GAAR specialists. Alas! They will now have to wait!

Whenever there is a controversy, a time-tested model for any government is to form a Committee to defuse the controversy. This has happened so many times in the past that no one was surprised when a Committee was formed to look into all the aspects of GAAR. Now that the Committee's recommendations have been accepted by the Government, we can move on to something else.

By the time you read this article, the Annual Budget would have been announced by the Hon'ble Finance Minister. Most Budgets are like Bollywood blockbusters – there is suspense, drama, emotions and controversy! For people who don't watch movies, they can get their annual "fix" by watching the Budget speech and then like any review of a movie by a critic, there are experts analysing every remark and every word in the Budget speech.

The Annual Budget seems a bit unfair for those working in listed companies. CFOs and CEOs of listed companies are required to show their quarterly results and are answerable to various stakeholders. The intense scrutiny over every quarter can get quite stressful. Shouldn't the Finance Ministry also be asked to show their quarterly results and the Hon'ble Minister face tough questions every quarter? This will make his job at par with CEOs of listed companies!

So now that we know that GAAR is far, far away, what next? There is always a lot of scope for more controversies. After all, if there are none, we won't have a lighter side!

Hitesh R. Shah & Paras Savla, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Through this column, we communicate with you about, and keep you abreast with, the events and the happenings that take place at the CTC. The events that have taken place after the previous issue of the Income Tax Review from 8th January, 2013 till 8th February, 2013 and also some of the important future events which are as under –

I Admission of New members

The following are the new members, who were admitted in the Managing Council meeting held on 8th February, 2013.

LIFE MEMBERSHIP

1.	SHRI MANEK SUDDEEP PRAVINCHANDRA	CA	MUMBAI
2.	SHRI KHUSHLANI SUNIL GOPALDAS	ADVOCATE	MUMBAI
3.	SHRI KHAITAN RAMESH N.	ADVOCATE	MUMBAI
4.	SHRI NAGDA RAJESH RATANSHI	CA	MUMBAI

ORDINARY MEMBERSHIP

1.	SHRI RAVEENDRAN P.M. (APRIL 2012 TO MARCH 2013)	CA	MUMBAI
2.	SHRI THAKUR JAYANT M. (APRIL 2012 TO MARCH 2013)	CA	MUMBAI
3.	MS VORA TANVI PRAKASH (APRIL 2012 TO MARCH 2013)	CA	MUMBAI
4.	SHRI ARORA SAURAB ARUN ((APRIL 2012 TO MARCH 2013)	CA	MUMBAI
5.	SHRI HIRA VARUN PRAKASH	CA	MUMBAI
6.	SHRI RUSTAGI RAMA ANAND	CA	MUMBAI

2. PAST EVENTS

1. CORPORATE MEMBERS COMMITTEE

Lecture Meeting on Companies Bill, 2012 was held on 14th January, 2013 at IMC. The meeting was addressed by Shri Bharat Vasani, Chief Legal & Group General Counsel, TATA Group. The meeting was a grand success.

2. DIRECT TAXES COMMITTEE

The 6th Intensive Study Group (Direct Tax) Meeting was held on 21st, January, 2013 on the subject "Recent Important Decisions under Direct Taxes". The meeting was addressed by CA Samir Kapadia.

The 1st session of Study Course on Interpretation of Taxing Statutes was held on 1st February, 2013 where Shri P. C. Joshi, Advocate and at the 2nd Session, Shri Hiro Rai Advocate addressed the delegates. The third and fourth sessions were held on 2nd February, 2013 where Shri S. D. Srivastava CIT, DR ITAT Mumbai and Shri Vipul Joshi, Advocate addressed the delegates. The fifth Session was held on 8th February, 2013, where Shri Advet Sethna, Advocate addressed the delegates. The response for the course was overwhelming and the enrollment was closed.

The Committee has announced "Second Essay Competition-2013" for students of Law & Article Trainees pursuing C.A. Course. The Rules governing the competition are available on our website www.citcindia.org.

3. DELHI CHAPTER

The 1st Study Circle Meeting on Direct Taxes was held on 19th January, 2013 on the subject "Recent Judgment under Direct Taxes" at India Habitat Centre, New Delhi. The meeting was addressed by Shri R. P. Garg, Advocate and Shri K. C Singhal, Advocate.

