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A Monthly Journal of
The Chamber of Tax Consultants

The Chamber's Journal

May 2013

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Your Monthly Companion on Tax & Allied Subjects

Maharashtra Co-operative Housing Societies - Part-II

Under section 79 of Maharashtra Co-operative Societies Act, the Commissioner of Co-operation and Registrar of Co-operative Societies, Maharashtra State, approves model bye-laws which prescribe a format of minimum requirement in the bye-laws of a co-operative housing society. The model bye-laws are not compulsory to be adopted by the co-operative housing society and it cannot be implemented until the General Body Meeting of the society adopts it by 2/3rd majority, with suitable amendments, alterations or changes.

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The Chamber of Tax Consultants

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TRANSFORMING INFORMATION INTO KNOWLEDGE

MAHARASHTRA CO-OPERATIVE HOUSING SOCIETIES - PART-II

ALLIED LAWS COMMITTEE

Study Circle Meeting held on 16th April, 2013 on the subject "FEMA Provisions with respect to Inbound & Outbound Investment in Real Estate".

Shri D. T. Khilnani addressing the members.

DIRECT TAXES COMMITTEE

8th Intensive Study Group (Direct Tax) Meeting held on 18th April, 2013 on the subject "Recent Important Decisions under Direct Taxes".

CA Jagdish Punjabi addressing the members.

STUDY CIRLCE & STUDY GROUP COMMITTEE

Study Group Meeting held on 16th April, 2013 on the subject "Recent Decision under Direct Tax".

Shri Keshav Bhujle, Advocate addressing the members. Seen from L to R : CA Ashok Sharma, Chairman, Allied Laws Committee, CA Mulesh Savla, Convenor, Shri Paras S. Savla, Advocate, CA Haresh Kenia, Chairman, Study Circle & Study Group Committee, CA Manoj Shah, President, CA Dilip Sanghvi, Vice Chairman, CA Dinesh Shah, Convenor.

Study Circle Meeting held on 25th April, 2013 on the subject "Rectification, Refund and Tax credits in relation to e-filing of Tax Returns".

CA Mahendra Sanghvi addressing the members.

MEMBERSHIP & EOP, RRC & PR AND JOURNAL COMMITTEE

Launching of e-Journal & Revamped Website & Organising a Musical Evening held on 19th April, 2013 at The Mysore Association Auditorium

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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 brings to you, the second part of the Special Story – Maharashtra Co-operative Housing Societies. In this issue, we have covered several new and pertinent topics. Both the issues put together, would constitute useful reference material as far as Co-operative Housing Societies are concerned. Leading professionals handling issues pertaining to Co-operative Housing Societies have contributed to this issue. I thank all of them for sparing their valuable time.

While the Chamber was busy putting together this Special Story on Co-operative Housing Societies in Maharashtra, it is ironic that two tragic and puzzling incidents occurred involving the housing societies – one that of the collapse of an illegal structure in Mumbra, in which about 75 people were killed and another, the Campa Cola compound residents, who faced eviction and subsequent demolition of their houses.

The tragic collapse of the illegal structure causing end of several innocent lives and the subsequent 'bandh' called by the politicians in protest against orders of the local authorities to demolition other such illegal structures speaks volumes about the stink in the industry. The age-old nexus between the politicians and builders has fractured the legal structure within which the housing society industry is to function – the collapse is symbolic of the collapse of the legal structure itself and it also highlights the necessity to revive the legal framework.

Equally puzzling was the scene of wailing residents of the Campa Cola Compound – elements in the local authority let the illegal structure be constructed and inhabited for twenty long years and one fine day, for reasons best known to it, ordered eviction and subsequent demolition. Builders coming up with illegal structures, selling them at very high costs under the protection of the local politician-goons, the builder ultimately abandoning the responsibility of the structure once his pockets are filled is quite common throughout Mumbai – whether it is far flung and impoverished areas like Mumbra or posh localities like Worli. I hope these incidents serve as pointers to all the stakeholders involved – the buyers, the sellers and the politicians. I wish this Special Story would come to the aid of all the members who are definitely part of the industry in various capacities.

K. GOPAL
Editor

From the President

Dear Reader,

It's time to renew our ties with the Chamber; yes I am referring to renewing membership of the Chamber. Quite a few members are yet to renew their membership. I request them to do so at earliest. May I further request readers to spread awareness about Chamber and its activities amongst your group of professional acquaintances to mobilise membership of the Chamber. It would surely be your contribution to profession in terms of offering an opportunity to a professional to be part of continuous process of knowledge dissemination which Chamber carries as its core object.

Chamber has launched its revamped website on 19th April, 2013, the day of Ram Navami. I would urge members to visit website (www.ctconline.org) and give their constructive suggestions, especially on the e-Journal in terms of accessibility, search functions and user friendliness.

Last few days have been extremely disturbing from India's governance perspective. Scams after scam have hit the headlines and as a country and its citizens we are passing through one of the worst phase. It seems country's leaders are morale proof. It is absolutely chaotic and uncontrollable, be it cash for job instance, or tampering with CBI's report, the governance and ethical standards have hit the rock bottom. In the wake of this state of affairs, important bills like Companies Bill, Land Reforms Bill may not get a chance to turn into Act/s.

While summer is at its peak in May, the heat on professional front would be at its lowest in this month. And therefore month of May is a time to relax, unwind ourselves and be with family and enjoy vacation time. Being less hectic, month of May is offering us an opportunity to think out

of box for our practice; to develop or think of venturing into newer areas in practice where as a professional one would have developed interest by now. Many of us would have entered practice without having any specific goal of developing practice in certain direction. Rather, the flow of work would have decided the direction of practice. This sort of growth in practice at times leads to fatigue as things become too routine and therefore current practice may not be offering charm and joy of professional achievement. But this requires us to move out of comfort zone and take risk in terms of developing area of practice where one has keen interest. The best way to develop is to learn the subject of desire deeply and simultaneously get ready to expose oneself by leading study circles and writing articles. This approach will bring objectivity to learning and study. In my view, this is the only way for a professional to demonstrate his abilities and speaking and writing is the only way of marketing for a professional.

Let the heat of summer ignite the fire within us to do what we like as professionals. Each one of us has potential, may be untapped so far.

Let me leave you with these thoughts and saying – First Deserve & then Desire.

MANOJ SHAH
President

The power is with the silent ones, who only live and love and then withdraw their personality. They never say "me" and "mine"; they are only blessed in being instruments.

— *Swami Vivekananda*

The Chamber of Tax Consultants

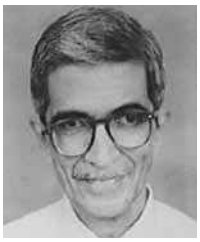
Vision Statement

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

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

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

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



V. H. Patil, *Advocate*

Ved and Vedanta

SANKHYA (JNANA) THE YOGA OF KNOWLEDGE

Sanjaya uvaca:

Tam tatha krpayavistamasrupurnakuleksanam

Visidantamidam vakyamuvaca Madhusudanah 1

Sanjaya said:

1. To him who was thus overcome with pity, whose eyes were filled with tears, who was agitated and despondent, Madhusudanah spoke these words.

Sri Bhagavan uvaca:

Kutastva kasmalamidam visame samupasthitam

Anaryajustamasvargyamakirtaramarjuna 2

The blessed Lord said:

2. Whence has this dejection come upon you in a crisis, unworthy of an Aryan, attaining neither heaven nor fame, O Arjuna.

Klaibya ma sma gamah Partha naitattvayyupapadyate

Ksudram hrdayadaurbalyam tyaktvottistha Parantapa 3

3. Yield not to unmanliness, O Partha, it does not befit you. Casting off this mean weakness of heart, arise O Parantapa.

Arjuna uvaca:

Katham Bhismamaham sankhye Dronam ca Madhusudana

Isubhih prati yotsyami pujarhavarisudana 4

Arjuna said:

4. How shall I, O Madhusudana, fight with arrows against Bhisma and Drona in battle, they who are worthy of worship, O Arisudana?

Gurunahatva hi mahanubhavan

Sreyo bhoktum bhaiksyamapiha loke

Hatvarthakamamstu gurunihaiva

Bhunjiya bhogan rudhirapradigdhan 5

5. Better indeed is to live on alms in this world than to slay the most noble teachers; but by slaying them all my enjoyments of wealth and desires even here will be stained with blood.

Na caitadidmah kataranno gariyo

Yadva jayema yadi va no jayeyuh

Yaneva hatva na jijivisama

Ste'vasthitah pramukhe dhartarastrah 6

6. Nor do we know which is better for us, that we should conquer them or they should conquer us. The very sons of Dhrtarastra, whom

having slain we do not wish to live, stand facing us.

Karpanyadosopahatasvabhavah

Prcchami tvam dharmasammudhacetah

Yacchreyah syanniscitam bruhi tanme

Sisyaste'ham sadhi mam tvam prapannam 7

7. My nature is overpowered by the taint of pity. With my mind confused as to duty I ask thee: Tell me decisively which is good for me. I am thy disciple Instruct me who has taken refuge in thee.

Na hi prapasyami mamapanudyad

Yacchokamuchosanamindriyanam

Avapya bhumavasapatnamrddham

Rajyam suranamapi cadhipatyam 8

8. I do not see that which can remove the grief which is drying up my senses even on obtaining prosperous and unrivalled kingdom on earth and lordship over the gods.

Sanjaya uvaca:

Evamuktva Hrsikesam Gudakesah parantapa

Na yotsya iti Govindamuktva tusnim babhuva ha 9

9. Having spoken thus to Hrsikesa, Gudakesah, the destroyer of foes, said to Govinda, "I will not fight" and became silent.

Tamuvaca Hrsikesah prahasanniva Bharata

Senayorubhayormadhye visidantamidam vacah 10

10. To him who was despondent in the midst of the two armies, Hrsikesa, smiling as it were, spoke these words, O Bharata.

Sri Bhagavan yvaca

Asocyananvasocastvam prajnavadamsca bhasase

Gatasunagatasumsca nanusocanti panditah 11

The blessed Lord said:

11. You have been grieving for those that should not be grieved for and you speak words of wisdom. The wise grieve neither for the living nor for the dead.

Na tvevaham jatu nasam na tvam neme janadhipah

Na caiva na bhavisyamah sarve vayamatah param 12

12. Never indeed was I not, nor you, nor these rulers of men; also none of us will cease to be hereafter.

Dehino sminyatha dehe kaumaram yauvanam jara

Tatha dehantarapraptirdhirastatra na muhyati 13

13. Just as the embodied (passes through) childhood, youth and old age in this body, so does it pass into another body; there the wise one is not grieved.

Matrasparsastu Kaunteya sitosnasukhduhkhadah

Agamapayino nityastamstitiksasva Bharata 14

14. The sense contacts, O Kaunteya, which cause heat and cold, pleasure and pain, they come and go, they are impermanent; endure them, O Bharda.

Yam hi na vyathayantyete purusam Purusarsabha

Samaduhkhasukham dhiram so mrtatvaya kalpate 15

15. The man who, verily, these afflict not, O Purusarsabha; balanced in pain and pleasure, steadfast, he is fit for immortality.

Nasato vidyate bhavo nabhavo vidyate satah

ubhayorapi drsto ntastvanayostattvadarsibhih 16

16. The unreal has no existence, the real never ceases to be, the truth about both these indeed has been seen by the seers of truth.

Avinasi tu tadviddhi yena sarvamidam tatam

Vinasamavyayasyasya na kascitkartumarhati 17

17. Know indeed That to be indestructible by which all this is pervaded, none can cause the destruction of this Imperishable.

Antavanta ime deha nityasyoktah saririnah

Anasino prameyasya tasmadyudhyasva Bharata 18

18. These bodies of the Embodied, which is eternal, indestructible, immeasurable, are said to have an end. Therefore fight, O Bharata.

Ya enam vetti hantaram yascainam manyate hatam

Ubhau tau na vijanito nayam hanta na hanyate 19

19. He who regards This as slayer and he who thinks This is slain, both of them are ignorant. This neither slays nor is slain.

Na jayate mriyate va kadacin-

Nayam bhutva bhavita van a bhuyah

Ajo nityah sasvato yam purano

Na hanyate hanyamane sarire 20

20. This is not born nor does it die, nor having been will ever again cease to be; This is unborn, eternal, changeless, ancient, It is not killed when the body is killed.

Vedavinasinam nityam ya enamajamavyayam

Katham sa purusah Partha kam ghatayati hanta kam 21

21. He who knows This to be indestructible, eternal, unborn, immutable, how can that man, O Partha slay anyone or cause anyone to be slain?

Vasamsi jirnani yatha vihaya

Navani grhnati naro parani

Tatha sarirani vihaya jirna-

Nyanyani samyati navani dehi 22

22. Just as a man casting off worn-out garments puts on new ones, so the embodied casting off worn-out bodies enters new ones.

Nainam chhindanti sastrani nainam dahati pavakah

Na caiman kledayantyapo na sosayati marutah 23

23. Weapons do not cleave This, nor fire burns This, nor water wets This, nor wind dries.

Acchedyo yamadahyo yamakledyo sosysa eva ca

Nityah sarvagatah sthanuracalo yam sanatanah 24

This cannot be cut, nor burnt, nor wetted, nor dried. This is eternal, all-pervading, stable, immovable and ancient.

Avyakto yamacintyo yamavikaryo yamucyate

Tasmadevam viditvainam nanusocitumarhasi 25

25. This is said to be unmanifest, This is inconceivable, This is unchangeable; therefore, knowing This as such, you should not grieve.

Atha caiman nityajatam nityam va manyase mrtam

Tathapi tvam Mahabaho nainam socitumarhasi 26

26. But if you think This as constantly being born and constantly dying, even then, O Mahabaho, you should not grieve like this.

Jatasya hi dhruva mrtyurdhruvam janma mrtasya ca

Tasmadapariharye rthe na tvam socitumarhasi 27

27. Certain, indeed, is death for the born and certain is birth for the dead; therefore you should not grieve over the inevitable.

Avyaktadini bhutani vyaktamadhyani Bharata

Avyaktanidhandnyeva tatra ka paridevand 28

28. Beings are unmanifest in their origin, manifest in their middle, unmanifest again in their end, O Bharata, what is there to grieve about?

Ascaryavatpasyati kascidena-

Mascaryavadvadati tathaiva canyah

Ascaryavaccainamanyah srnoti

Srutvapyenam veda na caiva kascit 29

29. One sees This as a wonder so also another speaks of This as a wonder, another hears, of This as a wonder; and though having heard, none knows This at all.

Dehi nityamavadhyo yam dehe sarvasya Bharata

Tasmatsarvani bhutani na tvam socitumarhasi 30

30. This Indeweller in the bodies of all is ever indestructible, O Bharata; therefore you should not grieve for any creature;

Svadharmamapi caveksya na vikampitumarhasi

Dharmyaddhi yuddhacchreyo nyatksatriyasya na vidyate 31

31. Further, looking at your own duty you should not waver, for there is nothing better for a kshatriya than a righteous war.

Yadrcchaya copapannam svargadvaramapavrtam

Sukhinah ksatriyah artha labhante yuddhamidrsam 32

32. Happy are the kshatriyas, O Partha, who get such a battle that comes unsought as an open door to heaven.

Atha cettvamimam dharmyam sangramam na karisyasi

Tatah svadharmam kirtim ca hitva papamavapsyasi 33

33. Now, if you will not wage this righteous war, when having abandoned your duty and fame you will incur sin.

Akirtim capi bhutani kathayisyanti te vyayam

Sambhavitasya cakirtirmaranadatircyate 34

34. People also will recont your perpetual dishonour and to the honoured, dishonour is worse than death.

Bhayadranaduparatam mamsyante tvam maharathah

Yesam ca tvam bahumato bhutva yasyasi laghavam 35

35. The great chariot-warriors will think that you have withdrawn from the battle out of fear and you that were highly esteemed by them will be lightly held.

Avacyadamsca bahunvadisyanti tavahitah

Nindantastava samarthyam tato duhkhataram nu kim 36

36. And your enemies will say many unbecoming words caviling your prowess. What indeed could be more painful than that?

Hat ova prapsyasi svargam jitva va bhoksyase mahim

Tasmaduttistha kaunteya yuddhaya krtaniscayah 37

37. Either slain you will attain heaven or victorious you will enjoy the earth, therefore arise O Kaunteya, determined to fight.

Sukhaduhkhe same krtva labhalabhau jayajayau

Tato yuddhaya yujyasva naivam papamavapsyasi 38

38. Treating alike pleasure and pain, gain and loss, victory and defeat, then get ready for battle, thus you will not incur sin.

Es ate bhihita sankhye buddhiyoge tvimam srnu

Buddhya yukto yaya Partha karmabandham prahasyasi 39

39. This is the wisdom of sankhya taught to you, now listen to the wisdom of yoga, endowed with which O Partha, you shall cast off the bond of action.

Nehabhikramanaso sti pratyavayo na vidyate

Svalpamapyasya dharmasya trayate mahato bhayat 40

40. In this there is no loss of effort nor is there production of contrary result. Even very little of this discipline protects one from great fear.

Vyavasayatmika buddhirekeha Kurunandana

Bahusakha hyanantasca buddhayo vyavasayinam 41

41. In this the intellect is resolute and one-pointed O Kurunandana; many-branched and endless indeed are the thoughts of the irresolute.

Yamimam puspitam vacam pravadantyavipascitah

Vedavadaratah Partha nanyadastiti vadinah 42

Kamatmanah svargapara janmakarmaphalapradam

Kriyavisesabahulam bhogaisvaryagatim prati 43

Bhogaisvaryaprasaktanam tayapahrtacetasam

Vyavasayatmika buddhih samadhau na vidhiyate 44

42. The unwise utter flowery speech, rejoicing in the letter of the Vedas O Partha, saying. "There is nothing else than this."

43. Obsessed with desires, with heaven as the ultimate goal of birth and action, (they prescribe) many specific rites for attainment of pleasure and power.

44. Those are attached to pleasure and power, whose minds are drawn away by that (flowery speech), have no determined intellect fixed in Samadhi (God-consciousness).

Traigunyavisaya veda nistraigunyo bhavarjuna

Nirdvandvo nityasattvastho niryogaksema atmavan 45

45. The Vedas deal with the three gunas (attributes). Be thou free, O Arjuna, from the three gunas, free from the pairs of opposites, remain ever in sattva (purity), free from acquisition and preservation and established in the Self.

Yavanartha udapane sarvatah samplutodake

Tavansarvesu vedesu brahmanasy vijanatah 46

46. To an enlightened Brahmana all the Vedas are of as much use as a pond is where there is a flood of water everywhere.

Karmanyevadhikaraste ma phalesu kadacana

Ma karmaphalaheturbhurma te sango stvakarmani 47

47. Your right is in action only, never to the fruits; let not the fruit of action be your motive nor let your attachment be to inaction.

Yogasthah kuru karmani sangam tyaktva Dhananjaya

Siddhyasiddhyoh samo bhutva samatvam yoga ucyate 48

48. Seadfast in yoga, perform actions O Dhananjaya, renouncing attachment and being the same in success and failure; evenness is called yoga.

Durena hyavaram karma buddhiyogaddhananjaya

Buddhau saranamanviccha krpanah phalahetavah 49

49. Far inferior to yoga of knowledge is action O Dhananjaya. Seek refuse in knowledge; wretched are they whose motive is fruit.

Buddhiyukto jahatiha ubhe sukrtaduskrte

Tasmadyogaya yujyasva yogah karmasu kausalam 50

50. United to knowledge, one sheds here both good and bad deeds, therefore devote yourself to yoga; skill in action is yoga.

Karmajam buddhiyukta hi phalam tyaktva manisinah

Janmabandhavinirmuktah padam gacchantya-namayam 51

51. The wise, united to knowledge, renouncing the fruit of action, liberated from the bond of birth, indeed reach the state beyond evil.

Yada te mohakalilam buddhirvyatitarisyati

Tada gantasi nirvedam strotavyasya srutasya ca 52

52. When your intellect will cross the mire of delusion then you will grow indifferent to what has been heard and what is yet to be heard.

Srutivipratipanna te yada sthasyati niscala

Samadhavacala buddhistada yogamavapsyasi 53

53. When your intellect, perplexed by what has been heard, shall stand immovable and steady in meditation then you will attain yoga (self-realisation).

Arjuna uvaca:

Sthitaprajnasya ka bhasa samadhisthasya Kesava

Sthitadhih kim prabhaseta kimasita vrajeta kim 54

54. What is the description of one of steady wisdom merged in the super-conscious state O Kesava? How does one of steady wisdom speak, how sit, how walk?

Sri Bhagavan uvaca:

Prajahati yada kamansarvan Partha manogatan

Atmanyevatmana tustah sthitaprajnastadocyate 55

The blessed Lord said:

55. When one completely casts off, O Partha, all desires of the mind and is satisfied in the Self by the Self, then is one said to be of steady wisdom.

Dukhesvanudvignamanah sukhesu vigatasprhah

Vitaragabhayakrodhah sthitadhirmunirucyate 56

56. He shows mind is not agitated by sorrow nor excited by joy, who is free from desire, fear and anger, he is called a sage of steady wisdom.

Yah sarvatranabhisnehastattatprapya subhasubham

Nabhinandati na dvesti tasya prajna pratisthita 57

57. He who is everywhere without attachment, who having met good or evil neither rejoices nor hates, his wisdom is established.

Yada samdharate cayam kurmo nganiva sarvasah

Indriyanindriyarthebhyastasya prajna pratisthita 58

58. When like the tortoise drawing in its limbs on all sides, he withdraws his senses from sense objects, then his wisdom is established.

Visaya vinivartante niraharasya dehinah

Rasavarjam raso pyasya param drstva nivartate 59

59. The sense objects turn away from an abstinent man but not the relish; even his relish turns away on seeing the Supreme.

Yatato hyapi Kaunteya purusasya vipascitah

Indriyani pramathini haranti prasabham manah 60

60. O Kaunteya, the turbulent senses of even a wise man while striving, indeed forcibly carry away his mind.

Tani sarvani samyamya yukta asita matparah

Vase hi yasyendriyani tasya prajna pratisthita 61

61. Having controlled them all, he should sit focused on me as supreme, his wisdom is established indeed shows senses are under control.

Dhyayato visayanpumsah sangastesupajayate

Sangatsanjayate kamah kamatkrodho bhijayate 62

Krodhadbhavati sammohah sammohatsmritvibhramah

Smrtibhramsad buddhinaso buddhinasatpranasyati 63

62. A man musing on objects develops attachment for them, from attachment arises desire, from desire arises anger.

63. From anger arises delusion, from delusion confusion of memory, from confusion of memory loss of intellect, from loss of intellect he perishes.

Ragadvesaviyuktaistu visayanindriyatscaran

Atmavasyarvidheyatma prasadamadhigacchati 64

64. But the self-controlled man, free from likes and dislikes, moving among objects with his senses under control attains peace.

Prasade sarvaduhkhanam hanirasyopajayate

Praannacetaso hyasu buddhih paryavatisthate 65

65. In peace all his sorrows are destroyed, the intellect of the tranquil-minded soon becomes steady.

Nasti buddhirayuktasya na cayuktasya bhavand

Na cabhavayatah santirasantasya kutah sukham 66

66. There is neither knowledge nor meditation for the unsteady and to the unmeditative there is no peace; to the peaceless how can there be happiness?

Indrianam hi caratam yanmano'nu vidhiyate

Tadasya harati prajnam vayurnavamibhasi 67

67. For the mind, which follows the roving senses, carries away his intellect as the wind (carries away) a boat on water.

Tasmadyasya mahabaho nigrhitani sarvasah

Indriyanindriyarthebhyastasya prajna pratisthita 68

68. Therefore, O Mahabaho, his wisdom is established whose senses are completely restrained from sense objects.

Ya nisa sarvabhutanam tasyam jagarti samyami

Yasyam jagrati bhutani sa nisa pasyato muneh 69

69. That which is night to all beings, therein the self-controlled one keeps awake; that in which beings are awake is night to the sage who sees.

Apuryamanamacalapratistham

Samudramapah pravisanti yadvat

Tadvatkama yam pravisanti sarve

Sa santimapnoti na kamakami 70

70. As the waters enter the ocean which, filled from all sides, remains undisturbed, likewise he, in whom all objects of enjoyment enter, attains peace, not the desire of objects.

Vihaya kamanyah sarvanpumamscarati nihsprihah

Nirmamo nirahankarah sa santimadhigacchati 71

71. That man, who abandons all desires and moves about without yearning, without the sense of `I' and `mine', he attains peace.

Esa brahmi sthitih Partha nainam prapya vimuhyati

Sthitvasyamantakale pi brahmanirvanacchati 72

72. This is the state of Brahman O Partha; attaining this none is deluded. Being established therein, even at the end of life, one attains oneness with Brahman.

SANKHYA YOGA

The second chapter of Bhagavad Gita deals with jnana yoga, the yoga of knowledge.

Sankhya deals with the basic principles of life and living and yoga deals with the way and method of realising of sankhya principles of life.

The second chapter has 72 shlokas. The same may be divided into following parts –

(1) Arjuna's despondent condition (shlokas 1 to 7)

(2) Indestructibility of soul, self (Atma) (Shlokas 8 to 30)

(3) One's duly to Act (Shlokas 31 to 40)

(4) Desire ridden Actions (Shlokas 41 to 44)

(5) Desire less actions, lead to self realization (Shlokas 45 to 53)

(6) the qualities of an enlightened person (jnani) (Shlokas 54 to 72)

The teaching of Bhagavad Gita of life and living and purpose and object of living and the ways of their realisation are discussed in Chapter II itself.

To start with its teaching, it lays down, three basic principles.

(I) The Atma (the self) is death less and indivisible;

(II) The body of a person is insignificant and is transcient

(III) One must follow ones `Swadharma' to realise, one's goal of life, one's self realisation.

Lord Krishna starts His sermon with the nature of one's soul. He says one who is wise neither grieves for the living nor for the dead. The soul is indestructible and it is eternal, neither with the beginning nor with the end. It is Anadi and Ananta. It was always there, it is there and it will be there always, without an end. Death is certain for the born and the birth for the dead. Being constently passing through the repeated stages unmanifest `Manifest and again in unmanifest, so why one should grieve over the inevitability. The indwelling soul in the body remains eternity, the same.

In the next ten shlokas (31 to 40) Lord tells Arjuna the importance of following one's swadharma. By his swadharma that is by his nature, he is a kshatriya and therefore by nature he must fight a war for a right cause. Abandoning such an opportunity will only incur infamy and sin. In victory he enjoys kingdom and in case of death in such war he will, gain heaven. Therefore the Lord advises Arjuna to arise from the paralysis state and fight, without

concern for the result of the battle, as in either case he is a gainer and not a loser.

Now as per Bhagavad Gita every person born has his own swadharma and he must do his duty as per his swadharma. Every person born, is born in a family and as such he has a Father, a Mother, brother and sister and his relatives and friends, his neighbors, his city and his country. His duly is to do his best without any personal desires and without caring for the result, he has to serve, his parents he has to love his brothers and sisters and the relatives and live harmoniously and selflessly in his all actions, as a duty (Karma), that is duty to act selflessly, one should serve the society in which he is born.

(iv) Actions with desires.

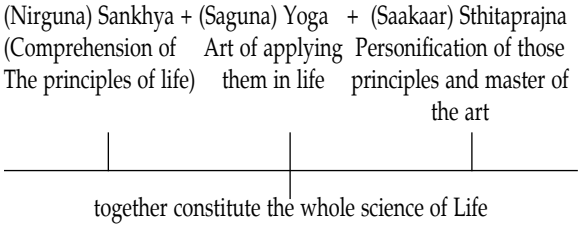
Those who fanatically adhere to mechanical rituals irresolute whose desires dissipate the minds. They strick to the ritualistic portion of the Vedas and declare in a flowery speech, that there is nothing beyond, these rituals. Despite regular performance of the reituals their attention in life remains focused on enjoying the pleasures and power of the world, such people posses a vacillating mind, unable to concentrate and mediate on the supreme self.

Desireless, unattached actions, lead to self realisation (shloks 45 to 53).

Vedas deal with three kinds of Gunas. Tamas, Rajas and Satvick. They explain that in life one should while working should elevate from Tamas to Rajas from Rajas to Satvick. Normally human beings act with two attitudes, The Tamas, the indolent says, that if I am not getting the fruits of my actions, I will not work at all. In our country many belong to this class of persons. The Rajas' predominated persons, say that they will work and keep, the fruits of their action and will not give away the fruits of their actions. The western world is dominated by persons with `Rajas' Gunas. However the best of these three categories is one with Satwick gunas' one who works, without any desires and without any attachment, nor caring for the results of his actions, and voluntarily gives up the fruits of his actions and uses the same for the welfare of the others. These qualities are described by Lord Shri Krishna in Shlokas 44 to 53. The basic principle, is to work for work's sake, tirelessly without caring for the results of their such work. Shlokas 47 is often quoted Shlokas and if that is followed by the Tamas India and Rajas west, it will change everything that is wrong and, the whole humanity will live in peace, and in harmony, with all-round development with human values. This shloka is as under "Your right is in action only, never in the fruits, let not the fruits of actions, be your motive nor your attachment to inactivity." The next Shloka (48) defines what is yoga. It says steadfast in yoga performs actions, renouncing, attachment and being the same in success or failure, evenness, is called yoga.'

In Shloka 53 the `LORD deals one self realisation. He tells Arjuna that when your intelled perplexed by what has been heard shall stand the immovable and steady in meditation, then you attain yoga (self-realisation).

Now, the whole advice given by the LORD, in brief can be surmised as under:



It is bound to lead to brahmanirvana, or moksha, i.e. liberation of the Self and its union with the Brahman. What else could follow?

As up to Shloka 53 the whole sermon of life is covered, Chapt. II would have ended, but for the question put by Arjna in shloka 54, as to what is the description of one of study wisdom (sthitaprajna) merged in the super conscious state? How he speaks, how does he sit, how does he work. As an answer to this question. The LORD narrates the qualities of a sthitaprajna, the realised soul. In short after attaining union with spirit

a devotee's consciousness never descend. The devotee merged in God consciousness remains in samadhi union with God. His plane of activity changes instead of working in the world, while looking towards God, he feels himself in God, while in the world His discrimination is merged with the spirit, even whether sleeps, eats, works. He realises that God has become his nature, not his little self as well as all other selves. He beholds the entire material world as God saturated cosmos. Even in the wakeful state he enjoys nirvikalpa Samadhi or the state in which the devotee perceives both nature and God. He has given up all personal desires completely, all the desires of the mind and he is satisfied in the self by the self. It must be noted that giving up desires of the mind does not mean abandonment of the duties. He does his duties desirelessly and with even mind. He is not agitated by sorrows nor excited by joy, he is free from desires, fears and anger. He is everywhere without attachment, having met good or evil neither rejoices nor hates. Like a tortoise withdraws his senses from sense objects (shloka 58). The sense objects (vishaya) turn away from an abstinent man but not the relish; even his relish turns away on seeing the supreme (shloka 59). Senses are very strong and even a wise man is carried towards them. However a wise man controlling senses must focus on God (shloka 61). A self controlled person, a sthitaprajna, moving among sense objects with his sense under control and he is free of attraction or aversion. In his tranquillity all sorrows are destroyed and he becomes firm. (shloka 65). A Jnani's, all senses are fully under his control, keeping them away from all sense objects. A sthitaprajna keeps away all the sense objects, and also the I and my sense, as I and mine leads for craving. Such person (sthitaprajna) attains his real self and becomes one with Soul. That, is he becomes jeevana mukta, which is the final goal of every person. He gets away from the circle of birth and death and thereafter lives in eternal peace.

With this the discussion, on the path of knowledge ends on a Jnani realising his final stage of self's union with Brahma?

At the end let us describe the nature our Soul, our real nature, with the description of the nature of the Soul, in the words of Adia Sankaracharya.

Chidanand Roop Shivoham Shivoham

Chidanand Roop Shivoham Shivoham

Aham nirvikalpo, niraakar roop,

vibhor vyap sarvatra, sarveyendriya

Sadame samatvam, na muktir na bandha

Chidanand roop, Shivoham Shivoham

Manobudhhi ahankar Chitta ninaham

Nacha Shotra jive nacha ghrana Netre

Nacha Vyoma Bhoomir na tejo na vayu

Chidananda rupas Shivoham Shivoham 1

I am not mind, intellect, ego and the memory.

I am not the sense of organs (ears, tongue, nose, eyes and skin).

I am not the five elements (sky or ether, earth,

light or fire, the wind and the water).

I am supreme bliss and pure consciousness, I am Shiva,

I am all auspiciousness, I am Shiva.

Nacha prana sandhno na ve manchtauh

na va saptadhatur na va panchakoshah

na vak panipadau na chopastha payu

Chidananda rupas Shivoham Shivoham 2

I am not Prana (energy) nor five vital airs (Panch Vayu),

nor the seven essential material (sapta dhatu),

nor the five sheaths of the body (pancha kosha).

I am not the organ of speech, nor hand nor the leg,

nor the organs of procreation or the elimination (anus).

I am supreme bliss and pure consciousness, I am Shiva,

I am all auspiciousness, I am Shiva.

Na me dwesh ragau na me loobha mohau

mado naiva me naiva matsaryabhvah

na dharmo na chartho na kamo na mokshah

Chidananda rupas Shivoham Shivoham 3

I have no hatred or dislike, neither greed nor liking, no delusion,

I have no pride or haughtiness, nor jealousy.

I have no duty to perform (dharma), no desire for any wealth or pleasure (kama),

I have no liberation (moksha) either.

I am supreme bliss and pure consciousness, I am Shiva,

I am all auspiciousness, I am Shiva.

Na punyam na paapam na Saukhyam na dukham

na mantro na tirtho na veda na yagna

aham Bhojanam naiv bhojam na bhokta

Chidananda rupas Shivoham Shivoham 4

I have neither virtue, nor vice.1

nor pleasure or pain,

I do not need mantras (sacred chants), nor pilgrimages.

nor scriptures (Vedas), rituals or sacrifices (yajnas).

I am neither the enjoyed nor the enjoyer, nor enjoyment.

I am the supreme auspiciousness of the form of consciousness-bliss (chidananda rupah). I am the auspiciousness

I am supreme bliss and pure consciousness, I am Shiva,

I am all auspiciousness, I am Shiva.

na me mrutu Shanka na me Jatibheda

Pita naiva me naiva mata na Janma

na bhandu na mitra gurur naiva shishya

Chidananda rupas Shivoham Shivoham 5

I have no fear of death, nor do I have death. No doubt about my existence, nor distinction of caste. I have no father or mother, I have no birth.

I have no relatives, nor friend, nor the guru, nor the disciple.

I am pure knowledge and supreme bliss, I am Shiva,

I am all auspiciousness, I am Shiva.

Aham Nirvikalpo Nirakar rupo

Vibhurvyapa sarvatra sarvendriyani

Sada me samatvam na muktir na bhandha

Chidananda rupas Shivoham Shivoham 6

I am formless and devoid of all dualities

I exist everywhere and pervade all senses

Always I am the same,

I am neither free nor bonded

I am pure knowledge and supreme bliss, I am Shiva,

I am all auspiciousness, I am Shiva.

Kishor Vanjara, *Tax Consultant*

Registration of a Society

A Housing Society means a group of houses the object of which is providing its members with houses or flats and to provide its members common amenities and services.

(A) Registrar (Section 3)

The State Government may appoint a person to be the Registrar of Co-operative Societies for State and also appoint one or more persons to assist the Registrar. The person or persons so appointed to assist the Registrar and on whom any powers of the Registrar are conferred, shall work under the general guidance, superintendence and control of the Registrar.

(B) Conditions of Registration (Section 6)

As provided in section 6(1) of the MCS Act, 1961 the minimum number of persons for registration of housing society is 10 each of such person being member of a different family. [Explanation:– For the purpose of section 6 and section 8 the expression "member of family" means wife, husband, father, mother, son or unmarried daughter].

All the persons should gather and hold a meeting to :

1. Select a Provisional Committee and elect a Chief Promoter
2. Select a name for such society and to pass appropriate resolution.
3. To apply to the registration authority for name reservation of the society and obtain a letter in that connection.
4. To open a bank account in the name of the proposed society and deposit therein the entrance fee, share money and the amount recovered for preliminary expenses from the promoters.
5. To deposit the registration fee and to obtain the receipted challan.
6. To prepare and to submit the proposal for registration.

(60% of total flat owners is minimum number of eligible members – Circular dated 24-7-1992 of State Government) *Om Sai Pratibha Co-operative Housing Society vs. State of Maharashtra and Others, 2002(5) Bom. C. R. 177.*

(C) Application for Registration (Section 8)

The application for registration should be made to the Registrar in prescribed form and shall be accompanied by four copies of proposed bye-laws of the society. The said application has to be signed by a member of the Committee. Along with the application, the Chief promoter should submit particulars such as :-

(a) name, address, age, occupation of the promoter, etc.,

(b) particulars of proposed society,

(c) bank balance certificate,

(d) undertaking of the Chief promoter in form, as applicable,

(e) a challan showing the deposit of registration fee,

(f) copy of the approved plans and declaration by promoters members including the Chief Promoter that their residence is within the area of the operation of the society.

Thereafter, pursue the proposal filed with Registration Authority and get the same processed and obtained from Registration Authority the certificate of registration with registered bye-laws, etc.

(D) Registration (Section 9)

1. If the Registrar is satisfied that a proposed society has complied with the provisions of MCS Act, 1960 and the rules, or any other law for the time being in force, or policy directives issued by the State Government under section 4 and its proposed bye-laws are not contrary to the Act or to the rules, he shall, within two months, from the date of receipts of the application register the society and its bye-laws.

2. Where there is a failure on the part of the Registrar to dispose of such application within the period of two months, the Registrar shall, within a period of fifteen days from the date of expiration of that period refer the application to the next higher officer and where the Registrar himself is the registering officer, to the State Government, as the case may be dispose of the application within two months from the date of receipt and on the failure of the such higher officer or the State Government, as the case may be to dispose of the application within that period, the society and its bye-laws shall be deemed to have been registered and thereafter the Registrar shall issue a certificate of registration under his seal and signature within a period of fifteen days.

3. Where the Registrar refuses to register a proposed society, he shall forthwith communicate his decision, with the reasons therefor, to the person making the application and if there be more than one to the person who has signed first thereon.

4. The Registrar has to maintain register of all societies registered or deemed to be registered, under the MCS Act, 1960.

(E) Evidence of Registration (Section 10)

A certificate of registration signed by the Registrar, shall be conclusive evidence that the society therein mentioned, is duly registered, unless it is provided that the registration of the society has been cancelled. *(Rukshana Apartment Co-operative Housing Society Ltd vs. Smt. S. Aluwalia and Others, 1987(T.J. 456)*

(F) Power of Registrar to decide certain questions (Section 11)

When any question arises whether a person is an agriculturist or not or whether any person resides in the area of operation of the society or whether a person is or is not engaged in or carrying on any profession, business or employment, or whether a person belongs or does not belong to such class of persons as stated in section 22(A) and has or has not incurred a disqualification, such question should decide by the Registrar and his decision shall be final but same shall be decided by the Registrar after giving an opportunity of being heard.

(G) Amendment of Bye-Laws of Society (Section 13)

The application for registration of the amendment of bye-laws of the society shall be disposed of, by the Registrar within a period

of one month from the date of its receipt. No amendment of bye-laws would register by Registrar if in his opinion, if the amendment is repugnant to the policy directives, if any, issued by the State Government. After the registration, the Registrar would issue a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered. If Registrar refuses to register such amendment, he should communicate the order of the refusal, together with his reasons to the society.

(H) Power to Direct Amendment of Bye-Laws (Section 14)

The Registrar *suo motu* call upon the society, for amendment of the bye-laws, if it is necessary or desirable in the interest or any bye-laws are inconsistent with the provisions of MCS Act, 1960 or rules, he may call upon the society in the prescribed manner to make the amendment within such time as he may specify.

If the society fails to make the amendment within the time specified, the Registrar may, after giving the society an opportunity of being heard register such amendment and issue to the society a copy of such amendment certified by him. With effect from the date of the registration of the amendment in the manner aforesaid, the bye-laws shall be deemed to have been duly amended accordingly, and the bye-laws as amended shall subject to appeal, if any, be binding on the society and its members.

(Shri Kiran Shriram and Another vs. State of Maharashtra and Others 2005 (4) All M. R. 94)

(I) Change of Name (Section 15)

A society which wants to change its name can do so by passing a resolution in general meeting and with the approval of the Registrar, it can change its name, but changing the name shall not affect any right or obligation of the society and any legal case instituted against them will continue under its new name. Where a society changes its name, the Registrar shall enter the name in its place in the register of societies and shall also amend the certificate of registration accordingly.

(J) De-Registration (Section 21-A)

1) If the Registrar is satisfied that any society is registered on misrepresentation made by applicants or the purpose for which the society has been registered are not served, he may, after giving an opportunity of being heard to the Chief Promoter, the Committee and the members of the society, de-register the society.

2) When a society is de-registered under the provisions of sub-section (1) the Registrar may, notwithstanding anything contained in MCS Act, 1960 or any other law for the time being in force, make such incidental and consequential orders including appointment of Official Assignee as the circumstances may require.

3) The Official Assignee has power to realise the assets and liquidate the liabilities within a period of one year from the date he takes over the charge of property, assets, books, records and other documents, which period may, at the discretion of the Registrar, be extended date from time to time, so however, that the total period does not exceed three years in the aggregate.

4) The remuneration and allowances as may be prescribed shall be payable to Official Assignee and he is not entitled to any remuneration whatever beyond the prescribed remuneration or allowances.

5) The powers of the Registrar under sub-sections (1) and (2) shall be exercised only by the Registrar or Joint Registrar of Co-operative Societies.

Bharat Joshi, *Advocate*

Smooth Sailing of Redevelopment of the Society

I) Nowadays it is seen that many co-operative societies are opting for redevelopment of their property.

II) Every building in city or suburbs of Mumbai, either ownership, apartment or tenanted, wants to go for redevelopment. Every owner wants to take advantage of the changed position in Law and develop (redevelop) vertically for high-rise buildings. In the process, the occupants, society members and tenants, if they are well versed with the law, then they will be in a better position to negotiate and protect their interest either with the Builder or with the Landlord. Let us try to understand few terms which are often used in negotiation for redevelopment process. These terms are not as per its legal definition but they are explained for better understanding.

1. **F.S.I.** – This is a term used for buildable area which can be constructed on a piece of land if it is a vacant land. If the land area is 1000 sq. mtrs. and if the FSI is 2 that means that a structure of 2000 sq. mtrs. can be constructed on that piece of land of 1000 sq. mtrs.

2. **T.D.R.** – This terms means transfer of development rights. It means whenever a piece of land is reserved for any public purpose in development plan and the Mumbai Municipal Corporation does not have money to acquire it and the owners surrender the vacant land to BMC, then for such surrender of land the MMC will issue a certificate to the owner authorising the owner, for his entitlement of development right equivalent to 40% of area of the land and that right can be transferred (loaded on) to any other land for construction (situated in North direction). That means if an owner surrenders 1000 sq. mtrs. of land to MMC in Vile Parle (West), then the MMC will give 40% of land area i.e. 400 sq. mtrs. of TDR certificate to him, which he can sell that right to any other land owner in city of Mumbai North of Vile Parle (West) to construct a structure on another land, in addition to the FSI available for the other land.

