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A Monthly Journal of
The Chamber of Tax Consultants

The Chamber's Journal

June 2013

Vol. I | No. 9

Your Monthly Companion on Tax & Allied Subjects

Recent Controversies in Income Tax Assessments

This issue is dedicated to Late **Shri. B. C. Joshi** Past President of Chamber

The Finance Minister, when he took over in August, 2012, made a statement that "clarity in tax laws, a stable tax regime, a non-adversarial tax administration, a fair mechanism for dispute resolution, and an independent judiciary will provide great assurance". That statement was the underlying theme of his tax proposals in Budget 2013. He emphasised on the need for an emerging economy to have a tax system that reflects best global practices and proposed to set up a Tax Administration Reform Commission to review the application of tax policies and tax laws and submit periodic reports that can be implemented to strengthen the capacity of our tax system.

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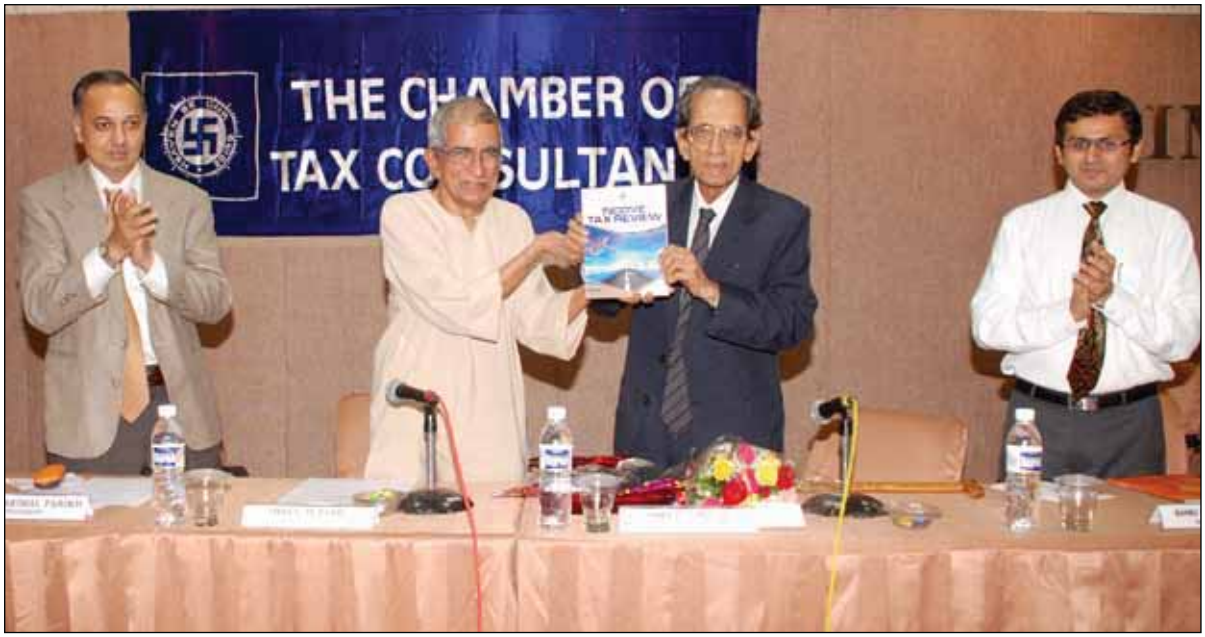
Shri B. C. Joshi
(20-4-1923 to 16-5-2013)

Release function of Income Tax Review (Journal)
"Embracing Change" held on 14th July, 2011 at IMC.



Shri B. C. Joshi, Past President releasing the Income Tax Review (Journal) on the subject "Embracing Change" to commemorate completion of 36 years of publication. Seen from L to R : S/Shri Parimal Parikh, President, V. H. Patil, Past President and CA Paras Savla, Hon. Jt. Secretary.

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THE CHAMBER OF TAX CONSULTANTS
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The Chamber's Journal

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Editorial

This issue of the Chamber's Journal is dedicated to the fond memory of Late Shri B.C. Joshi, who is remembered among the tax fraternity as a fearless fighter against injustice, corruption and nepotism. Late Shri B.C. joshi was a dynamic person,known for his expertise on sales tax law; he was very active in sales tax bar and surprisingly he was equally active in Chamber's activities also. He always wanted that the Chamber should have its own magazine, which would serve as a mouth piece for profession as practising in the field of Direct Taxes. The first editorial written for Income Tax Review reflects this vision (April 1975 Vol. I No. 1) which is relevant even today after 38 years. The same is reproduced as homage to an advocate *par excellence*, a fearless leader , who has been a fighter to the end.

"Even though Income-tax has held the field for last over fifty years and even though the major part of Income-tax is being paid by the erstwhile State of Bombay and now Maharashtra and particularly the citizens of Bombay, there is no significant unison in the effort to understand the kaleidoscopic complications of the Income-tax Act. Periodic efforts by practitioners and conferences by groups do not serve the purpose of a concerted attempt to understand the Income-tax and allied laws and to represent against some of the invidious features in an organised way. Within the last over 50 years, the Income-tax laws have given birth to a number of children; to mention a few mischievous children the Expenditure tax, the Estate Duty Act, Wealth-tax Act and the Gift tax. The proliferation is much more complicated with host of allied and subsidiary legislations of Rules and Notifications. While tackling the problems of understanding the law or application of law to a given problem requires expertise and experience which has been the preserve of only a few so far, it is in the interest of the tax-practitioners, tax-payers and the tax-masters alike that these laws should be understood by every tax-payer. It is equally important that some of the weak spots are highlighted, some ugly growth here and there recommended to be amputed and, wherever necessary, reform is made in the law not only with a view to deliver to the State the maximum tax with minimum bleeding, but with a view to achieving some of the social objectives which 25 years of Republic Democracy has failed to achieve.

It is indeed a happy moment that one of the oldest institutions of the tax-practitioners, i.e. the Chamber of Income-tax Consultants has taken up the task and started a periodical publication to deal with Income Tax Law and the allied laws and

their problems, the practice and dealings with some pernicious thorny spots. It is in a sense a pioneering effort by a Chamber of Practitioners, because quite a few Income Tax Practitioners' Associations exist, but nonetheless there is none which is dedicated to the problems of tax-payers and the tax practitioners alike on a common platform. Indeed, these objectives cannot be achieved except by an organised association, with a band of selfless workers dedicated to these problems even at some personal sacrifice.

It is unfortunate that the Central enactments having far-reaching consequences and affecting citizens throughout the length and breadth of this vast country should still have some of its problems in a state of uncertainty and a state of suspended animation. It is equally unfortunate that by the time a point of law becomes clear, it is further adulterated with hybrid amendments with the result that the tax laws which, in principle should remain crystallised and clear so as to be understood by the common people at large, remain a labyrinth of multiple puzzles some of which still remain to be understood, sorted out and interpreted. It is equally unfortunate that law-reporting in this country has taken roots in quantity and not in quality, because quite a number of decisions binding constitutionally remain un-ravelled, un-noticed and un-reported. When an important judgment is embodied in a printed journal, it is already few months or few years past. The result has been that the people and the practitioners have been kept obliviously ignorant of binding decisions and the direct consequence is that the correct law may not be noticed by the tax-masters (most of whom learn the law by a process of trial and error). The resultant chaos has been responsible for a perennial crop of litigation. The cost in terms of money and waste of time being stupendous to the people, the tax-payers and the tax-masters is in the final analysis a national waste.

This is our first step towards our aim to have a common platform for the tax-payers and the tax practitioners to come together to discuss laws, exchange notes, to report the gist of recent decisions of the Supreme Court, High Courts and the Tribunals, to give timely information on impending or hurriedly introduced changes in law. I am sure, the tax-payer and the tax practitioner well equipped with the latest law will un-ravel and cut the Gordian knots. What we have in mind for launching this journal is not merely commercial reporting, but to provide for a vehicle of thoughts, which ultimately may turn out to be an exchange of thoughts between practitioners, the tax payers and the tax officials to the ultimate benefit of all.

It is a proud moment for this Chamber and we dedicate this journal to the tax-payers, tax masters and the tax practitioners, aspiring that this vehicle of thoughts will serve useful purpose to one and all."

We at Chamber would always be guided by the light provided by his vision.This issue's special story is on 'Recent Controversies In Income Tax Assessments'. I hope the topics covered in this issue shall help members to make more effective representation in assessment proceedings. I thank all the contributers of this issue for sparing there time for the journal.

K. GOPAL
Editor

From the President

Dear Reader,

My journey of communicating with you is coming to an end as this is my last communication as President of this august organisation, The Chamber of Tax Consultants.

The emphasis during the year has been on 'creativity' and that was not just reflected in the mission statement for the year – Disseminating Knowledge Creatively, Inspiring excellence collectively- but Team Chamber has truly put the same in practice during the year. It just required a desire to be creative because we at Chamber knew, creativity will not only bring charm to the activity but will also bring added value for the members. At Study Group Meetings, which discusses latest case laws, we introduced the concept of explaining 'legal maxims' and linking the same with court rulings where such legal maxims were referred to. In every programmes, structuring and designing of the content have been given utmost importance with touch of creativity- be it programmes on 'Estate Planning – use of Domestic and International Trust' or even RRC on Direct Taxes, where we introduced panel discussion on Accounting vis-a-vis taxation or even sightseeing at RRC at Manesar (visit to Kingdom of dreams) or be the unique course on 'Interpretation of taxation Statutes'. It's befitting to quote APJ Abdul Kalam, at this juncture, on Creativity – he says – "when creativity blossoms, thinking emanates, when thinking emanates knowledge is lit and when knowledge is lit nation ("an organisation" – words added) progresses.

The portfolio of activity also saw the diversity in the form of Chamber Premier League 2013 – a Cricket Tournament and organising Musical Evening to launch revamped Website and E-Journal. These activities bring recreational touch and offer an opportunity to further the bond of fellowship amongst member and their family.

Like every organization, the Chamber also has a hierarchical system in terms of leading the organisation but at the same time, it operates like a flat organisation. Chairmen, Council Members and office bearers all are on same pedestal which allows freedom to all to air their views which leads to healthy and intellect stimulating discussion resulting in informed and well considered decisions on policy matters as well as on conducting diverse activities.

I have thoroughly enjoyed my term as the President as I had blessings of Past President & fatherly figure Shri V.H. Patil, encouraging guidance from other past presidents, cohesiveness in working amongst Office Bearers, proactive approach of Committee Chairmen, valuable guidance from Advisors to the Committee, critical contribution from

Managing Council members and all these ably supported by Team Chamber. I must admit, this has given me most memorable experience of my life which I will cherish forever.

I must not forget the immense support given by administration staff of the Chamber. With every passing year canvass of activity has been growing in size, stature and diversity and Staff Chamber have ably shouldered the added burden with smiling face, remaining fully committed to the pressing deadlines and delivering the result in best possible manner. I sincerely thank each and every staff member of the Chamber.

As the President, one remains fully engrossed with the Chamber even if he is physically away from Chamber office. The year of Presidency requires full commitment to the Chamber and therefore unless one has full support & backing from his office, it is difficult to give justice to the post of Presidency. Indeed, I am fortunate to have very supportive partners which enabled me to concentrate and give full commitment to the Chamber.

On 16th May, 2013 the Chamber lost one of its legendary Past Presidents Shri B. C. Joshi. He was president for the term 1974-76. His tenure as President and his association with the Chamber was instrumental in instilling vibrancy to the then era of Chamber. The Journal of the Chamber, in fact took birth under his presidency in the year 1975. The Journal of the Chamber today has turned out to be one of the most sought after tax publications and the foundation of the same was laid by him. At the condolence meeting organised by the Chamber on 22nd May, 2013, I could feel that he was a man of substance, extremely forthright and fearless. The void caused due to his demise can never be filled but we can fondly remember his good work and invaluable contribution to the Chamber which has left permanent marks in the history of the Chamber. In case readers want to share any of their experiences and cherished memories with Late Shri B.C. Joshi, they may write at "bcjoshimemorial@gmail.com"

Chamber has a glorious past and it serves as an inspiration to create an even greater future and I made a humble attempt by putting best efforts for the Chamber as President, working with dignity and in the process upholding the glory of the Chamber. If there were any deficiencies in working of the Chamber, I take full responsibility for the same.

The time has now come for me to make a transition from present to history with a promise that I shall always be available to any services which Chamber may require.

Good Bye.

With Warm Regards,

MANOJ C. SHAH
President

LIFE OF SHRI B.C. JOSHI
(20th April, 1923 to 16th May, 2013)

- **Birth:** Shri Balabhadra C. Joshi was born to Shri Chunilal P. Joshi and Smt. Kamlaben on 20th April, 1923 at Godhra, Dist. Panchmahal in present State of Gujarat. He inherited his value system and fearless nature from his parents. His father was a Head master-principal in a Gujarati School and mother was also an educated woman.

- **Education:** His initial years of education were at Godhra. He did his B Com., graduation in H.L. College, Ahmedabad and stood first in Gujarat University. He pursued his further studies along with his professional and other activities. His struggle started early in life at the age of 20 when he lost his father. Immediately after completing his graduation, he took up a job and very soon started his own business.

- **Profession:** In 1948-49, he started his practice as a Railway Claims agent, sales tax representative and income tax representative. As mentioned earlier, he continued his education and very soon obtained law degree and enrolled himself with the Bar. In his, more than six decade long, professional career, he fought tirelessly against injustice and highhandedness of the bureaucrats.

- **Associations and Organisations:** He has been actively involved in various professional organisations. Though his field of specialization was Sales Tax, in his initial years he practiced both Income Tax and Sales Tax. He rejuvenated the activities of the Chamber of Income-tax Consultants and soon become president of the same in the year 1975-76. As mentioned elsewhere, he brought out the first Income Tax Review as Editor and organised the first national level Tax Conference in the Golden Jubilee Year of the Chamber of Income-tax Consultants. In the national tax conference, he mooted the idea of a national level organization which can bring under its aegis all tax practitioners from different fields and the Associations as well. Thus All India Federation of Tax Practitioners was born on 11-11-1976. As a founder member of AIFTP, he actively participated in its growth and expansion of its scope of operations and went on to become the president of the same during the period 1984-90. He became president of Sales Tax Practitioners Association in the year 1964-65. He was responsible for establishing the Sales Tax Tribunal Bar Association in 1967 exclusively for the Advocates, CAs and STPs regularly practicing before the Maharashtra Sales Tax Tribunal. He contested the election of Maharashtra Bar Council successfully and remained member of the same for 22 years. He is the only person from the tax fraternity to become Chairman and Executive Chairman of the Bar Council of Maharashtra and Goa. During his tenure as Chairman, he started Maharashtra Bar Council Journal. A very unique aspect is as a Chairman of Maharashtra Bar Council, he signed his daughter Nikita's Sanad in Oct., 1981..He was perhaps the first professional to form an Association of Traders all over Maharashtra called federation of Association of Maharashtra FAM

- **Articles & Publications:** He was a voracious reader and expressed views which were original and completely independent. This quality of his is reflected in many of his scholarly articles in various journals. He was awarded first prize by Indian Institute of Law, New Delhi on his

paper 'Administration of Sales Tax' in 1972. His article on Natural Justice written in the 1980s is, even now, counted as reference material. As mentioned earlier, he was instrumental in starting the publication of the Chamber's Journal, which, in those days was known as Income Tax Review. His editorials were thought provoking and made comments which are relevant even today. As a member of Bar Council he started the Maharashtra Bar Council Journal. He has authored a digest of Sales Tax – called – Joshi and Vyas book. He also authored the book named Shape of Things to Come on Navi Mumbai Cess. He wrote a book – What is wrong with Sales Tax administration and when VAT was introduced he wrote a book "Black book on VAT".

As an editor of the magazine, he left his footprint which are points of reference even today. Following are excerpts of his editorials which reflect his vision.

Income Tax Review – Dec. 1976 – Mar. 1977 (Vol. II Nos. 5 & 6)

Abetment

Under Sec. 278 a practitioner could be held liable for committing an offence of abetment if he knowingly helps an assessee to file a false return or aids the filing of any declaration etc. which he knows to be false or which he believes not to be true. Due to this provision it is eminently desirable that tax practitioners must be careful while they assist their assessee in filing of the return. Apart from the grave consequences which may follow out of the intentional abetting of filing a false return, it would be clearly derogatory of the honourable profession to which we practitioners belong, if one abets filing of a false return with a view to avoid tax liability. As a citizen in general and being a member of honourable profession in particular, we have social obligation to see that we intentionally do not abet the assessee in evasion of tax. Under the circumstances, it is highly desirable that we should not identify ourselves too closely with the assessee and we should act more as an officer of justice to see that justice is done both to the State and the assessee.

Income Tax Review – April-May 1977 (Vol. III No. 1)

Nurturing Tax Payers

It therefore calls for a serious thought, what can induce a tax payer to pay his last rupee of tax honestly. Quite a number of variegated factors enter into causing person to fall in the vice of secret saving. Civil customs like marriage is one of them. In most communities it is costliest event of life. Only social education backed by enlightenment can stop it. We do not want to attempt to dwell on other variegated factors. But we do want to focus attention on one aspect of social security and social welfare to the weaker section of the class of tax payers. We will have to appreciate that a large part of middle class tax payers reside in cities. Their needs particularly in towns like Bombay in times of distress are telling in their meagre savings. An ailment like typhoid, a major operation, a complicated child birth are all occasions where a large chunk is spent over. While salaried employees of companies get considerably near sailsfactory amenities the same is not the case for a professional, petty business—man, an employee of a small firm and the like. While the public hospitals are full to the brim, the private or semi-public hospitals are too costly. It would therefore be compatible with other better placed employees of organised industries for a tax-payer to be accorded medical allowance to the extent of amount on major ailments in the family. The same principle should apply for school and college education. Children of tax payers temporarily fallen to lean days after contributing their mite to State Exchequer should be given free education in consonance with total taxes paid by the parents in the past.

Income Tax Review – June-July 1977 (Vol. III No. 2)

Wanted Rational Approach

That apart, this Chamber in the past made a demand that this declaration should also be allowed to be attested by a Chartered Accountant or a Legal Practitioner. Significantly years have rolled on but there is no reply. With the anxiety of the Legislature to see that persons earning below say Rs. 13,200 Gross, should not be subjected to procedural grilling, this form will have a far reaching implication. A large number of citizens residing in nook and corners of cities and villages will have to make such declarations. Why should the declaration be attested by somebody not known but who will require to be made known though professionals like Advocates or others? Such introduction may at times degenerate into a make believe introduction bought through the go—betweens. But in every small corner, village or town there is an Advocate or a Chartered Accountant. Normally each tax affected person is attached to a tax Advocate or a Chartered Accountant. Why not allow these professionals who really know the declarant to attest the declaration? Incidentally while an M. P. or others catalogued in S. 194A may not be subject to disciplinary action in case of wrong or false attestation, the Chartered Accountants and Advocates are subject to rigorous well imposed and enforced disciplinary jurisdiction. Are they not better placed than Municipal Councillor or a District Board Member to appreciate the seriousness and the implication of such declarations? How are they in any way inferior to the rest catalogued in S. 194A? Are not Advocates regarded as officers of Court? Are not their names Gazetted upon enrolment in the same way as other Civil Officers? And finally if they can attest declarations under Partnership Act, why are they not eligible for attesting declarations of lesser significance, importance and implication? To these questions the administration had no reply nor shall they have any. As far as we are concerned, we sit sore at the lack of faith in the profession. This is what we mean by a sympathetic approach much more important than a simpler code of law.

Income Tax Review – Oct.-Nov., 1977 (Vol. III No. 4)

Demonetisation Again

Therefore, let us look at the present expedient of demonetisation. Whom is it going to help? We believe, there will hardly be a sizable chunk which will not come forward for being tendered for exchange. We believe, the entire currency will be tendered minus of course accidentally lost, misplaced currencies not retrievable by human ingenuity. This is evident from the fact that there were quite a number of buyers even on 23rd January, 1978 at ₹ 500/- per note of ₹ 1,000/- as the newspaper reports go. It means that these notes which belong to a section of people changed hands and went to another section of the same tribe and nothing more. One man's loss is another man's gain but that is hardly a solace to the Government because the class of this unholy alliance is the same class — no matter why and how the amounts change hands in the same class. It may be an irony of fate that in this process there is poetic justice of giving some of the lesser fortunate some remuneration for declaration either as benamidar or otherwise.

We believe that none of these expedients are ever going to solve the tremendous problems centering around black money. What is necessary is taking away the utility of black money. We must have adequate social insurance, medical aid, cheap education to all those who want. We must assure the honest citizens of this country that they shall have a peaceful, well-looked after eve of their life. We must assure each businessman that there will be a fair deal to his problems and the consideration of money will be replaced by consideration of national interests, personal liberties and detached

sense of justness. Quite a number of things can be said in this direction but the main point is that all these things require Government initiative, a spontaneously invoked confidence of the people in the Government and the complete brainwash for change of values. This is a stupendous task but no day is too late to begin with.

Income Tax Review – Dec. 1977 – March 1978 (Vol. III Nos. 5 & 6)

Audi Alteram Partem
But what is the concept of notice – as jurists look towards it or as is being displayed in the actual procedure adopted by the tax authorities? Is it the cyclostyled brown form with blanks and 'not applicable to be struck off', which is doled out to the assessee with gaping gaps, some teasing ticks here and there, and illegible signature of a person known by designation and number and not by name? Such a notice is meant to keep you guessing as to the exact nature of default and the details are left to be 'understood' rather than specified, For example, look at the notice u/s. 274-271. That notice is nothing but a printed form reproducing the language of the section with its 'and - or' left unchecked.

Income Tax Review – June-July, 1978

Passing The Buck
In a bid to save some instances of inaction, in differences and indiscipline in day-to-day administration of the Income-Tax Law, the Union of India has come out with section 209A. Quite the host of new problems arises with the birth of this new impost, but the main worry is that it is likely to keep assessees on the tenterhook. It was possible, that a few persons escaped payment of advance tax for the simple reason that the department could not send, missed to send, or overlooked sending timely notices for advance tax. A few scheming persons may have taken advantage of this weak spot. This is nothing uncommon that happens with any administration where there is bureaucratic set up.

It was expected that the Government would streamline the tax structure so that the tax can be realised with as little bleeding to the tax-payer, as possible. These hopes are belied and what we feel is that the tax will be realised under prods, with its share of blood spilled further by a process of pricks and it will be too early to realise the full impact and the ill-effects of these provisions. But we do take this opportunity to request the Government to make these provisions a little less rigorous by making the provisions of penalties and interest not applicable where it is impossible for the tax-payer to have liquid funds to flow in the coffers of the State.

Personal: He was a simple and disciplined man in his personal life. He believed a healthy body is home for a healthy mind. His food habits were simple. He is survived by his wife, Smt. Jayamangala Joshi, 82 years, three daughters and two sons. One son and daughter have followed his footsteps and joined the tax profession. Daughter, Ms. Nikita Badheka, Advocate is well known in the field of Sales Tax and she is a regular contributor to Chamber's Journal. His son, Shri Vipul Joshi is Past President of Chamber of Tax Consultants and an advocate of eminence. He left peacefully for heavenly abode in the early hours of sleep on 16th May 2013 .

Various programmes attended by Shri B. C. Joshi

TRIBUTE TO SHRI B.C. JOSHI

Sohrab E. Dastur
Senior Advocate

1D Kakad House
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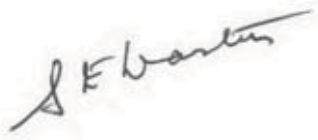
Bombay 400020

A SMALL TRIBUTE

Late Shri B. C. Joshi was a many faceted personality. Before he took to the practice of law, almost 65 years ago, he had dabbled in business and this gave him a very practical view of life and things. Though indirect tax was one of his specialities he was direct in his speech and address and was never afraid to speak his mind. He did not hesitate to call a spade, a spade. He nurtured the Sales Tax Practitioners' Association and the Sales Tax Tribunal Bar Association and was very active in the Federation and the Chamber of Income Tax Consultants (now the Chamber of Tax Consultants). Most importantly he was one of the very few persons active in the field of tax practice who were elected to the Bar Council of Maharashtra and the only one from that field, as far as I recollect, to head the Bar Council as its Chairman. He took life day-by-day as it came and was fully conscious that the race of life would one day come to an end – and we all recognise that he was the winner in that race.



A TRIBUTE TO SHRI B.C.JOSHI

The last Roman has fallen was what I thought when I was told about the sudden death of Shri Balbhadra C. Joshi on Thursday. In fact it was only on Tuesday that I met Shri Pankaj Parikh who told me that he had a long discussion with Shri Joshi when he visited for obtaining his signature on a Nomination form the same day. He told me that he had an animated discussion with him regarding the present state of affairs, particularly in the Tribunal and the Department.

He also told him that he was not keeping idle but was quite up-to-date with the latest law on Sales Tax matters and other allied laws.

The news of Shri Joshi's sudden death was a shock to me. He was a workaholic and never ceased to work till his death. I have seen him coming to the Tribunal only a few days back although it was not necessary for him to do so because he has a very competent daughter- Mrs. Nikita Badheka who could handle these cases.

Shri Joshi was born fighter and a crussador for justice where in injustice was done to the dealers or even to the officers of the Department. I know it for certain that he has helped quite a number of officers in fighting their cases when they were not fairly treated by the Department.

Shri Joshi was a brilliant man with razor- sharp intellect and was able to invent arguments and marvel both the judges and the Assesses alike. In fact, when he merely put forth proposition which apparently looked absurd. However, when he argued he was able to convince the judges that what he argued was justified and was therefore able to succeed.

Shri Joshi had also an uncanny sense of reading the judgments in the right manner. He was therefore able to rely on such judgments in the best interests of his clients.

I can say without fear of contradiction that the law on Sales Tax during the last six decades has been developed largely because of him. His tenacity in arguing the matters was to my mind un-paralled.

Above all, although he was a little moody as all brilliant men normally are he had absolutely no airs and would mix freely with the juniors without any reservations.

Although Shri Joshi's death cannot be called premature, his death has certainly created a void which will be difficult to fill.

May God give enough strength to his family to bear the loss caused by his death.

May his soul rest in peace.

S.S.GAITONDE

MY PERSONAL AND PROFESSIONAL RELATIONSHIP WITH SHRI B.C. JOSHI

Way back in 1974-75, when Shri Joshi was the president of our Chamber, he planned an All India, Tax Practitioners' Conference, in Mumbai. He was in the search of faculty and Judges to preside over various sessions in various topics. He then contacted me to become one of the faculty, and to contact various judges and to persuade them to grace the occasion. As I was regularly appearing before all the tax Benches, I was knowing all of them and I persuaded the Hon'ble Chief Justice to inaugurate, the conference and four other Hon'ble Judges to preside over the four sessions. I was one of faculty is a session on Trusts & Taxes. The conference was a great success attended by about 900 delegates from all over India, consisting of Advocates, Chartered Accountants and tax practitioners. My paper was also very well received, and Mr. Joshi was very much pleased with me and in the second year of his presidentship, in early 1976 he asked me to be on the managing committee of the Chamber, and though I agreed, I was hardly knowing anything, about the working of the Chamber. To my utter surprise and real shock, when I returned from summer holidays, I was informed that I have been chosen as the president of the Chamber. Believe me at that time I was not even a member of the Chamber. But Mr. Joshi's word was a law, and nobody objected to his decision. The first thing I did, on taking over the presidentship was, I admitted myself as a member of the Chamber.

Before that, in the year 1976, because of the great efforts of Shri B.C. Joshi, Shri R.V. Patel and Shri N.C. Mehta, with a view to have a tax association, on all India basis; The All India Federation of Tax Practitioners was formed on 11th July 1976, Shri N.C. Mehta as its first president.

Going back to our Chamber, after I completed, my first year of my presidentship. I was not to continue for the second year, so that others may get a chance. The managing committee was to elect the new president. Two persons were contesting. On the date fixed for election, I was about to distribute, ballad papers, then Shri Joshi entered the Hall and ordered the two contestants to withdraw, saying that Mr. Patil will continue as a President for second year. To that purpose Shri Joshi not even asked me whether I will continue as president. The two contestants meekly withdrew from the contest and Mr. Joshi declared that Mr. Patil is elected as a president for the second year. Such was the love and respect Mr. Joshi commended in the Chamber.

There are so many instances to show the great love and affection of my Bhaisab (Shri Joshi) for me, but I will narrate only two such instances. One day Shri Joshi came to my Chamber along with his son Vipul, and told me Vijayrao (as he addressed me always) this boy will be your new junior and he is also from today your son. I was clearly over come by emotion. However it goes to Shri Vipul's credits that he has always behaved as an ideal son and as an ideal junior.

Another instance of such love, I was arguing a Sales Tax Appeal before Sales Tax Bench of the Tribunal. The learned D.R. produced some tribunal decisions in his favour, I told the bench that we may not go by some tribunal decision and let us argue on the merits of the case. My remark irritated them and they remarked, "Mr. Patil you can't take our orders so lightly! Shri Joshi was present in the court, and he gotup and said `Mr. Patil is right', as some of your orders are not even the worth, the paper on which they are written". What a moral courage to tell bluntly the members about the real worth of their orders ! Yes that was our great leader and, my dear Bhaisab.

V. H. Patil

15th May' 2013..... "Going, Going but NOT Gone" .....B. C. Joshi.

16th May' 2013..... "Going, Going and NOW Gone"
"Never to return" .....P.C. Joshi.

MY HOMAGE TO DEAR BALABHADRABHAI

To penned down about someone who was my guardian, right from tender age of seven years when I lost my father, is really a difficult task. One can write in a flowery language about an unconnected person, but with great difficulty instead of referring to his professional achievements, I would share some of my momentary and emotional reflections hereunder about some of the aspects which may possibly be not known to others.

The first thing which comes to my mind is his riding me as a young boy on the bar of his cycle. By nature he was so different that he would create a new path instead of following the traditional religious actions which did not appeal to his mind. During College days at Ahmedabad he jumped in the Quit India Movement in 1942 and went to the extent of physically removing the rail tracks near Anand Station. The news reached our family and fearing his arrest by British rulers, my father overnight rushed and traced him amongst several young, energetic and enthusiastic freedom fighters; and persuaded him with great difficulty to return to the family at Godhra, our native place.

His fighting spirit was also visible to all his college hostel mates when as a mess In charge, he challenged the purchases of some grocery items at a higher price than the one in wholesale market. After graduation in Commerce from H L College of Commerce, Ahmedabad, he came down to Bombay where our eldest brother was in employment with Railways. Finding that several people did not get their railway claims in time he started practising as a Railway Claims Practitioner. After some time he switched over to an employment with a private concern (M/s L.N. Gadodia & Sons) as an accounts clerk. That employment also was found to be not suitable to his independent style of working; therefore he ventured to do his own independent business in the name and style of M/s Cosmic Services. Unfortunately, his partner behaved in a manner unacceptable to him. As a businessman he had the occasions to appear before the tax authorities. Finding grave injustice met at the hands of authorities he plunged into the tax profession as a Sales Tax and Income Tax Practitioner sometime in 1953/1954. During those days the matters arising out of Bombay Sales Tax Act, 1946 were in full flow. His past acquaintances with businessmen mostly in cloth and chemical, helped him during the initial period of practise. Soon thereafter, he obtained the law degree and continued to practice as an advocate in Direct and Indirect Taxes.

He took active interest in the formation of 'Sales Tax Practitioners' Association (STPA)' with hardly a few professional friends like Shri C.M. Mehta, J.P. Thakkar, B. M. Trivedi, C. B. Shah, P.C. Kshatriya, G.T. Dattary and others. During lunch time those who happen to be near Income Tax office at Queens Road, used to have tea/coffee in the ground floor flat of Sunbeam Chambers where the Chamber of Income Tax Consultants had its office.

In his appearances before Sales Tax Tribunal since its inception, he shined out as a workaholic person never interested in any other activity than the profession. His colleagues during initial years still cherish several memorable incidents of his activity, at times waging an intense battle at the Bar.

Accepting the suggestions from the then President of the Tribunal Shri T.P. Goghale, he took a leading active part in formation of an Association of only those professionals who were regularly appearing before the Tribunal. Such a move met with serious opposition from some of the members of STPA. It was Shri B.C. Joshi who withstood the protests like a solid rock. The Association later on flourished to the present position as Sales Tax Tribunal Bar Association. That was an example of his stubborn nature which forced him not to change his views very easily but strived for achieving the goal set in his mind.

Expanding his field of activity with a view to give benefit of his knowledge and experience, to younger generation, he took upon himself to make the Chamber of Income tax Consultants a vibrant institution instead of a place for whiling away the lunch time by those practising income tax. He also prevailed upon some of the active professional friends from STPA to join the Chamber, so as to enlarge the roll of membership side by side organizing the seminars and conferences. He also initiated the publication of Income Tax Review.

With a view to enlarge his horizon, he successfully contested the election of Bar Council of Maharashtra to become its first Tax Advocate as a Bar Councillor. Later on he became its Chairman. With the help of some of his fellow Councillors like Shri. D.R. Dhanuka, Shri. Ram Jethmalani, Shri. M. P.Vashi and Shri. Mahabaleshwar Morje, he started the publication of a quarterly Journal, possibly first of its nature by a statutory Body like Bar Council.

He always yearned for the independence of the Appellate forums including the Tribunal. He spent many days in search of the materials and authorities in its support. His contribution was recognised in the country when he was awarded the First prize in an All India Competition for a research paper. That thesis is even today referred to, for some of the finer points dealt with by him in great detail.

Though the appointment of I.T.A.T. members and its independence have by now well established, much remains to be attained as far as the other Tribunals are concerned. I may share herein that during the present summer vacation period he desired to draft a comprehensive Writ Petition for a transparent and independent System for appointment of Hon'ble members and working of the Sales Tax Tribunals as well as various similar Forums and Courts under all State Enactments. That desire or last wish remained unfulfilled. As a real tribute to the departed soul it would be our duty to strive to achieve it.

Balabhadrabhai did not restrict his attention only to The State of Bombay (since bifurcated into that of Maharashtra and Gujarat), but when in the year 1973-74 (I was the President of STPA) the Second All India Conference was organised, he floated the idea of having an all India Body that will unite the Direct and Indirect tax Professionals from the nook and corner of the Country on one common platform. An Adhoc Committee was then formed which worked out the modalities that were crystallised in the Draft form of Constitution of All India Federation of Tax Practitioners (AIFTP). It was on 11th November, 1976, in the course of yet another All India Conference arranged by Chamber of Income Tax Consultants under the Presidentship of my Brother B.C. Joshi the Draft Constitution of AIFTP was adopted in the presence of Hon'ble Chief Justice of India (Retd) Shri J. C. Shah and blessing of Shri Nani Palkhivala, Shri Ramrao Adhik-Advocate General of Maharashtra, SHRI S. P. Mehta, and several other renowned tax Professionals from all parts of the Country. Bhai became the Dy. President with Shri N. C. Mehta as the Founder President and myself as founder Secretary General. AIFTP today have grown up like a Big Banyan Tree. I salute those visionary GEMS OF India.

To me, Balabhadrabhai was the effective mentor; who moulded my life in entirety. Whatever I am today, is all due to his decisions about me and my family as Karta of our H.U.F.

I still cherish and follow his everlasting advise "welcome the clients with a smile and part with an assurance to him that the best of your ability would be at his command". Advise him to leave behind the problems he faced to be sorted out by you in his best interest. "Place the core points before the authorities duly supported by evidence / documents without any fear of being rejected". "Theirs are not the final words of law, that in future may be settled by the judgment of the tribunal, High Court or Supreme Court".

I conclude with a note that like a bright evershining Polestar in the Sky, he will always be with me and many others, to guide or show the right direction, or render help in arriving at the correct decision in future.

22-5-2013 **P.C. Joshi,** Mumbai

श्री बलभद्र जोशी के प्रति श्रध्दांजली

के. के. रामानी

श्री बलभद्र जोशी आज हमारे बीच नहीं हैं परंतु आज भी उनकी विद्वता, मानवीयता एवं कानून के परिक्षेत्र में दिया योगदान हम सबके स्मृति पटल पर यथावत बना हुआ है ।

श्री जोशी एक उत्कृष्ट कर सलाहकार के साथ-साथ, अनेक नवयुवक सलाहकारों के लिए आदर्श पथ-प्रदर्शन के रूप में जाने जाते थे। मैंने भी जब बिक्रीकर सलाहकार के रूप में सन् १९६४-६५ में शुरूआत की तब समय-समय पर उनके अनुभव और कानून के ज्ञान द्वारा विभिन्न समस्याओं से निपटने का तरीका उन्हीं से सीखा।

जोशीजी जहाँ एक तरफ अत्यन्त ही निडर व्यक्तित्व के स्वामी थे और किसी भी अधिकारी के समझ अपनी बात बिना भय के प्रभावी रूप से रखने में कभी सकुचाते नहीं थे वहीं दूसरी तरफ अपने सहायकों, करदाताओं एवं जूनियर अधिकारियों के प्रति उनका व्यवहार बहुत ही शालीन, सहानुभूतिपूर्ण और नम्रता का होता था । उनका मानना था कि–

"केवल कमाई न हमारा कर्म होना चाहिए,

उसमें परोपकार का भी मर्म होना चाहिए।।"

प्राय: देखा जाता था कि बिक्रीकर प्राधिकरण में विभागीय प्रतिनिधी को उनकी बात काटने से पहले कई बार सोचना पड़ता था । ऐसे निडर व्यक्तित्व के धनी व्यक्ति के बारे में श्री गुरूग्रंथ साहब में लिखा है–

भय काहू को देत नाहीं, नहिं भय मानस आनि ।

कहु नानक सुन रे मना, ज्ञानी ताहि बखानि ।।

कर्तव्य परायणता श्री. जोशी की कार्यप्रणाली का मूलमंत्र था, उनके लिए जीत और हार से ज्यादा इस बात का महत्व था कि उन्होंने अपना कार्य भलीभाँति निष्पादित किया या नहीं । "कर्मण्ये वाधिकारस्ते मा फलेषु कदाचन" उनकी कार्यप्रणाली में पूर्णरूप से चरित्रार्थ होता था । कोई भी हार उनको निराश नहीं करती थी क्योंकि उनका मानना था–

क्या हार में क्या जीत में, किंचित नहीं भयभीत में ।

संघर्ष पथ पर जो मिले, यह भी सही वह भी सही ।।

यह उनकी विद्वता, कर्मठता एवं दृष्टिकोण का ही परिणाम था कि श्री जोशी सेल्स टैक्स प्रैक्टीशनर एसोसिएशन, चेम्बर ऑफ टैक्स कन्सलटेन्ट तथा आल इण्डिया फेडरेशन ऑफ टैक्स प्रेक्टीशनरस् के अध्यक्ष पद से सुशोभित हुए।

आज चेम्बर ऑफ टैक्स कन्स्लटेन्ट का जो भी स्वरूप है उसका महत्तम श्रेय श्री जोशी को ही जाता है । जो चेम्बर १९७४ तक महज एक क्लब की तरह काम करता था, श्री जोशी के अध्यक्ष बनने के बाद निरंतर प्रगति की और अग्रसर होता हुआ अपने वर्तमान स्तर पर पहुँचा है।

वे बलभद्र ही थे जो अपने लिये जीते न थे ।

हो स्वार्थ रत नोटों की गड्डी कभी गिनते न थे ।।

चेम्बर के उद्धार हित, था जन्म उनका हुआ ।

निष्क्रिय होकर बैठ रहना वे कभी जानते न थे।।

वो श्री बलभद्र जोशी ही थे जिन्होंने १९७६ में ऑल इण्डिया कान्फ्रेन्स ऑन टैक्सेशन आयोजित की जिसमें सारे देश से कर सलाहकार, चार्टड एकाउन्टेन्टस् तथा कानूनी सलाहकारों ने भाग लिया । ये उसी की सफलता का परिणाम था कि A.I.F.T.P. की स्थापना हुई जिसके श्री जोशी फाउण्डर प्रेसिडेंट बने। मैं स्वयं उनके ही प्रात्साहन से १९७६ में CTC की मैनेजिंग कमेटी सहस्य बना।

बार काउन्सिल पर निर्वाचित होना किसी भी कर सलाहकार के लिए आसान नहीं होता परंतु वो श्री जोशी ही थे जो बार काउन्सिल ऑफ महाराष्ट्र के न सिर्फ सदस्य चुने गये बल्कि उसके चेयरमैन भी बने ।

बड़े हर्ष की बात है कि श्री. जोशी ने जिस परंपरा, आदर्श, एवं कर्मठता को स्थापित किया उसे उनके सुपुत्र विपुल एवं सुपुत्री निकिता बड़ी ही ईमानदारी से आगे ले जा रहे है। हमारे देश की पुरानी विचारधारा है–

"प्रजातंतु मां व्ययत्छेत्सी"

बड़े गर्व की बात है कि विपुल एवं निकिता भारत में तथ उनकी वो पुत्रियाँ दीप्ति तथा तृप्ति, पुत्र उत्कर्ष अमेरिका में जोशीजा का नाम ऊँचा कर रहे हैं और इस विचारधारा को पूर्णरूप से चरित्रार्थ कर रहे है।

इन्ही शब्दों के साथ उस महान आत्मा के लिए नतमस्तक होकर परम्पिता परमात्मा से प्रार्थना करता हूँ कि दिवंगत आत्मा को शांति प्रदान करे। उनका जीवन सदैव हम सब को प्रोत्साहित करता रहे और उनके पदचिन्हों पर चलने के लिए प्रेरित करता रहे।

BALBHADRABHAI AS I KNEW HIM

When I received the news of sad demise of Shri Balbhadrabhai, I was shocked and could not believe that my Balbhadrabhai was no more, whom I always called by his first name. He was a born lawyer everyday to fight against injustice caused by bureaucracy, Government or Lagislature. He was one of the greatest lawyer from Sales Tax Bar and instrumental in formation of not only one association but more than one. He was popular amongst the sales tax fraternity and also contributed substantially for education of Income Tax Law when he was a President of the Chamber for the year 1974-1976.

During my term as President of the Chamber, it was decided to bring out sketch of history of the Chamber and at that time I came to know that he revived the chamber and made it a vibrant association by starting new activities such as publication of our mouthpiece Income Tax Review, starting of study Circle Meetings, opening of J R Shah library at Aaykar Bhavan, etc. During his term, Chamber celebrated Golden Jubilee and organised All India Conference on Taxation which was attended by more than 800 delegates from various parts of India.

He was very humble and always respected the person holding the post as President of the Chamber. I remember once I called him and requested him to speak on a subject and he said "Vanjara, first you withdraw the word request and being a President of the Chamber you have right over me to give any order." I was stunned that such a great man gives so much respect to the person like me just because I am a President of the Chamber.

I had also personal and family relationship with him. While travelling with him for a conference or meetings hosted by AIFTP, he always asked about my well being and assured that I am like his son Vipul and always gave me a feeling of my father.

We all will miss him a lot not only as a lawyer but also as a family member.

I pray the Almighty God to bestow eternal peace to the departed soul and give enough strength and courage to his family members to bear irreparable loss caused due to his sudden departure.

Kishor Vanjara

V. H. Patil, *Advocate*

Ved and Vedanta

THE YOGA OF RENUNCIATION OF ACTION
SHLOKAS OF CHAPTER-V KARMA SANNYASA YOGA

Arjuna uvaca:
Sannyasam Karmanam Krsna punaryogam ca samsasi
yacchreya etayorekam tanme bruhi suniscitam 1

Arjuna said:

1. O Krsna, you praise renunciation of action and again yoga (path of action); tell me conclusively which of the two is better.

Sri Bhagavan uvaca;
Sannyasah karmayogasca nihsreyasakaravubhau
tayostu karmasannyasatkarmayogo visisyate 2

The blessed Lord said:

2. Both renunciation and yoga of action lead to supreme Bliss; but of the two yoga of action is superior to renunciation of action.

Jneyah sa nityasannyasi yon a dvesti na kanksati
nirdvandvo hi Mahabaho sukham bandhatpramucyate 3

3. He should be known as a perpetual sannyasi (ascetic) who neither hates nor desires; for, free from the pairs of opposites, O Mahabaho, he is easily set free from bondage.

Sankhyayogau prthagbalah pravadanti na panditah
ekamapyasthitah samyagubhayorvindate phalam 4

4. Children, not the wise, speak of sankhya and yoga as different; he who is duly established in one obtains the fruit of both.

Yat sankhyaih prapyate sthanam tadyogairapi gamyate
ekam sankhyam ca yogam ca yah pasyati sa pasyati 5

5. That state which is reached by the sankhyas is reached by the yogis also; he who sees sankhya and yoga as one, he sees.

Sannayasastu Mahabaho dukhamaptumayogatah
yogayukto munirbrahma nacirenadhigacchati 6

6. But renunciation, O Mahabaho, is hard to attain without yoga (action); a sage, well established in yoga, attains Prahman ere long;

Yogayukto visuddhatma vijitatma jitendriyah
sarvabhutatmabhutatma kurvannapi na lipyate 7

7. He who is united by yoga, who has purified and conquered the self, subdued his senses, who realizes his Self as the Self in all beings, is not tainted although acting.

Niva kincitkaromiti yukto manyeta tattvavit
pasyansrnvansprsanjighrannasnangaccha-
nsvapansvasan 8

Pralapanvisrjangrhnannunmisannimisannapi
Indriyanindriyarthesu vartanta iti dharayan 9

8. The knower of Truth, united with Self, thinks "I do nothing at all"; seeing, hearing, touching, smelling, eating, going, sleeping, breathing-

9. Speaking, releasing, seizing, opening and closing (the eyes) – he is convinced, "The senses move among he sense objects".

Brahmanyadhaya karmani sangam tyaktva
karoti yah
lipyate na sa papena padmapatramivambhasa 10

10. He who, dedicating his actions to Brahman, acts abandoning attachment, is not tainted by sin as a lotus leaf by water.

Kayen Manasa buddhya kevalairindriyairapi
yoginah karma kurvanti sangam
tyaktvatmasuddhaye 11

11. The yogis, having abandoned attachment, perform action merely by the senses, body, mind and intellect for self-purification.

Yuktah karmaphalam tyaktva santimapnoti
naisthikim
ayuktah kamakarena phale sakto nibadhyate 12

12. The yukta (united one) having abandoned the fruit of action, attains eternal peace, the ayukta (non united), impelled by desire and attached to fruit, is bound..

Sarvakarmani manasa sannyasyaste sukham vasi
navadvare pure dehi naivakurvanna karayan 13

13. Mentally renouncing all actions and self-controlled, the embodied rests happily in the city of nine gates neither even acting nor causing to act.

Na kartrivam na karmani lokasya srijati prabhuh]
na karmaphalasamyogam svabhavastu pravartate 14

14. The Lord creates neither doership nor actions nor the union with fruit of action for the world; but nature manifests itself.

Nadatte kasyacitpapam na caiva sukrtam vibhuh
ajnanenavrtam jnanam tena muhyanti jantavah 15

15. The Lord accepts neither the sin nor even the virtue of anyone; knowledge is veiled by ignorance, beings are thereby deluded.

Jnanena tu tadajnanam yesam nasitamatmanah
tesamadityavajjnanam prakasayati tatparam 16

16. But in whom ignorance is destroyed by knowledge, in them knowledge reveals the Supreme like the sun.

Tadbuddhayastadatmanastannisthastatparayanah
gacchantyapunaravrttim jnananirdhutakalmasah 17

17. With mind and intellect established in That, with That as the supreme goal, they whose sings have been dispelled by knowledge, reach a state of no return.

Vidyavinayasampanne brahmane gavi hastini
suni caiva svapake ca panditah samadarsinah 18

18. The wise view equally a brahmana endowed with learning and humility, a cow, an elephant, a dog and even an outcaste.

Jhaiva tairjitah sargo yesam samye sthnitam manah,
nirdosam hi samam brahma tasmadbrahmani te sthitah
19

19. Even here birth is overcome by those whose mind rests in evenness; Brahman is indeed spotless and equal, therefore they are established in Brahman.

Na prahrsyetpriyam prapya nodvijetprapya capriyam
Sthirabuddhirasammudho brahmavid brahmani sthitah20

20; With steady intellect established in Brahman, the undeluded knower of Brahman neither rejoices on obtaining what is pleasant nor grieves on obtaining what is unpleasant.

Bahyasparsesvasaktatma vindatyatmani yatsukham
sa brahmayogayuktatma sukhamaksayamasnute 21

21. Unattached to external contacts one finds the happiness that is in the Self; uniting oneself to Brahman by yoga one attains eternal bliss.

Ye hi samsparsajid bhoga duhkhayonaya eva te
adyantavantah Kaunteya na tesu ramate budhah 22

22. For, the entjoyments that are born of contacts are only wombs of sorrow, they have a beginning and an end, O Kaunteya, the wise one does not rejoice in them.

Saknotihaviva yah sodhum praksariravimoksanat
kamakrodhodbhavam vegam sa yuktah sa sukhi narah
23

23. He who is able to withstand even here, before liberation from the body, the force arising from desire and anger, he is a yogi, he is a happy man.

Yo'ntahsukho'ntararamastathantarjyotireva yah
sa yogi brahmanirvanam brahmabhuto dhigacchati 24

24. He who is happy within, who rejoices within, who is illumined within that hogialone, becoming Brahman, gains the bliss of Brahman.

Labhante brahmanirvanamrsyah ksinakalmasah
chinnadvaidha yatatmanah sarvabhutahite ratah 25

25. Sages attain the bliss of Brahman whose sins have been destroyed, whose dualities are destroyed, who are self-controlled, who revel in the welfare of all beings.

Kamakrodhaviyuktanam yatinam yatacetasam
abhito brahmanirvanam vartate viditatmanam 26

26. For those who are freed from desire and anger, who are self-controlled, who have subdued their mind completely, who have realized the Self, the bliss of Brahman resides in hem.

Sparsankrtva bahirbahyamscaksuscaivantare bhruvoh
pranapanau samau kriva nasabhyantaracarinau 27
Yatendriyamanobuddhirmunirmoksaparayanah
vigatecchabhayakrodho yah sada mukta eva sah 28

27. Shutting out external contacts and fixing the gaze as though between the eyebrows, equalizing the flow of incoming and outgoing breaths in the nostrils.

28. Having the senses, mind and intellect controlled, with liberation as the goal, the sage, free from desire, anger and fear, is verily liberated forever.

Bhoktaram yajnatapasam sarvalokamahesvaram
suhrdam sarvabhutanam jnatva mam
santimrcchati 29

29. Having known Me as the enjoyer of sacrifices and austerities, the supreme Lord of all world, the friend of all beings, he attains peace.

The fifth chapter, entitled Karma Sannyasa Yoga, has 29 shlokas. Having practiced the yajnas (sacrifices) prescribed in the preceding chapter and gained wisdowm, a seeker sheds his vasanas/ desires and develops a dispassion for the world. He enters into a state of renunciation, an essential prerequisite for practicing meditation. This chapter elucidates this state of development preliminary to meditation and realisation.

I. Yogi, sannyasi and jnani

In the opening verse of the chapter Arjuna asks Krsna to advise him conclusively as to which is the better of the two the Path of Action or the Path of Renunciation. Krsna clarifies this doubt by explaining the three distinct stages of spiritual growth. A seeker embarking on his spiritual journey with vasanas/desires is termed a yogi. Through karma yoga, the Path of Action, he sheds the bulk of his vasanas. As he does so he becomes dispassionate towards the world and becomes an ascetic, a sannyasi. A sannyasi, following the Path of Knowledge, practices contemplation and meditation until he reaches the ultimate state of Self-realisation to become a jnani, an enlightened soul. Both yogi and sannyasi reach the supreme goal. Thus, one takes up either the Path of Action or the Path of Renunciation according to one's basic nature.

II. How they relate to action

The above three types of individuals relate differently to action. The enlightened one, the jnani, having merged with the Self, realizes that the Self does not act at all. In and through all actions, external and internal, the jnani remains a silent witness while the senses contact the sense objects. The sannyasi, in his state of dispassion, dedicates all his actions to Brahman. He acts without any attachment. Consequently, his actions are not sinful and do not leave a residue of vasanas/desires. Such a person, like a lotus leaf in water, remains in the world, but detached from and unaffected by it. The yogi, one at the beginning of the spiritual journey, detaches himself from worldly entanglements ad directs all his physical, mental and intellectual activities towards his own self-purification.

III. State of supreme Being.

The Self, Atman, though the primeval cause of all actions, is not at all liable for either the merit or demerit accruing from them. Though the Self enlivens the actions of all beings It is neither the actor nor the action nor is It responsible for the fruits of action. Those ignorant of this relationship remain deluded in the world. But he whose ignorance has been removed by knowledge of the Self reaches he supreme state of Being whence there is no return. Thereafter, he maintains a universal vision of oneness and evenness towards everything he meets in the world. Having reached that eternal state he has forever transcended the cycle of birth and death.