Full Day Conference on "Estate and Succession Planning, Use of Domestic and International Trusts and Wills" was held on 2nd February, 2013 at Inspire, Hotel Le Meridien. The Conference was addressed by CA Dileep C. Choksi, CA Divya Bawja, CA Paresh. P. Shah and CA Mugdha Sahal.

4. INDIRECT TAXES COMMITTEE

The Indirect Tax Study Circle Meetings was held on 18th January, 2013 on the subject "Issues in Place of Provision of Services Rules, 2012". The meeting was chaired by CA Tejal Mehta and was led by CA Saket Patwari.

The 5th Session of the Workshop on MVAT & Service Tax was held jointly with AIFTP (WZ), BCAS, MCTC and STPAM on 19th January, 2013, where CA Vikram Mehta addressed the delegates on the subject "Issues in Works Contract Transactions under MVAT and CA Ashit Shah addressed the delegates on the subject "Issues in Works Contract Transactions under Service Tax and on 2nd February, 2013, CA Rajiv Luthia addressed the delegates on the subject "Issues in Point of Taxation Rules, 2011"

5. INTERNATIONAL TAXATION COMMITTEE

The Intensive Study Group on International Taxation was held on 29th January, 2013, where Shri Mitul Shah addressed the members on the subject "Cross Border Secondment of Employees – Implications from an Employee Perspective". The said meeting was in continuation of the earlier meeting held on 11th December, 2012.

6. MEMBERSHIP & EOP COMMITTEE

The Membership & EOP Committee and Allied Laws Committee jointly organised a Lecture Meeting on Wills on 22nd January, 2013 at Thane jointly with Tax Practitioners Association-Thane. The meeting was addressed by Shri K. K. Ramani, Advocate.

The Membership & EOP Committee jointly with RRC & PR Committee organised a Limited Over Cricket Tournament (with Tennis Ball) Chamber Premier League, 2013 (CPL) for the members on

25th January, 2013. Four teams, President-XI, Vice President–XI, Past President-XI and Chairman-XI participated in the Tournament. The CPL was won by Vice President - XI team led by Vice President Shri Yatin Desai and Runner up was Past President - XI team led by Shri Parimal Parikh..

The Self Awareness Series was held on 9th January, 2013 on the subject "Power of Money". The meeting was addressed by Shri Sanjay K. Nawalkha.

7. STUDY CIRCLE & STUDY GROUP COMMITTEE

The Study Circle on International Taxation Meeting was held on 11th January, 2013 on the subject "Taxation of Software". The meeting was addressed by CA Hariharan Gangadhar.

The Study Circle Meeting was held on 17th January, 2013, on the subject "Issues under Capital Gains – Sections 54, 54F, 54EC & Section 50 C". The meeting was chaired by Shri Vipul Joshi, Advocate and was addressed by Shri Mandar Vaidya, Advocate. The meeting was in continuation of earlier meeting held on 31st October, 2012.

The meeting was held on 4th February, 2013 on the Subject "Wealth Tax". The meeting was chaired by CA Ashok Rao and was led by CA Ketan Ved.

III. Future Events

1. ALLIED LAWS COMMITTEE

Allied Laws Study Circle Meeting will be held on 12th February, 2013 on the Subject "'Cyber Crime Dangers and Its Prevention". The meeting will be addressed by CA Sachin Dedhia.

2. DIRECT TAXES COMMITTEE

The Workshop on Finance Bill, 2013 (Direct Taxes Provisions) jointly with WIRC of ICAI will be held on 9th March, 2013. The Workshop will be chaired by CA Kishor Karia and will be addressed by CA Gautam Nayak and CA Yogesh Thar.

The 7th Intensive Study Group (Direct Tax) Meeting will be held on 14th February, 2013. The meeting will be addressed by Shri Ajay Singh, Advocate.

The remaining two sessions of the "Study Course on Interpretation of Taxing Statutes" will be held on 8th and 9th February, 2013. The coursre will be addressed by S/Shri B.V. Jhaveri, Advocate, Aaron Solomon, Solicitor and Advocate, Advait Sethna, Advocate and Ms Nikita Badheka, Advocate.

3. INDIRECT TAXES COMMITTEE:

The ongoing sessions of the Workshop on MVAT & Service Tax jointly with AIFTP (WZ), BCAS, MCTC and STPAM will be held on 16th February and 2nd, 16th, and 30th March, 2013.