3. **Fungible FSI** – This is a new term floated recently which is a FSI of 0.35% in case of residential premises and 0.20% in case of commercial premises on payment of premium. Earlier to this Law certain areas like common passage, balcony, staircase, lift areas, elevation designs, flowerbeds, were

not considered in the computation of FSI (free of FSI), such areas are now allowed and charged by MMC for construction as a part of fungible FSI. It has been seen that the Builders used to charge it for all those areas by calling it super built-up area or saleable area but in fact they were getting it in the building plan free of FSI. This FSI, which is in addition to the FSI available on that piece of land. Thus, a piece of land with 1 FSI can utilise 1.35 FSI for residential buildings.

4. **Carpet area –** Area which can be actually used by the occupant within the walls is known as carpet area.

5. **Built-up area –** It is the area measured after inclusion of the walls and normally, it is 16% more than the carpet area but some Builder started charging super built-up area or jumbo super area and later on saleable area in which the addition to the carpet area was called as loading. Sometimes, the saleable area would include area of the flat, common passage, staircase, servant quarters and other common amenities area.

6. **Free of FSI –** Prior to fungible FSI, area used up to 15% of the FSI area for common passage, staircase, flowerpots, lifts. Now, because of the fungible FSI, it is restricted to 0.35% and in case of commercial it is 0.20%.

III) How does the co-operative housing societies or its members ensure smooth sailing of the process and what steps they need to take it as enlisted herein.

1) Society must have conveyance of its property and if not, take steps to acquire it urgently.

2) Appoint projected management consultant who will advise you on the development potential of the property, for effective negotiation with the builders in future.

3) With due intimation, to the Registrar of co-operative society call for General Body meeting and pass a resolution for redevelopment with consent of 70% of the members out of total members.

4) Appoint an Advocate for all legal complexities, terms and conditions for tender documents and bid proposal and for development agreement and likewise appoint Project Management Consultant (PMC) for knowing potential of land and to frame bid conditions and to evaluate proposals and supervise work.

5) Frame suitable terms and conditions for tender such as:

   (a) for additional carpet areas and free FSI area like balcony, flower beds.

   (b) for amount of corpus funds to meet with future expenses of increase in taxes and maintenance charges.

   (c) for special common amenities in the new building like swimming pool, garden, gym.

   (d) for rent during development period and transportation charges, brokerage and

   (e) for other compensation for mitigating hardship.

   (f) for bank guarantee.

   (g) for fixed period for development.

   (h) for default mechanism if developer fails to complete work in time to the satisfaction.

(i) for all expenses by builder.

(j) for damages for delay.

(k) for title documents for new flats for members and such other.

6) The tender details and minimum terms to be published in 3 newspapers inviting bids.

7) Appoint Sub-Committees for redevelopment with different specific tasks and all Sub-Committees to report to Managing Committee.

8) After examining offers with help of PMC short list the builders and check their past projects and work of construction, other antecedents and financial capacity.

9) The negotiation for terms of agreement to be started with 2 builders simultaneously.

10) Consider following additional points besides tender terms.

11) The corpus funds should be deposited in name of society at the time of the Agreement for development.

12) The rent for alternate accommodation to be paid to members for full Development period in advance and for the grace period by post dated cheque.

13) The forfeiture clause for payment of rent and the corpus amount, in the event of termination of the Agreement for reasons of undue delay in construction.

14) The restrictive condition to put in agreement for not allowing the possession of the builders sale flats, to be handed over to his purchasers, before the members of society are handed over their new flats after occupation certificate.

15) Put up a condition that the Builder after has to manage with BMC to reduce the property tax ratable value.

16) Floating Bank Guarantee amount equivalent to construction cost of members total flats, with reducing sum as per progress of the construction of new building.

17) The building plans to be passed in the name of the Society.

18) Put up proper mechanism for termination of agreement.

19) In event of termination, vest authority in society to carry on further construction, with help of encashment of bank guarantee.

20) The builder should pay to society an amount equivalent to accumulated Sinking Fund.

21) The Agreement of development to be given to the members for discussion, and pass it in General Body Meeting after intimation to Registrar.

21A) The members be given agreement for new flats duly stamped and registered after sanction of plan and flats to be vacated.

22) The possession of new flat be taken only after occupation certificate.

23) All expenses, stamp duty, registration charges and incidental cost and construction cost to be borne by Builder.

24) Thoroughly discuss, design of new flats, quality of construction, fixtures,

fittings, lift, amenities, common areas, elevation, ornamental designs and such other things.

25) The builder to bear all expenses of litigation if initiated.

26) Do not enter into a Memorandum of Understanding with builder but go for Agreement for Development with all terms and conditions suitably specified in it and register it.

27) Sign Agreement of development with all consenting members as signatories duly stamped and Register it and keep original with society.

27A) Do not agree for an arbitration reference between developer and society (it is misused in many cases)

28) Vacate the old flats only after the plans are sanctioned and IOD is issued in name of society and rent cheques for total development period are received and agreement of new flats in name of the members are duly signed and registered.

29) Check progress of the construction of the building through project management consultant (PMC) or the Structural Engineer and demand copy of sanctioned plan and all correspondence with BMC.

30) In the cases of delay in construction without justifiable cause do not hesitate to encash the Bank Guarantee and terminate the Development Agreement.

31) In the event of the failure of the builder to complete the construction work on schedule or undue delay in completion of work, the Society should be authorised to take up the work of construction work, through a new Contractors or a new builder without objection from old builder.

32) Assess general damages and special damages for delay in construction and put as a payment to society.

33) Tax payment during development period and till new flat purchasers are accepted as member is responsibility of the builder.

(34) Every member of the Society has to consider that what is the development potential of the land of the Society and out of that full development potential, how much the members would be utilising for their rehabilitation and any balance area, which is normally known as free sale component for the Builder, how the Builder is going to profit out of it which the Society members should share the profit by demanding appropriate corpus fund and/or other compensation and/or rent for temporary alternate accommodation.

(35) If this calculation is understood by the members, then they will be in a better position to negotiate with the Builder through their Managing Committee.

36) If the proper procedure is followed then there will be smooth selling for the redevelopment process and the members can enjoy new construction with added amenity and with peace of mind.

37) Do not forget to invite your Rotary friends for house warming of ceremony.

Bharat Joshi, *Advocate*

Prescribed New Model Bye-Laws

1. Under section 79 of Maharashtra Co-operative Societies Act, the Commissioner of Co-operation and Registrar of Co-operative Societies, Maharashtra State, approves model bye-laws which prescribe a format of minimum requirement in the bye-laws of a co-operative housing society. The model bye-laws are not compulsory to be adopted by the co-operative housing society and it cannot be implemented until the General Body Meeting of the society adopts it by 2/3rd majority, with suitable amendments, alterations or changes.

2. The bye-laws of a co-operative society are not the statute, but it is part of delegated legislation and it provides mechanism for management of the day-to-day affairs and the procedure and rules prescribed in it for interactions between members and the Managing Committee. The bye-laws cannot be contrary to provisions of Maharashtra Co-operative Societies Act and Rules.

3. The Commissioner of Co-operation, Maharashtra State, had approved the model bye-laws on 2-7-2001, but it was prescribed for all types of co-operative societies. Then on 24-12-2010 a new model bye-laws have been approved for flat owners purchase types co-operative society. We will discuss the model bye-laws approved on 24-12-2010 for flat owners co-operative society.

4. It has 18 chapters and 176 bye-laws. It applies to co-operative housing society, which are formed by the flat owners who have purchased the flats under Maharashtra Ownership Flats Act and formed a co-operative housing society.

5. The bye-laws deals subject such as share capital, raising of the funds, liabilities, reserve funds, creation & utilisation of other funds. It also defines classes of members, their rights, responsibilities and liabilities, right of the member to take inspection of the books and records, nomination procedure rules for subletting and licensee and transfer of shares and interest in the capital of the society.

6. It also defines responsibilities and liabilities of members, maintenance of the flats by the member, procedure for expulsion of a member and liabilities of past member.

7. It also specifies levy of charges by the co-operative society, its computation & break up.

8. The duties and powers of the co-operative society are also specified. The

parking policy and management of allotment of parking spaces, change of user of the flats are also part of powers of the society.

9. Holding of General Body Meetings, Annual General Body Meetings and Special General Body Meetings are also covered up.

10. The management of the affairs of the society through General Body Meeting, operation of bank accounts, elections held in the society, custody of the records of the society, election of office bearers of the society and how the General Body Meetings are conducted are specified.

11. The maintenance of books of account and several statutory registers to be maintained by the society is stated.

12. The distribution and appropriation of profits by the society by due contribution to the statutory reserve fund is set out in bye-laws No. 149 and also audit of the accounts of the society under bye-laws No. 152, 153 & 154 are specified. A separate chapter on conveyance of the property and maintenance of the property is incorporated in the bye-laws.

13. A special chapter on complaints or the mechanism of redressal of the complaints of the members and the action expected from the Committee within the stipulated period.

14. Other miscellaneous matters such as service of the notice of the Meetings, notice board, right of the committee to levy penalties, operation of the lift, playing games in the society's compound, restriction on playing games in the society's compound, restriction on letting or giving on leave & licence basis, use of terrace, copying charges for the documents are all covered up in the model bye-laws.

15. A special provision under the bye-laws No. 176 for redevelopment of co-operative housing society is incorporated in the latest model bye-laws. The said bye-laws specifies that Government Resolution dated 3-1-2009 under section 79A of Maharashtra Co-operative Societies Act shall be followed in the case of redevelopment of the building. The Bombay High Court has held that the State Government Resolution dated 3-1-2009 is directory and not mandatory mechanism prescribed under the State Government Resolution applies only in the case where there is a dispute between members for redevelopment of the society and not when that there is no dispute and all the decisions are taken by appropriate majority in the General Body Meeting of the society.

16. Now, I will touch with the major topics for which the rules are framed in the model bye-laws.

17. The society has to issue share certificate to the members of the society and it should bear the seal and signature of the office bearers of the society.

18. The liability of the society is limited.

19. The society has the power to constitute reserve fund and collect the amounts for the reserve fund. The society can also create other fund for repairs and maintenance and major fund and sinking fund. These funds can be utilised for structural repairs, repairs & maintenance, sinking fund for emergency and corpus fund for future exigencies. The major fund can be utilised for major repairs of the society. The society can also constitute an investment fund and decide about the mode of investment of that fund.

20. There are two types of membership – principal member and associate member. The membership can be given to individuals who are not a minor and not of unsound mind and it can also be given to corporate bodies. The Application for membership of the society requires to be disposed of by the office bearers within 60 days.

21. The members have a right to get copy of the certified bye-laws. They have the right to inspect books and records. They have the right to occupy their respective flat. The associate member has a right to act in place of the principal member and with the written consent of the principal member and attend and vote at the General Body Meeting, contest election and hold office.

22. On the death of the principal member or transfer of the shares by the principal member, the associate membership is terminated. The associate member does not have an independent right or he is not a joint member. His continuation as an associate member is at the pleasure and will of the principal member.

23. The third type of category, nominal membership, is now discontinued after the amendment of 14-2-2013.

24. The members can be removed by resignation by the member or by providing expulsion provisions and also now, after the amendment of 14-2-2013, the society in certain case of persistent defaulter and for non-attendance of the General Body Meeting for 2 consecutive terms, can attract termination or cessation of the membership.

25. The nomination by the member is a facility that, in the event of death of the member, the society can by placing the name of the nominee in the name in the share certificate, deal with such persons. The nomination is not an inheritance or succession of the estate of the deceased. If the deceased member has executed a Will, then the share capital and shares and the flat will have to be dealt with in accordance with the Will and/or Probate. All the legal heirs of the deceased member, by indemnifying the society and by giving written consent, can nominate one of the legal heirs for transmission of the shares of the deceased member. He could be a nominee also.

26. In other circumstances, the transfer of the shares takes place in prescribed form and the transfer fee is ₹ 500/- and maximum transfer premium is ₹ 25,000/-. Any charge demanded or recovered by the society exceeding the aforestated amount is an illegal demand by the society and it can be recovered back even if paid under duress.

27. The members of the society can exchange the flats *inter se* by suitable agreement duly registered and by Application to the society.

28. The member can sublet the premises or give it on leave and licence by prior permission of the society and now, under the new rules by Mumbai Police Act, with the certification by the police authority about the tenant.

29. The member occupying premises has to pay maintenance charges and other legal dues demanded by the society in accordance with the law.

30. The maintenance charges of the society is broadly computed under 2 counts – one is tax component and the other is known as service charges. In tax component, the tax levied by the local authority on the premises are charged from the members and service charge which includes salaries of the staff, expenses for the society's office, stationery & postage, travelling allowance given to the staff by proper procedure if any fees are paid to the members of the society to the committee, subscription to the education fund, annual subscription to the housing federation to which the society is affiliated, committee fees, expenses incurred at the General Body Meeting and committee meetings, legal charges, common electricity charges and any other charges approved by the General Body Meeting could be part of the service charges and it is divided equally among all the members and these charges can

be divided on the basis of area or any other criteria.

31. The tax component part is decided as levied by the local authority for the property tax. The water charges can be divided on the basis of inlets provided in each flat. The expenses of repairs and maintenance of the building should be subject to the minimum of 0.75% p.a of the acquisition cost of the flat. Similarly, for the lift sinking fund should be 0.25% p.a of the construction cost of each flat. The parking charges can be fixed by the General Body Meeting. The interest on delayed payment of the charges can be fixed by the General Body or as prescribed in the bye-laws No. 72 and non occupancy charges can be fixed at 10% of the service charge and not more under bye-laws No. 43. The insurance charges paid by the society can be divided proportionately on area basis. The lease rent paid for the land by the society can be divided on the basis of the carpet area of the flat and all other charges can be divided by the General Body Meeting of the society.

32. The member of the society are under the wrongful impression that in any dispute with the office bearers or the society, they can stop payment of maintenance charges. This is a wrong impression and maintenance charges should not be stopped at any point of time. The issue of excessive charges or wrongful computation can always be taken up and excessive amount if paid can be adjusted from future maintenance charges or the members can take up the matter in Co-operative Court if the quantum of demand is large but in no circumstances the member should stop paying maintenance charges and become a defaulter which will have serious consequences.

33. The Annual General Body Meeting are called for approval of accounts and appointment of an Auditor and the other General Body Meetings are called Special General Body Meetings which can be called by the Managing Committee or can be requisitioned by 1/5th of the total members of the society requesting for a Special General Body Meeting on specific Agenda stated in the requisition notice to the Managing Committee.

34. The General Body Meeting of a society is the supreme body and it can pass Resolutions which are not contrary to the Maharashtra Co-operative Societies Act and rules and which are binding on all the members.

35. The audit of accounts of the society are compulsory and mandatory.

36. The bye-laws of the society can be amended by moving the appropriate Resolution in the Special General Body Meeting after 14 days with 2/3rd majority of the members present and voting in favour of the amendment and later on the amendment is approved by the registering authority by the Registrar of Co-operative Societies.

37. The Managing Committee can regulate the operation of the lifts, formulate a policy for parking on fair proposals of allotment to each one.

38. In bye-laws chapter No. 17, deals with redressal of complaint and in which different authorities like Registrar, Co-operative Court, Civil Court, local authority, police and general body and housing corporation and in which type of matters the complaints can be entertained by these authorities are very specifically mentioned.

39. The repairs of the society, as far as the internal repairs in the premises is concerned, it is the responsibility of the member and as far as the external walls, common area and terrace is concerned, it is the responsibility of the society to carry out the repairs.

40. The difference between the model bye-laws approved in 2001 and the model bye-laws now approved in 2010 are as under :-

i) The utilisation of sinking fund with approval of the General Body Meeting, without the permission of the Registrar of Co-operative Society, is now permitted.

ii) The minimum share amount is increased to ₹ 500/- to individual members and to ₹ 1,000/- to corporate bodies.

iii) Even a bank account can be opened in a nationalised bank now with permission of Registrar of Co-operative Society.

iv) The co-operative society having share capital of more than ₹ 10,000/- are required to hold election by secret ballot.

v) The society can recover the dues of a deceased member from the legal heirs of the deceased member and/or from the occupant of the flat.

vi) The Managing Committee can co-opt only 2 members with the prior permission of the Registrar in the vacant post in the Managing Committee.

vii) Every co-operative society has to prepare a plan for emergency situation and get it approved in the General Body Meeting and place it and display it in the notice board.

viii) The Managing Committee of each society has to ensure that no child labour is employed in the society and otherwise the person employing child labour will be fined up to ₹ 20,000/- and simple imprisonment up to 1 year.

41. The model bye-laws unless adopted by the society are not binding and society has all the right to adopt the model bye-laws as a format and make suitable changes in it to suit the needs of the members of the society and then put suggested additions or deletions in the model bye-laws for approval of the Registrar of Co-operative Societies for its acceptance, the proposed additions and alterations or deletions unless are contrary to the Maharashtra Co-operative Societies Act and its rules, it will be accepted by Registrar. It can easily be said that the model bye-laws of the co-operative housing society are guidance for the members and Managing Committee members and office bearers to conduct their day-to-day affairs for managing the affairs of the society and act in accordance with rules.

42. After the amendment from 14-2-2013 in Maharashtra Co-operative Societies Act, the aforestated bye-laws requires to be reconsidered by the authorities and well specified policies for parking, repairs, maintenance, levying of the charges and user of common spaces like terrace, lift are required to be more specified and prescribed. It is seen that the dispute arises between members and society on aforestated grounds and issues remain unresolved for years together. In all issues approach to Court is not proper redressal. The only solution I suggest it to amend bye-laws and bring required details and specifications on above issues and guide members properly and constitute an in-house redressal committee to resolve the issues.

43. It is high time, looking to the requirement of housing sector, the Government of Maharashtra, come with a separate law for housing co-operative societies. The present Co-operative Act covers all types of co-operative societies.

CA Priti Savla

Property and Funds

Chapter VI of the Maharashtra Co-operative Societies Act, 1960 (the Act) deals with the Property & Funds of the Co-operative Societies and chapter contains sections from 64 to 71A. Further Chapter V of the Maharashtra Co-operative Societies Rules, 1961 (the Rules) provides for rules with respect to the Property & Funds of the Co-operative Societies and chapter contains Rules from 49 to 56.

Restriction on distribution of funds

Co-operative Society is distinct from its members. S. 64 of the Act controls distribution of funds to its members. It lays that no funds other than net profit of a co-operative society can be distributed by way of bonus or dividend amongst the members with an exception of creation of dividend equalisation or bonus equalisation funds. The bonus/dividend to be declared on the basis of the profit of society earned during the relevant year.

S. 67 of the Act lays that no co-operative society shall pay dividend to its members at a rate exceeding 15% except with the prior permission of the Registrar. Primary agricultural credit co-operative society shall pay dividend to its members as per the guidelines issued by the Registrar, in accordance with the criteria specified by National Bank. Salary Earners Co-operative Societies are exempted from the provisions of S. 67[1]. Rule 52 provides/allows society to create Bonus equalisation fund for payment of bonus to the persons other than its paid employees who are not members i.e. non-members for the support received from them. Unless authorised by the Registrar, bonus equalisation fund cannot be utilised for any other purposes other than payment of bonus as per the provisions of bye-laws. Further dividend equalisation fund can also be created. Every year society can appropriate (towards dividend equalisation fund) up to 2 per cent of the paid share capital such that aggregate amount is not more than 9 per cent of the paid share capital. The society can draw amount from the dividend equalisation fund only in case it is unable to maintain uniform rate of dividend, which it has been paying during last preceding 5 years or more. Maximum rate of dividend cannot be exceeded by paying bonus on shares.

Member of the society is entitled for the remuneration for the services rendered. However such remuneration should be authorised by the bye-laws. The payment so made can be by way of honorarium[2], commission, labour charges, etc. Such remuneration need not be only out of the net profits of the society. It can be paid out of any funds of the society.

Ascertainment and appropriation of profits

S. 65 lays that a society shall construct its relevant annual financial statements and determine net profit in a prescribed manner.

1. CSL.1083/29693-15-C, dated 29-8-1983, M.G.G. Part IV-B dated 20-9-1983, p.283
2. *Daulatrao Sampatrao vs. M.C. Society* 8 BCT 8

Rule 49A prescribes calculation of net profits. Net profits to be determined by deducting the following from the gross profits for the year –

- all interest accrued and accruing on amounts of overdue loans (excepting overdue amounts of loans against fixed deposit, gold, etc.);
- interest payable on loans and deposits;
- establishment charges;
- audit fees or supervision fees;
- working expenses including repairs, rent and taxes;
- depreciation;
- bonus payable to employees under the Payment of Bonus Act, 1965;
- provision for payment of Income-tax;
- amount to be paid as contribution to the Education Fund at the State Federal Society which may be notified by the State Government in this behalf;
- amount to be paid for contribution to the Co-operative Cadre Employment Fund;
- provision for bad and doubtful debts;
- provision for share capital Redemption Fund;
- provision for Investment Fluctuations Fund;
- provision for retirement benefits to the employees;
- provision for any other claims admissible under any other law;
- provision for bad debts and revenue losses not adjusted against any fund created out of profits;
- contribution, if any, to be made towards any sinking fund or guarantee fund, constituted under the provisions of the Act, rules or bye-laws of the society for ensuring due fulfilment of guarantee given by Government in respect of loans raised by the society;
- provision considered necessary for depreciation in the value of any Security Bonds or Shares held by the society as part of its investments;
- any provision required to be made for the redemption and share capital contributed by Government or Federal Society.

Gross profit after prescribed deduction together with the brought forward profits for the previous year would be available for appropriation. A society may appropriate its net profits to the reserves or any other funds in accordance with the bye-laws. However no part of the profits shall be appropriated except with the approval at the AGM and in accordance with the provisions of the Act, Rules and Bye-laws.

Out of the profits, appropriation would be made as under

a. **Reserve fund (S. 66) –** at least ¼th of the net profits. Registrar having regards to the financial position of the society or class of societies may fix contribution to reserve fund which may be lower than ¼th of the net profit subject to minimum of 1/10th of the net profits. Reserve fund is required to be utilised and invested as per the provisions of section 70 and/or rule 54.

b. **Contribution for public purpose (S. 69) –** After setting aside for the reserve fund and funds towards co-operative education / training u/s 24A, society may set aside maximum 20 per cent of its net profits for contribution to public purposes. Such appropriated amount to be utilised with the approval of federal society as may be notified by the State Government for contributing to any co-operative purpose or any charitable purposes (as defined u/s 2 of the Charitable Endowment Act, 1980) or any other public purposes.

'Public purpose' includes a purpose, in which general interest of the community as opposed to the particular interest of the individual is directly and vitally concerned[3].

3. *Bhahjee Munjee vs. State of Bombay* AIR 1952 Bom 476; *State of Bihar vs. Kameshwar,* AIR 1952 SC 262

c. As per the rule 50 appropriation can be made –

   i. Appropriate for the education and enlightenment of the members of the society and any co-operative or charitable purposes including relief to poor, education, medical relief and advancement of any other general public utility, subject to maximum of 10 per cent of the net profits.

      'Co-operative purpose' means which has an effect of advancing the cause of co-operation or co-operative movement. Decision under Income-tax Act, 1961 for charitable purposes would also be relevant for determining charitable purposes under the Act.

   ii. Development fund

   iii. Dividend equalisation fund

   iv. Any other fund created under bye-laws

The question of appropriation would arise only if there is net profit during the financial year. Profits do not accrue from day-to-day or even from month to month and have to be ascertained by a comparison of assets at two stated points. Unless the right to profits comes into existence there is no accrual of profits and the destination of profits must be determined by the title thereto on the day on which they arise[4]. While dealing with the payment of additional/final price made on the last day of the accounting year, Hon'ble Bombay High Court[5] held that it is not appropriation of the profits. Such sum is necessarily required to be deducted for ascertaining the real profits on principles of commercial accounting. Creation of certain funds is allowed as deduction while computing taxable income of the society[6]. Issue may arise whether dividend or bonus could be paid out of such funds. Considering the objectives of the Act, dividend or bonus would not be allowed to be paid out of such funds

Investment of funds

In terms of section 70, a society[7] shall invest or deposits funds in one or more of the following –

a. A District Central Co-operative Bank, the State Co-operative Bank having at least 'A' audit class for last 3 consecutive years.

   Prior to promulgation of the Maharashtra Co-operative Societies (Amendment) Ordinance, 2013 dated 24th February, 2013 investments were allowed in a Central Bank or the State Co-operative Bank. Now investment can be made in the State Co-operative Bank only if such bank has been awarded 'A' audit class for last 3 consecutive years.

b. Any of the securities specified in section 20 of the Indian Trusts Act, 1882. However certain securities as permitted by Indian Trusts Act, specifically bars co-operative societies for making investment in them. Hence, under such circumstances no investment can be made by co-operative societies in such securities.

c. Shares, security bonds, debentures issued by any other society with limited liability and having same classification to which it belongs.

d. Any other mode as permitted by rules or by general or special order in that behalf by the State Government[8].

4. CIT vs. Ashokbhai Chimanbhai (1965) 56 ITR 42 (SC)
5. CIT vs. The Solapur Dist. Coop Milk Producers and Process Union Ltd ITA No. 997 of 2008 Order dt. 4-4-2009; CIT vs. Manjara Shetkari Sahakari Sakhae Karkhana Ltd. ITA No. 318 of 2007, 2007 (11) LJSOFT (URC) 73
6. Siddheshwar Sahakari Sakhar Karkhana Ltd. vs. CIT 270 ITR 1 (Bom); CIT vs. Malegaon Sahakari Sakhar Karkhana 279 ITR 19 (Bom)
7. *Vide* the Maharashtra Co-operative Societies (Second Amendment) Act, 2008 words 'A Society' was replaced with 'Every Society other than the Co-operative Credit Structure'. However *vide* the Maharashtra Co-operative Societies (Amendment) Ordinance, 2013 dt. 24th February 2013, words 'A Society' is again restored.
8. The Maharashtra Co-operative Societies (Second Amendment) Act, 2008 has substituted S. 70. While substitution this clause was deleted. However *vide* the Maharashtra Co-operative Societies (Amendment) Ordinance, 2013 dt. 24th February 2013, said clause is again restored.

e. The primary agricultural credit co-operative society, the District Central Co-operative Bank or the State Co-operative Bank, shall invest its funds subject to the guidelines issued by the RBI.

Utilisation of investments – Restriction /relaxation

a. Reserve Fund

Rule 54 provides that besides modes specified in S. 70, Reserve fund can be invested or deposited also as per the following permitted modes –

i. Primary societies can invest in the Central Financing Agencies

ii. Central Co-operative Banks and Urban Co-operative Banks in the State Co-operative Banks

iii. All societies can invest in debentures issued by the Apex Land Development Bank or in Government loans or in any immovable property specified by the Registrar by a general or special order

iv. Societies having reserve fund equal or more than its paid-up capital, the Registrar may by general or special order, allow such societies to invest portion of the reserve fund exceeding paid-up capital in its own business. However, Central Co-operative Banks and the State Co-operative Banks with the special or general permission from Registrar, invest 50 per cent of their reserve fund in their business.

Reserve fund would not be used otherwise than provided. Further pledge would be allowed on the securities in which Reserve funds is separately deposited/invested. However securities can be pledged or fund can be utilised otherwise with the prior sanction of the Registrar.

However, in case of –

- Co-operative housing societies, reserve fund can be utilised for expenditure on the maintenance, repair and renewal of society building
- Processing societies, reserve fund may be utilised for acquisition, purchase or construction of lands, buildings and machinery.

b. Other funds (Rule 55)

i. A society may invest any of its other funds in any of the modes specified in S. 70 when such funds are not utilised for the business of the society. Business of the society shall include any investment made by the society in immovable property with the prior permission of the Registrar in process of recovery of the society's normal dues or for the purpose if construction of building or buildings for its own use.

ii. Registrar may by the general or specific order in case of any society or class of society, specify maximum amount to be invested in any class or classes of securities.

iii. Every society, who has invested minimum 10 per cent of the working capital in securities, is required to set Investment Fluctuation Reserve. Further Registrar may direct that every year a specified per cent of the net profits is required to be credited to the investment fluctuation fund.

iv. Registrar by general or specific order shall determine proportion of paid-up share capital of the investing company or a class of society shall invest in the shares or security bonds or debentures issued by any other society.

v. Where two or more societies are allowed to enter into partnership u/s 20A of the Act, and it is necessary to invest funds in such partnership, the Registrar may, in addition to general or specific order of the State Government as specified in clause (e)[9] of section 70 impose such additional conditions as may be necessary in the interest of the society.

9. Rules are not amended post replacing of section 70 *vide* The Maharashtra Co-operative Societies (Second Amendment) Act, 2008 and introduction of new clause (d) to section 70 *vide* the Maharashtra Co-operative Societies (Amendment) Ordinance, 2013 dt. 24th February 2013. Hence reference to clause (e) be read as clause (d).

Provident funds

Any society may set for its employees a provident fund u/s 71 of the Act with the contribution by the society and form the employees. Such provident fund shall not be utilised in the business of the society nor would from part of the assets of the society. However in case where provisions of Employees' Provident Funds Act, 1952 is applicable to any society, then provisions of the said Act and not the provisions of s. 71 would apply.

Funds of the society and proceedings

No expenditure from the funds of a society shall be incurred for the purposes of the proceeding filed or taken by or against the any officer of the society in his personal capacity u/s 78 – Power of removable committee or member, 78A – Power of suppression of committee or removable of member thereof or 96 – Decision of Co-operative Court. In case any question arises whether expenditure can be so incurred or not, such question shall be referred to the Registrar.

In case any expenditure is incurred in violation of the provisions of s. 71A, Registrar shall direct such person to pay such sums within one month. In case of failure to pay, such sums could be collected as arrears of land revenue. Further such person would be disqualified to continue to be officer of any society or to be officer of any society at any next election including any next by-election held immediately after the expiration of allowed period of one month.

Writing off bad debts and losses (Rule 49)

Central and primary societies including Urban Banks showing losses consistently over a period of three years are allowed to write off against the Reserve Fund[10]. Rule 49 provides for writing off Bad Debts and losses as under:

a. All loans including interest thereon and recovery charges in respect thereof which are found irrecoverable and are certified as bad debts by the auditor appointed under section 81 shall be first be written off against the Bad Debt Fund and the balance, if any, may be written off against the Reserve Fund and the share capital of the society, with the sanction of the general body.

b. All other dues and accumulated losses or any other loss sustained by the society which cannot be recovered and have been certified as irrecoverable by the auditor may be written off against the Reserve Fund or share capital of the society

c. In case society is affiliated and indebted to a Central Bank, it shall first obtain the approval of that bank in writing and also the approval of the Registrar for writing off the bad debts and losses.

d. If the society is affiliated but not indebted to the Central Bank and in all other cases it shall obtain the approval of the Registrar in writing.

e. If the society itself is a Central Bank, approval of the State Co-operative Bank and the approval of the Registrar shall first be obtained.

In case of societies classified as A or B at the time of last audit, no permission need be taken if the bad debts are to be written off against the Bad Debt Fund specially created for the purpose.

Sections deleted by Ordinance

The Maharashtra Co-operative Societies (Amendment) Ordinance, 2013 dated 24 February 2013 has deleted following sections under Chapter VI - Property and Funds of Societies

a) Section 68 dealing with the Contribution to education fund of the State Federal Society; and

b) Section 69 dealing with Contribution of Co-operative State Cadre of Secretaries of certain Societies and establishment of employment such cadre of the Act has been deleted.

10. Government Circular No. AGC-274 of 1937 dt. 4-10-1937

Kishor Vanjara, *Tax Consultant*

Management of a Society

The management of affairs of a Society is vested with the Managing Committee which is duly constituted in accordance with the provisions of MCS Act, 1960, the rules 1961 and the bye-laws of the society .

This article covers only following topics:

1 The Committee, its power and functions
2 Reservation provisions
3 Appointment of Manger, Secretary and other officers
4 Maintenance charges
5 Annual General Body and Authority
6 Special General Body and Authority
7 Motion of no-confidence against officers
8 Act of societies not to be invalidated by certain defects
9 Power of suspension of committee
10 Registrars power

I have referred section of the Maharashtra Co-operative Societies Act, 1960 (MCS Act, 1960) and model Bye-Laws, wherever possible.

1. Committee, its Powers and Functions – Section 73

The Managing Committee of a Co-operative Housing Society is a Committee of the Management in which the management of the affairs of the society is vested and it exercises such powers and discharges such functions as are set out under the bye-laws of the society, provided however that the Managing Committee has to function subject to the directions given or regulations made by General Body Meetings of the Society

The following are some of the Powers conferred and Functions of the Managing Committee under the present model bye-laws of the Society,

Bye-Law No.	*Powers and Function*
6	To ensure that the society is affiliated to Housing Federation and its subscription is regularly paid
12 (i) and (ii) 14(a), (b) and (c), 15	To consider all matters relating to the creation, investment and for utilisation of the repair and maintenance fund, reserve fund and sinking fund
13 (a)/13 (c)	To consider and recommend to the general body the rates of contribution to the repairs and maintenance fund and the sinking fund

33	To ensure that, nominations and revocations thereof are recorded in the minutes of the Managing Committee Meetings
65	To consider and decide the applications for various purposes received by the society
69(b)	To fix in respect of every flat the society's charges (Maintenance and service charges) on the basis of proportion as laid down under the bye-laws
71	To review the position of recovery of the charges due to the society from members and to initiate action against defaulting members
76(a)	To issue letters of allotment of flats
95/96/97	To call general body meetings and to ensure that all matters to be considered are kept on agenda
116(a)/119	To arrange for election of a New Committee and to ensure that after elections new committee is duly constituted
126(a)	To elect office bearers
129	To fill in vacancies of the committee
156/159	To take steps to maintain the property of the society in good condition and to carry out repair
161	To insure the property of the society

Apart from the above, the Committee can consider and decide any other matters provided under the MCS Act, 1960, The MCS Rules, 1961 and the bye-laws of the society.

2. Reservation provisions – Section 73C

Section 73C is substituted by Mah. Ord. II of 2013 , cl. 33 w.e.f. 14-2-2013

1. Notwithstanding anything contained in MCS Act, or in the rules made thereunder, or in the bye-laws of any society, there shall be two (2) seats reserved for women on the committee of each society consisting of individual as members and having members from such class or category of persons, to represent the women members.

2. Any individual woman member of the society, or any woman member of the committee of a member – society, whether elected, co-opted or nominated, shall be eligible to contest the election to the seat reserved under sub-section 73(1).

3. Where no women member or, as the case may then be, women members are elected to such reserved seats, then such seat or seats shall be filled in by nomination from amongst the women member eligible to contest the election.

4. Nothing in this section shall apply to a committee of a society exclusively of women members.

3. Appointment of Manager, Secretary and Other Officers – Section 74

Every Managing Committee, at the first meeting, shall elect a Chairman, Secretary and Treasurer amongst the elected members of the committee. The Managing Committee can appoint manager, if required, to look after day-to-day affairs of the society at the reasonable salary. A Managing Committee member can

be paid remuneration at such rate as may be decided in the General Body Meeting, for the services rendered by him to the society.

4. Maintenance charges

With rights and ownership comes the responsibility which a member is expected to perform not only to protect his ownership but also to maintain the joint property. To maintain the society, every member should contribute towards various outgoing and establishment of its funds, such as, Property Taxes, Water charges, Common electricity charges, Repairs & maintenance of lifts, Service Charges, etc.

1) Service charges and expenses on repairs and maintenance of the lift shall be borne by all the members equally irrespective of the fact whether members use the lift or not.

2) Lease Rent, Non-Agricultural tax and Insurance Charges shall be borne as per built-up carpet area of each flat. But in case of insurance charges, if there is increase in the insurance premium if any flat, used for commercial purposes, the excess insurance premium shall be shared by only those members in proportion to the built-up carpet area of their flats.

3) Water charges should be collected on the basis of total number of taps and size of inlets (push cocks/turn cock/mixing taps /flush taps) provided in each flat.

4) Major repairs fund to be collected as fixed by General Body on area basis.

5) The fund should be collected to meet the normal recurring repairs of the construction cost of each flat at the rate fixed by General Body, subject to the minimum of 0.75% per annum of the construction cost of each flat.

6) The sinking fund to be collected at the rate decided by General Body subject to minimum of 0.25% per annum of the construction cost of each flat excluding the proportionate cost of land.

5. Annual General Body and is Authority – Section 75

Subject to the provisions, of the Act, Rules and Bye-Laws of the society, the final authority of every society shall vest in the General Body of members in General Meeting. Where the bye-laws of a society so provide, the general body meeting shall be attended by delegates appointed by the members and such meeting shall be deemed to be the meeting of the General Body, for the purpose of exercing all the powers of the General Body.

The following are the matters which are to be considered by the General Body Meeting:

1) To read the minutes of last AGM and SGM, if any, and to note the action taken thereon

2) To receive a report of the committee, together with the income and expenditure account and the balance sheet

3) To consider audit memorandum, if received along with the audit rectification report.

4) To declare the result of the election

5) To appoint an auditor from a panel approved by State Government

6) To consider important communication received from the Registering Authority, the Statutory Auditor, Government, Local or any other competent authority

7) Transfer of a flat

8) Expulsion of a member

9) Levy of charges – Parking, use of terrace, open space, etc.

10) Acceptance of resignation of the committee

11) Conveyance of the property

12) To decide the limits for incurring expenditure

13) To approve the tenders

14) Prescribe penalties for different breaches of the bye-laws of the society
15) To approve the alteration in the bye–laws
16) Playing of games in society's compound
17) To form an Advisory Committee In corporate by Mah. Ord. II of 2013
18) To prepare Annual budget for next year
19) All other like matters which fall within jurisdiction of the general body.

It is very important to note that no resolution can be brought at the General Body Meeting of the society cancelling its previous resolution unless six clear months have passed after passing the previous resolution.

6. Special General Body and is Authority – Section 76

As far as Special General Body Meeting is concerned, it may be called at any time by the Chairman or by a majority of the committee and shall be called within one month to discuss urgent, and important points, such as No confidence motion, major repairs etc. At the said Special General Body Meeting, no other agenda to be discussed other than that mentioned in the notice of meeting. The society can call any number of special General Body Meetings. A special General Body Meeting can be called at the instance of the Registrar.

It is very important to note that no resolution can be brought at the General Body Meeting of the society cancelling its previous resolution unless six clear months have passed after passing the previous resolution.

7. Motion of no – confidence against Officers – Section 73-ID

1. An officer who holds office by virtue election on that office shall cease to be such officer, if a motion of no-confidence is passed at a meeting of the committee by two-thirds majority of the number of committee members who are entitled to vote at the election of such officer and his office shall, thereupon be deemed to be vacant.

2. The requisition for such special meeting shall be signed by not less than one-third of the total number of members of the committee who are entitled to elect the officer of the committee and shall be delivered to the Registrar.

Provided that, no such requisition for a special meeting shall be made within a period of six months from the date on which any of the officer referred to in sub-section 73-ID(1) has entered upon his office.

3. The Registrar shall, within seven days from the date receipt of the requisition sub-section 73-ID(2), convene a special meeting of the committee. The meeting shall be held on a date not later than fifteen days from the date of issue of the notice of the meeting.

4. The meeting shall be presided over by the Registrar or such officer not below the rank of an Assistant Registrar of Co-operative Societies authorised by him in his behalf. The Registrar or such officer shall, when presiding over such meeting, have the same powers as the President or Chairman when presiding over a committee meeting has, but shall not have the right to vote.

5. The meeting called under this section shall not, for any reason, be adjourned.

6. The names of committee members voting for and against the motion shall be read in the meeting and recorded in the minute book of committee meetings.

7. If the motion of no-confidence is rejected, no fresh motion of no-motion of no-confidence shall be brought before the committee within a period of one year from the date of such rejection of the motion.

8. Acts of societies not to be invalidated by certain defects – Section 77

No act of a society or a committee or any officer, done in good faith in pursuance of the business of the society shall be deemed to be invalid by reason only of some defects subsequently

discovered in the organisation the society, or in the constitution of the committee, or in the appointment or election of an officer, or on the ground that such officer was disqualified for his office.

No act done in good faith by any person appointed in MCS Act, the rules and the bye-laws shall be invalid merely by reason of the fact that his appointment has been cancelled by or in consequence of any order subsequently passed under MCS Act, rules and the bye-laws.

The power has been given to the registrar to decide whether any act was done in good faith in pursuance of the business of the society, and his decision thereon, is final.

9. Power of Suspension of Committee – Section 78

The members of the committee shall be jointly and severally liable for making good any loss, which the society may suffer on account of their negligence or omission to perform any of the duties and functions cast on them under the MCS Act, 1960, MCS Rules, 1961 and bye-law of the society.

If in the opinion of the Registrar the committee of any society or any member commits default or is negligent, the Registrar can remove the committee.

The Registrar, after giving the committee an opportunity of showing cause, in writing, if any, within fifteen (15) days from the date of receipt of notice and after giving reasonable opportunity of being heard and after consultation with the federal society to which the society is affiliated, comes to a conclusion that the charges mentioned in the notice *prima facie* exist, but capable of being remedied with, he may be order, to keep the committee under suspension for such temporary period, not exceeding six months as may be specified in the order.

The power of appointment of an administrator is removed by the Mah. Ord. II of 2013, if any society is not receiving loan or financial assistance in terms of any cash or kind or any guarantee by the Government.

10. Registrar's Powers – Section 79/80

The Registrar on his own or on the basis of any complaint received by the member or Managing committee, take action against the concerned person or society. The main powers conferred upon the Registrar are:

1. To consider complaint against the society if the Management of the Society is not carried out as per the provisions of the Maharashtra Co-operative Society Act, 1960, The Maharashtra Society Co-operative Rules, 1961 and the bye-laws of the society.

2. A member of the committee or Managing Committee can be removed by Registrar, if in his opinion such members makes default or is negligent in the performance of the duties.

3. To convene the Managing Committee meeting or annual general meeting or special General Meeting, if the Secretary or Chairman failed to call such meeting

4. To recover the expenditure incurred in calling a meeting out of the funds of the society or by such person or persons who in his opinion were responsible for the refusal or failure to convene the meeting

5. To fix the contribution to be made to the reserve fund at the lower rate, after considering the financial position of the society.

6. To receive special report from Auditor in respect of civil or criminal offence and grant permission to file FIR with police.

7. Resignation of the committee.

8. To seize records and property of the society.

9. Any other, like matters which falls within jurisdiction of the Registrar.

CA Atul T. Suraiya

Accounts and Audit

Introduction

Maharashtra Co-operative Societies (Amendment) Ordinance, 2013 has been notified by the Maharashtra State Gazette dated 14th February, 2013 to amend the Maharashtra Co-operative Societies Act, 1960. The said amendment has far reaching impacts on the Accounts and Audit provisions of Societies. This article attempts to bring out the provisions in a nutshell.

Maintenance of Accounts and Records

Section 79 of the Act lays down the provisions in respect of Society's obligation to file returns and statements and Registrar's power to enforce performance of such obligations.—

(1) The Registrar may direct any society or class of societies to:

(a) Keep proper books of account, including keeping and maintaining the accounts in electronic form by using the latest technology and expertise as may be prescribed, with respect to all sums of money received and expended by the society, and the matters in respect of which the receipt and expenditure take place;

(b) Keep records of all sales and purchases of goods by the society, and the assets and liabilities of the society, and

(c) to furnish such statements and returns and to produce such records as he may require from time to time;

and the officer or officers of the society shall be bound to comply with his order within the period specified therein.