IV. Renunciation precedes meditation and Realisation

Sensual enjoyments arising out of external contacts have a diminishing value and they culminate in sorrow. The very sight of sense objects inflames desires, in people. Then they lose control and succumb to the lure of the sense objects. The wise understand the ephemeral nature of contact-born enjoyments and prevent any desire from developing into an uncontrollable force or momentum. Instead of indulging in such temporary bouts of sensual pleasure they divert their attention and interest to the Self within. Thus, they free themselves gradually from desires, subdue their mind and turn introvert. They begin to revel in the bliss of the Self. When a mind is subdued and relatively peaceful it becomes fit for meditation. The last three verses of the chapter give a few procedural details for practising meditation and realizing the ultimate Being in oneself.

The last three shlokas of the chapter give a few procedural details for practicing meditation and realizing the ultimate Being in oneself.

27. Shutting out external contacts and fixing the gaze as though between the eyebrows, equalizing the flow of incoming and outgoing breaths in the nostrils.

28. Having the senses, mind and intellect controlled, with liberation as the goal, the sage, free from desire, anger and fear, is verily liberated forever.

THESE TWO shlokas provide the procedural details of meditation. Meditation is the final step towards spiritual liberation. In it one practices the art of maintaining the mind in Sharp focus upon one chosen though to the exclusion of all other thoughts. The strategy of meditation is to converge the mind to single-pointed thought and ultimately crush that last thought out of existence. In order to achieve that state you must first free your mind from its extroverted pursuits. Thus, verse 27 says meditation requires you to have shut out external contacts.

The human mind runs wildly in all directions seeking the pleasures of the world. Full of desires and agitations, it cannot even concentrate, much less meditate. Therefore, you must first reduce your desires by controlling your senses, mind and intellect through the practice of the three yogas – karma (action), bhakti (devotion) and jnana (knowledge). The three yogas will help you withdraw your mind from its preoccupation with the world. A mind thus withdrawn remains calm. It is then prepared for the practice of meditation. Sit with your legs folded forming a maximum base, with your back and neck erect and your muscles relaxed. Equalise the flow of outgoing and incoming breaths in your nostrils. Proper regulation of breath is conductive for mental equanimity. Place your mind's concentration between your eyebrows. This suggestion given in verse 27 directs

your gaze slightly upwards, symbolizing devotion. A mind turned upwards develops devotion. A devotional attitude of the mind is also conducive for meditation. With a detached and devoted mind meditate upon the supreme Self within. This practice will take you to the transcendental Reality and liberate you from the limitations of this terrestrial world.

29. Having known Me as the enjoyer of sacrifices and austerities, the supreme Lord of all world, the friend of all beings, he attains peace.

PROPHETS AND enlightened sages have used the first person singular pronoun `Me' to mean the Self. Here is one such usage where Lord Krsna refers to the Self as the enjoyer of sacrifice (yajna) and austerity(tapas), the supreme Lord of all worlds and a friend of all beings. He who realizes the Self becomes all this and attains peace.

Yajna means work done in a spirit of service and sacrifice for a higher ideal. STapas (austerity) means conserving and directing your energy to the achievement of the ideal. Therefore, to practise yajna and tapas one must first fix an ideal in life. An ideal is a common cause, purpose or goal to work for beyond your selfish and self-centred interests. You can choose a limited or an absolute ideal. Limited ideals are thosue directed to the welfare of the world and beings in it while the one absolute ideal is Self-realisation. Selfish and self-centred activities produce mental agitations and sorrow. Whereas, those dedicated to a higher ideal generate peace and harmony within. The more you direct your energies towards an ideal and the more you practise sacrifice and austerity to achieve it, the more peace and happiness you command. Thus, by attuning to the Self, you gradually come to enjoy total happiness. The Self is therefore considered the enjoyer of sacrifice and austerity.

The Self is also described as the supreme Lord, Mahesvara, of all world. Every person experiences three states of consciousness in life, the worlds of the waker, dreamer and deep sleeper. The Self is the pure Consciousness which supports all three states. Without the Self the waker will not experience the waking world. Neither will the dreamer and deep sleeper experience their respective worlds. The Self controls and commands all states of consciousness. It is therefore the supreme Lord of all the worlds.

Finally, the Self is considered a friend (suhrda) of all beings. A friend gives comfort, solace, happiness, whereas an enemy gives discomfort, trouble, sorrow. That marks the difference between the Self and this world. Those who run after the world of objects and beings meet with stress, strain and sorrow. On the contrary, the few wise ones who pursue and gain the knowledge of the Self attain eternal peace and bliss.

Really the last three shlokas give an introduction to meditation which is elaborately discussed in the next chapter entitled as `Dhnyani Yoga, The Yoga of Meditation.

As we sow above Karma Yoga and Sanyasa Yoga are not only not separate parts, but they are inseparable parts of each other like two parts of the same coin, as the two facets or aspects of the same Yoga observed from different angles one aspect, of control of mind from outside (Yoga) (Karma Yoga) and the other inner control of the mind, (sanyasa).

This Chapter teaches that renunciation or the detached spirit is the fundamental principle of all Yogas. All beings experience an infinite joy in renunciation. In deep sleep everyone feels immense happiness when one really possesses nothing, thinks of nothing. Intellect. Mind and senses cease to function unconsciously and go nearer to the Self. In this state, the king, beggar and the animal merge into the one consciousness without the least distinction and renouncing all their unnatural superimpositions of personality. When one consciously renounces the activities of the senses, mind and intellect one will surely merge into one's essential nature of the Supreme Consciousness which is the Supreme Good and Supreme Happiness. Thus, the renunciation or loss of individuality becomes a means to supreme perfection. This is the glory of the wisdom of renunciation. The action done with freedom from individuality spontaneously unites one with Universality. (PARAMATMA).

CA Kamlesh Vikamsey

An Overview of the present system of Income Tax Assessment – A Critical Evaluation

The Finance Minister, when he took over in August, 2012, made a statement that "clarity in tax laws, a stable tax regime, a non-adversarial tax administration, a fair mechanism for dispute resolution, and an independent judiciary will provide great assurance". That statement was the underlying theme of his tax proposals in Budget 2013. He emphasised on the need for an emerging economy to have a tax system that reflects best global practices and proposed to set up a Tax Administration Reform Commission to review the application of tax policies and tax laws and submit periodic reports that can be implemented to strengthen the capacity of our tax system.

Income-tax Assessment, also popularly known as Scrutiny Assessment, is an important part of the tax administration system. It is a process whereby the tax administrator verifies whether correct income and tax payable is reported by tax-payers. To put it differently, Income-tax Assessment is audit of the Income-tax returns filed by tax-payers.

The main function of the Assessing Officer ("AO") in scrutiny assessments is to verify the income and tax payable declared by the tax-payer in his Income-tax return based on relevant information gathered about the tax payer and application of the relevant tax laws. Based on the scrutiny proceedings, the AO passes the assessment orders either accepting the income and tax as declared by the tax-payer or making additions to the income or tax of the tax-payer as he deems fit based on his assessment.

The Income Tax Department ("Department") gets information of income of various tax-payers through TDS returns that are filed by tax deductors as also information of high-value transactions in mutual funds, immovable properties, stock exchanges, banks, financial institutions etc., by various tax-payers which are gathered under section 285BA through Annual Information Returns ("AIRs").

Since the aforesaid information is in electronic form, the Department has evolved certain parameters based on which cases are selected electronically without any human intervention for Scrutiny Assessment. This system of selection of cases is called Computer Assisted Scrutiny System ("CASS"). The process of selection has been refined over a period of time to effectively pick up the cases of potential non-reporting of income. CASS should be constantly tweaked to pick up the relevant cases on a scientific & intelligent basis which meet the ultimate objective and which send signals to tax-payers to report correct income and tax thereon.

Tax-payers should ensure filing correct information including those of its investments, foreign assets etc. in the Income-tax returns so as to avoid mis-match being detected by the CASS and their cases being selected for scrutiny.

It is suggested that the tax-payer's data available on the Department's database should automatically be pulled in the electronic return of the respective tax-payer while e-filing their returns. Such information should be made editable by the tax-payer in case

found incorrect. This would deter tax-payers from concealing any information as also save on the time for filling up / verifying the returns.

With important information of tax-payers being available on the department's database, scrutiny assessments can be planned and carried out in a more scientific and effective manner within the limited time available based on relevant reports generated from the database and analysis of the same.

Based on this analysis, the initial list of information called for by the AO should be made more specific rather than the usually long list of information which is currently being sent, most of which may be irrelevant in majority of the cases. The Department should consider using their existing database while issuing notices. Questions on high value transactions contained in their database can be automatically picked up in the scrutiny notices.

It is important that the information / documents / proofs / extracts of books of accounts / explanations / submissions provided by the tax-payer should be in writing, precise, relevant, to the point and in an organised manner so as to enable timely assessment in a smooth manner as also form a good base in case of disputes in future. The tax-payer should co-operate with the proceedings and should not omit to provide the required and relevant information in the manner asked for.

It has been often seen that the letters / communications sent to the department are not acknowledged for receipt. The Department should evolve practice of mandatory acknowledgment of receipt of the submissions / letter made by the tax-payer to avoid confusion subsequently as also maintaining detailed order sheet of the proceedings during the scrutiny assessments which should be signed by both, the tax-payer / his representative and the AO.

Further, as a knowledge management process, the Department should evolve a system of receiving all submissions / communications / letter through e-mails / in digital form and the same be archived systematically & scientifically in the database so as to expedite the data retrieval / access process by the concerned jurisdictional officers / authorities. Similarly all communication to / from the Department should be saved systematically & scientifically in electronic form in their database so as to aim at a paperless system.

What is required is the correct and balanced attitude from the AO so as to discharge his duty properly. He must be strict at the same time, humble and polite towards the tax-payers so as to meet his ultimate objective of scrutiny. He should respect the tax-payers / their representatives. He should be conscious of and value the time of the opposite person. Number of hearings should be kept at minimum unless necessary. He should plan his proceedings in a timely manner so as to avoid any hardship to the tax-payers as well as himself and avoid hasty assessment orders.

The AO should refer to and rely on the Chartered Accountant's reports and certificates like the Tax Audit reports, except in circumstances which arouse suspicion about the reliability of such report or certificates.

The Department must have a ready common data base of major issues in each sector and recent judicial pronouncements, uniform stand taken by the Board on treatment of the issues, circulars, notifications, instructions, training materials in connection with the same so as to assist better quality of assessment.

If any legal matter has attained finality, either at the stage of Supreme Court or High Court or Tribunals, where department has not appealed against the same, the Board should take a stand on the same and communicate the same to officers so that these issues are treated uniformly across the board

The Department should aim at focusing on intelligent and scientific assessment so as to identify major non-reporting of income and tax leakages.

Based on his assessment of all information on record and the proceedings before him, if the AO intends to make any major additions, as per the Principle of Justice, the tax-payer should be intimated about the same by way of a show cause notice so as to give the tax-payer reasonable opportunity of being heard and putting forth his views and explanations. Many a times, due to paucity of time, this is not being done causing major shocks to the tax-payers

receiving unexpected demand orders based on such assessment orders. This practice should be avoided so as to create a just & fair and tax friendly environment.

In case of difference of opinion between the AO and the tax-payer on any major issue, a reference can be made by the tax-payer or the AO u/s. 144A to the Joint Commissioner for his direction / guidance to the AO on the same. In such case, it may be noted that the Joint Commissioner cannot issue any directions prejudicial to the tax-payer before giving him an opportunity of being heard.

Once the AO has heard the tax-payer and examined all the information on record, the next step is the final product of the scrutiny proceedings i.e. the assessment order.

It is observed, at times, that the assessment orders are not precise – they do not contain the relevant facts, information and data gathered during the proceedings and are quite often not well reasoned. This in turn works against the Department in case of disputes before the appellate authorities / Tribunals / Courts. Therefore they are advised to evolve a mandatory format / checklist for drafting orders so as to serve the ultimate objective of such an important exercise involving the precious time & resources of the Department as also the tax-payers.

The department should stop the standard practice of "Copy/Paste" so as to avoid long orders with irrelevant / incorrect information / data.

At times we see that large numbers of time-barring scrutiny cases are dumped on the officers which leaves very little time for making any meaningful scrutiny of the case before him. They just aim at completing the assessments somehow before the time barring date. This results in hasty assessments with incomplete data and consequent reassessments or assessments being set aside in appeal leading unnecessary difficulties and hassles to all.

If the tax-payer has declared his income correctly and in good faith, then the AO should be gracious enough to accept the same instead of making frivolous or routine additions and causing unnecessary dismay to tax-payers.

Again, as a knowledge / information management process, the assessment orders passed should be archived and saved in the Department's common database to enable easy access and reference by concerned officers / authorities.

In cases which have been subject to scrutiny assessment once and are subsequently picked up for reassessment, the AO should try and confine himself mainly to the issues for which the case has been reopened and not reinvent the wheel again. The credibility and sanctity of the scrutiny assessments should be maintained. The AO is expected to have properly applied his mind in the 1st innings and hence should not indulge in roving or fishing enquiries into all other matters as if doing the whole assessment again unless he stumbles across major non-reporting of income or concealments or leakages in the process. Even in cases of best judgment assessment, the same should be done scientifically and not on *ad-hoc* basis

The quality of assessments can be improved by improving the quality of the officers *vis-a-vis* their knowledge of law, skills, and finally drafting of the assessment orders.

There is a need to strengthen the capacity and resources of the tax administration system and investing in skills and management systems.

Meeting their annual targets should be the Department's goal, but definitely not at the cost of tax-payers. The concerned Ministry and authorities should know that tax collection is closely linked to the performance of the economy. If some sectors do badly, tax collection from the sector too will be affected. Under pressure from the top, tax officials often force tax-payers to pay tax, threatening them with the prospect of a raid or its softer version, the so-called survey. Officers are compelled to make high-pitched demand on large corporates based on wrong orders, which cannot be sustained at the appellate level. The excess demand gets refunded in future. This just defers the problem, as it gets into litigation for five to six years. Such aggressive stance of the tax authorities causes undue hardship to tax-payers.

What is needed is to focus on building and developing effective and efficient tax administration system so as to pin the major non-reporting of

income and tax leakages within the limited time and resources.

We need to equip the tax administrators and officers with all the requisite powers for assessment and tax collections but with corresponding accountability and transparency so that the powers are used judiciously to meet the ultimate objective – to discover the non-reporting of incomes and collection of correct taxes as per law. Accountability should be implemented in a balanced manner.

The Government should have an effective redressal system to ensure a tax friendly environment amongst tax payers & the department.

To resolve tax issues of the tax-payers, the Government has created office of "Income-Tax Ombudsman". The officer designated as "Ombudsman" holds independent jurisdiction and work as autonomous authority. The Government has so far set up twelve offices of Ombudsmen. They are stationed in Mumbai, Pune, New Delhi, Ahmedabad, Chennai, Bangalore, Kolkata, Hyderabad, Kanpur, Chandigarh, Bhopal and Kochi. The jurisdiction of the ombudsman is highly restricted; however, they can help the tax-payers in resolving issues such as (i) Income Tax Refunds matters, (ii) Refusal to acknowledge letters / communications sent to the department, (iii) Erroneous demand matters / assets attachments causing harassment to tax-payer, (iv) Scrutiny selection procedures and failure to communicate reasons thereof, (v) Tax credits and adjustment relating to TDS, (vi) Conduct of proceedings beyond working hours at the IT offices, (vii) Impolite behaviour of the officials, (viii) Matters concerning circulars of Central Board of Direct taxes about the Income-tax administration etc.

Further, almost every year, the CBDT carries on the ritual of issuing a D.O. / instruction containing Central Action Plans (CAPs) to the field formations for improving the quality of Scrutiny Assessments. As per this Scheme, AOs are to prepare compilation of minimum number of quality assessments passed in their respective charges in respect of scrutiny assessments completed during each financial year which clearly bring out the quality of work done and the resultant revenue impact. This compilation is then analysed by an Appraisal Committee constituted for 'Let us Share' by DGIT (Admin.) and incorporated in the issue of "Let us Share" with the objective of improving the quality of Scrutiny Assessments.

Further, with a view to expedite the time consuming litigation process in transfer pricings and in case of foreign companies, an alternate dispute resolution mechanism has been introduced in 2009 and a Dispute Resolution Panel (DRP) has been set for the same. However, until the last round of proceedings before DRP, the orders passed were without adequate analysis and essentially "non-speaking". In fact, the orders of DRP were simply thrashed by various Tribunals on the ground of their non-speaking nature. In most cases, the DRP had been conservative in its directions by just upholding the AO's / TPO's stand without any application of mind. However, this year, it was good to see that the DRP has slowly evolved and the orders passed recently have been more detailed and provided significant relief to tax-payers

In this era of globalisation, certainty in tax matters is one of the key considerations. Though a certain degree of tax litigation may be inevitable, a mature tax system must have a robust, effective and speedy tax department in place. The Government should endeavour towards improving the efficiency and effectiveness of tax administration systems. That means strengthening the capacity and resources needed for better tax-payer's services and enforcement, reviewing tax structures, and investing in skills and management systems needed to meet the ultimate objective. This includes creating the right attitude and atmosphere, building up tax administration capacity, equipping the officers dealing with scrutiny assessment with adequate powers with corresponding accountability, required technical and administrative support so as to evolve a tax administrative system that reflects best global practices. This will provide great assurance to the tax-payers, investors and the business community and help creating sound business environment in the country.

Sameer G. Dalal, *Advocate*

Section 14A and Rule 8D

When the case of an assessee is selected for scrutiny, it is always the endeavour of the Assessing Officer that the scrutiny assessment should result in a tax demand. The Assessing Officer in all the scrutiny assessment cases tries to make some addition by tinkering with the return income of the assessee. Sometimes the assessments framed by the Assessing Officer divulge that the additions and disallowances are made on flimsy grounds. This leads to unwarranted, superfluous and avoidable litigation. One of the disallowance the Assessing Officer always tries to make is the disallowance under section 14A of the Income tax Act, 1961 ("the Act") read with Rule 8D of the Income-tax Rule, 1962 ("the Rules").

The provisions of section 14A of the Act were inserted by the Finance Act 2001, with retrospective effect from the assessment year 1962-63 to overcome the effect of the Apex Court decision in the case of *Rajasthan State Warehousing Corporation vs. CIT - {(2000) 242 ITR 450 (SC)}*, which held that, the entire expenditure incurred by the assessee whether for earning taxable or non-taxable income was eligible for deduction under section 37 of the Act against the taxable incomes. The language used in section 14A(1) in crystal clear terms states that the relation has to be seen between the exempt income and the expenditure incurred in relation to it. The Apex Court in the case of *CIT vs. Walfort Share & Stock Brokers (P) Ltd.- {(2010) 326 ITR 1 (SC)}* held that, 'for attracting section 14A there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income'. Thus, wherever the expenses incurred have no relationship with the income not includible in the total income there cannot be any occasion to invoke the disallowance under section 14A of the Act. The policy behind this legislation is that it is wrong to claim deduction in respect of incomes which do not get included in the total income for taxation because of their exempt status.

The provisions of section 14A of the Act, as introduced by Finance Act, 2001 provided no method of computing the expenditure incurred in relation to income which does not form part of the total income had been provided for. Consequently, there were considerable disputes between the taxpayers and the Department on the method of determining such expenditure. The Hon'ble Bombay High Court in the case of *Godrej & Boyce Mfg. Co. Ltd. vs. Dy. CIT - {(2010) 328 ITR 81 (Bom)}* held that even prior to introduction of rule 8D of the Rules, Assessing Officer had to enforce provisions of sub-section (1) of section 14A and for that purpose, Assessing Officer was duty bound to determine expenditure which had been incurred in relation to income which did not form part of total income under Act by adopting a reasonable basis or method consistent with all relevant facts and circumstances.

Almost five (5) years after introduction of the section 14A, the section was amended by Finance Act, 2006, empowering the Assessing Officer to determine the amount of expenditure if it was found by him that the assessee's claim was found not satisfactory or to examine whether the claim made by the assessee with regard to the expenditure was correct or not. Sub-section (2) of section 14A Act provides the manner in which the Assessing Officer is to determine the amount of expenditure incurred in relation to income which does not form part of the total income. Sub-section (3) of section 14A of the Act applies to cases where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the Act. The section also empowered the Central Board of Direct Taxes ('CBDT') to frame rules to enable the Assessing Officer the method to be followed in this regard. Accordingly, rules for determination of disallowance were prescribed *vide* Income tax (5th Amendment) Rules, 2008, with effect from 24-3-2008. Thus, sub-sections (2) and (3) to section 14 A of the Act simply lay down the procedure and mechanism for working out the expenditure in relation to income which is exempt from tax. Rule 8D of the Rule prescribes the method for disallowing the expenditure.

Sub-section (2) and (3) of section 14A itself prescribes two (2) situations where the Assessing Officer can invoke section 14A for re-computing the amount of disallowance. They are:

(a) when he is not satisfied with the correctness of the claim of the assessee in respect of expenditure incurred in relation to exempt income; and

(b) where the assessee claims that no expenditure was incurred in relation to exempt income.

Thus, section 14A (2) empowers the Assessing Officer to re-compute the amount liable for disallowance under section 14A of the Act only if he is not satisfied with the correctness of the claim of the assessee. Hence, the section 14A of the Act itself provides an in built safeguard/ accountability mechanism, whereby the Assessing Officer before computing the disallowance under the provisions of Rule 8D of the Rule has to demonstrate with reasons as to why he is not satisfied with the correctness of the claim of the assessee. The Hon'ble Delhi High Court in the case of *Maxopp Investment Ltd. vs. CIT - {(2011) 64 DTR 122 (Del)}* held that whenever the issue of section 14A arises before an Assessing Officer, he has to ascertain the correctness of the claim of the assessee in respect of expenditure incurred in relation to income which does not form part of the total income. Where the assessee claims that no such expenditure has been incurred the Assessing Officer will have to verify the correctness of such claim and if he is satisfied with the claim, then, the Assessing Officer cannot embark upon a determination of the amount of expenditure to be disallowed for the purpose of section 14A(1) of the Act. However, where the Assessing Officer is not satisfied with the claim of the assessee, he will have to hear the assessee and thereafter record the reasons for not accepting the claim compute the disallowance of expenses under section 14A of the Act.

The Hon'ble Mumbai Tribunal in the case of *Auchtel Products Ltd. vs. Asstt. CIT - {(2012) 52 SOT 39 (Mum) (URO)}*, held that Assessing Officer without rendering any opinion on correctness of assessee's claim of not spending any amount for earning exempt income, cannot propose to make disallowance by applying rule 8D of the Rules read with section 14A of the Act. Recently, the Hon'ble Kolkata Tribunal in the case of *Dy. CIT vs. Ashish Jhunjhunwala - {I.T.A. No.: 1809 / M / 12, order dated: 14-5-2013; A.Y. 2009 – 10}* held that while rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the Assessing Officer has to indicate cogent reasons for the rejection. The Hon'ble Delhi Tribunal in the case of *Dy. CIT vs. Jindal Photo Ltd - {I.T.A. No.: 814 / M / 11, order fated: 23-9-2011; A.Y. 2008 – 09}* held that the Assessing Officer cannot apply Rule 8D without pointing out any inaccuracy in

the method of apportionment or allocation of expenses as adopted by the assessee. The Hon'ble Ahmadabad Tribunal in *AIA Engineering Ltd. vs. Addl. CIT - {(2012) 50 SOT 134 (Ahd.)}* held that where the assessee has given detailed workings regarding the expenditure incurred for earning exempt income, the Assessing Officer, without pointing out any mistake in the said workings, is precluded from altering or re-working/re-computing the amount of disallowance by invoking section 14A, read with Rule 8D of the Rules.

However, in spite of the above guidelines laid down by the Courts and Tribunal the Assessing Officers in most of the case have not been applying correct interpretation of law as they are arbitrarily applying provision for disallowance of expenses. In any case if the Assessing Officer find any exempted income in accounts of the assessee, disallowance of 0.5% of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance-sheet of the assessee, are being made without recording any satisfaction required for applicability of the section read with the rule. In the course of assessment disallowances are made by the Assessing Officers in a routine manner under section 14A of the Act read with Rule 8D of the Rules in respect of interest paid on borrowed funds without establishing, that the funds are borrowed for the purpose of purchasing shares or the assessee has actually diverted funds for purchase of shares. Many times, the Assessing Officer disallows interest with respect to funds borrowed in earlier years.

Courts and Tribunal have consistently disapproved this stand of department and held that where no part of borrowed money had any direct link or nexus with the investments made by the assessee, which had yielded tax-free income, no interest expenditure could be disallowed by mechanically applying the provisions of section 14A of the Act.

The Hon'ble Bombay High Court in the case of *CIT vs. K. Raheja Corporation P. Limited - {I.T.A. No. 1260 of 2009; order dated: 8-8-2011; A.Y. 2000-01}* held that, in the absence of any material or basis to hold that the interest expenditure directly or indirectly was attributable for earning the dividend income, disallowance of interest made u/s 14A cannot be made. Similarly, the Hon'ble Gujarat High Court in the case of *CIT vs. Gujarat Power Corporation Ltd.- {I.T.A. No. 1587 of 2009; Order dated: 28-3-2011}.*

Recently, Hon'ble Delhi Tribunal in the case of, *Asstt. CIT vs. Mohan Exports – {(2012) 138 ITD 108 (Del)}* while dealing with the provisions of Rule 8D (2) (ii), held that the Assessing Officer is expected to examine whether the interest paid during the year is or is not directly attributable to any particular income or receipt and if there is a finding that the interest is not directly related to receipts of dividends, it automatically follows that the payment of interest is in respect of income other than dividend income. The Tribunal concluded that, the interest cannot be said to be a kind of general expenditure incurred for earning of various kinds of incomes. Therefore, the provisions contained in Rule 8D (2)(ii) were not applicable. Similarly, the Hon'ble Kolkata Tribunal in the case of *Balarampur Chini Mills Ltd vs. Dy. CIT – {(2012) 140 TTJ (Cal.) 73 (UO)}* held that where entire amount of investments, yielding tax-free dividend income to assessee, had been acquired by assessee from its owned funds and no part of borrowed capital had been used for purpose of acquisition of investments at any time during previous year, no disallowance on account of interest expenditure could be made by invoking Rule 8D.

The Hon'ble Delhi Tribunal in the case of *Priya Exhibitors (P.) Ltd. vs. Asstt. CIT - {(2012) 54 SOT 356 (Del.)}* where the assessee had made investment in shares from which it derived exempt dividend income and the assessee had itself disallowed interest which was directly attributable to the investment in shares. However, it had not disallowed any expenditure relating to administrative and managerial services. The Assessing Officer applying the provisions of Rule 8D(2)(iii) disallowed under section 14A of the

Act expenses being 0.5% of average investment in shares out of the expenditure claimed by the assessee, as according to him the management of investments could not be done without making any expenditure. On appeal the Hon'ble Tribunal deleted the disallowance made by the Assessing officer under rule 8D(2) (iii) for the following three (3) reasons:

(a) There was no major activity of sale and purchase of shares done by the assessee during the year;

(b) the accounts of the assessee depicted that no direct expense has been incurred for earning exempt income apart from already disallowed by the assessee; and

(c) The Assessing Officer has not specifically pointed out any direct expense nor has given any finding regarding the correctness of claim of the assessee that no expenditure has been incurred for earning exempt income.

However, Chennai bench of the Hon'ble Tribunal in the case of, *M/s. Lakshmi Ring Travellers vs. Asstt. CIT - {I.T.A. No. 2083 / Mds / 2011; order dated: 2-3-2012; A.Y. 2008 – 09},* held that even in a case where an assessee claims that no expenditure was incurred, the assessing authority has to presume the incurring of such expenditure as provided under sub-section (2) of section 14A read with Rule 8D, and make disallowance.

Current controversies / Issues arising during assessment

A. Can Disallowance of Expenditure under section 14 A of the Act be made with respect to dividend earned on shares held as stock–in –trade

The issue whether any disallowance of expenditure could be made under section 14A of the Act, in respect of exempt income by way of dividend earned by an assessee engaged in the business of dealing in shares and securities has come up for consideration before on various occasions. The issue came up for consideration before the Hon'ble Special Bench of the Tribunal in the case of *ITO vs. Daga Capital Management P. Ltd. - {(2008) 312 ITR (AT) 1 (Mum) (SB)}*. Wherein the Tribunal held that the provisions of section 14A of the Act were held to be applicable with respect to the dividend income earned by the assessee engaged in the business of dealing in shares and securities, on shares held as stock-in-trade.

However, recently, the *Hon'ble Karnataka High Court in the case of CCI Ltd. vs. JCIT - {(2012)* 250 CTR (Karn.) 291}, held that when the assessee has not retained shares with the intention of earning dividend income and the dividend income is incidental to its business of sale and purchase of shares, the expenditure incurred in acquiring the shares should be disallowed invoking the provisions of section 14A of the Act.

The Hon'ble Mumbai Tribunal in the cases of, *Vivek Mehrotra vs. Asstt. CIT - {I.T.A. No. 6332 / M / 2011; order dated: 11-1-2013; A.Y. 2008 – 09}* following the decision of CCL Ltd. (Supra) held that disallowance of expenses incurred on borrowings made for purchase of trading shares cannot be made under section 14A of the Act. The Tribunal in both the above referred cases preferred to follow the decision of Hon'ble Karnataka High Court over the decision of the Special Bench in the case of Daga Capital Management P. Ltd. (Supra).

Similarly, view is also expressed by Ahmedabad Tribunal in the case of, *Ethio Plastics Private Ltd. vs. Dy. CIT - {I.T.A. No.: 848 / Ahd. / 2012; order dated 21-6-2012; A.Y.: 2008-09}.*

However, the Hon'ble Kolkata Tribunal in the case of *Dy. CIT vs. Gulshan Investment Co. Ltd – {(2013) 142 ITD 89 (Kol.)}* held that the provisions of section 14A would apply irrespective of the fact whether the shares are held as stock-in-trade or as investments. However, provisions

of Rule 8D(2)(ii) and (iii) of the Rules can be applied in a situations where shares are held as investments, and that the rule will not have any application when the shares are held as stock-in-trade. As according to the Hon'ble Bench one of the variables on the basis of which disallowance under Rules 8D (2)(ii) and (iii) is to be computed is the value of 'investments', income from which does not or shall not form part of total income, and, when there are no such investments and the shares are held as stock-in-trade, the above sub – rules (i) and (ii) of the Rule 8D cannot have any application.

B. Can the Disallowance under section 14A be more than expenditure claimed by the assessee

Only the expenditure incurred for earning of exempt income can be disallowed under sub-section (1) of section 14A of the Act. In other words, to disallow the expenditure under section 14A (1), there must be a live nexus between the expenditure incurred and the income not forming part of total income. Thus, the disallowance of expenses under section 14(1) of the Act cannot exceed the expenditure actually claimed by the assessee.

The Hon'ble Delhi Tribunal in the case of *Gillette Group India (P.) Ltd. vs. Asstt. CIT – {(2012) 16 ITR (Trib) 57 (Del.)},* held that the disallowance under section 14A (1) read with rule 8D could not exceed the actual expenditure incurred and debited in relation to exempt income. Accordingly, the Hon'ble Tribunal restricted the disallowance to the extent of expenditure actually claimed by the assessee.

Where the assessee had made a claim that no expenditure has been incurred or claimed for earning the exempt income and the expenditure incurred and claimed by the assessee was only towards earning other taxable income of the assessee, then the Assessing Officer has to indicate that certain expenditure is not incurred for earning the other taxable income, but is incurred in relation to exempt income or such expenditure is incurred for inseparable and indivisible activities comprising taxable as well as the activities on which are non-taxable / exempt. Thus, no disallowance under section 14A could be made when the assessee has not incurred / claimed any expenditure for earning the exempt income. Ref.:

(a) *CIT vs. Reliance Industries Ltd. - {(2011) 339 ITR 632 (Bom.)}*

(b) *Justice Sam P. Bharucha vs. Addl. CIT {(2012) 53 SOT 192 (Mum.) (URO)}*

(c) *Modern Info Technology P.Ltd. vs. ITO - {I.T.A. No. 4294/Del/2012; order dated: 19-10-2012; A.Y. 2009-10}*

C Can the Disallowance under section 14 A be made even if there is no exempt income earned

Issue which often arises in the course of assessment while computing disallowance under section 14A of the Act is, whether in absence of income which is not includible in the total income, the provision contained in section 14A can be invoked. The assessee always contends that since no income was earned during the year from exempted source, disallowance of expenditure could not be made. As for the purpose of making disallowance under section 14 A of the Act only those investments are to be taken into account on which tax-free income has been earned. On the other hand the Assessing authorities always contend that even if assessee has not earned any income which is not includible in total income, provisions of section 14A can still be invoked to disallow expenditure relatable to income not includible in total income.

A perusal of the provisions of section 14A clearly shows that the words used in the section are 'For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part

of the total income under this Act'. Thus, for the applicability of section 14A there must be:

(a) income which is taxable under the Act for the relevant assessment year and

(b) there should also be income which does not form part of the total income under the Act during the relevant assessment year.

If either one is absent, then section 14A(1) has no applicability. If one assume that section 14A(1) would apply, even when the assessee does not have any income which does not form part of the total income, then it would mean that where if the assessee makes any investment in any shares even though the assessee does not receive dividend income, the expenditure in relation to the investment in the shares would stand to disallowance.

The Hon'ble Bombay High Court was seized with the above mentioned issue in the case of *CIT vs. Delite Enterprises Pvt. Ltd. - {I.T.A. No.: 110 of 2009; order dated: 26-2-2009; A.Y. 2001-02}*, held that when there was no share of profit from the firm which otherwise would be exempt for the relevant year, the interest expense related to such tax-free profits cannot be disallowed under section 14A of the Act. Following the decision of Delite Enterprises Pvt. Ltd. (Supra) the Hon'ble Mumbai Tribunal in the case of, *Avshesh Mercantile P. Ltd. vs. Dy. CIT - {I.T.A. No.: 5779 / M / 2006; Order dated: 13-6-2012; A.Y. 2003 – 04}* held that where the investment made by the assessee are found to be capable of earning exempt income which was actually not earned by the assessee in the relevant period no disallowance invoking the provisions of section 14A of the Act could be made.

However, the Hon'ble Delhi Tribunal in the case of *Relaxo Footwears Ltd vs. Addl. CIT – {(2012) 50 SOT 102 (Del.)}* held that earning of an income in a particular year is not a sine *qua non* for allowing an expenditure.

D. Can the Disallowance under section 14 A be more than exempt income earned

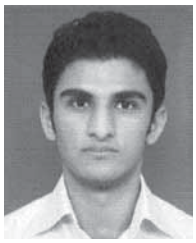
As per section 14A(2), the AO shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the Act, in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the Act. Rule 8D being an artificial method / manner / formula for computing the disallowance of expenditure under section 14(1) of the Act, sometime the disallowance computed under the rule may be more than the exempt income earned by the assessee. In this context, it may be appropriate to refer to the decision of *Asstt. CIT vs. Punjab State Co-op. Marketing Fed. Ltd. – {(2012) 14 ITR (Trib) 69 (Chd.)}* wherein the Tribunal held that disallowance under section 14 of the Act cannot be more than the exempted income earned by the assessee.

From the above analysis of the provisions of section 14A of the Act, Rule 8D of the Rules and judicial pronouncements following guiding principles for the purposes of invoking the provisions of Rule 8D to make disallowance of expenditure under section 14 A of the Act emerge:

(i) The Assessing Officer has to record precise reasons as to why he is not satisfied with the correctness of the claim of the assessee in respect of expenditure in relation to the exempt income;

(ii) The Assessing Officer has to establish nexus of the expenditure incurred with the earning of exempt income;

(iii) The disallowance cannot be made on ad hoc or merely on the basis of assumptions that the assessee may have incurred direct or indirect expenses to earn exempt income.

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Controversies in section 40(a)(ia)

1. Introduction

1.1 Sub-clause (ia) to Section 40(a) of the Income-tax Act, 1961 (the "Act") was inserted on the statute book by the Finance Act, 2004 with effect from 1st April, 2005. It provided for the disallowance of any interest, commission or brokerage, fees for professional or technical services and amounts payable to contractors/sub-contractors on which tax has not been appropriately deducted at source, or after deduction, had not been paid into the Government coffers. This sub-clause covers payments only to residents. This provision has remained substantially the same except that some more categories of payments have also been brought in the scope of its ambit *vide* a subsequent amendment.

The first proviso to this sub-clause provided that the amount so disallowed would be allowed as deduction in the computation of the total income of the previous year in which the tax has been subsequently deducted or paid, as the case may be.

1.2 The Memorandum explaining the provisions of Finance Bill, 2004 described sub-clause (ia) as a "measure to plug revenue leakage". Before its introduction, the disallowance of expenditure for non-compliance with TDS provisions was attracted only in case of specified payments outside India or to non-residents. This could be because if tax was not recovered at source from such payments made outside India or to non-residents, the subsequent recovery of tax from the non-resident payee could be very difficult.

However, with a view to augment compliance with TDS provisions and curb bogus payments[1], the existing provision was extended to cover payments to residents too. The provisions contained under Chapter XVII-B of the Act are one of the forms of recovery of tax, by way of tax deduction at source at the point where the payment is made or credited to a third party. The intention of the Legislature is not to tax the payer for its failure to deduct tax at source. The object of introduction of Sections 40(a)(i) and 40(a)(ia) is to ensure that this mode of recovery as provided in Chapter XVII-B is scrupulously implemented without any default.

2. Constitutional validity of the provision

2.1 At the time of its insertion on the statute, Section 40(a)(ia) was challenged on grounds of

1. Circular No. 5/ 2005, dated 15-07-2005 reported in [2005] 276 ITR (St.) 151

being ultra vires of the Constitution. The main ground of challenge was that the provision disallowed legitimate business expenditure for failure to carry out a vicarious liability. Thus, it was certainly harsh, especially when such tax was bound to be made good by the deductor with interest and penalty. Hence, a petition was filed before the Madras High Court (HC) challenging its validity. However, observing that presumption is in favour of the statute, the single Judge refused to grant stay of the amended provision[2]. The provision was again unsuccessfully challenged before the Allahabad HC[3] and the Punjab and Haryana HC[4]. On a petition that the provisions of section 40(a)(ia) be declared ultra vires on the ground that the same are harsh and discriminatory, the Punjab and Haryana HC held as follows:

> *"No exception can be taken to incorporation of a provision which excludes right to seek permissible deduction in the event of failure of the assessee to deduct or to deposit the deducted tax. Moreover, the proviso relaxes the rigour. If even in the subsequent year, one makes the deduction or makes the deposit, one gets the benefit of deduction. The provision cannot be held to be harsh."*

2.2 The controversy regarding the constitutional validity of this provision appears to have finally come to rest with the Madras HC deciding[5] that Section 40(a)(ia) is constitutionally valid and there is no arbitrariness, unreasonableness or discrimination in the said provision. The Court also held that Section 40(a)(ia) does not result in double taxation since the collection of tax will be only on behalf of the payee.

The Court observed that once the identity of assessees who are in receipt of the income can be ascertained after deduction of tax at source from their income, it will enable the tax-collection machinery to bring within its fold, all such persons who are liable to come within the network of taxpayers. The Court further observed that there is a provision inbuilt in the impugned Section itself providing for rectification of any default and thereby restore the financial implications suffered. The assessees would be entitled to seek adjustments in subsequent years when the deductions are made good. Hence, the provisions would not amount to any arbitrariness or unreasonableness and does not result in double taxation.

Thus, the provisions of Section 40(a)(ia) were held to be constitutionally valid.

3. Controversies on Section 40(a)(ia) of the Act

3.1 Amendment of 2006: No controversies

From 1st April, 2006[6], even payments in the nature of rent and royalty have been brought within the ambit of Section 40(a)(ia) of the Act. Thus, in addition to interest, commission or brokerage, fees for professional or technical services and amounts payable to contractors/ sub-contractors, disallowance would also be attracted in case of non-compliance with TDS provisions.

3.2 Amendment of 2008: No controversies

Prior to the amendment, the tax deducted at source had to be deposited with the Government within the time prescribed under Section 200(1) of the Act i.e. by the 7th day of the following month[7]. Any amount disallowed in a year due to non-compliance with the TDS provisions, would be allowed as deduction in the computation of total income of the year in which such tax has

2. Southern Agro Engine (P) Limited vs. Union of India [2008] 215 CTR 470 (Mad.)
3. Dey's Medical (U.P.) (P) Limited vs. Union of India [2008] 216 CTR 83 (All.)
4. Rakesh Kumar & Co. vs. Union of India [2010] 325 ITR 35 (P&H)
5. Tube Investments of India Limited vs. ACIT [2010] 325 ITR 610 (Mad.)
6. Inserted by the Taxation Law (Amendment) Act, 2006 w.r.e.f. 1st April, 2006
7. See Rule 30 of the Income-tax Rules, 1962 for exceptions

been deducted and paid, or as the case may be, paid.

An amendment beneficial to the assessees has been brought to the first proviso, w.r.e.f. 1st April, 2005, vide Finance Act, 2008. Post this amendment, additional time (till due date of filing of return of income) for deposit of TDS pertaining to deductions made for the month of March, has been allowed. The Board Circular[8] with Explanatory notes to the provisions of the Finance Act, 2008 explained that the purpose of this amendment was to mitigate any hardship caused by the provisions of Section 40(a)(ia) while maintaining TDS discipline. Since the Finance Act, 2008 itself provided that this beneficial amendment would have a retrospective operation, assessees have taken the benefit of extended time for the deposit of the tax deducted and the Revenue has been accepting the same. This issue appears to be quite settled.

3.3 Amendment of 2010 – Whether retrospective?

3.3.1 The Finance Act, 2010 further relaxed the rigours of Section 40(a)(ia) of the Act to provide that the all TDS made during the previous year can be deposited with the Government by the due date of filing the return of income. The idea was to allow additional time to the deductors to deposit the TDS so made[9]. This amendment was to be applicable from Assessment Year (AY) 2010-11. The Memorandum[10] explaining the provisions of the Finance Bill, 2010 expressly mentioned as follows:

> *"This amendment is proposed to take effect retrospectively from 1st April, 2010 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years."*

3.3.2 The controversy surrounding the above amendment was whether the amendment was curative in nature and therefore to be applied retrospectively. In this context, few decisions are being referred herein below:

A. Kanubhai Ramjibhai Makwana vs. ITO [2011] 44 SOT 264 (Ahd.) (Tribunal)

Facts of the case

During the previous year relevant to AY 2005-06, the assessee did not deduct tax at source from payments made to sub-contractors for the period April 2004 – February 2005. The Assessing Officer (AO) and the Commissioner (Appeals) disallowed the claim of expenditure for this period on account of non-compliance with TDS provisions.

Contentions of the Assessee

The assessee argued that as per the provisions as amended by the Finance Act, 2010, if the TDS deducted was paid on or before the due date of filing of return of income as specified in Section 139(1), the expenses relating to such TDS were eligible for deduction and no disallowance could be made by invoking the provisions of section 40(a)(ia). The assessee further argued that since the amendment was curative in nature, it has to be applied retrospectively.

Contentions of the Revenue

Besides submitting that the amendment was not curative in nature, the Revenue argued that since the Legislature had given effect to the amendment w.e.f. A.Y. 2010-11, it cannot apply to prior years.

Held

The Tribunal observed that the amendment was remedial in nature and intention of the Legislature was to remove the hardship of the taxpayers. It held that a declaratory amendment may be defined as an amendment to remove doubts existing as to the meaning or effect of any

8. Circular No. 1/ 2009 dated 27-3-2009 reported in [2009] 222 CTR (St.) 69
9. Source: Budget Speech of the then Hon'ble Finance Minister, Shri Pranab Mukherjee, Para 137
10. Circular No. 1 of 2011 dated 6-4-2011 reported in [2011] 333 ITR (St.) 7

statute and such amendments are usually held to be retrospective. Thus, the amendment was held to have a retrospective effect from AY 2005-06.

It appears that in this case, the Tribunal has not adequately considered the argument of the Revenue that the amendment has been given effect by the Legislature from 1st April, 2010.

B. Subsequently, the matter was referred to the Special Bench in the case of *Bharati Shipyard Limited vs. DCIT [2011] 11 ITR (T) 599 (Mum.) (SB) (Tribunal)*

Contentions of the Assessee

The major submission made by the assessee was that the amendment was made with a view to remove the unnecessary hardship caused to the assessee by the earlier provision and hence is retrospective.

Contentions of the Revenue

The Revenue argued that the Notes on clauses and the Memorandum explaining the provisions in the Finance Bill, 2010 clearly indicate that the amendment will take effect retrospectively from 1st April, 2010 and will accordingly apply in relation to A.Y. 2010-11 and subsequent years.

Held

The Tribunal held that since the Legislature has expressly provided that the amendment is prospective, the judicial authorities cannot hold it to be retrospective. The amendment was not aimed at removing any unintended hardship to assessee, but to relax an intended hardship to some extent by increasing time available for deposit of tax. It was further held that the amendment was neither curative nor remedial in nature and hence, was to apply only prospectively.

C. CIT v. Virgin Creations, ITAT No. 302 of 2011/ GA 3200/ 2011 dated 23-11-2011 – Calcutta High Court

The aforesaid issue came up for consideration before the Calcutta HC, wherein, the HC, relying on the decisions of the Supreme Court[11] (SC) in the context of Section 43B of the Act, it was held that the amendment to Section 40(a)(ia) had retrospective application.

3.3.3. A similar view was taken by the Mumbai Tribunal in the case of Bansal Parivahan (India) (P) Limited[12] and by the Delhi Tribunal in the case of Taru Leading Edge (P) Limited[13].

Thus, we can clearly see that there is a conflict in judicial opinion as regards the retrospective applicability of the amendment to Section 40(a)(ia) *vide* Finance Act, 2010. While the Special Bench of the Tribunal at Mumbai has ruled that the amendment would not have retrospective application, the Calcutta HC has opined otherwise. While the position for the assessees in the State of West Bengal is clear due to the decision of the jurisdictional HC (in the case of Virgin Creations), the issue becomes complicated for other assessees due to a contrary decision of a Special Bench. This issue was also resolved by the Vizag Tribunal in the case of *Rajamahendri Shipping & Oil Field Services Limited*[14] wherein it was held that a decision of a non-jurisdictional High Court prevails over an order of the Special Bench.

3.3.4. The issue of the binding nature of an order of a jurisdictional Special Bench vis-à-vis a contrary decision of a non-jurisdictional HC is not simple. However, in our view, the HC, albeit non-jurisdictional, being a constitutional authority, should have precedence over the Special Bench, even though jurisdictional. This view is also supported by the decision of the

11. CIT vs. Alom Extrusions Limited [2009] 319 ITR 306 (SC), Allied Motors (P) Limited vs. CIT [1997] 224 ITR 677 (SC)
12. Bansal Parivahan (India) (P) Limited vs. ITO [2011] 43 SOT 619 (Mum.) (Tribunal)
13. ITO vs. Taru Leading Edge (P) Limited – ITO No. 3592/Del/2011 dated 22-5-2012 (Source: www.itatonline.org)
14. Rajamahendri Shipping & Oil Field Services Limited vs. ACIT [2012] 51 SOT 242 (Vishakhapatnam)

Ahmedabad Bench of the Tribunal[15], wherein it was held that a decision of non-jurisdictional HC prevails over an order of jurisdictional Special Bench of the Tribunal. Thus, for the time being, this issue seems to be settled.

3.4 Amendment of 2012: Whether retrospective?

3.4.1 *Vide* the Finance Act, 2012, second proviso has been inserted in Section 40(a)(ia) of the Act. The proviso reads as under:

> *"**Provided further** that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso."*

3.4.2 Furthermore, a proviso has been inserted in Section 201(1) of the Act, *vide* the Finance Act, 2012, w.e.f. 1st July, 2012. This proviso provides that an assessee shall not be deemed to be an assessee in default even if he has not complied with the TDS provisions provided that the recipient of the income has paid the taxes due on such income.

In the context of Section 201, the SC has held[16] that where the recipient of income has paid taxes on amount received from deductor, the Revenue cannot recover such tax once again from the deductor on same income by treating deductor to be assessee in default. Even prior to this SC judgement, Instruction No. 275[17] issued by the Board stated that demand under Section 201(1) should not be enforced after the tax deductor has satisfied the officer in charge of TDS that taxes have been paid by the deductee-assessee.

However, the aforementioned Instruction and the SC judgment do not automatically grant immunity from the penal and interest consequences of non-compliance with the TDS provisions. The Mumbai Tribunal, in the case of DICGC Limited[18], had negated the argument of the assessee as to the applicability of the aforesaid decisions to a case of disallowance under Section 40(a)(ia) of the Act. However, the amendment of vide Finance Act, 2012 shows that the Legislature itself has accepted the principle laid down by the Hon'ble SC in the case of Hindustan Coca Cola Beverages Private Limited (supra). It is important to note that the proviso was inserted to make the provision workable and to avoid difficulty. An interpretation which brings an effective result and avoids unjust result or discrimination, should be accepted. Earlier, there was no provision under the Act to allow the deduction of the impugned expenditure which has been disallowed under Section 40(a)(ia) of the Act, unless the payer deposits the tax which ought to have been deducted from the payment. Thus, in spite of there being no revenue loss to the exchequer, the payer would suffer as the impugned expenditure was disallowed in his hands. In light of this, the insertion of the second proviso (supra) to Section 40(a)(ia) is a welcome move.

3.4.3. Considering the litigation around the retrospective application or otherwise, of the 2010 amendment, it is very likely that assessees adversely affected by the rigours of Section 40(a)(ia) would contend that the 2012 amendment too should be applied retrospectively. The assessees may rely on the decisions of the SC[19] in this regard. It may also be contended that since the amendment is clarificatory in nature, it should

15. Kanel Oil & Export India Limited vs. JCIT [2009] 121 ITD 596 (Ahd) (Tribunal) (TM)
16. Hindustan Coca Cola Beverage (P) Ltd. vs. CIT [2007] 293 ITR 226 (SC)
17. Dated 29th January 1997
18. Addtl. CIT vs. DICGC Limited [2012] 12 ITR (T) 194 (Mum.) (Tribunal)
19. Allied Motors Private Limited vs. CIT [1997] 224 ITR 667 (SC) and CIT vs. Alom Extrusions Limited [2009] 319 ITR 306 (SC)

be applied to pending matters also. Also, this amendment is contained under the heading "Rationalisation of TDS and TCS provisions" of the Memorandum[20] explaining provisions of Finance Bill, 2012. However, it remains to be seen as to what view the judicial authorities take on the retrospective or prospective application of this amendment.

3.5 Bona fide reason for non-compliance with TDS provisions – Whether relevant?

3.5.1 Under the Act, the consequences of non-compliance with TDS provisions are two fold, viz.

(i) Interest/ penalty/ prosecution; and (ii) Disallowance of the expenditure.

While immunity from penalty and prosecution can be availed under bona fide circumstances such as reasonable cause, good and sufficient reasons etc., there is no provision to avail of the deduction of the impugned expenditure in the event of non-compliance with the provisions of Chapter XVII-B. The wording of Section 40(a)(ia) is crystal clear in so far as even a very good and genuine cause for non-compliance with TDS provisions cannot prevent a disallowance of the expenditure. In other words, the reason for non-compliance with the TDS provisions is immaterial. However, of late, Courts have been willing to take a more lenient view of the matter wherein the concept of *bona fide* belief has been read into the provision, thereby providing relief in genuine cases. Few cases on this issue are discussed below.

3.5.2 *CIT vs. Kotak Securities Limited [2012] 340 ITR 33 (Bom.)*

Facts of the case

The assessee was engaged in the business of share broking, mobilisation of deposits etc. the assessee had paid transaction charges to the BSE and to the NSE in respect of transactions carried out through their systems. The AO held that the transaction charges paid by the assessee were in the nature of "fees for technical services" covered under section 194J and since the assessee had not deducted tax at source, the entire expenditure was liable to be disallowed under Section 40(a)(ia). The order of the AO was upheld by the Commissioner (Appeals). On appeal to the Tribunal, it was held that Section 40(a)(ia) was not attracted as the stock exchange did not render any managerial service or any technical consultancy service. Hence, the disallowance was deleted. The Revenue appealed to the HC against the order of the Tribunal.

Held

The HC ruled that the payment would fall under Section 194J. However, the disallowance under Section 40(a)(ia) was deleted on the following ground that:

(a) The object of introducing Section 40(a)(ia) is to augment compliance with the TDS provisions in case of residents and to curb bogus payments.

(b) Till AY 2005-06, both the Revenue and the assessee proceeded on the footing that Section 194J was not applicable to the payment of transaction charges. Accordingly, during the period from 1995 to 2005 neither the assessee had deducted tax at source on these payments nor the Revenue had raised any objection. In view of this decade old practice, it was held that the assessee had a bona fide reason to believe that the tax was not deductible at source and hence, the circumstances of the case did not warrant disallowance under Section 40(a)(ia).