The Workshop on Finance Bill, 2013 (Indirect Taxes Provisions) jointly with WIRC of ICAI will be held on 9th March, 2013. The Workshop will be addressed by CA A. R. Krishnan and Shri Vipin Jain, Advocate.

4. INTERNATIONAL TAXATION COMMITTEE

The 3rd Intensive Study Course on Transfer Pricing (Including Domestic Transfer Pricing) will be held on 16th & 23rd February, 2013, 16th, 23rd & 30th March, 2013 and 6th April, 2013. The course will be addressed by eminent speakers from the Profession and Revenue Department.

Publication on INTERNATIONAL TAXATION – A Compendium

The Committee is coming out with a publication of 4 volume set on "International Taxation – A Compendium". The Special Pre-Publication price for 4 volume set for members is ₹ 3,000/- and ₹ 3,250/- for non members, if booked before 28th February, 2013 and ₹ 3,500/- for members and ₹ 3,750/- for non-members, if booked after 28th February, 2013.

5. JOURNAL COMMITTEE

The Committee is planning to bring Special Story "Finance Bill – 2013" in the forthcoming issue for the month of March, 2013.

6. RESIDENTIAL REFRESHER COURSE & PUBLIC RELATIONS COMMITTEE

The 36th Residential Refresher Course will be held on 21st February to 24th February, 2013 at Heritage Village Resort & SPA, Manesar, Gurgaon. An interesting event of Panel Discussion is being introduced for the first time during this RRC. The enrollment is closed.

7. STUDY CIRCLE & STUDY GROUP COMMITTEE

The Study Circle Meeting will be held on 27th February, 2013, on the subject **"Recoveries and Stay proceeding under Income Tax Act,"** which will be led by Shri Ajay Singh, Advocate.

The Study Group Meeting will be held on 26th February, 2013, on the subject "Recent Judgments under Direct Taxes" and will be led by CA Kishor B. Karia.

8. LECTURE MEETINGS

A) AMITA MEMORIAL LECTURE MEETING

A lecture meeting under the auspicious of Amita Memorial Trust, jointly with BCAs is organised on 11th February, 2013. The meeting will be addressed by Brahmakumari Shivani. All the members are cordially invited to attend the meeting.

B) UNION BUDGET – 2013 – AN ANALYSIS

The CTC has planned a Public Meeting on "Union Budget" on Direct Taxes and Services Taxes jointly with Ghatkopar CA Study Circle, Forum of Free Enterprises and other organisations on 3rd March, 2013. The meeting will be addressed by Mr Raghav Narsale on "Economic Aspects", by CA Gautam Nayak on Direct Tax Proposal and by CA Rajiv Luthia on Indirect Taxes Proposals. All the members are cordially invited to attend the meeting.

9. PUBLICATION FOR SALE

- 1ST RESIDENTIAL REFRESHER COURSE ON SERVICE TAX held on 4-6 January, 2013 COURSE MATERIAL ₹ 300/-.

(For Enrollment and further details of all the future Events, please refer to the February, 2013 Issue of CITC News or visit the website www.citcindia.org)

CORPORATE MEMBERS COMMITTEE

Lecture Meeting on Companies Bill, 2012 held on 14th January, 2013.

Shri Bharat Vasani, Chief Legal & Group General Counsel TATA Group addressing the members. Seen from L to R : S/Shri CA Hasmukh Dedhia, Vice Chairman, CA Vipul Choksi, Chairman, CA Manoj Shah, President, CA Neha Gada, Convenor.

Section of Delegates

MEMBERSHIP & EOP COMMITTEE

Self Awareness Series held on 9th January, 2013 on the subject "Power of Money".

Shri Sanjay K. Nawalkha addressing the members.

INTERNATIONAL TAXATION COMMITTEE

Intensive Study Group meeting held on 29th January, 2013 on the subject "Cross Border Secondment of Employees – Implications from an Employee Perspective".

Shri Mitul Shah addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting held on 4th February, 2013 on the subject "Wealth Tax".

CA Ashok Rao chairing the session.

CA Ketan Ved addressing the members.

RRC & PR COMMITTEE AND MEMBERSHIP & EOP COMMITTEE

Chamber Premier League, 2013 (CPL) held on 25th January, 2013 at Pitch # 7, Oval Maidan.

Winning Team
(CPL - 2013)
– Vice President – XI

Runner-up Team
(CPL - 2013)
– Past President – XI

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle on International Taxation Meeting
held on 11th January, 2013 on the subject "Taxation of Software".