Time limit

Sub-section (1A) requires every society to file returns within six months of the close of every financial year to the Registrar or to the person authorised by him, including the following matters, namely –

(a) Annual reports of its activities;

(b) Its audited statement of accounts;

(c) Plans for surplus disposal as approved by the general body of the society;

(d) List of amendments to the bye-laws of the society, if any,

(e) Declaration regarding date of holding of its general body meeting and conduct of elections when due;

(f) Any other information required by the Registrar in pursuance of any of the provisions of the Act.

Information about Auditor

Sub-section (1B) requires every society to file a return regarding the name of the auditor or auditing firm from a panel approved by a State Government in this behalf, appointed in the general body meeting together with his written consent within a period of one month from the date of annual general body meeting.

Default

Sub-section (2) lays down that where any society is required to take any action under this Act, the rules or the bye-laws, or to file returns or to comply with an order made under the foregoing sub-section, and such action is not taken –

(a) Within the time provided in this Act, the rules or the bye-laws, or the order as the case may be, or

(b) Where no time is so provided, within such time, having regard to the nature and extent of the action to be taken, as the Registrar may specify by notice in writing, the Registrar may himself, or through a person authorised by him, take such action, at the expense of the society and such expense shall be recoverable from the society as if it were an arrears of land revenue.

Personal liability

Sub-section (3) lays down that where the Registrar takes action under sub-section (2), the Registrar may call upon the officer or officers of the society whom he considers to be responsible for not complying with the provisions of this Act, the rules or the bye-laws, or the order made under sub-section (1) and after giving such officer or officers an opportunity of being heard, may require him or them to pay to the society the expenses paid or payable by it to the State Government as a result of their failure to take action and to pay to the assets of the society such sum not exceeding Rupees twenty-five to Rupees one hundred, as the Registrar may think fit for each day until the Registrar's directions are carried out.

Auditor

Section 75(2A) lays down that every society shall,

(a) Appoint an auditor or auditing firm from a panel approved by the State Government in this behalf in its annual general body meeting having such minimum qualifications and experience as laid down in Section 81 of the Act, for the current financial year and

(b) Shall also file in the form of return to the Registrar, the name of the auditor appointed and his written consent for auditing the accounts of the society within a period of thirty days from the date of Annual General Body Meeting.

(c) It is further provided that the same auditor shall not be appointed for more than three consecutive years by the Annual General Body Meeting of the same society.

(d) It is further provided that no auditor shall accept audit of more than twenty societies for audit in a financial year excluding societies having paid up share capital of less than ₹. one lakh.

Audit

Section 81 lays down the provisions relating to Audit.

(1) The society shall cause to be audited its accounts at least once in each financial year and also cause it to be completed within a period of six months from the close of financial year to which such accounts relate and shall lay such audit report before annual general body meeting.

(2) It is further provided that if the Registrar is satisfied that the society has failed to intimate and file the return as provided he may cause its accounts to be audited, by

an auditor from the panel of the auditors approved by the State Government.

(3) The board of every co-operative society shall ensure that the annual financial statements like the receipts and payments or income and expenditure, profit and loss and the balance sheet along with such schedules and other statements are submitted to the auditor within the period as may be prescribed.

(4) The auditor's report shall have:

(i) All particulars of the defects or the irregularities observed in audit and in case of financial irregularities and misappropriation or embezzlement of funds or fraud, the auditor/ auditing firm shall investigate and report the *modus operandi*, the entrustment, amount involvement, and fix the responsibility for such misappropriation or embezzlement of funds or fraud, on the members of the board or the employees of the society or any other person as the case may be with all necessary evidence.

(ii) Accounting irregularities and their implications on the financial statements to be indicated in detail in the report with the corresponding effects on the profit and loss;

(iii) The functioning of the general body, board and sub-committees of the co-operative societies to be checked and if any irregularities or violation observed, reported duly fixing the responsibilities for such irregularities or violations.

(5) The remuneration of the auditor or auditing firm of a co-operative society shall be borne by the society and shall be at such rate as may be fixed by general body of the society.

(6) The Registrar shall maintain the list of co-operative societies district-wise, the list of working societies, the lists of societies whose accounts are audited, the list of societies whose accounts are not audited within the prescribed time and reasons therefor. He shall co-ordinate with the co-operative societies and the auditors and auditing firms and ensure the completion of audit of accounts of all the co-operative societies in time every year.

Qualifications of an Auditor

(a) A chartered accountant within the meaning of the Chartered Accountants Act 1949, who shall have a fair knowledge of the functioning of the societies and shall have an experience of at least three years in auditing, of which the auditor would like to be included in the panel, and chartered accountant shall have working knowledge of the Marathi language;

(b) Auditing firm means a firm of more than one chartered accountant within the meaning of the Chartered Accountants Act 1949, who shall have a fair knowledge of the functioning of the societies and shall have an experience of at least three years in auditing, of which the auditor would like to be included in the Panel, and chartered accountant shall have working knowledge of the Marathi language;

(c) A certified auditor means a person who holds a degree from recognised university and also has completed a Government Diploma in Co-operation and Accountancy and who shall have a fair knowledge of the functioning of the societies and shall have an experience of at least five years in auditing, of which the auditor would like to be included in the panel, and certified auditor shall have working knowledge of the Marathi language;

(d) Government Auditor means an employee of the Co-operation Department of the

State who has passed, in addition to the Graduation or Post Graduation Degree, Higher Diploma in Co-operative Management / Diploma in Co-operative Audit / Government Diploma in Co-operation and Accountancy and who has completed a period of probation successfully and who has working knowledge of Marathi knowledge.

It may be noted that for a fresh Chartered Accountant, it may be not be possible to get empanelled, but the experience of three years may be obtained either as an employee of another Chartered Accountant or being partner of a firm which has more than three years standing. This concept has been accepted by the other authorities which also empanel Chartered Accountants as auditors. However it is recommended that a clarification to this effect may please be sought.

Scope of Audit

The audit shall be carried out as per Accounting Standards as may be notified by the State Government from time to time and shall also include examination or verification of the following items, namely:

(i) Over dues of debts, if any;

(ii) Cash balance and securities and a valuation of the assets and liabilities of the society;

(iii) Whether loans and advances and debts made by the society on the basis of security have been properly secured and the terms on which such loans and advances are made or debts are incurred are not prejudicial to the interest of the society and its members;

(iv) Whether transactions of the society which are represented merely by book entries are not prejudicial to the interest of the society;

(v) Whether loans and advances made by the society have been shown as deposits;

(vi) Whether personal expenses have been charged to revenue account;

(vii) Whether the society has incurred any expenditure in furtherance of its objects;

(viii) Whether the society has properly utilised the financial assistance granted by government or Government undertakings or financial institutions, for the purpose for which such assistance was granted;

(ix) Whether the society is properly carrying out its objects and obligations towards members.

The Registrar or the person authorised shall, for the purpose of audit, at all times have access to all the books, accounts, documents papers, securities, cash and other properties belonging to, or in the custody of, the society, and may summon any person in possession or responsible for the custody of any such books, accounts, documents, papers, securities, cash or other properties, to produce the same at any place at the headquarters of the society or any branch thereof.

Every person who is, or has at any time been, an officer or employee of the society, and every member and past member of the society, shall furnish such information in regard to the transactions and working of the society as the Registrar, or the person authorised by him, may require.

The auditor shall have the right to receive all notices and every communication relating to the annual general meeting of the society and to attend such meeting and to be heard thereat, in respect of any part of the business with which he is concerned as auditor.

lf, during the course of audit of any society, the auditor is satisfied that some books of account or other documents contain any incriminatory evidence against past or present officer or employee of the society the auditor shall immediately report the matter to the Registrar and, with previous permission of the Registrar, may impound the books or documents and give a receipt thereof to the society.

The auditor shall submit an audit memorandum report within a period of one month from its completion and in any case before issuance of

notice of the annual general body meeting, duly signed by him to the society and to the Registrar in such form as may be specified prescribed by the Registrar, on the accounts examined by him and on the balance-sheet and profit and loss account as on the date and for the period up to which the accounts have been audited, and shall state whether in his opinion and to the best of his information and according to the explanation given to him by the society the said accounts give all information required by or under this Act and present the true and fair view of the financial transactions of the society.

Where the auditor has come to a conclusion in his audit report that any person is guilty of any offence relating to the accounts or any other offences, he shall file a specific report to the Registrar within a period of 15 days from his submitting the audit report. The Auditor concerned shall after obtaining written permission of the Registrar, file a First information Report as contemplated by Criminal Procedure Code. Failure to file First information Report, would make auditor liable for disqualification and removal of his name from panel of auditors or any other action as Registrar may think fit. When it is brought to the notice of the Registrar that the auditor has failed to initiate action as above the Registrar shall cause the First Information Report to be filed by a person authorised in that behalf.

Where the auditor finds that there are apparent instances of financial irregularities resulting in to losses to the society caused by any member of the committee, office bearers and officers of the society or any other person, then he shall prepare a Special Report and submit the same to the Registrar along with his audit report. Failure to file such Special Report would amount to negligence in his duties and he would be liable for disqualification for appointment as an auditor or any other action as Registrar may think fit.

If it appears to the Registrar, on an application by a society or otherwise, that it is necessary or expedient to re-audit any account of the society, the Registrar may by order provide for such reaudit and the provisions of this Act, applicable to audit of accounts of the society shall apply to such re-audit.

Rectification of defects in accounts

If the result of the audit held under the last preceding section discloses any defects, in the working of a society, the society shall within three months from the date of audit report, explain to the Registrar the defects, or the irregularities pointed out by the auditor, and take steps to rectify the defects and remedy irregularities and report to the Registrar, the action taken by it thereon, and place before the next general body meeting.

The Registrar may also make an order directing the society or its officers to take such action, as may be specified in the order to remedy the defects within the time specified therein.

The Registrar or the person authorised by him shall scrutinise the rectification report accordingly, and inform the society thereabout within six months from the date of receipt of the Rectification Report.

It shall be the responsibility of the auditor concerned, who has conducted the audit of the society, to offer his remarks on Rectification Report of the society item wise till entire rectification is made by the society, and Auditor should submit his report to the Registrar.

Penalties for various offences

Section 146 lists out the various offences that are contemplated under the Act and Section 147 lays down the punishments for the various offences, which range from fines and extend to imprisonment.

Conclusion

The new provisions require the auditing and accounting profession to carry out their professional duties with more expertise and responsibility.

CA A. S. Merchant

Election Rules

I. Introduction

This article deals and is restricted to elections in Co-operative Housing Societies based on the Model Bye-laws.

The management of the affairs of the Co-operative Housing Society vests in the Committee of the Management duly elected by the General Body of the Society as per the provisions of the Maharashtra Co-operative Societies Act, 1960 and the Maharashtra Co-operative Societies Rules, 1961.

1. The MCS Act was amended by an Ordinance of 2013 w.e.f February 14, 2013. The Chapter XIA governing elections viz., sections 144A to 144Y have been deleted. Section 73CB has been inserted by the ordinance and the election powers in a Co-operative Society has been vested in State Election Authority.

2. The Mumbai District Co-operative Housing Federation has made representation to the State Government that such a provision will cause tremendous hardships to small Co-operative Housing societies. Till such time the Model bye laws and the election rules prescribed thereunder will prevail

3. When the society is registered, the chief promoter /builder promoter has to call the first statutory general meeting of the society within a period of three months from the date of the registration of the society. In that meeting, a provisional committee of some members of the society is constituted until the regular election of the management committee is held.

II. Due date of election to the Committee

Many times elections are held not at the Annual General Meeting, which is supposed to be convened on 14th August every year. They are held sometime later during the year

The elections have to be conducted on or before completion of 5 years from the date of previous election. The period of 5 years shall commence from the date of the previous election. Thus if an election is held on 1st October 2012 the next election will only be on or before 1st October 1017. A Special General Body Meeting will have to be called for conducting or/and announcing election results.

III. Removal of Restriction on voting rights

The Maharasthra Co-operative Societies Act 1960, Section 27 has been amended thereby removing the waiting period of two years for voting rights. Hence, any eligible member or an associate member with the consent of 1st member can contest the election immediately after seeking

membership and his admission is made as a member of the society.

IV. Whether a member in arrears of the society can contest the election to the committee or propose or second any candidature

1. If a member is in arrears in respect of any dues of the society on the date of scrutiny of nomination papers beyond 90 days as per Bye-law No. 118 he cannot contest the election.

2. However if the proposer and seconder member of the society are in arrears in respect of dues to the society, they can propose and second any candidature.

3. How many times a member can propose or second the candidature? There are no any restrictions in this aspect. The member can any numbers of times propose and second candidature.

V. Election Procedure

1. The Managing Committee has to initiate steps at least three months prior to the date of conducting election. The strength of the managing committee shall be as per the bye-law No.115 (Rule No. 2.1)

2. There are disqualification stated in the Act, Rules and Model bye-laws for any member to be elected on the committee of the management. Thus any member who has interest in respect of services provided to the society, he cannot stand for election

3. All defaulting members in respect of dues of the society, shall be severed within three months from the date of service of notice in writing, demanding the payment of dues and if the dues are not paid before filing of the nomination and the date of scrutiny of nominations the nomination will be treated as invalid.

4. If the associate member does not submit No Objection Certificate of original member then he cannot stand for election.

5. After the elections are over, the Secretary of the previous committee of the society shall hand over the charge to the newly elected committee.

6. As per section of 73 (IAB) of the Maharashtra Co-operative Societies Act, 1960 and Rule 58 A of the Maharasthra Co-operative Societies Rule 1961, every elected committee member shall execute a bond to the effect within 15 days of his/her assuming office in form of M-20 on stamp paper of ₹ 200/-. The expenses shall be born by the society. The member who fails to execute such Bond within the specified period shall be deemed to have been vacated as a member of the committee. The Secretary of the society shall keep them on record of the society and according inform the concerned Registrar of the ward along with copies of the bonds within 15 days from formation of the committee. The execution of the bond has been waived in respect of Co-operative Housing Societies by notification order No. CSL2012/CR-402/15-C dated September 06, 2012.

VI. Bye law No.112. Management of the Society to vest in the Committee.

- The management of the affairs of the society shall vest in the committee duly constituted in accordance with the provisions of the Maharashtra Co-operative Societies Act, 1960, the Maharashtra Co-operative Societies Rules, 1961 and the bye-laws of the society.
- Under bye-law No.115 there is a provision regarding strength of the committee and now it is compulsory to have at least one women in the committee as provided under section 73(BBB) of the Maharashtra Co-op Societies Act 1960. However there is also a provision that in the event of women not being available or not willing to represent in the committee the seats reserved for her may be filled from other. The committee of management of the society as per Model bye-law No.115 depending on numbers of members of the society shall consist as under. The strength includes the reservation

of seats for women members as provided under section 73 BBB of the Act.

No. of Members	*Strength of the M.C*			*Quorum in M.C.*
	General	*Women*	*Total*	
Up to 50	4	1	5	3
51 to 100	6	1	7	4
101 to 300	8	1	9	5
301 and above	9	2	11	6

- In case women members are not available or not willing to represent on the committee, the seats reserved for them may be filled from other eligible members.

Strength of the committee

The committee shall consist of 5*/7/9/11 members of the society. This strength includes the reservation of seats for women members as provided under section 73 BBB of the Act, as indicated in the above table

VII. Election of the Managing Committee (MC) under Bye-law No.116

1. Election of all the members of the Managing Committee shall be held once in 5 years in accordance with the Election Regulations. The retiring members of the committee shall be eligible for election. If the paid up share capital is more than ₹ 10,000 then the voting shall be done by secret ballot.

2. Election of all the members of the MC shall be held once in 5 years, accordance with the Election Regulations annexed to the Model bye-laws. The retiring members of the committee shall be eligible for re-election. The period of office of the committee elected shall be for 5 years.

3. As per Model bye-law No. 116(b)

In the event of receipt of inadequate valid nominations, required to constitute the full Committee, the General body at its meeting shall fill in the vacancies by election. On the failure of the general body meeting to elect the required number of members to constitute the Committee, the elected members of the Committee shall be competent to fill in the same by co-option whether they form the quorum or not, notwithstanding the provisions of the bye-law No. 127 regarding the quorum.

VIII. Disqualification for election to the Managing committee. Bye law 118

No person shall be eligible for being elected as a member of the MC or Co-opted on it, if:

a. he has been convicted of the offence, involving moral turpitude, unless the period of six years has elapsed since his conviction,

b. he defaults the payment of dues to the society, within three months from the date of service of notice in writing, served either by hand delivery or by post (under certificate of posting), demanding the payments of dues.

c. he has been held responsible under Section 79 or 88 of the Maharashtra Co-operative Societies Act, 1960 or has been held responsible for the payment of the costs of enquiry under section 85 of the Maharashtra Co-operative Societies Act, 1960.

d. he has without the previous permission of the society, in writing sublet his flat or part thereof or given it on leave and licence and caretaker basis or has parted with its possession in any other manner or has sold his shares and interest in the society.

e. In case of an associate member, non submission of the no-objection certificate and undertaking, as prescribed under these bye-laws, by the member.

f. He is declared as ineligible as per the provisions of the Maharashtra Co-operative societies Act, 1960 and Rules, 1961.

g. A new sub-clause is inserted that no person shall be eligible for being elected as member of the committee or co-opted on it, if he is declared as ineligible as per the provisions of the Maharashtra Co-operative Societies Act, 1960 and Rules 1961.

h. Under Bye-law No.118 provision for disqualification for election to the committee is made. In sub-Bye-law No. 2 when a member defaults the payment of the dues to the society within three months from the date of service of notice in writing served either by hand or by U.P.C demanding the payments of dues and the same has not been compiled with then he shall not be eligible for being elected as a member of the committee or can be opted in to committee. Further now even associate member has been given a membership right can contest election for managing committee only if he has submitted no objection certificate and undertaking as prescribed under the present Bye-law.

IX. Constitution of a member of the committee

- Under Bye-law No.119 a new provision for constitution of committee has been inserted which is in compliance with the provisions of Maharashtra Co-op. Societies Act, 1960 and Maharashtra Co-op. Societies (2nd Amendment) Act,1986 (MAH.XXXVII of 1986).

- In a general election of members of the committee of a society, on the election of two-thirds or more number of members, the returning officer or any other officer or authority conducting such election shall within seven days after the declaration of results of the election of such members, or where such election is held before the date of commencement of the Maharashtra Co-operative Societies (second amendment) Act, 1966 (Mah. XXXVII of 1986), such number of members have been elected but the committee has, for whatever reason, not been so far constituted, forward their names together with their permanent addresses to the registrar, who shall within fifteen days from the date of receipt thereof by him, publish or cause to be published such names and addresses by affixing a notice on the notice board or at any prominent place in his office, and upon such publication, the committee of the society shall be deemed to be duly constituted in determining two thirds of the number of members, a fraction shall be ignored.

Cessation of a member of the committee under Bye-law No.120

A person shall cease to be the member of the committee, if:

He has incurred any of the disqualifications mentioned under the bye-law No. 118 or:

He has failed to attend any three consecutive monthly meetings of the Committee, without the leave of absence.

Intimation of cessation of membership of the committee

If a member of the Committee attracts any of the disqualifications under the bye-law No. 120 (1), the Committee shall record the fact in the minutes of the meeting and the secretary of the society shall inform the member and Registrar accordingly. Such member shall cease to be the member of Managing Committee on the order of the Registrar.

Period of office to the elected Committee

a. Under bye-law No.122 the period of office of the Committee elected under the bye-law No. 116(a) shall be for 5 years.

b. The first meeting of the newly elected committee to be held within 30 days of its election.

c. Under bye-law No. 123(A) a provision is made to hold first meeting of the newly elected and out going committee within 30 days from the date of constitution of new Committee as provided in bye-law No. 119.

d. Subject to the provisions of the bye-law No.123(a) the secretary of the outgoing Committee shall issue notice of the first meeting of the newly elected Committee and the outgoing Committee to the members thereof. On the failure of the secretary of the outgoing Committee to convene the said meeting, the chairman of the outgoing Committee shall call it. On the failure of both, the Registering Authority may call such a meeting.

e. Under bye-law No.126 the President, Chairman, Secretary, of the society shall hold office for the period of five years from the date of their election to such office. However same shall not be beyond the expiry of the term of the committee.

f. In case of a no confidence motion moved against Chairman, Secretary or Treasurer then such special meeting of the committee called shall be presided by the Registrar or such officer not below the rank of Asst. Registrar. The provision was not present in the old Model bye-laws.

Election of office bearers of the society

- Every Committee, at its first meeting after its election, shall elect a Chairman, Secretary and Treasurer from amongst the members of the Committee.

Period of office of the chairman/secretary and 'No Confidence' motion against either

a. The Chairman, Secretary and Treasurer of the society shall hold office for the period of 5 years from the date on which he is elected to be the Chairman or as the case may be the Secretary ant Treasurer. But not beyond the expiry of term of the Committee:

b. Provided that he shall cease to be the Chairman, or as the case may be the Secretary and Treasurer of the society if the motion of 'No Confidence' is moved in the special meeting of the Committee called, and presided by Registrar or such officer not below the rank of an Assistant Registrar, upon the notice given by 1/3rds members of the Committee and the motion 'No Confidence' is passed by 3/4th members present as such meeting, having attendance of a least 2/3rd members of the Committee, who are entitled to vote at election of such Chairman, Secretary and Treasurer.

c. Provided further that another motion of 'No Confidence' shall not be brought against the Chairman or as the case may be the Secretary or Treasurer of the society unless the period of 6 months has elapsed from the date of the preceding motion of the 'No Confidence'.

d. Numbers of Committee Meetings to be held in a month.

- Under Bye law No.128 the Committee shall meet as often as necessary but as least once in a month.
- In case of emergency, the committee may place a resolution and get the same passed by the committee members. However the same be placed before the next immediate meeting.

To fill in vacancies of the committee

a. Under bye-law No.129 in the event of vacancies in the committee, caused an account of the death, resignation, disqualification or removal of any members of the Committee, by the Registrar the Committee may fill in such vacancies by co-option on the Committee of any other members eligible to be on the Committee, irrespective of the fact whether there is the quorum or not, not withstanding anything contained in the bye law No. 127. Such vacancies by co-option shall not be more than two.

b. Bye-law No. 129 provides that in case of vacancy caused due to any reason of

disqualification, death, resignation or removal, the vacancy by co-option shall not be more than two.

The period of office of the member co-opted on the Committee.

- Under Bye-law No. 130: The period of office of the co-opted member of the Committee shall be co-terminus with tenure of office of the Committee.

Resignation by a member of the Committee

i. Under Bye-law No. 131: A member of the Committee may, by a letter, addressed to the Chairman of the society, resign his membership of the Committee. The resignation shall be effective from the date it is accepted by the Committee or an expiry of the period of one month from the date of the receipt of the letter of the resignation by the Chairman or the Secretary of the society, whichever is earlier.

ii) Under Bye-law No. 132 (E) a provision is made that in the event entire committee is desirous to resign then the resignation of such committee shall be placed before the general body and such resignations shall be effective from the date of acceptance of such resignations by the general body till alternative arrangement is made for the management of the society outgoing committee continues in office.

Resignation of office-bearership of the society

a. The Chairman of the Society may resign his office as Chairman by a letter addressed to the Secretary of the Society;

b. The Secretary or Treasurer of the society may resign his office as Secretary or Treasurer, by a letter addressed to the Chairman of the society;

c. Chairman/Secretary/Treasurer's resignation will be effective only after its acceptance and handling over the charge to the newly elected Chairman/Secretary/Treasurer, as the case may be.

d. The Committee may accept the resignation of the office of the Chairman/Secretary/ Treasurer only after it is satisfied that the Chairman or as the case may be the Secretary or Treasurer of the society has brought up to date the work entrusted to him and has produced the entire papers and property of the society, in his possession before the Committee.

e. In case entire Committee intends to resign, the resignations of the Committee shall be placed before the general body and such resignations shall be effective from the date of acceptance of such resignations by the General Body. The Committee shall continue in office till alternate arrangement is made for the management of the society.

Who can become a Returning Officer –

A returning officer has be appointed from amongst the members if the society provided he is not intending to contest the election or propose or second any candidature. If no member is willing to work as returning officer, the registering authority shall appoint a returning officer. The society will have to pay honorarium to the said returning officer for working as a returning officer. The amount will be related to the number of members of the society and numbers of candidates to be elected.

X. Duties of Returning Officer

Duties of returning are spelled out in the Election Rules

a. He has to function as per Election Programme and Rules.

b. If number of nomination papers are equivalent to number of seats on the Committee.

c. If numbers of nomination papers are less than number of seats on the Committee.

d. After scrutiny of nomination papers and date of withdrawal, the Returning Officer will have to report the valid number of nominations and invalid number of nominations. If valid numbers of nominations are equivalent to the number of seats on the Committee, no election will be held. The Chairman has to declare in the General Body that they are elected.

e. However, if number of nomination papers or number of valid nomination papers are less than the number of seats on the Committee, after scrutiny and withdrawal of nominations the Returning Officer has to report accordingly to the Chairman who will declare them as elected in the General Body and request the members to fill up the remaining number of seats on the Committee.

f. If the General Body does not elect the members for the remaining seats, the newly elected members at their first Committee meeting can co-opt the members for the remaining seats on the committee as per bye-law No. 116.

XI. Election Rules

1. These Rules shall be called the Rules of Election of a member of the Managing Committee of the …… Co-operative Housing Society Ltd. They shall be deemed to have come into force from the date of their approval by the Registering Authority.

2. Every Managing Committee shall hold elections before expiry of its term.

3. If the recovered share capital is more than ₹ 10,000 then, voting shall be secret voting.

4. The members of the society on the Register of Members as on 31st December, if the election is due during subsequent period between 1st January to 30th June, and as on 30th June if election is due during subsequent period between 1st July and 31st December, only be eligible to vote in the election to Managing Committee of the Society.

5. The retired members, if not disqualified, shall be eligible for re-election.

6. The provisional list shall be prepared by the Managing Committee as per (3) above and shall be notified on the Notice Board of the society, 60 (sixty) days before the date of election, inviting suggestions and objections in respect of the names of the members, within a period of 8 (eight) days, from the publication of such list.

7. After considering the suggestions and objections, if any, received, the Managing Committee shall publish final list of members eligible to vote, within two days of the last date as mentioned at 4 above.

8. The provisional and final list of members referred to above shall be in the Appendix 'A' appended to these Rules.

9. After the final list, the Managing Committee shall appoint from amongst the members who are not candidates for election or who have neither proposed nor seconded candidature of any member, or any other person, as Returning Officer. However in case of member being appointed as Returning Officer, the Managing Committee shall obtain an undertaking from such member that he will not contest the election nor propose or second any candidate. The Returning Officer shall have authority to appoint such polling staff as he deems necessary.

10. Where the Managing Committee has failed to appoint a Returning Officer, the Registering Officer shall appoint a Returning Officer and polling staff shall be borne by the Society.

11. The Returning Officer shall draw and declare a programme of various stages of election, on the Notice Board of the society, as indicated herein below, not later than seven days of the date of publication of final list of voters of the Society.

a. The Returning Officer shall submit copy of such Programme to the register and the concerned Housing Federation.

   i. Last date from making nominations. 7 days from the date of declaration election programme.

   ii. The date of publication of list of nominations received. On the last date and after the expiry of the time for nomination.

   iii. Date of scrutiny of Nominations. Next day of the date making nomination

   iv. Date of publication list of valid Nominations. Next day after the date of completion of scrutiny.

   v. Date of which candidature may be withdrawn. After clear 15 days form the date of scrutiny.

   vi. Date of Publication of final list of contesting candidates. The day next succeeding the last date fixed for withdrawal of candidature.

b. Date and time during which and the place at which the poll shall be taken

   i. Minimum 5 days after the date of withdrawal (time & place to be fixed by Returning Officer)

c. Date time and place for counting votes

   i. Immediately after polling is over.

d. Date of declaration of results of voting

   i. Immediately after counting of votes.

Explanation:– If the last date in reckoning dates as specified in the above cases is a public holiday, the next succeeding working day shall be fixed for the respective events.

The functions of the Returning Officer shall be as under.

1. To draw up a detailed programme of election to the Managing Committee of the society, after taking into consideration the various stages of election process, as enumerated in 9 above.

2. To invite nominations, to receive and scrutinise them, to exhibit list of valid nominations and list of final nominations remaining after withdrawal of nominations, if any,

3. To arrange for election by ballot in accordance with the provisions of the Election Rules.

4. To funish the result of election to the Chairman of the society for being declared at the General Body meeting/special general body meeting of the society.

5. To take such other actions as are necessary for and incidental to the election to Managing Committee of the society.

The nominations from members shall be in form at Appendix 'B' appended to the Rules.

6. No members of the society shall be eligible to participate in the election of the society, If

i. He is in arrears in respect of any charges and any other amounts due to the society, as on the date of scrutiny of nomination papers.

ii. He has incurred any of the disqualification as mentioned in the Maharashtra Co-operative Societies Rules, 1960 and Maharashtra Co-op Societies Rules,1961 and the bye- laws of the society.

7. The nominations received till the last date and hour fixed for receiving nominations shall be scrutinised by the Returning Officer on the date fixed for scrutiny of nominations, in the presence of the candidates or their duly authorised representatives and the list of the valid nominations shall be published on the Notice Board of the society as per election programme. The candidates whose nominations are rejected shall be informed by the Returning Officer. in writing of the reasons for rejection of their

nominations on the same day, in form at Appendix 'B-2'.

8. The candidates, whose nominations have been declared valid shall be allowed time of 15 days (as required u/s 152 A of the M.C.S. Act 1960) from the date of publication of the list of valid nominations, to withdraw their candidature by means of a letter handed over to the Returning Officer.

9. Immediately after the expiry of period allowed for withdrawal of candidature a final list of the candidates contesting the election shall be notified on the notice board of the society.

10. The voting at the election shall be secret Ballot.

11. The ballot paper shall be in the form of Appendix C' appended to these Rules. It shall bear the seal of the society and the counterfoil thereof shall bear the initials of the Returning Officer.

12. The names of the candidates in the ballot paper shall be arranged in alphabetical order with surname appearing first.

13. The date, time and place of voting shall be as declared in the election programme.

14. The ballot box shall be so constructed that ballot papers could be conveniently put into it but could not be taken out, without the box being unlocked.

15. On the date of the polling, the empty ballot box shall be shown to the candidates or their authorised agents, if any and present 15 minutes before the time fixed for commencement of the poll and shall be locked and sealed in their presence.

16. Each member voter shall be supplied with an authenticated ballot paper after satisfying his identity and obtaining his signature on the counterfoil of the ballot paper.

17. Member-Voter coming to the polling station after expiry of the time allowed for voting shall not be allowed to vote.

18. Immediately after the completion of voting, the ballot box shall be sealed in the presence of the candidates or their authorized representative if present.

19. The counting of votes shall be done immediately after the polling is over.

20. The Returning Officer shall submit to the Chairman of the Society a report indicating the numbers of voters who voted, number of valid and invalid votes, and the votes polled by each of them shall be put on the Notice Board of the society at the conclusion of the counting of votes.

21. The names of the candidates with votes polled by each of them shall put on the Notice Board of the society at the conclusion of the counting of votes.

22. The final result of the election shall be declared in the ensuing Annual General Body Meeting or Special General Body Meeting as the case may be.

23. All the records pertaining to the election shall be carefully preserved in box duly locked and sealed by the Secretary of the society for a period of 3 months and destroyed thereafter. However, if the result of the election is disputed, the records pertaining to election shall be preserved until the final decision of the dispute.

24. The Committee shall be constituted as enumerated under section 73(3) of the M.C.S. Act 1960.

25. If for any reasons beyond the control of the society, it is not possible to observe the time schedule under these Rules, the Returning Officer of the society may revise the same with due notice to members and with due consent of the concerned Housing Federation. The Returning Officer shall inform such revision of schedule to the Registrar.

A. R. Jani, *Advocate & Solicitor*

Powers, Duties and Responsibilities of Office Bearers

1. In this article it is intended to study and discuss powers, duties and responsibilities of the Office Bearers in a Co-operative Housing Society. The scope of the article is therefore made limited to the subject and confined to the Office Bearers of a Housing Society only. The Article may be perused with these restrictions. For this purpose the readers may keep in view and refer the Model Bye-laws of September 2011 printed and published by the Mumbai District Co-operative Housing Limited, Mumbai – 400 001.

2. As it is well known now that the properties are by and large big in size and people purchase flats in high rise sky scrapper buildings and flats therein form a very small part in a large complex. It is not practical to manage such large complexes by individual flat purchasers and Co-operative Housing Societies are therefore formed under the provisions of The Maharashtra Co-operative Societies Act, 1960 (the said Act). It is the main Act which governs the administration of Housing Societies along with the other types of Co-operative Societies. The Act has been in existence since last more than 50 years. There is no separate or specific Act especially for Housing Societies. However, so far as Housing Societies are concerned, they are governed by the Rules framed under the provisions of the said Act and Bye-laws that may be framed by the members of the would be Society under the said Act and Rules thereunder. Model of these Bye-laws are recommended by the Government. All Societies function under the said Bye-laws.

3. It can be stated that the General Body of the members of the registered Housing Society are supreme in their functions and work subject to the provisions of law, rules and regulations as applicable to such Housing Society. Members of such Housing Society are the supreme authority.

4. A Society is as such, a legal entity, recognised as such and the word "limited" is added at the end of its name to indicate that the liabilities of members are limited. It can sue and can be sued in its name. When a Society is formed, the property is transferred to the Society and the Society becomes the owner thereof. In fact, one of the main duties of the Office Bearers is to obtain Conveyance of property in Society's favour. Usually a Housing Society has many tenements/ flats/ shops and other premises occupied by its members and as such it is the Body vested with the legal and beneficial ownership. Since it is the responsibility of the Society and its members, it is difficult for all of them to carry out management and administration of various acts required to be done by such Society, such as payment of municipal taxes, land revenue, taking out insurance, carrying out repairs, collecting outgoings, etc. The functions are many and

hence few members are selected on Managing Committee to manage the various affairs of the Society. Therefore the Society appoints Managing Committee i.e. a small body of persons to manage the affairs of the Society. It is called the Managing Committee. The Managing Committee consists of few members, but even then some individual members have to be appointed as Office Bearers and assigned specific works to be carried out by them and so the Office Bearers come into existence as a matter of necessity.

5. The Office Bearers of a Co-operative Housing Society are:

(a) Chairman

(b) Secretary and

(c) Treasurer

This is as per the provisions referred to in the Bye-Laws but some Societies also appoint a President, Vice Chairman or Vice President, Joint Secretary, Assistant Secretary, Joint Treasurer or Assistant Treasurer, etc., although there are no specific provisions for in the Act or Bye-Laws for appointing additional office bearers. If they are appointed they are supposed to be working with or under the principal office bearers i. e. the Chairman, Secretary and Treasurer and they would be enjoying the same powers and having duties and responsibilities of the principal office bearers particularly in absence of the principal office bearers. Although no specific provisions are made for such joint or assistant office bearers but by usage and custom they have come to stay and are generally recognised.

6. It will be interesting to know who is an office bearer. The word "office bearer" is not used in the Bye-Laws but the word "officer" is defined in section 2(20) of the Maharashtra Co-operative Societies Act, 1960. It means a person elected or appointed by the Society to any office of such Society according to its' Bye-Laws; and includes a Chairman, Vice Chairman, President, Vice President, Secretary, Treasurer, Member of the Committee and any other person elected or appointed under the Maharashtra Co-operative Societies Act, 1960 (MCS Act) and the Rules or Bye-Laws framed under the said Act. They are the persons who give directions in regard to the business of the Society. The definition is very wide and inclusive. It may be noted that it also includes members of Managing Committee (*vide* section 2 (20) of the said MCS Act). An Officer therefore means and can be read as office bearer also. An office bearer is generally a person who has been given the post as a Chairman, Secretary, Treasurer, etc. and he holds that post and does the work as provided under the Bye-Laws.

7. The Chambers 20th Century Dictionary defines the term "office bearer" as one who holds the office or one who is appointed to perform duty in connection with the Society, company, church, etc. So it is not intended to give a restricted meaning to the word Office Bearer. Many a times the Managing Committee appoints Sub-Committees and Chairman and Secretary thereof and assigns them particular specified works. Broadly speaking the Chairman, Secretary and Members of such Committees can also be called office bearers. When elections are to be held in the Society members appointed on special duty can also be called the office bearers.

8. The powers, duties and obligations of the Chairman are to have an overall superintendence, control and guidance in respect of the management and the affairs of the Society within the framework of MCS Act 1960, MCS Rules 1961, Rules and Bye-Laws of the Society. The Chairman is competent to exercise any of the powers of the Managing Committee. However, while doing so he has to record the reasons thereof in writing. It will therefore be seen that overall powers given are exercised by the Chairman but the same will have to be ratified in the next meeting of the Managing Committee. It will thus be seen that when powers are given they are with the condition as provided in Bye-Law No. 140 to be ratified in the next meeting of the Managing Committee.

9. As stated above, there is no provision for appointing a President but if any such President is appointed he is appointed by the General Body Meeting and answerable to General Body Meeting. He can preside over the General Body or Extraordinary General Body Meeting of the Co-Operative Housing Society. This means that he will not be a part of the Managing Committee but he will represent the General Body in a general sense. It is therefore not advisable to appoint a President (as some Societies do) as it will create confusion and problems about the powers and duties of such President.

10. The powers and duties and responsibilities of the Secretary are enumerated in Bye-Law No. 141. They are enumerated below for ready reference:

141. The functions of the Secretary of the Society are those as mentioned below:

Sr. No.	Items of the Functions	Bye-Law No. under which if falls
(1)	(2)	(3)
1.	To issue share certificate to members within the stipulated period and the prescribed manner	9 and 10
2.	To deal with resignations from members including associate and nominal members	27 to 30
3.	To enter nominations and revocations thereof in the Nomination Register	33
4.	To inspect the property of the Society	48(a)
5.	To issue notices regarding repairs to be carried out in flats	48(b)(c)
6.	To deal with cases of expulsion of members	51 to 56
7.	To deal with cases of cessation of membership, including associate and nominal membership	61
8.	To deal with the applications for various purposes received by the Society	65
9.	To prepare and issue demand notices/bills for payment of the Society's charges	70
10.	To bring cases of defaults in payment of the Society's charges to the notice of the Committee	71
11.	To issue letter of allotment of flats	76(a)
12.	To issue notices and agenda of all meetings of the general body	99
13	To record the minutes of all the meetings of the general body	109
14.	To call the first meeting of the newly constituted committee	123(b)
15.	To issue notices of all the meetings of the Committee	133
16	To attend meetings of the Committee and to record minutes thereof	137
17.	To maintain account books, register and other records, unless otherwise decided by the committee.	144
18.	To finalise account of the Society in the required manner	147(a)
19.	To produce records of the Society before different authorities concerned with the working of the Society with the consent of the Chairman	153

20.	To prepare the audit rectification reports in respect of audit memos received from the Statutory and Internal Auditors	154
21	To bring breaches of the bye-laws by the members of their notices under instructions from the committee	166
22.	To discharge such other functions under the MCS Act, 1960, the MCS Rules 1961 and the Bye-laws of the Society and directions of the Committee and the general body meetings, as are not expressly mentioned hereinabove	
23.	To place the complaint application with facts, before the Committee, in the coming meeting	174

It will thus be seen that he (Secretary) is virtually in the overall administration of the Society.

11. The Model Bye-Laws of the Society has detailed the functions of the Chairman and the Secretary. However, it is silent with respect to the duties of the Treasurer who nevertheless occupies an important standing as an important Office Bearer. Naturally in most Societies the Treasurer devotes his time mostly accounting functions. He is responsible for all moneys received and paid by the Society

A Treasurer in the Society is an important office bearer. His general duties will be to maintain the accounts and ensure that monies received are entered in the account books and deposited in the Bank and spend out of the said accounts monies required for day-to-day and routine expenses and such other expenses as may be sanctioned by the Managing Committee. The following may be ideally the duties of the Treasurer:

(i) To sign all receipts for cash and cheques received by The Society.

(ii) To ensure that all Account Books and Registers are properly maintained.

(iii) To operate the Bank Account of the Society jointly with the Secretary and the Chairman.

(iv) To scrutinize all requirements of expenditure and recommend the same sanction.

(v) To ensure that all entries in Petty Cash Book are checked thoroughly for correctness before signature and the items purchased have been taken on charge in the respective Stock Ledgers.

(vi) To ensure cash balance is held beyond the limit fixed by the Managing Committee.

(vii) To ensure that all transactions are properly reflected in General Ledger connected with Account.

(viii) To see that Non-Expendable Items are taken on proper Register.

(ix) To report cases of Misappropriation of Funds of the Society immediately, on detection, to the Chairman or Secretary and the Managing Committee and further suggest and implement appropriate remedial measures for avoidance or recurrence ff the same.

(x) To ensure that all vouchers, along with the bills relating thereto, are arranged in order ff entries in the Cash Book and the Journal.

(xi) To ensure proper records of all Counterfoils, challans, bills Receipts and cheques are preserved.

(xii) Ensure that periodical Statements of Accounts are prepared by the Society.

(xiii) To put up Monthly Balance Sheet and Income and Expenditure Statement of the year before the Managing Committee, for approval.

(xiv) To check Monthly Bank Reconciliation Statements for correctness.

(xv) To check Audit Reports and all auditable documents.

(xvi) To ensure that personal Ledgers of all Members are properly maintained.

(xvii) To initiate action for recovering outstanding liabilities of Sundry Debtors and Sundry Creditors.

(xviii) To ensure the original FD documents are kept safe preferably in Bank Lockers 1ith a photocopy in office file. Also submit same for renewal /encashment on maturity in time.

(xix) To put up Monthly Account Statement for the perusal of Management Committee.

(xx) To supervise the Accountant employed for writing accounts.

(xxi) To ensure that the Accounts are maintained as per statutory requirements including the accounting software.

(xxii) To see that Audit reports are received from Internal Auditors appointed in time with rectification reports thereon and they are placed before the Managing Committee.

(xxiii) To assist Hon. Secretary during audit, internal / statutory.

(xxiv) To assist in preparation of Audit Rectification Report in 'O' Form prescribed under Rule – 73 of the MSC Rules 1961.

(xxv) To ensure that all members pay their dues in time and in case of default to take action to recover the same without delay.

12. Each office bearer is personally responsible for his own area of work and will be held responsible for dereliction of his duties and if he fails to carry out his functions. He is responsible to the Managing Committee as also to the General Body of Members. He is also personally liable for criminal acts like fraud, misappropriation, cheating and can be prosecuted.

13. The office bearers are at present working free of any fees or compensation. They are many a time do not get time to attend Society's work because of their other activities. Since the Society does not get members voluntarily to act as office bearers, it is suggested that they should be paid adequate compensation for attending meetings and carry out their works. This will induce them to come forward and increase their accountability.

14. The subject is vast and books and books can be written thereon. In this short Article it is sufficient if Readers are made aware and where to look for detailed knowledge. It will be a good habit for persons concerned to periodically browse through the present Bye-Laws of the Housing Society as they spell out in great details the working of a Society.