(c) The Revenue has not suffered any loss on account of the failure on the part of the assessee to deduct tax at source because the stock exchange had discharged its tax liability.

20. [2012] 342 ITR 234 (St.) (260)

3.5.3 *DCIT vs. Anant Investment – ITA No. 6428/Mum/2010 dated 6-6-2012 (AY 2007-08)*

The Revenue was in appeal before the Tribunal in regard to the allowability of expenses on account of VSAT, leaseline, depository and transaction charges paid to the stock exchange. The AO had disallowed the above expenses under Section 40(a)(ia) of the Act. In appeal, the CIT (A), following the Tribunal decision in the case of *Kotak Securities vs. Addl. CIT [2008] 25 SOT 440 (Mum.),* had deleted the addition.

The Hon'ble Tribunal, in so far as the VSAT and leaseline charges are concerned, upheld the action of the CIT(A) by following the decision of the Bombay High Court in the case of Angel Capital & Debit Market Limited (ITA No. 475 of 2011 dated 28-7-2011). As regards the transaction charges, the ITAT observed that the Hon'ble Bombay High Court, in the case of Kotak Securities Limited (supra) decided the issue against the assessee. However, the disallowance under Section 40(a)(ia) was deleted on the ground that both parties had proceeded in the footing that tax was not deductible for last several years and therefore in the first year when the provisions were invoked by the Revenue, addition could not be sustained. Following the above decision and the principle laid down by the High Court, in the present appeal, it was held by the Tribunal that AY 2007-08 was the first year in which disallowance was made in the case of the said assessee. Therefore, the disallowance under Section 40(a)(ia) could not be sustained.

3.5.4 Thus, in the aforementioned cases, it can be seen that the judicial authorities have virtually looked into the bona fides of the intention of the assessee before invoking Section 40(a)(ia). While this may be good news for the assessees, it is on him to show reasonable cause for the non-compliance with the TDS provisions.

Considering the above decisions of the Bombay High Court and the Mumbai Tribunal, we are of the considered view that the concept of *bona fides* must be extended to the date when, for the first time, the belief of the assessee was not accepted by the Revenue i.e. the date of first assessment order by which the disallowance is made. The Mumbai Tribunal has given the benefit considering the first year of assessment when the disallowance was made. However, in a given case, it could also be argued that the benefit of *bona fide* belief should be extended to the date of the first assessment order when the disallowance was made, which will result in availability of the benefit in all the returns filed prior thereto. On similar lines, based on the facts of each case, other contentions may be raised by assessees showing their *bona fide* belief.

3.6 Section 40(a)(ia) – Whether applicable to cases of short deduction of tax at source?

A question that arises is what would happen if the assessee deducts tax at a rate lower than what is prescribed under the relevant provisions of Chapter XVII-B. Strictly speaking, the short deduction results in non-compliance with the provisions of Chapter XVII-B. A literal reading of Section 40(a)(ia) would mean disallowance of the entire impugned expenditure in case of short deduction of tax at source. Thus, out of the total TDS of ₹ 1,00,000/-, even if a person fails to deduct tax a meager sum of say, ₹ 100/-, disallowance under Section 40(a)(ia) could get attracted. Few decisions of the Tribunal, in this context, are discussed below:

3.6.1 *DCIT vs. Chandabhoy & Jassabhoy [2012] 49 SOT 448 (Mum.) (Tribunal)*

Facts of the case

The assessee employed consultants. These consultants were prohibited from taking any private assignments and worked full time with the assessee. The assessee paid an amount of ₹ 26.75 lakhs to these consultants by way of salary after deduction of tax at source under Section 192 and claimed deduction of the same. However, the AO contended that tax should have been deductible under Section 194J and hence, disallowed the entire payment.

Held

The Tribunal held that the assessee had deducted tax under Section 192 and hence, the provisions of Section 40(a)(ia) did not apply, as the said provision could have been invoked only in the event of non-deduction of tax at source but not for lesser deduction of tax.

This decision may suggest that once an assessee deducts tax at source from a particular payment, no disallowance can be made in respect of that expenditure under any circumstances. However, this may be a very liberal reading of this decision. While the facts of the case suggest that there was a genuine reason for short deduction of tax at source, the Tribunal did not seem to have discussed the same. It may not be advisable for assessees to apply the ratio of this judgement where the short deduction is not due to any bona fide reason.

3.6.2 *UE Trading Corporation (India) Limited vs. DCIT [2012] 54 SOT 596 (Delhi) (Tribunal)*

In this case, the Delhi Bench of the Tribunal held that when there is shortfall in deduction of tax at source due to any difference of opinion as to the taxability of any item or nature of payments falling under various TDS provisions, no disallowance can be made by invoking provisions of Section 40(a)(ia). A similar view has been taken in a few other cases[21] as well.

3.7 Applicability to amounts actually "paid" during the year

Section 40(a)(ia) reads as follows:

> *"(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor…"*

The issue that arose in the case of Merilyn Shipping & Transports[22] was whether the disallowance under Section 40(a)(ia) can be made only respect of expenditure which are payable as on 31st March of the financial year and whether the provision cannot be invoked to disallow expenditure which has been actually paid during previous year, without deduction of tax at source. This issue first came before the Jaipur[23] and the Hyderabad[24] Benches of the Tribunal. Both the Benches held that the provisions could not be invoked when the impugned expenditure has already been paid by the assessee during the year. The main reason cited in these decisions was the use of the term "payable" as against the term "paid" in Section 40(a)(ia). Reliance was placed on the definition of the term "paid" used in Section 43(2) of the Act to distinguish it from the term "payable". However, the Kolkata Bench of the Tribunal[25] decided otherwise and held that the provisions would be applicable even in respect of expenditure actually paid during the year.

This controversy got further raked up in the case of Merilyn Shipping & Transports (supra), wherein the matter was referred to a Special Bench due to a difference in judicial opinion on this issue.

Arguments advanced

The following main arguments were advanced on behalf of the assessee in support of the contention that Section 40(a)(ia) does not apply to amounts actually paid during the year:

i. Section 43(2) of the Act defines the word "paid" and not the word "payable". The word "payable" as defined by various dictionaries does not include sums which have actually been paid. Therefore, in the absence a specific definition, the language of a statute should be interpreted according to the plain dictionary meaning of the terms used therein. The term "payable" means the amount outstanding as on the last date of balance sheet.

21. ITO vs. Premier Medical Supplies & Stores [2012] 53 SOT 263 (Kol.) (Tribunal); CIT vs. S. K. Tekriwal [ITAT No. 183 of 2012, decided on 3rd December, 2012 – Calcutta HC]
22. Merilyn Shipping and Transports vs. ACIT [2012] 16 ITR (T) 1 (Visakhapatnam) (Tribunal) (SB)
23. Jaipur Vidyut Nigam Limited vs. DCIT [2009] 123 TTJ 888 (Jp.) (Tribunal)
24. Teja Construction vs. ACIT [2010] 39 SOT 13 (Hyd.) (Tribunal)
25. DCIT vs. Ashika Stock Broking Limited [2011] 44 SOT 556 (Kol.) (Tribunal)

ii. Since Section 40(a)(ia) imposes tax on "deemed income", it has to be interpreted by strict rule of construction and hence the words "payable" cannot include the amounts paid.

iii. The Finance Bill 2004, which sought to amend Section 40(a) of the Act by inserting sub-clause (ia) contained the words 'paid' and 'credited' in addition to the word "payable". However, at the time of final enactment the words "paid" and "credited" were removed.

The following main arguments were advanced on behalf of the Revenue in support of the contention that Section 40(a)(ia) applies to amounts actually paid during the year also:

i. The liability for TDS is continuous and cannot be segregated between amounts "paid" and "payable".

ii. Where the books of accounts are maintained on cash basis system, Section 40(a)(ia) would fail.

Held

i. The Tribunal relied on the difference in the wording used in the Finance Bill, 2004 and the Finance Act, 2004.

ii. Observing that Section 40(a)(ia) created a legal fiction, the same was given strict interpretation.

iii. Also, the argument of failure of Section 40(a)(ia) in case the books of accounts were maintained on cash basis, was rejected.

Due to the aforementioned reasons, the Tribunal held in favour of the assessee that Section 40(a)(ia) is not applicable to the amounts actually paid during the year. This decision was suspended from operation by the Andhra Pradesh High Court[26].

However, this issue soon reached various HCs in the country and the decision of the Special Bench of the Tribunal has been impliedly overruled by the Calcutta HC[27] and the Gujarat HC[28].

In the case of Sikandarkhan N Tunvar, the Gujarat HC observed that the language used in Section 40(a)(ia) is not that such amount must continue to remain payable till the end of the accounting year and such interpretation would require reading words which the Legislature had not used. It was also held that if the interpretation suggested by the assessee was accepted, taxpayers who did not comply with the TDS provisions, would escape the consequences only because the amount was already paid during the year as against taxpayers who would otherwise be in similar situation but had not paid the amount during the year. While applying the Heydon's rule of interpretation, the Court also observed that the reason why a certain language was used in the draft bill and why the provision ultimately enacted carried a different expression, could not be gathered by a mere comparison of the two sets of provisions.

4. Conclusion

Considering the history of Section 40(a)(ia) and the legislative amendments and judicial decisions, the controversy surrounding the provision would be resolved only by Courts sooner or later. Section 40(a)(ia), being a disallowance provision, ought to be interpreted strictly keeping in mind the object sought to be achieved. Any beneficial interpretation in favour of the assessee advancing the object of the Legislature, in our view, ought to be accepted and the interpretation leading to unjust results or unjust enrichment to the Revenue ought to be avoided.

One must also keep in mind the decision of the Madras High Court in the case of Tube Investments of India Limited (supra) which has upheld the constitutional validity of Section 40(a)(ia) on certain premises discussed above viz. no double taxation and recovery of tax from the payee only.

26. Vide order dated 10th December, 202 (Source: www.itatonline.org)
27. CIT vs. Crescent Export Syndicate – dated 3rd April, 2013 – ITAT No. 20 of 2013, G.A. No. 190 of 2013 and CIT vs. Md. Jakir Hossain Mondal – dated 4th April, 2013 – ITAT No. 31 of 2013, G.A. No. 320 of 2013
28. CIT vs. Sikandarkhan N Tunvar – Tax Appeal 905/2012 – dated 9th May, 2013 – Source: www.itatonline.org

CA Sanjeev Lalan

Additions based on AIR reporting

Introduction

In last few years there has been an increase in the number of cases selected for assessment under section 143(3) based on what is popularly known as CASS (Computer Assisted Scrutiny Selections) based on certain information that is collected by the Income-tax department from various sources and information systems. While the main purpose of this article is look into the additions that are based on Annual Information Returns filed by various persons specified in section 285BA, we would also look into some issues arising on account of other details collated by the department from its own sources and other information collected by the Central Information Branch (CIB). During the course of assessment proceedings the Assessing Officer receives certain information collected by the department from –

(1) Annual Information Returns (AIR);

(2) Central Information Branch (CIB);

(3) TDS Returns (26AS); and

(4) Online Tax Accounting System (OLTAS).

Before we proceed to examine the problems arising out of information collected under each of the above system, we may look into the type of information that is collected from each of the above sources.

I. Annual Information Returns (AIR)

1. As per Rule 114E (2), the specified persons who are required to furnish AIR and the nature and value of the specified transactions to be reported in the AIR are as under :

Sr. No.	*Person responsible to file AIR*	*Nature of Financial transaction*	*Value*
1	Banking company/institution	Total cash deposits in a savings bank account in a year	₹ 10 lakhs or more
2	Banking company/ institution or any other company / institution issuing credit card	Payments received in the year in respect of a credit card issued.	₹ 2 lakhs or more
3	Trustee or authorised person of a Mutual Fund	Receipt from any person for acquiring units of that Fund	₹ 2 lakhs or more

4	Company or institution issuing bonds or debentures	Receipt from any person for acquiring bonds or debentures issued by the company or institution.	₹ 5 lakhs or more
5	Company issuing shares through a public or rights issue	Receipt from any person for acquiring shares issued by the company.	₹ 1 lakh or more
6	Registrar or Sub-Registrar	Purchase or sale by any person of immovable property	₹ 30 lakhs or more
7	Authorised Officer of Reserve Bank of India	Aggregate receipts from any person for bonds issued by RBI	₹ 5 lakhs or more

Provisions relating to Furnish Annual Information Return of Specified Financial Transaction (Section 285BA) was first inserted by the Finance Act, 2003 w.e.f. 1-4-2004. It was substituted by Finance (No.2) Act, 2004 with effect from 1-4-2005. The detailed requirements for furnishing AIR are contained in Rule 114E. Section 285BA of the Income-tax Act,1961 read with Rule 114E, 1962 of the Income-tax Rules casts an obligation on certain specified persons to furnish an Annual Information Return containing details of certain specified transactions registered or recorded by them during every financial year.

2. Specified Persons

a. An Assessee;

b. Recognised stock exchange referred to in clause (f) of section 2 of the Securities Contract (Regulation) Act, 1956;

c. A local authority or other public body or association;

d. Registering Authority empowered to register motor vehicles under Chapter IV of the Motor Vehicles Act, 1988;

e. Prescribed person in case of Office of Government;

f. Post Master General as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898;

g. An officer of Reserve Bank of India, constituted under section 3 of the Reserve Bank of India Act, 1934;

h. A depository referred to in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996;

i. Registrar or Sub- Registrar appointed under section 6 of the Registration Act, 1908;

j. Collector Referred to in clause (c) of section 3 of the Land Acquisition Act, 1894.

The aforesaid specified persons who are responsible for registering or maintaining books of account/other documents containing a record of any "specified financial transaction" under any law for time being in force, are directed to furnish an annual information return, in respect of such specified financial transaction which is registered or recorded by him during any financial year beginning on or after 1-4-2004 and information relating to which is relevant and required for the purposes of Income-tax Act to the prescribed income-tax authority or to such other authority or agency as may be prescribed.

3. Specified Financial Transaction

Specified transactions mean the following transactions, as may be prescribed, of value ₹ 50,000 or more –

a. transaction of purchase, sale or exchange of goods or property or right or interest in a property; or

b. transaction for rendering any service; or

c. transaction under a works contract; or

d. transaction by way of an investment made or an expenditure incurred; or

e. transaction for taking or accepting any loan or deposit.

The CBDT is empowered to prescribe different values for different transactions in respect of different persons, having regard to the nature of such transaction. This means that, in respect of the same transaction, the monetary limits can be fixed differently for certain class of persons when compared with the monetary limit prescribed for other classes of persons. Also, the value or aggregate value of such prescribed transactions during a financial year cannot be less than ₹ 50,000. Thus, any financial transaction of individual value of less than ₹ 50,000 or aggregate value for the year of less than ₹ 50,000 are not to be reported in annual information return.

4. Points to be noted in Respect of Notified transactions

(a) Cash deposits in savings account –

(i) A banking company is required to submit AIR every year, stating "cash deposits aggregating to ₹ 10 lakhs or more in a year in any savings account of a person maintained by that bank".

(ii) The prescribed Form No. 61A requires the bank to give information about the name and address of the depositor, his PAN, mode of deposit (i.e. cash), total amount deposited during the year and name and address of the branch of the bank where deposit is made.

(iii) It is significant to note that there is no requirement to report about the savings bank account number in which the cash deposits are ₹ 10 lakhs or more.

(iv) It may be noted that deposits made otherwise than by cash (like cheques, DDs, and transfer adjustments) are not to be considered for the monetary limit of ₹ 10 lakhs in a year

(v) Deposits in a savings account must alone be considered. Deposits in other accounts, like current account, fixed deposit account, recurring deposit account, etc., are not to be taken into account.

(vi) Another important point to be noted is that the information must be furnished by 'a bank' in respect of deposits held by any person in that 'bank'. The term 'branch of a bank' has not been used. Therefore each 'bank' is the unit, both for the purpose of determining the aggregate of cash deposits made by any person as well as for the purpose of furnishing the information. Thus, if a person has more than one savings account in different branches of the same bank (which is possible as well as permissible), that bank will be required to furnish the information in respect of that person, if the aggregate of cash deposits made by that person in the various branches of the bank has exceeded ₹ 10 lakhs for the year, even though such aggregate in respect of each such branch has not exceeded this limit.

(b) Credit card payments –

The monetary limit of ₹ 2 lakhs will apply to each credit card issued by the company. In cases where a primary credit card and an 'add-on' card has been issued by the same company, information will have to be furnished, in respect of each credit card through which payment has been made against bills raised in respect of such credit card in excess of ₹ 2 1akhs during the year. Similarly, where a person is holding more than one credit card issued by different companies/banks, the information will be required to be furnished only by such of those companies/banks in respect of which payments made through credit cards issued by them has exceeded ₹ 2 lakhs for the year.

The banking company or any other Company or Institution issuing credit card will report this information branch-wise. It may be noted that the credit card number is not required to be reported.

(c) Investments in MF units, shares, debentures, etc.

(i) The following entities are required to file AIR in Form No. 61A and give the following information –

(a) A Mutual Fund has to file AIR, stating "Receipt from any person of an amount of ₹ 2 lakhs or more for acquiring units of MF."

(b) A company/institution issuing bonds or debenture has to file AIR, stating "Receipt from any person of an amount of ₹ 5 lakhs or more for acquiring bonds or debentures issued by the company/institution."

(c) A company issuing shares through a public or rights issue has to file AIR, stating "Receipt from any person of an amount of ₹ 1 lakh or more for acquiring shares issued by the company."

(ii) In all the above cases, it may so happen that the assessee may pay more than the limit specified above at the time of making application for units, shares, debenture or bonds, but may be allotted such securities of less than the specified amount. CBDT has clarified in its Circular No. 7/2005 that in such cases, information should be given if the amount paid at the time of application is more than the amount specified above. In other words, if the applicant has paid ₹ 2 lakhs as application money for 20,000 shares applied for Rights Issue of shares of a company, but he is allotted only 8000 shares for ₹ 80,000 and the balance of ₹ 1.20 lakhs is refunded to him, the company will have to report ₹ 2 lakhs as 'Receipt' in AIR. The company cannot consider the amount of ₹ 80,000 for this purpose.

(iii) It may be noted that Form No. 61A does not require information about the number of units, shares, debentures, etc. applied for and allotted to the assessee. Again, in the case of a Mutual Fund, the investor may acquire units under different schemes of the MF. Form No. 61A requires that the aggregate of the receipts under all schemes put together should be reported if the amount is ₹ 2 lakhs or more.

It may be noted that the words "in a year" have not been used and the words "receipt" has been used. Generally, Issue of Shares, Bonds and debentures are one time affair, hence the words "in a year" has not been used. Hence, the monetary limit shall apply to each investment and not aggregate investment.

(d) Purchase and sale of Immovable Property:

Since the information is required to be furnished by the registering authority, the definition of 'immovable property' in the Registration Act, 1908 may be relevant. Under section, 2(6) of that Act, 'immovable property' includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

Following Information in AIR becomes relevant –

(i) A Registrar or Sub-Registrar appointed under the Registration Act is required to file AIR, stating "Purchase or Sale by any person of immovable property valued at ₹ 30 lakhs or more" in a financial year. It appears that in this case the word 'value' will mean the value determined for the purpose of stamp duty and not actual consideration stated in the document registered.

(ii) However, information about each transaction of ₹ 30 lakhs or more is to be given. CBDT Circular No. 7/2005 clarifies that where there are joint owners of a property, the information about joint owners should be given. Further, even if the share of each joint owner is less than ₹ 30 lakhs, information should be given in AIR if the total value of the property registered is ₹ 30 lakhs or more.

(iii) It may be noted that particulars of property i.e., whether it is land or building or its location, area, etc. are not required to be given.

(e) Investments in RBI Bonds

(i) Reserve Bank of India (RBI) is required to file AIR every year before 31st August, stating "Receipt from any person of an amount aggregating to ₹ 5 lakhs or more in a financial year for bonds issued by RBI".

(ii) CBDT Circular No. 7/2005 clarifies that only the aggregate of all the receipts from a person during the financial year is required to be reported as one transaction.

It is to be noted that all the above details are furnished in electronic format and the NSDL is the prescribed agency that is authorised to collect the said information.

II. Central Information Branch (CIB)

There are certain information which are collected by the DIT (CIB) from various sources based on certain internal parameters by using powers vested in sections 131 and 133. Also, some financial transactions of suspicious nature get reported through the banking sector. The transactions which are generally investigated or get reported are of the following nature –

(i) Registration of vehicles;

(ii) Suspicious transactions by banking companies, for e.g., cash deposit at one time of ₹ 2,00,000/- or more;

(iii) School Fees over certain limits;

(iv) Spending at hotels over certain limits;

(v) Immigration details.

(vi) Transactions on stock exchanges.

(vii Information received from other government departments like sales tax, enforcement directorate etc.

Thus it will be seen that wherever there is a possibility of high value spending, such areas are generally covered by the DIT in charge of CIB to collect such information. Some information of this nature is also collected by the investigation department, especially when some reports are received from other departments of government.

Due to computerisation and available information systems, it has become very convenient to collate such information.

III. TDS Returns (26AS)

These details are compiled from the TDS returns filed in electronic media by the deductors every quarter in Form Nos. 24Q and 26Q and are available in CASS report with the Assessing Officer.

IV. Online Tax Accounting System (OLTAS)

In this report the payments of taxes made by the assessee relating to advance-tax and self-assessment tax are available. OLTAS transactions in CASS report available with the Assessing Officer is basically relating to taxes paid by the assessee.

The Assessing Officers get the following information during the course of assessment proceedings –

(1) Summary of number of transactions in respect of all the above four categories including the total amount involved in respect of each of the category.

(2) Details of transaction under AIR with details of filers, amount involved, date of transaction, details of branch of the filer and such other details.

(3) Details of information collected by the CIB with details of Agency furnishing the details, amount and date of transaction, reference of transaction and the officer in CIB uploading the details.

(4) Details of TDS in 26AS details which include deductor's name, its TAN and address, section code under which deduction is made, amount paid, TDS amount deducted and deposited.

(5) Details of advance and self-assessment taxes paid with BSR code of bank where deposited, date of deposit and other relevant details.

Thus, it will be seen that all the major transactions made by any person get covered within the information system network of the Income-tax department and most of the information collected is very comprehensive. In fact, it is on the basis of information thus collected, many notices have been issued recently to non-filers of Income-tax returns.

V. Practical difficulties faced during assessment proceedings

While all the above details are readily available with the Assessing Officer, it does pose huge challenges to the assessee. Some of the difficulties faced are discussed hereunder:

1. Wrong quoting of PAN in AIR/CIB Reports

- This is one of the major areas where problems have been faced by most of the assessees and their representatives. It has been noticed that many times the person filing the AIR makes mistake in capturing the PAN details of the assessee in their systems and these leads to big complications. At times it becomes difficult to convince some of the Assessing Officers that the transaction is wrongly reported by the filer of AIR. Most of the times, instead of calling the AIR filer to give explanations, it is the assessees and their representatives who are left to fend for themselves and seek the details. At times it becomes very difficult to obtain response from the AIR filers as there is total lack of any interface with them. Most of the AIR filers are big companies, institutions or government departments and for them providing any further details beyond that provided in the AIR already filed is last priority.
- In one of the cases during the course of assessment proceedings the assessing officer confronted the assessee with a transaction of deal in property of over ₹ 30 lakhs where assessee's PAN was quoted by the seller of the property. Atleast, these days the details of filers of AIR are provided to the Assessing Officers, earlier this detail was not available. The assessee denied the transaction and asked the Assessing Officer to initiate the penalty proceedings against the person quoting wrong PAN. Of course, in this case the accounts of the assessee were being audited and no property was reflected in its balance sheets for last few years. Later it transpired that the transaction was actually registered in some other city and assessee's PAN was wrongly quoted.
- These types of situations are also faced in details filed under other types of transactions reported in AIR.

The situation becomes really worse in case wrong quoting of PAN by deductors in TDS statements. The Assessing Officers have been insisting on adding the gross amount of sum reported as paid by the deductors as undisclosed income in such cases. Therefore it becomes important to rebut the said details and file appropriate submissions/details, depending on the facts of each case. Even where appropriate rebuttals are filed, the Assessing Officers are insisting on getting the TDS statements filed by the deductors revised, which is a very difficult task when there are no

financial dealings with such deductors or they are not known to the assessee. In *DCIT vs. G. Selva Kumar, Bangalore [ITA No.868/Bang/2009] the Bangalore Bench of Hon. ITAT* while remitting the matter back to the Assessing Officer has held that addition based merely on AIR report will not stand in the eyes of the law. It also directed the assessing officer to obtain the Sale Deed of the property from Sub-Registrar's office to prove revenue's claim. Reference may also be made to *Arati Raman v. DCIT [ITA No. 245/Bang/2012].*

- When faced with such situation, the assessee should put up a request to the Assessing Officer to provide details of the transaction and related documents and to issue a notice u/s. 131 or summon u/s.133 to the filer of such details. While in case of such mistakes being noticed in CIB report, the concerned office should be asked to clarify the transaction and provide necessary details to the assessee to rebut the same.

2. Reporting of transactions under PAN of which assessee is unaware

- This type of situations arise when the assessee may have assented to the service provider to provide some service, however the service provider uses the PAN for some other transactions connected to that service though without the involvement or knowledge of the assessee.
- An assessee had a current account with a foreign bank and it was provided a facility whereby it would get interest on idle funds. In turn the bank was parking these funds in mutual funds and also carrying on transactions of switching amongst other schemes. In this way, while the total transactions that got reported against assessee's PAN were 10X as against the 'X' idle amount in the current account throughout the year. One can well imagine the predicament of the assessee who had not entered into the transactions and was also not aware of the same.
- Also what happens in most of these cases is that much of the time is lost in Assessing Officer pressing the same matter and assessee keeping on denying the transactions. While the Assessing Officer feels that he has unearthed some huge evasion, the assessee is at loss to understand how it could not be aware of such huge transactions, if they were actually carried out.
- Most of such details are now available on the Income-tax departments website nowadays and it would be in interest of the assessees and their representatives to have a look into the same before appearing in any proceedings or upfront denying such transactions without any details. In appropriate cases asking the Assessing Officer to call for details from the AIR filer or summoning them may also be insisted upon.

3. Mutual Fund Re-investments

This is one more area where the difficulties faced by assessees are immense. Two major problems that arise in these types of transactions are:

- reporting of transaction in cases of all the joint holders and
- transactions involving switchovers or redemption & reinvestments.

While in first case it would become necessary to show with evidence the actual beneficiary of the transaction, that the transaction is duly reported in case of real beneficiary of the investment and that same are duly disclosed in that persons case. In second mentioned cases it will be necessary to reconcile the annual movement of funds from one scheme to another and that incomes arising from redemption and dividends, if any, are duly disclosed in appropriate column in the ITR.

In most of these cases the investments are handled by the financial advisors and the

assessees rarely look at the statements that are received by them from the Mutual Funds to verify the correctness of the details and accounting thereof, as many of these transactions do not get routed through bank accounts.

4. Cash Deposits, in savings account, out of sales or business receipts by small assessees

This is one area which has hurt assessees the most even in genuine cases. This happens especially when the assessee is carrying on some vocation or small trade in personal name and due to smallness of business do not deem it necessary to have a current account for business purpose. These are also cases where maintenance of books of account may not be necessary as income offered is equal to or more than the deeming provisions of section 44AD or 44AE. Many Assessing Officers have been insisting on adding the whole of such sums deposited in the bank account irrespective of the fact that the gross receipt of business, after considering the amount so deposited, is duly disclosed in the appropriate place in the return of income and that income offered is equal to or more than the applicable deeming provisions. In all such cases giving proper disclosures in ITR in columns relating to deemed income like sales, purchase, stock, debtors, creditors, cash and summary of cash dealings as also other possible details during the assessment proceedings becomes very essential. If books of account are maintained then proper disclosures should be made in profit and loss account and balance sheet in the ITR.

While in cases of small traders it may be possible to prove the same if the payment for purchases are made by cheque through the same account, the problems gets compounded in cases of those engaged in vocation or providing services. The problem gets worse especially because in most of such cases the source of receipts or details of sales are not available / maintained by the assessees due to smallness of such receipts from various customers.

5. Reporting of transactions of sale & purchase

While the requirement as per Rule 114E in respect of transactions in immovable transaction is that of reporting of "Purchase or sale by any person of immovable property valued at thirty lakh rupees or more, the Registrars/ Sub-Registrars have been reporting all the transactions relating to immovable properties including gifts, joint venture transactions involving joint development of properties, specific power of attorneys merely for registration of property. At times some assessing officers have been taking extreme views during the course of assessment proceedings. In one of the cases of joint venture agreement for development of property jointly, the assessing officer went to the extent of treating the value adopted for registration of instrument as unexplained investment under section 69, which was finally deleted by the CIT(A) having regards to the substance of the agreement.

6. Transactions in Stock Exchanges

The details relating to dealings in stock exchanges are obtained by the CIB and reported in CASS report. The problems encountered here are due to tracing of the transactions reported, because not all transactions entered into by the assessee get reported.

In many cases it is observed that in respect of transaction entered on one day in single scrip only a part of the transaction gets reported or that is what is available with the assessing officer. This will become clear by the following example:

An assessee enters into say a transaction for sale of 1000 shares and sets the limit at ₹ 50/- per share for such sale. Though all the transactions are executed at the ceiling price, the transaction may have taken place in 4 to 5 parts of say 200, 300, 150 and 350 shares each. While in the CASS report only one transaction of 150 may be reported and though the broker may

have issued one bill in which all transactions would be recorded, in the books of account only one entry is passed as the assessee considers it to be part of one sale only. In all such cases it becomes essential to go through each and every bill to find out sale of such quantity.

The difficulty here is that the CIB collects details from exchanges and culls out the transactions from voluminous details made available by the exchanges.

7. Reporting transaction in more than one PAN in case of Joint-holders

This problem is of the nature already discussed in 3 above. The problem is to some extent mitigated because the joint holder status is mentioned in the CASS report available with the assessing officer under the column head "Joint Count" where the serial number in holding as jointholder is mentioned as 1, 2 or 3. However, as mentioned earlier it would be necessary to show that the transaction is duly reported and explained in case of the real beneficiary.

8. Method of accounting and TDS Credit

This is a problem faced by most of the assessees who are following cash method of accounting and the deductor follows accrual basis of accounting. Some of the problems are similar to those mentioned in third bullet in "1" above. This happens because the credit for such TDS is available in the year in which income is offered to tax, whereas the tax is reported under 26AS in the year in which the deductor has deducted the tax and deposited the same. While in case of advance receipt of rent clarifications are issued, in other cases there is urgent need to either (i) provide in the ITR a column for postponement of claim of credit in respect of TDS to succeeding years or (ii) shift to position prevailing prior to 1986 where TDS was treated as income of the year in which deduction was done. The Local Standing Committee on TDS in Mumbai had made these recommendations; however this has not yet found favour with the law makers.

VI. Conclusion

While the efforts in computerising the information available from various sources and making use of the same for collecting the legitimate taxes needs to be lauded, it is also of utmost importance that some of the avoidable problems are addressed so as to mitigate the unnecessary hardships caused in genuine cases. Some of the suggestions are already discussed in "V" above, following are some of the steps that need to be taken urgently to make the process of reconciliation of data easy and process of assessment much more smooth. These are –

(a) The report of CASS should be shared with the assessee by the Assessing Officer immediately in the starting stages of assessment proceedings.

(b) The assessee and the authorised representatives should obtain Form No. 26AS from the Income-tax department/ NSDL site immediately when the notice u/s. 143(2) is received.

(c) When the assessee denies the transaction, the Assessing Officer should immediately issue notice u/s. 131 or 133, as the situation may demand, to the uploader of details calling for details in support of AIR and TDS statements. While in cases of CIB information further details should be obtained and provided to the assessee for rebuttal.

(d) In respect of provisions relating to credit of TDS the suggestions made in "V7" above need to be immediately provided for in the Act itself or the ITR Form should be modified so as to enable the assessee to fill up the details of credit that is postponed.

Deepak Tralshawala, *Advocate*

Power to call for information under section 133(6)

The powers of the income tax authorities are laid down in Chapter XIII of the Act. These powers are well-defined under the Income-tax Act. Thus, sec. 131 gives the Income-tax authorities the power to issue summons, sec. 132 deals with the powers of search and seizure, sec. 133A grants the power to carry out surveys, etc.

Section 133 deals with the various powers to call for information.

Who can call for information

Under the provisions of sec. 133 the information specified in sub-sections (1) to (5) can be called for by the Assessing Officer, the Joint Commissioner or the Commissioner (Appeals).

Under sec. 133 sub-section (6) the information can be called for by, in addition to the Assessing Officer, the Joint Commissioner or the Commissioner (Appeals), the Director/ Commissioner and the Director-General/Chief Commissioner also.

However, for the purposes of Double Taxation Avoidance Agreements u/sec. 90 and agreements entered into *inter-se* by specified associations in India and outside India, the powers under sec. 133(6) can be exercised only by an authority notified under sec. 131(2), i.e., not by an authority below the rank of Assistant Director or Assistant Commissioner, notwithstanding that no proceedings are pending before it or any other Income-tax authority.

From whom can the information be called for

The authorities concerned can call for the information from "any person including a banking company or any officer thereof". "Person" is defined under sec. 2(31) to include an individual, an HUF, a company, a firm, an AOP/BOI, "and every artificial juridical person, not falling within any of the preceding sub-clauses". In *Rechery Service Co-operative Bank Ltd. vs. Commissioner of Income-tax (2003) 182 CTR (Ker.) 517 : (2003) 263 ITR 161 (Ker.) : (2003) 129 Taxman 335/(2004) 134 Taxman 352 (Ker.)* notice under s. 133(6) was issued to co-operative banks calling for a list of persons who had made term/recurring deposits of ₹ 50,000 and above along with their addresses. Ruling that the notice was not invalid the Court held:

"The object of the amendment of s. 133(6) by the Finance Act, 1995 as explained by the CBDT in its Circular No. 717, dt. 14th Aug., 1995, shows that the legislative intention was to give wide powers to the officers, of course with the permission of the CIT or the Director of Investigation, to gather general particulars in the nature of survey and store those details in the computer so that the

data so collected can be made use of for checking evasion of tax effectively. It is not a condition for the issuance of a notice under s. 133(6) that any proceedings under the Act against the person with respect to whom the information is called for should be pending."

The **Circular No. 717, dt. 14th Aug., 1995 [(1995) 127 CTR (St) 21]** reads as follows :

"Power to call for information when no proceeding is pending —

41.1 The IT Department has taken steps to improve information – gathering and its processing to be in line with its plans of computerisation. Allotment of permanent account numbers is being done with the help of computers. Quoting of such numbers in high value transactions may be made a statutory requirement.

41.2 At present the provisions of sub-section (6) of s. 133 empower the IT authorities to call for information which is useful for, or relevant to, any proceeding under the Act which means that these provisions can be invoked only in cases where the proceedings are pending and not otherwise. This acts as a limitation or a restraint on the capability of the Department to tackle evasion effectively. It is, therefore, thought necessary to have the power to gather information which after proper enquiry, will result in initiation of proceedings under the Act.

41.3. With a view to having a clear legal sanction, the existing provisions to call for information have been amended. Now the IT authorities have been empowered to requisition information which will be useful for or relevant to any enquiry or proceedings under the IT Act in the case of any person. The AO would, however, continue to have the power to requisition information in specific cases in respect of which any proceeding is pending as at present. However, an IT authority below the rank of Director or CIT can exercise this power in respect of an inquiry in a case where no proceeding is pending, only with the prior approval of the Director or the CIT."

What information can be called for

Under sec. 133(6) the authorities mentioned above can call for

i. Information in relation to such points or matters, or

ii. Furnish statements of account and affairs verified in the manner specified by the above authorities,

which will be useful for or relevant to any enquiry or proceeding.

Information can be called for even where no proceedings are pending. It is not even necessary that any enquiry should have commenced with the issuance of notice or otherwise before s. 133(6) can be invoked. In such situations, however, the power to call for information shall be exercised by the Assessing Officer or by the Joint Commissioner only with the prior approval of the Director or Commissioner. As held in *Karnataka Bank Ltd. & Ors. vs. Secretary, Government of India & Ors. (2002) 175 CTR (SC) 405 : (2002) 255 ITR 508 (SC) : (2002) 123 Taxman 219 (SC),* it is not necessary that an inquiry should have commenced with the issuance of notice or otherwise before s. 133(6) could have been invoked. It is with the view to collect information that power is given under s. 133(6) to issue notice, *inter alia,* requiring a banking company to furnish information in respect of such points or matters as may be useful or relevant. The second proviso makes it clear that such information can be sought for even when no proceeding under the Act is pending, the only safeguard being that before this power can be invoked the approval of the Director or the Commissioner, as the case may be, has to be obtained. In the instant case, the notice dt. 7th July, 2000, indicates that it was at the instance of the Director of Income-tax (Investigation) that the information was sought for. However, as mentioned above, for the purposes of the Double Taxation Avoidance Agreements u/sec. 90 and agreements entered into *inter-se* by specified associations in India and outside India, the powers under sec. 133(6) can be

exercised only by an authority notified under sec. 131(2), i.e., not by an authority below the rank of Assistant Director or Assistant Commissioner, notwithstanding that no proceedings are pending before it or any other income tax authority.

In brief, this means that the authorities above can call for any information pertaining to any period irrespective of the pendency or otherwise of a proceeding, subject to the condition that in case no proceedings are pending the information can be called for only after the prior approval of the Director or Commissioner of income tax.

As mentioned above, this information can be called from "any person" who need not be the assessee.

Thus, the Income-tax authorities have enough powers granted by the statute to elicit information. A few examples should suffice to highlight this:

In *Grindlays Bank 183 ITR 62 (Cal.)* as the assessee-bank failed to discharge the obligation under ss. 192(1) and 200 in respect of furlough pay it was held that the ITO was justified in calling for information under s. 133(6).

In *Chavassery Service Co-operative Bank Ltd. & Ors. vs. Income Tax Officer & Ors. (2010) 231 CTR (Ker.) 404 : (2010) 37 DTR 102* it was held that IT authorities have power to issue notices under s. 133(6) on any person including private banks, co-operative societies and even nationalised banks calling for information useful or relevant to any inquiry. If no proceedings are pending, such information can be called with the prior approval of Director or CIT.

Another example of the circumstances under which information could be called for under sec. 133(6) was provided in *Commissioner of Income Tax vs. Hotline Electronics Ltd (2012) 205 Taxman 245 (Delhi),* where the issue concerned remission or cessation of trading liability under sec. 41(1). The Court held,

"It is the Assessing Officer who has invoked section 41(1). It is he who has stated that there was a remission or cessation of the assessee's liability. It was, therefore, incumbent upon him to make inquiry and bring on record material. By virtue of the powers vested in him under section 133(6) or any other provision of the Income-tax Act to seek clarification or confirmation from the creditors, the said material/evidence could have been ascertained."

In *Neesa Leisure Ltd. & Anr. vs. Union of India & Ors. (2011) 245 CTR (Guj.) 634 : (2011) 338 ITR 460 : (2012) 204 Taxman 86 : (2011) 64 DTR 312,* the assessee had alleged *mala fides* against the officer for issuing notice under sec. 133(6). The Court held,

"In-so-far as the allegations that the notices under s. 133(6) have been issued with a view to throttle the petitioner's business or with the collateral purpose of scaring away the investors are concerned, except for such bald averments there is no material or other averment to substantiate such allegations. No personal prejudice of any particular officer is brought on record. On reading the memorandum of the petition in its entirety, it is apparent that the petitioners have not named any officer who according to them has the *mala fide* intention of throttling the petitioner's business, nor are any supporting averments made as to why the respondents would possess such collateral intentions of scaring away the petitioner's investors. Except for general allegations no specific allegations of *mala fides* have been levelled against any particular officer to substantiate the said allegations. In the circumstances, the notices would not be rendered invalid on the ground of *mala fides* on the part of the Department. As regards the notices having been issued for the purpose of a roving inquiry, upon considering the nature of the information called for *vide* the impugned notices, the Court is of the view that the information called for cannot be stated to be irrelevant for the purpose of the inquiry which is required to be made by the concerned officer. Besides, considering the nature of the material collected during the course of search proceedings, it appears that there is sufficient reason for the concerned officer to call for the information, as stated in the notices under s. 133(6). In the above circumstances, the challenge to the said notices must also fail."

The last two sentences of the above judgment bring out the essence of sec. 133. The Court held that the information called for cannot be called irrelevant or based on a roving enquiry because it appeared from the records that there was sufficient reason for the officer to call for the information. On the flip side, this observation would also suggest that a roving enquiry was not possible, just as it was not permissible for the authorities to call for irrelevant information.

Do the income tax authorities have an unfettered right to call for information

A notable feature in sec. 133A is that there is no time limit laid down about the number of years for which the authorities can call for information. It would seem at first blush that the authorities can call for information pertaining to any number of years. The question that can arise is, can the authorities call for information of, say, twenty years earlier?

It was held in *Nawab Mir Barkat Ali Khan Bahadur vs. Assistant Controller of Estate Duty (1996) 135 CTR (AP) 89 : (1996) 222 ITR 672 (AP)* that where no limitation is prescribed for completion of reassessment, though prescribed for initiation thereof, reassessment must be completed within reasonable time and where period of limitation for reopening the assessment is prescribed as three years, not completing the reassessment for over a period of 12 years could be nothing but unreasonable and issue of notice for completing the reassessment after 12 years would amount to arbitrary exercise of power.

Similarly, it was held in *Krishna Bhatta vs. Income Tax Officer & Ors (1981) 132 ITR 21 (Ker.)* that where there was no time-limit prescribed by statute for imposing penalty, the said penalty was to be imposed within reasonable time. Levy of penalty after a delay of 16 years without Revenue attempting to explain delay was not valid.

Taking a cue from the above judgments it can be said that the absence of a non-obstante clause regarding time limits does not permit the authorities to go backwards for as many years as they may choose to while calling for information for assessments. Sec. 133(6) does not say, for instance, notwithstanding anything contained in sec. 148 the authorities may require any person from furnishing information for any number of years. Thus, the normal time limits that exist would effectively restrict the calling for information. Sec. 149 lays down the time limits for the issue of notice under sec. 148. Keeping this in mind, coupled with the above judgments, it is the opinion of the author that the number of years that can be covered by sec. 133 cannot exceed the time limits in sec. 149, so far as these pertain to assessments. However, the power to call for information is not restricted to assessments only, and information can be called for so long as they are within the boundaries of reasonableness.

Sec. 133, including sub-section (6) only authorises the authorities themselves to call for information. The power of the departmental authorities to call for information was discussed in *Smt. Amiya Bala Paul vs. Commissioner of Income-tax (2003) 182 CTR (SC) 489 : (2003) 262 ITR 407 (SC) : (2003) 130 Taxman 511 (SC).* In this case the issue was whether the AO could refer the question of estimating the cost of construction of the assessee's house to the Valuation Officer under sec. 55A. Holding that the AO could not do so, the Apex Court held:

"The power of the AO under the ss. 131(1) and 133(6) is distinct from and does not include the power to refer a matter to the Valuation Officer under s. 55A. Nor does the third section viz., s. 142(2) on which reliance has been placed by the respondents allow him to do so. The common feature of ss. 133(6) and 142(2) is that the AO is the fact-finding authority. It is his opinion on the basis of the facts as found on an enquiry conducted by himself which results in the assessment order. A report by the Valuation Officer under s. 55A is, on the other hand, the outcome of an inquiry held by the Valuation Officer himself and reflects his opinion on the evidence before him. Such a report would not be the result of an inquiry by the AO under the provisions of s. 133(6) or s. 142(2). . . Besides s. 55A having expressly set out

the circumstances under and the purposes for which a reference could be made to a Valuation Officer, there is no question of the AO invoking the general powers of enquiry to make a reference in different circumstances and for other purposes. It is noteworthy that s. 55A was introduced in the Act by the Taxation Laws (Amendment) Act, 1972, when ss. 131(1), 133(6) and 142(2) were already on the statute book. If the power to refer any dispute to a Valuation Officer were already available in ss. 131(1), 133(6) and 142(2), there was no need to specifically empower the AO to do so in certain circumstances under s. 55A. Whenever reference to a Valuation Officer appointed under the WT Act is permissible under the IT Act, it has been statutorily so provided as in s. 269L."

Thus, the Supreme Court said that sec. 133 had its own role to play under specific conditions and circumstances. It was not possible to interchange this role with the powers embodied in sec. 131 or s. 142(2). Sec. 133(6) empowers the AO as a fact-finding authority to carry out the enquiry himself. It is his opinion on the basis of the facts as found on an enquiry conducted by himself which results in the assessment order. A report by the Valuation Officer under s. 55A is, on the other hand, the outcome of an inquiry held by the Valuation Officer.

Comparision of section 142(1) and section 133(6)

Whereas both these sections ultimately lead to framing an assessment, they have their own place under the Income-tax Act. The salient features of each of these sections are highlighted below:

Section 142(1)

i. Notice under sec. 142(1) is issued for the purpose of making an assessment.

ii. This notice is issued only to an assessee.

iii. The notice is issued only by the Assessing Officer.

iv. If the assessee has not filed the return of income notice under sec. 142(1) obliges him to do so.

v. If the assessee has filed the return of income notice under sec. 142(1) requires the assessee to produce accounts or documents or information as called for by the Assessing Officer.

vi. If the Assessing Officer desires a statement of assets and liabilities not included in the accounts he shall do so with the previous approval of the JCIT.

vii. The Assessing Officer cannot call for accounts more than three years prior to the previous year.

Section 133(6)

i. Section 133 deals with the power to call for information, and is not confined for the purpose of making an assessment, but for any enquiry or proceeding under the Income-tax Act.

ii. Notice under sec. 133(6) can be issued to any person, including the assessee.

iii. Notice under sec. 133(6) can be issued not only by the Assessing Officer but also by the Joint Commissioner, Commissioner/ Director, Chief Commissioner/Director-General.

iv. Information can be called for under sec. 133(6) on any point or matter or accounts that in the opinion of the authorities specified above will be useful or relevant to any enquiry or proceeding under the Act.

v. The information called for is not just confined to pending proceedings, but can be called for irrespective whether proceedings are pending or not.

vi. Unlike sec. 142(1) there is no time limit fixed under sec. 133 for calling for information. However, the element of reasonableness should be adhered to while calling for information.

Nikhil Ranjan, *Advocate*

Registered and Beneficial Ownership : Bhaumik Colour

Introduction

In company law dividend is the profits distributed to the share holders out of the profits of the company for the current year or out of the accumulated profits of the company for previous year(s) after providing for depreciation and transfer of certain amounts to reserves. Clause (22) of section 2 of the Income-tax Act, 1961 (the "1961 Act") brings to tax certain distribution or payments to its share holders to the extent of the accumulated profits.

History of Section 2(22)(e)

Section 2(6A)(e) of the Indian Income-tax Act, 1922 (the "1922 Act") inserted by the Finance Act, 1955, was the corresponding provision to section 2(22)(e) in the 1961 Act. The 1922 Act, deemed following two categories of payments as dividend:

(i) any payment by way of advance or loan to a share holder;

(ii) any payment by any such company on behalf of, for the individual benefit, of a share holder.

The 1961 Act retained the above two categories of deemed dividend but added an additional condition that payment should be to a share holder who is the beneficial owner of shares and who has a substantial interest in the company, i.e., shareholding carrying not less than 20 per cent of the voting power.

The Finance Act, 1987 amended the above condition with effect from April 1, 1988, whereby the threshold of the voting power was reduced from 20 per cent to 10 per cent. A new category of payment was also inserted to be considered as deemed dividend. A payment to any concern in which such share holder is a member or a partner and in which he has a substantial interest would now be considered as deemed dividend. For this purpose, substantial interest has been defined to mean holding of shares carrying 20 per cent of voting power.

Three Limbs of Section 2(22)(e)

The three limbs of section 2(22)(e) are as follows:

"Any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after May 31, 1987, by way of advance or loan.

First limb

(a) to a share holder, being a person who is the beneficial owner of shares (not

being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power.

Second limb

(b) or to any concern in which such share holder is a member or a partner and in which he has a substantial interest (hereinafter in this clause referred to as the said concern).

Third limb

(c) or any payment by any such company on behalf , or for the individual benefit of any such share holder,

to the extent to which the company in either case possesses accumulated profits."

CBDT Circular No. 495 dated September 22, 1987 explaining the provisions of Finance Act, 1987, at paragraph 10.3, reported in 168 ITR (St.) 87 provided that deemed divided could be taxed in the hands of the concern:

"The new provision would, therefore, be applicable in a case where a share holder has 10 per cent or more of the equity capital. Further, deemed dividend would be taxed in the hands of a concern where all the following conditions are satisfied:

(i) where the company makes the payment by way of loans or advances to a concern;

(ii) where a member or partner of the concern holds 10 per cent of the voting power of the company; and

(iii) where the member or partner of the concern is also beneficially entitled to 20 per cent of the income of such concern."

Therefore, this controversy existed whether deemed dividend under section 2(22)(e) can be taxed in the hands of the "concern" or the "shareholder". In *ACIT vs. Bhaumik Colour Pvt. Ltd. 313 ITR (AT) 146 (Mumbai)(SB),* the Special Bench of the Tribunal was concerned with the second limb of section 2(22)(e), namely, payment "to any concern in which such share holder is a member or a partner and in which he has a substantial interest". Provisions of section 2(22)(e) inserted with effect from April 1, 1988 by the Finance Act, 1987 do not indicate as to in whose hands the dividend has to be brought to tax, i.e., the "concern" or the "share holder".

Facts of Bhaumik Colour

Bhaumik Colour Pvt. Ltd. (BCPL) manufactured pencil-paints. BCPL availed loan of ₹ 9 lakhs on interest from Umesh Pencil Pvt. Ltd. (UPPL). BCPL and UPPL had a common share holder, Narmadaben Nandlal Trust (NNT). NNT held 20 per cent shares in BCPL and 10 per cent shares in UPPL. The AO was of the view that the said transaction was covered by the second limb of section 2(22)(e), i.e., any payment by a closely held company, by way of advance or loan to a share holder, being a person who is the beneficial owner of equity share holding not less than ten per cent of the voting power, or to any concern in which such share holder is a member or a partner and in which he has a substantial interest.

The assessee submitted that the shares in BCPL were held in the name three trustees for and on behalf of the trust NNT and that the beneficiaries of the trust were five in number and none of the trustees were also beneficiaries of the trust. The assessee contended that to invoke the second limb of the provisions of section 2(22)(e) the primary condition was that NNT must be both a registered share holder and also beneficial share holder. Since, the trustees of NNT held the shares on behalf of the trust only as legal owners and were not the beneficial owners of the shares, the provisions of section 2(22)(e) could not be invoked. The AO, however, did not agree with the assessee and taxed ₹ 9 lakhs in the hands of BCPL as deemed dividend.

On appeal, CIT(A) deleted the addition made by the AO for the reason that NNT was not

the beneficial share holder of shares in BCPL or UPPL and therefore, the second limb of the provisions of section 2(22)(e) could not be applied vis-à-vis the assessee.

The Revenue appealed before the Tribunal and relied upon Deputy *CIT vs. Nikko Technologies (I) Pvt. Ltd of Mumbai bench (I.T.A. No. 4077/ Mum/2002* order dated December 30, 2005), wherein it was held that the loan or advance was taxable in the hands of the concern receiving the loan as deemed dividend. The assessee, on the other hand, relied on an earlier decision of the Mumbai bench in Seamist Properties (P) Ltd. ITO 20 TTJ 201, wherein it was held that dividend under section 2(22)(e) could not be taxed in the hands of a person other than a share holder.

Before the Special Bench

The Division Bench recommended the matter to be placed before the Special Bench on the following questions:

1. Whether deemed dividend under section 2(22)(e) of the Income-tax Act, 1961 can be assessed in the hands of a person other than a share holder of the lender?

2. Whether the words "such share holder" occurring in section 2(22)(e) refer to a share holder who is both the "registered" share holder and the beneficial share holder?

The Special Bench relied on two decisions of the Apex Court.

1. In *CIT vs. C.P. Sarathy Mudaliar 83 ITR 170 (SC),* the Supreme Court had held that section 2(22)(e) creates a fiction bringing in amounts paid otherwise than as dividend into the net of dividend. Therefore, this clause must be given a strict interpretation. In this case, members of an HUF acquired shares in a company with the fund of an HUF. Loans were granted to the HUF and the question was whether the loans could be treated as dividend income of the family under section 2(6A)(e) of the 1922 Act. The apex court held that only loans advanced to share holders could be deemed to be dividends under section 2(6A)(e), HUF could not be considered to be a "share holder" under section 2(6A)(e) of the Act and hence, loans given to the HUF will not be considered as loans advanced to "share holder" of the company and could not, therefore, be deemed to be its income. The court further held that when the Act speaks of share holder it refers to the registered shareholder.