CA Hariharan Gangadhar addressing the members. Seen from L to R :
Ms. Priti Shukla, Advocate,
CA Manoj Shah, President,
CA Haresh Kenia, Chairman.

MEMBERSHIP & EOP COMMITTEE AND ALLIED LAWS COMMITTEE

The Lecture Meeting on Wills jointly with Tax Practitioners Association, Thane held on 22nd January, 2013.

CA Manoj Shah, President, CTC welcoming the members. Seen from L to R : Shri Navin Dedhia, President of TPA, Thane, Shri Mahesh Kumar Idnani, CCIT, Thane, Shri K. K. Ramani, Advocate, Faculty, CA Vijay Kewalramani, Convenor, Allied Laws Committee, CTC.

Shri Mahesh Kumar Idnani, CCIT, Thane, addressing the members. Seen from L to R : Shri Navin Dedhia, President of TPA, Thane, Shri K. K. Ramani, Advocate, Faculty, CA Manoj Shah, President, CTC, CA Vijay Kewalramani, Convenor, Allied Laws Committee, CTC.

Shri K. K. Ramani, Advocate addressing the members

Section of members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting held on 17th January, 2013 on the subject "Issues under Capital Gains – Sections 54, 54f, 54EC & Section 50C".

Shri Vipul Joshi, Advocate chairing the session.

Shri Mandar Vaidya, Advocate addressing the members.

Study Group Meeting held on 31st January, 2013 on the subject "Recent Judgments under Direct Taxes".

CA Sanjay R. Parikh addressing the members.

DIRECT TAXES COMMITTEE

The Study Course on Interpretation of Taxing Statutes held on 1st, 2nd, 8th & 9th February, 2013 at IMC.

CA Yatin Desai, Vice President welcoming the delegates. Seen from L to R : CA Ketan Vajani, Vice Chairman, Shri Ajay Singh, Chairman, CA P. C. Joshi, Advocate, Faculty, CA Bhavik Shah, Convenor.

Faculties

Shri P. C. Joshi
Advocate

Shri Hiro Rai
Advocate

Shri S. D. Srivastava
CIT, DR ITAT Member

Shri Vipul Joshi
Advocate

Shri Advait Sethna
Advocate

Shri B. V. Jhaveri
Advocate

Shri Aaron Solomon
Solicitor & Advocate

Mrs. Nikita Badheka
Advocate

INDIRECT TAXES COMMITTEE

Indirect Tax Study Circle Meeting held on 18th January, 2013 on the subject "Issues in Place of Provision of Services Rules, 2012".

CA Tejal Mehta addressing the members. Seen from L to R : S/Shri CA Saket Patwari, Chairman of the session.

DIRECT TAXES COMMITTEE

6th Intensive Study Group (Direct Tax) Meeting held on 21st January, 2013 on the subject "Recent Important Decisions under Direct Taxes).

CA Samir Kapadia addressing the members.

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THE CHAMBER'S JOURNAL
Posted at the Mumbai Patrika Channel Sorting Office, Mumbai 400 001.
Date of Posting: 15th & 16th February 2013
No. MA/MR/South-365/2013-15
R.N.I. No. MAHENG/2012/47041
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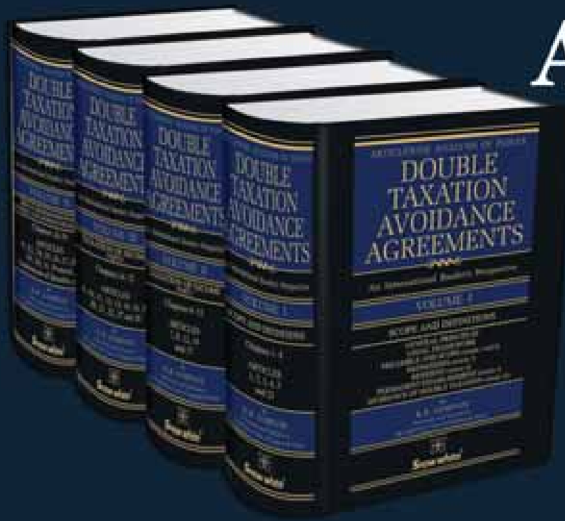

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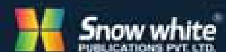

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Printed and Published by Shri. Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chamber, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chamber, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.