CA Vipin Batavia

Records to be maintained by the Society and Check list for transfer of a Flat

Every Co-operative Housing Society is required to maintain statutory records prescribed under the Co-operative Societies Act and there are certain other records, like books of accounts, various registers, files, vouchers, other documents etc., are to be maintained for smooth running and proper management of the society for various purposes.

Records to be maintained by the society

1) Nomination Register

(i) Serial Number
(ii) Name of the Member making nomination
(iii) Date of nomination
(iv) Name/s of nominee/s & Address/es of the nominee/s
(v) Date of the Managing Committee Meeting in which the nomination was recorded
(vi) Date of any subsequent revocation of nomination
(vii) Remarks

Note: - On revocation, entry of fresh nomination should be taken after the last entry in the register.

2) Share Register

(i) Serial Number
(ii) Date of allotment of share
(iii) Cash Book Folio No.
(iv) No. of Shares (Now for Individual-10 Shares & Statutory Body – 20 Shares)
(v) Value of Shares
(vi) Name of the Members to whom Shares Allotted
(vii) Date of transfer / refund
(viii) Cash Book Journal Folio No.
(ix) No. of Shares transferred or refunded
(x) Share Certificate Nos. transferred or refunded
(xi) Value of Shares transferred or refunded ₹
(xii) Value of Shares transferred or refunded ₹
(xiii) Name of transferee or the person receiving refund
(xiv) Authority of transfer or refund
(xv) Remarks

3) "I" Form Register - (As per Rules – 32 and 65 (I)) (Section 38 (I) of the Maharashtra Co-Operative Societies Act, 1960)

(i) Serial Number
(ii) Date of Admission
(iii) Date of payment of Entrance Fee
(iv) Full Name
(v) Address
(vi) Occupation

(vii) Age on the Date of Admission
(viii) Full Name and address of the person nominated by the Member under Section 30 (I)
(ix) Date of Nomination
(x) Date of Cessation of Membership
(xi) Reasons for Cessation
(xii) Remarks

4) "J" Form Register - (As per Rule 33)

(i) Serial Number
(ii) Full Name of the Member
(iii) Address
(iv) Class of Member

5) Sinking Fund Register

(i) Serial Number
(ii) Name of the Member
(iii) No. of the Flat allotted
(iv) Value of the flat excluding value of land
(v) The amount of Monthly / Quarterly Contribution @ 0.25% of the Construction cost of the flat per year (as shown in col. 4) per annum
(vi) Date of Receipt of contribution to the Sinking Fund
(vii) Amount contributed
(viii) Remarks

6) Monthly Collection Register

(i) Flat Number
(ii) Area (carpet) Sq. ft.
(iii) Rateable Value ₹
(iv) Member
(v) Transfer Details (Date and Transfer Premia received (₹))
(vi) Vehicles (Car and Scooter / M. Bike)
(vii) Month
(viii) Bill No.
(ix) Date of Bill
(x) Loan Installment
(xi) Interest on Loan
(xii) Sinking Fund
(xiii) Repairs Fund
(xiv) Municipal Taxes
(xv) Water Charges
(xvi) Electricity Charges
(xvii) Parking Charges
(xviii) Insurance Premium of Property
(xix) Service Charges
(xx) Interest on Arrears
(xxi) Total Dues
(xxii) Recoveries (Receipt No., Date and Amount Received)
(xxiii) Balance

7) "O" Form Register - (As per Rule 73) (Rectification Report Under Section 82/87)

(i) Date of Audit
(ii) Number & Date of order under Sections 83-84
(iii) Period covered
(iv) Name & Designation of person carrying out audit, inquiry or inspection
(v) Serial number of the objection in the Audit memo or Report of the officer carrying out inquiry or inspection
(vi) Observations made by the Auditor or officer carrying out inquiry or inspection
(vii) Explanation of the Society and remarks regarding action taken by it to rectify the irregularities and implement the suggestions made by the Auditor or officer, carrying out inquiry or inspection
(viii) Number and Date of the resolution of the committee approving the report
(iv) Remarks

8) Investment Register

(i) Name of the Fund

(ii) Serial Number

(iii) Date of Investment

(iv) Details of Investment (Securities, Shares F.D. Receipts Nos.)

(v) Name of the Institution / Bank

(vi) Total Amount Invested

(vii) Rate of Dividend Interest

(viii) Dividend / Interest Received / Accrued Per Annum (Period & Amount)

(ix) Date of Realisation

(x) T.D.S. Details

(xi) Amount Realised

(xii) Remarks

9) Property Register

(I) Information about Property

Name of the Society

Address

Registration No. and Date

Municipal house no.

Survey No. / Sub Div. No.

Land Free / Lease Hold

Annual Lease Rent

Total Plot Area

Constructed Area

Total No. of Flats

Garages

Shops

Land Cost

Construction Cost

Annual Non-Agriculture Assessment

Particulars of Building

Completion / Occupation Certificates (BCC / OC)

Occupation Date

Municipal Assessment Year

Total Rateable Value

Date of Conveyance

Date and Signature of the Hon. Secretary & Chairman

(II) Other Details

(i) Name of Co-partner Member

(ii) Date of Possession

(iii) Distinguishing No. of tenement (Flat No. & Floor)

(iv) Description of tenement

(v) Area of tenement

(vi) Cost of the tenement (Land & Construction)

(vii) Annual Ground Rent

(viii) Date of Cessation of Membership

(ix) Signature Chairman / Hon. Secretary

(x) Remarks (Reason of Cessation / Transfer to Sr. No. and Date)

10) Members List Register

(i) Serial Number

(ii) Flat Number

(iii) Name of the Members

(iv) Joint Member

(v) Associate Member

11) Stock / Dead Stock Register

(i) Serial Number

(ii) Date

(iii) Cash B.F.

(iv) Article with Particulars (Name, Qty., Rate, M. C. Resolution, Date)

(v) Voucher No.

(vi) Total Cost

(vii) Percentage of Depreciation

(viii) Particulars of Depreciation and Balance per Annum

Year

Amount of Depreciation

Balance

Signature of Chairman or Secretary

Remarks

(ix) Signature of Chairman or Secretary

(x) Remarks

12) Books of Account

(i) The Cash & Bank Book

(ii) The General Ledger

(iii) The Personal Ledger

(iv) Bill Register

(v) Vouchers for Payment

(vi) Monthly / Quarterly bills raised on the members for outgoings of the society.

(vii) Receipts of the collection of charges / transfer fees and other funds of the society.

(viii) Bank Statement / Pass Book

(ix) Statement of accounts as final Annual Accounts of the society are prepared at the end of every financial year

(x) Auditing records and Audit reports (Now the accounts are to be audited within six months of the close of the F.Y. and the auditor concern shall after obtaining written permission from registrar to file F.I.R. against fraud)

13) Other Records to be Maintained

(i) Notices & Minutes Books of meetings for:

a) Managing Committee

b) Annual General Meeting

c) Special General Body Meeting

d) Grievance settlement and Redressal committee.

(ii) Approved Copy of Bye Laws of the Society

(iii) Maharashtra Co-operative Societies Act and Rules

(iv) Inward & Outward Register

(v) Structural Audit Records

(vi) Parking Register (Now parking space will be transferable right with the flat or to other eligible member of the society)

(vii) Annual Returns (To be filed with the authority designated by state government)

(viii) Record of active and non active members.

(ix) Income Tax Records & Returns

(x) TDS Records & Returns

(xi) Contract Register

(xii) Various Files:

The Housing societies should maintain separate file for the correspondence and receipt for the payment made with different statutory authorities like Local Authority (Municipality), Registrar, Federation, Electric Department, Collector, Police Station etc. Separate file has to be maintained for members' application, nomination forms, transfer forms, Building approval records, Registration records, Circulars, Complaints, Tender & Quotation File, Election and insurance records etc. and also separate file for each member of the society.

Check List for Transfer of a flat

A) Copy of Instrument

(i) Certified true copy of the instrument executed for transfer of right in the flat either Agreement to sell or Gift Deed or any other instrument duly stamped and registered with Registrar of Assurances along with other required forms and charges.

B) List of Forms to be submitted along with registered instrument for transfer of a Flat in a Co-operative (H) Society.

Sr. No.	Form No.	Name of the Form	To be signed by
1	20 (1)	A form of Notice of Intention of a member (Transferor) to transfer his shares and interest in the Capital / Property of the society (Bye-law No. 38 (a) along with the consent of transferee.	Transferor
2	20 (2)	A form of letter of consent of the Proposed Transferee to transfer shares and interest of the member (Transferor) to him (Transferee) [Bye-law No. 38 (a)]	Transferee
3	—	The Form resignation of Membership of the society by a member (Transferor) [Bye-law No. 38(e)(iii)]	Transferor
4	21	Form of application for transfer of shares and interest in the capital / property of the Society by the transferor (being an individual) [Bye-law No. 38 (e) (i)] Form of Application for the membership of the society By the proposed Transferee (being an individual) [Bye-law No. 38 (e) (ii)]	Transferor
5	23	Form of Application for the membership of the society By the proposed Transferee (being an individual) [Bye-law No. 38 (e) (ii)]	Transferee
6	4	The Form of Undertaking to be furnished by the prospective member to use the flat for the Purpose for which it is allotted. [Bye-law Nos. 17 (b) and 19 (A) (iv)]	Transferee
7	—	Indemnity Bond on ₹ 200/- Stamp Paper	Transferee
8	—	Possession Letter	By Transferor & Transferee (Both)

C) Optional Forms

(i) Form No. 14 Form of Nomination to be filed by the transferee. The amended Nomination fees is now ₹ 100/- (It was ₹ 50/- prior to amendment)

(ii) Form No. 7 – The form of Associate Membership by an individual (New entrance fees ₹ 100/-)

The transferee & transferor should submit the certified copy of the instrument duly stamped & registered along with the above set of documents to the society along with the required remittances and the transfer fees as payable.

CA Ajit Rohira

Various types of meetings

1. Type of Meeting

Basically there are three types of meetings in Co-operative Housing society, First is Managing Committee Meeting, Second is Annual General Body Meeting and third is Special General Body Meeting.

2. Managing Committee Meeting

2.1 Every committee at its first meeting after its election shall elect a Chairman, Secretary and Treasurer from amongst the members of the Committee.

2.2 The period of office of the committee shall be for five years. Accordingly election of all the members of the Committee shall be held once in five years.

2.3 The Committee shall meet at least once in a month.

2.4 For Managing Committee Meeting the Secretary in consultation with the Chairman of the society has to give three days clear notice for such meeting to all the members of the Committee. Such notice shall state the date, time and place of the meeting and the business to be transacted.

2.5 The strength of the Managing Committee and its Quorum shall be as under :

No. of Members	Strength of Managing Committee	Quorum in Managing Committee
Up to 100	11	6
101 to 200	13	7
201 to 300	15	8
301 to 500	17	9
501 and above	19	10

2.6 The Chairman of the society shall preside over all the meetings. In case he is absent, then members of the Committee present shall elect one of them to be the Chairman on that occasion.

2.7 Every member of the Committee shall have one vote. However in the case of equality of votes the Chairman shall have a second or casting vote. All decisions shall be taken by majority of votes.

2.8 The Secretary shall attend every meeting of the Committee and record its minutes. After the minutes are signed by the Secretary and Chairman of the meeting it shall be placed for confirmation before the next

meeting of the Committee. In the absence of the Secretary of the society, the Chairman of the society shall make alternate arrangement for recording minutes of the meeting.

3. Annual General Meeting

3.1 The Annual General Meeting of the society should be held on or before 30th September every year. There is no provision for extension to hold Annual General Body Meeting.

3.2 The Quorum for the meeting shall be 2/3rd of the total number of members or 20 members whichever is less.

3.3 If the society has passed a resolution that in case there is no Quorum the meeting will be adjourned for half an hour then the business as per the agenda will be transacted at the adjourned meeting irrespective of quorum.

3.4 In case of Annual General Body Meeting 14 days' clear notice of the meeting shall be given to all the members of the society.

3.5 Only a member can attend the General Body Meeting and in his absence the Associate member can attend the meeting. No proxy or holder of Power of Attorney or Letter of Authority or Son or Daughter or relative shall have any right to attend the meetings of the society.

3.6 The Managing Committee should finalise the draft minutes of the Annual General Body Meeting within three months from the date of the meeting and should circulate the draft minutes amongst all the members within 15 days from the meeting of the Committee at which the draft minutes are finalised. The members may communicate to Secretary their views / observations, if any on the draft minutes within 15 days from the date of the circulation. The Committee at its subsequent meeting should prepare the final minutes of the general body meeting after taking into consideration the views / observations made by the members on the draft minutes. Then the Secretary or any other person authorised should record them in the Minutes Book.

4. Special General Body Meeting

4.1 A special general body meeting of the society may be called at any time at the instance of the Chairman or by the decision of the majority of the Committee and shall be called within one month of the date of the receipt of requisition in writing signed by at least 1/5th of the members of the society or from the Registering Authority or from the Housing Federation to which the society is affiliated. The meeting so convened shall not transact any business other than that mentioned in the notice of the meeting.

4.2 The requisition for the special general body meeting of the society shall be placed within 7 days of its receipt before the meeting of the Committee by the Secretary of the society for fixing the date, time and place for the special general body meeting of the society.

4.3 In case of Special General Body Meeting five days clear notice of the meeting shall be given to all the members of the society, under intimation to the federation and to the Registering Authority. In case of an emergency the Special General Body Meeting may be called even at a shorter notice, if the Committee unanimously decides to call the Special General Body Meeting at a shorter notice.

5. Grievances Settlement and Redressal Committee

5.1 There shall be a Grievances Settlement and Redressal Committee in each society to deal with the grievances of the members and the society relating to its business and management to be constituted in the Annual General Body meeting of the society to hear and settle the grievances as far as may be practicable within a period of three months. The committee of a society shall make a report of such constitution of Grievances Settlement and Redressal Committee to the Registrar.

5.2 The Grievances Settlement and Redressal Committee shall consist of three active members of the society, who shall not be the members of committee of the society.

5.3 If any member, past member or any legal representative of the deceased member of a society has any grievance against any member of the society and if the parties agree to resolve the grievance by settlement, the party aggrieved shall submit written application to the Grievances Settlement and Redressal Committee alongwith the documents which he relies upon. On receipt of the application, the Grievances Settlement and Redressal Committee shall fix up a date and call upon the other party to submit its say alongwith the documents on which it relies and fix a date of meeting for settlement of the grievance amicably by compromise.

5.4 If the parties with the assistance of the Grievances Settlement and Redressal Committee reach a settlement agreement, they would draw up a settlement agreement. After considering the settlement agreement, the Grievances Settlement and Redressal Committee shall draw a final settlement agreement resolving the grievances.

5.5 When the final settlement agreement is drawn up, the parties shall sign the settlement agreement and the same shall be binding on the parties and the persons claiming under them. The Grievances Settlement and Redressal Committee shall authenticate the settlement agreement and furnish a copy thereof to each of the parties. The record of the entire proceedings shall be kept by the Grievances Settlement and Redressal Committee.

So long as there is desire or want, it is a sure sign that there is imperfection. A perfect, free being cannot have any desire.

— Swami Vivekananda

CA Dilip Sanghvi

Co-operative Courts

Co-operative movement was initially sponsored by the State and now it has become a formidable factor in an economic development of the country, particularly Maharashtra. Co-operative movement has made spectacular progress. It is a voluntary association formed with the aim to service its members. It is a form of business where individuals belonging to same class join hands for the promotion of common goal. Co-operative Society is "a society which has its objective the promotion of economic interest of its members in accordance with co-operative principles". Unlike in Private Sector, where the control is in the hands of Capitalist, whereas Co-operative Society follows the principal of 'one man one vote'. This is unique feature of a Co-operative Society where the capital does not dominate the administration of Co-operative Society.

There exist various types of Co-operative Societies such as co-operative banking, co-operative housing, co-operative credit societies etc. With growth of co-operative movement, there was increase in disputes between society and its members, members themselves, Registrar of Co-operative Society and Co-operative Societies. To monitor the efficient and smooth functioning of Co-operative movement, Bombay Co-operative Societies Act, 1925 was enacted, which was later replaced by The Maharashtra Co-operative Societies Act, 1960.

To resolve the dispute separate provisions were incorporated in Bombay Co-operative Societies Act, 1925 and The Maharashtra Co-operative Societies Act, 1960.

In the State of Maharashtra, a Society is formed, regulated and controlled by the Maharashtra Co-operative Societies Act, 1960. There are two machineries to resolve the disputes namely Registrar of Co-operative Societies and Co-operative Courts. Disputes are referred to either Registrar or Co-operative Court depending upon its nature.

Section 54 of the repealed Bombay Co-operatives Societies Act, 1925 was dealing with the disputes in case of Co-operative Societies. Said section of 54 of repealed Bombay Co-operatives Societies Act, 1925 and (pre-amendment) Section 91 of the Maharashtra Co-operative Societies Act, 1960, were applying simple methods of arbitration to resolve dispute between the Society and its members or between society and agents or between society and office-bearers.

Under the pre-amended provisions, the Registrar of Co-operative Societies used to publish a list of nominees who can act as arbitrators and thereby any dispute was referred to such nominee to

arbitrate in the matter. The Civil Procedure Code was not followed. Registrar's nominee used to conduct hearing at their residence or offices. However, Registrar's nominees had power to pass awards which was binding. It ensured speedy disposal of disputes. However, with passage of time, and spectacular increase in co-operative movement, various complicated question of law arose and need was felt to establish Co-operative Court. Therefore, the Act was amended to establish Co-operative Courts. Today, the Co-operative Courts are like Civil Courts. The jurisdiction of Co-operative Courts today is very wide. Unfortunately the infrastructure provided to Co-operative Courts is not sufficient to cater its increasing jurisdiction.

Section 91 of the Maharashtra Co-operative Societies Act, 1960, falling under Chapter heading IX 'Settlement of Disputes' deals with the types of disputes that can be referred to Co-operative Court.

Section 91 of the said Act particularly relates to disputes between the society and its members.

Cases to be referred to Co-operative Court

- Disputes touching the Constitution
- Elections of the Committee or its officers
- Conduct of general meetings
- Management or business of Society

Disputes include

- a claim by or against a society for any debt or demand due (whether admitted or not);
- a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower (whether such a sum or demand be admitted or not);
- a claim by a society for any loss caused to it (whether such a loss is admitted or not),
- a refusal or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land or any other asset resumed by it for breach of condition as the assignment.

Who can refer case/dispute to Co-operative Court

- Any of the parties to dispute (specified parties) or
- Federal society to which the society is affiliated or
- Creditor of society

Specified parties under section 91 are:

- a society,
- committee or any past committee,
- any past or present officer,
- any past or present agent,
- any past or present servant
- nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society,
- the Liquidator of the society,
- the official Assignee of a deregistered society,
- a member, past member or a person claiming through a member, past member or a deceased member of society,
- a society which is a member of the society,
- a person who claims to be a member of the society,
- a person other than a member of the society, with whom the society, has any transactions in respect of which any

restrictions or regulations have been imposed, made or prescribed under sections 43, 44 or 45 and any person claiming through such person;

- a surety of a member, past member or deceased member, or surety of a person other than a member with whom the society has any transactions in respect of which restrictions have been prescribed under section 45, whether such surety or person is or is not a member of the society,
- any other society, or the Liquidator of such a society or de-registered society or the official Assignee of such a de-registered society.

With effect from 14-2-2013, even the disputes pertaining to elections of committees of specified societies including its officers are brought under ambit of Co-operative Court. This is a positive step, as earlier dispute pertaining to specified societies (such as Co-operative spinning mills or sugar factories etc) was referred to Divisional Revenue Commissioner which works under direct control of state Government. Now bringing it under ambit of Co-operative Courts will ensure independent and fair administration of Justice.

In case of Housing Co-operative Societies disputes between members or members and society pertaining to following issues can be referred to Co-operative Courts:

- Resolutions of the Managing Committee and General Body,
- The election of the Managing Committee, except the Rejection of Nominations, as provided under Section 152A of the ACT,
- Repairs, including major repairs, internal repairs, leakages,
- Parking,
- Allotment of Flats/Plots,
- Escalation of construction cost,
- Appointment of Developer/Contractor, Architect,
- Unequal water supply
- Excess recovery of dues from the members etc.

Following disputes are specifically excluded from ambit of Co-operative Court

- An industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947
- Rejection of nomination paper at the election to a committee of any society
- Refusal of admission to membership by society to any person who is qualified thereto
- Any proceeding for the recovery of the amount as arrear of land revenue on a certificate granted by the Registrar under sub-section (1) or (2) of section 101 or sub-section (1) of section 137
- The recovery proceeding of the Registrar or any officer subordinate to him or an officer of society notified by the State Government, who is empowered by the Registrar under sub-section (1) of section 156
- Any order, decisions, awards and actions of the Registrar against which appeal under section 152 or 152A and revision under section 154 of the Act has been provided
- A dispute between the Liquidator of a society or an official Assignee of a de-registered society and the members (including past members, or nominees, heir or legal representative or deceased members) of the same society

Section 91 specifically states that the matters which are exclusively within jurisdiction of Co-operative Court cannot be interfered with by the Registrar of Co-operative Societies or any other court. Similarly, Co-operative Court cannot entertain a dispute which is within jurisdiction of Registrar of Co-operative Societies. For instance any dispute pertaining to the election of the Managing Committee which falls within the ambit of Co-operative courts cannot be entertained by Registrar of Co-operative Societies

and Co-operative Court cannot entertain any dispute pertaining to misappropriation/ misapplication of society funds which falls within jurisdiction of Registrar of Co-operative Societies.

Constitution of Co-operative Court

The State Government is empowered to constitute one or more Co-operative courts for adjudication of dispute under the Act. A Co-operative court shall consist of atleast one member appointed by State Gonernment possessing the prescribed qualification. A Co-oprative Court will have jurisdiction over the whole State unless otherwise specified by notification.

Appeals under Co-operative Societies Act, 1960

Any dispute arising under this Act can either be referred to Registrar of Societies or Co-operative Court established under section 91 of the Co-operative Societies Act, 1960 depending upon the type of dispute.

Maharashtra Co-operative Societies Act, 1960 provides for independent provisions of appeal in case order passed by Registrar of Societies as well as Co-operative Court.

Section 152 of the Maharashtra Co-operative Societies Act, 1960 provides for appeal against order passed by Registrar of the societies or Co-operative Court.

Section 152 states that an order or decision under sections 4, 9, 11, 12, 13, 14, 17, 18, 19, 21, 21A, 29, 35, 77A. 78, 79, 85, 88 and 105 including against an order for paying compensation to society shall lie:

- In case order is made or sanctioned or approved by the Registrar, or the Additional or Joint Registrar on whom powers of the Registrar are conferred the appeal lies to the State Government,
- In case order is made or sanctioned by any person other than the Registrar or the Additional or Joint Registrar on whom the powers of the Registrar are conferred, to the Registrar
- In case order or decision to the Co-operative Appellate Court has been provided under this Act, it shall lie to the Co-operative Appellate Court.

Time limit

In either case i.e., an appeal to the State Government or to the Registrar or Co-operative Appellate Court, shall be filed within two months of the date of the communication of the order or decision.

In case, remedy is not available to appeal for any order, decision or award passed under provisions of this Act, then one can file revision application under section 154 of the Co-operative Societies Act, 1960.

For example, in case of refusal of membership to any person, sections 22 and 23 of the Maharashtra Co-operative Societies Act, 1960 empowers Registrar of Co-operative Societies to decide if such refusal is in accordance to provisions of sections 22 and 23 of the Maharashtra Co-operative Societies Act, 1960. In case any of the person seeking membership is aggrieved by the order of Registrar or his subordinate then remedy available to him is to file application for revision under section 154 of the Maharashtra Co-operative Societies Act, 1960 before higher authorities viz., higher authorities of Registrar of Co-operative Societies and further more to State Government.

In case order is passed under section 23 of the said Act by Registrar or his sub-ordinates i.e. Assistant Registrar or Deputy Registrar, his decision or order is final and there is no provision to appeal against the same under section 152 of the said Act. However, the person aggrieved has remedy to file revision application under section 154 of the said Act. In case of extra-ordinary circumstance, person aggrieved can take recourse by filing Writ Petition under Articles 226 or 227 of the Constitution of India.

If the Managing Committee or its member is removed under Section 77-A or 78 of the said Act then appeal lies with the Divisional Joint Registrar. If however such powers are exercised by the Divisional Joint Registrar in charge of Administration, then the power of appeal or Revision as the case may be, are with the State Government.

However, if an award is passed by the Judge of the Co-operative Court, then an appeal is provided under Section 97 of the said Act before the Maharashtra State Government Appellate Court at Mumbai (hereinafter referred to as the Appellate Court). The Appellate Court has been established under Section 149 of the Maharashtra Co-operative Societies Act, 1960. If the Judge of Co-operative Court passes any interim order or interlocutory order by exercising powers under Section 95 of the said Act, then an appeal is provided under Section 97 before the said Appellate Court. The Appellate Court can exercise powers of revision against any order passed by any Co-operative Court in the state. For example, in a given case, a question of jurisdiction is raised before the Co-operative Court and a decision is given by the judge of the Co-operative Court holding that Co-operative Court has or has no jurisdiction, a party aggrieved can file a revision application against such an order of the judge of the Co-operative Court before the Appellate Court, which Appellate Court can decide in its revisional jurisdiction. In short, for any order passed by the subordinate officer of the Registrar, an appeal or revision is provided at higher level viz., Divisional Joint Registrar in charge of Appeals and if any order is passed by Co-operative Court, appeal or Revision is with the Appellate Court.

Offices of Registrar of Co-operative Societies

Sr. No	Designation of the Registrating Authority	Jurisdiction (Wards in Charge)	Pin Code	Area Covered in Wards	Address of the Office
	1	2	3	3	4
1	Deputy Registrar C.S. 'A' Ward Mumbai - 01.	A - Ward	400 001, 005, 020, 023, 038, 040, 039	G.P.O. V.T. Colaba, Marine lines, Yogakshema, Cuffe Parade, Hutatma Chowk, Ballard Estate, Mantralaya	Malhotra House (Formely Known as India House), 6th Floor, Opp. GP.O. Mumbai - 400 001
2	Assistant Registrar C.S. B' Ward Mumbai - 01	B - Ward	400 003, 009	Mandvi Dongri Umarkhadi, Masjid and Adjoining Market Areas	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001
3	Assistant Registrar C.S. 'C' Ward Mumbai - 01	C - Ward	400 001, 004	Kalbadevi C.P.Tank, Bhuleshwar and Adjoining Market Areas	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001
4	Deputy Registrar C.S. 'D' Ward Mumbai - 01	D - Ward	400 004, 006, 007, 008, 034, 036	Girgaon, Malabar Hill, Opera House, Grant Road, Cumbala Hill, Rajbhavan Tardev	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001
5	Deputy Registrar C.S. 'E' Ward Mumbai - 01	E - Ward	400 088, 027, 033	Tank Road, Bombay Central Chinch Bunder, Mazgaon, Jijamata Udhyan, Kalachowki	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001

6	Deputy Registrar C.S. 'F'/South Ward Mumbai - 01	F - South Ward	400 012, 013, 014, 015	Parel, Shivadee, Abhyudaynagar, Naigaum	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001
7	Deputy Registrar C.S. 'F'/North Ward Mumbai - 01	F - North Ward	400 022, 030, 031, 019, 014,	Dadar (Central Rly), Matunga, Sion, Wadala, Antop Hill King's Circle, Chunabhatti	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001
8	Deputy Registrar C.S. 'G/South Ward Mumbai - 01	G - South Ward	400 018	N. M. Joshi Marg, Gadge Maharaj Chowk, Prabhadevi, Worli, Bhavani Shankar Road, Dadar, Kolesewadi	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001
9	Deputy Registrar C.S. 'G'/North Ward Mumbai - 01	G - North Ward	400 016, 017 019,	Shivaji Park, Mahim Dharavi, Matunga (W), Dadar (W)	Malhotra House 6th Floor, Opp. G.P.O., Mumbai - 400 001
10	Deputy Registrar C.S. 'H' Ward Mumbai - 01	H-East	400 029, 51, 55, 98	Bombay Aerodrome, Bandra (E), Santacruz (W), Bandra (E), Bagali Naka, Vidyanagari, Vakola, Kalina	Bhandari Sahkari Bank 2nd Floor, P L Kale Guruji Marg, Dadar (W) Mumbai-48
11	Assistant Registrar C.S. 'H''/West Ward, Mumbai - 01	H-West Ward	400 051, 054 50	Khar (W), Santacruz (W), Bandra	Bhandari Sahkari Bank 2nd Floor, P L Kale Guruji Marg, Dadar (W) Mumbai-48
12	Deputy Registrar C.S. 'K' Ward Mumbai - 01	K - East Ward	400 057, 051 069, 093, 096	Vile Parle (E), J. B. Nagar, Chakala, MIDC Seepz, Andheri (E), Jogeshwari (E)	A-1 Bldg., 315/316, 6th Floor, Near Wadala Truck Terminus, Wadala (E), Mumbai - 3
13	Deputy Registrar C.S. 'K'/West Ward, Mumbai - 01	K - West Ward	400 056, 060 061, 049, 102	Vile Parle (W), Andheri (W), Jogeshwari (W), Versova (W), Juhu	Room No. 69, MHADA, Office Bandra.
14	Deputy Registrar C.S. 'L' Ward Navi Mumbai	L - Ward	400 024, 070, 072	Nehru Nagar, Saki Naka, Kurla	Kokan Bhavan Belapur, Navi Mumbai.
15	Assistant Registrar C.S. 'F' North Ward Navi Mumbai - 01.	M - Ward	400 071, 074, 085, 088,094	Chembur R.C.F. Deonar, Govandi, Mankhurd, Anushakti Nagar, BARC	Kokan Bhavan Belapur, Navi Mumbai.

16	Assistant Registrar C.S. N' Ward, Vashi, Navi Mumbai	N - Ward	400 075, 077 079, 083, 086	Pantnagar, IIT Bombay, Rajawadi, Garodianagar, Tagore Nagar, Barve Nagar, Ghatkopar (E&W)	Kokan Bhavan Belapur, Navi Mumbai.
17	Assistant Registerar C.S. 'S' Ward, Vashi Navi Mumbai.	S - Ward	400 087	Bhandup (East & West), Kanjur Marg, Vikhroli (East & West)	Kokan Bhavan Belapur, Navi Mumbai.
18	Assistant Registerar C.S. 'T' Ward, Mulund Navi Mumbai - 01.	T - Ward	400 081	Mulund (East & West) Mulund Colony	Associated Cement Compund, Mulund (W) Mumbai - 80.
19	Deputy Registrar C.S. 'P' Ward, Mumbai-01	P - Ward	400 062, 063 054, 065, 090 104	Goregaon (E & W) Malad (E & W) Aarey Milk Colony, Malwani, Marve	P & R Ward, Mahanagar Palika Bldg., & Cultural Complex, 90 Feet D. P. Road, Near Saint Laurence School, Kandivali (E) Mumbai - 400101.
20	Deputy Registrar C.S. 'P' Ward, Mumbai-01	R - Ward	400 066, 067, 068, 092, 103	Borivali (E & W) Kandivali (E & W) Dahisar (E & W)	P & R Ward, Mahanagar Palika Bldg., & Cultural Complex, 90 Feet D. P. Road, Near Saint Laurence School, Kandivali (E) Mumbai - 400101.
21	District Deputy Registrar, Co-op. Soc. Mumbai.	A to R		Greater Mumbai District	Malhotra House (Formely Known As India House) 6th Floor, Opp. G.P.O., Mumbai - 400 001
22	Deputy Registrar	MHADA		All Societies Under	MHADA Grih Nirman, Bhavan Opp. Kalanagar Bandra (E), Mumbai-51
23	Assistant Registrar	S R A		All Societies Under Slums	Asst. Registrar Co-Op-Soc. S. R. A. Administrative Bldg, Gr, Floor, Behind HDFC Bank, Anant Kanhere Marg, Bandra (E) Mumbai - 400051

JURISDICTION OF CO-OPERATIVE COURTS
(Mumbai and Thane)

Sr. No.	Muni Wards	Nos.	Area
CO-OPERATIVE COURT NO. I			
I	A	1, 5, 20, 21,	Fort, Mumbai C.S.T.
		23, 38, 32,	Mantralaya, Colaba.
	B	3, 9, 10	Wadi Bunder, Carnac Bunder, Mandvi, Dongri, Umarkhadi
	C	2	Kalbadevi
	E	8, 10, 27, 23	Ray Road, Bombay Central, Mazgaon,
	M	71, 74, 84, 88,	Chembur, Govandi,
		94, 43	Anushakti Nagar, Deonar, B.A.R.C.
CO-OPERATIVE COURT NO. II			
II	D	4, 6, 7, 8, 26, 34, 35, 36,	
	H	51, 29, 55	Bandra (E) & (W)
		52, 54	Khar, Kalina, Santacruz Airport,
CO-OPERATIVE COURT NO. III			
III	F	12, 15, 14, 19, 22	Parel, Sewri, Naigaum, Matunga, Sion.
	G	17, 13, 18	Delisle Rd., Jacob Circle
		25, 16, 28	Prabhadevi, Worli, Dadar (W), Shivaji Park, Dharavi
	S	76, 78, 83, 31	Bhandup, Kanjur Marg, Vikhroli.
CO-OPERATIVE COURT NO. IV			
IV	K	56, 57, 58	Vile Parle, Juhu,
		59, 67, 69	Andheri, Jogeshwari,
		49	Versova.
	P	62, 63, 64	Barve Nagar,
		65, 90	Goregaon, Malad.
	R	66, 67, 68, 92	Borivali, Kandivali, Dahisar.
CO-OPERATIVE COURT NO. V			
V.	L	24, 70, 72	Nehru Nagar, Kurla,
		79, 77, 75	Saki Naka
	N	86, 87, 89	Ghatkopar, IIT.
		80, 81	Rajawadi, Pant Nagar, Barve Nagar, Mulund and Thane Dist.

Vinod Sampat, Advocate

Landmark Judgments

2013 – 2012 Court judgments

Sr. No	Citation	Judgment	Contents
1	1984 (2) Bombay CR 505 Bombay High Court	Smt. Neena S. Wadia vs. M/s. Venus Enterprises & Kunjan Construction co. vs. Deepakbhai R. Shah & Others	Consent cannot mean blanket authority obtained at the time of agreement of sale or handing over possession of flat as per sec. 7 (1) of the MOFA Act.
2	1994 C.T.J. 22 The Mah. State Co-op. Appellate Court, Mumbai	Smt. Mayadevi Krishna Lulla vs. Byculla Service Industries Premises C.H.S. Ltd., & Others	Any amount due for the period prior to registration of the society would be payable to the builders and it was for them to claim and/or recover from the appellant such an amount would not be payable by the appellant as a member of the society.
3	1998 C.T.J. 103 Bombay High Court Hon'ble S.C. Pratap J. (Writ Petition No.1779 of 1984 ; decided on the 17th December,1984)	Shalikram Shivram Khobragade & Other vs. Divisional Joint Registrar Co-operative Societies, Nagpur & Others	Consultation of housing federation for show cause u/s. 78 should be meaningful & effective
4	1985 C.T.J. 256 Bombay High Court	R. J. Uttamchandani vs. La-Rose C.H.S. Ltd., & Other	Society can recover amounts from occupant who is a (non-member)
5	WP No. 3153 of 1998 decided on 27/7/1998	Sai Griham Apartment CHS Ltd., vs. Dy. Registrar Co-op. Soc. Nashik	Society can recover amounts from occupant who is a (non-member)
6	1991 C.T.J. 239	Madhukar M. Mahajan r/o Plot No. 4, Archana C.H.S Ltd., Pune & Others vs. Archana Sahakari Gruha Rachna Sanstha Maryadit	The activities of tuition or balawadi are permitted in the housing society as the same are covered under the object clause of housing society
7	Bombay High court Contempt Petition No.28 of 1993 Bombay High Court Undertaking	Ashok Bansilal Mutha & Other vs. 1. State of Maharashtra 2. Inspector General of Registration & Controllers Stamps, M.S. Central Bldg., Pune. 3. Collector, 4. Sub-Registrar Registration, Collector Compound, Ahmednagar	The Govt. will not use Ready Reckoner for calculating the stamp duty.

8	Petition No. 4577 of 1985 1999 Vol. 101 (3) BLR 184	Smt. Ramagauri Keshavlal Virani vs. Om Walkeshwar Triveni C.H.S Ltd., Other.	No authority of builder to sell terrace.
9	Supreme Court (1999) 5 (SCC)	ICICI vs. State of Maharashtra	Agreement putting lessee for a specific period does not amount to a lease.
10	Bombay High Court W.P. No. 2027 of 2001	Practising Valuers Associations (India) & Ors. vs. The State of Maharashtra & Ors.	Registering authorities will not refuse registration of document on the ground that full stamp duty has not been paid in accordance with Ready Reckoner. this will however not prevent them from taking further action in accordance with rules.
11	1991 MLJ 630	Girdharlal Bhanulal vs. State of Maharashtra	Bye-laws do not have the force of law.
12	AIR 1970 Supreme Court 245 (V 57 C 51) (From Andhra Pradesh)	Co-operative Central Bank Ltd. and Others vs. Industrial Tribunal, Hyderabad	Bye-laws of co-operative society framed in pursuance of provisions of the Act – they cannot be held to have force law.
13	1990 CTJ Page 364	Sanwarmal Kejriwal vs. Vishwa C.H.S. Ltd. & Other	There can therefore be no doubt that that a member allotted has a right to transfer his interest in the flat to a third party and therefore the right to induct a third party one and licence basis.
14	Maharashtra State Co.op. Appellant Court 86 of 2001	M/s. Prakash Auto vs. Arenja Arcade Premises C.H.S. Ltd. & M/s. Shabi Construction & Co.	Builder cannot sell open space like basement as per the provisions of MOFA Act.
15	1989 CTJ 659 Bombay High Court	R. B. Rajput vs. Hiralal B. Rajput & Another	Associate member is not merely a sympathiser member of a nominal member but has a right which arises out of the joint ownership of the shares.
16	1996 (4) Bom. C.R. 696	Abdul Rehman Siddique & Others vs. Ahmed Mia Gulam Mohuddin Ahmedji and Others	Ad - Interim Injunction can be granted in very rare cases of compelling circumstances--- grant of such order in routing manner cannot be sustained.
17	1995 (3) Bom. C. R. 65	Bhujangrao vs. State of Maharashtra	Public servant members of Co-operative Societies are not public servants under sec. 6 of Corruption Act 1947 of Criminal Procedure.
18	Writ Petition No. 209/03 Amendment Act 22/02 decided on 10-7-03 (Panji-Goa) 2003 (4) Mh. L.J.	Jerry Alex Braganza alias Jeronimo Oriculo Alex Braganza vs. Rajeshree alias Rayeshri Ramdas Borkar alias Shobhavati Ramdas Borkar and Others	The court in its direction may permit filing of written statement even beyond period of 90 days.
19	Civil Revisional Application No. 1024 / 1983 decided on 27/4/1984.	Western Coalfields Ltd. through General Manager (Planning) Nagpur vs. Rajkumar Kanhiyalal Bhiwapurkar & Others.	Court has jurisdiction to allow written statement to be filed inspite of its earlier order.
20	Writ Petition No. 1304 of 2004	Sky Anchorage C.H.S Ltd. & Mr. Pradeep Rathi vs. The Municipal Corporation of Grater Mumbai & Others.	Open space are meant for the benefit of all persons, who are entitled to the benefit under the development & no single individual can appropriate any part of the same.

21	State of Maharashtra Writ petition No.1642 of 1983 Decided on 28/8/1984 Citation 1985 CTJ 37	Dr. D. C. Shah vs. State of Maharashtra	The requirement of 90% membership of a proposed society is only a part of guideline policy and not a statutory limit.
22	All India Reporter 2005 Supreme Court AIR 2005 Supreme Court	Friends Colony Development Committtee vs. State of Orissa & Others	Officers are liable to compensate purchasers for allowing unauthorised construction.
23	Civil Appeal No. 92 of 1998 2004 Supreme Court Cases 305	Secretary, Thirumurugan Co-operative Agricultural Credit Society vs. M. Lalitha	Co-op. Society are also covered under sec. 3 of Consumer Protection Act.
24	1989 C.T.J. 497 Andhra Pradesh High Court	Toddy Tappers Co-op. Society vs. Excise Superintendent	This indicates that the society is obliged to take a decision regarding admission and communicate it within sixty days or otherwise deeming provision will come into operation. The interpretation by our learned brother in the decision aforesaid will lead to a situation where the society can deprive all admissions to membership by merely not taking a decision. This is contrary to the scheme of the act which not only provides for a deemed membership u/s. 19 (2-A), but also for a machinery for ascertaining the eligibility and other relevant factors of the applicant for membership.
25	Maharashtra Co-operative Societies Act, Sections 101 and 79-A [2006(1) MH. L.J.]	Sunanda Janardan Rangekar vs. Rahul Apartment No. 11 Co-operative Housing Society Ltd.	Maharashtra Co-operative Societies Act, (24 of 1961). S. 101 – Application for recovery of arrears of maintenance charges from petitioner-society levied maintenance charges for commercial premises of petitioner at twice the rate of residential premises in the society – in absence of any additional services to the petitioner being holder of commercial premises, the society was not entitled to levy maintenance charges twice the rate of the residential premises. 2004(5) MH.L.J.197=2003(3) All.mr 570, rel (para 7).
26	First Appeal No. 786 of 2004 and First Appeal No. 989 of 2004 Bombay High Court	M/s. Jayantilal Investments vs. Madhuvihar C. H. S. Ltd. & Parmanand Natwarlal Parekh & Himatlal Virchand Sheth & Shri Ketan Surayakant Trivedi & Shri Kirit Ramanlal Dalal & Shri Harshad Kantilal Shah & The Mun. Cor. of Gre. Bombay & The Exe. Engineer	Builder is supposed to provide area for amenities like garden, as he had made a mention of the same in brochure as well as agreement. Brochure will have to be given weightage, if the amenity also mentioned in the agreement.

27	Writ Petition No. 1820 of 1986 1991 Co-op. C-1 Co-operative Cases	Hanuman Vitamins Foods Pvt. Ltd. and Others vs. The State of Maharashtra and Another	Maharashtra Co-operative Societies Act 1960 – S. 29 and 30 – Bombay Stamps Act, 1958 – Sections 2(1), 2 (G) and Schedule, Article 25 (B) (I) (As Amended in 1985) – Transfer of shares in a co-operative society – Document of transfer – Transferee getting right to allotment and occupancy of office premises previously occupied by the transferor – Though the title is transfer of shares, it is conveyance of a right to occupy the immovable property and was chargeable with duty under Article 25 (b) (i) and cannot be exempted from the duty – Levy of the stamp duty was not *ultra vires* the powers of the State Legislature.
28	1981 Bom. C.R. 716 Letters Patent Appeal No. 44 of 1976, in First Appeal No. 172 of 1974, decided on 8-12-1980.	The Association of Commerce House Block Owners Ltd. vs. Vishandas Samaldas & Ors. M.N. Chandurkar & R.S. Bhonsale, Jj	(a) The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963, secs. 4 & 7 – the construction of India, article 133 – Agreement by defendant No. 1 – promoter with plaintiff – suit for specific performance of agreement by plaintiff respondent No. 1 – City Civil Court decreed – Single judge confirmed dismissing appeal by defendant no. 2 – justification for judgment and decree of trial court as confirmed by single judge – Held trial court and single judge in error in decreeing plaintiff's suit for specific performance. (b) The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963, sec. 4 & 7 – the Indian Contract Act, 1872, sec. 56 – Agreement in question whether sham and bogus transaction – Mere refunding a certain sum by cheque, not any guarantee to genuineness of transaction – Held, plaintiff and defendant No. 1 being closely related, said transaction entered into between them could not be called a genuine transaction. (c) The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963, sec. 4 & 7 – Agreement in question whether in contravention of sec. 4 & 7 – Courts below negatived contention of appellant – Entitlement of appellant to plead invalidity of agreement in light of provisions of sections 4 and 7 – Held, it is difficult to hold that transaction was a genuine one.