2. Again in *Rameshwarlal Sanwarmal vs. CIT 122 ITR 1 (SC),* the Apex Court held that what section 2(6A)(e) is designed to strike at is advance or loan to a 'share holder' and the word 'share holder' can mean only a registered share holder. It is difficult to see how a beneficial owner of shares whose name does not appear in the register of share holders of the company can be said to be a 'share holder'. In this case, the company had advanced the loans to the assessee HUF who was the beneficial owners of the shares in the company, but the shares were registered in the name of the individual Karta, who held the shares for and on behalf of the HUF. The apex court held that the HUF being only the beneficial share holder and not registered share holder would not fall within the purview of section 2(6A)(e) of the 1922 Act.

Registered Share holder vs. Beneficial Share holder

On the issue whether a share holder in section 2(22)(e) connotes a registered share holder or beneficial share holder or both, the Special Bench observed as follows:

1. The words "share holder" alone existed in the definition of dividend in the 1922 Act. The expression "share holder" has been

interpreted under the 1922 Act to mean registered share holder. This expression "share holder" found in the 1961 Act has to be, therefore, construed as applying only to registered share holder. Because once certain words in an Act have received certain judicial construction in one of the superior courts, and the Legislature has repeated them in a subsequent statute; the Legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given them.

2. The expression "being a person who is the beneficial owner of shares" used in section 2(22)(e) both in the original provisions of the 1961 Act and in the amended provisions with effect from April 1, 1988 only qualifies the word "share holder" and does not in any way alter the position that the share holder has to be a registered share holder. If a person is a registered share holder but not the beneficial share holder then the provisions of section 2(22)(e) will not apply. Similarly, if a person is beneficial shareholder but not a registered share holder then also the first limb of provisions of section 2(22)(e) will not apply.

Such Share holder

3. Here expression "such share holder" refers to the share holder referred to in the earlier part of section 2(22)(e), i.e., a registered and a beneficial share holder of shares holding 10% voting power.

4. Bhaumik Colour did not fall within the mischief of section 2(22)(e) inasmuch as NNT held shares in BCPL and UPPL only as legal and registered owner but not as a beneficial owner. The three trustees of NNT held shares in BCPL and UPPL only as a legal and registered owner. They held shares for and on behalf of 5 beneficiaries of the trust who were different individuals. They themselves were not the beneficial owner of shares. Therefore, the first requirement of holding shares both as a legal registered owner and beneficial owner of shares was not satisfied and provisions of section 2(22)(e) was not applicable.

Intervener Weaveland's Case

In the case of the intervener in I.T.A. No. 5036/Del/2008, the Special Bench had to decide as to whether deemed dividend under section 2(22)(e) can be assessed in the hands of a person other than a share holder of the lender?

Facts of Weaveland

Weaveland was a partnership firm. It had various transactions of receipts and payments of money with Paliwal Industries Pvt. Ltd. (PIPL). The four partners of Weaveland held shares in PIPL in the following percentage: ACS – 30%, RP – 27.50%, AP – 30%, SP – 12.50%. They shared the profits of the partnership in the same proportion. The AO applied the provisions of section 2(22)(e) in respect of the net outstanding by Weaveland to PIPL and brought the same to tax in the hands of Weaveland. The CIT(A) reversed the order of the AO on the ground that the deemed dividend under section 2(22)(e) cannot be brought to tax in the hands of a non- shareholder.

Intention behind enacting section 2(22)(e)

The Special Bench surveyed into the intention behind enactment of section 2(22)(e) and observed that as there was no indication in section 2(22)(e) to extend the legal fiction to a case of loan or advance to a non-share holder, a loan or advance to a non-share holder cannot be taxed in the hands of a non-shareholder. For this purpose the Special Bench also relied on the judgment of Rajasthan High Court in *CIT vs. Hotel Hilltop 313 ITR 116 (Raj.)* where it was held that deemed dividend can be assessed only

in the hands of the person, who is a shareholder of the lender company and not in the hands of a person other than a share holder.

The Special Bench explained the intent behind enactment of section 2(22)(e) in the following words:

1. Closely held companies are controlled by a group of members. Therefore, such companies may not distribute their accumulated profits as dividends for the fear of being taxed in the hands of the share holders. The deeming provision is based on the presumption that the loan or advance made available to a concern in which a share holder has substantial interest or makes any payment on behalf of or for the individual benefit of such shareholder would ultimately be made available to the share holder of the company giving the loan or advance. Therefore, the intention of the Legislature is therefore to tax dividend only in the hands of the share holder and not in the hands of the concern.

2. The intention behind amendment to section 2(22)(e) by the Finance Act, 1987 is to ensure that person who control the affairs of a company as well as that of a firm can have the payment made to a concern from the company and the person who can control the affairs of the concern can draw the same from the concern instead of the company directly making payment to the share holder as dividend. The source of power to control the affairs of the company and the concern is the basis on which these provisions have been made. It is therefore proper to construe those provisions as contemplating a charge to tax in the hands of the share holder and not in the hands of a non-share holder concern.

3. A loan or advance received by a concern is not in the nature of income. In other words there is a deemed accrual of income even under section 5(1)(b) in the hands of the share holder only and not in the hands of the payee i.e. non-share holder concern. Section 5(1)(a) contemplates that the receipt or deemed receipt should be in the nature of income. Therefore, the deeming fiction can be applied only in the hands of the share holder and not the non-share holder concern.

4. Section 8(a) merely fix the year in which dividend has to be taxed. It is therefore clear that the share holder alone cane, if at all, be subjected to tax for having earned dividend.

5. The Special Bench declined to rely upon the decision of Nikko Technologies Ltd. (supra) in which reliance has been placed on Circular 495, dated September 22, 1987 stating that deemed dividend would be taxed in the hands of a concern, because the circular did not tone down the rigour of the provisions of the Act in the sense to the extent they are not benevolent are not binding.

6. In addition, "dividend" does not include any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e) to the extent to which it is so set off [Section 2(22)(e)(iii)]. In the event the loan or advance is treated as dividend and taxed in the hands of the concern, the benefit of set off cannot be allowed to the concern, because the concern can never receive dividend from the company which is only paid to the share holder, who has substantial interest in the concern. It is, therefore, contemplated that the deemed dividend be taxed in the hands of a share holder only.

Some Recent Judgments

In *Madura Coats P. Ltd., in re 274 ITR 609 (AAR)*, the applicant was an Indian company and resident in India. It proposed to advance to CFL, a non-resident company incorporated in the UK, interest bearing loan out of accumulated profits within the meaning of Explanation 2 to section 2(22)(e). CFL did not by itself held any shares in the applicant. Another UK Company CHL was the holding company of CFL, and

some subsidiaries of CHL (other than CFL) and JPC held shares in the applicant. The applicant stated a case to the Authority for a ruling on the question whether the amount of the proposed loan could be treated as "deemed dividend" under section 2(22)(e) to the extent of accumulate profits. The Authority ruled that being a share holder of the lender company was a common factor of the requirements of section 2(22)(e). To attract sub-clause (e) the shareholder had to be a registered share holder of the lending company. CFL was not a registered share holder of the applicant; JPC was not a member or a partner much less had it any substantial interest in CFL as defined in section 2(32); and there was nothing on record to suggest that the loan was being advanced to CFL on behalf of, or for the individual benefit of JPC. Therefore, the proposed loan to be given by the applicant to CFL could not be "deemed dividend" under section 2(22)(e) to the extent of accumulated profits.

The Bombay High Court in *CIT vs. Universal Medicare P. Ltd. 324 ITR 263 (Bom.)* observed that by providing an inclusive definition of the expression "dividend", clause 2(22) brings within its purview items which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression "dividend" by providing an inclusive definition. In this case, it was held that the amount received from a company having been misappropriated by share holder, there was no loan or advance. Further, even assuming that it was dividend, it has to be taxed in the hands of the share holders and not in the hands of the assessee concern.

In *CIT vs. Ankitech P. Ltd. 340 ITR 14 (Del.),* the assessee-company had received advances of ₹ 6,32,72,265/- by way of book entry from a company, JGPL. The share holders having substantial interest in the assessee-company had 10 per cent of the voting power in JGPL. The AO was of the view that as two share holders of the assessee were members holding substantial interest in JGPL which had provided loans and advances to the assessee-company, the amount received by the assessee from JGPL constituted "advances and loans" and would be treated as "deemed dividend" within the meaning of section 2(22)(e) and added the amount to the income of the assessee. The Tribunal deleted the addition. The Delhi High Court dismissed the appeals. The High Court observed that if the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of "deeming share holder", then the Legislature would have inserted a deeming provision in respect of share holder as well.

In *CIT vs. Rajkumar Singh and Co. 295 ITR 9 (All),* the Allahabad High Court held that clause (e) of section 2(22) as it existed provided that if the loan in received by the share holder then only the loan can be deemed to be dividend in his hands. The assessee-firm was not the shareholder of the company and the partners of the firm were the share holders of the company. Therefore, the loan advanced by the company to the assessee could not be deemed dividend inasmuch as the loan was not to the share holder but to the assessee who was not shareholder in the books of the company.

On the contrary, in *CIT vs. National Travel Services (2011) 202 Taxman 327 / 249 CTR 540 / 70 DTR 321 (Del),* the same bench of Delhi High Court as in Ankitech (supra) took a different view on facts similar to Rajkumar Singh (supra). Here the assessee was a partnership firm consisting of three partners. The assessee was the "beneficial owner" of 48.18% of the share capital of J which were held in the name of the partners. The assessee took a loan of ₹ 28.52 crores from J. The AO held that the said loan was assessable as "deemed dividend" under section 2(22)(e) in the hands of the assessee which was reversed by the Tribunal. Before the Delhi High Court, the assessee argued, relying upon Ankitech (supra), Universal Medicare (supra) and Bhaumik Colour (supra), that section 2(22)(e) could not apply to the assessee-firm as it was not a "share holder" of J. The High Court rejected the assessee's plea

and held that the first limb of section 2(22)(e) is attracted if the payment is made by a company by way of advance or loan "to a share holder, being a person who is the beneficial owner of shares". While it is correct that the person to whom the payment is made should not only be a registered share holder but a beneficial share holder, the argument that a firm cannot be treated as a "shareholder" only because the shares are held in the names of its partners is not acceptable. If this contention is accepted, in no case a partnership firm can come within the mischief of section 2(22)(e) because the shares would always be held in the names of the partners and never in the name of the firm. This would frustrate the object of section 2(22)(e) and lead to absurd results. Accordingly, for section 2(22)(e), a firm has to be treated as the "share holder" even though it is not the "registered share holder".

In *Shruti Properties P. Ltd. vs. ITO (2010) 4 ITR 186 (Mum.) (Trib.),* a company granted loan to the assessee company. The lender and the assessee company had common share holders holding more than 10 per cent in both companies. But as the assessee company was neither a registered share holder nor a beneficial share holder in the lender company provisions of section 2(22)(e) were held not to be applicable.

In *MTAR Technologies (P) Ltd. vs. ACIT 39 SOT 465 (Hyd.),* the assessee had transferred certain amount as loan to a company MMPL, a sister concern. Two share holders of the assessee company holding more than 10 per cent and 20 per cent of the voting rights, respectively, were also share holders of MMPL, having more than 20 per cent of the voting rights in the latter company. The AO formed the view that the loan advanced by the assessee to MMPL is deemed dividend in the hands of MMPL under section 2(22)(e) to the extent of accumulated profits of the assessee company. The AO also held that the assessee should have deducted tax at source under section 194 in respect of the deemed dividend. CIT(A) upheld the AO's action. On appeal, the Tribunal held that deemed dividend under section 2(22)(e) can only be assessed in the hands of person, who is the shareholder of the lender company and not in the hands of a person other than share holder. The Tribunal further held that under the provisions of the Companies Act, 1956, every company is expected to maintain a register of share holders under section 150. Companies are not obliged to maintain any register wherein the details of such concerns may be maintained to which provisions of section 2(22)(e) apply. Under these circumstances, when a payment is made to a non-share holder, it is impossible for the payer-company to ascertain whether it will attract the provisions of section 2(22)(e) or not. Therefore, in this view of the matter, law does not expect the payer-company to deduct TDS under section 194 when payment is made to a non-shareholder. Section 194 required TDS only when payment is made to a share holder.

Conclusion

Therefore, it may be concluded that deemed dividend can be assesses to tax only in the hands of a person who is a share holder of the lender company and no other person. The expression "share holder" referred to in section 2(22)(e) refers to both a registered and a beneficial share holder; and for section 2(22)(e) to apply a person should be both registered shareholder and beneficial share holder. However, Delhi High Court's decision in National Travel Services (supra) has left open the debate where the advance or loan receiving concern is a partnership firm.

Nikita R. Badheka, *Advocate & Notary*

Disallowances of Purchases

A. The subject stated hereinabove is the disallowance of purchases with reference to Income Tax implications of disallowance of ITC under MVAT Act. Most of us are aware of the ongoing crusade against the alleged Hawala dealers by the Sales Tax Department. I purposely use the word "Alleged Hawala" because as can be seen from the Government website the dealers are described as "fictitious dealers". The website has a disclaimer to the effect that if any dealer, where name is published, has grievance, he should contact, DC Vigilance. Meaning, there are good chances that at least few of the dealers listed therein may not be really fictitious. This statement is further strengthened by the fact that as per our information, about nine months back, 800 appeals were pending against cancellation of assessment.

The term Hawala Dealer is the term coined by the Sales Tax Department since last more than fifty years. In the era of Sales Tax Act, 1946 and 1953 they were known as "ABCD Dealer". Thereafter the name was "Listed Dealers "and now words coined by them is Hawala Dealers. However the Sales Tax Department is cautious about using the words Hawala Dealers. The list updated in March 2013 is described as "Revised List of Fictitious dealer – March 13".

The reference is broadly to three types of dealers:

1. Those registered dealers whose registration are cancelled either prospectively or retrospectively, on the said dealers admitting that they have not done genuine business but issued only invoice.
2. It also includes the dealers who may have done genuine business but not deposited the tax collected in to Government treasury and now being unable to pay the tax, are provided safe escape route by the sales tax department. They can file affidavit and avoid payment of full tax collected.
3. There are some dealers who have mainly done genuine business and also issued bills in some of the cases. Such dealers are also happy to go scot-free by filling affidavit of having not done genuine business.

There can be many more types of dealers. I shall come to the issues about how dealers are declared Hawala, etc. or how registration is cancelled little later on.

Let us look into the basic provisions under the MVAT Act. The VAT system as the name suggests is the tax on the Value Added. The grant of Input Tax credit (ITC for short) is sine-qua-non for the VAT system of taxation.

Without the grant of ITC the cascading effect of tax at multiple stages cannot be removed. At the same time it is also true, logically, that unless the tax is deposited in the Government treasury by the former supplier, the subsequent purchaser cannot claim the ITC. Section 48(5) reads as follows:-

"For the removal of doubt it is hereby declared that, in no case the amount of set off or refund on any purchase of goods shall exceed the amount of tax in respect of the same goods, actually paid, if any, under this Act or any earlier law, into the Government treasury except to the extent where purchase tax is payable by the claimant dealer on the purchase of the said goods effected by him :

Provided that, where tax levied or leviable under this Act or any earlier law is deferred or is deferable under any Package Scheme of Incentives implemented by the State Government, then the tax shall be deemed to have been received in the Government Treasury for the purposes of this sub-section."

There is no dispute about the validity of section 48(5). The Bombay High Court has also in terms accepted that Section 48(5) is constitutionally valid.

Our discussion today would not be complete without discussion on three decisions of Bombay High Court in case of Premier Paper and M/s. Mahalaxmi Cotton Ginning Mill case and Timex Art Décor Private Limited. It is important to understand their time judgment, is as without it the whole circle will not be complete.

B. Premier Paper Case (51 VST 382 (Bom) dt. 30-4-2012

One set of Petitions was relating to disallowance of set off where the investigation was initiated at the behest of Advisory Branch on the allegations that the transactions appears to be with Fictitious Dealers. It was found that Petitioner's vendors were engaged in the activity of only issuing tax invoice without actually delivery of goods and passing on the tax credit without paying the tax into the Government Treasury. The allegations were made that such transactions are 'Hawala Transactions' carried out to defraud the Revenue. The investigation also revealed that some person had induced vendors to take Registration under the Act and such vendors were not aware of the nature of business or the quantum of business. It was further alleged that most of the vendors were found to be residing in hutments in slum areas. Several of such members are alleged to have admitted in their Statement that they have not carried out business relating to sale and purchase and that they had signed the Documents including the invoices at the behest of some one. The person who had induced the vendors to take Registration and sign the invoice, etc. also gave a statement that he did not possess any books of account of the alleged company.

Under these circumstances the State pointed out that no one is claiming responsibilities of the company from whom the Petitioners claim to have purchased the goods and claim the set off. The State gave preliminary estimate about the liability of the Petitioner with interest and provisionally attached the accounts. The Application made to the Commissioner of Sales Tax against the Order u/s 35 was confirmed.

Referring to Sec. 48(5) the State also submitted that mere issuance of Invoice or filing of Returns, does not constitute sales. For effecting actual sales goods must move from seller to the buyer. Tax has to be levied and collected by the Selling dealer, who should deposit this tax in Govt. Treasury. The Government also stated that from 2008-09 onwards, cross verification of ITC is done electronically by matching sale and purchase details with the help of uploaded Form-704. In the event of ITC mismatch, enquiry is initiated and the dealer is given opportunity to substantiate his claim of ITC by producing documentary evidence.

If at the end of enquiry it is found that the dealers transactions are Hawala or non genuine the department would initiate actions against the dealers, beneficiaries and other parties involved in illegal transactions. However where the transactions are found genuine but if the mismatch is due to non filing or short filing of returns the department initiates the process to recover the taxes from defaulting dealers/vendors. When such tax is recovered the ITC claim would be allowed to the extent of recovery.

In terms of Sections 48(5) the State ensures that in no event set-off or refund is allowed in excess of tax actually paid or recovered by the Government Treasury.

The Bombay High Court refused to exercise the Writ Jurisdiction for following reasons:-

1) Against the order under Section 35 the application was filed before Commissioner of Sales Tax and against the Commissioners order confirming the order under section 35 an appeal is provided to the Tribunal.

2) Secondly the entire matter needs to be investigated, although the affidavits were filed by both the sides i.e. Petitioners and the State, the assessment will have to be framed. Before the Constitutional validity of 48(5) is considered the basic facts needs to be established in the course of Assessment Proceedings.

3) The issue as to whether, Petitioner is disabled from a claim of set off u/s 48(5) is a matter which would be determined during the course of assessment and in appeal and therefore the Petitioners petitions were dismissed as premature. The High Court also observed that it would be inappropriate to entertain the challenge during the course of investigation. High Court has thus not adjudicated upon validity of Sec. 48(5).

Note: Similarly about 13 more Petitions where disposed of as premature. The Department claims that the Petitions are dismissed. This claim is not accurate.

C. Mahalaxmi Cotton Ginning Case (51 VST 1(BOM) dt. 11-05-2012)

1) The only Petition which was entertained by the Bombay High Court on merit is in case of Mahalaxmi Cotton Ginning Pressing and Oil Industries WP No. 33 of 2012 dt: 11th May 2012. In this Petition also the challenge was made to Sec. 48(5) and it was urged that if Sec. 48(5) is held to be valid then the phrase "Actually paid" be read down to mean "ought to have been paid".

2) In the present case Petitioner is a reseller in cotton bales, the Petitioners set off was sought to be disallowed based on the unmatched data available on the Department's Computer. It was the Petitioners case that except producing the tax invoice containing all the details like Registration certificate, description, quantity, prices of the goods no further requirement is imposed on the purchasing dealer. There is no obligation for obtaining from the vendor challan evidencing payment of tax by the supplier. The purchasing dealers do not have authority to obtain the challan or return from the selling dealer. It was submitted by the Petitioner that for failure to deposit tax in the Government treasury by the selling dealer, the purchasing dealers set off, should not be denied. It was also submitted that the Sales Tax Authorities have statutory powers to assess the dealers and recover tax interest and penalty. The supplier can also be assessed to tax, interest and penalty and the vendors can be prosecuted for non payment of dues.

3) It was urged that the compliance of Rule 55 is not denied and if conditions under Rule 55 are fulfilled the dealer would be entitled to benefit of set off. Irrespective of the fact whether the selling dealer has deposited the tax collected in the Treasury.

4) In the present case the Petitioners had urged that in the very nature of their business the suppliers come from various places during to season to sell the goods and at the end of the season they go back to their native place and therefore it was extremely difficult for Petitioners to find out suppliers and furnish the details like ledger copies as well as proof of filling of returns by the suppliers showing the unmatched list by the Department.

5) Interestingly in the Assessment Order, the RD purchases were determined fully but the set off was disallowed.

6) In this case there was no allegation of 'Hawala' transactions by the Department. However it was stated by the State that number of dealers from whom the goods were purchased were not traceable.

7) The Petitioners challenge was on the following grounds:

   a. The selling dealer collects the tax on behalf of the purchasing dealers and acts as agent of Government. As for the purchasing dealer once he produces valid tax invoice the law does not require him to obtain from its suppliers challan supporting the payment of tax nor he has the authority under the law to obtain challan or return from the selling dealer.

   b. Denying the set off benefit on account of failure on the part of the selling dealer to deposit the tax collected would result in imposing the condition which is impossible of compliance.

   c. The State has machinery as well as the powers to assess the dealers to recover tax, interest and penalty as also to prosecute them for non payment of dues collected.

   d. Sec. 48(5) is like giving unequal treatment to equals as the law does not provide machinery for the purchaser to ascertain whether the seller has actually paid VAT, no protection is provided to the purchaser where the seller fails to deposit the tax.

   e. No provision is available under the Act to refund the tax if after recovery from the purchasing dealer the State is able to recover the tax from selling dealer.

   f. Sec. 48(5) casts an unbearable burden on the purchasing dealer as he has already paid the tax to the vendor and again is called upon to pay the amount with interest and penalty, which may result in closure of the business of the Petitioner.

   g. It is not the case of the Petitioner that claim of set off under 48 should be allowed where the transaction of sale is sham or in cases involving fraud, collusion or connivance between selling and purchasing dealer.

8) Considerations by the High Court.

The High Court referred to the economic basis of VAT, the White paper by State Level Committee of Finance Ministers on VAT, as also the system under which Maharashtra Value Added Tax Act operates.

The High Court referred to certain case laws regarding fundamental principles of Sales Tax legislature.

a. Tata Iron and Steel Company (9 STC 267 SC), the Supreme Court held in this case that though the tax can be collected from the purchaser the primary liability to pay the sales tax is on the seller and that the Sales Tax need not be passed on to the purchaser.

b. *George Oaks Pvt. Ltd. (13 STC 98 SC), SC* held that when the seller passes on the tax and the buyer agrees to pay, Sales Tax is really part of the entire consideration. In terms of Entry 54 of List II the Legislature can include the sale price and tax as turnover of sale of the dealer. In law the tax imposed by the Government is not the tax on the buyer.

c. In case of *Khazanchand vs. State of JK (AIR 1984 SC 762) the SC* Court held that the liability of the dealer to pay the tax is irrespective of the fact whether he makes profit or loss or whether he has received the sale price or not. The purchaser is not bound to pay the Sales Tax payable by the vendor unless he has agreed to do so and where the purchaser agrees to pay the amount, it forms part of the Sale Price.

d. The Supreme Court also in the case of Central wines held that a dealer who sells the goods, does not act as an agent for the State in collecting the sales tax from the persons to whom he sells the goods.

9) The Bombay High Court thereafter analysed Sec. 48(5) and held that the phrase "in no case shall the amount of set off exceed the amount of tax actually paid into Govt. Treasury" are prohibitory. The words "actually paid" are significant. The set off must actually and physically be deposited into the Treasury. The constructive or notional deposit will not fulfil the mandate of the provision, except in case of PSI Units under deferral scheme.

10) The Bombay High Court held that Sec. 48(5) is not qualificatory provision to Sub Section 3 and 4 but a separate sub-section is created. The Bombay High Court also referred to the parallel provision under the Bombay Sales Tax Act, 1959 Act and held that Legislature did not contemplate the grant of set off without any tax being received into Government Treasury. The grant of set off without the receipt of tax into Government Treasury would result in loss of revenue, a consequence not contemplated under law.

11) The next proposition of the Bombay High Court was the set off is a concession granted by the legislation, there is no independent right to a set off apart from Sec. 48. The Bombay High Court relied on SC judgment in case of Goderej and Boyce (SC) which held that the dealer has no legal right to claim set off of the purchase tax paid and the entitlement of set off flows from the rule, it is open for the legislature to restrict and curtail the set off. In case of Harichand Gopal Case (10 (2011) I SCC 236) similar view was confirmed.

12) In case of *India Agencies 139 STC 329 SC,* a three-member bench of SC held that condition on which the concession was granted was mandatory and liberal view cannot be taken merely on grounds of hardship.

13) As regards Constitutionality of section 48(5) the Bombay High Court referred to judgments which has followed the

Doctrine of Judicial Deference, i.e. Presumption of Constitutionality which attaches to a law enacted by competent Legislature. The Court refused to read down the statute which was held constitutionally valid. The Supreme Court has in case of Indore Iron and Steel Ltd. (1998 AIR SC 3050) interpreted the words 'suffered Entry tax' and held that it is only where entry tax is actually paid that the exemption would be available. The Bombay High Court therefore held that in the context of 48(5) the word "actually paid" must be given plain and ordinary meaning to mean, the tax that has been matter of fact deposited in the treasury. The contention that it should mean the tax which ought to have been deposited but not actually deposited in the treasury was not accepted.

14) The challenge of discrimination was also overruled. By observing that Scheme of set off in 48 has to be read in entirety. The conditions are not severable and are part of one integrated scheme.

15) The Bombay High Court also referred to SC judgment in case of Suresh Trading (109 STC 439) but did not comment upon it.

16) Bombay HC thereafter referred to Gherulal Balchand Case Punjab and Haryana HC, wherein the P & H HC had held that while the genuineness of a certificate and a declaration may be examined by a taxing authority, the onus cannot be placed on the assessee to establish the correctness and truthfulness of the statements recorded therein. The Department must allow the claims once proper declaration is furnished. The Department can proceed against the defaulter when the genuineness of the declaration is not in question, This judgment is not followed by the Bombay HC by stating that the judgment does not involve a challenge to provision like 48(5) of MVAT Act.

17) The Bombay High Court thereafter directed the Revenue to file its say in the matter. In reply the State pointed out the procedure followed of matching and mismatching, however the Advocate General appearing on behalf of the State, tendered a statement of the steps that would be pursued against defaulting selling dealers. It reads as follows:

"The State Sales Tax department has stated before the Court that while the electronic system is being continuously evolved, the following steps are being taken to promote greater transparency and efficient handling of claims for input tax credit:

(a) At the end of each financial year, the Sales Tax Department will reconcile the data on its system and inform the dealer about the input tax credit which may have become available on reconciliation, allowing the claimant dealer to seek an additional claim of refund to the extent of his input tax credit so matched in such cases; and

(b) The Department shall, during the course of the current year set up a Dealer Information System (DAS) and Dealer Ledger account showing the status of the taxes collected and paid on the web portal of the Maharashtra State Sales Tax Department (www.mahavat.gov.in) in order to facilitate the process of the grant of additional claim of input credit to claimant dealers.

(c) The Learned Advocate General appearing on behalf of the State has tendered a statement of the steps that would be pursued against defaulting selling dealers:

1) The Sales Tax Department will identify the Defaulters namely, registered selling dealers who have not paid the full amount of tax due in the Government Treasury either by not filing returns but not paying the full tax due (i.e., "short filing") or where returns are filed but sales to the concerned dealers are not shown (i.e. "undisclosed sales").

2) Set off will be denied to dealers where at any stage in the chain of sales tax invoice/ certificate by a defaulter is or has been relied on:

3) In the event of no returns having been filed by the defaulter, the dealer will be denied the corresponding set off;

4) In the case of short filing, dealers who have purchased from the defaulter will be granted set off *pro rata* to the tax paid;

5) In the case of undisclosed sales, the dealers will be denied the entire amount being claimed as set off in relation to the undisclosed sale;

6) To prevent a cascading effect, the tax will be recovered only once. As far as possible, the Sales Tax Department will recover the tax from the dealer who purchases from the defaulter. However, the Sales Tax Department will retain the option of denying a set off and of pursuing all selling dealers in the chain until recovery is ultimately made from any one of them.

7) The full machinery of the Act will be involved by the Sales Tax Department wherever possible against defaulters with a view to recover the amount of tax due from them, notwithstanding the above. Once there is final recovery (after exhaustion of all legal proceedings) from the defaulter, in whole or part, a refund will be given (after the end of that financial year) to the dealer(s) claiming set off to the extent of the recovery. This refund will be made *pro rata* if there is more than one dealer who was denied set off;

8) Refund will be given by the Sales Tax Department even without any refund application having been filed by the dealers, since the Sales Tax Department will reconcile the payments, inform the dealer of the recovery from the defaulter concerned and grant the refund;

9) Details of defaulters will be uploaded on the website of the Sales Tax Department and dealers denied set off will also be given the names of the concerned defaulter(s);

10) The above does not apply to transactions by dealers where the certificate/invoice issued is not genuine (including Hawala transactions). In such cases, no set off will be

granted to the dealer claiming to be a purchaser;

11) The above should not prevent dealers from adopting such remedies as are available to them in law against the defaulters."

18) The Bombay HC thus upheld the Constitutional Validity of Section 48(5) and Sec 51(7) of the MVAT Act holding that regulating the process of refund is within the province of legitimate tax enactment and the Legislature is within its power in requiring the Refund to the applied within a reasonable period.

The situation has not changed much thereafter. The list of Hawala Dealers continues to increase every day. At the same time the State is not transparent in disclosing the documents and the evidence on the basis of which the dealers are declared as Hawala dealer nor are the officers passing on information even when demanded repeatedly. Before I go to the issue arising from such situation I would like to point out few more judgments which have impact on issue under discussion.

D. Gheru Lal Bal Chand vs. State of Haryana [2011] 45VST 195

The decision of the Punjab and Haryana High Court was the first to come i.e., the case of *Gheru Lal Bal Chand vs. State of Haryana [2011] 45 VST 195. The P & H HC* had held that while the genuineness of a certificate and a declaration may be examined by a taxing authority, the onus cannot be placed on the assessee to establish the correctness and truthfulness of the statements recorded therein. The Department must allow the claims once proper declaration is furnished. The Department can proceed against the defaulter when the genuineness of the declaration is not in question. This judgment is not followed by the Bombay HC by stating that the judgment does not involve a challenge to provision like 48(5) of MVAT Act.

E. Timex Art Décor Pvt. Ltd. W.P. 8898 of 2012 dt. 25-3-2013

The next important judgment of the Bombay High Court is of Timex Art Décor Pvt. Ltd. W.P. 8898 of 2012 dt. 25th March, 2013. This was a case of beneficiary whose ITC claim was disallowed on the basis of intelligence information that the suppliers were fictitious and bogus tax invoice has been issued to the petitioner without actual delivery of goods and for passing off tax credit without payment or deposit in the treasury. During the course of search the Director stated that he did not know the whereabouts of the dealer and no supporting document for the movement of goods were available with him. He also did not had the details about transporter and was unable to explain the disposal of goods purchased from those parties. The affidavit of the vendor was relied on. In this affidavit the vendor had admitted that no sale was effected by him to the petitioner and bogus tax invoices had been issued to different dealers from his proprietary business.

The Sales Tax Department filed the complaint with Economic Offence Wing (EOW) of the crime branch of CID alleging that the petitioner and its directors had obtained false bills from Hawala dealers and huge revenue loss has occurred on account of that. On 12th July, 2012 on website of the Sales Tax Department the List of the name of the beneficiary dealers against whom complaints were lodged was uploaded. The petitioners name was Sr. No. 17 in the said list.

Relying on section 73 of MVAT Act the petitioners claim was prior to filing of the FIR (FIR filed on 22nd October, 2012). The State is not empowered to upload their name as beneficiary of Hawala Transaction. The petitioner claimed that the uploading of the name was premature. However the High Court

held that the State Government is empowered to publish the name of the dealer if it is of the opinion that it is necessary of expedient if it is of public interest to do so.

In para 7 the Hon'ble High Court noted the submission of the State representative. However, the High Court has not recorded the reply given by the senior counsel appearing for the appellant. His submission was, presuming the State has every evidence, in assessment, the State must provide all the details to the assessee. The High Court has not negated this submission nor noted this. However, they have made it very clear in para 6 that:

"The assessment of the Petitioner undoubtedly has to be carried out in accordance with law and all facts relevant or necessary for the purpose of assessment will be dealt with in the assessment proceedings. We clarify that the observations contained in this order shall not conclude the assessment proceedings and are only confined to the disposal of the controversy before the Court."

Yet, the Sales Tax officials cite this judgment as if it has put a full stop to all the arguments in the matter of Hawala Dealers.

There is one more aspects to this judgment. The Hon'ble H.C. is reproduced the undertaking given by the Advocate General in Mahalaxmi Cotton case. The Hon'ble H.C. observed that in terms of para 6 of the undertaking, the modalities as envisaged in the previous paragraph will not apply to transaction by the dealer where the certificate/invoice is not genuine (Hawala transaction). The H.C. observed that:

"On the issue as to whether and at what stage the State should carry out the assessment of Hawala dealers that is not a matter which falls for determination in these proceedings. The Petitioner cannot possibly assert that its assessment in accordance with law must be deferred until an assessment is carried out in the first instance against Hawala dealers. The Petitioner has no case whatsoever to make such an assertion. The State is justified in taking necessary steps to complete the assessment of the Petitioner in accordance with law. We are satisfied from the disclosures which have been made by the State Government in the initial affidavit as well as in the additional affidavits that steps are being taken by the State for pursuing the remedies lawfully open even against the Hawala dealers. A web of complex transactions has been put into place to defraud the revenue and we do not in the course of this judgment intend to circumscribe in any manner whatsoever the full range of powers vested in the State Government through its Sales Tax Department for ensuring that due steps are taken to curb or as the case may be deal with Hawala transactions which pose a serious threat to the revenue of the State."

F. It is this observation which is being capitalised by the State for assessing only the beneficiary not the Hawala dealer. It is pertinent to note that the H.C. has not stated that Hawala dealer need not be assessed at all. In none of the above judgments, the High C has averred that the basic rules of jurisprudence, the principle of nature justice should not be followed. This principles are sacrosanct to any valid assessment and therefore this principles will have to be followed by the department while passing the assessment order of a beneficiary.

Under the circumstances as and when you attend for the purpose of notice or in response to show cause notice, kindly ensure that you put your written submission on record.

G. The basic principles of assessment is, the primary onus to prove a claim lies on the dealer. Therefore it is a duty of an assessee to produce the books of account, to produce the documents, details and evidence in support of his claim including the bank details to prove the geniuses of a transaction. A very important aspect which is often used as against the assessee is the absence of proof of delivery.

However one must look into normal practice of the trade regarding delivery of goods. Take for example; The chemical market in Mumbai is full of traders who receive the order for sale first and on the basis of such order direct the supplier to delivery the goods directly to their customer. In case of local delivery normally the confirmation of delivery is taken by the supplier. The proof of delivery is not required by the purchaser as he has received the goods and on receipt of goods he has made the payment for goods received. This is an accepted trade practice today also. The business is run on trust. The system followed over the years is not doubted till date and therefore the insistence of proof of delivery by the State is unwarranted. Of course, this is subject the prevalent trade practice.

H. Going back to the assessment, once the assesse has *prima facie* proved its case, the burden shifts to the department if they wish to aver that what is produced is not correct.

The assessee would be fully justified in demanding the material on basis of which the department wishes to allege that what is produced by the assessee is not correct. The assessee also has a right to ask for the copies of documents/evidence/affidavit and on receipt of such document the assessee can demand the cross examination/ examination of the persons whose affidavit/statements are relied on. The most important aspect to look into this area is whether the statement or affidavit is made by the person authorised or person not connected with the business. In one of the cases I found the Department was relying on statement of the father of the proprietor which has no legal sanctity.

I. A Madras High Court judgment in case of *Shri Vinayaga Agencies (60 VST 283) (Mad.)* may also be referred to The Madras High Court held that once the dealers claim of ITC was accepted after following the provisions of the law and if he establishes that the tax due on such purchase has been paid by him in the manner prescribed and that was accepted at the time self assessment was made, if it is found later on that the selling dealer has not paid the collected tax, the liability had to be fastened on the selling dealer and not on the petitioner dealer which has shown proof of payment of tax on purchases made by him.

While reading this judgment one must keep in mind a specific provision under Tamil Nadu Value Added Tax. Section 19(1) of the said Act reads as follows:-

"There shall be input tax credit of the amount of tax paid or payable under this Act by the registered dealer to the seller on his purchases of taxable goods specified in the First Schedule:

Provided that the registered dealer, who claims input tax credit, shall establish that the tax due on such purchase has been paid by him in the manner prescribed."

J. Shanti Kiran India Pvt. Ltd. reported in 57 VST 405 (Del.)

Unlike Section 48(5) this section does not prohibit the grant of set off unless the tax is paid by the supplier. One more decision of Delhi High Court needs to be mentioned here that is the case of *Shanti Kiran India Pvt Ltd reported in 57 VST 405.* This was a case where the Delhi High Court held :-

"Section 9(1) of the Delhi Value Added Tax Act, 2004 grants input-tax credit to purchasing dealers. Section 9(2) lists out specific situations where the benefit is denied. The negative list, as it were, is restrictive and is in the nature of a proviso. As a result, the interpretation that there is statutory authority for granting input-tax credit, only to the extent tax is deposited by the selling dealer, is unsound and contrary to the statute. It is also iniquitous because an onerous burden is placed on the purchasing dealer – in the absence of clear words to that

effect in the statute – to keep a vigil over the amounts deposited by the selling dealer. These are no provision or methodology by which the purchasing dealer can monitor the selling dealer's behaviour, vis-à-vis the latter's value added tax returns. Indeed, section 28 stipulates confidentiality in such matters. Nor is the insertion of clause (g) to section 9(2) to the effect that input-tax credit is admissible to the purchasing dealer only when tax is actually deposited by the selling dealer clarificatory. Section 9(2) is an exception to the general rule granting input-tax credit to dealers who qualify for the benefit. The conditions for operation of the exception are well defined. The absence of any condition such as the one spelt out in clause (g) and its addition in 2010, rules out the legislative intention of its being a mere clarification of the law which always existed. In the absence of any mechanism enabling a purchasing dealer to verify if the selling dealer deposited tax, for the period in question, and in the absence of notification in a manner that can be ascertained by men in business that a dealer's registration is cancelled the benefit of input-tax credit, under section 9(2) cannot be denied.

The decision of *Mahalaxmi Cotton Ginning Pressing and Oil Industries vs. State of Maharashtra [2012] 52 VST 1 (Bom.)* was distinguished.

It also held, that the cancellation of both selling dealer's registration had occurred after the transactions with the appellant-dealer. The authorities observed that the scanty amount deposited by the selling dealers was incommensurate with the transactions recorded, and straightaway proceeded to hold that they colluded with the appellant dealer. Such a prior conclusions were based on no material, or without inquiry, and unworthy of acceptance. The appellant-dealer was entitled to the credit claimed."

K. Jinsasan Distributors vs. the Commercial Tax Officer (CT) Chintadripet Assessment Circle (W.P. No.12305 of 2012 dated 22-11-2012

Hon'ble Madras High Court had an occasion to deal with such claim Jinsasan Distributors vs. the Commercial Tax Officer (CT) Chintadripet Assessment Circle (W.P. No. 12305 of 2012 dated 22-11-2012). At the time when effected when the buyers made the purchases, the registrations of the respective vendors were valid. Subsequently, the registrations were cancelled for various reasons with retrospective effect. Department sought to disallow the set off to the buyers. This action was challenged before Hon'ble Madras High Court which held as under:

Insofar as the cancellation of the registration certificates of the selling dealers is concerned, it is for those selling dealers to canvas the plea as to when it will take effect either on the date of the order or with retrospective effect. Insofar as the petitioners are concerned, they have purchased the taxable goods from registered dealers who had valid registration certificates; paid the tax payable thereon; availed input tax credit; and the assessing officers have passed orders granting such benefit. Therefore, the assessment orders granting input tax credit were validly passed. There was no cancellation of the registration certificates of the selling dealers at that point of time. The petitioners/ assessees have paid input tax based on the invoices issued by registered selling dealers and availed input tax credit. The retrospective cancellation of the registration certificates issued to the selling dealers cannot affect the right the petitioners/assessees, who have paid the tax on the basis of the invoices and thereafter claimed the benefit under Section 19 of the TNVAT Act, 2006. They have utilized the goods either for own use or for further sale. At the time when the sale was made, the selling

dealers had valid registration certificates and the subsequent cancellation cannot nullify the benefit that the petitioners/assessees availed based on valid documents.

L. The discussion on Hawala transaction can be endless. However as we stand today the beneficiaries are flooded with assessment notice, show cause notice penalty notice. In all the cases the appeal will have to be filed. In all the cases the appellant would be well advised to follow the due process of law. Normally if the amounts are small many dealers have opted to pay the amount to buy peace. However they have not agreed for levy of penalty. Such dealers are flooded with assessment topped with hundred per cent penalty. Each case has to be argued on its own merits. The Commissioner of Sales Tax in an open meeting of STPAM on 4th June, 2013 declared that the department will follow the undertaking given before the High Court in Mahalaxmi in true spirit and with sincerity. The department would not normally prosecute the beneficiaries unless it is revealed or established that the beneficiaries are hand in gloves with the Hawala dealers.

At the end the issues do not end here. The logical end would come on final assessment confirmation by the highest authority i.e., by Supreme Court

A very important but delicate aspect is about retrospective cancellation of registration. The decision of Supreme Court in *Suresh Trading {(109 STC 439) SC}* arising from Bombay provisions holds field today also. The Supreme Court held affirming the decision of the High Court, that a purchasing dealer was entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it. Whatever might be the effect of a retrospective cancellation upon the selling dealer, it could have no effect upon any person who had acted upon the strength of a registration certificate when the registration was current. It was not the duty of persons dealing with registered dealers to find out whether a state of facts existed which would justify the cancellation of their registration.

I have come across the dealers whose Registration certificates are cancelled because the declared place of business was closed on one occasion. This is practically possible. Especially in case of proprietary business, in the absence of staff, the POB may be closed when proprietor goes out. At such times the officials must double check rather than straight away cancelling the registration. The claimant dealer, the beneficiary would be justified in demanding the cancellation record of the Hawala dealers.

At the end, mere listing of the name of dealer is not the proof that the beneficiary is not entitled to set off. The due process of law has to be followed. All is not well behind this declarations also. Many cancellations are challenged. The Appellate Authority appears to be taking their own sweet time to conclude the matters. We at the Bar, should continue to guide genuine dealers.

At the end there is basic difference between disallowance of claim of input tax credit on account of sec. 48(5) and disallowance of purchases. Both have different reasoning and different purpose. Near disallowance of set-off does not ispo-facto mean disallowance of purchases as well.

CA N. C. Hegde

Disallowance of Mark to Market ('MTM') Losses on foreign exchange ('forex') derivatives based on CBDT instructions

1. Background

'Prudence' is one of the fundamental concepts of accounting. This concept ensures that assets and income are not overstated and liabilities and expenses are not understated. Thus, prudence requires that the books of account provide for losses that have arisen on the date of the balance sheet.

MTM primarily refers to the accounting methodology for reporting assets at their 'fair value' having regard to the market price on the date of the balance sheet. Marking assets to their market value aims to provide a realistic picture of the company's financial situation, in accordance with the accounting principle of 'prudence'.

The past decade has witnessed an upsurge of several types of financial instruments such as forward contracts, foreign exchange derivatives, futures, options, swaps, etc. Although these instruments are distinct from each other as far as their feature are concerned, most of them are in the nature of a derivative contract and are employed by companies as arbitrage and/or hedging tools.

The accounting treatment in respect of financial instruments is governed by the Accounting Standard ('AS') 30 on "Financial Instruments: Recognition and Measurement"[1]. In the context of derivative transactions, AS 30 requires the application of MTM principle for unsettled contracts as on the balance sheet date. *Vide* its Announcement dated March 2008 on "Accounting for Derivatives" the Institute of Chartered Accountants of India ('ICAI') has clarified the suggested treatment to be followed for all derivatives. The Announcement mandates that in case an entity does not follow AS 30, it is required to provide for losses in respect of all outstanding derivative contracts as at the balance sheet date by marking them to market. It may also be noted that AS 11 on "Effects of changes in Foreign Exchange Rates", to the extent that it deals with forward exchange contracts will stand withdrawn, from the date of AS 30 becoming mandatory.

Thus, as per the current accounting framework, MTM principle is required to be adopted in reporting the financial statements of a company.

2. Forex derivatives

The Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations defines foreign exchange derivative contract to mean "a financial transaction or an arrangement

1. Presently AS 30 is recommendatory in nature; early adoption is however encouraged.

in whatever form and by whatever name called, whose value is derived from price movement in one or more underlying assets, and includes:

a) a transaction which involves at least one foreign currency other than currency of Nepal or Bhutan, or

b) a transaction which involves at least one interest rate applicable to a foreign currency not being a currency of Nepal or Bhutan , or

c) a forward contract

but does not include foreign exchange transaction for Cash or Tom or Spot deliveries[2].

In common parlance, a forex derivative represents an agreement whose value depends on the value of the underlying foreign exchange rates. Commonly forex derivatives are utilised to hedge the currency risk and could be in the form of a forward contract or an option.

In terms of the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, an Indian resident may enter into a forex derivative contract to hedge the risk exposure in respect of a transaction permissible under the exchange control regulations.

As pointed out earlier, the recommendatory AS 30 requires that MTM losses on financial instruments, including forex derivatives, should be recognised irrespective of whether the contract has matured/ concluded. However, claiming MTM losses on forex derivatives in computing the taxable income of a taxpayer has been a contentious issue. In this article it is proposed to examine the issue of allowability of MTM losses on forex derivatives.

3. Board instructions

With reference to the allowability of MTM losses on account of forex derivatives the Central Board of Direct Taxes ('CBDT') has issued instruction number 3/2010 dated 23rd March, 2010 which clarifies the treatment to be adopted by tax officers.

The Instruction starts by highlighting that a large number of taxpayers report losses on account of trading in forex derivatives on a MTM basis either *suo motu* or in compliance of the AS or advisory circular issued by the ICAI. It further directs tax officers to follow the guidelines laid down there under with regard to the allowability of such losses against the taxable income of an assessee.

Para 2 of the CBDT instruction provides that MTM losses on forex derivatives, being the difference between the purchase price and the value as on the valuation date, is a notional loss and is contingent in nature and therefore not allowable in computing the taxable income. Thus, wherever such MTM losses have resulted in reduction of book profits, the same is to be added back for computing the taxable income.

Para 3 of the Instruction clarifies that even actual realised losses on forex derivatives could be treated as speculative loss unless it is an eligible transaction which is carried out in a recognised stock exchange and in case it is considered to be a speculative loss, the same can be set off only against speculation profits.

Thus, the CBDT Instruction clearly provides that MTM losses in respect of unsettled forex derivatives are not allowable in computing the taxable income. It further goes to add that even the losses realised/crystallized on maturity/ settlement of such contracts may be treated as loss on 'speculative transaction' and hence cannot be set-off against the business income of the taxpayer.

In this context it is noteworthy to mention that under section 119 of the Income-tax Act the purpose of issuing instructions by the CBDT is to ensure proper administration of the Income-tax

2. Cash, Tom and Spot delivery are defined to mean delivery of foreign exchange on the transaction day, on working day next to the transaction day and on second working day after the transaction day

Act and the same are binding on the income-tax department. However, it is very clear that a Board circular that is not accordance with the position of the law is not binding on the taxpayer as well as the appellate authorities. To put it differently, instructions issued by the CBDT can neither override the provisions of the law nor can they curtail a relief which is otherwise available to a taxpayer.

Nonetheless, having looked at the stand of the tax department on the subject of allowability of losses on forex derivatives, it would be useful to examine this issue from the perspective of the applicable provisions under the Income-tax Act.

4. Key principles for allowance of MTM losses

Having regard to the above background, the following key principles emerge in respect of claiming allowance of MTM losses:

4.1 Capital vs. revenue account

For the purpose of computing the 'profits and gains from business', a taxpayer is *inter alia* allowed deduction in respect of any expenditure incurred wholly and exclusively for the purposes of the business, provided it is not in the nature of capital or personal expenditure[3]. It is pertinent to note that the term 'expenditure' is not necessarily confined to the money actually paid by the taxpayer, but it also covers an amount which is really a loss, even though said amount has not gone out from the pocket of the assessee[4]. Therefore, MTM losses on forex derivatives would constitute 'expenditure' for the purpose of section 37(1) of the Income-tax Act, and consequently the same would be eligible for deduction, provided it is incidental to the taxpayer's business and is not in the nature of capital or personal expenditure.

This implies that the allowability of MTM losses booked by a taxpayer is dependent, in part, on whether it is incurred on revenue account or on capital account. Accordingly, it is important to determine whether the underlying forex derivative transaction has been undertaken on revenue account or capital account, having regard to the facts of each case.

An item of expenditure may be regarded as of a capital nature when it is relatable to a fixed asset or capital, whereas expenditure relatable to circulating capital or stock-in-trade would be treated as revenue in nature[5]. Thus, profit or loss arising to a taxpayer on account of appreciation or depreciation in the value of foreign currency held by it on conversion into another currency, would ordinarily be treated as trading profit or loss if the foreign currency is held by the taxpayer on revenue account or as a trading asset or as part of circulating capital embarked in the business. But on the other hand, if the foreign currency is held as a capital asset or as a fixed asset, such profit or loss would be of capital nature[6].

In determining the true nature and character of the loss, the cause which occasions the loss is immaterial; what is material is whether the loss has occurred in the course of carrying on the business or is incidental to it. For determining whether devaluation loss is revenue loss or capital loss what is relevant is the utilisation of the amount at the time of devaluation and not the object for which the loan had been obtained. Even if the foreign currency was intended or had originally been utilised for acquisition of fixed asset, if at the time of devaluation it had changed its character and had assumed the new character of stock-in-trade or circulating capital, the loss that occurred on account of devaluation shall be a revenue loss and not a capital loss[7].

3. Section 37(1) of Income-tax Act
4. CIT vs. Woodward Governor India (P.) Ltd. (SC) (312 ITR 254) - Para 13
5. J K Cotton Manufacturers Ltd vs. CIT (SC) (101 ITR 221)
6. Sutlej Cotton Mills Ltd. vs. CIT (SC) (116 ITR 1); Apollo Tyres Ltd. vs. ACIT (Delhi SB) (89 ITD 235); Essar Steel Ltd. vs. DCIT (Ahmedabad ITAT - TM) (97 ITD 125)
7. CIT vs. Dempo & Co. Pvt. Ltd. (Bom.) (206 ITR 291)

Having regard to the above principles, it can be concluded that if the MTM loss is on revenue account or in respect of circulating capital, then such MTM loss qualifies for deduction from taxable income, subject to satisfaction of other conditions. However, whether the MTM loss is on revenue or capital account is highly fact specific and it would be necessary to determine whether the forex derivative transaction has been undertaken on revenue account or capital account having regard to the facts of each case.

4.2 Contingent or notional liability

The term expenditure as used in section 37(1) of the Income-tax Act covers a liability which has been accrued or incurred by the taxpayer although it may have to be discharged at a future date[8]. Ordinarily, under the mercantile system of accounting, expenditure is deductible when the liability to settle the same is accrued, irrespective whether it is 'due' or not.

However, in case of a contingent liability, there is no present existence to discharge the same; it is payable only when the contingency occurs. A contingent liability is essentially a conditional liability which is uncertain and may or may not materialize. Thus, any amount payable in respect of a contingent liability cannot be considered as expenditure for the purpose of computing the taxable income.

In contrast, MTM losses arise on account of a fall in the value of the underlying derivative contract as on the reporting date. The same represents a loss on an onerous contract existing as on the reporting date, albeit to be discharged/ settled on a future date. Thus, MTM losses are not notional or contingent but accrue as on the balance sheet date and hence should be allowable.

The significant judicial precedents which have ruled on the principles of contingency or notional loss in the context of forex fluctuations are summarised below:

- *CIT vs. Woodward Governor India P. Ltd. (SC) (312 ITR 254)*

  In the instant case the taxpayer claimed certain unrealized loss due to forex fluctuation in foreign currency transaction on revenue items, on the last date of the accounting year. The tax officer held that the liability as on the last date of the previous year under consideration was not an ascertained liability, but a contingent liability and, consequently, the same would not be allowable.

  The Hon'ble Supreme Court observed that under the mercantile/accrual system of accounting it is essential to compare the value of the assets on two different dates in order to arrive at profits for a period. The Apex Court further analysed the balance sheet date valuation principles laid out in the applicable AS and held that losses arising as a result of foreign exchange fluctuation are deductible under section 37, as read in conjunction with section 145.

- *Oil and Natural Gas Corporation vs. DCIT (SC) (322 ITR 180)*

  Applying the principles laid out in the case of Woodward Governor (supra) it was held that loss claimed by the taxpayer on account of fluctuation in rate of foreign exchange as on date of balance sheet was allowable as an expenditure under section 37(1).

- *DCIT vs. Bank of Bahrain & Kuwait (Mumbai ITAT, Special Bench) (41 SOT 290)*

  The Hon'ble Special Bench of the Mumbai Tribunal held that if an event has already taken place, which, in that case was of entering into the contract and undertaking of obligation to meet the liability, and only consequential effect of the same is to be

8. Bharat Earth Movers vs. CIT (SC) (245 ITR 428); Madras Industrial Investment Corporation vs. CIT (SC) (225 ITR 802)

determined, then, it cannot be said that it is in the nature of contingent liability.

The Special Bench further held that the contention that the liability can arise only when the contract matures is completely divorce of the principles of commercial accounting and cannot be accepted.

In this regard, it is also pertinent to note that a liability would be an accrued liability and would not convert into a contingent one merely because the liability was to be discharged at a future date. There may be some difficulty in estimation thereof but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate thereof having regard to all the circumstances of the case[9]. Thus, if a business liability has definitely arisen in the accounting year, the deduction should be allowed in respect of the same even though the liability may have to be quantified and discharged at a future date[10]. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one.

As pointed out earlier, in terms of para 2 of the CBDT instruction, MTM losses on forex derivatives, is a notional loss and is contingent in nature and therefore not allowable in computing the taxable income. Based on the above discussion, it can be contended that MTM losses are not contingent or notional in nature due to the following reasons:

- It arises out of a contractual obligation existing as of the reporting date.
- The value of the contract is as per a valuation document given either by the contracting banker or by an independent valuer. Therefore the quantum of loss is not arbitrarily determined. A reliable estimate of the amount of loss can be made, though the same is to be discharged in future.
- As on the date of the balance sheet, the trigger for the loss, i.e. the event which is the contract has already taken place and therefore it is not contingent.
- It can be argued that this loss has arisen as at the balance sheet date, though to be discharged in future, notwithstanding that a condition subsequent may result in a reduction or extinction of the liability.
- Also that the MTM losses are not inchoate, unascertained or uncertain obligations as at the balance sheet date and hence do not qualify as a contingent or notional loss.

4.3. Accrual

Section 145(1) of the Income-tax Act provides that income chargeable as business income shall be computed in accordance with either cash or mercantile system of accounting, regularly employed by the taxpayer.

Under the mercantile system of accounting, any amount can be claimed as expense only if the same had accrued during the relevant period. Thus, MTM losses can be allowed as a deduction provided the same have accrued at the year-end in accordance with the method of accounting regularly employed by the taxpayer. The fundamental principle of accrual rests on the basic premise of recognition of expenses incurred during the year, even though the same may be discharged at a future date.

In terms of the provisions of section 145(2), the Central Government has notified AS 1 on disclosure of accounting policies which needs to be followed by all taxpayers in determining their taxable business income. The said AS 1 *inter alia* provides that the accounting policies

9. Calcutta Co. Ltd. vs. CIT (SC) (37 ITR 1)
10. Bharat Earth Movers vs. CIT (SC) (245 ITR 428)

adopted by a taxpayer should be such so as to represent a true and fair view of the state of affairs of the business. It further provides that provisions should be made for all known liabilities and losses even though the amount cannot be determined with certainty and represents only a best estimate in the light of available information.

As pointed out earlier, recognition of MTM loss in the books of account is encouraged as the same is based on the principles recommended by the ICAI. In case MTM losses are recognised under AS 30, (which is currently recommendatory in nature) the same would be in accordance with the "mercantile system of accounting regularly employed by the assessee" as described in section 145 of the Act.

Further, the ICAI announcement dealing with accounting of MTM losses specifies that such losses are to be accounted for in view of the principles of prudence and therefore the same is in line with section 145 of the Act read with the AS 1 notified thereunder.

In view of the above, it can be argued that MTM losses provided at the balance sheet date is in line with the requirements of section 145 of the Income-tax Act and hence the same accrues as at the balance sheet date even though no sale/ conclusion/settlement has taken place in respect of the underlying forex contract.

The Apex Court has itself affirmed the principles of method of accounting and AS issued by the ICAI in the context of forex fluctuations in the case of Woodward Governor India P. Ltd. (supra) which has been followed in the case of Oil and Natural Gas Corporation (supra).

Having regard to the above, MTM loss accounted in line with the regular accounting principles also meets the provisions of section 145 of the Income-tax Act and accordingly it can be said to have accrued as at the balance sheet date for the purpose of claiming deduction.

5. Allowability of crystallised losses

Para 3 of the CBDT instruction provides that even actual realised losses on forex derivatives could be treated as speculative loss unless it is an eligible transaction which is carried out in a recognized stock exchange. It further provides that any loss in a speculative transaction can be set off only against profit from speculative transactions. However as discussed earlier the Circular is only binding on the tax department and does not necessarily lay down the correct position of law. Accordingly, it is worthwhile to examine the allowability of such losses crystallised on maturity/ settlement of a forex derivative contract.

5.1 Meaning of speculative transaction

Section 43(5) of the Income-tax Act defines 'speculative transaction' to mean a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. A speculative transaction is thus characterised by four features namely:

i. It is a contract for purchase or sale;

ii. The purchase or sale should be of a share, stock or commodity;

iii. There should be periodical or ultimate settlement of the contract; and

iv. Settlement to be otherwise than by actual delivery or transfer.

Proviso to the above section lists the following exceptions:

- Hedging contracts in respect of:
    - raw material or merchandise, entered into by a person in the course of his business, to guard against loss through future price fluctuations, in respect of his contracts for actual delivery of goods;

- stocks and shares entered into by a dealer/ investor to guard against loss through future price fluctuations.

- Contract entered into by a member of forward market/ stock exchange in the course of a transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of business;

- Eligible transaction in respect of trading in derivatives[11] carried out in a recognised stock exchange. For this purpose eligible transaction means any transaction:

  - carried out electronically on screen based systems through a registered broker/ sub-broker/ intermediary and in accordance with the relevant provisions[12]; and

  - which is supported by a time stamped contract note indicating the unique client identity number and permanent account number.

- Eligible transaction in respect of trading in commodity derivatives carried out in a recognised association[13]. For this purpose eligible transaction means any transaction:

  - carried out electronically on screen based systems through an intermediary registered with the recognised association and in accordance with the relevant provisions[14]; and

  - which is supported by a time stamped contract note indicating the unique client identity number and permanent account number.

Thus, hedging contracts entered into by taxpayers in the course of their business to guard against prejudicial price fluctuations are excluded from the definition of speculative transactions. In this regard, it may be relevant to note that the onus to prove that a transaction is a hedging transaction is on the taxpayer[15].

5.2 Whether forex derivative contracts can be considered as a speculative transaction?

A forex derivative may be construed as a speculative transaction, provided all the conditions specified above are fulfilled. Each of the aforesaid condition is examined below:

i. Contract for purchase or sale - Since forex derivative is a contract for purchase or sale of foreign exchange, this first characteristic is satisfied.

ii. Purchase or sale should be of a share, stock or commodity - A forex derivative is not a contract for the purchase of a share or a stock. In a forex derivative, the purchase or sale is towards foreign currency. Therefore it needs to be examined whether a foreign currency can be equated with the term "commodity" such that its purchase or sale triggers the definition of a speculative transaction under the Income-tax Act.

    The term "commodity" has not been defined under the Income-tax Act and

11. As defined in section 2(ac) of the Securities Contracts (Regulation) Act, 1956
12. Securities Contracts (Regulation) Act or Securities and Exchange Board of India Act or Depositories Act and the rules, regulations, bye-laws made or directions issued under these Acts or by banks or mutual funds on a recognised stock exchange
13. As referred to in section 2(j) of the Forward Contracts (Regulation) Act and which fulfils the conditions prescribed by the Central Government in this regard.
14. Forward Contracts (Regulation) Act and the rules, regulations, bye laws made or directions issued under this Act on a recognised association
15. CIT vs. Joseph John (SC) (67 ITR 74)

some common definitions for the said term are discussed below –

- An article of trade or commerce; the term embraces only tangible goods, such as products or merchandise, as distinguished from services; an economic good, especially a raw material or an agricultural product – Black's Law Dictionary – 8th Edition
- Other definitions include
    - o Articles of commerce
    - o Anything movable which is bought and sold
    - o A raw material that can be sold
    - o An article of trade or commerce, especially an agricultural or mining product that can be processed and resold
    - o Reasonably homogenous goods or material, bought and sold freely as an article of commerce. Generally, commodities include agricultural products, fuels, metals, etc., and are traded in bulk on a commodity exchange or on spot market.

iii. There should be periodical or ultimate settlement of the contract – This condition would be satisfied in a forex derivative transaction.

iv. Settlement to be otherwise than by actual delivery or transfer – This condition would also be satisfied in a forex derivative transaction.

Based on the above, it can be argued that foreign currency does not fall within the purview of the term "commodity" and hence this characteristic of a speculative transaction is not satisfied. Accordingly forex derivative transactions would not be covered within the scope of speculative transactions as defined by the Income-tax Act. In this regard reliance can be placed on the following judicial precedents:

- *Essar Steel Limited vs. DCIT (Ahmedabad ITAT) (97 ITD 125)* wherein it has been observed that foreign currency is not a commodity except in the case of a bank.
- *Thomas Cook (India) Ltd. (Mumbai ITAT) (103 ITD 119)* - In this decision, in the context of deduction under section 80HHC, the Mumbai Tribunal has held that foreign exchange is not goods.

Even in case foreign currency is construed to be a 'commodity', (as certain precedents would suggest) it can be contended that forex derivative contracts are incidental to the business of the taxpayer and therefore losses arising on settlement/ conclusion of such contracts would be arising out of the taxpayer's business. Accordingly, such MTM losses cannot be treated as arising from speculative transaction.

The various judicial precedents rendered on speculative transactions in the context of foreign exchange transactions are summarised below:

- *CIT vs. Soorajmul Nagarmull (Calcutta HC) (129 ITR 169)*

  In this case the taxpayer was engaged in the import and export business; it entered into foreign exchange contracts in the normal course of its business in order to cover up loss and difference of foreign exchange valuation. On the issue of allowability of losses pertaining to such foreign exchange contracts, the Hon'ble High Court held that contract for foreign exchange as such can be treated as a contract for commodity, but only when the assessee was a dealer in foreign exchange. In this case the assessee was

not a dealer in foreign exchange as such. Foreign exchange contracts were only incidental to the assessee's regular course of business. In those foreign exchange contracts, if any loss occurred then such loss was a loss referable to and related to the business carried on and arising out of the business of the assessee and not a speculative transaction.

- *CIT vs. M/s Badridas Gauridu (P.) Ltd. (Bombay HC) (261 ITR 256)*

  In this case the assessee was a cotton exporter. In order to hedge against losses, the assessee had entered into forward contracts with banks in respect of foreign exchange. Losses booked by the assessee on cancellation of such forward contracts was considered as speculation loss by the assessing officer and hence disallowed.

  On these facts the Honourable High Court upheld the Tribunal's order in favour of the assessee and held that the foreign exchange contracts were booked only as incidental to the assessee's regular course of business and hence the assessee would be entitled to claim deduction of losses in respect thereof.

- *CIT vs. Friends & Friends Shipping (P.) Ltd. (Gujarat HC) (Tax Appeal No. 251/2010) dated 23rd August 2011*

  In this case, the Gujarat High Court has relied on the decisions of *Soorajmul Nagarmull and Badridas Gauridu (P.) Ltd.* cited supra and held that although the assessee is not a dealer in foreign exchange, it entered into forward contracts with banks for the purpose of hedging the loss due to fluctuation in foreign exchange while implementing the export contracts. The transactions in foreign exchanges were incidental to the assessee's regular course of business and the loss was thus not a speculative loss under section 43(5) but was incidental to the assessee's business and allowable as such. The fact that there may have been no direct co-relation between the exchange document and the precise export contract cannot be seen in isolation if there are in fact several separate contracts with the bankers.

- *CIT vs. Panchmahal Steel Ltd. (Gujarat HC) (Tax Appeal No. 131/2013) dated 28th March ,2013*

  In this recent decision, the Gujarat HC has relied on the above decision and held that loss on cancellation of foreign exchange forward contract is allowable and the same does not fall within the purview of speculative transaction under the Income-tax Act.

Having regard to the above judicial precedents, it can be argued that in case forex derivative contracts are incidental to the business of the taxpayer; losses pertaining to the same cannot be construed as arising from a speculative transaction for the purpose of Income-tax Act.

However, it may also be useful to note that there are contrary views in the matter which would need to be either noted and distinguished. Some of significant judicial precedents in this regard are discussed below:

- *ACIT vs. K. Mohan & Co. (Exports) P. Ltd. (Bengaluru ITAT) (126 ITD 59)*

  In this case the Bengaluru Tribunal held that profits arising from forward contracts are speculative in nature. It held that "Proviso to section 43(5) specifies certain categories of transactions which cannot be treated as speculative transaction. Exclusion is of transaction in respect of contract for actual delivery of goods manufactured or merchandise sold by him. In the instant case, contract was in respect of foreign exchange which was not a goods manufactured by assessee

or merchandise sold by it. The contract was not for the goods manufactured by the assessee. Hence, it could not be said that transaction of settlement of foreign exchange without actual delivery could be considered to be covered under proviso to section 43(5)"

- *D. Kishorekumar & Co. vs. DCIT (Mumbai ITAT) (2 SOT 769)*

  In this case, the Tribunal accepted that the purpose of the forward transactions were to minimise the taxpayer's risk on account of fall in value of rupee and the quantum of foreign exchange covered by these forward contracts was limited to the extent of the taxpayer's actual exposure in respect of import value commitments. On facts the Tribunal held that the transactions having been settled without delivery, the conditions of section 43(5), describing speculative transactions, are clearly fulfilled.

- *S. Vinodkumar Diamonds Pvt. Ltd vs. ACIT (Mumbai ITAT) (ITA No. 506/Mum/2013)*

  In this recent decision, the Mumbai ITAT has held that for a taxpayer dealing in diamond exports, forward contract in diamonds could qualify as 'hedging' contract, not foreign exchange forward contract. ITAT observed that in terms of proviso (a) to section 43(5), hedging contract needs to fulfil following conditions:

  i. There is a contract for actual delivery of goods manufactured or merchandise sold by assessee;

  ii. There is another transaction intended for safeguarding against losses due to future price fluctuations;

  iii. Hedging transaction must be a contract entered into in respect of raw materials or merchandise in the course of the assessee's manufacturing business and it should have been settled otherwise than by actual delivery of goods;

  iv. Hedging contracts may be both with regard to sales and purchases;

  v. Hedging contracts need not succeed the contracts for sale and actual delivery of goods manufactured, but the latter may be subsequently entered into, provided they are within the reasonable time not exceeding generally the assessment year;

  vi. The total of hedging transactions should not exceed the total stocks of the raw materials or the merchandise on hand, which would include existing stocks as well as the stocks acquired under the firm contracts of purchases;

  vii. The hedging contract need not necessarily be in the same variety of the commodity. They could be in connected commodities.

Thus, ITAT held that the taxpayer's transactions were speculative transactions and hence, loss on settlement of forward contracts in respect of foreign exchange was not deductible. Interestingly the ITAT did not consider the Mumbai High Court ruling in the case of Badridas Gauridu while arriving at its conclusion.

In view of the above judicial precedents, it may be appreciated that there are contrary decisions on the issue of treating forex derivative transactions as speculative in nature. Thus, it is important to demonstrate, through adequate documentation, that the forex derivatives were entered into by the assessee as a hedge against underlying forex exposure. The decision of the Authority of Advance Rulings in the case of Sopropha S.A. 268 ITR 37 provides detailed legal guidance on the issue.

5.3. Speculative transaction vis-à-vis speculation business

Under the Income-tax Act where the speculative transactions carried on by an assessee are of such a nature as to constitute a business, such business (hereinafter referred to as 'speculation business') shall be deemed to be distinct and separate from any other business[16]. The distinction between a speculative transaction and a speculative business is important as the Act prescribes restrictions in respect of losses from speculation business; losses in respect of speculation business can be set-off only against profits from another speculation business[17].

A single speculative transaction would not amount to a speculation business as such[18]; however in few cases the courts have taken a contrary view on this issue[19]. Having held that forward transactions are speculative in nature, the Mumbai Tribunal in the case of *D. Kishorekumar & Co. vs. DCIT (supra)* held that the requirement of Explanation 2 to section 28 is not fulfilled in as much as it cannot be concluded that the transactions are of such a nature as to constitute a business by itself.

Thus, whether a single isolated speculative transaction or a series of speculative transaction leads to a speculative business or not is a question of fact. Nonetheless the fact that a taxpayer is not a dealer in forex but has used forex derivative only as a hedge instrument in his regular business can be used to strengthen the claim that even if the forex derivative transaction falls within the definition of a speculative transaction, it does not lead to the assessee carrying out speculative business.

6. Tax Accounting Standards

In December 2010, the CBDT had constituted a committee comprising departmental officers and professionals to suggest Tax Accounting Standards ('TAS') to be notified under section 145(2) of the Income-tax Act, 1961. The Committee has submitted its Final Report in August, 2012 which provides draft of 14 TAS on specified issues which *inter alia* include TAS on accounting policies ('TAS – AP') and on the effects of changes in foreign exchange rates ('TAS – FE').

The significant features of the TAS with respect to recognition of MTM are as follows:

- TAS – AP provides that MTM loss or an expected loss shall not be recognised unless the recognition of such loss is in accordance with the provisions of any other TAS;
- TAS – FE provides that MTM gain or loss on forward exchange contracts shall be recognised as income or as expense provided such contract is not intended for trading or speculation purposes and it is entered into to establish the amount of the reporting currency required at the settlement date of the transaction.
- In case of forward contracts entered for trading/ speculation purposes, or to hedge foreign currency risk of a highly probable forecast transaction, MTM gain or loss to be recognised only on settlement of the contract.

7. Conclusion

7.1 MTM loss in respect of unsettled forex derivatives can be claimed as deduction in computing the taxable income provided such MTM loss, as on the valuation date, is on revenue account or on account of circulating capital embarked in the business of the taxpayer.

16. Explanation 2 to section 28
17. Section 73
18. ACIT vs. Maggaji Shermal (Andhra Pradesh HC) (114 ITR 862); CIT vs. Indian Commercial Co. P. Ltd. (Bombay HC) (106 ITR 465)
19. CIT vs. Shree Textiles (Rajasthan HC) (206 ITR 345); CIT vs. Ganga Prasad Birla (HUF) (Calcutta HC) (199 ITR 173)

7.2 Since the MTM loss arises out of a contractual obligation existing as of the reporting date, the same cannot be regarded as contingent or notional in nature. Such MTM loss would not convert into a contingent one merely because the liability is to be discharged at a future date.

7.3 MTM loss recognised in the books of accounts are in line with the regular accounting principles which also meets the provisions of section 145 of the Income-tax Act and accordingly it can be said to have accrued as at the balance sheet date for the purpose of claiming deduction.

7.4 Losses arising on settlement/ conclusion of forex derivative contract may constitute speculation loss. However it is possible to argue that:

- Forex derivative contracts are not covered within the scope of speculation transaction as defined in section 43(5) of the Income-tax Act;
- In case forex derivative contracts are incidental to the business of the taxpayer; losses pertaining to the same cannot be construed as arising from a speculative transaction for the purpose of Income-tax Act.
- A single forex derivative contract would not amount to speculation business being carried on by the taxpayer. Where a taxpayer is not a dealer in forex but has used forex derivative only as a hedge instrument in his regular business, then even if the forex derivative transaction falls within the definition of a speculative transaction, it does not lead to the assessee carrying out speculative business.

7.5 In each case, a detailed analysis is to be carried out to determine whether a position could be taken for allowability of MTM losses on unsettled/ settled forex derivatives.

7.6 The CBDT Instruction on disallowance of MTM losses as contingent/ notional in the case of unsettled contracts and treatment of settled contracts as a speculative in nature is binding on the tax officers. However, since these instructions are not binding on the taxpayers, a position to the contrary can be adopted having regard to the above discussion. Nevertheless, considering the history of litigation on these issues, such a position is likely to involve litigation, especially at the assessment stage and therefore may need to be settled at the appellate level.

Take the precept to abstain from killing

Take the precept to abstain from stealing

Take the precept to abstain from adultery

Take the precept to abstain from lying

Take the precept to abstain from liquor.

— Lord Buddha

CA Arvind H. Dalal

Controversies in Charitable Trusts arising from proviso to Sec. 2(15) and Registration u/s. 12A

As indicated by the title, the article is restricted to controversies arising from provisos to Sec. 2(15) and registration u/s. Sec. 12A/12AA of the I. T. Act. There are other controversies relating to provisions of Sec. 11, 12 and 13 and Sec. 10(23C) which are outside the scope of this article.

1. Section 2(15) provisos

1.1 Sec. 2(15) defines charitable purpose as including –

i) relief of the poor;

ii) education;

iii) medical relief;

iv) preservation of environment (including water sheds, forests and wild life);

v) preservation of monuments or places or objects of artistic or historic interest and

vi) the advancement of any other object of general public utility.

1.2 The above definition was substituted by the Finance Act, 2008 with effect from 1-4-2009. To understand the exact position arising from amendment in Sec.2(15) in 2008 effective from Asst. Year 2009-10, it is necessary to know the background of the amendment as stated by the Finance Minister while moving the amendment.

1.3 The Finance Minister has amended the definition of charitable purpose given in Section 2(15) by the Finance Act, 2008 with effect from 1-4.2009 by adding a proviso to the Section of just five lines.

1.4 In para 180 of the Budget speech, the Finance Minister stated as follows:

"Charitable purpose" includes relief of the poor, education, medical relief, and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes have sought to claim that their purpose would also fall under "charitable purpose". Obviously, this was not the intention of Parliament and, hence, I propose to amend the law to exclude the aforesaid cases. Genuine charitable organisations will not in any way be affected." (emphasis supplied)

1.5 It will thus be noted that the intention of Finance Minister was only to exclude from exemption entities carrying on business and earning income for which exemption was claimed on the basis that the purpose would fall under charitable purpose. The actual effect of the amendment is however far reaching and going much beyond the case of the above entities.

1.6 "Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration, irrespective of the nature of use or application or retention of the income from such activity."

2. Effect of the Amendment

2.1 The most controversial aspect of the law relating to the business income had been settled since 1984 or at least since 1992. This is now totally unsettled by the proviso inserted in section 2(15) relating to carrying on any activity in the nature of trade, commerce or business.

2.2 The direct effect of the amendment is that in case of trust for advancement of any other object of general public utility, if it involves the carrying of any activity in the nature of trade, commerce or business or activity of rendering any service in relation to said business for a cess or fee or any other consideration, the exemption will not be allowed in respect of such income irrespective of the nature of use or application or retention of the income from such activity.

2.3 Thus, all charitable trusts for the last object namely, object of general public utility will cease to be for charitable purpose, if the advancement of the object involves the carrying on of any activity in the nature of trade, commerce or business or rendering any service in relation to any trade, commerce or business for a cess or fee.

2.4 The Central Board of Direct Taxes has issued the Circular No. 11/2008 dated 19-12-2008 stating that the following implications arise from the amendment.

"2.1 The newly inserted proviso to section 2(15) will not apply in respect of the first three limbs of section 2(15) i.e. relief of the poor, education or medical relief. Consequently where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute charitable purpose, even if it incidentally involves the carrying on of commercial activities."

2.5 Thus, it is clear that the amendment does not apply to trusts which are for the first three objects of relief of the poor, education or medical relief, which can constitute charitable purpose, even if it involves the carrying on of commercial activities.

2.6 The Circular states further as follows:

"3. The newly inserted proviso to section 2(15) will apply only to entities whose purpose is advancement of any other object of general public utility i.e. the fourth limb of the definition of the charitable purpose contained in section 2(15). Hence such entities will not be eligible under section 11 or 10(23C) of the Act if they carry on commercial activity. Whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity."

2.7 In Para 3.1 the Circular states :

"there are industry and trade associations who claim exemption from tax under section 11 on the ground that their objects are for charitable purpose as these are covered under any other object of general public utility. Under the principle of mutuality, if trading takes place between persons who are associated together and contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus returned to the persons forming such association is not chargeable to tax. In such cases, there must be complete identity between the contributors and the participants."

"Therefore, where industry or trade associations claim both to be charitable institutions as well as mutual organisations and their activities are

restricted to contributions from and participation of only their members, these would not fall under the purview of the proviso to section 2(15) owing to the principle of mutuality. However, if such organisations have dealing with non-members, their claim to be charitable organisations would now be governed by the additional condition stipulated in the proviso to section 2(15)."

2.8 Para 3.2 of CBDT Circular states as follows:

"In the final analysis, whether the assessee has for its object the advancement of any other object of general public utility is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. In such a case, the object of general public utility will be only a mask or device to hide the true purpose which is trade, commerce or business or the rendering of any service in relation to trade, commerce or business. Each case would therefore be decided on its own facts and no generalisation is possible. Assessees, who claim that their object is 'charitable purpose' within the meaning of section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business." (emphasis supplied)

2.9 Thus, the Circular leaves the position of trade associations and chambers of commerce quite uncertain, even though the Finance Minister has stated that they would not be affected by the amendment. The Circular does not lay down any guidelines for determining whether the entity is carrying on any commercial activity. The activities of chambers of commerce for issuing certificate of origin, arbitration, etc. may be considered to be commercial in nature by the Department and therefore, not eligible for exemption, by stating that such entities would be well advised to eschew any commercial activity.

3. Effect on Sec.11(4) and (4A)

3.1 There is no amendment proposed in sections 11(4) and (4A) so that the trust for first five objects of relief of poor, educational, medical relief, preservation of environment, monuments, etc. will get the benefit of sections 11(4) and (4A) if the provisions of these sections are complied with even if, activity in the nature of business is carried on.

3.2 Section 11(4) deals with cases where the business itself is settled in trust for a charitable purpose. The two other cases of trust carrying on business may be (i) where the business is carried on as incidental to the attainment of the objectives of the trust or institution or (ii) the activities may be carried on *de hors* the objects of the trust and are not incidental to the attainment of the objects of the trust. The first type of trust will be governed by section 11(4A) and get the benefit of the exemption without being hit by the amendment, whereas the second type of trust will not get exemption under section 11(4A) of the Income-tax Act. Of course, the condition regarding separate books of account being maintained in respect of such business must be complied with. The Supreme Court held in case of *ACIT vs. Thanthi Trust 247 ITR 785* that even if business is held as property in trust for charitable purpose under section 11(4) it must also comply with the conditions of section 11(4A) namely, the profit or gain of business is incidental to the attainment of the objectives of the trust.

3.3 A question arises from the above analysis whether business settled in trust for general public utility under section 11(4) and carrying on activities which are in order to fulfil the objects of the trust can get exemption and be not hit by the proviso to section 2(15) for trust for general public utility. In my opinion, the amendment will not affect trust under sec. 11(4). If the intention was otherwise, S.11(4) would have been amended to provide that Sec.2(15) proviso will override Sec.11(4).

3.4 Similarly, a question arises whether a trust for general public utility can claim the

exemption under Section 11(4A) , if it complies with the conditions of section 11(4A) by utilizing the income from such business activities on its objects of general public utility and separate books of account are maintained. It is submitted that section 11(4A) overrides the proviso to section 2(15); if the intention was otherwise, S.11(4A) would have been amended to provide that Sec.2(15) proviso will override Sec.11(4A).

4. Distinction between object and its advancement

4.1 If the following interpretation of the proviso to Sec.2(15) is accepted, the proviso will not apply to such a trust/society, which will continue to be exempt u/s.11. There is a distinction between the "advancement of any other object of general public utility" and object itself involving activities of general public utility; e.g. an institution for the blind carries on activities through the inmates to provide training to handicapped but the advancement of the objects in such a case does not involve activities for profit as the object itself is to carry on commercial activities by the blind inmates. In such a case the proviso to section 2(15) does not apply. On the other hand if the object itself does not involve carrying on commercial activities but for advancing such objects of the Trust/Society commercial activities are carried on, then alone the proviso to Section 2(15) does apply.

4.2 The distinction was noted by the Supreme Court in the case of Indian Chamber of Commerce on page 152 of (1971) 81 ITR 147 as follows:

"Dr. Pal for the assessee submits that the proper interpretation of Section 2(15) of the Income-tax Act, 1961, would be that the object of general public utility must itself involve the carrying on of any activity for profit. That was the main thesis of his argument. He therefore submits that the objects, as described in the memorandum of the assessee, Indian Chamber of Commerce, as such do not *ipso facto* involve the carrying on of any activity for profit within the meaning of section 2(15) of the Income-tax Act, 1961. We are unable to accept the submission of Dr. Pal for the assessee. We shall state our reasons briefly.

The expression "the advancement of any other object of general public utility not involving the carrying on of any activity for profit" plainly indicates that it is not the object of general public utility which would involve the carrying on of any activity for the profit but the "advancement" of that object. Otherwise, it will lead to a self contradictory situation because the reason for including the object of general public utility as a charitable purpose was that it was not a charitable purpose with a blanket cover for any object of general public utility but with the severe limitation that the advancement of an object of general public utility would not involve the carrying on of any activity for profit or else it would not be a charitable purpose within the meaning of section 2(15) of the Income-tax Act, 1961. That, in our view, is the true import, meaning and significance of this new definition with expression "the advancement of any other object of general public utility not involving the carrying on of any activity for profit". In other words, the advancement of any other object of general public utility would be a charitable purpose provided that its advancement does not involve the carrying on of any activity for profit. The wisdom behind the limitation is plain. The expression "object of general public utility" is an expression of wide import and it was therefore, thought necessary by Parliament in the wisdom to impose certain restriction on the area of the object of general public utility and the area selected is that its advancement must not involve the carrying on of any activity for profit." (emphasis supplied)

4.3 Thus, the submission made by us in this behalf is also supported by the observation of the Supreme Court in the above judgment and the contention can be extended to sec. 2(15) proviso also, which requires the advancement of object of general public utility to attract the proviso but if the object itself is to carry

on commercial activities, then the proviso to Sec.2(15) does not apply.

4.4 The Supreme Court in the case of Surat Art Silk 121 ITR 1 made a distinction between the phrases 'object of general public utility" and "advancement of object of general public utility".

It is clear on a plain natural construction of the language used by the Legislature that the ten crucial words "not involving the carrying on of any activity for profit" go with "object of general public utility" and not with "advancement". It is the object of general public utility which must not involve the carrying on of any activity for profit and not its advancement or attainment. What is inhibited by them in last ten words is the linking of activity for profit with the object of general public utility and not its linking with the accomplishment or carrying out of the object. It is not necessary that the accomplishment of the object or the means to carry out the object should not involve an activity for profit. That is not the mandate of the newly added words. What these words require is that the object should not involve in the carrying on of any activity for profit. The emphasis is on the object of general public utility and not on its accomplishment or attainment. The decisions of the Kerala and Andhra Pradesh High Courts in *CIT vs. Cochin Chamber of Commerce & Industry (1973) 87 ITR 83* and *Andhra Pradesh State Road Transport Corporation vs. CIT (1975) 100 ITR 392,* in our opinion, lay down the correct interpretation of the last ten words in section 2, clause (15). The true meaning of these last ten words is that when the purpose of a trust or institution is the advancement of an object of general public utility, it is that object of general public utility, and not its accomplishment or carrying out, which must not involve the carrying on of any activity for profit."

4.5 A plain reading of the proviso to section 2(15) would immediately make it evident that the legislature has addressed precisely this distinction made by the Supreme Court, by stipulating that the advancement of any object of general public utility shall not be a charitable purpose if it involves the carrying on of any activity in the nature of trade, commerce or business even though the business income is used for charitable purposes. Therefore, the decisions of various Courts rendered prior to the amendment w.e.f. 1-4-2009 would not be applicable to A. Y. 2009-10 onwards.

4.6 The Income Tax Department has interpreted proviso to Sec. 2(15) regarding commercial activities in their favour by considering all activities of various types of trusts/institutions as commercial activities, so as to hold that the trust/institution ceases to be for charitable purpose and therefore it taxes their entire income allowing establishment expenses but including the amounts applied on the object of the trust. They have also not accepted the contention that even if the proviso applied to the sixth object of general public utility, the tax should be restricted to income for sixth object but the income for educational, medical and five objects should not be liable to tax.

4.7 Thus, in the case of trade association and chambers of commerce, which were the main categories of trusts covered by the Circular, exemption is denied on the ground that they are carrying on commercial activities like issuing certificate of origin, arbitration fees, fees from holding examinations relating to commercial courses, etc. Further, as held by the Supreme Court in the case of *Yogiraj Charitable Trust vs. CIT (1976) 103 ITR 777*, if one of the objects ceases to be charitable as per the amendment, even though other objects may be charitable, the exemption would not be available. In other words the trust cannot be partly for charitable purpose and partly for non-charitable purpose, with the one exception in Sec.11(1)(b) i.e. trust created before 1-4-1962.

4.8 Regarding the claim for exemption u/s.11(4A), on the basis of the principle that all provisions of the Act are to be read harmoniously, it is held that the proviso governs only the last category i.e. general public utility,

when one reads both sections 2(15) and 11(4A) together, it is clear that after the amendment of Sec.2(15), Sec. 11(4A) would be applicable to a trust, which is engaged in activities falling under the first five objects only and therefore, there was no need for an amendment to Sec.11(4A).

4.9 As regards reliance on Finance Minister's assurance during the course of Budget speech, it is held not material since the language of the act is very clear. It is settled rule of interpretation that the language of proviso is clear and brooks no ambiguity, then the intention of the author of the bill would not matter.

5. Mutuality

5.1 As regards the principle of mutuality, the entire receipts from members are not exempt in view of provision of Sec.28(iii) of the Act, which states that income derived by trade, professional or similar association from specific services performed for its members would be income chargeable to tax under the head profits & gains of business. Therefore, income on account of specific services are brought to tax. Thus, income from issue of certificate of origin, arbitration fees, fees for holding commercial diploma examination, etc. are taxed under S.28(iii). The Supreme Court in the case of *CIT vs.. Calcutta Stock Exchange Association Ltd. 36 ITR 222* held that the words specific service meant conferring on members some tangible benefit which would not become available to them unless they paid the specific fees charged for such specific benefit. Thus, the major part of the income is taxed u/s.28(iii) and only the balance income, subject to deduction of relevant expenses, would be exempt as mutual income.

6. Amendment in practice

6.1 In the case of educational institutions narrow meaning given by Supreme Court in Sole Trustee, Loka Shiskshana Trust case (1975) 101 ITR 234 is formal education by schools, colleges and universities; the income is taxed in respect of all other educational activities by holding such activities as of commercial nature. It may be noted that there are several cases after the Supreme Court decision which have given a wider meaning to the term education, including observations in one of the cases that the Supreme Court has given a very restricted meaning to the term education.

i) *Ecumenical Christian Centre vs. CIT (1983) 139 ITR 226;*

ii) *Indo –American Society vs. ADIT(E) (2005) 278 ITR (AT) 49;*

iii) *CIT vs. Sri Thyaga Brahma Gana Sabha (Regd.) (1991) 188 ITR 160 and 164 to 166;*

iv) *Guajarat State Co-operative Union vs. CIT 195 ITR 279;*

v) *Prajapati Brahma Kumari Ishwariya 71 ITD 169 (Jaipur Tribunal);*

vi) *CIT vs. Sangit Kala Mandir Trust (1987) 166 ITR 217 (Cal.)*

6.2 In the case of one educational trust which runs several colleges and Institutions, the Management Development Programmes held by the trust with different companies for development of managements skills involving faculty of the trust is considered to be commercial activity as per the proviso to Sec.2(15) merely on account of largeness of the amount and the number of such programmes. The Tribunal has reversed the order of CIT(A) but the Department has appealed to the Hon'ble Bombay High Court. Likewise, in the same case, the rental received from the hall and college properties is held to be business income and though, the Tribunal has reversed the Order of CIT(A) following Supreme Court judgment in Andhra Chamber of Commerce case (1965) 55 ITR 722 (SC) reaffirmed in (1981) 130 ITR 181 (SC), the Department has filed appeal to the Hon'ble Bombay High Court.

6.3 In case of a leading hospital trust, the sale of medicines by the Pharmacy attached to the hospital is considered to be business income

under 2(15) proviso on account of large amount of receipts.

6.4 In case of sports clubs and gymkhanas, on account of sales of restaurant and rental from the property apart from game fees from members, the proviso to Sec.2(15) is invoked to deny exemption u/s.11.

6.5 In case of trusts/societies for the Church operated by a Society, the receipts from sale of publications to improve the life and principles of good living are considered to be commercial activities for taxing the income of the Church.

6.6 Most ridiculously, in case of large Panjrapole trust, the sale of milk after distributing free maximum amount to poor persons and selling at subsidised price to hospital, old age homes, etc. the sale of milk to the public is considered to be commercial activity on the basis of the large amount and percentage to total sale for taxing the income. Should the trustees spill the milk on the road to save the Panjrapole from tax which otherwise rescues the animals going to slaughter house? The above illustrations show that all trusts for the general public utility will be considered to have ceased for charitable purpose under S.2(15) proviso.

6.7 Even if part of the income is claimed exempt as mutual as per Board Circular, the same is substantially denied by invoking Sec.28(iii) for receipts for specific services. The approach arises from the belief of the Government that most of the trusts are not really charitable and don't deserve any exemption.

6.8 One can think of a remedy in such cases to form a separate entity which may be a trust taking over the activities of the existing charitable trusts, which are considered as commercial activities u/s. 2(15) proviso. The new entity will pay the tax on its income after deduction of expenses, but the interest and other investment income of the charitable trusts will not be liable to tax. Common trustees between the charitable trust and the new trust should be avoided so that it is not caught within the vortex of Sec.13(2) and Sec.13(3) of the Act. Of course, this is easier said then done depending upon the facts of each case and very careful attention will have to be given to the formation of the new trust or entity.

6.9 The last question affecting Sec.2(15) proviso is whether purely religious trusts are attracting the proviso. As reference to religious trust is totally absent in Sec.2(15), it can be contended that such trust should not be liable to tax under the amendment, as wherever religious trusts were intended to be covered, there is specific provision in the Act like Sec.13(1)(a), Sec.115BC regarding anonymous donations, etc.

6.10 The Income Tax department has in May 2013 issued a booklet on "Assessment of Charitable Trusts and Institutions (TPI Series 37)" wherein the only comment given on this is most vexed controversy in Para 3.2 is as follows:

"Prior to assessment year 2009-10, business income of a charitable trust or institution was also eligible for exemption subject to conditions that such business should be incidental to the attainment of its objects and that separate books of account are maintained for such business. With effect from 1-4-2009 (i.e., from Asst. year 2009-10 onwards) however, the "advancement of any other object of general public utility" shall not qualify as a "charitable purpose" if the same involves the carrying on of any activity in the nature of trade, commerce or business, or rendering of any service in relation to any trade, commerce or business, for a consideration. This new restriction applies irrespective of the nature of use or application of the income arising from such activity. However, the rigour of this amendment has been reduced somewhat by a subsequent amendment brought in by the Finance Act, 2010 (with retrospective effect from 1-4-2009) to the effect that the said restriction shall not apply if the aggregate value of receipts from such activity during the given financial year does not exceed ₹ 10 lakhs. (25 lakhs from 1-4-2012)." Thus, the booklet of the Department

does not clarify at all when the advancement involves the carrying on of commercial activity. One expected that when a guidance is issued on the subject of charitable trusts, it should have clarified beyond doubt the scope of amendment.

6.11 To sum up, the assurance contained in the Finance Minister's speech that the genuine charitable organisations will not in any way be affected and caution in para 3.2 of CBDT circular that assessees who claim that their object is charitable purpose would be well advised to eschew any activity which is in the nature of trade, commerce or business, really reflect the approach of the Government to charitable trusts.

II. Registration u/s.12A/12AA

7.1 All public trusts must be registered with the Commissioner of Income-tax u/s.12AA by making an application in form No.10A before 1st July 1973 or within one year from the date of creation of trust. The Section provided till 31st May, 2007 that where the Commissioner was satisfied that there was sufficient cause for delay, the registration would be retrospective from the date of creation of the trust, while other belated applicants would be granted registration from the first day of the financial year in which the application is made. With effect from 1st June, 2007 there is no provision for condonation of delay by the Commissioner and exemption shall be granted only from the financial year in which the application is made. Recently the trend in the subject is that the registrations are denied on several grounds which are not justified, giving an impression that the intention is to tax the charitable trust right from the inception.

7.2 The most common ground for rejection of the registration is that the trust has not carried out any activities before applying for registration. The Allahabad High Court has held in the case of *Fifth Generation Education Society vs. CIT (1990) 185 ITR 634,* that at the time of application for registration, the Commissioner is not required to verify the application of income on objects of the trust. He has to verify only whether the application is made in accordance with Sec.12A and Rule 17A and whether Form 10A is properly filled up. He has to also verify whether the objects as per the trust deed are charitable or not. The Kerala High Court held in the case of *Self Employers' Service Society vs. CIT 247 ITR 18 (Ker.)* that since the society has not done any charitable work and activities which it carried on were only for the purpose generating income for its members, the rejection of application of the trust for registration u/s.12AA was justified. Mercifully, an opportunity was given to the Society to file a fresh application when it started charitable work and the Commissioner was directed to consider such application. However, this case was decided on its peculiar facts. It was held by the Delhi Bench of the Tribunal in *Aryan Education Society vs. CIT 281 ITR 72 (Del)* that after the insertion of Sec.12AA w.e.f. 1-4-1997 the Commissioner is empowered to enquire about activity carried on by the Trust before passing the Order. The scope of the enquiry by the Commissioner is not limited to ascertaining whether objects of the trust are charitable or not *(Fifth Generation Education Society vs. CIT (1990) 185 ITR 634* (All) distinguished.) The Karnataka High Court in the case of *Sanjevamma Hanumanthe Gowda Charitable Trust vs. DIT(E) 223 CTR 533* decided that for the purposes of registration u/s.12AA, what the authorities have to satisfy about the genuineness of the activity of the trust and how the income derived from the trust property is applied to charitable or religious purpose and not the nature of the activity by which, the income is derived by the trust. The Orders passed by the DIT(E) and the Tribunal were set aside and the matter was remanded back to the Director for fresh consideration in accordance with law.

7.3 As the trust is entitled and required to apply for registration immediately on the settlement of the trust, the registration shall apply in relation to the income of such trust from the assessment year immediately following the financial year in which such application

is made. Therefore, it is not necessary that the trust should have commenced charitable activities at the time of application. All that Sec. 12AA requires that the Commissioner shall call for such documents or information from the trust as he thinks necessary in order to satisfy himself about (i) the genuineness of activities of the trust (if commenced) and (ii) the objects of the trust and make such enquiries, as he may deem necessary for satisfying himself for the two conditions and he shall either register the trust by passing an Order in writing or if not satisfied pass an Order in writing refusing registration of the trust, after giving reasonable opportunity to the trust of being heard.

7.4 In spite of such clear position in law the DIT(E) goes beyond the limits specified above and asks for accounts of the trust and questions the nature of the activity by which the income is derived.

7.5 The second most common objection raised by the DIT(E) is whether Trust Deed contains a clause for dissolution of the trust and in the absence thereof summarily reject the application for registration. This is totally incorrect as a trust is a perpetual entity and it need not have such a clause or dissolution. If in such a case a trust wants to dissolve itself, if there is a proviso to hand over the income and property of the trust to another trust having similar objects, it can do so and the Charity Commissioner also cannot object to the same. (In practice he does object, but the remedy may be to leave a small amount say ₹ 11 with the trust.) Therefore, it is not necessary to have a dissolution clause for the validity of the Trust Deed and yet the applications are wrongfully rejected by the DIT(E). If the clause for dissolution is there, then the trust can be dissolved only as per the provision in the clause which normally provides that the trust may be dissolved by the Trustees handing over the entire income and property of the trust to another trust with similar objects.

7.6 Thirdly, the DIT(E) also considers whether the trust carries on activities of commercial nature for the object of general public utility and refuses registration. As already discussed above, the DIT(E) has only to consider whether the objects of the trust are charitable and whether activities are genuine. The application of Sec.2(15) proviso has to be considered in the course of assessment and not at the time of registration u/s.12A.

7.7 Another curious reason for rejecting the application when all reasons are exhausted, is to consider that if the trust has large surplus income from the activities carried on by it, the surplus itself is a sign of non-genuine activities. There is a difference between the genuineness of the activities and a trust having surplus income from activities, which may still be genuine. Therefore, to reject the application on the ground of surplus implying non-genuine activities is absolutely incorrect.

7.8 Another difficulty in the registration of the trust is that the application is accepted only after the trust has applied for registration under Bombay Public Trust Act. The registration under B.P.T. Act can take a long time, say more than six months, before registration is granted. Sometimes, there may be a delay on account of the fact that the Charity Commissioner considers whether a trust is charitable under B.P.T. Act or not. If a trust is constituted under Deed of Trust showing settlement of property for a charitable purpose, the DIT(E) can decide whether the trust is for charitable purpose without waiting for registration under the B.P.T. Act. Moreover, statute similar to B.P.T. Act is not applicable in all the States of India and therefore, the registration u/s.12A cannot be linked up to the registration under B.P.T. Act. Hence, instructions should be issued to accept application for registration without insisting on the application for registration under B.P.T. Act.

8. Sec.12A in practice

8.1 We may consider some of the actual cases where the applications were rejected by the DIT(E). In the case of a Foundation for Research

by the trust, the application was rejected because research was not actually commenced. In the case of sports, Clubs and Gymkhanas already in existence, the applications were rejected on the ground that they were carrying on commercial activities like – restaurant and charging fees for the games resulting in large surplus. As stated above, 2(15) proviso cannot be considered at the time of registration but only in the course of assessment. In case of a Welfare Fund set up by a Stock Exchange as per requirement of SEBI, the application was rejected on the ground that a fund to reimburse persons suffering loss on account of default by the Stock Exchange members or investors was not a charitable purpose but a fund for reimbursement of commercial losses. It was overlooked that any member of the public, rich or poor, was entitled to be reimbursed the loss and the Stock Exchange itself was a different entity from the Welfare Fund which compensated the member of the public for the loss suffered by him and even if such member of the public was not a poor person, it does not cease to be charitable. Eleemosynary element is not essential for a charitable trust, which can be both for poor and rich persons but which cannot be restricted only to rich persons.

8.2 In the case of a trust owning and maintaining a sanatorium for the convalescent persons the application was rejected on the ground that the sanatorium was being given to persons who were not treated by the trust medically, thereby holding that it was a guest house other than sanatorium, though, the application clearly stated that the applicants were requiring the sanatorium for convalescence.

8.3 In the case of a trust for the improvement of the City by providing plans for gardens, jogging park and other beautification projects, registration was refused on the ground that the objects of the trust were not for general public utility, though, the documentary evidence was produced for the projects carried out in the metropolitan City of Mumbai.

8.4 In the case of an association of building contractors for the promotion of the interest of the builders in the building trade, the registration was refused on the ground that the appellant carried on non genuine activities within the meaning of Sec.12AA(3) of the Act and cancel the registration retrospectively with effect from A. Y. 2009-10. The Bombay High Court has however held in the case of *Sinhagad Technical Education Society vs CIT 343 ITR 23* that the DIT(E) can cancel the registration with retrospective effect.

8.5 Finally, the provision of Sec.12AA(3) should be noted that once the registration is granted, it can be cancelled only if the registration was granted even though the objects were not charitable or the activities of the trust were not genuine. Of course, registration u/s.12AA does not mean that the trust is automatically entitled to the exemption u/s.11 each year. However, such registration is certainly an evidence of the fact that the objects of the trust were charitable or religious in nature. An Assessing Officer cannot deny exemption u/s.11 to a trust registered u/s.12AA on the ground that its objects are not charitable in nature, as held in *Stock Exchange, Ahmedabad vs. ACIT 74 ITD 1 (Ahd)*. The *Madhya Pradesh High Court held in Madhya Pradesh Madhyam vs. CIT 256 ITR 277* that the proceedings for registration are different from assessment proceedings and registration is binding on Income Tax authorities.

8.6 To sum up the approach of the I. T. Department seems to be to deny registration at the 'fall of the hat' as illustrated by a few cases cited above and the policy seems to be to deny registration more than to grant the same so as to tax the charitable trusts.



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DIRECT TAXES
High Court

1. Business expenditure – S.37 – Expenses incurred for providing accommodation abroad for duration of project – Does not amount to guest house expenditure – Expenses allowable – A.Y. 1987-88

CIT vs. Ansal Properties and Industries Ltd. [2013] 352 ITR 637 (Delhi)

The assessee had contracted to provide to execute a project in Iraq, and contracted services for providing accommodation to its workers and employees. The intention of the assessee was not to provide accommodation for those who visited the project site on tours or visits, but to provide accommodation for the entire period until the project was executed. The AO sought to disallowed the expenses on the basis of S. 37(4) and 37(5) of the Act. The High Court held that the provisions of Ss. 37(4) and 37(5) apply to accommodation provided to employees who merely use them on transitory or temporary basis and not in the case of the present case where accommodation was provided until the entire project was executed, and therefore held the said expenses for providing accommodation at the location of the project was deductible.

2. Interest – 234B – Non resident – Income liable to tax deduction at source – No liability u/s 234B

CIT vs. Reiter Inglostadt Spinners Imaechinanbau [2013] 353 ITR 349 (Mad.)

In the instant case the assessee is a foreign company is subject to 100% tax deduction at source and that there was no liability on the assessee to pay advance tax. The High Court while dismissing the appeal, held that the question of levy of interest under section 234B of the Income-tax Act alleging short payment does not arise.

3. Deduction – 54F – Husband sold residential house – Invested in new house property in wife's name – Eligible for deduction – A.Y. 2008-09

CIT vs. Kamal Wahal (2013) 86 DTR (Del.) 37

The assessee is an individual, had sold a property inherited by him. The assessee invested the sales proceeds in house property which was purchased in the name of his wife. The AO while completing the assessment held that for claiming deduction u/s. 54F the residential house ought to have been purchased in the name of the assessee. The High Court while considering the issue was faced with conflicting decisions of various High Courts. The High Court took the view of the decisions in favour by relying on the decision in the case of *CIT vs. Vegetable Products Ltd. 88 ITR 192 (SC)* which held that if a statutory provision is capable of more than one view, then the view which favours the taxpayer should be preferred and therefore held that exemption u/s 54 F is allowable where the assessee has purchased new residential house in the name of his wife.

4. Recovery of tax – S. 179 – Director of a company is jointly and severally liable for tax dues of company – Not for interest and penalty due

Kantilal Sakarlal Gandhi vs. ITO [2013] 33 taxmann. com 141 (Gujarat)

The petitioner was a director of a company. An outstanding demand of ₹ 2.47 lakhs and ₹ 4.38 lakhs pertaining to penalty under section 271(1)(c) was pending against the company for the assessment year 1988-89 and 1989-90 respectively. The Assessing Officer issued notices under section 179 and held the petitioner, jointly and severally liable for payment of demand of all income tax, interest, penalty due of company. On filing writ Petition, the Hon'ble court allowed it by relying on *Maganbhai Hansrajbhai Patel vs. Asstt. CIT [2012] 211 Taxman 386/26 taxmann.com 226 (Guj.),* the court held that the liability of the director to pay the dues of the company arises in terms of section 179(1) and such liability would be co-extensive as provided in the said provision which refers to tax dues. The director may be considered an assessee under section 2(7) which provides that assessee means a person by whom any tax or any other sum of money is payable under the Act. However, the same must be *qua* the tax of the company which was due and remained unpaid. By virtue of section 179(1) of the Act, the director cannot be held liable for interest and penalty and thereupon be treated as an assessee under section 2(7) of the Act as a person by whom any tax or any other sum of money is payable under the Act.

5. Business expenditure claimed towards software development and upgradation is allowable as revenue expenditure

CIT vs. N.J. India Invest (P.) Ltd. [2013] 32 taxmann.com 367 (Gujarat)

The question of law involved was whether expenditure claimed on software development and upgradation of it is allowable as capital or revenue expenditure? Dismissing the revenue's appeal the court held that the assessee had entered into contract with a company, which had agreed to provide certain services. These services, thus, essentially were in the nature of maintenance and support services providing essentially backup to the assessee, who had procured software for its purpose. These services, thus, essentially did not give any fresh or new benefit in the nature of software to be used by the assessee in the course of the business but were more in nature of technical support and maintenance of the existing software and hardware. For example service provider had to provide technical support to the employees of the company and to maintain the computers and the laptop, had to supply security service for controlling the data theft and providing checks on access by unauthorised persons to the data etc. In essence, these services, therefore, were in nature of maintenance, back up and support service to existing hardware and software already installed by company for the purpose of its business. The court further held Tribunal had rightly allowed the expenditure as revenue in nature.