			(d) The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963, sec. 4 – Words 'the agreement shall be registered under the Indian registration Act' – Meaning of – the Indian Registration Act, 1908, sec. 32 (a) – Registration of agreement – Whether obligation of promoter – held, if promoter declines or avoids to get document registered, it is permissible for purchaser to present it for registration. (e) The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963, sec. 4 – Provisions of sec. 4 whether directory and not mandatory – Tests to be applied for – Held, no universal rule can be laid down. It is duty of courts to get real intention of legislature. (f) The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963, sec. 7 (1) (ii) – The Indian Contract Act, 1872, sec. 56 – Agreement in question whether void – Held yes. agreement hit by sec. 56 of Contract Act.
29	Bombay High Court Writ Petition No. 7231 of 2002 Leakage	Humble Home C.H.S. Ltd. vs. Shri Sham Balani & Mrs. S. N. Shetty	Terrace repairs is the responsibility of the society. The first issue has been answered by holding that the terrace which forms the roof of the disputant's flat is the property of the society and therefore, in reply to issue No. 2, the society has been directed to pay an amount of ₹ 8.458/-
30	Air 1970 Supreme Court 245 (V 57 C 51)(From Andhra Pradesh)	Co-operative Central Bank Ltd. and Others vs. Industrial Tribunal, Hyderabad.	Bye-laws of Co-operative Society framed in pursuance of provisions of the Act – They cannot be held to have force law.
31	Bombay High Court Writ Petition No. 110 of 2004	Sukhsagar Co-operative Housing Society Ltd. vs. State of Maharashtara and Others	Maharashtra Co-operative Societies Act, (24 of 1961), Ss, 2 (1 and 9) __ Registration of Co-operative Housing Society of Flat Owners in Builder. The questions as to whether the construction is in accordance with builder regulation and if so, whether an occupation or completion certificate should be granted, does not lie within the provision of the Registrar.
32	In The High Court of Judicature at Bombay Appeal Jurisdiction	Nahalchand Laloochand vs. Panchali CHS Ltd. Car Parking Space	
33	In the High of Judicature at Bombay, OOCJ Appeal No. 297 of 200 Notice of Motion No. 1966 of 2008 Insuit No. 1698 of 2008	M/s. Manratna Developers vs. Meghratan CHS Ltd. & Ors.	Builders can carry out construction even if a co-operative society is formed.

34	Dated 15/10/2007	S. Rangarajan vs. Oyster CHS Ltd.	2008 (6) All MR 754 Shri S. Rangarajan vs. Oyster CHS Ltd. & Anr Writ Petition No. 7574 of 2007 12Th February, 2008
35	The Addl. Consumer Redressal Forum Kokan Bhavan , Navi Mumbai C/91/2008	Environ Emanual Co-op. Hsg. Soc. Ltd. vs. The Environ Enterprises Inc.	Conveyance Order in 128 days
36	Bombay High Court Second Appeal No. 357 of 1986 decided on 9/4/2009	Ramdas Shivram Sattur vs. Rameshchandra Ramchandra Popatlal Shah & Others	Nominee does not become the owner of the property but to hold the property in trust
37	Justice Dharmadhikari	Sweety Agarwal	Even one member can stop the redevelopment.
38	15th July/2008 01/July/2010	479 Natalia Co-operative Housing Society vs. Navbharat Development Corporation and Others	Stamp Duty difference after 4 months to be paid by builder. Daily fine on builder till he obtains building completion certificate
39	Complaint Case No. 2008/657 (In Mumbai Suburban District Consumer Forum)	1. Anand J. Gupta Vasantapt. Gandhi Gram Rd, Juhu, Mumbai-49. .....Complainant(s) vs. 1. Royal Palms (India) Pvt. Ltd. Survey No. 69, Near Unit No. 26, Aarey Milk Colony, Goregaon(E), Mumbai-65. .....Opp. Party(s)	Parking cannot be sold by developer
40	Dated 19th July, 2010 Order	489 Commercial purpose only includes profit generating activity, other goods & services are covered under CPA-2 (NC) (2)	Consumer Course Jurisdiction
44		537 Supreme Court Nahalchand Laloochand Pvt. Ltd. vs. Panchali Co-operative Housing Society Ltd. dated 31-8-2010	Parking Space cannot be sold by builder
45		545 Friends Colony Judgment to be added	Committee to be formed to check unauthorised construction.

Useful Websites for Co-operative Housing Societies

Website of Bombay High Court: http://bombayhighcourt.nic.in/

Website of prime ministers office http://www.pmindia.gov.in/

New CHS Model Bye-laws: http://tinyurl.com/New-Model-Byelaws-CHS-2013

Website of Commissioner for Cooperation and Registrar,Cooperative Societies (CC & RCS) Maharashtra State, Pune: https://sahakarayukta.maharashtra.gov.in/SITE/Home/Home.aspx

Website of Mharashtra Govt.: www.maharashtra.gov.in

http://tinyurl.com/4-pt-attack-on-corrupt-mg-cmte • http://tinyurl.com/Co-opSocyProblems

http://tinyurl.com/4RTIForms • http://tinyurl.com/LandmarkCourtOrders

http://tinyurl.com/ImpGRsCirculars • http://tinyurl.com/BldgPropDepts

http://tinyurl.com/RTILandmarkOrders • Website of DDR III: ddr3csmumbai.org

Website of MHADA http://www.mhada.org/

V. R. Ghelani, *Tax Consultant & Legal Advisor*

Special Article – Recent Amendment applicable to Property Tax

1) Do you know that the Mumbai Municipal Corporation Act, 1888 is recently amended and now the Property Tax is levied on the bases of Capital Value of the Property? In the case of residential premises of more than 500 sq. ft. there shall be a cap of two times of the existing tax, commercial premises shall have a cap of three times of the existing tax and for residential premises up to 500 sq.ft. the cap is equivalent to the existing tax up to 31-3-2015. However, w.e.f. 1st April, 2016, the cap would stand removed and the property tax shall be increased by 40% of the property tax payable. Thereafter property tax shall be increased by 40% every five years.

2) Accordingly, the Municipal Corporation of Greater Mumbai (MCGM) has as per the amendment made in the Act, started issuing special notice to all property owners/landlords and all Societies/ owners calculating the property tax based on Capital Value (C.V.) instead of Rateable Value (R.V.) and demanding property tax accordingly on the basis of the capital value determined by them. Further, the MCGM has asked Citizens & others to pay the bills before 30th June, 2013 for a period of three years i.e. from 1st April, 2010 to 31st March, 2013

3) You may note that in fact, that Property Tax is a form of Compensatory Tax as is evident from the provisions of the Mumbai Municipal Corporation Act 1888 including *inter alia* sections 61 and 140 to 143. It will be seen that even though the tax is termed as Property Tax, it is nothing but a levy for providing services by the MCGM.

4) The theory of compensatory tax is that it rests upon the principle that if the Government by some positive action confers upon individual/s a particular measurable advantage, it is only fair to the community at large that the beneficiary shall pay for it.

5) Compensatory tax is based on the principle of "pay for the value". It is a sub-class of "a fee".

6) Under the provisions of the Maharashtra Rent Control Act, 1999, the burden of property tax is to be borne by the tenants. In AIR 2003 SC 4278, it was held that in view of specific provisions of the Act, the burden of tax is imposed on the tenant,

sub-tenant and occupiers and the tax is liable to be recovered from them through the landlord or directly by attachment of property or other coercive modes. Therefore the tenants sub-tenants and occupants are entitled to an opportunity to participate in the process of valuation and assessment. And as such, they are also entitled to get written notice apart from public notice for assessment, revision of assessment or amendment of assessment of the consolidated rate of tax.

7) However, it would be seen that no such notice has been issued to the tenants to enable them to make their complaints though in turn ultimately the tenants are required to bear and pay the same.

8) Property Tax should have a reasonable co-relation with the money required for performing the obligation cast on MCGM with regard to the specific services for which the property tax is levied. In view of the above, the value of the property is totally irrelevant for arriving at the basis of the property tax.

9) In every compensatory tax, the authorities have to establish that the levy has a co-relation with the expenditure for providing the same. Therefore, the system should be based on sound economic consideration and commensurate with the services provided in a given locality.

10) In any event, MCGM has been making substantial surpluses every year and there is no reason or ground to increase the property tax being levied by the MCGM.

11) If at all any concessions or free services are to be rendered by the civic corporations to the slum dwellers or the like, this SUBSIDY IS THE FUNCTION OF THE STATE. The State should bear the said burden and cost of services rendered. This and cost of services should not be transferred arbitrarily to another citizen and thereby causing unreasonable discrimination and deprivation. In any event, Property Tax cannot be levied for the aforesaid purpose and the said levy is arbitrary and contrary to law.

12) The extremely high increase of taxes shall result in considerable litigation between the owners and the tenants as the tenants/occupants shall not be paying to the owners, the increased Municipal taxes based on capital values. The non-payment of exorbitant taxes by the tenants/occupants to the owners shall result in non-payment of taxes to MCGM by the owners. Although they are ready & willing to pay earlier prevailing Municipal Taxes.

13) Similarly, under the Maharashtra Co-op. Housing Societies Act all the increased taxes and the maintenance charges are to be paid by the members of the society. The members can be evicted from the flats/premises for non-payment of increased taxes. This will give rise to dispute between members and lakhs of litigations will be filed in the Co-operative courts.

14) In Mumbai the market value of premises are very high and thus the taxes based on Market Value of premises is also extremely high and the persons would not be able to pay such high exorbitant taxes. The building which is tenanted cannot fetch the value mentioned in the Stamp Duty Ready Reckoner.

15) The levying of taxes in any form has to be prospective and not with retrospective effect. The MCGM has levied this Property Tax retrospectively with effect from 1st April, 2010 with is illegal.

16) The levy of Municipal taxes based on Capital Value system is illegal,

unconstitutional, and beyond Legislative competence.

17) In fact, the Rules framed by MCGM for the present mode of arriving at the property tax is erroneous on the following among other grounds viz;

a) The basis of arriving at the Capital Value of property is contrary to law.

b) Stamp Duty Ready Reckoner is not the measure of capital value as it does not arrive at true value for the purpose of calculating capital value.

c) Where the building is more than sixty years old, as per the Stamp Duty Ready Reckoner, depreciation of 70% is to be granted. This has not been considered by MCGM.

d) The rate should be of only 2 users – Residential and Non-residential user instead of the several classifications made in the Rules.

e) The formula for calculation of built-up area from carpet area by applying a multiplying factor of 20% is erroneous

f) Under the property tax while capping the taxes on capital value at 2 times or 3 times of the existing taxes, the % of the general tax is 30% of the Rateable Value in the existing bill of property tax. However the same is made 90% of Rateable Value which is not valid under the Rules, as Rules cannot override the provisions of Act/section and hence is invalid.

g) In general the formula applied for arriving at the Rateable Value and Tax is disputed.

h) Even though the Act requires the rates to be taken as per Stamp Duty Ready Reckoner, MCGM has failed to do so and has come out with its own basis.

Under the circumstances above, the Property Owners Association and its members and many others have submitted their Memorandum dated 16-1-2013 and 7th February, 2013 and made an appeal on the 15th March, 2013 to his Excellency the President of India, Prime Minister of India and The Chief Minister of Maharashtra, etc. to issue direction/order to the MCGM and State of Maharashtra to forthwith withdraw the new property tax based on Capital Value System and continue with collection of taxes based on old Rateable Value System.

In the meantime, The Property Owners Association and few others have recently filed a Writ Petition in the Hon'ble Bombay High Court challenging the above amendment for adopting Capital Value system for levy of Property Tax under the Mumbai Municipal Corporation Act, 1888 and also to strike down sections 128(3); 129A, 144, 144A, 144E, 146, 140(1)(a), 140 (1) (b) 140(1)(ca) read with section 195 (E) AND 195(G): 140 (1) (d) read with sections 354 (UA), 146, 154, and lastly section 202 of the Act.

All those residing or holding/having office/ shop premises and immovable properties in the area limit of the MCGM will be highly affected by this capital system of levy of property tax. Hence, they are requested to support the above Writ Petition and contact the Property Owners Association having address 204, Chandra Mahal, Room No.9, 1st Floor, Thakurdwar Road, Mumbai 400 002, Tel. No. 2385 3436, for necessary guidance and to file necessary objections and adopt further line of action in the matter, in the interest of all concerned.



Ashok Patil, Mandar Vaidya & Priti Shukla
Advocates

DIRECT TAXES
High Court

1. Business expenditure – S. 37 – Liability on account of wage revision – Liability deductible

CIT vs. Bharat Heavy Electricals Ltd. [2013] 352 ITR 88 (Delhi)

The assessee had claimed liability on account of wage revision proposals, and the same was certain and ascertained on the basis of past experience, union demands and the ability of the employer to bear the additional burden. The claim was disallowed by the AO as it being contingent, and allowed by the Tribunal. The High Court, held that the deduction could not be held to be contingent, because the wage and probable revision or rates of revision would be within the fair estimation of the employer, and therefore held that the liability could not held as contingent but an ascertained liability which was deductible.

2. Business expenditure – S. 37(1) – Business decision not to honour export entitlement due to losses – Penalty – Deductible

CIT vs. Regalia Apparels Pvt. Ltd. [2013] 352 ITR 71 (Bom.)

The Apparel Export Promotion Council granted to the assessee entitlements for export of garments, in return the assessee filed a bank guarantee of its commitment that it will abide by the terms and conditions. The assessee taking decision not to honour commitment in view of losses if it fulfils the commitment. The Apparel Export Promotion, encashed the bank guarantee. The assessee claimed the same as deduction being compensatory in nature. The AO disallowed the same as the deduction claimed was in the nature of penalty. The Tribunal held in favour of assessee. The High Court held that, the assessee had not contravened any provisions of law and thus forfeiture of the bank guarantee was compensatory in nature u/s. 37(1), and therefore allowable.

3. Income from House Property – S.24 – Unsold flats let out – Assessable as income from house property

Azimganj Estate Pvt. Ltd. vs. CIT [2013] 352 ITR 82 (Cal.)

The assessee is a property developer and builder, constructed a building, and had let out the unsold flats and offered the income as income from house property. The AO disallowed the same and assessed the same as income from business income and disallowed deduction being repairs and maintenance. The High Court held that whether the asset was being exploited commercially by letting it out or whether it was being let out for the purpose of enjoyment of

the rent, and held that exploitation of the unsold flats should be assessed as income from house property.

4. Business expenditure – 37 – Expenditure incurred for the issue of convertible debentures – Deductible

CIT vs. Havells India Ltd. [2013] 352 ITR 376 (Delhi)

The assessee had issued debentures which were to be converted into shares on a subsequent date. The AO held that the issue of debentures is akin to issue of share capital, and disallowed the expenditure related to it. The High Court held that in connection with the issue of debentures or obtaining loan is revenue expenditure, despite indications to the effect that the debentures are to be converted in the near future into equity shares, the expenditure incurred should be allowed as revenue expenditure on the basis of the factual position that the same was incurred at the time of issue of debentures.

5. Business expenditure – 37 – Expenditure incurred for voluntary retirement scheme of two units – Business not shut – Allowable as deduction

CIT vs. Foseco India Ltd. [2013] 352 ITR 320 (Bom.)

The assessee had shut down two of its units but not shut down its business. It claimed deduction of the expenses incurred for voluntary retirement scheme for the employees of the two units. The AO and CIT(A) held the expenses as capital in nature, the Tribunal decided in favour of the assessee. The High Court held that shutting of the two units and expenses incurred was a part of restructuring of business, and the same is considered as expenditure in the course of conducting its business and therefore allowable as revenue expenditure.

6. Disallowance – S. 40A(3) R. 6DD(k) – Sourcing of food articles – agent insisting on cash payments – No disallowance could be made

R.C. Goel vs. CIT (2013) 84 DTR (Del.) 432

The assessee is engaged in the business of executing catering contracts for Railways in respect of two trains. The assessee had appointed on agent to provide supplies at various stations to provide food in the train for passenger at all times. The Agent insisted on cash payment for providing such supplies at various stations. The AO disallowed such cash payments as it was in contravention of the provision of s. 40A(3). The High Court held that in the particulars of the present case, the lower authorities had adopted a unduly narrow and technical interpretation of r. 6DD(k), the benefit of which the assessee was clearly entitled to, for the reason being the assessee would have been deprived of the benefit of the supplies, and therefore held that assessee's case was covered by r. 6DD(k) and no disallowance u/s 40A(3) was called for.

7. Capital gains – S. 2(14)(ii) – Carpets, paintings, antique furniture – Capital assets – Personal effects – Not taxable

Faiz Murtaza Ali vs. CIT (2013) 85 DTR (Del.) 33

The assessee had received items such as carpets, paintings, crystals, furniture as gifts or through inheritance from her father or uncle. The assessee *vide* an affidavit before the AO has said that all the items were held by him for personal use by the assessee. The High Court held that, as the department could not give any findings to the contrary of the affidavit filed by the assessee, capital gains was not chargeable on the sale of these items.

8. Capital or revenue – S. 4 – Entertainment tax exemption – Capital receipt not taxable – AY 2003-04

DCIT vs. INOX Leisure Ltd. (2013) 85 DTR (Guj) 103

The assessee was in the business of operating multiplexes in Baroda, and for the relevant year under consideration had received an amount by way of exemption from payment of entertainment tax. The assessee claimed the same as capital receipt and the same being exempt, as the same was granted for covering the capital outlay. The AO was of the opinion that the said amount was received for commencement of businesss and such subsidy was for business operation. The High Court after studying the scheme, held that the purpose of granting exemption, was for giving boost to the tourism sector and to give incentive to the multiplex units which were found to be highly capital incentive, same constituted capital receipt.

9. Capital gains – S.45 – Consideration received for relinquishment of ownership rights in plot – Assessable as capital receipt – A.Y. 2006-07

Simka Hotels and Resorts vs. DCIT (2013) 85 DTR (Del.) 249

The Assessee had relinquished its ownership rights in a plot of land and offered the same for tax under the head income from capital gains tax. The AO assessed the same as income from other sources on the basis that the assessee had sold only the rights and not land. The High Court held that the assessee's interest in the plot of land was in the nature of an actionable claim which could be asserted in a legal proceeding, and therefore held that the assessee had rightly offered the income under the head capital gains.

10. Capital or revenue expenditure – S.37 – Compensation paid to the landlord for non-occupation of premises by assessee, in lieu of withdrawing claims by landlord, is allowable as revenue expenditure

CIT vs. UTI Bank Ltd. [2013] 32 taxmann.com 282 (Gujarat)

The assessee had contracted with a landlord to take premises on lease for opening its branch, but no formal agreement was entered into. The landlord started the construction of the premises as per assessee's requirements. However, before completion of construction, assessee came to know of the proposed construction of an overbridge over the said property which would cause hindrance to conduct its business and services. The assessee, therefore, terminated the understanding with the landlord and paid compensation to the landlord for the work done, in lieu of withdrawing all claims against the assessee. The assessee claimed such amount paid as revenue expenditure. The Assessing Officer disallowed the amount. The CIT(Appeals) and the Tribunal deleted the disallowance as the compensation was paid in the course of business and for the purpose of business, to protect the assessee's interest and in lieu of the claims that could have been raised by the landlord. On further appeal by revenue. The Tribunal by referring to the case of *J.K. Woollen vs. CIT [1969] 72 ITR 612 (SC)* in which it was held, that in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the IT department. On further appeal in High Court, High Court affirmed the findings of Tribunal and dismissed the revenues appeal.

11. Assessment order – 143(3) – Once Assessing Officer gives effect to the order of Tribunal – Successor Assessing Officer has no jurisdiction to recompute his predecessor's order

Classic Share & Stock Broking Services Ltd. vs. ACIT [2013] 32 taxmann.com 273 (Bombay)

The assessee filed a return claiming loss of ₹ 16.82 crores which included a loss from share transactions of ₹ 13.63 crores. An assessment order was passed under section 143(3) determining a total loss of ₹ 3.13 crores after disallowing the loss from the share transactions. On appeal, the CIT(A) upheld the disallowance of loss from share transactions. On Second Appeal, the Tribunal restored the assessment back to the AO for fresh examination of the nature of the share transactions in view of SEBI guidelines and to decide the matter. The AO passed an order giving effect to the order of the Tribunal and recomputed the total loss at ₹ 16.83. Subsequently, the successor in office of the AO passed another order computing the loss at ₹ 3.19 crore. On a writ petition in High Court, the Hon'ble court allowed the Petition and held that once effect was given to the order of the Tribunal by the passing of an order under section 254, that order could have been modified or set aside only by following a procedure which was known to the Act. The court further held that what the AO has done by the impugned order was only a substantive review of the earlier order of the predecessor which was clearly impermissible. Since the order of the successor Assessing Officer was clearly without jurisdiction, there was no reason or justification to relegate the Petitioner to the remedy of an appeal.

12. Failure on the part of Commissioner of passing order within six months as per section 12AA of the IT Act is directory and does not lead to the presumption that registration is granted

CIT vs. Karimangalam Onriya Pengal Semipu Amaipu Ltd. [2013] 32 taxmann.com 292 (Madras)

In this case the question of law framed or the issue in dispute was as under:

""Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in setting aside the order of the Commissioner of Income Tax rejecting the assessee's application for registration u/s 12AA on the grounds that the order was not passed within six months from the date of filing without appreciating the said time limit prescribed was only directory and not mandatory, considering the nature and design of the relevant statutory provisions?

Dismissing the appeal of the Tribunal and by remitting the matter back to the Commisioner the Hon'ble High Court set side the order of Tribunal by relying on the decision of In *Srikhetra, A.C. Bhakti-Vedanta Swami Charitable Trust vs. Asstt. CIT 2006 (II) OLR 75* wherein the Orissa High Court took the view that period of six months as provided under sub-section (2) of Section 12AA of Income-tax Act is not mandatory and held as follows:-

…."5. We are unable to uphold such contention. In our view the period of six months as provided in sub-section (2) of Section 12AA is not mandatory. Though the word 'shall' has been used but it is well known that to ascertain whether a provision is mandatory or not, the expression 'shall' is not always decisive. It is also well known that whether a statutory provision is mandatory or directory has to be ascertained not only from the wording of the statute but also from nature and design of the statute and the purpose which it seeks to achieve. Herein the time frame under sub-section (2) of section 12AA of the Act has been so provided to exclude any delay or lethargic approach in the matter of dealing with such application. Since the consequence for non-compliance with the said time frame has not been spelt out in the statute, this Court cannot hold that the said time limit is mandatory in nature nor the period of six months has been couched in negative words. Most of the time negative words indicate a mandatory intent. This Court is also of the opinion that when public duty is to be performed by the public authorities, the time-limit which is granted by the Statute is normally not mandatory but is directory in

the absence of any clear statutory intent to the contrary. See *Montreal Street Railway Company vs. Normandin AIR 1917 PC 142.* Here there is no such express statutory intent, nor does it follow from necessary implication…"

Further relying on the decision of CIT V., *Salem vs. Sheela Christian Charitable Trust,* wherein by following the decision of this Court reported in Anjuman-E-Khyrkhah-E-Aam (supra) the court held that there is no automatic or deemed registration if the application filed under section 12AA was not disposed of within the stipulated period of six months. The court further held that the time frame fixed under the said provision is only directory.

Relying on the above decisions the court held that the time frame under sub-section (2) of section 12AA of Income-tax Act is only directory. Tribunal was not right in holding that since the application for registration has not been disposed of within the limitation of six months, the assessee company was deemed to have been granted registration under Section 12AA of the Act.

13. Exemption – S.11 – Even if provisions of trust has not been complied in earlier years will not debar the assessee to claim the exemption in the subsequent assessment years u/s 11 of the IT Act

DIT (Exemptions) vs. G.K.R. Charities [2013] 32 taxmann.com 208 (Bombay)

In this case, the respondent-assessee was engaged in the charitable activities and has been granted registration under section 12A of the Income-tax Act, 1961 (the Act). The revenue seeks to deny the benefit of exemption under section 11 of the Act *inter alia* by disallowing the repayment of the interest free unsecured loan taken from the managing trustees in earlier years without obtaining prior approval from the Charity Commissioner under the Bombay Public Trust Act, 1950 (the Trust Act). On appeal, the CIT(A) following the ITAT's decision in the case of *ITO (Exemption) vs. Bombay Stock Exchange IT Appeal No. 5551 (Mum.) of 2009* dated 22nd August, 2006 allowed the claim of the assessee for exemption under section 11 of the Act. On further appeal filed by the revenue, the ITAT while upholding the order of CIT(A) held that once the registration has been granted under section 12AA of the Act, the exemption under section 11 cannot be withdrawn unless there is violation of provisions of Section 13 of the Act or the registration under section 12AA (3) of the Act is cancelled. The Tribunal held that the decision of this Court in the matter of *CIT vs. Pruthivi Trust [1980] 124 ITR 488* is distinguishable on facts as the Trust in that case was carrying out profit making activity without any authorisation in the Trust Deed. On further appeal in High Court, the question of law or the issue in dispute was as under:

"Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in allowing the claim of the assessee for exemption u/s. 11 of the Act ignoring the fact that the assessee failed to get the permission of the Charity Commissioner to raise loans for the trust in violation of provisions of section 36(3) of the Bombay Public Trust Act without considering the decision of the Bombay High Court in *CIT vs. Pruthivi Trust reported in 124 ITR 488 ?"*

Dismissing the appeal of the revenue the hon'ble court held that in this case, there is no bar in the Trust Deed to take unsecured loans. The breach, if any, was in failing to comply with the provisions of the Trust Act in an earlier year. The court held that it was not in dispute that the unsecured loans taken in earlier years were duly reflected in the books maintained by the assessee and though prior approval was not obtained, the assessee had, in fact, subsequently applied for approval from the Charity Commissioner and the Charity Commissioner has neither granted approval nor initiated any proceedings under the Trust Act for the alleged violation of obtaining unsecured loan without prior permission.

14. Sections 35ABB, 37. Amortisation of expenses vs. revenue expenditure

Evergrowth Telecom Ltd. 213 Taxman 299 (Bom.)

The assessee had paid licence operating fees of ₹ 115 crores to one J.T. Mobiles Ltd., who had appointed the assessee as an operator for providing mobile service in Punjab circle. The assessee claimed the same as revenue expenditure u/s. 37. The learned A.O. disallowed the same on the ground that such expenses were not allowable in one year but had to be amortised over the life of the licence in view of section 35ABB. The Tribunal allowed the expenses fully u/s. 37 as revenue expenditure. It was held that the amount of ₹ 115crores was paid as operating licence fee and therefore no enduring benefit was received by the assessee. And hence there was no warrant to spread the expenditure beyond one year viz. the year of incurring the expenditure. It was further held that section 35ABB would have no application in the hands of the assessee but would apply in hands of M/s. J.T. Mobiles Ltd. who had paid licence fees. Further since treatment given by the assessee in its' books is not conclusive of the nature of the transaction nor is determinative of the eligibility for deduction, the fact that the assessee had in its books of account spread the expenditure of ₹ 115 crores over a period of time, would not change the position vis-à-vis deduction for computation of income.

15. Section 68- Suppliers' credit

Smt. Rekha Krishnaraj ITA No. 811 of 2009 (Kar.) – decision dated 13th March, 2013.

There was a discrepancy in the assessee's books of creditors. The learned A.O. noted the discrepancies in the accounts of the creditors and added the same being ₹ 19,67,702/-, to the income of the assessee as 'cash credits' u/s. 68 of the Act. Because the credit balance as shown by the assessee was more than the amounts shown by the creditors as receivable. The Tribunal upheld the addition. Before the High Court, the assessee contended that section 68 can have no application to suppliers' credit since it applies only to 'cash credits'; the heading of section 68 was heavily relied upon. It was held that the heading cannot be conclusive for the purpose of interpreting the true scope of the section; a heading can be taken help of for guidance in case of ambiguities and cannot control the words of the section. While interpreting a section its words have to be primarily considered and the words cannot be overlooked so as to draw support from the heading. Since section 68 applies to credits found in the books, there can be no difference between cash credits and suppliers' credit.

16. Sections 40A(2), 143

CIT vs. Rajnish Ahuja (P & H High Court) ITA No. 27 of 2013 dated 2nd April, 2013.

Sale to sister concerns at lower rate.– The assessee had supplied to its sister concerns at a lower rate compared to what was charged to others. The learned A.O. made an addition of 15% on basis of sales to non-sister concerns. It was held that no addition can be made merely because lower rates were charged to sister concerns as charging of lower rates was not prohibited under any provision. Further the sister concerns were paying tax at a higher rate than the assessee. It was also held that section 40A(2) would apply only to expenditures and not to sales.

Note: This decision impliedly overrules the Larger Bench decision in case of Manoj Agarwal 113 ITD 377. In which it was held that section 68 cannot apply to suppliers' credit since there is difference between a case where an assessee actually receives money and an amount shown as amount payable be assessee for value received.


Jitendra Singh & Sameer Dalal
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DIRECT TAXES
Tribunal

REPORTED

1. Penalty – Section 271(1)(c) of the Income-tax Act, 1961 – Assessee having agreed to surrender certain amount in the course of survey proceedings and filed its return subsequently wherein said amount was offered to tax – Held no concealment on part of assessee – Penalty under section 271(1)(c) of the Act not leviable. A.Ys. 2007-08 & 2008-09.

Vasavi Shelters vs. ITO - (2013) 141 ITD 590 (Bang.)

The assessee was engaged in real estate business. For relevant assessment years, the assessee did not file its return before the due date as prescribed under section 139(1). A survey was carried out at assessee's premises. The assessee during the course of survey agreed to offer certain percentage of its sale, as its income. Thereupon, the assessee during the assessment proceedings agreed that the income declared in the course of survey be adopted as the total income of the assessee. The Assessing Officer completed the assessment based on the declaration made by the assessee and also passed/levied penalty section 271(1) (c).

On appeal Tribunal held that section 271(1) (c) has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of particulars of income in return filed by assessee, penalty cannot be imposed. Concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee has to be in return filed by it. The assessee can furnish the particulars of income in his return and everything would depend upon the return filed by him. In the present case, the Tribunal found that there was no such concealment or non-disclosure, as the assessee had made a complete disclosure in the return and offered the surrendered amount for the purposes of tax. As such penalty under section 271 (1)(c) of the Act was not leviable.

2. Revision – Section 263 of the Income-tax Act, 1961 – Order prejudicial to interest of revenue –Where show cause notice issued under section 263 of the Act was issued for non-deduction of tax at source out of certain expenses incurred by assessee, and in final order, Commissioner had directed Assessing Officer to recompute income in hands of assessee by applying suitable net profit rate – Such direction under section 263 was held to be not justified in law – Further, revision proceedings initiated only on basis of audit objection were also held to be bad in law. A.Y.: 2005-06.

Jaswinder Singh vs. CIT – (2013) 56 SOT 85 (Chd.)

The assessee was carrying on the business of transportation by using his own trucks and hired trucks. The assessee failed to produce books of account accordingly, the Assessing Officer invoking the provisions of section 144 completed the assessment and estimating the income of the assessee from trucks in accordance with the

provisions of section 44AE. Further, as the assessee had failed to produce the books of account, the loading charges and freight charges of the hired trucks were worked out on proportionate basis by the Assessing Officer. The Commissioner in exercise of his powers under section 263 issued show-cause notice pointing out that since the assessee made payments on account of freight charges, loading and unloading charges etc. without deducting tax at source, provisions of section 40(a)(ia) got attracted. However, during the revision proceedings after considering the facts of the case of the assessee and explanation, the Commissioner, found that the provisions of 40 (a)(i) were not attracted in the assessee case. However, the Commissioner directed the Assessing Officer to recompute the income in the hands of the assessee by applying a higher net profit rate and then disallow certain per cent of the expenses. On appeal the Tribunal held that such directions of the Commissioner in exercise of powers under section 263 of the Act were not warranted and the same is liable to be set aside, as the Commissioner had given direction to revise the original assessment on a totally different ground than, the ground mentioned in the show-cause notice issued under section 263 of the Act issued by him for revising the original assessment.

Further, the Tribunal found from the records that, the Commissioner had initiated the proceedings under section 263 of the Act merely on the basis of the audit objections. In this regard the Tribunal held that the provisions of section 263 are clear and absolute that the power is to be exercised by the Commissioner from the examination of the records of the proceedings under the Act. Audit objections under no circumstances can be called as record empowering the Commissioner to exercise jurisdiction under section 263 of the Act. Accordingly on this ground also the Tribunal held that the order passed by the Commissioner under section 263 was not tenable.

3. Disallowance under section 40(a)(ia) – TDS deducted from the payment of the sub-contractors deposited before the filing of the return of income – disallowance made under section 40(a)(ia) is not justified. A.Y. 2005-06.

B.M.S. Projects (P) Ltd vs. DCIT – (2013) 85 DTR (Ahd.) (Trib.) 393

The assessee during the previous year relevant to the impugned assessment year deducted the TDS from the payments made to the sub-contractors. However, same was deposited in the Government Treasury belatedly but before the filing of the return of income. The A.O. while finalising the Assessment Order disallowed the payments made to the sub-contractors invoking the provisions of section 40(a)(ia) of the Act. On appeal the First Appellate Authority confirmed the disallowance made by the A.O. On further appeal to the Hon'ble Appellate Tribunal, the Tribunal has deleted the disallowance made under section 40(a)(ia) by observing that assessee having deducted TDS from the payments made to sub-contractors and deposited the same before the due date of filing of returns said payments could not be disallowed under section 40(a)(ia) of the Act.

4. Addition under section 69 – Assessee having purchased property in the name of his wife – A.O. accepted the investment in the wife's name and all documents relating to the investment were available in the assessment record of the wife who was assessed by the same A.O. – No addition under section 69 of the Act is called for. A.Y. 2005-06.

Asst. CIT vs. Om Prakash Lohiya (2013) 86 DTR (Jd.) (Tribunal) 1

The assessee filed his return of income declaring total income of ₹ 1,99,705/-. Subsequently the assessee's premises were subjected to the search action under section 132 of the Act. In response to the notice issued under section 153A, the assessee has filed his return declaring total income at ₹ 10,99,705/-. During the course of the assessment proceedings, the A.O. made inquiries from the officer of the Sub-Registrar and observed that the assessee has purchased a property at Khasra for ₹ 40,000/- whereas for the stamp duty purposes the Sub-Registrar has adopted the value at ₹ 1,43,438/-. However, this property has not been admitted by the assessee in his statement during the

search proceedings. The A.O. therefore held that the assessee failed to explain the source of investment in the said property satisfactorily and therefore made the addition under section 69 of the Act. The assessee being aggrieved by the Assessment Order preferred an appeal before the Ld. CIT(A). During the course of the appellate proceedings, the assessee explained that the total investment in the said property was ₹ 59,000/- and not ₹ 1,43,438/- as adopted by the A.O. and to substantiate the same copy of purchase deed was furnished. The assessee further explained that the said investment was duly shown in the balance sheet of wife for the relevant period and the same was also filed. The assessee, further, contended that his wife is also assessed with the same A.O. Hence, the investment in the said property is duly explained. The Ld. CIT(A) after considering the submissions and the relevant assessment folder of the wife of the assessee, deleted the additions made by the A.O.

The revenue being aggrieved by the order passed by the Ld. CIT(A) preferred an appeal before the Hon'ble Jodhpur Appellate Tribunal. The Appellate Tribunal confirmed the order of the Ld. CIT(A) by observing that the A.O. having accepted the investment in the hands of the assessee's wife in respect of the property purchased in her name and all the documents relating to said investment being available in the assessment records of the assessee's wife who was assessed by the same A.O., addition under section 69 made in the hands of the assessee cannot be sustained.

5. Revision under section 263 – Erroneous and prejudicial order – lack of proper enquiry – A.O. rejected assessee's books of account by invoking the provisions of section 145(3) after raising various queries and determined the income by applying net profit rate of 9.5 per cent as against 8.5 per cent declared – CIT exercised powers under section 263 on the ground that the stock register has not been mentioned and the A.O. ought to have applied net profit rate of 10 per cent – Not justified. A.Y.: 2006-07.

Jeewanram Choudhary vs. CIT (2013) 84 DTR (Jd) (Tribunal) 317

The assessee for the previous year relevant to the assessment year 2006-07 filed the returns declaring total income at ₹ 26,53,998/-. The A.O. after calling for the various records finalised the Assessment Order under section 143(3) of the Act at ₹ 39,35,440/- after making trading addition of ₹ 12,81,440/- by applying the Gross Profit rate of 9.5 per cent as against the 8.5 per cent declared invoking the provisions of section 145(3) of the Act. The assessee accepted the Assessment Order and has not preferred any appeal. Thereafter, the Ld. CIT has passed an order under section 263 of the Act by observing that the last hearing took place on 14th March, 2008 on which date the assessee filed a reply along with relevant details. It requires to be noted that the assessment was also completed on 14th March, 2008 itself and the tax calculation sheet was also checked and signed by the concerned Dy. CIT as also the tax assistant on the same date i.e. 14th March, 2008. The above facts show that the assessment was completed in a very hurried manner without looking into the details filed, leave aside making any inquiry thereby rendering the assessment as erroneous as also prejudicial to the interest of the revenue.

The assessee being aggrieved by the order of the Ld. CIT preferred an appeal before the Hon'ble Jodhpur Appellate Tribunal. The Appellate Tribunal after considering the various submissions and evidences placed on record, quashed the order passed under section 263 of the Act by observing that A.O. having rejected assessee's books of account after discovering certain defects and determining the income by applying net profit rate of 9.5 per cent having regard to the past history of the case as against 8.5 per cent declared by the assessee, it cannot be said that the A.O. did not apply his mind while framing the assessment and therefore the order passed by the A.O. cannot be held to be erroneous or prejudicial to the interest of the revenue. Order under section 263 passed by the CIT on the ground that the A.O. ought to have applied profit rate of 10 per cent instead of 9.5 per cent and made separate additions for the said defects is not sustainable.

UNREPORTED

1. Charitable or religious trust - Section 12AA of the Income-tax Act, 1961 – Power of Commissioner / Director to cancel registration under section 12AA(3) for the registration granted under section 12 A – Enacted with effect from 1-6-2010 – Prospective – Cancellation of Registration made with effect from assessment year 2009-10 not valid. A.Y.: 2009-10.

Agra Development Authority vs. CIT – [I.T.A. No.: 166 / Agra / 2012; Order dated 11-1-2013]

The assessee was constituted for development of Agra city. It was granted registration under section 12A with effect from 1-4-2003. The Commissioner issued a notice for cancellation of registration under section 12AA(3) of the Act with effect from assessment year 2009-10 by holding that the assessee was rendering service in relation to trade, commerce or business for a cess, fee or any other consideration and accordingly the Commissioner cancelled the registration under section 12A of the Act with effect from assessment year 2009-10.

On appeal the Tribunal held that the provisions of sub-section (1) of clause (b) and sub-section (3) of section 12AA, clearly provides that the cancellation of the registration under sub-section (3) of section 12AA was provided where the registration was granted under clause (b) of sub-section (1) to section 12AA. The power of cancellation of registration obtained / granted under section 12A came to be incorporated by way of amendment introduced by the Finance Act, 2010 with effect from 1-6-2010. Thus, before 1-6-2010 section 12AA(3) nowhere empowered the Commissioner to cancel or withdraw registration granted under section 12A. In absence of such power, the registration granted under section 12A cannot be withdrawn or cancelled before 1-6-2010. The Tribunal further held that even the CBDT Circular No. 1/2011 dated 6-4-2011 has explained that this amendment will apply for assessment year 2011-12 and subsequent years. Thus, the Commissioner cannot cancel the registration granted under section 12A for A.Y. 2009-10.

2. Exempted Income – Disallowance under section 14A of the Income-tax Act, 1961, read with rule 8D of the Income-tax Rules, 1962 – Disallowance under section 14A where shares are held as stock-in-trade, and not as investment, should be restricted to disallowance of only direct expenses. A.Y.: 2008-09.

Dy. CIT vs. Gulshan Investment Co. Ltd - [I.T.A. No.: 666 / Kol / 2012; Order dated 11-3-2013]

The assessee was engaged in the business of share trading. The assessee held shares as stock-in-trade. The assessee earned dividend income but, it had not made any disallowance under section 14A of the Act in respect of expenses relatable to the exempt income, as according to him no expenses were directly incurred by it for earning dividend income. The A.O., however, computed the disallowance under section 14A of the Act, read with Rule 8D of the Rules. On appeal the CIT(A) held that no interest expenses were incurred as such, no disallowance could not be made in terms of Rule 8D of the Rules. However, CIT(A) estimated ten per cent (10%) of dividend earned as expenditure which could be disallowed under section 14A of the Act.

On appeal by the Revenue to the Tribunal, held that 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 situation where shares are held as investments, and that this rule will not have any application when the shares are held as stock-in-trade. As 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 provisions of the Rule 8D cannot have any application. Thus, no disallowance can be made under rule 8D (2)(ii) and (iii) in case where shares on which dividend income is earned which are held as investment and, disallowance under rule 8D is restricted to the expenditure directly relatable to earning of exempt income in terms of Rule 8D (i).

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Notifications

Section 10(46) of the Income-tax Act, 1961 – Exemptions – Statutory Body/ Authority/Board/Commission – Notified body or authority – Assam State AIDS Control Society

The Central Government for the purposes of section 10(46) notified the 'Assam State AIDS Control Society', a body created by way of notification in this regard by the Government of Assam, in respect of the "amount received in the form of grants-in-aid from the Central Government and other international development agencies such as World Bank, UNAID (Joint United Nations Programme on HIV/AIDS), USAID (United States Agency for International Development), GFATM (Global Fund to fight AIDS, Tuberculosis and Malaria) through the Government of India" arising to the said Society for the financial year 2011-12 and shall apply with respect to the financial years 2012-13, 2013-14, 2014-15 and 2015-16. The notification shall be effective subject to further conditions as mentioned in the notification. The grants from various international development agencies shall be received and applied in accordance with the prevailing rules and regulations.

(Notification No. 27/2013 dated 30-3-2013)

Double Taxation Agreement – Agreement for Exchange of Information with respect to taxes with foreign countries – Gibraltar

Agreement between the Government of the Republic of India and the Government of Gibraltar for the Exchange of Information with respect to taxes has been signed. The date of entry into force of the Agreement is the 11th day of March, 2013, being the date of later of the notifications of completion of the procedures as required by the respective laws for entry into force of the Agreement, in accordance with the provisions of Article 12 of the Agreement; The Central Government directed that all the provisions of the Agreement between the Government of the Republic of India and the Government of Gibraltar for the exchange of information with respect to taxes, as set out in the Annexure thereto, shall be given effect to in the Union of India with effect from date of entry into force i.e. the 11th March, 2013.