6. Penalty – 271(1)(c) – No concealment of penalty for retro-amendment which confirmed two views on allowances

CIT vs. Yahoo India (P.) Ltd [2013] 33 taxmann.com 332 (Bombay)

In this case penalty under section 271(1)(c) of the Income-tax Act, 1961 (the Act) was levied upon the assessee on the ground that in the regular assessment, the deduction of the amount paid by the assessee to Yahoo Holdings (Hong Kong) Ltd. without deducting tax at source has been disallowed by invoking the provisions of section 40(a) of the Act. The CIT(A) upheld the penalty imposed by the assessing officer. The Tribunal deleted the penalty on the ground that in quantum appeal, the disallowance made by the Assessing Officer has been deleted by the Tribunal. Challenging the order of the Tribunal in deleting the disallowance, the revenue has filed appeal before this Court, wherein the revenue has sought to justify the disallowances by placing reliance on Explanation 5 introduced to section 9 of the Act by the Finance Act, 2012 with retrospective effect from 1st June, 1976. The very fact that the law has been amended with retrospective effect clearly shows that the issue was debatable and in the absence of any failure to disclose material facts necessary for the purpose of assessment, the deletion of penalty levied under section 271(1)(c) of the Act cannot be faulted. Accordingly, the revenues appeal was dismissed.

7. Appeal under Section 260A – Powers of the High Court – High Court can formulate additional or new substantial Question of Law during the course of hearing.

CIT vs. Indo Gulf Fertilizers Ltd (2013) 86 DTR (All) 374

The Hon'ble Allahabad High Court while deciding the appeal filed by the department against the order of the Appellate Tribunal formulated additional Question of Law which was not raised by the department in its appeal. The Hon'ble High Court while formulating the additional Question of Law has held that the proviso of sub-s. (4) of s. 260A is an exception giving High Court a judicial discretion to frame additional substantial question of law during the course of hearing. The language used by the legislature in the proviso is quite clear and does not suffer from any ambiguity. The legislature to their wisdom has used the words "nothing shall be deemed to take away or abridge the power of Court", means, in spite of sub-s. (4) of s. 260A, Court may frame additional substantial question of law. Court may formulate another substantial question of law for the reasons recorded if satisfied and feels that such substantial question of law involves.

8. Expenditure on scientific research – Expenditure on clinical trials conducted outside – allowable under s. 35(2AB) of the Act

CIT vs. Cadila Healthcare Ltd. (2013) 87 DTR (Guj.) 56

The assessee during the year incurred certain expenditure on clinical trials for developing its pharmaceutical products outside the approved laboratory facility. The A.O. disallowed the same by observing that such expenditure not having been incurred in the approved facility cannot form part of the deduction provided under s. 35(2AB) of the Act. The Appellate Tribunal allowed the claim of the assessee. On appeal, the Hon'ble Gujarat High Court has dismissed the appeal filed by the department by observing that clinical trial cannot, always be carried out only in the laboratory of the pharmaceutical company and, therefore, benefit of s. 35(2AB) cannot be denied to the assessee merely because the prescribed authority has segregated the expenditure incurred by the assessee on clinical trials in two parts, namely those incurred within the in-house facility and those incurred outside.

9. Re-assessment – reason to believe – an agreement to sell without being there anything more, cannot be equated with transfer of property – there being no statement of income, re-opening of assessment unjustified.

Ratna Trayi Reality Services (P.) Ltd. vs. ITO (2013) 87 DTR (Guj.) 33

The assessee filed a writ petition challenging the notice issued under s. 148 of the Act. Hon'ble High Court quashed the notice issued by the ITO by observing that the Assessee had first entered into MOU to form a consortium of different entities to bid for a large piece of land which would require sizable investment. The Assessee participated in such auction proceedings. The bid was accepted being the highest. Assessee, thereupon, entered into an agreement to sale with the society. Ultimately, as per the terms of the agreement and the understanding between the Assessee and other signatories to the MOU at the instance of the Assessee, the society entered into a separate sale deeds in favour of various parties. We fail to see how the revenue can contend that under such circumstances, there was escapement of income under the head of short term capital gain.

10. Penalty under s. 271(1)(c) – profit on sale of stock option is taxable under long term gains or short term capital gains is debatable issue – penalty not leviable

CIT vs. Jasvinder Singh Ahuja (2013) 86 DTR (Del.) 414

The assessee has offered profit on sale of stock options as long term gains. However, the A.O. sought to tax the same under the head Short term capital gains. The A.O. also levied concealment penalty on the same. Hon'ble High Court affirmed the order of the Appellate Tribunal in quashing the penalty levied by observing that the issue of tax liability of profit on stock options is a debatable one, penalty levied on the same is deleted.


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DIRECT TAXES
Tribunal

REPORTED

1. TDS – Under section 194I – provision for rent *vis-à-vis* actual payment – assessee making provisions for disputed rent payable to landlord but reverse the same later – TDS liable to be deducted on actual rent payment and not on provision – Assessment Year 2007-08

Income-tax Officer vs. Hotel Parag Ltd. (2013) 86 DTR (Bang.) (Trib.) 121

The assessee was operating its hotel business from a leasehold building. Due to dispute over the rent payable to the landlord, the lease rent to be paid is not finalised. The landlord demanded lease rent of ₹ 75 lakhs per month whereas the assessee was offering ₹ 50 lakhs for the leasehold premises. In these circumstances, the assessee at the time of closing its books of account for the year ended 31-3-2007 made a provision of an amount of ₹ 9 Crore as lease rent i.e. @ ₹ 75 lakhs per month payable to the landlord. Since the lease rent was not agreed upon neither the assessee paid any lease rent nor remitted any amount by way of TDS towards the lease rent. However, in the computation of income, the assessee added back the entire sum of ₹ 9 Crores debited to the Profit & Loss Account and offered the same to tax. Subsequently, the assessee and the landlords agreed upon a monthly rent of ₹ 50 lakhs per month and therefore, the assessee reversed the provision for the lease rent to the extent of ₹ 3 Crores in its books of account. The assessee also remitted the TDS as applicable on the actual lease rent of R6 Crores per annum, together with interest for delayed remittance. Subsequently, the TDS Wing of IT Department conducted survey proceedings under section 133A to verify whether the assessee is complying with the TDS provisions. Subsequent thereto, the Income-tax Officer, TDS, Ward-16(2), Bangalore passed an order under section 201(1) and section 201(1A) of the Act dated 24th March, 2009 raising a total demand of ₹ 99,63,360; comprising ₹ 67,32,000 being the demand raised under section 201(1) of the Act and ₹ 32,31,360 being interest charged under section 201(1A) of the Act. The assessee aggrieved by the above order preferred an appeal before the CIT(A). The First Appellate Authority after examining the issue in detail granted relief to the assessee.

The Department being aggrieved by the order of the First Appellate Authority preferred an appeal before the Income Tax Appellate Tribunal. The Hon'ble ITAT

dismissed the appeal of the department by holding that the assessee had not only deducted and remitted TDS on the lease rent of ₹ 6 Crores after the same was agreed to between the assessee and the landlord, it could not be contended that the assessee was liable to deduct tax on a provision of ₹ 9 crores initially made by the assessee.

2. Search & Seizure – Computation of undisclosed income – addition on the basis of statement recorded under section 132(4) – Statement given under section 132(4) cannot be the sole basis without having any cogent and corroborative evidence – addition unjustified. Block period 1996-97 to 2002-03

Jyotichand Bhaichand Saraf & Sons (P) Ltd vs. DCIT (2013) 86 DTR (Pune) (Trib.) 289

During the course of the search and seizure action, the statement of the director of the Appellant was recorded under section 132(4) of the Act. In his statement he explained the deficiency in the stock of gold ornaments and jewellery stated that there have been unrecorded sales which were not reflected in books of account and the proceeds from such sales have been invested in purchase of agricultural land and therefore offered an amount of ₹ 50 lakhs as unaccounted income. Later on after about 7 months the director of the Appellant retracted from the statement saying that he has given the statement under the mistaken belief of facts and law. The director also stated that he intended to declare the profit earned out of unrecorded sales and not the total amount of unrecorded sales. As for the investment in the agricultural land is concerned, the director of the Appellant contended that said investment was in fact shown as an advance of respective family members. The Appellant, therefore, in response to the notice issued under section 158BC of the Act filed the returns showing undisclosed income of ₹ ₹ 4,01,321/- which included Gross Profit on unaccounted sales relatable to shortage of gold ornaments. The A.O. has also accepted the contention of the Appellant and finalised the Assessment Order without making any addition. Subsequently the CIT, Pune invoking the jurisdiction under section 263 of the Act set aside the Assessment Order passed under section 143(3) of the Act on the ground that the A.O. has accepted the retraction of statement given by the Director of the Appellant without verifying the investment made in purchase of agricultural land. Hence, the Assessment Order is erroneous as well as prejudicial to the interest of the revenue. The Appellant challenged the jurisdiction of the CIT to invoke the provisions of section 263 of the Act in its case before the Appellate Tribunal. The Appellate Tribunal has modified the order of the CIT and directed the A.O. to examine and verify the issue raised in the order passed under section 263 of the Act. As per the directions of the Income Tax Appellate Tribunal, the A.O. has initiated the fresh assessment proceedings. The A.O. after considering the submissions made by the Appellant passed the Assessment Order by making an addition of ₹ 50 lakhs as undisclosed income on the basis of statement given during the course of search and seizure action under section 132(4) of the Act. The Appellant being aggrieved by the Assessment Order preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) without appreciating the facts and circumstances of the Appellant's case confirmed the Assessment Order passed by the A.O.

The Appellant, being aggrieved by the order passed by Ld. CIT(A) preferred an appeal before the Hon'ble Income Tax Appellate

Tribunal, Pune. The Hon'ble Appellate Tribunal was pleased to allow the appeal of the Appellant by observing that where the admission was made under section 132(4) under the mistaken belief of law that ₹ 50 lakhs represents the sale value of stock found short was undisclosed income of the assessee instead of the correct legal position that only gross profit on suppressed sale is the income of the assessee and assessee having produced all evidences in respect of investment in agricultural land and revenue could not contradict the same with any evidence found in the course of the search action or post search enquiries to the effect that the assessee has made any investment over and above sale price with regard to agricultural land, impugned addition towards undisclosed income was not justified.

3. Business Income – Benefit or perquisite under section 28(iv) of the Act – Transfer of capital reserve of amalgamating company to amalgamated company – Capital receipts are outside the scope of an income – cannot be taxed under section 28(iv) of the Act – A.Y. 2008-09

ITO vs. Shreyans Investments (P) Ltd (2013) 87 DTR (Kol.) (Trib.) 1

The assessee filed return of income disclosing a loss of ₹ 1,26,760/-. During the course of scrutiny proceedings, the A. O. noticed that the assessee had increased its share capital, and that an amount of ₹ 2,06,87,692/-, which was shown as 'Capital Reserve', was shown in the current year's balance sheet, whereas no such amount was reflected in the immediately preceding year's balance sheet. In reply to the A. O.'s query to explain these facts, it was submitted that the share capital was increased due to the amalgamation of Vidya Vincon Private Limited into the assessee's company with effect from 1st April 2007. It was also explained that the capital reserve of ₹ 2,06,87,692/- came into existence in the books of the assessee, on account of amalgamation. The A. O. called upon the assessee to show cause as to why the amount of ₹ 2,06,87,692/- being the capital reserve credited by the company on amalgamation, not be treated as income of the assessee under section 28 (iv) of the Act. The assessee's explanation was that the said amount is neither a benefit, nor a perquisite, nor even advantage of any kind, but simply a result of merger of accounts of amalgamating and amalgamated company. Hence, the same is not liable for taxation under section 28(iv) of the Act. However, the A.O. has rejected the explanation of the assessee and finalised the Assessment Order by making the addition of ₹ 2,06,87,692/- under the head 'Business Income'. The assessee being aggrieved by the Assessment Order preferred an appeal before the Ld. CIT(A). The First Appellate Authority after considering the explanations of the assessee deleted the addition made by the A.O. and thus, allowed the appeal of the assessee.

The revenue being aggrieved by the above order passed by the Ld. CIT(A) preferred further appeal before the Hon'ble Income Tax Appellate Tribunal. The Appellate Tribunal was pleased to dismiss the appeal of the revenue by observing as that capital receipts are inherently outside the scope of an income which can be taxed under section 28(iv); transfer of capital reserve of the amalgamating company to the assessee as a result of amalgamation being a benefit referable to the capital and not in the revenue field, it is not chargeable to tax under section 28(iv) of the Act.

4. Disallowance – Section 40 A (3) of the Income tax Act, 1961 – Rule 6DD of the Income-tax Rules, 1962 – Payments for purchase of agricultural land made in cash – Disallowed by the Assessing Officer invoking provisions of section 40 A (3) of the Act – Cash payments to vendor made before Sub-Registrar at places, where banking facilities were not available – Further, identity of payees and genuineness of land transactions in respect of which payments had been made were not disputed – Disallowance under section 40A(3) not called for. A.Y.: 2006-07

Saraswati Housing & Developers vs. Addl. CIT (2013) 142 ITD 198 (Del.)

The Assessing Officer noted that the assessee had made payments for purchase of agricultural land in cash, he therefore, invoking the provisions of section 40A(3) disallowed 20% of total cash payment made by the assessee for purchase of land.

On appeal the Tribunal deleting the addition under section 40 A(3) held that the assessee has made cash payment to various landowners who were illiterate and poor agriculturists and had insisted on cash payments as no banking facilities exist in their villages. The cash payments to the land vendors was before the Sub-Registrar who is a statutory authority. The Tribunal further noted that there was no dispute regarding the identity of the payees and the genuineness of the land transactions in respect of which payments had been made, thus, said payments were covered under proviso to section 40A(3) and rule 6DD of the Rules.

5. Disallowance – Section 40 A (3) and 145 of the Act – When the income is assessed by estimating profit after rejection of books of account under section 145(3) – No separate disallowance for cash payment exceeding prescribed limits can be made under section 40A(3). A.Y.: 2009-10

ITO vs. Nardev Kumar Gupta (2013) 22 ITR (Trib.) 273 (Jp.)

During the assessment proceedings the Assessing Officer pointed out certain defects in the books of account of the assessee. Accordingly, the Assessing Officer applied higher gross profit rate and added it to the business income declared by the assessee. Further, the Assessing Officer also made addition under section 40A(3) of the Act on the ground that the assessee made cash payments in the course of its business.

On appeal the Tribunal held that once the addition has been made by increasing the gross profit rate after rejecting the books of account of the assessee then, there is no further scope of making separate addition / disallowances under different heads. As composite addition made by way of application of gross profit rate would be sufficient to take care of such discrepancies found in the books of the assessee and there was no need to look into the provision of Section 40A(3) of the Act.

6. Exemption – Capital Gain – Section 54, and 54F, of the Income-tax Act, 1961 – Where long-term capital gain arose from sale of two distinct and separate assets, namely, residential house and plot of land, and assessee invested entire capital gain in purchase of a new

residential house, he was entitled to claim exemption under 54 as well as 54 F. A.Y.: 2008-09

Venkata Ramana Umareddy vs. Dy. CIT (2013) 142 ITD 16 (Hyd.)

During the year the assessee transferred / sold of two distinct and separate assets, namely, a plot of land and a residential house property. He invested the entire long-term capital gain arising from the sale of the both assets in purchase of the new residential house and, accordingly, avail exemption under sections 54 and 54F of the Act. The Assessing Officer rejected claim as according to him for claiming exemption under sections 54 and 54F the assessee should have invested in two separate houses.

On appeal the Tribunal held that Sections 54 and 54F are independent of each other and operate in respect of long-term capital gain arising out of transfer of distinct long-term capital assets. However, both the sections allow exemption only on purchase or construction of a new residential house. There is no specific bar either under sections 54 and 54F or any other provision of the Act prohibiting allowance of exemption under both the sections in case the conditions of the provisions are fulfilled. Thus, where the assessee has invested the entire capital gain arising to him from sale of two distinct and separate assets, namely, residential house and plot of land in purchase of a new residential house, he is entitled to claim exemption both under sections 54 and 54F.

UNREPORTED

1. Appellate Tribunal – Rectification – Section 254 of the Income-tax Act, 1961 – Period of limitation would commence from point of time when said order is communicated to assessee and not from date of passing order, for purpose of filing application under section 254(2) seeking rectification of order passed by Tribunal. A.Y.: 1990-91

Pawan Kumar Jain vs. Dy. CIT [M.A. No. 140 / M / 2012; order dated: 27-2-2013 (Mumbai Tribunal)]

The Tribunal passed an ex parte order on 4-8-2006 in the assessee's case. Against said order, the assessee filed a miscellaneous application under section 254(2) of the Act on 1-3-2012, after expiry of specified period of four years from date of order. Before the Tribunal the assessee contended that he came to know about ex parte order passed by the Tribunal only on 17-2-2012 and accordingly, sought condonation of delay in filing application under section 254(2) of the Act.

The Tribunal allowing the miscellaneous application of the assessee filed after four years from the date of order held that, the phrase 'from the date of the order' should be construed and reckoned with the date of knowledge of the order, to the assessee that is, when the order has been communicated to the assessee. The reason behind this is, how a person concerned or a person aggrieved is expected to exercise the right of remedy conferred by the statute, unless the order is communicated or known to him either actual or constructively.

2. Deduction of tax at source – Section 194H of the Income-tax Act, 1961 – Commission, brokerage etc. – Payments of commission / sub-brokerage made by assessee who is an agent of post office schemes, PPF, RBI Bonds, Mutual funds, etc., to the persons whose services were taken for earning commission in relation to securities

falls outside purview of provisions of section 194H. A.Y.: 2008-09

ITO vs. Mittal Investment & Co. [I.T.A. No. 1951 / Del / 2012; order dated: 27-2-2013 (Delhi Tribunal)]

The assessee during the relevant period was engaged as an agent of post office schemes, PPF, RBI Bonds, Mutual fund, etc. It claimed expenditure on account of commission paid to sub-brokers in respect of sale and purchase of mutual funds. The Assessing Officer disallowed the claim as no tax was deducted at source under section 194H of the Act while making the above payments.

On appeal the Tribunal held that according, to Explanation (i) to section 194H, if the commission or brokerage is paid by a person acting on behalf of another person for services rendered in connection with securities then the said commission or brokerage falls outside the purview of section 194H. In the present case, the Tribunal found that assessee had paid commission to sub-broker with respect to purchase and sale of mutual funds and according to clause (h) of section 2 of the Securities Contract Act, 1956 mutual funds are within the ambit of the term 'securities'. Therefore the assessee was not liable to deduct tax at source under section 194 H of the Act from such payments.

3. Search – Section 153 C – Assessment – Before invoking provisions of section 153C of the Act the Assessing Officer should record satisfaction that seized documents belong to other person. A.Y.'s: 2003-04 to 2008-09

Asstt. CIT vs. Global Estate [I.T.A. Nos.: 144 to 149 / Agra / 2011; order dated: 30.11.2012; Agra Bench]

A search operation was carried out at the premises of the partners of the assessee firm. There was no search warrant issued in the name of the assessee firm. Subsequently, Assessing Officer issued notice under section 153C requiring the assessee to file its return. The assessee challenged the validity of the assessment proceedings under section 153C of the Act as, during the course of search at the partners premises, no valuable items, account books or documents, much less, incriminating material was found against the assessee. The additions according to the assessee in the order passed under section 153 C of the Act were made without reference to any incriminating material and no reasons had been indicated to the assessee as to why the proceedings under section 153C had been initiated against it.

On appeal the Tribunal held that the provisions contained under section 158BD are more or less similar to provisions contained in section 153C except 'undisclosed income' which is mentioned in section 158BD, however, in section 153C, it is mentioned any money, bullion, jewellery or other valuable articles or things or books of account or documents seized or requisitions. The conditions precedent for invoking provisions of 158BD are, therefore, same as are provided under section 153C. Since, in the present case no search warrant was executed against assessee's firm under section 132(1), therefore, before invoking provision of section 153C Assessing Officer has to record satisfaction that any seized document or material belongs to any person other than person searched and in absence of such satisfaction the assessment under section 153 C was bad in law.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Notifications

Section 35(1)(ii) of the income-tax act, 1961 – Scientific research expenditure – approved scientific research associations /institutions

"The Institute of Research & Development" under Gujarat Forensic Sciences University, Gandhi Nagar, (PAN-AAALG1981A), "Centre for DNA Fingerprinting and Diagnostics, Hyderabad (PAN-AAATC2727J), and "Gujarat Energy Research and Management Institute Gandhinagar (PAN-AAATG6316R) have been approved by the Central Government for the purpose of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961, read with Rules 5C, 5D and 5E (which ever applicable) of the Income-tax Rules, 1962 from 1-4-2011, 1-4-2012, and 1-4-2012 respectively and onwards in the category of 'University, College or Other Institution', and 'Scientific Research Association' subject to the conditions laid down in the said notification. (Notification No. 33/2013 dt. 29-4-2013, 36-37/2013 dt. 23-5-2013 respectively)

CBDT expands the scope of e-filing of Income-tax return; covers audit reports as well and mandates e-filing of audit report and return with 5 lacs income; no more ITR 1 if Sec. 10 benefit exceeds 5k; Amendment to Rule 12 and Forms SAHAJ (ITR-1), ITR-2, ITR-3, Sugam (ITR-4S), ITR-4 and ITR-V - substituted

Income-tax (3rd Amendment) Rules, 2013 redefine the conditions and eligibility to choose from a variety of Income-tax return forms. In addition, certain important amendments have also been made in, which are as follows:

Form	*Existing position*	*New position*
Form Sahaj (ITR 1)	**Return in ITR 1 can't be filed if assessee incurs losses under the head 'Income from other sources'**	
	An individual if his total income includes: (a) Salary and family pension; (b) Income from one house property (excluding losses);	An individual if his total income includes: (a) Salary and family pension; (b) Income from one house property (excluding losses);

	(c) Income from other sources but does not include: • Winnings from lottery; and • Winnings from horse races.	(c) Income from other sources but does not include: • Winnings from lottery; • Winnings from horse races; and • Loss under this head.
Form Sahaj (ITR 1)	**Return in ITR 1 can't be filed if assessee claims tax relief or has any income which is exempt under Chapter III**	
	Return in ITR 1 cannot be filed by a resident person (other than not ordinarily resident in India), if he has: (a) Any asset (including financial interest) located outside India; (b) Signing authority in any account located outside India.	Return in ITR 1 cannot be filed by a person, who: (a) Is a resident person (other than not ordinarily resident in India), and has: • Any asset (including financial interest) located outside India; • Signing authority in any account located outside India; (b) Has claimed any relief of tax under sections 90, 90A or 91; (c) Has income exceeding ₹ 5,000 which is not chargeable to tax. In other words, if assessee claims exemption in respect of any income under sections 10, 10A, 10AA, etc.
Form Sugam (ITR 4S)	**Return in ITR 4S can't be filed if assessee claims tax relief or has any income which is exempt under Chapter III**	
	Return in ITR 4S cannot be filed by an Individual or a HUF deriving income as referred to in section 44AD or 44AE, if it has: (a) Any asset (including financial interest) located outside India; (b) Signing authority in any account located outside India.	Return in ITR 4S cannot be filed by a person, who: (a) Is a resident Individual or a HUF (other than not ordinarily resident in India) deriving income as referred to in section 44AD or 44AE, and has: • Any asset (including financial interest) located outside India; • Signing authority in any account located outside India; (b) Has claimed any relief of tax under sections 90, 90A or 91; (c) Has income exceeding ₹ 5,000 which is not chargeable to tax. In other words, if assessee claims exemption in respect of any income under sections 10, 10A, 10AA, etc.

Audit Report	**Mandatory e-filing of audit reports**	
	No such requirement	E-filing of following audit reports shall be mandatory in following cases: (a) Audit report under Sec. 44AB in respect of books of account; (b) Audit report under Sec. 92E in respect of international transaction; or (c) Audit report under Sec. 115JB in respect of MAT computation.
Mandatory e-filing of return	**Mandatory e-filing of return if income exceeds ₹ 5,00,000 or assessee claims tax relief**	
	It is mandatory for an individual or an HUF to e-file the return of income if its total income exceeds ₹ 10,00,000	(a) It is mandatory for every person (not being a co. or a person filing return in ITR 7) to e-file the return of income if its total income exceeds ₹ 5,00,000 (b) Every person claiming tax relief under sections 90, 90A or 91 shall file return in electronic mode.

List of forms to be used by different persons for filing of return of income for the Assessment Year 2013-14

Individual and HUF

Nature of income	*ITR 1 (Sahaj)*	*ITR 2*	*ITR 3*	*ITR 4*	*ITR 4S (Sugam)*
Income from salary/ pension	Yes	Yes	Yes	Yes	–
Income from one house property (excluding losses)	Yes	Yes	Yes	Yes	–
Income or losses from more than one house property	–	Yes	Yes	Yes	–
Income not chargeable to tax which exceeds ₹ 5,000	–	Yes	Yes	Yes	–
Income from other sources (other than winnings from lottery and race horses or losses under this head)	Yes	Yes	Yes	Yes	–
Income from other sources (including winnings from lottery and race horses)	–	Yes	Yes	Yes	–
Capital gains/loss on sale of investments/ property	–	Yes	Yes	Yes	–
Share of profit of partner from a partnership firm	–	–	Yes	Yes	–
Income from proprietary business/ profession	–	–	–	Yes	–
Income from presumptive business	–	–	–	–	Yes
Details of foreign assets	–	Yes	Yes	Yes	–
Claiming relief of tax under sections 90, 90A or 91	–	Yes	Yes	Yes	–

Other Assessees

Nature of income	*ITR 5*	*ITR 6*	*ITR 7*
Firm	Yes	–	–
Association of Persons (AOP)	Yes	–	–
Body of Individuals (BOI)	Yes	–	–
Companies other than companies claiming exemption under Sec. 11	–	Yes	–
Persons required to furnish return under: (1) Section 139(4A); (2) Section 139(4B); (3) Section 139(4C); and (4) Section 139(4D)	–	–	Yes

(Notification No. 34/2013 dt. 1-5-2013)

Section 10(22B) of the income-tax act, 1961 – exemptions – news agency – notified news agency :

The Central Government has specified "The Press Trust of India Limited, New Delhi" as a news agency set up in India solely for collection and distribution of news, for the purpose of the clause 10(22B) for two assessment years 2014-15 to 2015-16 , subject to the condition that the news agency applies its income or accumulates it for application solely for collection and distribution of news and does not distribute its income in any manner to its members.

(Notification No. 35/2013 dt. 17-5-2013)

Press Release / Memorandums

Finance bill, 2013 – Clarification on amendment to section 206-C of income-tax act dealing with tax collection at source (TCS) on sale of bullion or jewellery in cash:

Currently, sale in cash of bullion (excluding coin or any other article weighing 10 grams or less) in excess of ₹ 2 lakh or jewellery in excess of ₹ 5 lakh is subject to Tax Collection at Source (TCS) @ 1%. As coins were neither included in bullion nor in jewellery, therefore, coins, even when amounting to more than ₹ 2 lakh in value, were being sold in cash without TCS. The Finance Bill, 2013 proposes to delete exclusion of coins/ articles weighing 10 grams or less from bullion. Hence, the sale of bullion (including coins/ articles) in cash in excess of ₹ 2 lakh shall be subject to TCS @1%. Similarly, sale of jewellery in cash in excess of ₹ 5 lakh shall be subject to TCS @1%. It is not a new levy of tax but continuation of old levy except withdrawal of exemption in the case of coins/articles weighing 10 grams or less.

(Press release, dt. 1-5-2013)

Rationalisation of Withholding Tax (WHT) on foreign investments in Indian debt securities:

To enhance resource availability for infrastructure development in the economy, the rate of With-holding tax (WHT) on interest payments on the borrowings of Infrastructure Debt Funds (IDF) was reduced from 20% to

5% in the 2011-12 Budget. Subsequently, in the 2012-13 Budget, Section 194 LC was introduced in the Income-tax Act to reduce the rate of WHT from 20% to 5% in respect of interest paid on money borrowed in foreign currency from a source outside India in a period of three years i.e., 1-7-2012 to 30-6-2015 under a loan agreement and by way of long term infrastructure bonds issued in foreign currency.

2. In the Budget speech 2013, it was announced that necessary changes are proposed to be made to section to provide benefit of reduced WHT to cases where investment is made by a non-resident in rupee denominated long-term infrastructure bonds. However, in order to provide broad based incentive and encourage greater off-shore investment in debt market by Foreign Institutional Investors (FIIs) and Qualified Foreign Investors (QFIs), it has been decided that the benefit of lower withholding tax [i.e., 5% instead of 20%] shall be available in respect of interest on investment made in bonds issued by Indian companies and Government securities. The benefit would be available in respect of interest income of FIIs and QFIs accruing between 1-6-2013 and 31-5-2015, irrespective of the date of investment. The necessary amendment to the Income-tax Act, has been made through the introduction of new section 194LD and other consequential changes.

3. Further, in cases of investment in long term infrastructure bonds covered under section 194LC, where PAN of non-resident investor was not provided, the benefit of 5% WHT could not be availed due to the conditions of section 206AA. Considering the practical difficulty involved in obtaining PAN of non-resident investor in case of investment in long term infrastructure bonds, it has been provided that the benefit of reduced WHT shall be available even if the PAN of foreign investor is not obtained by the Indian company which is responsible for payment of interest and deduction of tax in respect of long term infrastructure bonds.

4. The aforesaid reduction in rates and simplification of the With-holding tax norms would encourage greater subscription in Indian debt securities by foreign investors, encourage development of the Indian debt market and accelerate the pace of growth of the Indian economy.

(Press release dt. 20-5-2013)

Turning with splendour of his precious eye

The meagre cloddy earth to glittering gold.

— *Shakespeare*

If I have done the public any service, it is due to patient thought.

— *Sir Isaac Newton*


CA Tarunkumar Singhal & CA Sunil Lala

INTERNATIONAL TAXATION
Case Law Update

A] HIGH COURT JUDGMENTS

I Transfer Pricing – Whether since the installation and maintenance were domestic transactions and unconnected to the international transactions with associated enterprise, transfer pricing provisions will not apply to the same? Held : Yes

CIT vs. Stratex Net Works (India) Pvt. Ltd. [2013] 33 taxmann.com 168 (Delhi) – Assessment Year: 2004-05

Facts

1 The assessee, Stratex Net Works (India) Pvt. Ltd., a wholly owned subsidiary of Digital Microwave (Mauritius) Ltd. which in turn was a subsidiary of Digital Microwave Corporation USA, was engaged mainly in undertaking of installation, commissioning and maintenance of microwave link equipments.

2 The activities undertaken by the assessee during the year were:

- Commission income from Digitak Microwave Corporation USA – Equipments manufactured by the associated enterprise ("AE") were supplied directly to the customers in India and the assessee company received commission income on the same.
- Warranty Service – The equipments supplied were covered by a warranty given by the AE. This warranty service was provided by the assessee company.
- Installation and Maintenance – The assessee entered into independent contracts with Indian parties for the installation and maintenance of equipments.

3 The Transfer Pricing Office ("TPO") while computing the margin of the assessee company for the purpose of transfer pricing, included the domestic transactions of installation and maintenance charges along with the international transactions of warranty and commission from AE. He computed the margin of the assessee to be 1.31% instead of 18.98%. Since the margin of the comparables was 16.34% an addition to the income of the assessee was made.

4 The assessee preferred an appeal before the Commissioner of Income Tax (Appeals) ("CIT(A)") who deleted the addition. The Revenue further went in appeal before the Hon'ble Income Tax Appellate Tribunal ("ITAT") which dismissed the same.

5 The Revenue claimed that there was nothing wrong in including the operating cost

and revenue from installation and maintenance services since the same were intricately connected with the international transaction of warranty support services and commission income.

Judgment

1 The Hon'ble High Court, while dismissing the appeal filed by the Revenue, held that the transactions pertaining to installation / commissioning and maintenance services were not international transactions as per the provisions of Section 92B(1) of the Income-tax Act, 1961. They were also not deemed international transactions as per Section 92B(2) of the Income Tax Act, 1961as none of the conditions mentioned therein was satisfied.

2 It was further held by the Hon'ble High Court that since there was no finding that the installation / commissioning and maintenance contracts were determined in substance by the associated enterprise, it cannot be deemed that the said contracts were international transactions falling under Section 92B(2) of the Act. Accordingly, it was concluded that no substantial question of law arises.

II. Transfer Pricing – Whether if more prices than one are thrown up by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices and it cannot be held that if one of the prices determined by the most appropriate method is lower than the price as indicated by the assessee, that may be selected and there would be no need to adopt the process of taking arithmetic mean? Held : Yes – Whether since provisions of section 92C(3) and Rules 10B(2) and 10B(3) are specific provisions, OECD guidelines cannot be referred? Held : Yes

CIT vs. Mentor Graphics (Noida) Pvt. Ltd. [2013] 32 taxmann.com 300 (Delhi) – Assessment Year: 2002-03

Facts

1 The assessee, Mentor Graphics (Noida) Pvt. Ltd., a wholly owned subsidiary of IKOS System Inc. was engaged in business of software development and rendering marketing services to its parent company / associated enterprise ("AE").

2 During the course of Transfer Pricing assessment, the Transfer Pricing Officer ("TPO") rejected all the comparables submitted by the assessee and adopted a profit level indicator of 24.53% as against 6.99% adopted by the assessee. He accordingly made an addittion of ₹ 1.46 crores.

3 On appeal, the Commissioner of Income Tax (Appeals) ("CIT(A)") confirmed the addition which was later deleted by the Hon'ble Income Tax Appellate Tribunal ("ITAT").

4 Aggrieved, the Revenue filed an appeal before the Hon'ble High Court against the observations of the Hon'ble ITAT that if one profit level indicator of a comparable out of set of comparables, is lower than that of the assessee, then the transaction reported by the assessee is at arm's length.

Judgment

1 The Hon'ble High Court held that the observation made by the Hon'ble ITAT was incorrect. It was held that when more than one price are determined by way of the most appropriate method, the statute required one to take the arithmetic mean as the arm's length price.

2 The Hon'ble High Court also observed that as the provisions of Section 92C(1) of the Income-tax Act, 1961 contemplated only one most appropriate method and not prices determined by more than one method.

3 The Hon'ble High Court continued to observe that the Assessing Officer ("AO") may himself determine the arm's length price and if found necessary may refer its computation to the TPO after the necessary approvals. It was also observed that the TPO ought to first form an opinion that any one of the conditions of Section 92C(3) of the Income-tax Act, 1961 existed and only then he can proceed to determine the arm's length price of the international transaction.

4 The Hon'ble High Court also held that since the provisions of Section 92C(2) of the Income-tax Act, 1961 and Rule 10B(2) and Rule 10B(3) of Income Tax Rules, 1962 are specific, there was no need to go to the provisions of OECD Guidelines.

III. Transfer Pricing – Whether interest income earned and closure expenses incurred by the assessee were non-operating in nature and hence were not to be included while determining the arm's length price? Held : Yes

Marubeni India Pvt. Ltd. vs. DIT [2013] 33 taxmann.com 100 (Delhi) – Assessment Year: 2002-03

Facts

1 The assessee company, Marubeni India Pvt. Ltd., a 100% subsidiary of Marubeni Corporation, Japan, carried on representation (agency) services and marketing services for its parent company as well as trading of a broad range of industrial, agricultural and consumer goods, commodities and natural resources.

2 For the agency and market support services, the assessee received two kinds of remuneration:

- Handling commission – which varies from transaction to transaction and depends on the product and volume
- Service fee – fixed fees for rendering marketing support

3 For the assessment year ("A.Y") 2002-03, the Transfer Pricing Officer ("TPO") held that interest income earned by the assessee by way of investing surplus funds was not an operating income and hence should be excluded while calculating the margin of the assessee company.

4 The assessee had also paid a compensation for the closure of its certain units which was sought to be excluded while computing the margin of the assessee, the same being non-operating in nature. The contention of the assessee was that the said expense did not benefit the associated enterprise and the Indian business was run independently. Thus, the payment of compensation for closure of the Indian units was an abnormal item of expense and ought to have been excluded from the operating costs while arriving at the ALP of the international transaction.

5 The TPO, however was of the view that the assesee was a captive unit of its associated enterprise which undertook the entire risk, that the associated enterprise was paying the assessee at the rate of cost plus 10% and if the Indian units were closed then the operating costs would correspondingly be reduced and therefore, the compensation paid would form part of the operating costs and would thus be relevant for arriving at the ALP.

6 The order of the TPO was upheld by the Commissioner of Income Tax (Appeals) ("CIT(A)") and the Hon'ble Income Tax Appellate Tribunal ("ITAT"). Aggrieved, the assessee filed an appeal before the Hon'ble High Court.

Judgment

1 With regard to the question of whether interest income should be considered as operating income, the Hon'ble High Court observed that whether a particular activity of

the assessee i.e. the interest generating activity in this case, should be taken into consideration in the determination of the ALP is a question which needs to be decided considering the nature of the business of the assessee, which is referred to as "business model" in the transfer-pricing jargon. The Hon'ble ITAT rightly noted that the fact that the memorandum of association gave powers to the assessee to earn interest by making investments is relevant only for the purpose of determining the appropriate head of income under section 14 of the Income-tax Act, 1961 under which the interest would fall to be assessed and that such a consideration is not relevant for the purpose of determining the operating income of an assessee for the purposes of transfer pricing regulations. Moreover, the Hon'ble ITAT also found as a fact that the interest arose out of investment of surplus funds which were not immediately required for the core business of the assessee.

2 Accordingly, it held that the Hon'ble ITAT's view that in such circumstances the interest income cannot be considered to be its operating income is essentially a question of fact to be gathered from the nature of the assessee's business and its business profile and thus there was no substantial question of law..

3 On the question whether the variation of 5% of arithmetic mean was a standard deduction or not, the Hon'ble High Court held that no question of law arose due to the retrospective amendment of Section 92C(2A) of the Income-tax Act, 1961. The Hon'ble High Court also dismissed the question of whether data of multiple years ought to be considered, since the same was not pressed before the Hon'ble ITAT.

4 On the question of whether closure expense was operating or not, the Hon'ble High Court held that a formula could not be laid down to determine whether an expense was normal or abnormal. It was held that the CIT(A) and the Hon'ble ITAT proceeded on the wrong notion that the assessee was remunerated at cost plus, whereas in reality, the said expense was not considered while fixing the arm's length price. It thus concluded that the said expense was an abnormal expenditure and was to be excluded while determining the arm's length price.

IV India-Denmark DTAA – Whether remuneration / salary for services rendered in India salary paid by non-resident assessee company to foreign nationals who resided for less than 183 days in India is not taxable in India as per the provisions of India-Denmark DTAA? Held : Yes

DIT (International Tax) vs. M/s. Maersk Company Ltd. [TS-933-HC-2012(UTT)]

Facts

1 The assessee, Maersk Company Ltd., a non-resident company, was engaged in certain businesses in India and had employed 13 Danish nationals to render service in India.

2 The 13 Danish nationals stayed and worked in India for a period less than 183 days and the salary / remuneration for such services was not paid to them directly, but was paid to another non-resident company.

3 The Assessing Officer ("AO") and Commissioner of Income Tax (Appeals) ("CIT(A)") were of the opinion that the said remuneration is taxable in India. The assessee preferred an appeal before the Hon'ble ITAT.

4 The Hon'ble ITAT held that the same was not taxable in India as per the Double Taxation Avoidance Agreement between India and Denmark ("the DTAA") since the Danish nationals had stayed for a period less than 183 days during the concerned fiscal year and the remuneration was paid by or on behalf of a non-resident employer and was not borne by a

permanent establishment or any fixed base in India.

5 Aggrieved, the Revenue filed an appeal before the Hon'ble High Court contending that the assessee was a resident of United Kingdom ("UK") and not Denmark and that it had a permanent establishment or fixed base in India.

Judgment

1 The Hon'ble High Court observed that the contention of the Revenue that the assessee company was not a resident of Denmark but UK was not relevant as the DTAA requires the employer to be a non-resident of India and not necessarily a resident of Denmark.

2 It further observed that it was also irrelevant whether the assessee company had a permanent establishment or fixed base in India or not since as per the DTAA what has to be established was that the remuneration is borne by a permanent establishment or fixed base which the assessee company has in India and the Hon'ble Tribunal noted that the remuneration was not borne by any permanent establishment or fixed base, which the assessee had, if any in India.

3 Accordingly, it dismissed the appeal of the Revenue holding that no question of law arose.

B] TRIBUNAL DECISIONS

V. Referral fees – Business connection – Fees for Technical Services – Whether the mere activity of referring clients by a non-resident company to its Indian group company for which it is paid referral fees, constitutes business connection as per section 9(1)(i), even when the fees was received outside India – Whether in the absence of any sort of durability or permanency of result of rendering of services, the referral fees paid by the Indian company was not fees for technical services u/s 9(1)(vii) – Whether referring international financial institutions to the Indian stock broking company for investment in the capital market is in the nature of FTS as per section 9(1)(vii) – Held : In assessee's favour

CLSA Limited vs. ITO 2013-TII-65-ITAT-MUM-INTL – Assessment Year 2004-05

Facts

1 The assessee is a company incorporated in Hong Kong and belongs to the CLSA Group of companies.

2 The assessee had received referral fees from CLSA India. The assessee contended before the AO that it has business relationship with various financial institutions outside India which required services of a broker in relation to the investment activities carried out by such Institution in Indian capital market. It was submitted that the assessee referred such overseas institutional clients to CLSA India acting as India stock broker for which it received referral fees from CLSA India. It was contended that such fees received by the assessee from CLSA India was not in the nature of FTS as per section 9(1)(vii) and the same, therefore, was not chargeable to tax in India. It was also submitted that the fees was in the nature of commission paid by Indian exporter to foreign agents and as per para 4 of CBDT Circular No. 23 dated 27th July, 1969, it was not taxable in India. However, the AO treated the same as FTS and held it to be chargeable in India.

3 On appeal before the CIT(A), the assessee contended that it merely secured the business of institutional investors in respect of dealing

in securities and referred the same to CLSA India, an Indian stock broker and received referral fees from CLSA India which were not in the nature of any managerial, technical or consultancy services. Further, it relied on the decision of Supreme Court in the case of *CIT vs. Toshoku Ltd.* and contended that the commission amount earned by the non-resident for services rendered outside India could not be deemed to be income which was either accrued upon or arisen in India so as to bring the same to tax in India. However, the CIT(A) held that although the assessee had rendered services abroad and also pursued and solicited clients there, the right to receive commission/referral fees arose in India only when the referred clients executed the transactions through CLSA India and made full and final payment to CLSA India in India. Further, the services provided by the assessee in the form of referring clients to CLSA India would amount to rendering market and sales promotion services which are covered in the bracket of managerial and consultancy services and the same, therefore, would fall in the definition of FTS.

4 Regarding the location of the assessee, the CIT(A) held that since the services were in the nature of FTS, therefore, as per section 9(1)(vii), even if the services were rendered outside India, the place where the services were utilised needs to be considered. In other words, the CIT(A) observed as per section 9 the "source rule" i.e. the source of payment would apply. The CIT(A) further observed that the assessee did not benefit from the CBDT Circular, because it was only applicable to the foreign agents of the Indian exporters.

5 Before the Tribunal, the counsel for the assessee submitted that the referral fees was not in the nature of FTS and since the same was received by the assessee for services rendered outside India and the same being not income accruing or arising, whether directly or indirectly, through or from any business connection in India, the same was not taxable in India. Further, the assessee submitted that the Authority for Advance Ruling in the case of Ravi Malhotra relied upon by the CIT(A), was contrary to the decision of Supreme Court in the case of *Carborandum Co. vs. CIT*.

6 The Departmental Representative argued that since the services rendered by the assessee required expertise knowledge for referring the clients, they were in the nature of FTS. The DR further contended that whether the services were rendered in India or outside India has become irrelevant after the amendment made in the relevant provisions and what was relevant in the context of FTS is where the relevant services were utilised.

7 In the rejoinder, the counsel for the assessee contended that only in case of FTS covered u/s 9(1)(vii), place of accrual of income was not relevant, and since the assessee did not earn any FTS, so this argument of the Revenue was of no avail.

Decision

Re - Taxability of 'Referral fees' as FTS

1 We have considered the rival submissions and also perused the relevant material on record. We have also gone through the various judicial pronouncements cited by the representatives of both the sides in support of their respective stand. The issue that is involved in this case for our consideration is whether the referral fees received by the assessee who is a non-resident in India from CLSA India is chargeable to tax in India. In this regard, the CIT(Appeals) has relied on the provisions of section 5(2) read with section 9(1) of the Act to hold that the source of the referral fees being the execution of transactions in India through CLSAI on behalf of the referred clients, the right to receive the referral fees arose in India only and the income on account of the referral fees thus was chargeable to tax in India in the hands of the assessee as per the specific provisions contained in section 5(2)(b) read

with section 9(1)(i) of the Act being the income deemed to accrue or arise in India. In support of this conclusion, the CIT(Appeals) has relied on the decision of Authority for Advance Ruling in the case of Rajiv Malhotra.

2 In the case of Star Cruise India Travel Services (P) Ltd. cited by the counsel for the assessee, a similar issue arose for the consideration of co-ordinate bench of this Tribunal relating to taxability of cruise package money received by the non-resident assessee from India through Star India. The stand taken by the Revenue in this regard was that the non-resident was having a business connection in India and the same was sufficient to invoke the tax liability of a non-resident in India in view of the provisions of section 9(1)(i) read with section 5(2). In support of this stand, reliance was placed by the Revenue on the decision of Authority for Advance Ruling in the case of Rajiv Malhotra. The Tribunal, however, did not find merit in the stand taken by the Revenue and declined to rely on the decision of Authority for Advance Ruling in the case of Rajiv Malhotra on the ground that the impact of Explanation 1(a) to section 9(1)(i) of the Act was not considered by the Authority for Advance Ruling.

3 Similar issue came up for consideration before the Delhi High Court in the case of *CIT vs. Eon Technology P. Ltd.* wherein the assessee company in India which was engaged in the business of development and export of software had paid commission to its holding company in U.K., namely, ETUK on sales and amounts realised on export contracts procured by ETUK for the assessee. The issue involved for the consideration of (the) Delhi High Court was that whether the commission income earned by ETUK was taxable in India being income accrued or deemed to accrue in India and whether the assessee was liable to deduct tax at source therefrom failing which disallowance u/s 40(a)(ia) was warranted. In this context, it was held by the Delhi High Court that since ETUK was not rendering any service or performing any activity in India itself, commission income could not be said to have accrued, arisen to or received by ETUK in India merely because it was recorded in the books of the assessee in India or was paid by the assessee situated in India. Reliance was placed by the Delhi High Court in this regard on the decision of Supreme Court in the case of *CIT vs. Toshoku Ltd.* wherein the term "business connection" was interpreted by the Supreme Court to mean something more than mere business and is not equivalent to carrying on business, but a relationship between the business carried on by non-resident, which yields profits and gains and some activity in India, which contributes directly or indirectly to the earning of those profits or gains. It was held that the business connection must be real and intimate from which the income had arisen directly or indirectly.

4 The CIT(Appeals) in (the) impugned order has also treated the referral fees received by the assessee from CLSAI as fees or technical services u/s 9(1)(vii) of the Act. In support of this conclusion, she had relied on the decision of Authority for Advancing Ruling in the case of International Hotel Licensing Company. While supporting this conclusion of the CIT (Appeals), the CIT-DR at the time of hearing before us, has relied on the decision of Delhi High Court in the case of *CIT vs. Havells India Ltd.* On a careful perusal of both these judicial pronouncements relied upon by the Revenue, we find that the same are distinguishable on facts and the reliance of the Revenue thereon is clearly misplaced.

5 The issue involved before the Delhi High Court in the case of Havells India Ltd. as well as the material facts relevant thereto thus were entirely different from that of the present case.

6 In our opinion, the facts involved in the present case are entirely different from the facts involved in the case of International Hotel Licensing Company inasmuch as the amount in question was paid to the assessee by CLSAI

on account of referral fees for referring the international clients and going by the nature of services rendered by the assessee *qua* CLSAI, it cannot be said that the real and intimate relation exists between the activities carried on by the assessee outside India and the activities of CLSAI in India. Moreover, going by the nature of services rendered by way of referring the international clients to CLSAI, the assessee cannot be said to have rendered any technical, managerial or consultancy services as envisaged in Explanation 2 to section 9(1)(vii) as held by the Authority for Advance Ruling in the case of Cushman and Wakefield (S) Pte Ltd. reported in cited by the counsel for the assessee wherein a similar issue was involved.

7 Since the issue involved in the present case as well as all the material facts relevant thereto are similar to that of the case of Cushman and Wakefield (S) Pet. Ltd. and we agree with and endorse the views expressed by the Authority for Advance Ruling as well as the reasons given in support while deciding the said issue, we hold that the referral fees received by the assessee is not taxable in India. Accordingly, the addition made by the AO and confirmed by the learned CIT (Appeals) on this issue is deleted.

VI. India-Australia DTAA – Article 12 – Fees for Technical Services – Royalty – 'Make Available' – Whether a stipulation in the agreement that 'Providing Party is prepared to transfer such knowledge to the Receiving Party and to provide the receiving parties with information technology, consultancy and data process services' is sufficient to infer that technology was made available – Whether the expression 'make available' is different than the mere obligation of the person rendering the services of that person's own technical knowledge or technology in performance of the services – Whether the technology will be considered as made available when the person receiving the services is able to apply the technology by himself – Held in favour of the assessee

Sandvik Australia Pty Ltd vs. DDIT 2013-TII-52-ITAT-PUNE-INTL – Assessment Year: 2007-08

Facts

1 The assessee is an Australian company, and engaged in rendering IT support services for Sandvik Asia Ltd. in Asia-pacific region and acted as a global information technology support centre, in order to achieve a consolidated and standardised IT environment for the Sandvik Group. Two group companies from India, Sandvik Asia Ltd. and Walter Tools India Pvt. Ltd., had made payments to the assessee company on account of such IT support services.

2 Under its agreement with these companies, the assessee had provided services in the nature of administrative and maintenance IT support besides help desk services in connection with any problem faced by users in operating various application softwares. The assessee also provided networking services which comprised provision of routers and other hardware devices, and networking lines for connection to the global servers, which were owned and maintained by the assessee. The assessee had provided data centre services with the software application being stored on its centralised server in Sydney. The assessee did not have a permanent establishment in India.

3 In its return, declaring nil income, the assessee had claimed the benefit of the tax treaty between India and Australia in terms of which since no technical services were made available to its two group companies in India, the payment was claimed as exempt.

4 Although, under the normal provisions of the I.T. Act, particularly in view of Explanation 2 to section 9(1)(vii), this payment received by the assessee from its Indian affiliates was taxable as FTS, it was claimed as exempt in view of Article 12 of the Treaty. It was claimed that as the assessee did not have any Permanent Establishment (PE) in India, this income was not taxable.

5 Rejecting the assessee's submission, the AO held that the IT support services for which the assessee had received the payment from its Indian group companies was taxable under the normal provisions of the Income Tax Act. Referring to the assessee's agreement with its affiliates, the AO held that the assessee provided not only the basic IT services but also IT infrastructure. In view of section 5(2) read with section 9(1)(vii), the AO concluded that the services rendered by the assessee company to its group companies in India were in the nature of technical services and payments made for those services got covered under the fees for the technical services. Referring to Article 12 of the tax treaty, the AO noted that the assessee had created global basic infrastructure to provide the global functional services.

6 The Dispute Resolution Panel confirmed the view taken by the TPO that the payment received by the assessee from its Indian affiliates was taxable under the normal provisions of the Act, under section 5(2) read with sections 9(1)(vi) and 9(1)(vii) of the Income-tax Act, 1961 as well being taxable in view of Article 12 of the DTAA between India and Australia. The DRP held that the assessee had created a global basic infrastructure to provide global functional services and rendered IT support, which were technical services that had resulted in the transfer of technical knowledge to its Indian affiliates. The DRP also observed that according to the tax treaty, FTS meant payments made to any person in consideration for rendering any technical or consultancy services if such services made available technical knowledge, experience, skill, know-how or processes, or consisted of the development and transfer of a technical plan or technical design. Hence the payment received by the assessee was squarely covered as per the provisions of section 5(2) in conjunction with sections 9(1)(vi) and 9(1)(vii) of the I.T. Act and Article 12 of the Treaty and hence taxable in India.

7 In appeal before the Tribunal, the assessee contended that the services rendered by the assessee were not only limited to its affiliates or group companies in India but also for companies in the entire Asia region.The Revenue, on the other hand, submitted that as per its agreement with Sandvik Asia, the assessee was prepared to transfer knowledge and hence the assessee was not only rendering the back-up IT support services but also transferring knowledge of these services to the recipients. On the other hand, referring to Article 12 of the India-Australia Treaty, the Revenue submitted that the payment received by the assessee from the Sandvik Asia Ltd was nothing but royalty.

Decision

The Tribunal held in assessee's favour as under:

1 The assessee is providing help desk and user administration services, i.e., IT support and advisory services for solving any IT related problems faced by the users as well as user administration services such as addition of new user/deletion of any existing users in the system. It is further claimed by the assessee company that it also provides IT help desk services in connection with any problems faced by the users in the usage of Lotus Notes i.e., Notes Domino Administration. Assessee also provides S&C based services which are in the nature of IT help desk services in connection with any problems faced by the users in operating various application softwares. Assessee provides networking services which comprise provision of routers

and networking lines for connection to the global servers. Assessee also contended that the routers, network lines, WAN and other hardware devices are owned and maintained by the assessee. Assessee also provides data centre services. AS400 software application is stored on the centralised server of the assessee in Sydney. As per the agreement, assessee is responsible for updation of patches of the software and provision of backup and recovery services in respect of data stored on the centralised server. The responsibility of the assessee is to maintain and upkeep of the centralised server owned by it. In sum and substance, assessee has not imparted any technical know-how, skill, process or technical plan or design and hence, in view of Article 12(3)(g), the amount received by the assessee cannot be taxed in India.

2 We find that in the said agreement the parties have described the nature of the services which the assessee company is to provide to the recipient company i.e., Sandvik Asia Ltd. The DRP has placed his emphasis in the recital of the said agreement where it is stated as under: "Providing Party is prepared to transfer such knowledge to the Receiving Party and to provide the receiving parties with information technology, consultancy and data process services.

3 Though the agreement is to be read as a whole and cannot be read into piece-meal basis but what we find as per operative clauses in respect of the contractual obligation of the assessee company nowhere it is suggested that assessee has to make available the required technical know-how for solving the problems faced by the Sandvik Asia Ltd. in their IT related problems.

4 We are concerned with para No. 3 of Article 12, which defines the term Royalty. Under the IT Act, the term royalty and expression FTS are classified as two different connotations, i.e. 9(1)(vi) and 9(1)(vii). So far as Article 12 is concerned, FTS is included in the term "royalty" for the purpose of deciding in which contracting state the income from the same is to be taxed. Clause (g) in Article 12(3) goes to the roots of the issue. Main thrust of the argument of the Counsel is that it is not only sufficient to render the services but the same should be made available to the recipient and this particular important aspect is missed by the DRP/TPO. We find that the expression "making available" is very much important to decide in which contracting state the amount received for rendering the services relating to the technical know-how is to be taxed. The expression "make available" is used in the context of supplying or transferring technical knowledge or technology to another. It is different than the mere obligation of the person rendering the services of that person's own technical knowledge or technology in performance of the services. The technology will be considered as made available when the person receiving the services is able to apply the technology by himself.

5 The Karnataka High Court had held that technology would be considered as 'made available' when the person acquiring the service was enabled to apply the technology. The provision of the service required technical knowledge, skills, etc., did not mean that technology was made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodied technology could not *per se* be considered to make the technology available. Thus, payment of consideration was to be regarded as 'fee for technical/included services' only if the twin tests of rendering services and making technical knowledge available at the same time was satisfied.

6 In the present case, as per the terms of the agreement between the assessee company and Sandvik Asia Ltd., does not support the case of the Revenue that the assessee's case is covered in clause (g) of para 3 to Article 12 of the India-Australia Treaty as the assessee has not made available any technical knowledge

or expertise to the recipient Indian company. In our opinion, the assessee has only provided the back-up services and IT support services for solving IT related problems to its Indian subsidiary. Hence, unless and until the services are not made available, same cannot be taxable in India. We, therefore hold that the services rendered by assessee company to its Indian group companies, though are in the nature of technical services, but is not covered in para (3) (g) to Article 12 of the India-Australia Treaty and hence, the same is not taxable in India. We also hold that the amount received by the assessee cannot be treated as a Royalty even under the normal provisions of I.T. Act. But under the normal provision of the I.T. Act the same constitute consideration for rendering the technical services covered u/s. 9(1)(vii) of the I.T. Act.

VII. India-France DTAA – Article 13 – Whether when the assessee, a non-resident company with a permanent establishment in India, had shown receipts from fees for technical services, which included the service tax collected by the assessee from its clients, the amount of service tax is to be excluded for computing presumptive income under section 44BB – Held In assessee's favour

DDIT v. Egis Bceom International SA 2013-TII-47-ITAT-DEL-INTL – Assessment Year: 2007-08

Facts

1 The assessee was a France headquartered company. The assessee had a permanent establishment in India and was involved in providing technical consultancy services in the infrastructure sector. Most of its clients were government organisations. The assessee's income was taxable under section 44D read with section 115A at the rate of 20% of gross receipts.

2 During the year, the assessee had received from its clients fees for technical services rendered, which included the service tax collected from them. Therefore, the assessee, while computing its tax liability, had excluded the amount of service tax collected by it from its clients and paid taxes at the rate of 20% on the net amount. Similarly, the assessee also excluded the service tax collected on account of fees for technical services received, other than business income taxable in the hands of the PE, which was offered to tax at the rate of 10 per cent under Article 13 of the tax treaty. According to the assessee, service tax did not have any element of income. It was not in the nature of fee for technical services and, therefore, did not partake the character of income.

3 The assessee rejected the assessee's stand and referring to the provisional clause (b) of section 44D, that no deduction in respect of any expenditure or allowance was allowable in computing income by way of royalty or fees for technical services, held that income included the amount of service tax collected by it from the clients and tax was payable on the gross receipts.

4 In appeal, the CIT(A) held in favour of the assessee holding that service tax was not part of the gross receipt that was to be taxed under section 44D read with section 115A.

5 In the Revenue's appeal before the Tribunal, the assessee submitted that service tax was to be excluded for computing presumptive income under section 44BB. Also, the issue was squarely covered in its favour by ITAT decisions and the CIT(A) order was in conformity with these decisions.

Decision

The Tribunal held in assessee's favour as follows:

1 The issue was squarely covered in favour of the assessee by various decisions of the ITAT benches. Dealing with a similar issue,

the Tribunal had relied on the decision of the jurisdictional High Court holding that it was clear from section 44BB that all the amounts either paid or payable (whether in India or outside India) or received or deemed to be received (whether in India or outside India) were mutually inclusive. This amount was the basis of determination of deemed profits and gains of the assessee at the rate of 10 per cent. The Tribunal had also held that service tax was a statutory liability like custom duty. It had considered the decision of the Uttarakhand High Court wherein it was concluded that reimbursement of custom duty paid by the assessee could not form part of amount for the purpose of deemed profits under section 44BB unlike the other amounts received towards reimbursement. Following this view, Mumbai Bench of the Tribunal had held that service tax being a statutory liability, would not involve any element of profit and accordingly, the same could not be included in the total receipts for determining the presumptive income. Relying on these decisions, the Tribunal had held that service tax paid by the assessee could not form part of amount for the purpose of deemed profits under section 44BB unlike the other amounts received towards reimbursement. Following these decisions, the Department appeal was dismissed.

VIII. India-Denmark DTAA – Article 13 – Technical knowhow – Royalty – Engineering services – Supply of equipment – Turnkey contract – Whether when technical equipments are imported, the payment for know-how and engineering services should be considered as an integral part of such equipment without a separate existence, even if provided under a separate invoice, and hence not liable to tax in India – Whether under a single contract for the purpose of taxability of the income, the payment received for the execution of different parts of the contract has to be treated separately as per the real nature of the execution of work and payment – Held: Matter remanded back to lower authorities.

Haldor Topsoe A/S Denmark vs. ACIT 2013-TII-80-ITAT-MUM-INTL – Assessment Year: 2007-08

Facts

1 The assessee was a chemical technology company in Denmark and engaged in the supply of fertilisers, technical know-how, engineering and technical services to various Indian companies in connection with projects, mainly in the fertilisers and petrochemical industry.

2 The assessee's agreement with Indian clients was for supply of equipment together with associated equipments and materials in accordance with the particular requirements of each client. Thus, along with the equipment supplied, the assessee had also provided drawings, manuals, and installation documentation because without this information, the equipment could not be utilised by the client and such information was an integral part of the overall cost of the equipment purchased by the party.

3 The assessee had entered into two agreements with Gujarat Narmada Valley Fertilizers Company (GNFC) for supply of equipments along with associated materials as per the specific design and technical data to meet the specific requirements of the party's plant. The assessee had granted to GNFC a non exclusive, non transferable right and licence regarding ammonia loop revamp designed and implemented using technical information and engineering services.

4 The assessee had received from GNFC, a payment in Euros for revamp of ammonia

loop, which was converted into rupees and claimed as exempt from tax as it had been received towards engineering fee, that formed an integral part of the supply of the equipment as supplied by the assessee on FOB basis.

5 According to the assessee, when certain technical equipments were imported by an Indian party from the assessee, the know-how and engineering became an integral part of such equipment and had no separate existence. Hence, the price payable to the assessee under the contract was not taxable in India, being part of the total contract price, which covered the supply of equipments from the stage of design to the stage of commissioning. Thus, the assessee claimed that the payment received for the services was purely in accordance with the exclusive purchase of property therein with reference to the supply of the equipments, and, hence, could not be considered as royalty, as defined under section 9 of the IT Act or under Article 13 of the tax treaty.

6 The AO did not accept the assessee's claim regarding the non-taxability of this payment for technical documentation/ engineering on the ground that the department had not accepted the CIT(A) order in favour of the assessee, on similar addition made in earlier assessment year, and appealed before the ITAT.

7 The AO thus held that the fee received by the assessee was for supply of technical know how in India and did not form part of the FOB price on the goods imported by Indian clients. An addition was proposed to the assessee's income. The DRP confirmed the AO's order, holding that the taxability of the fee for services was to be determined in terms of section 9(1)(vii). The DRP observed that the amount was received by the assessee *vide* a separate invoice which was not part of supply of the equipments. If the know-how was part of the sale as claimed by the assessee, there would have been no need to draw a separate invoice. Therefore, the DRP concluded that the fee received by the assessee was for the supply of technical know-how, which was independent of equipment sales. The DRP also considered the retrospective amendment whereby Explanation to section 9 was introduced by the Finance Act, 2010 with effect from April 1976, under which income in the nature of royalty or fee for technical services is to be taxed irrespective of the fact whether the services or rights were rendered in India or not.

8 Before the Tribunal, the assessee submitted that the terms and the additions of the agreement were identical in the earlier years as in the year under consideration. The only difference was that in the earlier year, the agreement contained all the terms and conditions whereas for the year under consideration, the terms and conditions had been bifurcated in two separate agreements. A similar matter had been considered and decided by the Tribunal in favour of the assessee for the assessment years 1990-91 to 1998-99. The Tribunal had specifically held that the payment for the services supplied, being an integral part of the supply of equipments, was not royalty. The payment was part and parcel of the contract of supply of equipments.

9 In its appeal, the Revenue submitted that the fees received were separate and distinct from the machinery and equipment supplied. Unlike earlier years, for the AY under consideration, the assessee had entered into two separate agreements, one for supply of equipments and another for supply of technical know-how services. The assessee has also raised two separate invoices one for the supply of goods and another for the supply of technical now-how services. The assessee was thus in the business of rendering engineering services and the payment for the supply of equipments and payment for technical services/information were exclusive and independent. It was argued that the ITAT decision in the assessee's own case for earlier years should not apply since in the earlier years, the Tribunal had decided

the issue of royalty whereas for the year under consideration, the payment was held to be covered as fee for technical services as per the terms of section 9(1)(vii).

10 The Revenue also relied on the order of the apex court order, holding that the contract amount received under a single contract had to be considered separately for each of the components of the contract for the purpose of taxability in India. The Supreme Court had held that for the purpose of taxability, the entire contract shall not be considered to be an integrated one so as to make the assessee to pay tax in India. The taxability events in execution of a contract may arise at several stages in several years and accordingly, the liability of the parties may also arise at every stage. Thus, even if there is one contract, the price for each of the components of the contract is separate and therefore, the contract amount received under a single contract has to be considered separately for each of the components of the contract for the purpose of taxability in India. The Revenue contended that the Tribunal had not considered this decision of the Supreme Court and further the facts were distinguishable for the year under consideration.

Decision

The Tribunal held that:

1 It is to be noted that the decision in the case of the assessee in the earlier years were prior to the retrospective amendment in section 9 whereby the Explanation has been introduced retrospectively by the Finance Act 2010. Further, the decision of the Supreme Court in the case of Ishikawajimma-Harima Heavy Industries Ltd. has also not been brought to the notice of the Tribunal and therefore, the same was not considered.

2 It has been held by the Supreme Court that though under a single turnkey contract, the price of each component of the contract is separate and taxable events in the execution of the contract may arise at every stage in several years and therefore, the prices of each segment are also different. Though, the contract was executed in India; but parts thereof to be carried out outside India would not be taxable in India. Thus, it is clear that under a single contract for the purpose of taxability of the income, the payment received for the execution of different parts of the contract has to be treated separately as per the real nature of the execution of work and payment.

3 The authorities below have decided the issue by treating the payment as fee for technical services; however, the crucial fact of having two separate agreements for the year under consideration has not been considered and further the provisions of DTAA have also not been considered. Since the facts are distinguishable in the year under consideration and the decision of the Supreme court in the case of Ishikawajimma-Harima Heavy Industries Ltd. as well as the retrospective amendment in section 9 has not been considered in the earlier years, therefore, the issue has to be decided on the basis of the facts of the year under consideration.

4 Since certain crucial aspects and facts related to two separate agreements and provisions of DTTA as well as decisions of Supreme Court in the case of Ishikawajimma-Harima Heavy Industries Ltd have not examined by the authorities below; therefore, in the interest of justice, we remit this issue to the record of the AO for deciding the same after considering all the relevant facts as well as the decisions on the point.

IX. India-France DTAA – Surcharge – Whether when the DTAA does not say anything about inclusion of surcharge and education cess for the purpose of deduction of tax at source, there is an apparent conflict

between the Income-tax Act and DTAA with regard to deduction of tax at source – Whether if the provisions of DTAA are more beneficial to the taxpayer, then the provisions of DTAA would prevail over the Indian Income-tax Act – Whether when the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, the taxpayer may take advantage of the provision in the DTAA for deduction of tax – Held : Yes in favour of the assessee.

ITO vs. M/s M Far Hotels Ltd 2013-TII-84-ITAT-COCHIN-INTL – Assessment Years: 2003-04 to 2008-09

Facts

1 Assessee is a company, engaged in hotel operations. The assessee made payment of management charges to a French resident. For deduction of tax at source, it did not take into account the surcharge. The issue before the Tribunal was whether the taxpayer was as "assessee in default" u/s 201(1) and also levy of interest u/s 201(1A) of the Act.

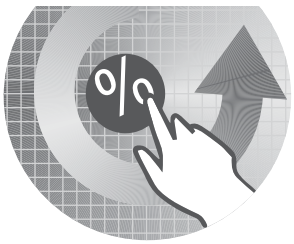
2 The Department argued that the CIT(A) was not correct in deleting the addition by following the DTAA. On the other hand, the representative of the assessee submitted that that the provisions of DTAA would prevail over the Indian Income-tax Act; that the DTAA between India and France did not say anything about inclusion of surcharge for the purpose of deduction of tax. Therefore, DTAA is more beneficial to the taxpayer than the Indian Income-tax Act.

Decision:

The Tribunal held in assessee's favour as under:

1 Admittedly, the management fee, interest, etc. are paid to a resident of France. It is also not in dispute that there was an agreement between the Government of India and Government of France for avoidance of double taxation. It is also not in dispute that the double taxation avoidance agreement between the Government of India and France does not say anything about inclusion of surcharge and education cess for the purpose of deduction of tax at source. Therefore, there is an apparent conflict between the Income-tax Act and DTAA between the two sovereign countries with regard to deduction of tax at source on surcharge and education cess. In these circumstances, the question arises for consideration is whether the provisions of Indian Income-tax Act would prevail over the double taxation avoidance agreement between the two sovereign countries.

2 In view of Section 90(2), it is obvious that in respect of a taxpayer to whom the double taxation avoidance agreement applies, the provisions of the Indian Income-tax Act shall apply to the extent they are more beneficial to that taxpayer. In other words, if the provisions of DTAA are more beneficial to the taxpayer, then the provisions of DTAA would prevail over the Indian Income-tax Act. Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, this Tribunal is of the considered opinion that the taxpayer may take advantage of that provision in the DTAA for deduction of tax. The CIT(A) has only deleted the tax component to the extent of surcharge and education cess at the rate applicable under the DTAA.



CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

SSI Units – Clubbing of clearances

Kich Industries vs. Commissioner of Central Excise, Rajkot – 2013 (290) E.L.T. 434 (Tri. – Ahmd.)

There were seven business entities involved in this case and admittedly all the seven entities are owned by family members or limited companies where family members are the directors. The details of family members are as under.

Name	Relation
CH	Father (Founder & Chairman)
BH	Son of CH
NH	Son of CH
DH	Son of CH
Ms SH	Daughter in law of CH (wife of BH)
VNP	Bro/in law of CH & Uncle of BH/DH/NH

The family members had several SSI Units. The names and their constitution and name of directors/partners/proprietors are as under.

Name	Consti-tution	Name of Directors/ Partners/ Proprietors
M/s. KI	Partnership	CH+SH
M/s. KMPL	Pvt Ltd Co	CH+BH+NH
M/s. KM	Proprietary	DH
M/s. JBI	Proprietary	CH
M/s. FTPL	Pvt Ltd Co	CH+BH+NH
M/s. CI	Proprietary	NH
M/s. KO	Proprietary	BH+NH Closed since 2004

All the above named business entities have the five persons of a family members mentioned above as owners and they controlled these units. After considering the evidences gathered during investigation and records and documents, the Commissioner has come to the conclusion that KI was the main unit having the required infrastructure for manufacturing and maintenance of accounts and all the other firms/companies were created for the purpose of showing them as independent manufacturing units, which they were not, to derive maximum benefit from SSI exemption notification.

The Hon'ble Tribunal considered it appropriate to discuss the arguments advanced by the Department on the basis of evidences/issues discussed by the Commissioner and his conclusions thereon and submissions on behalf of the Appellant on those issues as follows.

1. Department view

Entire purchase of raw materials, consumables etc. for all units was done at the insistence of

Shri NH, all payments are made under his signatures. Thus all expenses are controlled by Shri NH who is the son of Shri CH.

Appellant's view
Shri NH was the Director of M/s. KMPL. This company looked after the marketing of all the products manufactured by all the group companies. The raw materials, consumables etc. were purchased by KMPL and supplied to the units who manufactured finished goods and supplied to KMPL. The KMPL gets the goods manufactured on conversion basis and naturally it is not surprising that Shri NH signed the bills for purchase of materials. It is not the case of the Department nor there is any evidence to show that purchase of any materials by each unit was controlled by Shri NH but it is a case of controlling purchase of major raw materials meant for goods manufactured on job work basis.

Hon'ble Tribunal view
It is not the department's case that KMPL was to be treated as the manufacturer and duty demand is to be from them. While the case has been made out against KI, the supply of raw materials, consumables etc., is controlled by KMPL and KMPL is a purely marketing company. It was also submitted during the hearing that after the amendment of valuation rules, appellants have been paying the duty at the price at which KMPL is selling the goods. It is not even the case of the department that KMPL is a related person. Under these circumstances, these findings are not of much help to the Revenue.

2. Department view
The receipt of raw materials for all the units were looked after by Shri VP a clerk of KI.

Appellant's view
It is true that in his first statement Shri VP had admitted that he received the goods for all units in the premises of KI. However, during cross-examination he stated that he was going to respective units to receive the materials. Bills and invoices of suppliers show the address of respective units and also show that the goods have been delivered at respective units. Since all the units were owned by family members only, Shri VP was helping all the units at the instance of Shri CH.

Hon'ble Tribunal view
Even though searches have been conducted in all the units, excess/shortage of raw materials have not been found and there is no clear finding by panchas that the concerned units did not have machinery for production of the goods which they claim to have produced. While the Department has relied upon the statement of the clerk, the appellants have relied upon the submissions during cross-examination and documentary evidence which show that delivery took place in the individual units. While it is the claim of Revenue that all the units had a common head office, there is no allegation or finding that other units were nonexistent or were located in the same premises. Therefore the claim that all the raw materials were received in the premises of KI does not emerge from the facts.

3. Department view
Costing job work charges were determined by Shri BH.

Appellant's view
KMPL is getting goods manufactured from various units on job work basis out or raw materials supplied by KMPL as per their specifications. Therefore it is natural that BH (Director of KMPL) does costing of each product and determines the job work cost. Up to 31-3-2007 each unit was paying duty on the basis of value arrived at as per the decision of the Hon'ble Supreme Court in the case of Ujagar Prints Ltd. After introduction of Valuation Rule 10A, the appellants started paying duty on the basis of sale price of KMPL, even though

appellants do not agree with the view taken by the Revenue that they were liable to pay duty at the price of KMPL since branding and packaging was done by KMPL and goods sent by job workers were not sold as such.

Hon'ble Tribunal view
The Department is relying upon the statement of Shri BH that he did not know whether other units had the facility or not. On that basis as well as based on the fact that he determines the job work charges, conclusion against KI is proposed to be established. We do not find any relationship between the two. If KI was supposed to be treated as the manufacturer and clubbing was to be done, department has to slow that other units did not have the facility and were controlled by the two partners of KI. Neither of the two partners is shown to be involved in determination of job work charges or in control of supply of raw materials.

4. Department view
Accounting methods for all units was determined and controlled by KI.

Appellant's view
There is no finding or conclusion that accounts are not maintained separately for each unit. There is not even an allegation that there was combined accounting. Each unit has been identified as separate and separate registration certificates have been issued by the department.

Hon'ble Tribunal view
Just because accounting policy is determined and methods followed are same by all the units, clubbing cannot take place.

5. Department view
5.1 The stock of raw materials or finished goods of all units lying at a particular time is controlled by KI and KMPL

The Appellant's view
No common stock of raw materials or finished goods was controlled by KI. Further each unit is situated at a different place and they are not even adjacent to each other and each has its own accounting of raw material and finished goods and during the visit of officers or during the search operations, no discrepancy was found. KMPL gets the goods manufactured from other units as per their specification and out of their raw materials and no evidence has been shown that other units were doing it for KI. It is natural for KMPL to maintain account of raw material supplied to each unit and finished goods manufactured by each unit No evidence has been put forth either documentary or by way of findings by panchas that materials were received in KI.

5.2 Department View
The quality of goods manufactured by all units is controlled by one Shri MK.

Appellant's view
Shri MK is an employee of KMPL and therefore quality control by him is natural and is in the fitness of things.

5.3 Department View
Same PF code number was being used by KI and KMPL,

Appellant's view
Assistant Provident Fund commissioner's letter has been relied upon and this cannot be conclusive evidence. The appellant had written to the Provident Fund Commissioner pointing out that this was a mistake.

5.4 Department View
The office work of all units was done from the premises of KI.

Appellant's view
It is a settled law that this cannot be a ground for clubbing value of clearances. Further, all the units were registered with Central and State authorities like Central Excise, Income-tax, Sales Tax, Municipal Authorities etc. Moreover, the goods were being manufactured for KMPL and not for KI. No evidence has been put forth that KMPL and KI were one and the same.

5.5 Department View

Certain officials on the role of KI and KMPL were nominated as authorised signatories to execute work of other units.

Appellant's view

Shri BC signed as Director Marketing of other units also. In view of the fact that other units were job workers of KMPL, certain items of work were authorised to be done by KMPL officials and they were paid by both KMPL and KI. Neither of the partners of KI executed any work in any of the other units.

5.6 Department View

Raw materials of KMPL were stored in other units.

Appellant's view

The raw materials of KMPL were directly sent to other units since others were their job workers. KMPL had their own premises/ godown where they received finished goods from each of the other units and carry out branding and packaging. In the absence of any law requiring the principal getting the goods manufactured on job work basis to have storage and manufacturing facilities, this cannot be a ground for clubbing.

5.7 Department view

KMPL paid ₹ 1,00,000/- to KI.

Appellant's view

The payment of ₹ 1,00,000/- to KI on 14-3-2005 by KMPL was because KI did not have sufficient balance to pay M/s. Speciality Heaters and this was out of payment due from KMPL to KI and a natural transaction during the course of business.

5.8 Department view

The appellants had claimed all the units as one unit for getting SSI award.

Appellant's view

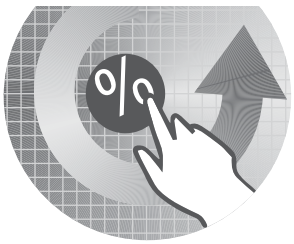
It was clearly mentioned that award was given to K Group and no award was claimed on the basis of a single unit. The claim was correct since all the units in Kich Group were SSI units during the relevant time.

The Hon'ble Tribunal did not accept any of the above view taken by the Department.

6. After discussion of various grounds relied upon by the Revenue in the order and the counter points submitted by the Appellants the Hon'ble Tribunal observed that Revenue has not been able to make out a case by showing that KI was in reality the manufacturer; other than completing some finishing work, KI did not undertake manufacture of all the goods claimed to have been manufactured by others; even though the same family members were partners, directors, etc in the firms and companies, for all legal purposes, each unit was treated separately and no evidence has been put forth to show that such is not the case; even though units were searched and visited, the panchanama does not reveal that the units did not have facilities for manufacture; raw materials were received by each unit separately, accounted separately and finished goods were sent to KMPL and not to KI. From the facts and records of the case what emerges is that it was KMPL for whom goods were manufactured by all the units and KMPL did control the supply of raw materials, quality of raw materials, payment for raw materials and job charges and receipt of finished goods from them and sale thereof whereas no records/evidences have been put forth to show that it was KI in such a position.

7. The Hon'ble Tribunal held that Revenue has not been able to make out a case that KI has to be treated as the manufacturer and the clearances of other units have to be clubbed and KI has to be held as liable to pay duty on all the goods manufactured by all the concerned units. Accordingly the demand for duty from KI in respect of goods manufactured by all the units cannot be sustained and is set aside. Since it was held that on merits Revenue has no case, the penalties imposed on various appellants were set aside. In the result all the appeals were allowed with consequential relief, if any.

CA Janak Vaghani



INDIRECT TAXES
VAT Update

1) Amendment to MVAT Rules

i) MVAT (Amendment) Rules, 2013
(Notification No. VAT 1512/CR 115/Taxation-1, dated 16-5-2013)

Set-off/Refund to SEZ Unit/Developer – Rule 55B

The Government of Maharashtra had issued GR dated 15-10-2011 allowing refund of tax paid on purchase of goods used by SEZ unit or developer of SEZ, however no corresponding amendment was made in MVAT Rules enabling refund to such dealers. Now the Government has amended Rule 52 and inserted new Rule 55B w.e.f. 15-10-2011, which will enable SEZ unit/developer to claim refund of tax paid on purchase of goods.

Rule 52 providing for set-off is amended so that provisions of set-off contained in it is made subject to newly inserted Rule 55B.

Rule 55B provides that provisions of Rules 53(6), 54(g) and 54(h) shall not apply to the developers and units, in processing area of SEZ. By way of Explanation to Rule 55B the term "processing area" is defined to mean the processing area as demarcated u/s. 6 of the SEZ Act, 2005 but excluding educational institutions, hospitals, hotels, residential or commercial complexes, leisure and entertainment facilities or other facilities allowed for authorised operations as may be notified by the State government, u/s .50 of the SEZ Act, for their operations and maintenance.

ii) MVAT (Second Amendment) Rules, 2013
(Notification No. VAT 1513/ CR 61/Taxation-1, dated 21-5-2013)

Amendments to give effect to State Budget Proposals

a) Due Date For Filing of Last Return With Annexures – Rule 17(4)

Rule 17(4) provides for periodicity and due date for filing of returns by the registered dealer. Second proviso to sub-rule 4(a) and first proviso to sub-rule 4(d) provides that dealers who are not required to get their books of account audited under the act shall file Annexures J-1, J-2 and other details in Annexures C and D etc., along with last monthly, quarterly or six monthly, as the case may be, within ninety days from the end of the year. Now the said clauses are amended to change the time limit for submission of last return along with required annexures from ninety days to on or before 30th June of the succeeding year. This amendment is made retrospectively from 1-4-2012.

b) Deletion of Sub Rule (1) of Rule 24

MVAT act was amended to provide for automatic cancellation of unilateral assessment order passed u/s. 23(1) of the act, when dealer files such return. As a result of which, provisions contained in Rule 24(1) for filing of application for cancellation of assessment order became redundant. Therefore the consequential amendment is made to delete the said sub rule (1) of Rule 24 providing for application for cancellation of assessment order and also deletion of Form 304.

c) VAT TDS Annual E-Return Form 424- Rule 40(1)

At present under rule 40(1), every employer who is required to deduct VAT at source is required to file annual return in Form 405 manually and pay tax in Form 210. Clauses (a) and (d) of said sub rule 40(1) are amended to provide for payment of VAT TDS in Form MTR-6 and to provide for filing of annual return in form 424 in an electronic Form by the employers. Consequently Form 424 is added and Form 405 is deleted and amendment is made in rule 45A to give reference of Rule 40 in heading of challan form MTR-6. This amendment is made effective from 1-5-2013 and accordingly shall apply to filing of annual return for the year ended on 31-3-2013 onwards.

d) Denial of Set-off of Tax Paid on Purchase of Motor Car and Used for Business of Leasing- Rule 54(a)

Rule 54(a) provides for disallowance of set-off of tax paid on purchase of motor vehicles (being passenger vehicles) which are treated by the claimant dealer as capital assets and parts, components and accessories thereof unless the claimant dealer is engaged in the business of transferring the right to use the said vehicles. In budget speech, the Finance Minister had announced that set-off shall not be allowed on purchase of passenger motor vehicles used for business of leasing. To give effect to this budget proposal to disallow the set-off of tax paid on purchase of passenger motor vehicles, parts, components and accessories thereof and used for leasing of motor vehicles Rule 54(a) is amended by deleting following portion "unless the claimant dealer is engaged in the business of transferring the right to use (whether or not for a specified period) for any purpose, in respect of the said vehicles" with effect from 1-5-2013.

e) Bank Guarantee From Private Sector or Foreign Bank – Rule 61

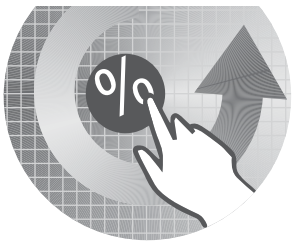
Rule 61 provides for obtaining bank guarantee from any branch of the bank notified as government treasury. Rule 61 is amended to obtain bank guarantee also from branch of any Private Sector or Foreign Bank, as may be notified by the State Government. This amendment is made effective from 1-5-2013.

f) Service of Notice or Order Digitally Signed – Rule 87

Rule 87 provides for service of scanned copy of notice or order by email. This Rule 87 is amended to provide service of electronically generated and digitally signed copy of notice or order by email to the dealer. Sub-rule (4) is added to provide that where an order or notice or any communication is made electronically and addressed to the dealer by email which is provided to the department by the dealer, then such order or, notice or communication, shall be deemed to have been served on the addressee. For the purpose of this sub-rule, the provisions of section 13 of the Information Technology Act, 2000 shall be applicable. This amendment is made effective from 1-5-2013.

g) Substitution of Form of Assessment Order – Form 303

Assessment order Form 303 is substituted by new Form 303 from 1-5-2013.




CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute update

1. Voluntary Compliance Encouragement Scheme, 2013

The Government has declared Voluntary Compliance Encouragement Scheme, 2013 (VCES) *vide* Finance Act, 2013 (Chapter VI) which has come into effect from 10-5-2013, the day on which the Finance Bill 2013-14 has received the Presidential assent. The Government has issued a clarificatory circular No. 169/4/2013-ST, dtd. 13th May, 2013 in this regards. The salient features of the scheme are discussed hereinbelow.

I. Immunity

- The declarant, upon payment of tax dues declared by him u/s. 97(1) and payment of interest (if any payable on the remaining portion of the tax dues from 1-6-2013 to 31-12-2014 at the rate specified u/s. 75 or S. 73B of the Finance Act, 1994) shall be entitled to immunity from penalty, interest or any other proceedings under Chapter V of the Finance Act, 1994. It has been clarified that the immunity is available from payment of late fees for filing of returns and non-registration.
- Barring the provisions of S. 101 of Ch. VI of the Finance Act, 2013 (relating to substantially false declaration), the declaration shall be conclusive upon issuance of acknowledgement of discharge U/s. 97(7) and cannot be reopened thereafter in any proceedings under Ch. V of the Finance Act, 1994 before any authority or court relating to the period covered under such declaration.

II. Eligibility – Period October, 2007 to December, 2012

- Any person against whom service tax dues (including Cess) is pending under Ch. V or any other amount due or payable u/s. 73A as on 1-3-2013 ("tax dues" do not include interest and penalty and the VCES is not applicable in case of non-payment or short payment of mere interest and penalty);
- Registered but not having filed ST-3 Return or not having declared true liability in the returns;

III. Ineligibility

- Those who have made true declaration in ST-3 Returns but not paid dues;
- Those who have failed to file returns but paid tax dues;
- Person on whom any notice or order of determination has been issued in respect any issue, for any period, no declaration can be made on the same issue for any subsequent period ;

- Person against whom any inquiry is pending as on 1-3-2013 for non-payment or short payment of service tax by way of a) search of premises, b) issue of summons under S. 14 of CE Act, 1944, c) requirement of production of accounts, documents or any other evidence and d) initiation of audit, no declaration can be made even on any issue other than covered under such inquiry. (However, if such inquiry etc., is pending, then the designated authority[1] shall by an order and for reasons to be recorded in writing, reject such application. It has been clarified that a mere summons, general inquiry letter for production of any document which is not in respect of any non-payment or short payment, would not be regarded as an inquiry for the purpose of this ineligibility;
- No immunity for short/non payment for the period starting from 1-1-2013.

IV. Procedure

- If the person is not registered he will have to get registered;
- Declaration has to be filed by 31st December, 2013 with the designated authority in the prescribed form.
- The designated authority shall acknowledge the declaration within 7 days –
- Payment of tax –
  - Not less than 50% of tax dues declared up to 31-12-2013
  - Balance amount or part thereof by 30-6-2014
  - If any payment remains to be made as on 30-6-2014, then the same should be paid by 31-12-2014 along with the interest as prescribed u/s. 75 or 73B for the period starting from 1-7-2014
- Declarant to furnish details of payment made under the scheme along with the copy of acknowledgement;
- On furnishing the details of full payment of declared tax dues and the interest, if any, payable as above, the designated authority shall issue an acknowledgment of discharge of such dues to the declarant in the prescribed form and manner;
- If the declarant fails to pay the tax dues in full or in part as declared by him, the same shall be recovered with interest thereon within the provisions of S. 87 of the Act;
- Where the Commissioner of Central Excise has reasons to believe that the declaration made by a declarant under this Scheme was substantially false, he may, for reasons to be recorded in writing, serve notice on the declarant in respect of such declaration requiring him to show cause why he should not pay the tax dues not paid or short paid;
- No action shall be taken as above after the expiry of one year from the date of declaration;
- It has been clarified that payment of tax dues shall be by cash only and not by credit;
- In pursuance of the scheme, the Central Government have already issued the relevant forms of the declaration, acknowledgment of the declaration and the form of discharge of tax dues;
- The Central Government has acquired powers to remove the difficulties, by an order, not inconsistent with the provisions of this scheme. However, no such order can be made after two years from the date on which the scheme coming into force, and any such order shall be laid before both the Houses of the Parliament.

1. The designated authority would mean a person not below the rank of Assistant Commissioner

2. Change in abatement on under constructed residential flats from 8-5-2013

The Government has issued Notification No. 9/2013 dtd. 8-5-2013 to the effect that for the purpose of abatement of 75% on sale of under constructed[2] residential units, both the following conditions are required to be satisfied :

I. The carpet area of the unit is less than 2,000 sq. ft., and

II. The amount charged for the unit is less than ₹ 1 crore

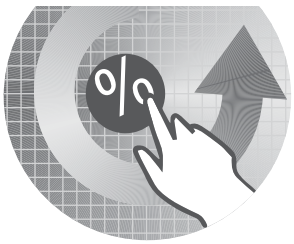
It means that the abatement of 75% is now available only if the carpet area of the residential unit is less than 2000 sq. ft. for which the consideration is less than ₹ 1 crore. E.g. If an under constructed residential unit of 1800 sq. ft. of carpet area is sold for ₹ 2 crores, the abatement will only be 70%. Similarly, if another under constructed residential unit of 2200 sq. ft. is sold for ₹ 80 lakhs, the same will be eligible for abatement of 70%.

In the earlier Notification No. 2/2013 dtd. 1-3-2013, any of the above conditions were required to be satisfied for the purpose of higher abatement which meant that if under constructed residential unit of 1800 sq. ft. of carpet area is sold for ₹ 2 crores, the eligibility of abatement was of 75% and in case a similar unit of carpet area of 2200 sq. ft. is sold for ₹ 80 lakhs, the abatement would be of 75%. This position would now be valid from 1-3-2013 to 7-5-2013.

In case of commercial units, the abatement of 70% applies for all sale of under constructed unit from 1-3-2013.

2. "Sale of under constructed unit" means any amount received before issue of completion certificate for sale of such unit.

CA. Bharat Shemlani



INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Renting of Immovable Property Service:

1.1 Mohan Clothing Company Pvt. Ltd. vs. UOI 2013 (30) STR 236 (Kar.)

The High Court in this case held that, tenant, who is not a service provider cannot challenge levy to service tax. He is only subject to the conditions imposed in contract.

1.2 K. M. Building Tenants Association vs. Kuthuparamba Municipality 2013 (30) STR 237 (Ker.)

The High Court in this case held that, since Supreme Court granted leave, with interim order staying collection of Service Tax on rental agreement service until 30-9-2011, and liberty to Department to collect it from 1-10-2011 onwards, the appellant is directed to remit tax from 1-10-2011, subject to result in Supreme Court. It is further held that, every party is not required to approach the Supreme Court to get benefit of its judgment as decision on constitutional validity applies to all. Those who had paid Service Tax before above date could claim refund, if eligible based on Supreme Court judgment, and those who had not paid tax from 1-10-2011, it could be recovered from them by coercive steps.

Management or Business Consultant's Service

1.3 B. S. R. & Co. vs. CST, Gurgaon 2013 (30) STR 242 (Tri.-Del.)

The Tribunal in this case held that, only services in nature of providing consultancy or advice for improving management of business entity only are covered by the definition of Management or Business Consultant's Service and not executory type of responsibilities of management done through another agency. Scope of the said services is restricted to services in relation to consultancy as evident from name given to service and commercial understanding of management or business consultancy.

It is further held that, no penalty is imposable in case of short payment due to clerical errors.

1.4 CST Bengaluru vs. Robert Bosch (India) Ltd. (30) STR 410 (Tri.-Bang.)

The assessee in this case provided, services to their parent company, such as observation of business activities of the Associate Companies and licences of BOSCH in India; cultivation of contacts with Associate Companies, assistance with respect to the exchange of technical, economical and other information between BOSCH and its licensees; attending to the personnel of BOSCH delegated to India and to other visitors; entering into contracts with new applicants for licences and observation and surveillance of markets. The Tribunal held that, none of the above functions could fall within the ambit of the statutory definition of Management Consultant.

Business Auxiliary Service

1.5 Interocean Shipping Co. vs. CST, New Delhi 2013 (30) STR 244 (Tri.-Del.)

The appellant in this case engaged in the activity of ship broking such as acting as intermediary between vessel owner and vessel charterer, helping negotiations, compiling terms of negotiations, following up freight payments, etc. The department sought to tax them as Commission Agent acting on behalf of another person under BAS. The Tribunal held that, from nature of activity, brokers are purely intermediaries and not acting on behalf of either, ship-owners or charterers, which is essential ingredient for Commission Agent and therefore the appellant is not a Commission Agent.

1.6 VFS Global Services Pvt. Ltd. vs. CST, Mumbai 2013 (30) STR 411 (Tri.-Mumbai)

In this case appellant provided visa facilitation and customer care service to the Diplomatic Mission, Embassies/Consulates and the visa applicants. The Tribunal relied on CBEC Circular No. 137/06/2011 dated 20-4-2011 wherein it was clarified that, services provided by visa facilitator, in the form of assistance to individuals directly, to obtain a visa, does not fall under any of the taxable service notified under Finance Act, 1994.

1.7 Daya Shankar Kailash Chand vs. CCE&ST, Lucknow 2013 (30) STR 428 (Tri.-Del.)

The appellant in this case engaged in purchase and sale of SIM cards. The Tribunal following the decision in Martend Food & Dehydrates Pvt. Ltd. held that activity of purchase and sale of SIM card belonging to BSNL where BSNL has discharged the Service Tax on the full value of SIM card does not amount to providing Business Auxiliary Service.

Commercial Training or Coaching Service

1.8 I. C. Financial Analysts of India vs. CC&CE Hyderabad-III 2013 (30) STR 273 (Tri.-Bang.)

The appellant in this case, consortium of ICFAI institutions, Badruka Institute of Foreign Trade, Institute of Insurance and Risk Management and Indian School of Business imparted training or coaching for consideration. The Tribunal held that, impugned institutions not legally constituted body authorised by law to issue certificates/degrees, etc. therefore, the said consortium cannot claim immunities on ground of being covered by exclusion clause of CTCC definition. The activity carried out by the appellant *ipso facto* fall within the ambit of CTCC service.

1.9 Abacus Brain Study (P) Ltd. vs. CCE (A) Hyderabad 2013 (30) STR 401 (Tri.-Bang.)

The appellant in this case, coaching children based on the ancient Japanese methods of mathematical calculation with the help of an instrument popularly known "Abacus" and claimed exemption under Notification No. 9/2003-ST dated 20-6-2003 providing exemption for recreational training institute. The Tribunal relying on decision in case of *Fast Arithmetic 2010 (17) STR 158 (Tri-Bang.)* which considered Abacus training as an activity of a recreational training institute allowed the appeal.

Chit Business Service

1.10 Delhi Chit Fund Association vs. UOI 2013 (30) STR 347 (Del.)

The High Court in this case held that, there can be no levy of service tax on subscriptions contributed in the form of money and services rendered by foreman (consideration received as commission) in a business of chit fund. The entry serial no. 8 of Notification No. 26/2012-ST subjecting to activities of business of chit fund companies to Service Tax is liable to be quashed.

Goods Transport Agency Service

1.11 Caps & Prints (P) Ltd. vs. CST, Kolkata 2013 (30) STR 426 (Tri.-Kolkata)

The appellant in this case contended that, they have availed the services of various individual

truck owners and drivers and never availed services of any GTA and hence not liable to pay service tax. The Tribunal following decision of *Bellary Iron & Ores Pvt. Ltd. 2010 (18) STR 406 (Tri.-Bang.)* held that, no service tax is payable where assessee availed services of transportation of goods carriage not operated by GTA.

2. Interest/Penalties/Others

2.1 Vippy Industries Ltd. vs. CCE, Indore 2013 (30) STR 238 (Tri.-Del.)

The Tribunal relying on earlier decisions held that, refund of service tax paid on transportation of empty containers from yard to factory for stuffing export goods is admissible as the said activity is in relation to transportation of export goods.

It is further held that, service tax paid on detention charges are also in relation to transportation of export goods as the expression "in relation to transportation of export goods" is wide enough to cover such activity.

2.2 CCE&ST, Vapi vs. Veena Industries Ltd. 2013 (30) STR 318 (Tri-Ahmd.)

The appellant in this case asked for adjustment of tax paid under wrong code. The Tribunal observed that, payment of tax on Installation and commissioning is in fact payment for Annual Maintenance and Repair Service and therefore the adjustment of tax is permissible in view of Board Circular No. 58/7/2003-ST dated 20/05/2003.

2.3 Sarvashaktiman Traders Pvt. Ltd. vs. CCE, Kanpur 2013 (30) STR 385 (Tri.-Del.)

In this case, the cheuqe for bills raised received on 4-1-2007, which was physically deposited in bank on 5-2-2007 and service tax thereon paid on 5-3-2007. The department sought to impose penalty under section 76 for delay in payment of tax. The Tribunal held that, receipt of consideration of service is to be considered in February itself and hence there is no delay in deposit of tax.

3. CENVAT Credit

3.1 Doshion Ltd. vs. CCE, Ahmedabad 2013 (30) STR 240 (Tri.-Ahmd.)

The appellant in this case engaged in manufacture of water treatment plant, water treatment chemicals and providing taxable services under Maintenance or Repair Service, Erection, Commissioning and Installation Service availed CENVAT credit on Travel Agent Service, Custom House Agent's Service, Tour Operators Service, etc. The Tribunal held that, the lower authorities' assumption that, use of input services to be direct is unsustainable and the credit admissible as the services are used directly or indirectly for providing output service.

3.2 CST Bengaluru vs. Mercedez Benz Research & Develp. India (P) Ltd. 2013 (30) STR 257 (Tri.-Bang.)

The department in this case sought to deny CENVAT credit attributable to rent on car park, cafeteria, terrace of building, in-house training of professionals and services of professionals. The Tribunal held that, car park and cafeteria are necessary part and parcel of business premises of company employing 400 workers. The department has not given any justification for not treating terrace as part of business premises. Further, Outdoor Catering Service, training service, and professional services deserve to be treated as input service in relation to export of 100% EOU under STPI Scheme.

3.3 Danmet Chemicals P. Ltd vs. CCE, Mumbai-I 2013 (30) STR 308 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of service tax paid on Storage & Warehousing at Depot, which was place for selling and removal as defined in section 4(3)(c) of CEA, 1944. It is a service received up to place of removal, hence input service.

3.4 Paper Products Ltd. vs. CCE, Mumbai-III 2013 (30) STR 310 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of Service Tax paid on cleaning services

undertaken in factory premises as the same provides hygienic atmosphere, which is prerequisite and integrally connected with manufacturing, hence it is input service.

3.5 Birla Corporation Ltd. vs. CCE, Lucknow 2013 (30) STR 320 (Tri.-Del.)

The Department in this case sought to deny credit of Commission Agent's service on the ground that commission and brokerage paid to the commission agent and brokers was the payment made for the services provided after the removal of goods from the factory. The Tribunal held that, the contention of the department is not justified as services of commission agent/broker being in the nature of sales promotion, which were specifically included in the definition of input services and also being activity related to business.

3.6 Hindustan National Glass & Indus. Ltd. vs. CCE, Rohtak 2013 (30) STR 322 (Tri.-Del.)

The Tribunal in this case held that, the CENVAT credit of service tax paid on loading and unloading services availed at the transshipment point after removal from factory gate is not admissible as the factory gate being place of removal and said activity is not related to the manufacturing business.

3.7 Hindustan Zinc Ltd. vs. CCE, Jaipur 2013 (30) STR 324 (Tri.-Del.)

The appellant in this case claimed CENVAT credit of service tax paid on manpower supply services availed for plantation, maintenance of lawn etc. on the ground that, State Pollution Control Board, has given permission to set up zinc smelter plant subject to the condition of maintaining 33% area under green cover, failing which the permission was liable to be withdrawn. The Tribunal held that, the said service was necessary for compliance with the statutory provisions and covered under the definition of input service.

3.8 Oracle Granito Ltd. vs. CCE, Ahmedabad 2013 (30) STR 357 (Tri.-Ahmd.)

The Tribunal in this case allowed Cenvat credit of service tax paid on renting of immovable property for display of final product as the same is used for business purpose.

3.9 Rico Castings Ltd. vs. CCE, Delhi-III 2013 (30) STR 374 (Tri.-Del.)

The Tribunal in this case held that, services without which business is not possible is input service. Service of arranging finance for running business is included in examples of 'input service' given in definition in Rule 2(l) of CCR, 2004 and hence CENVAT credit thereon is admissible.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2013] 178 Comp Cas 173 (Delhi) In the Delhi High Court – World Phone India P. Ltd and Others vs. WPI Group Inc., USA

Section 9 of the Companies Act, 1956 having overriding effects of the provisions of the Act over the provisos in the Memorandum and Articles of Association of the company or any resolutions or agreements by a company also applies to a private company. Thus, non inclusion of any provisions of joint venture agreement in the Articles of Association, shall not be binding on the company.

Brief facts

This appeal filed under section 10F of the Companies Act, 1956 ("Act") , challenging the order of the Company Law Board ("CLB") on validity of a Board Meeting in contravention of joint venture agreement.

WPI Group Inc USA ("WPI") has filed a petition under sections 397 and 398 read with other sections before the CLB for various acts of oppression and mismanagement, including declaration of proceedings of a Board Meeting of World Phone India P. Ltd ("Company").

WPI had entered into a Joint Venture Agreement ("JVA") with the respondents, for investment in the above company. As per JVA, WPI holds 43.75% of shares of the company and remaining shares are held by other share holders who are also part of JVA. The Chairman of the company is a nominee of the WPI.

WPI has made various allegations as to act of oppression and mismanagement against the respondents. The allegations are, non-holding of AGM, no notice provided for AGM and transfer of shares among respondent share holders resulting in to one group now having shareholding of 56.25% of the company. The above facts were disclosed when draft of audited account was received by the Chairman. The Chairman carried out the RoC search of the company's records and found several discrepancies in the documents filed with the RoC. Also, the following allegations are made.

a. Legality of the appointment of one of the respondents as a director.

b. Non receipt of notice for AGM and holding of postponed AGM.

c. Validity of transfer of shares to other share holders instead of transferring equally among WPI and other share holders resulting into WPI becoming a minority shareholder.

d. Siphoning off of funds.

e. Holding Board Meeting without the Chairman's presence who has affirmative vote for issuance of further shares on right basis.

The above, allegations are at final stage of CLB's proceedings, except, one particular allegation as to validity of one board meeting, without the presence of the Chairman. It was submitted that notice of the said board meeting was received by the Chairman, but because of hurricane in USA, he could not come to India and by e-mail he had requested for the adjournment of the said board meeting. The meeting was for right issue of shares and offering to existing share holders was 1:1 ratio. No details of above right issue were given. It is submitted that as per clause 6.2 of the JVA, the Chairman had an affirmative vote in relation to certain matters and resolution in the said board meeting was passed without his presence and vote. One of the questions of CLB which is the matter for present matter, is the validity of clause 6.2 of JVA and whether without the Chairman's attendance, meeting was valid or not.

In its order CLB has found that since the company is a private company, provisions of section 81 as well as provisions of section 171 to 186 are not applicable. The company is at liberty to carve out its own rules. The company is governed by its Articles of Association and provisions of section 9 of the Act as to overriding effect of provisions of section to the Articles of Association is not applicable to a private company. CLB held that in present case, there are three share holders and all are also directors of the Company, the holding of the board meeting in the absence of one share holder with a right of affirmative vote was in violation of JVA. CLB has ruled that said board meeting was null and void.

The other two share holders, who are the respondents in the CLB petition, filed this application under section 10F of the Act against the above order of CLB.

Both the parties have made their submission for the above application on the following questions.

a. In absence of specific clause in article as to affirmative vote of the Chairman, whether clause 6.2 of JVA should be applicable.
b. Whether section 9 of the Act having overriding effect of the Act over any provisions of Memorandum and Articles of Association and resolution or agreement of the company or its members.

Judgments and reasoning

Court has upheld the application and quashed the CLB order on declaring the board meeting as null and void. However, court has stayed the implementation of the above interim order in light of final order from CLB. Court has observed that as per legal provisions, if article is silent on the existence of affirmative vote, then it is not possible to hold that validity of the clause of agreement would be binding on the share holders without being incorporated in the articles of association. Court has observed that provisions of JVA, which is though not inconsistent with the provisions of the Act, but not incorporated in the article is not binding. The court has rejected the submission by the respondents based on judgment by the Supreme Court in *Reliance Natural Resources Ltd., vs. Reliance Industries Ltd. [2010] 156 Comp Cas 455; 7 SCC 1.* In the said judgment, in terms of "doctrine of identification" it was submitted that knowledge of key personal viz. Mr. Mukesh Ambani, Mr. Anil Ambani and Smt. Kokilaben Ambani is also the knowledge of the company related to family arrangement and action of key personal should also be the action of the company. Court has observed that in said judgment, Supreme Court has not accepted the above play. Reliance was placed on the judgment in Supreme Court Judgment in *V.B. Rangaraj vs. V.B. Gopalakrishnan [1992] 73 Comp Cas 201; AIR 1992 SC 453* and also decision in *Shanti Prasad Jain vs. Kalinga Tubes Ltd. [1965] 35 Comp Cas 351; [1965] 2 SCR 720.* The said judgments provide that unless Articles of Association of the company is amended to be brought in terms of JVA, the terms of JVA are not enforceable. Various other judgments such as Bombay High Court decision in IL and *FS Trust Co. Ltd v. Birla Peruchhani Ltd. [2004] 121 Comp Cas 335;*

On applicability of section 9 of the Act, the Court has observed that while sections 81 to 89 and 171 to 186 of the Act so far as not applicable to a private company, the language of section 9 does not exempt the private company from its purview.