(Notification No. 28/2013 dated 1-4-2013)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Agreement for Avoidance of Double Taxation and Prevention of fiscal evasion with foreign countries – UAE

The Second Protocol amending the Agreement between the Government of the Republic of India and the Government of the United Arab Emirates

for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital signed in April, 2012 shall enter into force on the 12th day of March, 2013 after completion of the procedures as required by the laws of the respective countries for the entry into force of the Protocol, in accordance with Article 2 of the said Protocol. Now the Central Government directed that all the provisions of the Protocol annexed thereto shall be given effect to in the Union of India with effect from the 12th day of March, 2013.

(Notification No. 29/2013 dt. 12-4-2013)

Section 92C of the income-tax Act, 1961 – Transfer pricing – Computation of arm's length price – Notified tolerable limit for determination of ALP

The Central Government notified that where the variation between the arm's length price determined under section 92C and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed one per cent of the latter for wholesale traders and three per cent of the latter in all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for assessment year 2013-14.

(Notification No. 30/2013 dated 15-4-2013)

Section 80-IA, sub-clause (iii) of sub-section (4) of the Income-tax Act, 1961 – Deductions – In respect of profits and gains from industrial undertakings, or enterprises engaged in infrastructure development, etc. – Notified undertakings – Amendment in Notification No.1/2013, dated 8-1-2013

The Central Government made amendment to the notification dated 8th January, 2013, namely: for the words "being developed and being maintained and operated", the words "being developed" be substituted and in the Annexure, item number 7 has been omitted.

(Notification No. 31/2013 dated 18-4-2013)

Circulars

Transfer Pricing – Computation of Arm's Length Price – Application of Profit Split Method

Observing that clarification is needed for selection of profit split method (PSM) as most appropriate method, the CBDT clarified that while selecting PSM as the most appropriate method, the following points to be kept in mind:

1. Since there is no correlation between cost incurred on R&D activities and return on an intangible developed through R&D activities, the use of transfer pricing methods [like Transactional Net Margin Method] that seek to estimate the value of intangible based on cost of intangible development (R&D cost) plus a return, is generally discouraged.
2. Rule 10B(1)(d) of Income-tax Rules, 1962 (the Rules) provides that profit split method (PSM) may be applicable mainly in international transactions involving transfer of unique intangibles or in multiple international transactions which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction. The PSM determines appropriate return on intangibles on the basis of relative contributions made by each associated enterprise.
3. Selection and application of PSM will depend upon following factors as prescribed under rule 10C(2) of the Rules :
   - the nature and class of the international transaction;
   - the class or classes of associated enterprises entering into the transaction and the functions performed by them taking into account

assets employed or to be employed and risks assumed by such enterprise;

- the availability, coverage and reliability of data necessary for application of the method;
- the degree of comparability existing between the international transaction and the uncontrolled transaction and between the enterprise entering into such transactions;
- the extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction and the comparable uncontrolled transaction or between the enterprise entering into such transactions;
- the nature, extent and reliability of assumptions required to be made in application of a method.

4. It is evident from the above that rule 10C(2) of the Rules stipulates availability, coverage and reliability of data necessary for the application of the method as one of the several factors in selection of most appropriate method. Accordingly, in a case, where the Transfer Pricing Officer (TPO) is of view that PSM cannot be applied to determine the arm's length price of international transactions involving intangibles due to non-availability of information and reliable data required for application of the method, he must record reasons for non-applicability of PSM before considering TNMM or comparable uncontrolled price method (CUP) as most appropriate method depending upon facts and circumstances of the case.

5. Application of Profit Split Method requires information mainly about the taxpayer and associated enterprises. Section 92D of the Income-tax Act, 1961 provides for maintenance of relevant information and documents by the taxpayer as prescribed under rule 10D of the Rules. Therefore, there should be good and sufficient reason for non-availability of such information with the taxpayer.

6. Depending upon facts and circumstances of the case, TPO may consider TNMM or CUP method as appropriate method by selecting comparables engaged in development of intangibles in same line of business and make upward adjustments taking into account transfer of intangibles without additional remuneration, location savings and location specific advantages.

(Circular No. 2/2013 dated 26-3-2013)

Section 92-C of the Income-tax Act, 1961 – Transfer Pricing – Clarifications on functional profile of development centres engaged in contract R&D services with insignificant risk – Conditions relevant to identify such development centres

On noticing that there is divergence of views amongst the field officers and taxpayers regarding the functional profile of development centres engaged in contract R&D services for the purposes of transfer pricing audit and at times taxpayers have been insisting that they are contract R&D service providers with insignificant risk, the TPOs are treating them as full or significant risk-bearing entities and making transfer pricing adjustments accordingly, the CBDTclarified that a development centre in India may be treated as a contract R&D service provider with insignificant risk if the following conditions are cumulatively complied with :

1. Foreign principal performs most of the economically significant functions involved in research or product development cycle whereas Indian development centre would largely be involved in economically insignificant functions;
2. The principal provides funds/capital and other economically significant assets including intangibles for research or product development and Indian development centre would not use any other economically

significant assets including intangibles in research or product development;

3. Indian development centre works under direct supervision of foreign principal who not only has capability to control or supervise but also actually controls or supervises research or product development through its strategic decisions to perform core functions as well as monitor activities on regular basis;
4. Indian development centre does not assume or has no economically significant realised risks. If a contract shows the principal to be controlling the risk but conduct shows that Indian development centre is doing so, then the contractual terms are not the final determinant of actual activities. In the case of foreign principal being located in a country/ territory widely perceived as a low or no tax jurisdiction, it will be presumed that the foreign principal is not controlling the risk. However, the Indian development centre may rebut this presumption to the satisfaction of the revenue authorities; and
5. Indian development centre has no ownership right (legal or economic) on outcome of research which vests with foreign principal, and that it shall be evident from conduct of the parties.

The satisfaction of all the above-mentioned conditions should be borne out by the conduct of the parties and not merely by the contractual terms.
(Circular No. 3/2013 dated 26-3-2013)

Issuance of certificate for tax deducted at source in Form No. 16 in accordance with the provisions of section 203 of the Income-tax Act, 1961 read with the Rule 31 of the Income-tax Rules, 1962 – Regarding

Section 203 of the Income-tax Act 1961 and Rule 31 of the Income-tax Rules, 1962 stipulates furnishing of certificate of tax deduction at source (TDS) by the deductor to the deductee specifying therein the prescribed particulars such as amount of TDS, valid PAN) of the deductee, and TAN of the deductor, etc. The relevant form for such TDS certificate is Form No. 16 in case of deduction under section 192 and Form No. 16A for deduction under any other provision of Chapter XVII-B of the Act. TDS certificate in Form No. 16 is to be issued annually whereas TDS certificate in Form No. 16A is to be issued quarterly. TDS Certificate in Form No 16 as notified *vide* Notification No. 11/2013 dated 19-2-2013 has two parts viz Part A and Part B. Part A contains details of tax deduction and deposit and Part B contains details of income. With a view to streamline the TDS procedures, including proper administration of the Act, the Board had issued Circular No. 03/2011 dated 13-5-2011 and Circular No. 01/2012 dated 9-4-2012 making it mandatory for all deductors to issue TDS certificate in Form No. 16A after generating and downloading the same from "TDS Reconciliation Analysis and Correction Enabling System" or (https://www.tdscpc.gov.in) (hereinafter called TRACES Portal), previously called TIN web-site.

The Board has now decided :

1. That Part A of Form No. 16 shall be issued by all the deductors, only by generating it through TRACES Portal and after duly authenticating and verifying it. And Part B of Form No. 16 shall be prepared by the deductor manually and issued to the deductee after due authentication and verification along with the Part A of the Form No. 16 stated above. Rule 31 of the Rules sets the time limit for issuance of Form 16 by the deductor to the employee. Currently, Form 16 should be issued by 31st May of the financial year immediately following the financial year in which income was paid and tax deducted.
2. The Director General of Income-tax (Systems) shall specify the procedure, formats and standards for the purpose of download of Part A of Form No. 16 from the TRACES Portal and shall be responsible for the day-to-day administration in relation to the procedure, formats and standards for download of Part A of Form No. 16 in electronic form. It has further been clarified

that Part A of Form No. 16 issued by the deductors in accordance with this circular and as per the procedure, formats and standards specified by the Director General of Income-tax (Systems) and containing Unique Identification Number shall only be treated as a valid compliance to the issue of Part A of Form No. 16 for the purpose of section 203 of the Act read with rule 31 of the Rules.

(Circular No. 04/2013 dated 17th April, 2013)

Instructions

Compilation of quality scrutiny assessment cases completed during financial year 2012-13

In view of the CBDT's decision to review the quality of assessments completed by the Assessing Officers during financial year 2012-13 in each CCIT/DGIT charge which finds mention in "Guidelines for Scrutiny Selection" for Financial Year 2012-13, all the CCsIT/DGsIT charges have been requested to ensure that a compilation of at least 50 quality assessments passed in their respective charges be made in respect of scrutiny assessments completed during financial year 2012-13, clearly bringing out the quality of work done and the resultant revenue impact. The compilation has been directed to be made in the format enclosed thereto keeping all the parameters in to consideration. The Board's letter dated 20-9-2012 mentions that quality orders compiled through above process would form source material for quality assessment work to be incorporated in forthcoming issue of 'Let us share'.

The board also directed that compilation should not include the cases of PSU, Government organisations and the cases with a history of addition/disallowances being consistently made and contested in appeals in the past years. In such cases only those issues may be reported which have been detected for the first time during the year. Before reporting such cases in compilation, due care to be taken that the issues have been properly thrashed and it is not a case where the Assessing Officer has resorted to summary additions, routine disallowances or best judgment assessment without any worthwhile independent inquiry. Reporting of such cases would be viewed adversely. The cases where addition has been made due to Transfer Pricing Adjustment on the basis of TPO report should not be included. The Central Charges also requested to incorporate those cases where the Assessing Officer, while framing assessments in search and seizure cases, have been able to establish tax evasion and made independent detailed investigation traversing beyond the indicated facts in Appraisal report of the investigation unit. The assessments in any other cases which reflect the work done by the Assessing Officers on the basis of their independent investigations may also be included if it amounts to quality work.

(CBDT's Letter [F. No. 225/65/2013/ITA-II], dt. 11-4-2013)

Press Release/Memorandums

Agreement and protocol signed between India and Malta for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income

The Double Taxation Avoidance Agreement (DTAA) and the Protocol between the Republic of India and Malta for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income is already in force since February, 1995. Both India and Malta have renegotiated the Agreement to bring in line with international standards, change in domestic laws and changed economic scenario. India and Malta have now signed the new DTAA. Once the DTAA enters into force, it will stimulate the flow of capital, technology and personnel between both the countries and will further strengthen the economic relationship. It also provides tax stability and reduces any obstacles in providing mutual co-operation between India and Malta.

(Press Release, dated 15-4-2013)


CA Tarunkumar Singhal & CA Sunil Lala

INTERNATIONAL TAXATION
Case Law Update

A] HIGH COURT JUDGMENTS

I. Whether a non-resident enterprise not having a permanent establishment in India, would not come within purview of section 44BB even in respect of remuneration received by it in connection with any matter provided in Section 44BB ? Held : Yes

CIT vs. Enron Oil & Gas Expat Services Inc. [2013] 29 taxmann.com 419 (Uttarakhand)

Facts

1. The assessee, Enron Oil & Gas Expat Services Inc., a non-resident USA company, was providing cost-to-cost services based on a tripartite agreement.

2. The assessee claimed that since it provided cost to cost services, it was outside the scope of section 44BB of the Act. It did not maintain books of account and other documents as required under section 44AA(2) of the Act and did not get its accounts audited as required under section 44AB of the Act.

3. It was also contended by the assessee that it does not have a permanent establishment in India as per Article 7 of the Double Taxation Avoidance Agreement between India and USA ('the DTAA') and hence it does not come under the purview of section 44BB of the Act.

4. The Revenue was of the view that 10 per cent of the remuneration received by the assessee of the nature mentioned in section 44BB of the Act must be deemed to be the profits chargeable to tax under the head 'Profits and Gains from Business and Profession'. In order to claim any lower amount of profit, the assessee ought to have maintained books of account as per section 44AA of the Act and get the same audited as per section 44AB of the Act.

Judgment

1. The Hon'ble High Court held that Section 44BB will apply irrespective of the fact whether the assessee makes a profit or not. Thus 10 per cent of the remuneration would be taxed under section 44BB of the Act unless books of account are maintained under section 44AA(2) and are audited under section 44AB of the Act to declare a lower amount of profits.

2. The Hon'ble High Court further observed that there was no dispute that the assessee had no permanent establishment in India and no such fact was determined by the Assessing Officer and the Commissioner of Income Tax (Appeals).

3. Following its earlier judgment of the Division Bench of the same Court in the case of the assessee itself, it held that Article 7 of the DTAA requires a non-resident to have a permanent establishment in India for being taxed

in India; otherwise it is not taxable in India in view of the DTAA even if it receives remuneration in connection with any matter provided in section 44BB of the Act.

II. Whether if the Tribunal had, after detailed analysis, held that the comparables selected by the TPO were not functionally comparable to the assessee, then no question of law arises for consideration? Held :Yes

CIT vs. Carlyle India Advisors (P.) Ltd. [2013] 32 taxmann.com 23 (Bombay) Assessment Year: 2007-08

Facts

1. The assessee, Carlyle India Advisors (P.) Ltd. rendered investment advisory and related support services to its Associated Enterprise in Hong Kong.

2. During the course of Transfer Pricing assessment, the Transfer Pricing Officer ("TPO") rejected all the comparables except one comparable chosen by the assessee and selected 8 more comparables.

3. The Hon'ble Tribunal, by way of a detailed order, held that the 8 comparables selected by the TPO were not comparable to the assessee company.

4. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court on whether the Hon'ble Tribunal was correct in deleting the comparables and allowing safe harbour margin of 5%.

Judgment

1. The Hon'ble High Court did not entertain both the questions raised by the Revenue and dismissed the appeal. It observed that for the subsequent assessment years, the Assessing Officer himself had found that the 8 comparables selected by the TPO were not functionally comparable with the assessee. Moreover, the Hon'ble Tribunal had also passed a detailed order for exclusion of the same.

2. As regards the question of allowing safe harbour margin, the Hon'ble High Court held that the same was academic if the 8 comparables were excluded.

III. Whether the Hon'ble Tribunal was right in accepting the Cost Plus Method method adopted by the assessee to compute the arm's length price of the international transaction where the AO had accepted the CPM method in the subsequent assessment years and there was no allegation by the Revenue that the facts in the subsequent years were materially different? Held :Yes

CIT vs. M/s. L'oreal India Pvt. Ltd. [TS-58-HC-2013(BOM)-TP] Assessment Year : 2002-03

Facts

1. The assessee company, L'oreal India Pvt. Ltd. had adopted Cost Plus Method ("CPM") as the most appropriate method to compute the arm's length price in respect of international transaction relating to purchase of raw material from its associated enterprise.

2. For year under consideration, the Transfer Pricing Officer ("TPO") did not accept CPM as the most appropriate method and instead chose Transaction Net Margin Method ("TNMM") to compute the arm's length price of the said international transaction.

3. In the subsequent years, A.Ys. 2003-04 and 2004-05, the Assessing Officer ("AO") had accepted CPM as the most appropriate method to compute the arm's length price of the said international transaction.

4. Aggrieved, the assessee went in appeal before the CIT(A) who upheld that CPM was correctly chosen as the most appropriate method. On further appeal, the order of the CIT(A) was upheld by the Hon'ble Tribunal.

5. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court questioning whether the Hon'ble Tribunal was right in accepting CPM adopted by the assessee to arrive at the arm's length price.

Judgment

1. The Hon'ble High Court held that the Revenue could not prove that the facts in the subsequent year, where the AO held CPM to be the most appropriate method, were materially different from the relevant year.

2. Accordingly, the Hon'ble High Court did not entertain the question of law proposed by the Revenue.

B] TRIBUNAL DECISIONS

IV. Reimbursement of Expenses – Whether reimbursement of overhead expenses without any profit element can be charged to tax in the hands of the recipient – Held : No; Whether when the amount paid by the assessee is not taxable in the hands of the recipient, there can be any question of making any disallowance for non-deduction of tax at source - Held: No; Whether when the assessee availed services from some third parties and payment for such services was made to such third parties through the medium of its holding company, such payment can be considered as reimbursement of expenses at cost to its holding company – Held: No; Whether there can be situations under which albeit the payment includes income element but it still may not be not chargeable to tax – Held : Yes; Whether chargeability to tax in the hands of the recipients needs to be established first before there can be question of deduction of tax at source – Held : Yes – Sections 40(a)(ia) and 195 of the Act

M/s C U Inspections (I) Pvt. Ltd. vs. DCIT [2013-TII-62-ITAT-MUM-INTL] Assessment Year: 2006-07

Facts

1. The assessee is a subsidiary of M/s P.S.O. Beheer B.V., a resident of Netherlands. It is engaged in the business of certification of activities in respect of quantity, quality, pre-shipment inspections, surveys, etc.

2. The assessee entered into an agreement with its holding company towards incurring of various overhead expenses, in terms of which, the holding company agreed to incur various costs for and on behalf of the assessee and other group concerns. The total overhead costs was to be collected from various group members at certain percentage of the total cost determined as per arm's length principle by considering the size of the group member, percentage of ownership, time spent by the management, number of visits, etc.

3. The assessee paid ₹ 34.94 lakhs to its holding company towards reimbursement of overhead expenses without deducting tax at source. However, the AO observed that section 195 was applicable on these payments and hence the assessee should have deducted tax at source and in default, disallowed the expenditure u/s 40(a)(ia). On appeal, the CIT(A) confirmed the disallowance.

4. The assessee claimed deduction for a sum of ₹ 15.44 lakh towards training expenses to its employees claiming the amount paid as reimbursement of expenses to its holding company. No tax was deducted at source from such payment. The training was, in fact, imparted to the employees of the assessee by one Mr. Henk Jan Sijtsma and Mr. Mike van de Laak. This was arranged by the holding company. Two invoices were raised by the holding company on the assessee for the training imparted by these two persons.

5. The Assessing Officer, invoking the provisions of section 40(a)(ia), made the disallowance for the failure of the assessee to deduct tax at source from such payments. On appeal, the same was confirmed by the CIT(A).

Decision

On assessee's appeal, the Tribunal held as follows:

1. Re: TDS on reimbursement of overhead expenses

(i) From the Agreement and the Certificate of the Auditor, the contents of which have not been controverted by the authorities below, it is amply clear that the assessee's share at 4% of total overhead charges, as worked out at ₹ 34.94 lakh, is without any profit element. When we consider the nature of expenses borne by the head office such as accounting, legal and professional, staff and management, etc., it becomes vivid that these expenses are otherwise in the nature of revenue expenses. It is not the case of the AO that some part of such expenses is not deductible as breaching the mandate of section 44C of the Act.

(ii) A prerequisite for making disallowance under section 40(a)(ia) is that the payment for the expenditure should necessarily be liable to deduction of tax at source. In the instant context, an amount will be liable to tax withholding if it *inter alia* contains some income element. If the amount paid by the assessee is not taxable in the hands of the recipient, there can be no question of making any disallowance under this provision.

(iii) A conjoint reading of sections 195 and 40(a)(ia) brings to the fore that the disallowance can be made only if the amount paid is chargeable to tax in the hands of the recipient. In other words, if the amount is not chargeable to tax in the hands of the recipient, there cannot be any scope for deduction of tax at source. There is no dearth of judgments and Tribunal orders to the effect that the reimbursement of expenses without any profit element cannot be charged to tax in the hands of the recipient. If such an amount is not chargeable to tax there cannot be any scope for deduction of tax at source from such payment. Once no deduction of tax at source is contemplated, the natural corollary which manifestly follows is that the provisions of section 40(a)(ia) cannot be triggered.

2. Re: Payment to third party through holding company

(i) The reimbursement of expenses for avoiding deduction of tax at source contemplates the actual incurring of expenses by the later in the first instance, which is subsequently made good by the former. Where the expenses are incurred not by the later itself but someone else, its payment by the former to the later to pass it to such third person cannot be considered as reimbursement of expenses to the later so as to push such transaction outside the ambit of the provisions of deduction of tax at source.

(ii) To put it in simple terms, if the Indian subsidiary company incurs expenses or makes purchases or avails any service from some third party abroad and the payment to such third party is routed through its holding or related company abroad, the provision for deduction of tax at source apply as if the assessee has made the payment to such independent party *de hors* the routing of payment through the holding company. The remission of amount to the holding or related company for finally making payment to the third person will be considered as payment to third party. It cannot be termed as reimbursement of expenses to the holding company.

(iii) If the contention of the assessee is accepted and the payment to third party, routed

through its related concern, is considered as reimbursement of expenses to the related party, then probably all the relevant provisions in this regard will become redundant. Such a route is impermissible to thwart the flow of law. It, therefore, follows that the payment made to the related party for paying eventually to some third party cannot be construed as reimbursement of expenses to the related party. It is only where the payment is ultimately stopping with the related party that it can be considered as payment to the associated concern and not otherwise.

(iv) Reverting to the facts of the instant case, it is noticed that the assessee availed services from some third parties. Payment for such services was made to such third parties through the medium of its holding company. Such payment cannot be considered as reimbursement of expenses at cost to its holding company.

(v) However, the mere fact that the payment in question is not reimbursement of expenses to the holding company would not *per se* expose the expenditure to disallowance u/s 40(a)(ia) of the Act. It has been noticed that the disallowance u/s 40(a)(ia) is activated when there is failure on the part of the assessee to deduct/pay tax at source from the payment on which tax is otherwise deductible as per law. Deduction of tax at source u/s 195 from payment is envisaged when the amount is chargeable to tax in the hands of recipient. Reimbursement of expenses to the related party without any mark-up is one of the situations under which the amount paid cannot be considered as chargeable to tax. There can be several other situations under which albeit the payment includes income element but it still may not be not chargeable to tax under the provisions of the Act and/or the relevant Double Taxation Avoidance Agreement (DTAA). The crucial factor to consider is the chargeability to tax of the amount in the hands of the recipient. If the amount is not chargeable to tax due to one reason or the other, the payment cannot suffer disallowance in the assessment of the payer

(vi) Adverting to the facts of the instant case, we find that the assessee paid a sum of ₹ 15.44 lakh to two trainers through the medium of its holding company. Patently the payment cannot be considered as having been made to the holding company at cost. But, in order to invoke the provisions of section 40(a)(ia) it is of paramount importance to ascertain the chargeability of the amount to tax in the hands of such two trainers who were eventual receivers. Unless the chargeability of such amounts is established in the hands of such trainers, the provisions of section 195 cannot apply and ex consequenti, the application of section 40(a)(ia) is ruled out. We find virtually no discussion in the assessment order and the impugned order about the taxability of this amount in the hands of those two trainers so as to bring it within the purview of chargeability. We order and direct the A.O. to first decide the question of chargeability or otherwise of the amounts paid by the assessee in the hands of the two trainers under the relevant provisions of the Act read with the relevant DTAA and thereafter the question of application of section 40(a)(ia).

IV. Online Advertising, Web Advertising, Banner Advertisement – Whether payments for advertisement can be deemed to be royalties u/s 9(1)(vi) – Held : No; Whether online advertising services can be considered to be technical services u/s 9(1)(vii) – Whether services rendered without human intervention can be considered

as technical services u/s 9(1)(vii) – Whether in online advertising, there is any transfer of any technology of any kind, and any payment for such service is outside the ambit of source taxation under Article 12 of India-USA DTAA – Whether when recipient of an income does not have the primary tax liability in respect of an income, the payer can have vicarious tax withholding liability – Article 12 of India-USA & India –Ireland DTAA – Sections 5(2)(a) & (b), 9(1)(i), (iv), (vi) & (vii), 40(a)(i), 195 of the Income-tax Act

ITO vs. Right Florists Pvt Ltd [2013-TII-61-ITAT-KOL-INTL] Assessment Year: 2005-06

Facts

1. The assessee is a florist and uses advertising on search engines, i.e. by Google and Yahoo, to generate business. Whenever anyone does a web search on the respective search engines, in looking for a particular website, and uses certain keywords, the advertisement of the assessee is shown along with the search results.

2. The assessee had made payments in respect of online advertising to Google Ireland Limited and Overture Services Inc USA (Yahoo USA). However, no taxes were withheld from these payments.

3. During the course of scrutiny assessment proceedings, the Assessing Officer required the assessee to show cause as to why these payments not be disallowed, as a deduction in computation of its income, under section 40(a)(i). The assessee submitted that that the payments were made to foreign entities, who did not have any permanent establishment in India and that even u/s 9(1)(i), only so much of the income of the non-resident could be brought to tax as was reasonably attributable to the operations carried out in India.

4. However, the A.O. held that this claim was unsubstantiated and that there was no material to establish that these entities were of the treaty partner countries. He held that whether or not, in assessee's opinion, the income was taxable in India, the assessee ought to have approached the Assessing Officer u/s 195 prior to making the foreign remittance. In appeal, however, the Commissioner (Appeals) deleted the impugned disallowance. Aggrieved, the Revenue appealed to the Tribunal.

Decision

The Tribunal held in assessee's favour as under:

1. Re: Income accruing or arising in India:

i. To examine taxability of an income in the hands of a non-resident, three aspects need to be examined – application of Section 5(2)(a), application of Section 5(2)(b), and application of Section 9 which actually deals with the deeming fiction embedded in Section 5(2)(b). In the present case, it is an admitted position that the payment was not received or deemed to have been received in India. Section 5(2)(a), therefore, has no application in the matter. As regards Section 5(2)(b), i.e. 'income accruing or arising in India' and 'income deemed to accrue or arise in India' , let us pick up the scope of 'income accruing or arising in India' first;

2. Re: Permanent establishment:

ii. The expression 'income accruing or arising in India' has not been statutorily defined under the provisions of the Income-tax Act, 1961. However, while dealing with the connotations of this expression under Section 5(2), the Supreme Court, in the case of *CIT vs. Hyundai Heavy Industries Limited,* has *inter alia* observed that, "……as far as the income accruing or arising in India, an income which accrues or arises to a foreign enterprise in India can be only such portion of income accruing or arising to such a foreign enterprise as is attributable to its business carried out in India. This business could be carried out through its branch(s)

or through some other form of its presence in India such as office, project site, factory, sales outlet, etc. (hereinafter called as "PE of foreign enterprise") …"

iii. Interestingly, even though the Supreme Court has used the expression 'permanent establishment', this expression is used in the context of Section 5(2), and not in the context of tax treaties – where it has its origin. The Supreme Court has explained that, in order to attract taxability in India under Section 5(2)(b), the income must relate to such portion of income of the non-resident, as is attributable to business carried out in India, and the business so carried out in India could be "through its branches or through some other form of presence such as office, project site, factory, sales outlet, etc" as "branch or through some other form of its presence in India such as office, project site, factory, sales outlet, etc".

iv. The term permanent establishment, has its origin in the tax treaties but, by the virtue of judge made law – which is as binding on us as law enacted by the Parliament , it is used in the context of domestic law where it is not defined or even elaborated upon. As to how we should construe such an expression, we find guidance from Australian New South Wales Supreme Court's decision in the case of *Unisys Corporation vs. Federal Commissioner of Taxation.*

v. Since the expression 'permanent establishment' is not defined by legislation at all and not adequately defined even by judge made law, it will be appropriate to look at primary meaning of permanent establishment in the context of the tax treaties, and construe the scope of the expression 'permanent establishment' under the domestic tax law, and in the context of issue before us, accordingly.

vi. Let us first examine as to what is primary meaning of a PE and whether a search engine like Google or Yahoo can be said to have a PE, within its primary meaning, in India. It is important to bear in mind the fact that the concept of PE evolved because in traditional commerce, physical presence was required in the source country if any significant level of business was to be carried on, but, with the development of internet, correlation between the size of business and extent of physical presence in the source country has virtually vanished. In that sense, the traditional concept of PE, which was conceived at a point of time when internet and e-commerce was not even on the radar, does not really fit into the modern day world in which virtual presence through internet, in certain respects, is as effective as physical presence for carrying on businesses.

vii. At a policy level, taxation may infringe neutrality when it is dependent on the form of presence, i.e. physical presence vis-a-vis virtual presence, traditional commerce vis-à-vis ecommerce, direct presence vis-à-vis presence through a dependent agent. A search engine's presence in a location, other than the location of its effective place of management, is only on the internet or by way of a website, which is not a form of physical presence.

viii. Clearly, conventional PE tests fails in this virtual world even when a reasonable level of commercial activity is crossed by foreign enterprise. It is a policy decision that Government has to take as to whether it wants to reconcile to the fact that conventional PE model has outlived its utility as an instrument of invoking taxing rights upon reaching a reasonable level of commercial activity and that it does fringe neutrality as to the form of commercial presence i.e. physical presence or virtual presence, or whether it wants to take suitable remedial measures to protect its revenue base. Any inertia in this exercise can only be at the cost of tax certainty.

ix. In the light of the above discussions, a website *per se*, which is the only form of Google's presence in India – so far as test of primary meaning i.e. basic rule PE is concerned, cannot be a permanent establishment under the domestic law.

x. The interpretation of the expression 'permanent establishment', even in the context of tax treaties, does not, therefore, normally extend to websites unless the servers on which websites are hosted are also located in the same jurisdiction. The underlying principle is this. While website *per se*, which is a combination of software and electronic data, does not constitute a tangible property as it cannot have a location which constitutes place of business, a web server, on which the web site is stored and through which it is accessible, is a piece of equipment having a physical location and such location may thus constitute a "fixed place of business" of the enterprise that operates that server. A search engine, which has only its presence through its website, cannot therefore be a permanent establishment unless its web servers are also located in the same jurisdiction. That's not the situation here and it is not the case of the revenue that servers are located in India;

3. Re: Implications of India's Reservations:

xi. Coming to the reservations expressed by Government of India, the first issue that needs to be considered is as to what is the role of 'reservations' and 'observations' in judicial examination. In our humble understanding, the 'reservations' so expressed or 'observations' so made to the commentary is relevant only to the extent that in interpreting any tax treaty, entered into after expressing those 'reservations' or making those 'observation', to that extent, related commentary cannot be taken as contemporanea expositio. It is so for the following reasons:

(a) When an expression or a clause is picked up from the OECD Model Convention, the normal presumption is that the persons using the said clause or expression are also aware about the meanings assigned to the said clause or expression by the OECD and have used it in the same sense and for the same purpose. Andhra Pradesh High Court in the case of *CIT vs. Visakhapatnam Port Trust,* referred to the OECD Commentary on the technical expressions and the clauses in the model conventions, and referred to, with approval, *Lord Redcliffe's observation in Ostime vs. Australian Mutual Provident Society* which have described the language employed in those documents as the 'international tax language'.

(b) These documents are thus in the nature of contemporanea expositio inasmuch as the meaning indicated in these documents to the clauses and expressions in the tax treaties can be inferred as the meaning normally understood in, to use the words of Lord Redcliffe, 'international tax language' developed by the organisations like OECD. Therefore, when an expression or a clause from the OECD Model Convention is used even in a bilateral tax treaty involving a non OECD country, one may generally proceed on the basis that it is used in the same meaning and with the same connotations as assigned to it by the OECD Model Convention Commentary.

(c) Of course, even contemporanea expositio is not a binding interpretation of statutory provisions and there are serious limitation in its legal application, but when it comes to interpreting a tax treaty,

the position is entirely different and this principle has much bigger role to play because interpreting a tax treaty is a case in which emphasis has to be on true intentions rather than on literal meaning.

(d) In the view of discussions above, the Government of India 's reservations on the OECD Commentary are relevant only to the extent that OECD Commentary, to that extent, cannot be treated as a fair index of intention of the Government of India and as contemporanea expositio in respect of tax treaties entered into by India after so expressing its reservations. Beyond that, in our humble understanding, these reservations have no role in judicial analysis.

(e) In any event, even the reservations expressed by the Government of India merely states the view that website may constitute a permanent establishment in certain circumstances, but it does not specify what are those circumstances in which, according to tax administration, a website could constitute the permanent establishment. In effect, these reservations only reserve a right to set out the circumstances in which a website *per se* can be treated as permanent establishment, even though these reservations do not really constitute actionable statements. We find it difficult to fathom the underlying principle embedded in this reservation, and to understand somewhat vague and ambiguous stand of the tax administration on this issue. In our considered view, therefore, even on merits, the reservations so expressed by India, as on now and without anything more, cannot have any practical impact on a website being treated as a permanent establishment.

(xii) In the light of the above discussions, in our considered opinion Google's presence in India through its website cannot be said to constitute permanent establishment in India under the basic rule and thus conditions of Section 5(2)(b), read with Supreme Court's judgment in the case of Hyundai Heavy Industries, are not satisfied to the extent that no profits can be said to accrue or arise in India. We, however, make it clear that our observations are confined to the basic rule PE and these will have no application on extended PE provisions, such as dependent agent permanent establishment i.e. DAPE, which are relevant only in the context of tax treaties – something with which we are not really concerned at this stage.

4. Re: Whether the payments are royalties:

(xiii) That takes us to the question whether second limb of Section 5(2)(b), i.e. income 'deemed to accrue or arise in India', can be invoked in this case. So far as this deeming fiction is concerned, it is set out, as a complete code of this deeming fiction, in Section 9 of the Income-tax Act, 1961, and Section 9(1) specifies the incomes which shall be deemed to accrue or arise in India. In the Pinstorm's case and in Yahoo's case, the co-ordinate benches have dealt with only one segment of this provision i.e. Section 9(1)(vi), but there is certainly much more to this deeming fiction. Clause (i) of section 9(1) of the Act provides that all income accruing or arising whether directly or indirectly through or from any 'business connection' in India, or through or from any property in India or through or from any asset or source of income in India, etc. shall be deemed to accrue or arise in India. However, as far as the impugned receipts are concerned, neither it is the case of the Assessing Officer nor has it been pointed out to us as to how these receipts

have arise on account of any business connection in India. There is nothing on record to demonstrate or suggest that the online advertising revenues generated in India were supported by, serviced by or connected with any entity based in India. On these facts, Section 9(1)(i) cannot have any application in the matter. Sections 9(1)(ii), (iii), (iv) and (v) deal with the incomes in the nature of salaries, dividend and interest, etc., and therefore, these deeming fictions are not applicable on the facts of the case before us. As far as applicability of Section 9(1)(vi) is concerned, co-ordinate benches, in the cases of Pinstorm and Yahoo, have dealt with the same and , for the detailed reasons set out in these erudite orders, concluded that the provisions of Section 9(1)(vi) cannot be invoked. We are in considered and respectful agreement with the views so expressed by our distinguished colleagues.

5. Re: Whether the payments are fees for technical services:

i. While there is no specific definition assigned to the technical services, and Explanation 2 to Section 9(1)(vii), as also Article 12 (2)(b) merely states that 'fees for technical services' will include considering of "rendering of any managerial, technical or consultancy services". It is significant that the expression 'technical' appears along with expression 'managerial' and 'consultancy' and all the three words refer to various types of services, consideration for which is included in the scope of 'fees for technical services'. The significance of this company of words lies in the fact that, as observed by a co-ordinate bench of this Tribunal in the case of *Kotak Securities Ltd Vs DCIT,* "when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general". Just as a man is known by the company he keeps, a word is also to be interpreted with reference to be accompanying words. Words derive colour from the surrounding words.

ii. Broom's Legal Maxims (10th Edn.) observes that "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu* i.e. the coupling of words together shows that they are to be understood in the same sense. It is, therefore, clear on principle that as long as words are used together in a statutory provision, they take colour from each other and restrict its meaning to the genus of these words. In this way, the meaning of words is restricted because of other words in the same group of words, and the meaning is so restricted to the species or genus of those other words. Genus of these words should be clearly discernible from the lowest common factor in those words.

iii. The lowest common factor in 'managerial, technical and consultancy services' seems to be the human intervention, because while these three words are of wide scope and are in varied field, the only common thread in these words seems to be that the services, which are essentially professional services in nature, can be rendered with human interface. A managerial or consultancy service can only be rendered with human interface, while a technical service can be rendered with human interface as also without human interface. A technical service, for example, could be automated analysis of a chemical compound without any scope of any human contribution at any stage, and a technical service could also be physical examination by an expert chemical analyst, with or without the help of machines, of the same chemical compound. However, when we try to restrict the meaning of technical services

to the services which are covered by managerial and technical services as well, services without human interface will have to be taken out of its ambit.

iv. It is, therefore, clear on principle that as long as words are used together in a statutory provision, they take colour from each other and restrict its meaning to the genus of these words which is evident by the lowest common factor in those words. The lowest common factor in 'managerial, technical and consultancy services' being the human intervention, as long as there is no human intervention in a technical service, it cannot be treated as a technical service under Section 9(1)(vii).

v. There is one more approach to this issue, even though the results will be the same. The other way of looking at these three words on the basis of the principle of *noscitur a sociis* is, as was done by the Delhi High Court in the case of *CIT vs. Bharti Cellular Limited*, is that the common characteristic of the majority of the words be read as limitation on the scope of the other words.

vi. We may also point out that while this judgment did not meet approval of the Supreme Court, in the judgment reported as *CIT vs. Bharti Cellular Limited,* on the short factual aspect regarding fact of human intervention. It was for recording the factual findings on this aspect that the matter was remitted to the file of the Assessing Officer. However, so far as the principle laid down by the Delhi High Court on the application of principle of *noscitur a sociis* in restricting the scope of 'technical services' to 'technical services with a human interface' was concerned, Their Lordships of the Supreme Court took note of the said principle and left it intact. The stand taken by the Delhi Court, in our humble understanding, stands approved. Of course, what constitutes a technical service without human interface is essentially a question of fact and each case will have to be examined on its own facts. However, as long as there is no human intervention in a technical service, in the light of law so laid down, it cannot be treated as a technical service under Section 9(1)(vii).

vii. The service which is rendered by the Google is generation of certain text on the search engine result page. This is a wholly automated process. There is no dispute that in the services rendered by the search engines, which provide these advertising opportunities, there is no human touch at all. The results are completely automated and, as evident from the screenshots, these results are produced in a fraction of a second – 0.27 seconds in the screenshot. For the reason that there is no human touch involved in the whole process of actual advertising service provided by Google, in the light of the legal position that any services rendered without human touch, even if it be a technical service, it cannot such a technical service which is covered by the limited scope of Section 9(1)(vii), the receipts for online advertisement by the search engines cannot be treated as fees for technical services taxable as income, under the provisions of the Income Tax Act, in the hands of the Google. The wordings of Explanation 2 to Section 9(1)(vii) as also that of the definition of fees for technical services under Article 12(2)(b) being similar in material respects, the above legal proposition equally applies to the definition under Article 12 (2)(b) of India Irish tax treaty. The income earned by Google, in respect of online advertising revenues discussed above and based on the facts on record, cannot be brought to tax as income deemed to accrue or arise under section 9(1)(vii), i.e. last limb of Section 9(1), as well.

viii. Once we come to the conclusion that the online advertising payments made to Google Ltd. cannot be brought to tax in India, under section 5(2) r.w.s. section 9 of the Income-tax Act, we can conclude that these amounts are not exigible to tax in India at all. The facts relating to Yahoo being admitted similar in material aspects, the same conclusion holds good in respect to Yahoo as well. We may, however, point out that since Yahoo is a USA based Delaware company and since Indo-USA tax treaty provides for a make available clause which restricts the source taxation of only such technical services, referred to as 'included services' in Indo-US tax treaty, as make available the technical knowledge, etc.

ix. As is the settled legal position, unless services rendered by the service provider results in transfer of technology and enable the recipient of service to make use of technical knowledge by himself, and without recourse to the service provider, mere rendition of such services cannot be brought to tax as fees for technical service. Clearly, so far as online advertising is concerned, there no transfer of any technology of any kind, and as such any payment for such service is outside the ambit of source taxation under Article 12. For this reason also, the payments made to Yahoo could not be brought to tax in India.

x. On the limited facts of the case as produced before us, the receipts in respect of online advertising on Google and Yahoo cannot be brought to tax in India under the provisions of the Income-tax Act, as also under the provisions of India-US and India-Ireland tax treaty. This observation is subject to the rider that so far as the PE issue is concerned, we have examined the existence of PE only on the basis of website simpliciter, and on no other additional basis, as no case was made out for the same. In any case, revenue has not brought anything on record, either at assessment stage or even before us, to suggest that Google or Yahoo had a PE in India, and as held by a Special Bench of this Tribunal in the case of *Motorola Inc vs. DCIT* "*DTAA* is only an alternate tax regime and not an exemption regime" and, therefore, "the burden is first on the Revenue to show that the assessee has a taxable income under the DTAA, and then the burden is on the assessee to show that that its income is exempt under DTAA". No such burden is discharged by the Revenue. Accordingly, there is no material before us to come to the conclusion that Google or Yahoo had a PE in India, which, in turn, could constitute the basis of their taxability in India;

6. Re: Whether there was any withholding liability:

xi. It is only elementary that when recipient of an income does not have the primary tax liability in respect of an income, the payer cannot have vicarious tax withholding liability either. This position is independent of the payer having moved an application under section 195 or not, or on the payer or the payee having obtained an advance ruling in their favour or not. The law is now very well settled in this regard by the Supreme Court's judgment in the case of *GE India Technology Centre Pvt Ltd vs. CIT* wherein Their Lordships have categorically held that, "where a person responsible for deduction is fairly certain, then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof".

CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

Manufacturer

Commissioner of Central Excise vs. Diwan Sahib Fashions Pvt. Ltd. [2013 (289) E.L.T. 113 (Del.)]

The facts in this case are as follows:

M/s Diwan Sahib Fashions Pvt. Ltd. (hereinafter referred to as 'respondents') was engaged in the manufacture of readymade garments falling under the "Chapter Heading 6201" of the First Schedule of the Central Excise Tariff Act, 1985. The respondents were also engaged in stitching garments out of fabric bought by customers from their shop or brought by the customers from outside. In all cases, as a matter of fact, the fabrics were given by the individual customer for stitching. On the garments so stitched by the respondents it affixed the label "Specially Tailored by Diwan Sahib Designs for Men". In cases where the fabrics were bought from the respondents only, the stitching took places after the "sale" of the fabric. Moreover, it was not compulsory for the customer to get the fabric stitched from the respondents. Thus, the dispute pertained to whether the tailoring activity of the respondents, in cases where the fabrics were given by the customer, either after being bought from the respondents, or from outside, was liable to excise duty.

After going through the process of Adjudication, Appeal to Commissioner (Appeals) and then to the Hon'ble Tribunal, the Commissioner referred the following question to the Hon'ble Delhi High Court for determination.

"Whether the respondents were liable to pay excise duty in respect of garments stitched by them from fabric either bought by the customers themselves or bought by the customers from the Respondent for stitching purpose?"

It was contended on behalf of the department that since what the respondents return to the customers is a finished product, a garment, falling under Chapter 62, the same is excisable. It was urged that the ownership of the raw material (in this case, the fabric) is irrelevant for deciding who the manufacturer in terms of Section 2 (f) of the Central Excise Act, 1944 is. It is settled law that when goods are manufactured through a job worker, the latter is the manufacturer and not those supplying raw material. In this case, the job worker was the respondent, and not the customers who gave the fabric. The manufacturing activity is done by the respondent, who shall, accordingly, be liable to pay the excise duty.