Hence, same is equally applicable to a private company also. It has also observed that section 9 does not distinguish as to agreement is entered by the company or its directors and share holders.

Case Law No. 2

[2013] 178 Comp Cas 163 (Delhi) In the Bombay High Court – VOV Cosmetics P. Ltd and Others vs. Union of India and Others.

Section 20 of the Companies Act, 1956 does not provide that a company cannot be registered merely because the proposed name is identical or too nearly resemble with the name of an existing company's name. Thus, under section 22, Central Government cannot, by rule, direct the company for change of its name due to above reason unless it satisfies itself as to the facts of the case.

Brief facts

The Petitioner has filed this petition challenging the order of the Regional Director ("RD") under section 22 of the Companies Act, 1956. ("Act"). As per RD's order, petitioner was directed to change the name of its company "VOV Cosmetic" from its name within 3 months from the date of order.

One of the petitioners ("P5") has been carrying the business of manufacturing and marketing of cosmetics under sole proprietorship in the style of Pioneer Products. The products were sold under the mark "VOV". Subsequently other petitioners (P2 & P3) have formed a partnership and continued the above business of P5. As per P2 & P3, they borrowed essential and distinctive characteristic VOV from P5 in the name of the firm. Subsequently they decided to convert the firm into a company under the Act.

The name "VOV" was objected to by another company namely "VOV Cosmetic P. Ltd" ("R4") which was incorporated on May 2011 prior to the Incorporation of petitioner company in September 2011 ("P1) by P2 & P3.

R1 has filed an application with the RD under section 22 of the Act to rectify the name of P1 so as not to resemble its name and not to use the words `VOV Cosmetic' in the rectified name.

It was also contended by the R4 that one of its promoters had applied for the registration of mark "VOV" and also by it and said applications are still pending.

RD has issued notice to P1 and others and in reply, they have admitted that their marks are not registered.

Both the parties have given their submissions supporting their claims. It was observed that name was obtained by certificate of chartered accountant under straight through process without giving the RoC a chance to review the false declaration in Form 1A.

Judgments and reasoning

Court has upheld the petition. It quashed the RD's order and directed the RoC that after hearing both the parties, it may pass a fresh order after considering the relevant facts in the application.

The court has analysed the provisions of section 20 and 22 of the Act. It observed that provisions of section 20 which states that "companies not to be registered with undesirable name" of the Act does not bar the Central Government from registering the company with the identical name or too nearly it resembles the name of an existing company. Whether name of such company is desirable or not depends on facts of each case. As language of section 20(2) provides that a name "may be deemed to be undesirable" by the Central Government.... thus use of word "may" - if legislature had a different intention, they would have used the word "shall". Further on review of provisions of section 22 as to rectification of name of company" the court has observed that language used in section is "if the Central Government so directs".... thus the word"if" indicates that it does not follow as a rule that merely because a company is inadvertently or otherwise registered with identical or too resemblance name with an existing company.

CA. Mayur Nayak, CA. Natwar Thakrar &
CA. Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent changes in FEMA through RBI circulars:

A. RBI CIRCULARS

1. Anti-Money Laundering (AML) standards/Combating the Financing of Terrorism (CFT) Standards – Money changing activities

The Financial Action Task Force (FATF) is the global standard setting body for anti-money laundering and combating the financing of terrorism (AML/CFT). In order to protect the international financial system from money laundering and financing of terrorism (ML/FT) risks and to encourage greater compliance with the AML/CFT standards, the FATF identified jurisdictions that have strategic deficiencies and works with them to address those deficiencies that pose a risk to the international financial system.

Risks arising from the deficiencies in AML/CFT regime of certain jurisdiction as stated in A.P. (DIR Series) Circular No. 70 dated January 10, 2013 has been updated *vide* this circular.

Financial Action Task Force (FATF) has updated its statement on the subject and document 'Improving Global AML/CFT Compliance: on-going process' on February 22, 2013.

The statement /document can be accessed from the following URLs also:

http://www.fatf-gafi.org/documents/documents/fatfpublicstatement22february2013.html and

http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/improvingglobalamlcftcompliance on-goingprocess-22february2013.html

This, however, does not preclude Authorised Persons from legitimate transactions with these countries and jurisdictions

(A.P. (DIR Series) Circular No. 101 dated May 2, 2013)

2. Anti-Money Laundering (AML) standards/Combating the Financing of Terrorism (CFT) Standards – Cross Border Inward Remittance under Money Transfer Service Scheme

Risks arising from the deficiencies in AML/CFT regime of certain jurisdiction as stated in A.P. (DIR Series) Circular No. 71 dated January 10, 2013 has been updated *vide* this circular.

With reference to the risks arising from the deficiencies arising in the AML/CFT regime of certain jurisdictions Financial Action Task Force (FATF) has updated its statement on the subject

and document 'Improving Global AML/CFT Compliance: on-going process' on February 22, 2013.

The statement /document can be accessed from the following URLs also:

http://www.fatf-gafi.org/documents/documents/fatfpublicstatement22february2013.html and

http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/improvingglobalamlcftcompliance on-goingprocess-22february2013.html

This, however, does not preclude Authorised Persons from legitimate transactions with these countries and jurisdictions

(A.P. (DIR Series) Circular No. 102 dated May 2, 2013)

3. Import of Gold by Nominated Banks/Agencies

In terms of AD (G.P. Series) Circular No. 7 dated March 6, 1998 RBI has permitted nominated banks/agencies to import gold on loan basis, Suppliers Credit/Buyers Credit basis, Consignment basis as also on Unfixed price basis.

However, the Working Group on Gold (Chairman: Shri K.U.B. Rao) recommended aligning gold import regulations with rest of the imports for creating a level playing field between gold imports and other imports. This was recommended taking into consideration that bulk of the gold imported by nominated banks is on consignment basis whereby nominated banks do not have to fund these stocks. Hence, to moderate the demand for gold for domestic use, it has been decided to restrict the import of gold on consignment basis by banks, only to meet the genuine needs of exporters of gold jewellery.

(A.P. (DIR Series) Circular No.103 dated May 13, 2013)

(This is a wise move by the RBI as restrictions on banks to import gold on consignment basis will require them not only to invest but also bear the exchange risk which is likely to result in lesser imports resulting into control of widening current account deficit.)

4. Foreign Direct Investment (FDI) in India – Issue of equity shares under the FDI scheme allowed under the Government route against pre-operative/pre-incorporation expenses

In terms of A.P. (DIR Series) Circular No. 74 dated June 30, 2011 read with A.P. (DIR Series) Circular No. 55 dated December 9, 2011 RBI has allowed issue of equity shares/ preference shares under the Government route by conversion of monies payable towards import of capital goods, etc., subject to various terms and conditions stated therein.

RBI has amended one of the conditions as stated in Para 3(II)(c) of A.P. (DIR Series) Circular No. 74 dated June 30, 2011 which prescribes the mode in which the payment should be made by the foreign investor to the company. The said condition has been amended as follows:

A.P.(DIR Series) Circular No. 74 dated June 30, 2011	***Earlier Condition***	***Revised condition***
Para 3(II)(c)	Payments should be made directly by the foreign investor to the company. Payments made through third parties citing the absence of a bank account or similar such reasons will not be eligible for issuance of shares towards FDI;	Payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA Regulations;

(A.P. (DIR Series) Circular No. 104 dated May 17, 2013)

(This move by the RBI will provide some flexibility. However, it appears that still more clarity is required to make the provisions effective)

5. Export of Goods and Software – Realisation and Repatriation of export proceeds – Liberalisation

In terms of A.P. (DIR Series) Circular No. 52 dated November 20, 2012, RBI had extended the enhanced period for realisation and repatriation to India, of the amount representing the full value of goods or software exported from six months to twelve months from the date of export. This relaxation was available up to March 31, 2013.

It has now been decided, in consultation with the Government of India, to bring down the above stated realization period from twelve months to nine months from the date of export, with immediate effect, valid till September 30, 2013.

The provisions in regard to period of realization and repatriation to India of the full export value of goods or software exported by a unit situated in a Special Economic Zone (SEZ) as well as exports made to warehouses established outside India remain unchanged.

(A.P. (DIR Series) Circular No. 105 dated May 20, 2013)

6. Liberalised Remittance Scheme for Resident Individuals – Reporting

As per the extant guidelines, AD Category banks are required to furnish information on the number of applications received and the total amount remitted under the Liberalised Remittance Scheme (LRS), on a monthly basis, in the prescribed format in both hard copy as well as soft copy in Excel format. AD banks are also advised to submit monthly statement before 5th of the succeeding month to the Reserve Bank of India.

In addition to submitting the hard copy, AD Banks were required to submit the LRS data through the Online Returns Filing System (ORFS) of Reserve Bank.

However, RBI has now decided that the AD banks will submit the data in soft form only. Accordingly, with effect from July 01, 2013, AD banks are required to upload the data (LRS data of June 2013) in ORFS on or before 5th of the following month. Where there is no data to furnish, AD banks are advised to upload 'nil' figures in the ORFS system.

(A. P. (DIR Series) Circular No. 106 dated May 23, 2013)

7. Format for seeking clarifications on the FDI Policy Issues

The Department of Industry Policy & Promotion has been receiving a large number of requests from various stakeholders seeking clarifications on the provisions of FDI policy. It is noted that many of the requests for clarification do not provide specific/adequate details of the proposal. As a result, this Department is unable to take decision/provide clarifications on such references.

In view of above, this Department has decided that henceforth it will process only the requests, which provide complete details of the issues, in the annexed format.

ANNEXURE

1.	Name of the existing/Proposed foreign investor	
(a)	Address	
(b)	Phone No.	
(c)	Mail id	
(d)	Date and place of incorporation	
2.	Name of the Indian investee entity/joint venture partner	
(a)	Address	
(b)	Phone No.	
(c)	Mail id	
(d)	Date and place of incorporation	
(e)	Present business activities	
(f)	Copy of MoA	
3.	Proposed amount of investment	
4.	Percentage foreign shareholding (pre and post investment)	
5.	Sector	
6.	NIC code of proposed activity	
7.	Gist (not exceeding 200 words) on proposed business activity in India	
8.	Mention paragraph No. of the policy on which clarification	
9.	Please mention the issue in brief.	
10.	Details of earlier SIA/FIPB/RBI approvals, if any. Enclose copies.	
11.	Any other information relevant to the case/issue.	

Authorized signatory

(This move is aimed at gathering necessary information for serious inquiries while at the same time restricting the flow of casual inquiries which imposed heavy burden on the DIPP. This move will help both the stakeholders as now there is specific format for seeking clarifications while DIPP also will be able to provide meaningful clarifications.)

Perfection is the child of Time.

— *Bishop Joseph Hall*


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Word "false" – Means wrongful act done intentionally and knowingly – Words 'malicious' and 'vexatious' – Meaning explained: Criminal P. C., 1974, Ss. 300, 403 – Estoppels – Different from principle of double jeopardy – It does not bar prosecution of accused for different offence. Constitution of India, Article 20

The appellant claimed to be the owner of agricultural land, Respondent No. 1 allegedly made an attempt to take forcible possession of the said land also filed FIR under Sections 427, 447 and 506 read with Sections 34 of the Indian Penal Code, 1860. Aggrieved, the appellant filed a complaint against Respondent No. 1, as well as against the police officials involved and in view thereof, under Sections 447, 323, 429 and 34, IPC was registered. The appellant engaged a lawyer who is respondent No. 2 in this appeal and filed Writ Petition seeking direction for quashing of FIR. The said writ petition was dismissed. In the meantime, in the criminal proceedings launched by the appellant a charge-sheet was filed against the Respondent No. 1. In the allegations made in FIR against the appellant, the police submitted a final report under Sections 173 and 169 of the Code of Criminal Procedure, 1973, in the court of the Metropolitan Magistrate, Delhi.

Respondent No. 1 approached the revenue authorities i.e. Tahsildar seeking the inclusion of his name in the revenue record as a person in possession/occupation of the said land. However, his claim was rejected by the Tahsildar. Respondent No. 1 also filed contempt case before the High Court of Delhi against the appellant for filing two criminal writ petitions seeking the same relief, and for not disclosing the fact that he had filed the first writ petition, while filing the second writ petition, owing to which, the said writ petition stood dismissed in default. On receiving notice from the High Court, the appellant filed a reply expressing his ignorance regarding the filing of the second criminal writ petition, and further stated that he was an illiterate person, owing to which, he had given all requisite papers to Respondent No. 2 advocate. The appellant filed a complaint before the Bar Council of Delhi against Respondent No. 2 for filing the second writ petition in collusion with Respondent No. 1. The High Court accepted the version of events submitted by the appellant and simultaneously also the apology tendered by the Respondent No.2 and closed the said criminal proceedings at the instance of Respondent No. 1.

After a period of six months Respondent No. 1 filed a Criminal Complaint u/s. 3(1)(vii) of the Act, 1989 for filing false criminal Writ Petition by the Appellant. The said complaint was rejected by the Metropolitan Magistrate. However the revision petition was allowed by the revisional court. The High Court also upheld the order. Before Supreme Court it was stated by the Appellant that filing of the instant complaint case amounts to abuse of process of the court. The criminal complaint was barred by the principle of estoppel, as the same issue has been fully adjudicated by the High Court in a criminal contempt case before it, and the High Court was fully satisfied that the fault lay in the actions of the Advocate i.e. Respondent No.2. The High Court even accepted the apology of the Respondent No.2 thereafter, and closed the said criminal proceedings at the instance of Respondent No.1. As the issue had already been adjudicated, and finally closed by the High Court, the Magistrate court cannot sit in appeal against the said order passed by the High Court, closing the said case of criminal contempt, as the subject matter and allegations of the case before him, are verbatim and have already been adjudicated To invoke the provisions of the Act, 1989, it is not enough that the complainant belongs to a Scheduled Caste or Scheduled Tribe, as it must further be established that the alleged offence was committed with the intention to cause harm to the person belonging to such category. Moreover, the term false, malicious and vexatious proceedings must be understood in a strictly legal sense and hence, intention *(mens rea),* to cause harm to a person belonging to such category must definitely be established.

The Supreme Court held that the dictionary meaning of word 'false' means that, which is in essence, incorrect, or purposefully untrue, deceitful, etc. Thus, the word 'false', is used to cover only unlawful falsehood. It means something that is dishonestly, untrue and deceitful, and implies an intention to perpetrate some treachery or fraud. In jurisprudence, the word 'false' is used to characterize wrongful or criminal act, done intentionally and knowingly, with knowledge, actual or constructive. The word false may also be used in a wide or narrower sense. When used in its wider sense, it means something that is untrue whether or not stated intentionally or knowingly, but when used in its narrower sense, it may cover only such falsehoods, which are intentional. The question whether in a particular enactment, the word false is used in a restricted sense or a wider sense, depends upon the context in which it is used.

Legitimate indignation does not fall within the ambit of a malicious act. In almost all legal inquiries, intention as distinguished from motive is the all important factor. In common parlance, a malicious act has been equated with an intentional act without just cause or excuse. The word 'vexatious' means 'harassment' by the process of 'law', 'lacking justification' or with 'intention to harass'. It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to claimant and that it involves an abuse of process of the court.

The Court further observed that the principle of estoppels is also known as 'cause of action estoppel' and the same is different from the principle of double jeopardy or; autre fois acquit, as embodied in section 403, Cr. P.C. This principle applies where an issue of fact has been tried by a competent court on a former occasion, and a finding has been reached in favour of an accused. Such a

finding would then constitute an estoppels, or *res judiciata* against the prosecution but could not operate as a bar to the trial and conviction of the accused, for a different or distinct offence. It would only preclude the reception of evidence that will disturb that finding of fact already recorded when the accused is tried subsequently, even for a different offence, which might be permitted by section 403(2) Cr. P. C. thus, the rule of issue estoppels prevents re-litigation of an issue which has been determined in a criminal trial between the parties.

The Court further observed that the issue involved herein stood closed at the instance of Respondent No. 1 himself before the High Court. Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh. The inherent power of the court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done. Thus, it is a judicial obligation on the court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. *Ex debito justitiae* is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint.

The Supreme Court set aside the judgment of the High Court and the complaint filed was also quashed, allowed the appeal.

Ravinder Singh vs. Sukhbir Singh & Ors. AIR 2013 SC 1048

2. Speedy justices – Importance emphasised – Adjournments – Should not be allowed to paralyse virtues of adjudication: Constitution of India, Article 21 – Civil P. C., 1908, O.17 R. 1

The respondent initiated civil action by instituting Civil Suit for injunction to restrain the defendant therein from selling or otherwise transferring the suit land towards the southern side of the house and further to permanently injunct him to make any construction on the land in dispute. After the written statement was filed, a counter claim was put forth by the defendant. Thereafter, issues were framed and the parties adduced evidences to substantiate their respective stands. The District Judge dismissed the suit and decreed the counter claim filed by defendant –petitioner herein. Being aggrieved by the aforesaid judgment and decree, the first respondent preferred First Appeal in the Court of the concerned additional District Judge who dismissed the appeal. The dismissal of appeal compelled the respondent to file Second Appeal in the High Court. The said appeal was dismissed for non-prosecution in the presence of the counsel for the respondent. After the appeal was dismissed for want of non-prosecution, the appellant before the High Court woke up from slumber and filed an application for restoration which was eventually allowed. And thereafter the matter was admitted on two substantial questions of law and there was direction for stay of operation of the impugned judgment and decree passed by the courts below. The Petitioner before the Supreme Court contended that there was no substantial question of law involved and the High Court had no reason to entertain the Second Appeal only on the factual score.

The Supreme Court observed that the proceedings before the High Court from the date of presentation of the Second Appeal till

the date of admission, the manner in which it has progressed is not only perplexing but also shocking. The Court further observed that the High Court should not have shown indulgence of such magnitude by adjourning the matter when the counsel for the appellant was not present. It is also astonishing that the lawyers sought adjournments in a routine manner and the court also acceded to such prayers. When the matter stood dismissed, though an application for restoration was filed, yet it was listed after a long lapse of time. Adding to the misery, the concerned official took his own time to put the file in order. It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments. Getting an adjournment is neither an art nor science. It has never been appreciated by the courts.

The Supreme Court observed that in a democratic set up, intrinsic and embed faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect –potentiality to bring in a state of cataclysm where justice may become causality. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. The philosophy of justice, the role of a lawyer and the Court, the obligation of a litigant and all legislative commands, the nobility of the Bench and the Bar, the ability and efficiency of all concerned and ultimately the divinity of law are likely to make way for apathy and indifference when undue delay takes place, for procrastination on the part of anyone destroys the values of life and creates a catastrophic turbulence in the sanctity of law. The virtues of adjudication cannot be allowed to be paralysed by adjournments and non-demonstration of due diligence to deal with the matter. It is therefore necessary that all who are involved in the justice dispensation system, which includes the Judges, the lawyers, the judicial officers who work in Courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of the time. There has to be strong resolve in the mind to carry out the responsibility with devotion. A time has come when all concerned are required to abandon idleness and arouse one self and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command. The Special Leave Petition was disposed of accordingly.

Noor Mohammed vs. Jethanand and Anr. AIR 2013 SC 1217.

3. Registration – Unregistered and unduly stamped instrument – Admissibility – Instrument chargeable with stamp duty, not duly stamped – Not admissible in evidence for any purpose, thought such document might be admissible in evidence for collateral purposes in view of proviso to S. 49 of Registration Act of 1908

The Additional District Judge in a Suit held that the document namely deed of partition was admissible in evidence though unregistered and not duly stamped. The facts are that the respondent plaintiff had filed the suit against the petitioners (defendants)

seeking declaration to the effect that the suit property of the plaintiff was purchased from the funds of HUF consisting of the plaintiff and the father of the defendants, and that therefore the plaintiff had one half share therein. The respondent-plaintiff has also prayed for the partition of the said property and for the possession of his ½ share and also for permanent injunction in respect of the said property. The trial court after framing the issues during the course of the evidence of the respondent plaintiff admitted the deed of partition in evidence. The Petitioners defendants therefore objected against the admissibility of the said document in evidence on the ground that the same was unregistered and therefore inadmissible in evidence. The trial court rejected the objections of the petitioners and held that the said document though unregistered was admissible in evidence for collateral purposes. The Petitioner defendants being aggrieved by the said order, filed a petition under Article 227 of the Constitution of India.

The High Court held that the instrument which was chargeable with stamp duty, if duly stamped could not be made admissible in the evidence for any purpose in view of S. 35 of the Stamp Act unless the requirements of the proviso to the said Section were complied with, though such a document might be admissible in evidence for collateral purposes in view of the proviso to S. 49 of the Registration Act. In the instant case, instrument partition deed itself created the rights in the immovable properties of the value of ₹ 100/- and upwards, in favour of the concerned parties partitioning the properties, it was a deed of partition requiring registration under S. 17(1)(b) of the Registration Act and was also an instrument chargeable to stamp duty as contemplated in S. 3 read with Schedule to the Stamp Act of 1899. The document in question though required to be compulsorily registered under S. 17 of the Registration Act, would be admissible in evidence for collateral purpose, in view of the proviso to S. 49 of the said Act, the suit being for the declaration and possession of one half share in the suit property and for permanent injunction on the basis of the document in question. However since the document in question, being an instrument of partition as contemplated in S. 2(14) of the Stamp Act of 1899, was chargeable to stamp duty, and since no such stamp duty as required under the said Act was paid, the said document was not admissible in evidence for any purpose in view of S. 35 of the Stamp Act of 1899 unless the requisite stamp duty was paid by the party concerned. Plea that since the document was already exhibited during the examination in chief of the plaintiff and the counsel for the defendants having already cross-examined the plaintiff on the said document, it was not open for the defendants to challenge the order of the trial Court maintaining the admissibility of document, would not be tenable as defendants had raised the objection against the admissibility of the said document in evidence and document was held admissible pending instant petition challenging admissibility.

When any document sought to be produced during the course of evidence is found to be insufficiently stamped, it is the duty of the Court to decide the issue of admissibility of such document under the relevant Stamp Act.

Since the defendants had specifically raised the objection with regard to the admissibility of the said document in evidence, the trial Court ought to have considered the provisions of the Stamp Act and the Registration Act before admitting such document in evidence. Thus document held inadmissible in evidence. The petition was allowed.

Jagdish Prasad & Ors. vs. Parshu Ram & Anr. AIR 2013 Rajasthan 17

4. Hire-purchase agreement – Rights of financier vis-à-vis purchaser – Recovery of possession of vehicle by financier owner as per terms of hire-purchase agreement – Whether an offence

The petition had been filed against the order passed by the High Court of Gauhati in Criminal Revision rejecting the case of the petitioner against the respondents that they had forcibly taken the custody of the vehicle purchased by the petitioner on hire-purchase from them., The Court had quashed the criminal proceedings against the respondents.

The Petitioner submitted that respondent financier had forcibly taken away vehicle financed by them and illegally deprived petitioner from its lawful possession and thus, committed a crime. Complaint filed by petitioner had been entertained by Magistrate even directing interim custody of vehicle (Maruti Zen) to be given to the petitioner. The Respondents submitted that under Hire-purchase agreement financier remains owner of vehicle till entire payment is made and, therefore, possession taken by financier for non-payment of installments by petitioner could not be held to be an offence. High Court rejecting case of petitioner against respondents that they had forcibly taken custody of vehicle purchased by the petitioner on hire-purchase from them.

The Supreme Court after examining the decision in case of *Sardar Trilok Singh vs. Satya Deo Tripathi (1979) 4 SCC 396* wherein it was held that proceedings initiated were clearly an abuse of process of the Court. The dispute involved was purely civil nature, even if the allegations made by the complainant were substantially correct. Under the hire-purchase agreement, the financier had made the payment of huge money and he was in fact the owner of the vehicle. The terms and conditions incorporated in the agreement gave rise in case of dispute only to civil rights and in such a case, the civil court must decide as to what was the meaning of those terms and conditions. In *K. A. Mathai vs. Kora Bibbikutty (1996) 7 SCC 212* the Supreme Court had taken similar view holding that in case of default to make payment of installments the financier had a right to resume possession even if the hire-purchase agreement does not contain a clause of resumption of possession for the reason that such a condition is to be read in the agreement. In such an eventuality, it cannot be held that the financier had committed an offence of theft and that too, with the requisite mens rea and requisite dishonest intention. The assertion of rights and obligations accruing to the parties under the hire-purchase agreement wipes out any dishonest pretence in that regard from which it cannot be inferred that the financier had resumed the possession of the vehicle with a guilty intention. In *Charanjit Singh Chadha vs. Sudhir Mehra (2001) 7 SCC 417* the Supreme Court held that recovery of possession of the vehicle by the financier owner as per terms of the hire-purchase agreement, does not amount to criminal offence.

The Supreme Court reiterated and held that in an agreement of hire purchase, purchaser remains merely a trustee/bailee on behalf of financier/financial institution and ownership remains with latter. Thus, in case vehicle is seized by financier, no criminal action can be taken against him as he is repossessing goods owned by him. There is no cogent reason to interfere with impugned judgment and order. The petition was dismissed.

Anup Sarmah vs. Bhola Nath Sharma & Ors. (2013) 1 SCC 400

5. Sale of property of Minor – Court permission – Hindu Minority and Guardianship Act 1956, S. 8(4)

The applicant is maternal uncle of Ku. Kamna Satyanarayan Handibag. A application was

filed by the respondent No.1 for sale of land in the name of Ku. Kamna which had been allowed by the trial court. The said order was challenged on the ground that while allowing the said application, the trial court had not taken into consideration the interest of minor child. It was also submitted that it was an admitted position that the said land was purchased by the respondent for ₹ 4.00 lacs and the approximate value of the said land, in the application filed before the trial Court, was shown ₹ 2.00 lacs. The applicant submitted that the fact that the said land is purchased for ₹ 4.00 lacs and the respondent No.1 wants to sell it for just ₹ 2.00 lacs, that itself, shows that the respondent No.1 is not interested in protecting the interest of the minor and the Court had also not considered the interest of the minor. It was also submitted that, even the Court should have considered the provision of Sections 29 and 31 of the Guardians and Wards Act 1890.

The Hon'ble High Court observed that in view of sub-section (4) of Section 8 of the Hindu Minority and Guardianship Act, it was incumbent upon the trial court to find out and make enquiry in depth how the sale of the land standing in the name of the minor is going to be benefited or advantageous to the child in future. The very fact that the land standing in the name of the minor is purchased at ₹ 4.00 lakhs and its approximate price is shown in the application as ₹ 2.00 lakhs itself is indicative of the fact that the respondent i.e. original applicant has not approached the Court with clean hands. That apart, a copy of notice received by the revision applicant in Misc. Application No. 18 of 2012 clearly indicated that, the custody of the minor is with the revision applicant i.e. maternal uncle of Kum. Kamna. In the said proceedings, there was a prayer by the applicant to declare him as a natural guardian. Therefore, in Misc. Civil Application No. 18 of 2012, a formal declaration is sought by the respondent in the said application to declare him as a natural guardian. Therefore, it follows from the said prayer that application filed by the respondent for the sale of land standing in the name of Ku. Kamna (minor) was premature. Apart from the above fact the trial court was duty bound to find the truth whether the application seeking permission to the sale land, standing in the name of the minor, would be for the benefit of the minor. However, the trial court had not made in a depth endeavour to do such an exercise and by cryptic reasons had allowed by the application filed by the respondent granting him permission to sale the land standing in the name of minor Ku. Kamna. In the application for sale of the land, the averments were general in nature and there were no specifications given by the applicant, in which he expressed his desire to protect the interest of the minor and by which mode and manner, he intends to deposit the amount after sell of land standing in the name of minor. Further the trial court had not adverted to the provisions of Sections 29 and 31 of the Guardians and Wards Act 1890.

The Hon'ble Court set aside the order of trial court and remitted the matter back to trial court to decide alongwith the Misc. Civil Application No.18/2012 which was kept pending for hearing.

Ku Kamna Satyanarayan Handibag vs. Satyanarayan Chatrabhuj Handibag & Anr.

Kishor Vanjara, *Tax Consultant*

TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxman, Current Tax Report (CTR), The Tax Referencer (TTR), Income Tax Review (I. T. Review), The Bombay Chartered Accountant Journal (BCAJ), The Chamber's Journal (CJ), All India Federation of Tax Practitioners Journal (AIFTPJ), Sebi and Corporate Laws (S & Co Laws), Company Case, Economic Times and Times of India for the period April to May 2013 have been arranged and indexed topic-wise.

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CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

VOLATILE TIMES

The month of May saw a sudden buoyancy in the global economy. Fortunately, there was no major negative news during this month from any corner of the world and the big positive factor was the US economy, which sustained a good rate of growth. Though the European economy was nothing to write about, at least there was no further deterioration. The improvement in the US economy and the sudden spurt in expectations from Japan changed the global sentiments for the better. The psychological winter which prevailed in many parts of the world changed into spring. The sentiments of investors, especially in Japan and the US improved and the patronage to equity investment by the investors, increased. This resulted in substantial and sudden rise in share prices across the globe. The stock markets in Japan and US started trading at their all time high. The change of sentiments during 2013 has been so rapid that since the beginning of the year, the Japanese stock price index Nikkei improved 48% before coming down from its peak at 15600 and the S&P 500 index rose 16% when it peaked in the month of May. Though the current developments anger well for the global economy, which was in desperate need of an impetus; the change that has happened is too sudden and fast. In the present era of too much information, people tend to react very quickly and investors are no exceptions to this rule. There seems to be a definite improvement in the global economies in the last few months but sentiments and expectations are probably running ahead of reality and immediate potentials. At their current levels, the markets have risen sharply and the volatility is also high. What goes up very fast may come down fast. Therefore, it is essential for the investors to watch out for proper valuations before they jump on to the bandwagon of investment opportunities in equity. It is likely that there will be a gradual improvement in the world economy over the next few years but the current valuations may not be cheap and may even be overstretched in some cases. A reaction has set in the Japanese stock market and it has already lost 15% from its peak. A similar possibility also exists in the US market but the reaction may be milder than that in Japan. Though the US data is looking impressive, it may be remembered that it has been achieved through monetary policy intervention and not based on pure fundamentals. When quantitative easing starts easing in the near future, it is essential for the US economy to sustain the growth. An economy cannot suddenly perform well after using crutches for a long period.

The current policy intervention by the Bank of Japan is likely to yield results but the impact on the real economy will be felt gradually. Therefore, the sharp improvement in the Japanese stock markets due to the policy measures was not fully justified. As the Japanese market advanced very sharply and

much beyond the fundamentals, it has resulted in a correction, which may continue for some more time. The Japanese stocks are attractive on a long term basis but they are not underpriced at the current levels.

The US stock market has had a dream run over the past few months and the market is hovering around its peak for some time now. As the economy is looking up, the markets may not react and even if a reaction sets in, it may be a mild one. The growth rate achieved by the US has shown improvement but it is not so great. Recovery from the current levels may not be quick and the economy will remain vulnerable to the developments in the other parts of the world.

The Chinese economy was expected to slow down and had actually slowed down a bit. However, recently there are positive developments which can push up the growth rate in China. If China accelerates its growth, the world economy will bounce back faster. In spite of the US growing faster, a slowing China can affect the overall growth in the world, as growth in Europe is flat and the Indian economy has not convincingly overcome its slow down.

Though there have been assurances by various Government authorities and ministers, the Indian economy is struggling to accelerate its rate of growth. The downward spiral of the growth rate might have got arrested, but the data is not suggesting great improvement in the economy. The positive sentiments are probably running ahead of the actual economy and this can result in a dangerous situation as the country enters the year of elections. In the absence of reforms, growth can remain subdued and foreign investment may not come up to the expected level. The Indian Rupee continues to remain weak as there is a huge current account deficit which the Government is unable to address in spite of its best efforts. This high current account deficit will also hinder the coveted easing of interest rates, which Indian businesses and industry are eagerly looking forward to. Therefore, though the sentiments have suddenly improved in India on the back of global events, the local situation is not yet satisfactory. The economic forward indicators are not becoming positive and there are more hopes and expectations than reality. We can only hope that the reality does not belie the expectations in the months to come.

Considering the current environment and the ensuing parliamentary elections, the economy may not improve suddenly, at least over the next one year. The Government in power is not likely to take any decisions on necessary reforms, which may prove to be unpopular with the masses. This will restrict the inflow of foreign funds and investments in India. The domestic investment is not in a great shape and there is no reason for it to suddenly increase. Therefore, no sudden fireworks can be expected from the Indian economy and the way upward is likely to be gradual. The rate of new investments will improve slowly and India will struggle to achieve 5.8% growth rate in the current year, though predicted by the Government.

The Indian stock markets have suddenly improved since the middle of April and reached their intermediate peak in the month of May. On the improved sentiments in Japan and the US, the global sentiments took a positive turn and that made the Indian stock market rally. The sudden rally sustained till the end of May. The current fundamentals of the Indian economy do not fully justify such a rally, nevertheless the stock market gained momentum. The flow of funds from foreign investors continued and some retail Indian investors joined in to fuel the rally. However, the faltering fundamentals are not allowing a rosy picture to emerge and therefore the investors are likely to remain skeptical over the next few months. The stock market may only gradually improve till the end of the current year and the rise may not take the index beyond 21000. Recently, the stock markets have reacted by about 5% from their intermediate peak and if it reacts a bit further, there can be an opportunity to buy at the Sensex level of around 19000. If the global markets start a fresh rally before the Sensex retreats to 19000 level, it may be advisable to start investing around the Sensex level of 19500. It is essential that the investors do not jump in but gradually accumulate their preferred stocks. Long term equity investors

and specially the retail investors may take the route of Systematic Investment Plan (SIP) of mutual fund houses for investing in equity. The term of the SIP can be at least one year though a term of three years is more preferable. If the Sensex rallies to about 20500 levels, profit booking will be advisable. Indian stock markets are likely to remain volatile as is the case with the global markets. In such markets, trading opportunities can be compelling for many investors. Non-seasoned players are advised not to get carried away with the attraction to trade and they should continue their steady investment policy.

There is an eminent possibility of a quarter per cent reduction in the bench mark interest rate in the ensuing policy of the Reserve Bank of India (RBI) but the current account deficit remains a serious concern and it can result in postponement of the easing for some more months. The bank fixed deposit rates have already started coming down and this fall will continue, though gradually. An important event for the business and industry will be the reduction of interest rates by the banks but the banks may not oblige till the RBI signals a rate cut. Therefore, businesses may continue to struggle due to high interest rates, which affect their profitability. The opportunities available to investors in the fixed income investment asset class may gradually reduce.

It appears that the property markets are slowing down as expected. They have definitely slowed down in big metros like Mumbai, Delhi and nearby areas but have some steam left in smaller towns, where the genuine housing needs are emerging on the back of increasing rural affluence. The property investments in smaller cities will probably do better in the near future and the investors may invest in such properties, provided that they have a reasonable access and contacts in those cities. Though there is a potential, investing in an altogether unknown location should be avoided, as from a non-local investor, market extracts more discounts, when the investor tries to sell the property. Impatience in selling and non-availability of local support can reduce the realisation from the sale of the property.

Bullion has remained steady with a negative bias in the month of May but the losing Indian currency has been exerting a positive pressure on the prices of the precious metals in the Indian markets. But for the chance of further depreciation of the Indian Rupee, the outlook of precious metals is not bright in the near future and so the investments may be avoided in this asset class for the time being. Possibility of a downward correction being existent, investors can also book partial profits.

The Indian Rupee continues to remain weak on the back of increase in the current account deficit. The growing Indian economy has an increasing need of imports and further, heavy import of gold is turning out to be a big spoiler in the efforts of the Government to reduce the deficit. The situation may continue unless some policy measures are taken to control the bulging deficit in the near future. It is hoped that the Government will take action at the earliest and stabilise the Rupee below the level of 55 per Dollar. A weakening currency is normally considered as a booster to exports but it may not so happen in the case of India, as Indian exports are elastic to exchange rate fluctuations but major Indian imports are quite non-elastic. Therefore, the weakening of Rupee can be more damaging for India due to increase in the current account deficit.

The economic sentiments have suddenly brightened in the world but it seems that the celebration is a bit premature. The long term outlook remains positive, but there can be short term hiccups in the months to come. External factors such as improved sentiments in the US market can negatively affect the foreign fund flow to India and can even cause some pull back of funds by foreign investors from the Indian stock market, resulting in a fall. The investors need to take a cautious approach in the days to come. They should not increase their allocation to equity drastically though a bias towards equity can be advantageous over a medium term. Opportunities will exist and be in abundance especially for those who are knowledgeable. Therefore, knowledge based investment is advisable to take advantage of the current volatile environment.

V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Facts & Query

Q.1 A car is purchased by a partnership firm in one of its partners name to save the registration/ taxes etc., but it is exclusively utilized for firm's business use. Can company claim depreciation on it as its own asset? Also whether profit / loss on sale can be booked and provided for taxation in the firm's books?

Ans. A partnership firm can purchase its asset either in the name of the firm or it may purchase it in the name of one of it's partners. In either case such asset is held by all the partners collectively. As such only because the asset is purchased in the name of one of its partners, will not make it an asset of such partner, and the said asset is an asset held by the firm. And as the firm is using its own asset for its business purposes, it can claim depreciation allowance on the said asset and also book the income or loss arising on the sale of the said asset.

Q.2 Mr. A booked sales turnover of ₹ 61,50,000/- in F.Y. 2011-12. This includes VAT of ₹ 1,50,000/-. Is Mr. A required to get his books audited u/s. 44AB?

Ans. Under S. 44AB, a person carrying on business, and if his turnover of sales or of any other business receipts, exceed its prescribed limit, he has to get his accounts duly audited by a Chartered Accountant. The taxes paid by him on his sales will be part of business turnover and as such VAT paid will be part of its turnover and it cannot be deducted from its turnover.

As such the querist has to get its accounts duly audited.

Q.3 Father-in-law distributed his whole worth equally amongst his 2 sons & their 2 wives as per his will while he was alive. Whether this income received as gift by daughter-in-law will be clubbed in the hands of father-in-law?

Ans. Under the law of Wills a Will becomes operative only after the death of the person making the Will. As such the father-in-law cannot distribute his assets, as per terms of the Will. As such distribution of assets among the daughter-in-law will be clubbed with his income, but it is not the gifted amount, but the income arising out of the distributed assets will be clubbed with his income. The distributed assets are not taxable under S 56(2)(vii) of the Act, as a daughter-in-law is a relative within definition under the said sub-section.

Q.4 Mr. A of Indian origin who was having Non residential status in F.Y. 2012-13 gifted ₹ 5 lakhs to his sister Ms. B who again is of Indian origin but NRI for F.Y. 2012-13. This

gift amount was received by Ms. B in India in foreign currency. She is having some taxable sources of income in India. Whether this gift is exempt in her hands in India?

Ans. A gift made to a relative is not taxable under S. 56(2)(vii) irrespective of the fact that a gift is made to a non-resident by another non resident. Such gift by a non-resident to another non-resident is not taxable under s. 56(2)(vii) if the donee is the relative of the donor. As in the querist's case gift is to the sister, who is relative and as such the same is not taxable under S. 56(2)(vii) of the I. T. Act.

Q.5 Mr. A incurred expenses of ₹ 10 lakhs for the marriage of his daughter which was not disclosed in his books. Can Assessing Officer make this addition twice, one as unexplained expenses and other as undisclosed source of income?

Ans. No receipt as income, whether deemed income or ordinary income cannot be added twice one as an unexplained marriage expenditure and other as income from undisclosed source. As such the A.O. can not add the same amount of ₹ 10 lakhs twice once as an unexplained expenditure and again as income from undisclosed source.

CA Ninad Karpe

THE LIGHTER SIDE

IN A FIX!

In the good old days, everyone enjoyed a test match. You watched a leisurely game played by gentlemen in white flannels over five days, with a possibility of no result.

The world of cricket has now turned upside down. There are various formats – test cricket, 50 over matches, T 20 and IPL. No other sport has so many formats of the same game.

In IPL, there are coloured clothes, cheerleaders and loud music – exact antithesis of the gentle game which was played many years ago. And with it, the money stakes are now really high. So, when you hear about match-fixing, why are you surprised?

In fact, when I heard the new term of spot fixing, I remembered the term "spot assessment" which was prevalent in Income-tax many years ago. In that sense, our tax laws are more forward looking than cricket!

When I read in the papers how the spot fixing was done, I rolled over with laughter. There is strategic timeout, when all the action outside the stadium is apparently brewed. It is, indeed, strategic – but, for whom?

After reading about players wearing their clothes in a particular manner, with a hand-towel hanging out, I have now become cautious. Whenever I visit a government office, I now ensure that there is nothing hanging out from my pocket and I have stopped carrying a handkerchief. Should it, by chance, be hanging out, I could be potentially accused of wanting to fix something.

I also learnt the difference between "stepping aside" and "stepping down", because of the recent controversy. Since I have been writing this column for so many years, I was thinking of "stepping down". Maybe, it is better to "step aside". Ultimately, I can always bounce back.

Fixing is as ancient as Adam and Eve. Eve "fixed" Adam and that's how he ate the apple.

We should stop fuming about all fixing and get back to our tax work. After all, we can always have cricket matches and give away "acting" award, instead of "man of the match" award!


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 9th May, 2013 till 8th June, 2013 and also some of the important future events which are as under –

1. Admission of New Members

The following new members were admitted in the Managing Council meeting held on 4th June, 2013.

LIFE MEMBERSHIP

1	SHRI SHAH MANOJ C. (Tran. Ord to Life)	CA	MUMBAI
2	SHRI NAYAK MAHESH GAUTAM	CA	MUMBAI
3	SHRI JAIN NARENDRA JAYANTILAL	CA	BANGALORE
4	SHRI SHRINGI SHAILESH VIJAY	CA	KOLHAPUR
5	SHRI KHANDELWAL GIRIRAJ B.	CA	MUMBAI
6	SHRI MORAY RAJU Z. (Tran. Ord to Life)	ADVOCATE	MUMBAI

ORDINARY MEMBERSHIP

1	SHRI SHAIKH KHALID BISMILLAH	ADVOCATE	NAVI MUMBAI
2	SHRI DHOLAKIA BHAVIK H.	CA	JAMNAGAR
3	SHRI BALDIA SHITAL KANTILAL	CA	MUMBAI
4	SHRI AGARWAL HARIOM	CA	MUMBAI
5	SHRI SHAH VIPUL JINENDRA	CA	MUMBAI
6	MRS. PANDYA NISHITHA	CA	MUMBAI
7	SHRI GUJRATHI CHETAN DEEPAK	CA	AURANGABAD
8	SHRI NAGAR YASH PANKAJKUMAR	CA	AURANGABAD
9	SHRI DAND DEVANG KUMAR	CA	MUMBAI
10	MS. THAKKAR DHARA HARESH	CA	MUMBAI
11	SHRI SHAH VIPIN MUGATLAL	CA	DHARANGAON
12	SHRI SHINDE PRASHANT WASUDEVRAO	CA	JALGAON
13	SHRI MAHALE SUNIL RUPCHAND	CA	JALGAON
14	SHRI BANSAL VIJAY R.	CA	INDORE
15	MRS AWATE PRAVINA SHARAD	ITP	MUMBAI
16	MISS SHASHTRI DHRUTI P.	ITP	MUMBAI
17	MISS VERMA MONU V.	CA	MUMBAI

18	SHRI SARAF ANUJ ASHOK	CA	MUMBAI
19	SHRI MEHTA PRANAV PRAKASH	CA	MUMBAI
20	SHRI B. RAMANA KUMAR	ADVOCATE	CHENNAI
21	SHRI UPNEJA MANEESH ASHOK	CA	NEW DELHI
22	SHRI SINHA RANJIT KUMAR H.	ADVOCATE	MUMBAI
23	MRS SINHA PUSHPA RANJIT KUMAR	ADVOCATE	MUMBAI
24	SHRI SUKHADIA TARANG D.	CA	MUMBAI
25	SHRI MISHRA RISHIKESH A.	CA	MUMBAI
26	SHRI PATIL MADHUKAR R.	CA	PUNE
27	SHRI PATKI SHYAMKANT MADHUKAR	CA	PUNE
28	SHRI VANARSE PRASAD SUDHAKAR	CA	PUNE
29	SHRI JANARTHANAN BHARATH	CA	MUMBAI
30	SHRI PUNJABI JETHA N.	CA	MUMBAI
31	SHRI KEDIA ASHISH VINOD	CA	MUMBAI
32	SHRI SHAH LITESH K.	CA	MUMBAI
33	SHRI NANDLAL KEYUR SURESHCHANDRA	CA	MUMBAI
34	SHRI BALDEVRAJ OMPRAKASH	CA	NEW DELHI
35	SHRI MANIYAR SATYANARAYAN R.	CA	JALGAON
36	SHRI SHAH BHAVIK JAYESH	CA	MUMBAI
37	SHRI GANDHI CHINTAN V.	CA	MUMBAI
38	SHRI SHETH SAHIL HASMUKH	CA	MUMBAI
39	SHRI RAMAWAT SUBHASH BIHARILAL	CA	MUMBAI
40	MRS ASSAR SWATI SANDEEP	ITP	MUMBAI
41	SHRI DANGERWALAL MEET SAURIN	CA	MUMBAI
42	MS BHATI NIDHI MANOJ	CA	MUMBAI
43	MS MULTANI SAISUDHA N.	CA	MUMBAI
44	SHRI TURALKAR KALPESH S.	ADVOCATE	MUMBAI
45	SHRI SARDA RAHUL RAJENDRA	CA	MUMBAI
46	SHRI UTPAT RAJENDRA SITARAM	CA	MUMBAI
47	SHRI SUTHAR ASHOKKUMAR RATANLAL	CA	MUMBAI
48	SHRI JAIN VIRENDRA NEMICHAND	CA	MUMBAI
49	SHRI DAMANIA ASHWIN PRABHUDAS	CA	MUMBAI
50	SHRI THAKKAR DEEPAK H.	CA	MUMBAI
51	SHRI DWIVEDI VIMAL	CA	THANE

STUDENT MEMBERSHIP

1	MS BATHIJA SHRADDHA	ICAI

ASSOCIATE MEMBERSHIP

1	UDF & ASSOCIATES	1 YEAR
2	MEHTA & MEHTA	1 YEAR

2. PAST EVENTS

1 MEMBERSHIP & EOP COMMITTEE

A half day Students workshop was organised on 24th May, 2013 at National Stock Exchange, BKC.

2 DIRECT TAXES COMMITTEE

The Intensive Study Group Meeting was held on 7th June, 2013 on the subject "Recent Important Decisions under Direct Taxes". The meeting was addressed by CA. Ashok L. Sharma

3. FUTURE EVENTS

1. NOTICE OF 86TH ANNUAL GENERAL MEETING

The 86th Annual General Meeting of The Chamber of Tax Consultants will be held on Thursday, 4th July, 2013 at Terrace Hall, West End Hotel, New Marine Lines, Mumbai – 400 020 at 4.30 p.m. For further details, please refer to CITC News Vol. XIII No. 8 of June, 2013.

2. DIRECT TAXES COMMITTEE

WORKSHOP ON TAX DEDUCTED AT SOURCE:

The "Workshop on TDS" will be held on 15th June, 2013 at M. C. Ghia Hall. The Workshop will be addressed by CA Nishit Kapadia, CA Mahendra Sanghvi, Mr Deepak Tralshawalla, Advocate, CA Mayur Nayak, Shri Keshav Bhujle, Advocate, CA Gautam Nayak, and CA Mayur Nayak will be trustee for the Brains Trust Session.

3. INTERNATIONAL TAXATION COMMITTEE:

a. Publication on INTERNATIONAL TAXATION – A Compendium:

The Committee has come out with a publication of 4 volume set on "International Taxation – A Compendium". The Special Pre-Publication price for 4 volumes set for members is Rs. 3500/-.

b. The 7th Residential Conference on International Taxation-2013 will be held on 20th June to 23rd June, 2013 at The Golden Palms Hotel & Spa, Bengaluru. The conference will be addressed by eminent faculties in the field of International Taxation. The enrolment of the conference is closed on Residential basis and is open for Non-Residential Delegates.

c. INTENSIVE STUDY GROUP ON INTERNATIONAL TAXATION- MEMBERSHIP

CTC's Intensive Study Group on International Taxation has been making in-depth study of various fundamental concepts, controversial provisions and practical issues related to International Taxation for the past few years. Recent studies included Indian Anti-avoidance decisions, GAAR, Royalties, Article-wise Study of OECD Model, important OECD Reports, Section 9, etc. The study is done by analysis of a specific topic by the group as a whole, led by a couple of group leaders. The idea is to have a self-study and to learn from debate, discussion and deliberation.

The focus of the Intensive Study Group is on advanced concepts of International Taxation. We will be planning more meetings in the near future on relevant day-to-day practice issues and fundamental topics of interest. Some of the topics for discussion being planned to include are: Treaty Entitlement, Inbound & Outbound Tax Structuring; Royalty, FTS, etc.

4. JOURNAL COMMITTEE

The Committee has planned to bring special story "Business Valuation" in the forthcoming issue for the month of July, 2013.

5. STUDY CIRCLE & STUDY GROUP COMMITTEE

i) Study Group Meeting is scheduled on 28th June, 2013 on the Subject "'Recent Decision's under Direct Taxes". The meeting will be led by Shri Nitesh Joshi, Advocate.

ii) Study Circle Meetings are scheduled

a) on 11th June, 2013 on the subject "'Taxation of Builders & Developers". The meeting will be led by CA. Jagdish Punjabi.

b) on 27th June, 2013 on the subject " Issues under Capital Gains – Section 54,54F, 54EC, & Section 50C. The meeting will be chaired by Shri Vipul Joshi, Advocate and led by Shri Mandar Vaidya, Advocate. The meeting is in continuation of earlier meeting held on 31st October, 2012 and 17th January, 2013.

iii) Study Circle Meeting on International Taxation is scheduled on 17th June, 2013 on the subject "Taxation of Shipping Company". The meeting will be lead by CA Natwar Thakrar.

6. ELECTION FOR THE YEAR 2013-14

This is to notify that there will not be any election for the post of President and for the post of Managing Council Members (Thirteen) in view of there being only one valid nomination for the post of President and thirteen valid nominations for the post of Managing Council Members.

The Nominations are:

FOR THE POST OF PRESIDENT

1. Mr. Yatin K. Desai

FOR THE POST OF MANAGING COUNCIL MEMBERS

1. Mr. Ajay R. Singh
2. Mr. Apurva R. Shah
3. Mr. Ashit K. Shah
4. Mr. Ashok L. Sharma
5. Mr. Avinash B. Lalwani
6. Mr. Haresh P. Kenia
7. Mr. Hinesh R. Doshi
8. Mr. Hitesh R. Shah
9. Mr. Ketan L. Vajani
10. Mr. Paras K. Savla
11. Mr. Paresh P. Shah
12. Mr. Vijay U. Bhatt
13. Mr. Yatin R. Vyavaharkar

7. RENEWAL NOTICE – 2013-2014

The renewal fees for Annual Membership, Subscription of IT Review, Study Group and Study Circles meeting and Other Subscription for the financial year 2013-14 has fallen due for payment on 1st April, 2013.

The details of the Fees are as under:

		FEES	SERVICE TAX	TOTAL
1.	Membership Renewal Fees (for 1 year)	₹ 1,300/-	₹ 161/-	₹ 1461/-
2	The Chamber's Journal Subscription (Life Members)	₹ 550/-	–	₹ 550/-
3	The Chamber's Journal Subscription (Non Members)	₹ 1,000/-	–	–
4	Associate Membership	₹ 2000/-	₹ 247	₹ 2247
5	Student Membership Fees	₹ 250/-	₹ 31/-	₹ 281/-
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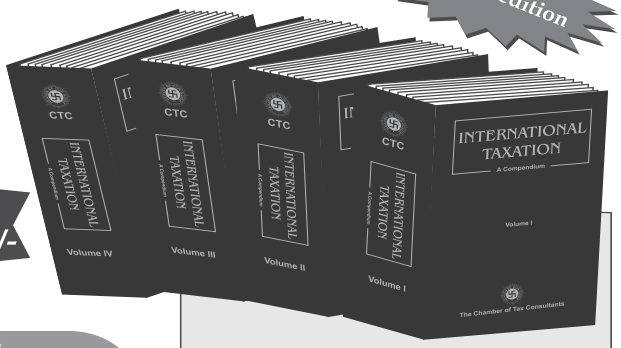

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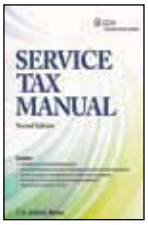

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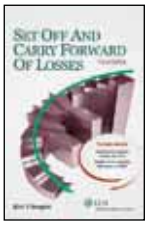

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