On behalf of the respondents, reliance was placed on the Tribunal's reasoning and conclusion and on Rule 7AA, and its successor Rules, Rules 4 (1) and 4 (3) of Central Excise Rules, 2001 and 2002. It was urged that according to these rules, liability to pay excise duty is that of those who supply the raw material. Therefore, the excise duty, if any,

was payable by the individual customer, and not by the respondents. Reliance was also placed on Notification No. 7/2003-C.E., dated 1-3-2003 to contend that garments got stitched from one's own fabric and based on measurements was exempted from excise duty.

The Hon'ble High Court observed that:

"Under the special provisions made as per Rule 7AA of the Central Excise Rules, 1944 and its successor rules, the responsibility to pay duty on textile article got manufactured on job-work basis is put on the person who gets goods manufactured on job-work basis. He has to discharge such liability "as if he is the manufacturer". This rule does not say anywhere that the person supplying the raw material would be the manufacturer. The rule only says that such person has to discharge the liability and that in the normal course is done by the manufacturer.

Notification No. 7/2003-C.E., dated 1-3-2003 exempts from excise duty the following type of goods:

"Article of apparel or clothing accessories manufactured or got manufactured for personal use and not intended for sale

Explanation – This exemption shall also apply to such article of apparel or clothing accessories knitted or stitched by a tailor from material supplied by the customer for the personal use of the customer."

This Notification makes it clear that tailoring establishments that stitch garments in a customised manner as per the customer's specification are exempted from excise liability thereon in cases where the fabric is supplied by the customer himself. This, in our opinion, settles the matter in favour of the respondent.

The Hon'ble High Court further took notice of the Tribunal's observation as follows.

"27. Under the special provision made as per Rule 7AA of the Central Excise Rules, 1944 and its successor rules, the responsibility to pay duty on textile article got manufactured on job-worker basis is put on the person who gets goods manufactured on job work basis. He has to discharge such liability "as if he is the manufacturer". This rule does not say anywhere that the person supplying the raw material would be the manufacturer. The rule only says that such person has to discharge the liability and that in the normal course is done by the manufacturer. There is no ruling by the Court that a rule cannot be framed to make the supplier of raw material liable to pay duty. This is to say that there is no ruling that Rules like Rule 7AA and its successor rules are bad in law. That is to say even when the manufacturer of the goods is the job worker, the liability to pay duty can be on another. This position becomes very clear if the definition of assessee and the Rules prescribing who has to pay duty are scrutinized. Rule 7AA was making a deviation, for textile goods, from the general rule that manufacturer has to pay duty. The position becomes clear when Rule 4 of Central Excise Rule as it existed prior to 25-3-2000 (After 25-3-2003 similar provisions were incorporated as a new rule 12B), is examined.

28. This rule does not state that for textile items job worker is not the manufacturer. It only says that the duty is to be paid by the person supplying the material as if he is the manufacturer. So we are of the view that the Appellant had no obligation to pay excise duty on garment stitched out of fabrics bought or brought by the customers. Thus, the argument that in the case of textile goods got manufactured on the job work basis during the period 2001-04, the job worker has to discharge excise duty liability is not acceptable. Further if duty liability is determined as if the customer is the manufacturer he should be eligible for exemption for SSI units also. But this issue need not be determined in this proceeding because the persons to pay duty are not before us."

The Hon'ble High Court answered the question in favour of the respondent, and against the department. The appeal accordingly was dismissed.

Nikita Badheka, *Advocate & Notary*

INDIRECT TAXES
VAT Update

Amendment by Maharashtra Act No VIII of 2013

A) The effective date in all the sections is 1st May 2013 except for the amendment relating to Schedule A relating to milk

A.1 Amendment to Definitions

Sec 2(15A) and Sec 2(17A) defines motor spirits and petroleum products respectively . In both the definitions at the end i.e. after (a) to (f), it was stated "or any other product' as the State government may from time to time notify in the official gazette". The word "or" is removed from both the places and replaced by "and". This means motor spirits and petroleum products respectively would mean the products specified in the definition as also any other product as may be notified. It appears it was a mistake which is corrected.

A.2 Revised Annual Returns

Sec 20(4) is amended to provide for one Annual revised return for a year for the returns/revised returns to be filed under Sec 20(4)(b) and Sec 20(4)(c). That means a dealer would be able to file one annual revised return after filing the Audit Report as also after receiving the intimation under Sec 63 from the Department. This is in conformity with the earlier clarification given by the Commissioner . There were many problems in adjusting the findings of auditor in the last return. The problems are solved now. Any revised return filed under these two sections after 1-5-2013 can be single revised return for the year.

A.3 Power to reduce late fee

Under Sec 20(6) a new proviso is added to enable the State Government to exempt whole or part of the late fee payable for late filing of the return, by class of dealer or classes of dealers, for such period or periods as may be stated therein. The waiver can be given in the notification prospectively or retrospectively.

A.4 Automatic cancellation of Order u/s 23(1)

Sec 23 (1) entitles the Commissioner to pass best judgment order if the Registered Dealer fails to file the returns by the prescribed date. The first proviso to this sub-section is substituted. As per the new proviso if after the Assessment order under this section is passed, the dealer submits the return for the period to which the order relates, then the order passed under 23(1) shall stand cancelled. However the dealer may be assessed in respect of the same period under other provisions of the section.

Therefore in terms of this new sub-section unless the dealer files a return the order will not be cancelled. The previous condition about the full payment of tax is also absent. Dealer will be able to apply for installment if eligible.

A.5 Automatic Recovery on acceptance of Audit Report in Form 704

Section 32A is inserted. As per this new section if after the submission of Audit Report u/s 61, the recommendation about sum payable or interest payable made by Accountant i.e., CA or Cost Accountant is accepted by the dealer, either fully or partly, then the dealer shall pay the same within 30 days from the date of service of the notice issued by the Commissioner in this respect. The provisions with regard to interest u/s 30(2) will apply to such tax accepted by the dealer. It is also provided that if such amount is less than ₹ 100. The Commissioner shall not recover the same.

A.6 Exemption power for wine

Sec 41 provides exemption (partial or full) to various class of dealers. Sec 41(5) empowers the government to provide exemption in part or full on sales of liquor. This power is now extended to wine also. This amendment will enable the State to bring in first point levy on wine.

A.7 Carry forward of Refund up to ₹ 5 lakhs

Section 50 of the MVAT Act is amended. A proviso is added to Sec 50(2) by which a dealer whose refund claim at the end of the year is ₹ 5,00,000/- or less would be allowed to carry forward such return to the return or revised return for immediate succeeding year.

A.8 Grant of refund to Mega Unit

Sec 51(3)(a) (iii) included various types of holders of benefit PSI Scheme eligible for application of refund qua a return/fresh return/revised return. The dealers holding identification certificate issued to mega unit under PSI 2001 or under PSI 2007 are now included in this sub section. One more category of dealers are included as "vi" to be eligible for filing the application for refund qua a return/fresh return/ revised return.

The dealer selling the goods in the course of inter State trade or commerce and whose turnover of such interstate sale in immediate previous year exceeds 50 per cent of his total turnover of sale for the previous year is now eligible to apply for refund on filing of return, fresh return or revised return.

A.9 Amendment to Sec 61

The explanation to this section defines accountant for the purpose of sec. 61 this definition of Accountant would be made applicable to Sec 32(A) – newly inserted discussed herein above in A.5.

A.10 Company Secretary authorised to appear in Sales Tax Proceedings

Sec 82 of the MVAT Act is amended to include Company Secretary as a person eligible to appear before any authority in proceedings under MVAT Act. Consequential amendments are made in this section to include company secretary after the words cost accountant.

A.11 Retrospective amendment to Entry relating to milk

Sch A -34(b) is substituted w.e.f 1st April 2005. The new entry reads as follows:

Sch A- 34(b) : Milk containing any ingredients other than milk fat, milk powder or as the case may be solid non fat) and sold under a brand name.

B. Notification under CST Act exempting interstate Sale of furnishing cloth covered by C-101

By notification issued under section 8(5) of Central Sales Tax Act, the tax payable on interstate sale of furnishing cloth notified under C-101 of MVAT Act is exempt w.e.f 30th March 2013 (Notification No. CST.1413/ CR 48/Taxation 1 dated 30th March 2013).

C. The following are the details of additional information/Data available on website, which will be useful to Members

I] List of References filed by Department – You will find remark "Accepted" by Department in some places.

[II] List of remand back cases

[III] Revised list of suspicious dealers

[IV] List of Sales Tax Practitioners

Please, verify this list. I find some persons who are already qualified as lawyer or CA in this list. The address also needs to be changed in case the old declared place is closed/changed. List includes some STP who are no more with us.

[V] Clarification is given by Commissioner of Sales Tax.

For Builders & Developers dealers :

If the land cost deduction is more than turnover of sales in case of builders & developers

- If the land cost deduction is more than turnover of sales, then negative turnover is reflected in return.
- In this case 'template' is giving 'error' during validation. To resolve this difficulty, the deduction on account of land cost should be claimed to the extent of sales turnover, even if it is more.
- The deduction of balance land cost should be claimed in subsequent returns.
- Land cost deductions should be shown in Box no. 6(p) (line no 44) of Form 233.

VI] New FAQ on Developers available on website

VII] List of beneficiaries against whom the FIR is filed.

CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute update

1. Due date for submission of ST-3 return for 1st October, 2012 to 31st March, 2013 extended

By an Order dtd. 23-4-2013, the CBEC has extended the due date of submission of ST-3 return for the period 1-10-2012 to 31-3-2013 as the return forms are expected to be available on ACES on 31-7-2013. The revised due date for filing of these returns is 31-8-2013.

(Order No. 3/2013 – ST dtd. 23-4-2013)

2. Due date for submission of ST-3 return for 1st July, 2012 to 31st September, 2012 extended to 30-4-2013

By an Order dtd. 12-4-2013, the CBEC has extended the due date of submission of ST-3 return for the period 1-7-2012 to 31-9-2012 for difficulties in filing the returns. The revised due date for filing of these returns is 30-4-2013.

(Order No. 2/2013 – ST dtd. 12-4-2013)

3. Tax on service provided by way of erection of pandal or shamiana

The TRU has issued a circular clarifying that the activity of providing pandal and shamiana along with erection thereof and other incidental activities do not amount to transfer of right to use goods. It is a service of preparation of a place to hold a function or event. Effective possession and control over the pandal or shamiana remains with the service provider even after the erection is complete and the specially made up space for temporary use is handed over to the customer. Accordingly, service provided by way of pandal or shamiana would attract the levy of service tax.

(Circular No. 168/3/2013 – ST dtd. 15-4-2013)

4. Applicability of service tax on Indian Railways deferred from 1-7-2012 to 1-10-2012

The Finance Minister has moved the amendment in the Finance Bill, 2013-14 to the effect that no service tax would be levied or collected in respect of taxable services provided by the Indian Railways during the period prior to 1-10-2012 either u/s. 66 as prevailed before 1-7-2012 or u/s. 66B as applicable thereafter. It is further clarified that no refund shall be allowed in respect of service tax paid on taxable services provided by the Indian Railways during the period prior to 1-10-2012.

In view of this amendment, all taxable services provided by Indian Railways including transportation of passenger, transportation of goods, catering would remain exempt up to 30-9-2012.

The Finance Bill is passed by both the houses of the Parliament with this solitary amendment so far as the service tax is concerned.

5. Issue of duty credit scrips for payment of service tax on services procured by exporters under the Foreign Trade Policy, 2009-14

The Government has issued three notifications against export of products listed in the Hand Book of Procedures (Volume 1) to enable the exporters to purchase the taxable services from a provider of taxable service in the taxable territory subject to the terms and conditions specified in the notifications.

The Chapter 3 of Foreign Trade Policy ('FTP') provides for various measures to promote the export and realisation of foreign exchange. FTP , *inter alia*, provides for Vishesh Krishi And Gram UgyogYojana, Focus Product Scheme and Focus Market Scheme (collectively referred as 'duty credit scrips'), which enables exporters of specific products to claim prescribed percentage of duty credit scrip with an intent to reduce the cost of the product exported.

Earlier, the said duty credit scrips were allowed to be utilised for payment of customs duty / excise duty on import or domestic procurement of goods respectively (DEPB). However, w.e.f. 18th April, 2013 (as per amended para 3.17.5 (c) of the FTP) the above referred duty scrips can also be utilised for payment of service tax on services procured by exporters. In simple words, service tax charged by service provider can also be paid by debiting the scrip obtained. Further, the exporter would be eligible to claim CENVAT credit / Duty Drawback of such service tax paid by debiting the scrips. It may be noted that the abovementioned scripts are freely transferable. Thus the scheme is on the line of DEPB (Duty Entitlement Pass Book) scheme.

The detailed clarification on how the scheme would work is not yet provided and the same will be put up in the website of the Chamber, once it is made available.

(Notification Nos. 6/2013, 7/2013, 8/2013 – ST all dtd. 18-4-2013).

CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Accommodation Service

1.1 Tirumala Tirupati Devsthanams vs. Supt. of CCEST, Tirupati 2013 (30) STR 27 (AP)

The High Court in this case held that, Guest houses provided to pilgrims by the appellant constituted under AP Charitable and Hindu Religious Institution and Endowment Act, 1987 is liable to service tax under Accommodation Service.

Construction Service

1.2 LCS City Makers Pvt. Ltd. vs. CST, Chennai 2013 (30) STR 33 (Tri.-Chennai)

In this case the land owner transferred part of his right in land and in return got construction flats and thereafter, land owner share of Undivided Share of land (UDS) of flats registered in his name. The Tribunal in this case held as under;

- After registration of his UDS, land owner was like any other prospective buyer for whom construction of complex is carried out except that he has a guaranteed right to get his share of number of flats. Land owner parted with his rights in land partially for consideration in form of constructed flats to be received later. Service was provided to UDS holders including land owner. It was not the case that flats were constructed and sold, and in that view, it was not construction service for self.
- Residential complexes were not constructed for personal use of owners of land. It was predominantly for sale of individual buyers. In few cases, considering large percentage of total constructed area handed over to land owners, it was clear that, land owner had engaged developer for construction of flats which flats could be sold by him.
- Construction of flats was composite contract as specified in Article 366(29A) of Constitution of India. Value of material and service can be separated and subjected to service tax by providing abatement from total contract value.
- Land owner transferring part of his rights in land to developer, for consideration in form of constructed flats received later is a type of barter system, and therefore value indicated in agreement between developer and land owner was not correct. Flats handed over to land owner were not different

from those sold to individual buyers, and could not be assessed at different values for services in respect of both.

- Works Contract Service introduced w.e.f. 1-6-2007, covers services which were liable to Service Tax under different categories, hence it cannot be interpreted as altogether new entry. It only provides a new method of determining liability on such service at option of service provider.

Commercial Training or Coaching Service

1.3 Soni Classes vs. CCE, Jaipur-I 2013 (30) STR 92 (Tri.-Del.)

The appellant a proprietary firm provided Commercial Training or Coaching Service and another proprietary firm sold study material etc., to students. The department sought to include value of study materials, test papers etc., sold to students by the other proprietary firm run from the same premises. The Tribunal held that, there is no material on record showing other proprietary firm is independent firm and there is failure to show purchase and resale of text books to students. Therefore, the value of study materials is to be included in value of taxable service and liable to service tax.

Rent-a-Cab Service

1.4 CCE, Ludhiana vs. Singh Travels 2013 (30) STR 96 (Tri.-Del.)

The assessee in this case engaged in providing a cab-on-call and demand. The Tribunal held that, such kind of service is not included in rent-a-cab service.

Goods Transport Agency Service

1.5 Birla Ready Mix vs. CCE, Noida 2013 (30) STR 99 (Tri.-Del.)

The department in this case demanded service tax on vehicles used for transporting ready mix concrete from place of manufacturing to place of delivery of goods. The appellant contended that, they are responsible only for vehicle and no custodial rights or responsibilities in matter of goods carried. They have also not issued consignment note. The Tribunal held that, in terms of section 65(50b) of FA, 1994, when consignment note is not issued by operator, operator cannot be considered as GTA. Mere fact that, activity of transportation carried out by operator not to make appellant GTA and Log book maintained can be equivalent as consignment note. The issue is already examined in G. S. Lamba & Sons 2011 (430) VVST (AP), though in context of State Sales Tax, however there is no need to take different view.

Clearing & Forwarding Agent Service

1.6 Jaiprakash Strips Ltd. vs. UOI 2013 (30) STR 139 (Bom.)

The appellant in this case engaged in procurement of orders and handling of goods as per terms of contract. The credit note issued disclosed that, the appellant directly dealt with goods in lifting, providing vehicles and delivering. The Tribunal held that, it is not a simple case of placing orders and earning commission and the service was liable to tax under Clearing and Forwarding Agent Service.

Management or Business Consultants Service

1.7 Bharti Televentures Ltd. vs. CCE, Delhi-I 2013 (30) STR 148 (Tri.-Del.)

The appellant in this case was engaged in liaison work and the department sought to tax them under Management or Business Consultants Service. The Tribunal held that, every name of service indicating entry in Section 65(105)(r) of FA, 1994 meant to cover only consultancy or advisory service and not all activities done by others for management. Liaison work not in the nature of any consultancy or advice but temporary function

required for company's functioning. Liaison work not to be considered as "Management or Business Consultancy service". It is further held that, inclusive portion of definition cannot restrict meaning of "Means" part of definition, defining the general meaning.

Business Auxiliary Service

1.8 Sharwan Kumar vs. CCE, Chandigarh-I 2013 (30) STR 176 (Tri.-Del.)

The appellant in this case, engaged in the process of denting and painting on the bus bodies claimed exemption under Notification No. 8/2005-ST on the ground that, the process amounts to manufacture. The department denied the said exemption. The Tribunal held that, processes carried out by the appellant is essential for completion of manufacture and therefore there is no reason to held processes not manufacturing activity within Section 2(f) of CEA, 1944. Further, as per Note 6 of Section XVII of CET, processes essential for transforming semi-finished bus body into complete and finished article, therefore processes of manufacture.

Further, with regard to coverage of shifting of goods within the factory premises under activities amounting to "Production or processing of goods for, or on behalf of the client" specified in Business Auxiliary Service, it is held that, 'production' not covering shifting of goods and expression 'processing' used in company of 'production' to cover activity of bringing about change in the goods and not expressions like shifting, transportation, storage etc.

2. Interest/Penalties/Others

2.1 Kalyani Hayes Lemmerz Ltd. vs. CCE, Pune-III 2013 (30) STR 71 (Tri-Mumbai)

In this case, the appellant failed to file refund claim under Notification No. 41/2007-ST quarter-wise as stipulated in para 2(c) of the said Notification. The Tribunal held that, exemption under Notification operationalised through refund mechanism and unless conditions specified satisfied, claim cannot be entertained. Amendment made *vide* Notification No. 32/2008-ST prospective and inapplicable to past refund claims.

2.2 M. R. Coatings Pvt. Ltd. vs. CCE, Rajkot 2013 (30) STR 76 (Tri.-Ahmd.)

In this case the appellant paid service tax and interest before issuance of SCN, however department imposed penalty under section 76. The Tribunal held that discharge of service tax liability and interest thereof and no adjudication for enhancement or addition to amount already discharged. In view thereof provisions of Section 73(3) of FA, 1994 are applicable and issuance of SCN was not required. The Tribunal followed Karnataka High Court decision in Adecco Flexione Work Force Solutions Ltd. 2011-TIOL-635-HC-KAR-ST.

2.3 Anand Decorators & Hirers vs. CST, Ahmedabad 2013 (30) STR 86 (Tri.-Ahmd.)

The appellant in this case mis-declared value of service by collection of excess amount on reverse side of Invoice and short payment of tax. They have contended that, since SCN is issued after two years of SCN no demand is to be raised. The Tribunal held that, judicial decision require decision of Delhi High Court in Bajaj Travels Ltd. 2012 (25) STR 417 (Del.) to be followed and hence, penalties under sections 76 and 78 are sustainable. Since the appellant is partnership firm facing stringent financial difficulties and almost 75% of tax demand paid before issue of SCN, penalty is restricted to 100% of Service tax demanded.

3. CENVAT Credit

3.1 CCE, Ahmedabad-II vs. Cadila Healthcare Ltd. 2013 (30) STR 3 (Guj.)

The High Court in this case allowed CENVAT credit on following input services;

- Technical Testing and Analysis service availed by appellant engaged in manufacture of medicaments, for testing of clinical samples by various agencies prior to commencement of commercial production.
- Technical Inspection and Certification services availed in respect of instruments used for measuring size, temperature, weight, humidity.
- Repair/maintenance of copier machine, air conditioner, water cooler, Management consultancy, Interior Decorator, Commercial or Industrial Construction service.
- Clearing and Forwarding Agents services used for storage of goods after clearance from factory.
- Courier collecting parcel of goods from factory for further transportation.

The High Court has not allowed CENVAT credit of service tax paid on commission paid to foreign agents as agents were directly concerned with sales rather than sales promotion and services provided by them was neither Business Auxiliary Service nor they were covered under the definition of input service. The said services were not used directly or indirectly in or in relation to manufacture of final products or clearance of final products from place of removal.

3.2 CCE, Guntur vs. Varun Motors 2013 (30) STR 31 (Tri.-Bang.)

The appellant, authorised distributor of 'Bajaj Auto Ltd.' distributed CENVAT credit from Sales Office to other authorized service station. The Adjudicating Authority revoked ISD registration as sales office not to be treated as service provider. The Tribunal held that, Input Service Distributor definition in CCR, 2004 indicating ISD to be an office of manufacturer or provider of service provider. Sales office undisputedly is appellant's office and appellant is service provider, therefore there is no objection for treating premises as ISD premises. Hence, denial of credit taken based on credit distributed by ISD is not irregular.

3.3 Wadpack Pvt. Ltd. vs. CCE, Bangalore 2013 (30) STR 51 (Tri.-Bang.)

The department in this case disallowed CENVAT credit of service tax paid on Business Auxiliary Service constituting commission paid to agents for sales promotion of dutiable goods. The Tribunal relying on Bombay High Court decision in Ultratech Cement Ltd. 2010 (20) STR 577 (Bom.) held that, where a particular activity is expressed mentioned in the inclusion part of definition, one need not bother to examine whether it satisfied the ingredients of main definition. Sales promotion is expressly figures in inclusion part of definition of Input service in Rule 2(l) of CCR, 2004.

3.4 Handa Refrigeration vs. CCE, Gurgaon 2013 (30) STR 111 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on purchase of PMP certificate and royalty paid for repair and maintenance service, both used for providing Repair & Maintenance Service.

3.5 YGI Industries (India) P. Ltd. vs. CCE, Mumbai-III 2013 (30) STR 146 (Tri.-Mumbai)

The Tribunal in this case held that, once the service tax has been paid on job charges for grooving and the said service has been used in or in relation to the manufacture of the final products of the appellant, the appellant is rightly entitled to avail CENVAT credit. It is further held that, whether he was entitled for exemption and was not required to pay duty at all should not be and cannot be a

consideration for the Jurisdictional Officers at the appellant's end, who is only a service recipient.

3.6 Zydus Nycomed Healthcare Pvt. Ltd. vs. CCE, Belapur 2013 (30) STR 197 (Tri.-Mumbai)

The Tribunal in this case allowed Cenvat credit of service tax paid on travel and car service, catering service and construction service used for repair and maintenance of factory premises.

3.7 Hindustan Zinc Ltd. vs. CC&CE, Jaipur-II 2013 (30) STR 199 (Tri.-Del.)

The department denied CENVAT credit of input services distributed by Head Office, which distributed credit of Service Tax paid thereon without registration as service distributor. The Tribunal observed that, identity of head office, service recipient and provider as well as genuinety of transaction not in doubt. It is held that, denial of CENVAT credit only because invoices had name of head office, defeated object of avoiding cascading effect. Also this was at initial stage of implementation of law regarding distribution of credit, where difficulties were being experienced because of Registration and other technical procedures involved.

3.8 Dagger Forst Tools Ltd. vs. CCE, Mumbai-I 2013 (30) STR 206 (Tri.-Mumbai)

The department in this case sought to deny distribution of credit by ISD on the ground that, the ISD is permitted to distribute taxes paid on or after registration. The Tribunal held that, there is no such kind of restriction provided in the Rules and therefore denying distribution of credit on such basis is unwarranted.

3.9 Castrol India Limited vs. CCE, Vapi 2013 (30) STR 214 (Tri.-Ahmd.)

The Tribunal in this case *inter alia* held that, demand for disallowance of Cenvat credit distributed by HO is required to be raised at the end of ISD (HO) and not at the unit level.

3.10 CCE, Vadodara vs. Schott Glass India Pvt. Ltd. 2013 (30) STR 219 (Tri.-Ahmd.)

The Tribunal in this case allowed CENVAT credit of service tax paid on Rent-a-cab service for transportation of employees from city to factory in a village, about 40 kms away on the ground that, to get proper employees, it was necessary for the assessee to provide transportation facility from nearest city and it was welfare measure, necessary to ensure that manufacture took place properly.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2013] 177 Comp Cas 230 (Karn.) – In the Karnataka High Court – Surya Elevators and Escalators India P. Ltd v. Union of India and Others.

Brief Facts

This writ petition has been filed by Surya Elevators and Escalators India P. Ltd ("Company") against the order of the Regional Director ("RD"). In the said order, RD has directed the Company under section 22(1)(ii)(b) of the Companies Act, 1956 ("Act") for changing its name within 3 (three) months from the date of the said order.

The Company has been registered with the name Surya Elevators and Escalators India P. Ltd. with the RoC, Bangalore. At the time of registration, Surya Elevators P. Ltd. ("Respondent") has issued a no-objection certificate in favour of the Company. Based on the said no objection certificate, the Registrar of Company ("RoC") has allowed the registration of the Company.

The Respondent has initiated the proceedings under section 22(1)(i) of the Act before the RD for directing the Company to change its name. In its arguments, Respondent has claimed that one of its director who is a close relative of the directors of the Company, has individually issued the no-objection certificate. The said certificate was issued without any authority.

Upon hearing of Company as well as Respondent, RD has issued an order directing the Company to change its name.

During this period, the Respondent has also initiated the suit in the civil court against the Company for injunction alleging "passing off". The said suit was dismissed by the court with a reason that the customers of the Respondent goods are not ordinary customer and cannot be compared with the customer buying tobacco. They are well aware people.

Company has argued that object of section 22 under the Act is to remove confusion when names are similar and not to provide adjudicatory form and when a civil suit has already considered the matter. It has also provided the similarities of names of various companies registered with the RoC, including company registered with the same name and object in the State of Maharashtra. It has also submitted the meaning of generic word "Surya". It has been also submitted that RD also needs to consider the order of the court. RD has given undue importance of the Respondent argument that RoC has inadvertently approved the name. It is also submitted that even court has accepted that "Surya" is a generic name and there can be no monopoly on it.

From the Respondent side, it has been submitted that, the Company has been started

by the relatives of the former director of the Respondent. He has issued the no objection certificate and thus acted detrimental to the interest of the Respondent. It has been also submitted that to protect the interest and intellectual property of the Respondent, said director has been removed as a director by the shareholders under section 284 of the Act.

Respondent has also submitted that the confusion of name is not negligible as combination of word used in name is exactly similar. It has also submitted the fraud played by the former director and that proceeding before the court and before RD is not similar. In its submission, Respondent has also submitted the minutes of earlier meeting, in which directors have noted that no other business in the name of "Surya" will be carried out by the former director and he has been allowed to continue with its sole proprietor in Andhra Pradesh in the name of Surya Elevators Services. It was also noted that Respondent will develop brand "Surya" and none of the promoters or their family members or their heirs will claim the said brand.

Judgments and reasoning

Court has dismissed the petition and has confirmed the RD's order. Court has observed that unilateral issuance of no objection certificate by the former director was opposed to the resolution passed by the Board of the Respondent. Court has made an observation that fraud vitiates everything, even judgment and orders of the Court. Court has also analysed the definition of fraud in Black's Legal Dictionary which states that "fraud as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part some valuable thing." Court has also analysed the provisions of section 20 which talks about "companies not to be registered with undesirable names" and 22 of the Act related to "Rectification of name of company". Court has concluded that above provisions provides that no company shall be registered by a name which is identical or to resembles the name of an existing company. Court has also relied on the judgment of Calcutta High Court in the case of *Kalpana Polytec India Ltd. vs. Union of India [2001] 106 Comp Cas 558,* that the Central Government has been authorised to rectify a mistake which might have been committed by it by way of inadvertence or otherwise. Court has further observed that it can safely be concluded that RoC has registered the Company negligently or carelessly as it has not verified as to whether Respondent has really issued the "no objection certificate". Court has also referred the case under sections 20 and 22 in *"Motari Overseas Ltd. vs. Montari Industries Ltd. ILR 1997 Delhi 64.* Court has also noted that RD while passing the order under section 22 of the Act should not exercise jurisdiction of the civil court relating to passing-off action.

Case Law No. 2 Court – [2013] 177 Comp Cas 261 (Delhi) – India bulls Financial Services Ltd., in re India bulls Housing Finance Ltd., in re.

Sections 391 to 394 of the Act relating to compromise, amalgamation and arrangement is a single window clearance and there is no requirement to follow separate procedure if, scheme has also proposed any alteration in the object clause or increase in share capital.

Brief Facts

The petitioner companies have filed the scheme of arrangement ("Scheme") under section 391 of the Companies Act, 1956 ("Act"). The Scheme is for approval of Court between the companies and their respective shareholders and creditors.

The Court has allowed the petition of amalgamating company to dispense with the calling meeting of equity shareholders and creditors. Court has directed the amalgamated company to call the meeting of its equity shareholders as well as secured and unsecured creditors. The said meetings were duly held and shareholders as well as creditors had approved the Scheme.

As per the requirement under the Act, petitioner companies have sent the notice of petition and Scheme as well as relevant documents to the Regional Director ('RD") as representative of the Central Government and to the Official Liquidator ("OL").

OL has filed its report conferring that affairs of the amalgamating company do not appear to have been conducted in a manner prejudicial to the interest of it members, creditors or to public interest.

In its report, RD has stated as follows:

a. Upon sanction of the Scheme, all employees of the amalgamating company shall become the employees of the amalgamated company.

b. That amalgamated company has to comply with the conditions raised by the Bombay Stock Exchange and National Stock Exchange.

c. That transferor company has to comply with all the rules and regulations as applicable to NBFC companies and RBI, being a regulator.

d. That amalgamated company, being a housing finance company needs to comply with rules and regulations of National Housing Bank.

e. That, petitioners have to give undertaking as to necessary compliance of the provisions of the Competition Act, 2002.

f. That petitioner companies needs to comply with the requirement and process under the Act for increase in authorised share capital and change in object clause as well as to file necessary forms.

In reply, Petitioner companies have submitted that under section 392, company has a power to compromise or arrangement which includes re-organisation of the share capital of the company it has also submitted that change in object clause of the company is an integral part of the Scheme and same has been approved by the equity shareholders. It is also submitted that upon approval of the Scheme, order of the court will be filed with the Registrar of Companies ("RoC") and the same shall be treated as intimation to the RoC for change in Memorandum of Association. On the reliance placed in precedent, several judgments of this court have been quoted for the above process. With regards to compliance of RBI and stock exchanges requirements, petitioner companies have stated that same will be complied with on applicability of the provisions of Competition Act, 2002, it is submitted that Scheme is for merger of wholly owned subsidiary and thus same is not applicable.

Judgments and reasoning

Court has sanctioned the Scheme with the reasoning that sanction under sections 391 to 394 is a single window clearance and there is no requirement of following the separate procedure. Thus, court has also noted that the RD's objection on requirement of following separate procedure under the Act for alteration in the share capital and the alteration of the memorandum of association are without any merit. Court has also taken note of several judgments as to the above.



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 and key changes in Consolidated FDI Policy dated April 5, 2013.

A. RBI CIRCULARS

1. Exim Bank's Line of Credit of USD 42 million to the Government of the Republic of Cameroon

The Credit Agreement under the LOC is effective from March 8, 2013 and the date of execution of Agreement is September 14, 2012.

[A.P. (DIR Series) Circular No. 91 dated 1st April, 2013]

2. Exim Bank's Line of Credit of USD 5 million to Banco Exterior De Cuba

The Credit Agreement under the LOC is effective from February 28, 2013 and the date of execution of Agreement is October 10, 2012.

[A.P. (DIR Series) Circular No. 92 dated 1st April, 2013]

3. Exim Bank's Line of Credit of USD 15 million to the Government of the Republic of Benin

The Credit Agreement under the LOC is effective from February 28, 2013 and the date of execution of Agreement is August 23, 2012.

[A.P. (DIR Series) Circular No. 93 dated 1st April, 2013]

4. Foreign investment in India by SEBI registered FIIs in Government Securities and Corporate Debt

- Hitherto, the limits as stated in A.P.(DIR Series) Circular No. 80 dated January 24, 2013 for investments by FII and Long Term Investors in Government securities are USD 25 billion including sub-limit of USD 10 billion for Government securities and USD 15 billion for Government dated securities respectively and for Corporate debt are USD 51 billion including sub-limit of USD 25 billion each for the bonds of the infrastructure sector and non–infrastructure sector and USD 1 billion for QFIs in non-infrastructure sector (including mutual fund debt schemes).
- RBI has now decided to merge existing debt limits into 2 broad categories:

(A) Government Debt Limit

The sub-limit of USD 10 billion for investment in Government securities including Treasury Bills

and the sub-limit of USD 15 billion for investment in Government dated securities has been merged within the overall limit of USD 25 billion for investment in Government securities.

(B) Corporate Debt

The sub-limit of USD 1 billion for QFIs, sub-limit of USD 25 billion for investment in non-infrastructure sector and the sub-limit of USD 25 billion for investment in infrastructure sector has been merged within the overall limit of USD 51 billion required for investment in Corporate Debt.

- A summary of revised position is given below:

Instrument/s	*Limit*	*Eligible Investor*	*Remarks*
Government securities including Treasury Bills	USD 25 billion	FIIs, QFIs and long-terms investors registered with SEBI – Sovereign Wealth Funds (SWFs), Multilateral Agencies, Pension/ Insurance/ Endowment Funds, Foreign Central Banks.	Eligible Investors may invest in Treasury Bills only up to USD 5.5 billion within the limit of USD 25 billion.
Eligible instruments as referred to in Schedule 5 of Notification No. FEMA 20 /2000-RB dated 3rd May, 2000.	USD 51 billion	FIIs, QFIs, long-terms investors registered with SEBI - SWFs, Multilateral Agencies, Pension/ Insurance/ Endowment Funds, Foreign Central Banks.	Eligible Investors may invest in Commercial Papers only up to USD 3.5 billion within the limit of USD 51 billion.

- The Non-Resident Indians which are not subject to any limit for investment in Government Securities as well as corporate debt will continue to be regulated as per extant guidelines.

[A.P. (DIR Series) Circular No. 94 dated 1st April, 2013]

(The confusions due to various sub-categorisations within the overall limits for investments in government securities and corporate debt is sought to be removed through this simplification with an eye to reduce the current account deficit.)

5. Deferred Payment Protocols between Government of India and erstwhile USSR

In terms of A.P. (DIR Series) Circular No. 53 dated November 20, 2012, the Rupee value of the Special Currency Basket was indicated as ₹ 75.570411 effective from October 25, 2012.

Upon further revision, RBI has fixed the Rupee value of the Special Currency Basket at ₹ 73.141761 with effect from March 18, 2013.

[(A.P. (DIR Series) Circular No. 95 dated 4th April, 2013]

6. Memorandum of Instructions governing Money Changing Activities

RBI has now allowed Authorised Money Changers (AMCs) to sell Indian Rupees to foreign tourists/visitors against international credit cards/international debit cards and advised them to take prompt steps to obtain reimbursement through normal banking channels.

All the other instructions contained in A.P.(DIR Series) Circular No. 57 [A.P.(FL/RL Series) Circular No.4] dated March 9, 2009 as amended from time to time shall remain unchanged.

[A.P. (DIR Series) Circular No. 96 dated 5th April, 2013]

(This move by RBI will benefit the foreign tourists/visitors to a great extent.)

7. Exim Bank's Line of Credit of USD 76.50 million to the Government of the Republic of Malawi

The Credit Agreement under the LOC is effective from March 13, 2013 and the date of execution of Agreement is December 13, 2012.

[A.P. (DIR Series) Circular No. 97 dated 9th April, 2013]

8. Trade credits for Import into India – Review of all-in-cost ceiling

RBI has decided that all-in-cost ceiling as specified under paragraph 4 of A.P. (DIR Series) Circular No. 28 dated September 11, 2012 will continue to be applicable till June 30, 2013 subject to further review. The all in cost ceiling has been continued as under:

Maturity period	*All-in-cost ceilings over 6 months LIBOR**
Up to one year	350 basis points
More than one year and up to three years	
More than three years and up to five years	
* for the respective currency of credit or applicable benchmark	

All other aspects of Trade Credit Policy will remain unchanged.

[A.P. (DIR Series) Circular No. 98 dated 9th April, 2013]

(In line with continuing credit scenario in financial markets, RBI has extended the continuation of the overall ceiling for trade credits.)

9. Investment by Navratna Public Sector Undertakings (PSUs), OVL and OIL in unincorporated entities in oil sector abroad

At present Navratna Public Sector Undertakings (PSUs), ONGC Videsh Ltd. (OVL) and Oil India Ltd. (OIL) are allowed to invest in overseas unincorporated entities in oil sector (for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits under the automatic route.

RBI has now further allowed Navratna Public Sector Undertakings (PSUs), ONGC Videsh Ltd. (OVL) and Oil India Ltd. (OIL) to invest in overseas incorporated JV/WOS in oil sector (for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits under the automatic route.

[A.P. (DIR Series) Circular No. 99 dated 23rd April, 2013]

(This is a welcome move by RBI which will provide flexibility to these entities to participate in equity of SPVs abroad. This will afford these entities to be more aggressive as their risk exposure can be limited to their equity participation in the SPVs)

10. Overseas Direct Investments – Clarification

The RBI has observed that eligible Indian parties are using ODI automatic route to set up certain structures facilitating trading in currencies, securities and commodities. RBI further noticed that such structures having equity participation of Indian parties have also started offering financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.).

RBI has clarified that any overseas entity having equity participation directly / indirectly shall not offer such products without the specific approval of the Reserve Bank of India given that

currently Indian Rupee is not fully convertible and such products could have implications for the exchange rate management of the country.

Any incidence of such product facilitation would be treated as a contravention of the extant FEMA regulations and would consequently attract action under the relevant provisions of FEMA, 1999.

[A.P. (DIR Series) Circular No. 100 dated 25th April, 2013]

(RBI appears to be of the view that overseas structures by Indian entities which are facilitating trading in currencies, securities and commodities (including derivate financial products linked to Indian Rupee) are indirectly affecting convertibility of the Indian currency and hence put investments in entities undertaking such activities under the approval route)

B. CHANGES IN CONSOLIDATED FDI POLICY THROUGH DIPP CIRCULAR No. 1 OF 2013

The significant changes introduced in Consolidated FDI Policy through 'DIPP Circular 1 of 2013' dated 5th April, 2013 (sixth edition of the Consolidated FDI Policy) are as follows:

1. 'Who can invest in India' redefined [Para 3.1.1 Page 13]

Hitherto, a citizen of Pakistan or an entity incorporated in Pakistan were not allowed to invest in India even under the approval route. The amendment brought by FDI Policy allows citizens and entities incorporated in Pakistan to invest in India under the approval i.e. Government Route except defence, space and atomic energy and other prohibited sectors.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated Press Note 3 (2012) issued on 1-8-2012 by DIPP and also directions issued by RBI through A.P. (Dir Series) Circular No. 16 dated 22nd August, 2012.)

2. Credit of dividend payments on QFI investments in single non-interest bearing Rupee account [Para 3.1.7.3 page 15]

Under the previous Consolidated FDI Policy, dividends were required to be directly credited to the single rupee pool bank account if not directly remitted to designated overseas bank accounts of the QFIs.

New Consolidated FDI Policy has allowed QFIs to receive their dividend payments on equity shares to be credited directly to their designated overseas bank accounts or single non-interest bearing rupee account. There is no more requirement for opening and maintenance of a single rupee pool bank account.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated RBI directions issued through A.P. (Dir Series) Circular No. 7 dated 17th July, 2012.)

3. FDI in Limited Liability Partnerships [Para 3.2.5 Page 16]

FDI in LLP is permitted under Government Route subject to various conditions. One of the conditions which stipulated that Foreign Capital participation in LLPs will be allowed only by way of cash consideration, received by inward remittance, through normal banking channels or by debit to NRE/FCNR account of the person concerned, maintained with an authorised dealer/authorised bank has been done away within the new Consolidated FDI Policy where company with FDI gets converted into an LLP.

(Under Third/Fourth Schedule of the Limited Liability Partnership Act, 2008, it is a pre condition in case of conversion of a company to LLP that the partners of LLP should comprise all share holders of the predecessor company and no one else and therefore, the condition prescribing introduction of fresh capital was unnecessary and hence modified accordingly in the new Consolidated FDI Policy.)

4. Non-Residents (including NRIs) allowed to subscribe shares at Face Value [Para 3.4.2 Page 20]

The current pricing guidelines for issue of shares by unlisted companies provide that issue of shares by such companies to persons resident outside India shall not be at a price less than the fair value of shares arrived as per the Discounted Free Cash Flow method. Now relaxation has been provided for issue of shares to those non-resident investors who are investing in an Indian company by way of subscription to its Memorandum of Association in compliance with the provisions of the Companies Act, 1956 to issue shares at face value.

(The amendment brings parity between Consolidated FDI Policy and FEMA Notification No. 20 issued by RBI where pricing guidelines were amended by RBI via A.P. DIR Circular No. 36 dated 26th September, 2012)

5. Conversion of ECB/Lump sum fees/Royalty, etc. to Equity [Para 3.4.6 Page 25]

In case of import of capital goods/ machinery/ equipment (excluding second-hand machinery), issue of equity shares under the FDI policy is allowed under the Government route subject to some conditions. However, condition which required an independent valuation of the capital goods/machinery/equipment (excluding second-hand machinery) to be done by a third party entity, preferably by an independent valuer from the country of import along with production of copies of documents /certificates issued by the customs authorities towards the assessment of the fair value of such imports, etc is removed.

6. Downstream Investment by an Indian company which is not owned and/or controlled by resident entity [Para 3.10.4.1 Page 32]

An Indian company which is not owned and/ or controlled by resident entity/ies making a downstream investment into another Indian company would be in accordance/ compliance with the relevant sectoral conditions on entry route, conditionalities and caps, with regard to the sectors in which the latter Indian company is operating.

Now, a note is added to this para specifying that downstream investment made by a banking company which is owned and/or controlled by a non-resident under Corporate Debt Restructuring (CDR) or other loan restructuring mechanism, or in trading of books, or for acquisition of shares due to defaults in loan will not be considered towards indirect foreign investment. However, strategic downstream investment will count towards indirect foreign investment. For this purpose, 'strategic downstream investments' means investment by these banking companies in their subsidiaries, joint venture and associates.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated Press Note 2 (2012) dated 31-7-2012)

7. Prohibited Sectors – Exclusion of Retail Trading [Para 6.1 Page 39]

Retail trading is now excluded from the list of prohibited sectors under FDI.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated Press Note 5 (2012) dated 20-9-2012)

8. Foreign Investment Limits in companies engaged in Broadcasting Carriage Services [Para 6.2.7.1 Page 48]

FDI limits in companies engaged in providing Broadcasting Carriage Services under the automatic/Government route have been reviewed and the same would be subject to the terms and conditions stipulated in Press Note No. 7 (2012 series) dated 20th September, 2012. FDI limit for service relating to Direct to Home (DTH) is now increased to 74%.

Mandatory requirement regarding Key Executives of the Company specify that security clearance of the personnel will be necessary.

9. FDI in Air Transport Services [Para 6.2.9.3.1 Page 56]

Foreign airlines are allowed to participate in the equity of companies operating cargo airlines, helicopter and seaplane services. The limits and entry routes for the same are mentioned in Press Note No. 6 (2012 Series).

Foreign airlines are now also allowed to invest, in the capital of the Indian companies operating scheduled and non-scheduled air transport services up to the limit of 49% of their paid-up capital under Government Approval Route. The conditions for such investments are mentioned in Press Note No. 6 (2012 Series).

10. FDI in Single Brand Product Retail Trading [Para 6.2.16.4 Page 68]

The New FDI Policy Circular has amended condition 2 (d) to provide that for FDI in Single brand retailing for a specific brand, only one foreign investor whether owner of the brand or otherwise shall be permitted to undertake single brand product retailing in India. The same shall be done through a legally tenable agreement. The onus for ensuring the compliance of this condition lies with the Indian entity. At the time of seeking approval, the investing entity shall provide evidence to this compliance including a copy of licensing/franchise/ sub-license agreement.

Condition (e) has been amended to provide that proposals involving FDI beyond 51% will require sourcing of 30% of the goods purchased preferably from MSMEs. The procurement requirement is required to be complied within the first instance from the beginning of 1st April of the year during which the first tranche of FDI is received as an average of five years total value of the goods purchased.

Condition (f) has been inserted to stipulate that retail trading by means of e-commerce is not permissible for companies with FDI.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated Press Note 4(2012) dated 20-9-2012 and also the directions issued by RBI through A.P. (Dir Series) Circular No. 32 dated 21st September, 2012.)

11. FDI in Multi Brand Retail Trading [Para 6.2.16.5 Page 69]

At present Foreign Direct Investment (FDI) is prohibited in retail trading, except in single-brand product retail trading, in which FDI, up to 100%, is permitted, under the Government route, subject to specified conditions.

With a view to liberalsed retail trading, the Government of India has now permitted FDI to invest up to 51% under the Government Route, in Multi Brand Retail Trading, subject to specified conditions.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated Press Note 5 (2012) issued on 20-9-2012 by DIPP and also the directions issued by RBI through A.P. (Dir Series) Circular No. 32 dated 21st September, 2012.)

12. Changes in FDI Policy in Asset Reconstruction Companies [Para 6.2.17.1 Page 72]

At present, Foreign Direct Investment (FDI) is permitted in Asset Reconstruction Companies (ARC) up to 49% under the Government route.

The Government of India has increased the overall limit to 74% of paid-up capital in ARCs and also permitted FII along with FDI to invest in the same through Government route and 2 new conditions as mentioned below have been inserted:-

- No sponsor may hold more than 50% of the shareholding in an ARC either by way of FDI or by routing it through an FII controlled by the single sponsor.

- The total shareholding of an individual FII shall not exceed 10% of the total paid-up capital.

(The above changes were announced by the Ministry of Finance vide *Press Release dated 21st December 2012 for which corresponding Press Note was not issued by DIPP. The same is now incorporated in the Consolidated FDI Policy)*

13. Liberalisation in setting up subsidiaries by Non-Banking Financial Companies (NBFCs) [Para 6.2.17.8 Page 77]

At present only 100% foreign owned NBFCs with a minimum capital of US $ 50 million were allowed to set up subsidiaries for specific NBFC activities.

Now the Government of India has relaxed the condition and allowed more than 75% and up to 100% foreign owned NBFCs to form the subsidiaries for specific NBFC activities.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated Press Note 9 (2012) issued on 3-10-2012 by DIPP and also directions issued by RBI through A.P. (Dir Series) Circular No. 41 dated 10th October, 2012.)

14. Changes in FDI policy in Pharmaceuticals Sector [Para 6.2.18 Page 79]

At present, FDI up to 100% is allowed for brownfield investments in the pharmaceuticals sector under the Government approval route. Consolidated FDI Policy has now further stated that appropriate conditions for FDI may be incorporated at the time of granting approval.

(Press Note 3 of 2011 had placed FDI for brownfield investments under Government Route mandating FIPB to review and approve proposals for an interim period of six months and providing that thereafter the requisite oversight will be done by the CCI entirely in accordance with the competition laws of the country. Considering that enabling provisions are not enacted by CCI till date, FIPB is mandated under the consolidated FDI Policy to prescribe appropriate conditions while granting approvals.)

15. FDI in Power Exchanges [Para 6.2.19 Page 79]

The Government of India has now permitted FDI and FII to invest up to 49% in Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 under Government route for FDI and under Automatic route for FII subject to specified conditions.

(The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated Press Note 8 (2012) issued on 20-9-2012 by DIPP and also directions by the RBI through A.P. (Dir Series) Circular No. 32 dated 21st September, 2012.)

16. Changes in Form FC GPR [Annex 1 Pages 87 to 93]

Every company, making allotment to any foreign investor, is required to report to Reserve Bank of India (RBI) in Form FC GPR along with a declaration within 30 days from the date of allotment.

The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has removed following two declarations:-

- Foreign entity/entities—(other than individuals), to whom we have issued shares do not have any existing joint venture or technology transfer or trade mark agreement in India in the same field. For the purpose of the 'same' field, 4 digit NIC 1987 Code would be relevant.
- We are not an Industrial Undertaking manufacturing items reserved for small sector.

OR

We are an Industrial Undertaking manufacturing items reserved for small

sector and the investment limit of 24% of paid-up capital has been observed/ requisite approvals have been obtained.

Further, it has added the following declaration:-

- The foreign investment received and reported now will be utilised in compliance with the provision of a Prevention of Money Laundering Act 2002 (PMLA) and Unlawful Activities (Prevention) Act, 1967 (UAPA). We confirm that the investment complies with the provisions of all applicable Rules and Regulations.

17. Changes in Annual Return Form on Foreign Assets and Liabilities [Annex 7 Pages 103 to 110]

The Consolidated FDI Policy through 'DIPP Circular 1 of 2013' has incorporated new format for the Annual Return on FLA introduced by RBI *vide* A.P. (Dir Series) Circular No. 133 dated 20th June, 2012.

Further, it has added the following declaration:-

- The foreign investment received and reported now will be utilised in compliance with the provision of a Prevention of Money Laundering Act, 2002 (PMLA) and Unlawful Activities (Prevention) Act, 1967 (UAPA). We confirm that the investment complies with the provisions of all applicable Rules and Regulations.

18. Changes in Form FC-TRS [Annex 8 Pages 111 to 115]

KYC requirements have been introduced in respect of non-resident investor whereby additional declaration for information in the KYC form has to be provided along with Form FC-TRS.


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Dishonour of cheque – Repeated presentation/dishonour of cheque – Multiple causes of action/Cause of action arises afresh each time – Prosecution based upon second or successive Dishonour of cheque is permissible: Negotiable Instruments Act, 1881 – Ss. 138 proviso and 142 (b)

Neither section 138 nor section 142 or any other provision contained in the Act forbids the holder or payee of the cheque from presenting the cheque for encashment on any number of occasions within a period of six months of its issue or within the period of its validity, whichever is earlier. The proviso to section 138 stipulates three distinct conditions precedent which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to section 138 as clauses (a), (b) and (c) thereof that an offence under section 138 can be said to have been committed by the person issuing the cheque. The expression "cause of action" has been universally understood to mean the bundle of facts which the plaintiff must prove in order to entitle him to succeed in the suit.

There is nothing either in section 138 or section 142 of the Act to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under section 138, must, on the language of section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not militate against the accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the

absence of any principle on which such failure to prosecute on the basis of the first default in payment should be result in forfeiture, it cannot be held that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of section 138.

There is nothing in the proviso to section 138 or section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognisable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be induced by several considerations but the holder of the cheque that given sometime, the payment covered by the cheques would be arranged, in the process rendering a time-consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. There is no reason why the parties should by process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The Magistracy in this country is overburdened by an avalanche of cases under section 138 of the Negotiable Instruments Act. If the first default itself must, in terms of the decision in Sadanandan Bhadran, (1998) 6 SCC 514, result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing the parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened Magistracy and judicial system at the district level is entirely because of compulsions arising out of the decisions in Sadanandan case, it is difficult to say that the law declared in that decision has not added to court congestion.

Hence Sadanandan case (supra), erroneously held that the second or subsequent dishonour of the cheque would not entitle the holder/payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. It was erroneously held therein that while a cheque is presented afresh the right to prosecute the drawer, if the cheque is dishonoured, is forfeited only because the previous dishonour had not resulted in immediate prosecution of the offender even when a notice under clause (b) of the proviso to section 138 had been served upon the drawer. Hence Sadanandan case (supra) is overruled.

MSR Leathers vs. S. Palaniappan & Anr. (2013) 1 SCC 177

2. Contract – Stipulated damages - Penalty clauses and earnest money deposits – Forfeiture of money paid as part-payment of purchase price and not as earnest money – Impermissibility – Transfer of Property Act, 1882, S. 55 – Contract Act, 1872, S. 74

The question arose before the Supreme Court was whether the seller is entitled to forfeit

the earnest money deposit where sale of an immovable property falls through by reason of the fault or failure of the purchaser?

An agreement for sale of property was entered into between appellant (seller) and the respondent (purchaser) for a consideration to be paid within particular date and towards earnest money with certain period, altogether was paid being 10% of total sale consideration. The purchaser however could not pay the balance amount within the stipulated period the sale could not be executed. The seller, therefore, did not return the earnest money to the purchaser. Consequently, the purchaser, as plaintiff, instituted suit for recovery from the defendant seller of the earnest money paid by him. The defendant contested the suit stating that as per the agreement, he is entitled to forfeit the amount of earnest money, if there was a failure on the part of the plaintiff purchaser in paying the balance amount. The trial court dismissed the suit holding that the defendant is entitled to retain the amount of earnest money since the plaintiff had failed to pay the balance amount before the stipulated date. Aggrieved by the judgment, the plaintiff took up the matter in appeal before the High Court. The High Court placing reliance on the judgment of the Supreme Court in *Fateh Chand va. Balkishan Dass AIR 1963 SC 1405* took the view that the seller is entitled to forfeit only a nominal amount and not the entire amount. The High Court further held that the seller can forfeit an amount out of the main amount and he is bound to refund the balance amount to the purchaser. To this extent, a decree was also passed in favour of the purchaser against the seller. It was also held that the purchaser is also entitled to interest @12% per annum from the date of payment of earnest money till the amount is paid.

The Supreme Court held that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated in the contract. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply.

The Supreme Court further held that the forfeiture clause in the present case was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, "earnest" is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause that militates against the clauses extracted in the agreement. Therefore, the seller was justified in forfeiting the amount as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and consequently, the seller is entitled to forfeit the entire deposit. Consequently, the appeal is allowed.

Satish Batra vs. Sudhir Rawal (2013) 1 SCC 345

3. Right to Privacy vis-a-vis Right to Information.– Personal information seeking information mostly found place in R-3's income tax returns – Held, such information constituted personal information and is exempted from disclosure under

S. 8(1)(j) - Right to Information Act, 2005 – S. 8(1)(j)

In the present case the question arose as to whether the Central Information Commissioner acting under the Right to Information Act, 2005 was right in denying information regarding the third Respondent's personal matters pertaining to his service career and also denying the details of his assets and liabilities, movable and immovable properties on the ground that the information sought for was qualified to be personal information as defined in clause (j) of section 8(1) of the RTI Act.

The petitioner submitted an application before the Regional Provident Fund Commissioner (Ministry of Labour, Government of India) calling for various details relating to the third respondent, who was employed as an Enforcement Officer in the Sub-Regional Office, Akola, now working in the State of Madhya Pradesh. As many as 15 queries were made to which the Regional Provident Fund Commissioner, Nagpur gave the reply. Aggrieved by the said order, the Petitioner approached the CIC. The CIC passed the order and held that the information which has been denied to the Petitioner essentially falls in two parts – (i) relating to the personal matters pertaining to his service career; and (ii) his assets and liabilities, movable and immovable properties and other financial aspects. And this information qualifies to be the 'personal information' as defined in clause (j) of section 8(1) of the RTI Act and the appellant has not been able to convince the Commission that disclosure thereof is in larger public interest. The CIC, after holding so directed the second respondent to disclose the information at particular paras to the petitioner within certain period and information sought for with regard to the other queries did not qualify for disclosure.

Aggrieved by the said order, the petitioner filed writ petition which was dismissed. The matter was taken up by way of the Letters Patent Appeal before the Division Bench and the same was dismissed. Against the said order the Special Leave Petition was filed before the Supreme Court.

The Supreme Court held that the performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest and on the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. The details disclosed by person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of section 8(1) of the RTI Act. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right. The details called for by the Petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment, etc. are qualified to be personal information as defined in clause (j) of section 8(1) of the RTI Act. The petitioner in the instant case has not made out a *bona fide* public interest in seeking information; the disclosure of such information would cause unwarranted invasion of privacy of the individual under section 8(1)(j) of the RTI Act. Therefore, of the view that the petitioner has not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, the petition was dismissed

Girish Ramchandra Deshpande vs. Central Information Commissioner & Ors. (2013) 1 SCC 212.

4. Complaint of dishonour of cheque – Need not necessarily be signed by complainant – Negotiable Instruments Act, 1881, S. 138

The appeal before the Supreme Court was filed against the judgment passed by the High Court whereby the Division Bench held that the complaint under section 138 of the Negotiable Instruments Act, 1881 without signature is maintainable when such complaint was subsequently verified by the complainant. The appellants accused in Criminal Complaint for the offence punishable under section 138 read with sections 141 and 142 of the Act. Respondent No. 3 i.e. company which has alleged to have issued cheques to Respondent No. 1. The Respondent No. 1 is the complainant and the manufacturers of Partially Oriented Yarn and other textile goods. From time to time, Respondent No. 3 used to place orders for the supply of POY to respondent No. 1 and had issued cheques for the payment of the same. The aforesaid cheques were deposited by the complainant and were returned by the Bank with the remark "exceeds arrangement". Pursuant to the same Respondent No. 1 issued a notice to the appellants and demanded the aforesaid amount for which they replied that they have not received any statement of accounts maintained by the complainant regarding the transactions with the accused. In addition to the same, Respondent No. 3 made various claims for the rate of difference, discounts etc., in respect of the transactions, however, Respondent No. 1 filed complaint under section 138 read with sections 141 and 142 of the Negotiable Instruments Act, Metropolitan Magistrate recorded the verification statement and issued summons against the appellants and Respondent No. 3 herein. The appellants preferred an application before the Metropolitan Magistrate for recalling the process issued against them. By order, the Metropolitan Magistrate dismissed the said application. Challenging the said order, the appellants and respondent No. 3 herein filed an application in the court of Session for Greater Bombay which was dismissed by Sessions Judge as not maintainable. By order the Metropolitan Magistrate dismissed the complaint and acquitted the accused persons. Challenging the acquittal of the accused persons, Respondent No. 1 herein-the complainant filed appeal before the High Court, Single Judge. The learned Single Judge by order referred two points for consideration by the larger Bench viz., (1) In the matter of complaint for the offence punishable under section 138 of the Act whether the complaint without the signature of the complainant, in spite of verification of complaint, is "non-entia" and whether no prosecution can lie on such complaint?; and (2) If answer to point No. 1 is negative then whether it is a mere irregularity and it can be cured subsequently and whether such subsequent amendment would relate back to the date of filing of the complaint or whether it would hit by the Law of Limitation.

By the impugned common judgment the Division Bench of the High Court, disposed of the matter by answering Point No. 1 in the affirmative holding that the complaint under section 138 of the Act is maintainable and when such complaint is subsequently verified by the complainant and the process is issued by the Magistrate after verification, it cannot be said that the said complaint is "non-entia" and the prosecution of such complaint is maintainable. Further, it was held that since the answer to Point No. 1 was in affirmative, it was not necessary to decide Point No. 2 and directed to place the appeals for deciding the same on merits. Aggrieved by the said decision, the appellants have filed the Special Leave Petition before the Supreme Court.

The Supreme Court held that the complaint of dishonour of cheque need not necessarily be signed by complainant. The only requirement that S. 142 provides is that the complaint must

necessarily be in writing and the complaint can be presented by the payee or holder in due course of the cheque. The definition of complaint as stated in section 2(d) of Criminal Procedure Code provides that the same needs to be in oral or in writing. The non obstante clause in section 142(a) is restricted to exclude two things only from the Code i.e. (a) exclusion of oral complaints and (b) exclusion of congnisance on complaint by anybody other than the payee or the holder in due course. None of the other provisions of the Criminal Procedure Code are excluded by the said non obstante clause. The Magistrate is therefore required to follow the procedure under section 200 of the Criminal Procedure Code once he has taken the complaint of the payee/holder in due course and record statement of the complainant and such other witnesses as present at the said date. Here, the Code specifically provides that the same is required to be signed by the complainant as well as the witnesses making the statement. Mere presentation of the complaint is only the first step and no action can be taken unless the process of verification is complete. The Magistrate thereafter has to consider the statement on oath, that is, the verification statement under section 200 and the statement of any witness, and then decide whether there is sufficient ground to the accused for non-signing the complaint as the statement made on oath and signed by the complainant safeguards the interest of the accused. Apart from the above writing does not presuppose that the same should be signed. This becomes clear when S. 2 (d) of Criminal Procedure Code is contrasted with provisions such as Ss. 61, 70, 154, 164, 281 of Code. A perusal of these sections show that the legislature has made it clear that where it required a written document to be signed, it should be mentioned specifically in the section itself, which is missing both from section 2(d) of Criminal Procedure Code as well as section 142 of Act. Even General Clauses Act, 1897 too draws a distinction between writing and signature and defines them separately. If the legislature intended that the complaint under the Act, apart from being in writing, is also required to be signed by the complainant, the legislature would have used different language and inserted the same at the appropriate place.

The Supreme Court further held that as per various provisions of the Act and the Code, the complaint under section 138 of the act without signature is maintainable when such complaint is verified by the complainant and the process is issued by the Magistrate after due verification. The prosecution of such complaint is maintainable and the Supreme Court agrees with the conclusion arrived at by the Division Bench of the High Court. The appeal was dismissed.

Indra Kumar Patodia & Anr. vs. Reliance Industries Ltd. & Ors. AIR 2013 Supreme Court 426

5. Probate of Will – In probate proceedings, question of title to property cannot be gone into – Only issue in probate proceedings is genuineness and due execution of Will – Succession Act, 1925, S. 276

This appeal was under section 299 of the Indian Succession Act, 1925 is directed against the judgment passed by the District Council Court in Probate Misc. Case rejecting the application filed by the appellant for probate of the Will executed by the appellant's father.

The appellant filed an application seeking probate of a Will executed by her father, in the District Council Court, Shillong, which contending that by the said Will her father bequeathed the property belonging to him in her favour, in presence of the witnesses and when he was in the disposition state of mind. The said proceedings was contested by the petitioner by fraud and misrepresentation

of facts. It has also been pleaded that the testator did not have any right whatsoever to execute the Will as the property sought to be bequeathed is an ancestral property of Rymbai clan of Satisohpen descended from the Late Ka Bei Rymbai and not the self acquired property of the testator and as such he does not have the right to bequeath the property by means of a Will. It has also been contended that late H. C. Rymbai, the father of the appellant who was merely managing and looking after the property on behalf of the Rymbai clan being the surviving elder uncle, has converted the patta in his name fraudulently without the consent of Rymbai clan, thereby, converting the ancestral property as his own, which is absolutely illegal and against the Khasi custom of inheritance.

The appellant in support of her claim for grant of the probate while examined six witnesses including herself and proved a number of documents including the Will the respondents examined three witnesses including the Respondent No. 1 herself and also proved a number of documents. The District Council Court thought answered the issue No. 3 in favour of the appellant by holding that the valid execution of the Will could be proved by the Appellant, answered the issue Nos. 7 and 8 against the appellant by holding that the property bequeathed by the father of the appellant being not his self acquired property but the ancestral property of Rymbai clan of Satisohpen, the appellants is not entitled to probate of the Will. The issue Nos. 9 and 10 were also decided against the appellant. Consequently, the learned Judge has rejected the application seeking probate of the Will. Hence, the appeal before High Court.

The High Court held that the District Council Court, is competent to entertain an application seeking probate of a Will executed by a Khasi and Jaintia under the provisions of 1984 Act, who is to follow the procedure as laid down in Part-IX of the 1925 Act in the proceedings initiated before him for probate of the Will executed under the 1984 Act. The District Council Court, therefore, is a probate Court. Thought the probate of a Will is a civil proceedings, in contemplation of law it is solely an inquiry as to the validity of a certain paper writing whether it is or is not the last Will and testament of the deceased and the judgment or the decree in such case passed by the probate is either that it is or is not such a Will. The probate proceeding thus is a proceeding to establish the validity of the Will and not a regular suit, and its inquiry is limited to the question as to whether the document to be forwarded as the last Will and testament of the deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate Court. In view of the aforesaid discussion, the judgment by the Probate Court is set aside. The probate of the Will and the testament is granted. The High Court kept open to the parties to approach appropriate Civil Court having jurisdiction over the matter for declaration of right, title and interest over the land in question, where the probate would be admitted into evidence by the Civil Court to decide the suit for title. Grant of probate, however, cannot be decisive for declaration that the suit property was the self-acquired property of the testator. The appeal was allowed by the High Court.

Ka Riverretta Diengodoh vs. Ka Trially Sara Rymbai AIR 2013 Guwahati 24

CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

TIME TO TAKE RISKS

The month of April bought a fair amount of positivity to the world. Though the fear of default by Cypress and other European economies receded, the issues were not fully addressed. As the European countries took a positive attitude and tried whole heartedly to diffuse the crisis, there was some relief. There is hardly any improvement in the European economies, but avoidance of a default, at least for the time being, has given a sentimental boost to the region. It is expected that things may not worsen in Europe, though they might not get corrected easily. The possible improvement in the economies in other parts of the world may help the European economies and improve their growth rates in the near future. Many countries in the region have taken austerity drives seriously and that may create a positive impact in the years to come. Europe may expect better days ahead.

Japan has been the dark horse for the month of April. Its currency continued to depreciate against most of the major currencies of the world thereby making its exports more viable in the global markets. The economic forecast of the country has improved and a positive growth rate of 1.6% is expected to be achieved for 2013, which may further improve in the subsequent years. The Japanese economy is likely to come out of its long slumber and it being the 3rd largest economy constituting about 8% of the global economy, any improvement therein will make a good impact on the overall growth rate of the world. For sustaining the improvement, Japan has planned a 2% inflation target in two years. However, surprisingly in the recent months, prices have dropped in the country; which is creating a concern for the economists and the Bank of Japan, the central bank of that country. If the rate of inflation becomes negative, there is a risk of the growth slowing down. Japan will try to stick to its inflation target for maintaining the growth tempo. The problem of Japan is diagonally opposite to that of India, wherein the Reserve Bank of India (RBI) is trying to reduce inflation to stimulate economic growth. Both the economies are different and both the countries are standing at different stages of economic development. Therefore, their problems as well as solutions are different. Things are expected to improve in Japan and that will help the global economy to overcome the menace of slow growth.

The US economy has continued its positive momentum by growing at 2.5% for the first quarter of 2013. Though the expectations were higher of 3%, the rate achieved is still not bad. The US is likely to continue its upward march and soon should be able to grow at 3% and above. This largest economy in the world constitutes about 22% of the global economy and a good growth therein can create wonders for the overall growth of the world economy and especially for the developing countries. The sentiment in US has been fluctuating on the back of mixed news. Every piece of news is getting factored into sentiment, which is making the stock markets volatile. In today's world of readily available excessive information, this volatility is

inevitable. The world will have to live with this problem and it is better to live with it than to live with uncertainty.

If the US economy improves further, the immediate beneficiaries are going to be China and the Asia Pacific countries. Substantial goods are sourced by the US from China and it in turn mainly sources the raw material requirements from the Asia Pacific countries and Australia. The increased demand and the improved sentiment in the US will be a positive development for the Asian economies and consequently growth can improve. China has already started doing better in the last few months and there is no reason for that country to lose momentum. The overall developments, which are currently taking place in the world, are positive for better growth in the months to come.

On the back of improved sentiments in the world, the sentiment in the Indian economy seems to have taken a positive turn in the month of April. Though nothing much has changed in terms of introduction of reforms and increase in foreign direct investment, the outlook has improved with better expectations. The fear of political instability has receded to an extent and that has added to the positivity. Since the last few months, the Government has been advocating that the worst is over for the economy but the statistical data was apparently not supporting this claim. Now it seems that more and more people have started believing that the Indian economy has turned the corner and things are likely to be better in the months to come. As per the latest report, inflation seems to have come under better control and has made the people as well as the Government happy. The lower inflation will give the policy makers some room to reduce the Repo and Reverse Repo rates and probably to cut Cash Reserve Ratio (CRR). This reduction will pave way for the banks to reduce the interest rates. High interest rate is one of the major hurdles for the Indian businesses to improve their performance for the last numbers of quarters. Reduction in interest rates will increase their profitability, which can give them more investable surplus. Lower interest rates will increase the viability of new projects and improve the profitability of the existing projects. In effect, it can improve the production of goods and services thereby leading to higher economic growth. But for political instability, which can crop up any time, the Indian economy seems to be on the track of recovery. The positive sentiment which is just being sniffed by the Government and the economists has not yet been recognised by the Indian investors and consumers to that extent. But it may only be a question of time before they start feeling the spring and come out of their shells.

The global stock markets have given a reasonably good performance in the month of April. The stocks markets in the US and Japan are around their highest levels. As these countries have very low interest rates, the yield on deposits therein is very meagre. Therefore, on the back of positive sentiment, more funds have flown to the stock markets, which have led them to the current high levels. The current inflation rate in these countries is low and it will continue to remain so for at least some more time. This will give rise to better opportunities for the investors to make money in those stock markets. If the sentiment remains the same, the party may continue till the rates of interest starts hardening again. Unless some negative event of wide global repercussion happens, the sentiment is likely to remain strong and the global stock markets will continue to grow. Falling commodity prices and falling cost of energy will add fuel to the growth and so to the positive movement of the stock markets in those countries. However, investors need to be careful while investing in the stocks of multinational companies, which are headquartered in these countries. Though some of these companies will make profit in their home countries, their financials can get affected due to slow growth or losses in their operations in some other part of the world. Opportunities do exist and risks are a bit less.

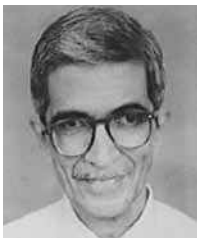
The Indian stock market continues its upward journey. In fact, in spite of expectations of a difficult last quarter of F.Y. 2012-13, the stock prices have improved. The results declared by technology companies, private banks and many other large companies are better than expected. Reducing prices of commodities and raw materials are contributing to the profitability. That has given a ray of hope to the Government as well as to the investors. Lots of results are yet to be declared and therefore it would not be appropriate to conclude that the quarter will be reasonably positive for the Indian corporates,

but at least the initial fears seem to have subsided. The current rise in the stock prices is more restricted to the large cap and blue chip companies and it is substantially aided by the increased inflow of foreign funds in the Indian equity markets. The participation of domestic investors and especially the retail investors seems to be limited. Therefore, the rise is mainly restricted to shares of A group and large cap B group companies as categorised in stock markets. The mid caps and small caps have not adequately participated in the gains. There is also a fear that these companies are highly leveraged and the interest outflows will mar their profitability. When the interest rates start reducing, it will only be a question of time for these companies to start gaining momentum. Stocks of many small and mid cap companies are available at reasonable prices as the fancy of investors in those counters has vanished. However, if the global economy continues to improve, the investors will return to those stocks thereby giving handsome gains to the smart investors who invest in them now. It is very difficult to find a multi bagger blue chip stock over a horizon of 2-3 years, but such stocks can be identified mostly in mid cap and small cap segments. Smart investors should start searching for such pearls in today's market.

Reduction of inflation in the Indian economy has improved the possibility of easing of bank rates in the near future. It is very likely that the interest rates will ease sooner than later. The Government is already lobbying with the RBI for such reduction and that should bear fruits. As soon as the easing happens, the interest rates on deposits will start falling. Though the banks may not reduce the lending rate in a proportionate fashion and try to retain more profits for themselves, over a few months, the reduction will become inevitable for them due to the economic as well as regulatory pressures. Therefore, investments in deposits for long tenure are advised. Investment in quoted bonds as well as debt oriented mutual fund schemes and sovereign bond fund schemes may turn out to be prudent as they will log some capital appreciation in a few months, which will add to their net yield. This horizon of opportunity may not last long and the investors need to take decisions quickly.

Gold continues to take a beating in the global markets and consequently in the Indian markets. This most sought after precious metal, which was the darling of the investors over the last decade has taken a big hit and it is not likely to reverse the losses in the immediate future. In fact, as per the opinion of many experts, it may have a further downside of 10-15% over the next six months. Gold has already tumbled by around 20% from its recent peak and the tumble has been sudden, which has hurt investors across the globe. However, the woes of gold have not come to an end and its prices may suffer further, at least in the short run. As the global economy has started improving, the need for holding gold for safety has reduced. Therefore, gold is likely to lose its weightage in the portfolio of many savvy investors, resulting in pressure on its price. Lots of investors have invested in the ETF of gold. Those investors are likely to book profit or get out of the investment fearing further depreciation. The likely sale by Cypress of a part of its gold reserves to repay debts may also increase the supply of gold in the global markets. There may also be pressure on many other European economies to sell gold. All these possibilities can add to the supply of the precious metal bringing down its price and making investment therein lackluster. Silver generally moves in tandem with gold, though it has substantial industrial use. The jerk in the price of gold has also disturbed the equilibrium of silver price and the commodity has dropped substantially. The downside may not be over yet and so the investors need to be cautious. At the current exchange rate of the Indian Rupee against the US Dollar, investment in gold can be considered only at around ₹ 22,000/- for 10 grams and investment in silver can be considered at a rate below ₹ 38,000/- per kg.

The overall investment sentiment remains positive in the world and India is no exception. There are enough indications that the positivity can continue for months or even years to come. Therefore, investors can afford to be more adventurous in their approach and their allocation to riskier asset classes, which can give better results in good times. The smart and savvy risk takers may be rewarded in the near future.



V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Facts & Query

Q.1 *Mr. A invested in a residential house property under construction in April 2010 by making initial booking payment of ₹ 2 lakhs. He sold his existing residential property in May 2011 and earned a long term capital gain of ₹ 20 lakhs. Out of this sale proceeds he invested ₹ 18 lakhs in August 2011 towards full & final payment for the new house property which he had booked in April 2010. Is Mr. A eligible for exemption u/s. 54 for whole Long term capital gain of ₹ 20 lakhs?*

Ans. If the sale and the purchase are within the time limits, when, the residential premises sold and when a new premises is purchased is immaterial, and when purchase payment is made in advance or otherwise is immaterial. As such in the case of the querist it is entitled to the benefit of investment under S.54 of the Act.

Q.2 *Mr. A sold his residential property in May 2011 and earned a long term capital gain of ₹ 20 lakhs. Out of this sale proceeds he invested ₹ 10 lakhs in July 2011 towards initial booking amount in an under construction house property and the balance amount he deposited in capital gain account. In Jan., 2013 he paid a further sum of ₹ 10 lakhs towards this new property and he was supposed to get its possession by April 2013 but due to some legal issues of builder the construction of the building was stayed and could get complete only in April 2014 and Mr. A got the possession in April 2013 after making balance payments. Is Mr. A eligible for exemption u/s. 54 for whole long term capital gain of ₹ 20 lakhs?*

Ans. In the case for no fault of the querist, the completion of the construction and handing over the possession of the property was delayed. As such as booking of the flat was in time and substantial payment of consideration for purchase was in time, the querist will be entitled to the benefit of investment under S. 54 of the Act.

Q.3 *Mr. A had invested in fixed deposit worth ₹ 10 lakhs for 5 yrs. in April 2003 for which he had not accounted for in his books and accrued interest was not offered while filing income tax returns. On maturity he again renewed it for further 2 years along with interest in April 2008. In April 2010 he deposited whole maturity proceeds in his accounted bank account and offered interest for only 2 years as interest income under "Other sources Income" head and rest amount was shown as addition to capital. In scrutiny case can Assessing Officer make addition of whole proceeds as undisclosed income? Or Mr. A can argue for non addition of fixed deposit amount till April 2008 on the basis of copy of FD receipt which shows the date of investments in the Asst. year prior to previous 6 Asst. years?*

Ans. S. 149 of the I.T. Act, 1961, provides for time limit for issuance of notice for assessment of escaped income under the provisions of S. 147 of the Act.

S. 149. (1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) [or clause (c)];

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts

to or is likely to amount to one lakh rupees or more for that year;]

As we see from the above provision, the time limit for reassessment of income of the escaped income is 6 years, that is assessment of escaped income can be for 6 years and one cannot make an assessment beyond 6 years.

Now in case of the querist, the deposit was made in the year in 2003 as such, ITO cannot assess the said deposit in the year 2010 or later on. Even the interest due on such deposit will be for 6 years and which was due before that, cannot assess as escaped income.

Q.4 *A Private Limited company invested ₹ 10 lakhs in an under construction commercial property. But after 6 months builder changed the policy and informed that it cannot transact with corporate and only individuals can continue. Private limited company by passing a resolution transferred the rights to one of its directors who was also a share holder carrying more than 10% of voting rights. Will it amount to deemed dividend in the hands of that director if he repays the investment amount to company after 3 months of this transfer?*

Ans. The relevant provisions for our purpose is s. 2(22)(e) which is as under:

S. 2(22)(e) 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 the 31st day of May, 1987, by way of advance or loan 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, or to any concern in which such share holder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] 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 ;

A loan means "a lending, delivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it with or without interest". *(Isaacson vs. House 216, Ga 698; 119 SE 2D, 113, 116).* A loan is something quite different from a debt. For a loan there must be a lender, a borrower, a thing loaned. A loan contracted no doubt creates a debt but there may be a debt without contracting a loan – *Lakhmichand Muchhal vs. CIT (43 ITR 315); Bombay Steam Navigation Co. Pvt. Ltd. vs. CIT - 56 ITR 52(SC); CIT vs. Saurashtra Cement & Chemical Industries Ltd. – 101 ITR 502 (Guj.).*

Now the amount in question must be by way of loan or by way of advance.

In our case it was neither by way of loan or by way of advance. Out of necessity the contract for purchasing the house property was transferred from the company to share holder and the amount already paid by the company to the builder was paid to the company by the concerned share holder within 3 months from the date of the such transfer. As such the same does not amount to loan or advance and as such the provisions of s. 2(22)(e) are not applicable and the said payment does not constitute deemed dividend in the hands of the said share holder or in the hands of the queirst company.

Q.5 *A company pays a fixed amount of ₹ 10,000/- per month as conveyance allowance to its few employees who are on outdoor assignments in addition to their fixed salary package. It is basically towards reimbursement of conveyance expenses incurred by those employees who travel for business purposes. It is irrelevant whether they utilise entire ₹ 10,000/- or less or more than it. Whether company can claim it as a conveyance expense or it needs to be added in salary / perquisites package of the employee & TDS to be deducted on it accordingly?*

Ans. The issue of T.D.S. arises, if a particular amount is paid to the employee by the employer by way of salary or by way of perquisite, which is taxable as income from salary in the hands of the said employee.

In our case a travelling allowance is paid to meet the travelling expenses which the employee has to incur, in course of the employment wherein he has to travel to various places for the purpose of the company employer. Such payment is on estimated expenditure which he has to incur and as such the same does not constitute income, still less as salary income and as such no issue of T.D.S. arises.


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 **16th April** till **8th May, 2013** and also some of the important future events which are as under –

I Admission of New Members

With the efforts of office of the chamber under guidance of Membership & EOP Committee, the Chamber could make following new members in the Managing Council meeting held on 26th April, 2013.

Life Membership

1	Shri Daris Daniel	Advocate	Thane
2	Shri Hakani Rahul Kirit	Advocate	Mumbai
3	Shri Patil Kalpesh Magan	CA	Jalgaon
4	Shri Shah Shreyas Niranjan	CA	Mumbai
5	Shri Shah Pathik Bharat	CA	Mumbai
6	Shri Luthia Rajiv Jaichand	CA	Mumbai
7	Shri Mehta Kunal Mahesh	CA	Mumbai
8	Shri Shenoy Radhakrishna	CA	Thane
9	Shri Aiyer Ananthasivan Gopalakrishnan	CA	Mumbai
10	Shri Patel Vispi Temurasp	CA	Mumbai
11	Shri Phatarphekar Karishma Rohan	CA	Mumbai
12	Shri Shah Sanjay Nathalal	CA	Mumbai
13	Shri Ramanand Balasubramanian	CA	New Delhi
14	Shri Panchal Bharat Bhogilal (Tran. Ord. to Life)	ITP	Mumbai
15	Shri Shah Hiten Sanmukhlal	CA	Mumbai
16	Shri Kothari Nilesh Motilal	CA	Mumbai
17	Shri Mehta Mitesh Manoharlal	CA	Mumbai

Ordinary Membership

1	Mrs. Suba Minal Rasesh	CA	Mumbai
2	Shri Shah Kalapi Chetan	CA	Ahmedabad
3	Mrs. Nankani Suchita Ramesh	CA	Hardwar
4	Ms. Japee Foram Bharat	CA	Mumbai
5	Shri Chheda Dhiren Nagji	CA	Mumbai
6	Shri Banwat Siddharth Lalit	CA	Mumbai
7	Shri Bahua Ramnik Bhanji	CA	Mumbai
8	Shri Shah Hemal Kishore	CA	Thane
9	Shri Mohan Manish	CA	Delhi
10	Shri Gandhi Jitendra Birdichand	CA	Jalgaon
11	Shri Bhat Ganesh Krishna	CA	Mumbai
12	Shri Gang Abhishek Virendra Singh	CA	Indore
13	Shri Sagade Jayani Sharad	Advocate	Mumbai
14	Dr. Basu Paritosh Chandra	CA	Mumbai
15	Shri Saiya Nilesh Kalyanji	CA	Mumbai
16	Shri Chapekar Prashant Prafulla	ITP	Mumbai
17	Shri Parmar Pramod Ramesh	CA	Mumbai
18	Shri Surathi Kalpesh Jaiprakash	CA	Mumbai
19	Shri Bagasrawala Shabbir Sirajuddin	CA	Mumbai
20	Shri Thacker Prashant Jagdish	CA	Mumbai
21	Shri Chawla Jayesh Naresh	CA	Mumbai
22	Shri Newatia Vivek Bal Kishan	CA	Kolkata
23	Shri Naredi Pradeep Sitaram	CA	Pune
24	Shri Ganatra Gaurang K.	CA	Thane
25	Shri Kulkarni Nagesh Narayan	ITP	Kolhapur
26	Shri Shetty Dinesh Sadu	CA	Mumbai
27	Shri Kasar Mallappa Basappa	CA	Mumbai
28	Shri Pandya Prakash Karunashankar	ICSI	Mumbai
29	Shri Shet Jagdish Dattatraya	CA	Mumbai
30	Shri Sutaria Ajit Prabhudas	CA	Mumbai
31	Shri Upadhyaya Rakesh Purshottamdas	CA	Mumbai
32	Shri Thakkar Tushar Vishanji	CA	Mumbai

33	Ms. Walanj Sanjyoti Pralhad	CA	Mumbai
34	Shri Shah Ashok Mansukhlal	CA	Mumbai
35	Ms. Kanetkar Vinita Suresh	CA	Mumbai
36	Shri Chheda Jayesh Ramniklal	CA	Mumbai
37	Shri Kumar Sarwan Prakash Chand	CA	Bengaluru
38	Shri Ahemad Furquan Ateeque Ahmed	CA	Mumbai
39	Shri Gandhi Ketan Pankaj	CA	Mumbai
40	Shri Renuka Vishnuprasad Ramlal	CA	Mumbai
41	Ms. Mittal Divya Archit	CA	Delhi
42	Ms. Parmar Roshni Sahdevkumar	Advocate	Valsad
43	Mrs. Desai Shruti Mitesh	Advocate	Valsad
44	Shri Otwani Ravi Ramesh	ITP	Thane
45	Shri Thakkar Rajesh Popatlal	CA	Mumbai
46	Shri Jain Chatarlal Nanalal	CA	Mumbai
47	Shri Vithlani Hitendra Arunbhai	CA	Mumbai
48	Shri Taggerse Vivekanand Datta	Advocate	Mumbai
49	Mrs. Bhuta Kinjal Vishal	CA	Mumbai
50	Shri Chulani Kausthub Jackie	CA	Mumbai
51	Shri Mulgaokar Sachin Prasan	CA	Mumbai
52	Shri Raichura Sitansh Purshottam	CA	Mumbai
53	Shri Singh Ram Anugrah Ram Bahal	CA	Mumbai
54	Shri Chakraborty Suman Satyendranath	CA	Mumbai
55	Shri Sharma Anil Dindayal	CA	Mumbai
56	Shri Kumar Vaidyanath Balan	CA	Mumbai
57	Shri Sabharwal Manuj Vinodkumar	CA	Delhi

Student Membership

1	Mrs. Modi Pankti Vishal	B.com.

II. Past Events

1 ALLIED LAWS COMMITTEE

The **Study Circle Meeting** was held on 16th April, 2013 on the Subject ***"FEMA provisions in respect to Inbound and Outbound Investments in Real Estate"***. The meeting was addressed by Shri D.T. Khilanani.

2 DIRECT TAXES COMMITTEE

The **Intensive Study Group Meeting** was held on 18th April, 2013 on the subject ***"Recent Important Decisions under Direct Taxes"***. The meeting was addressed by CA. Jagdish Punjabi.

3. INTERNATIONAL TAXATION COMMITTEE

a. The Intensive Study Group on International Taxation meeting was held on 30th April, 2013 on the subject **"Treaty Entitlement – Specific Issues".** The Meeting was lead by CA Ganesh Rajagopalan and CA Rutvik Sanghvi.

4. RRC & PR COMMITTEE, MEMBERSHIP & EOP COMMITTE AND JOURNAL COMMITTEE

The Chamber launched its e-Journal & Revamped Website on Friday, 19th April, 2013, on the auspicious day of Ramnavmi. The RRC and PR Committee jointly with the Membership and EOP Committee & Journal Committee organised a Musical Orchestra Show **"Surila Safar….Chamber ke Sang"** at the Mysore Auditorium at King's Circle, Matunga for the CTC members, their family and friends. The songs rendered by the Orchestra "Madhu Melodies" (Mr. Madhusudan Vyas) were very much enjoyed by the audience. The programme received a great response. It was attended by 161 members and their families.

The e-Journal and the revamped Website was inaugurated by the President Mr. Manoj Shah, while the Vice President, Mr. Yatin Desai explained various features of the newly revamped website and e-journal.

5. STUDY CIRCLE & STUDY GROUP COMMITTEE

a. The **Study Group Meeting** was held on 22nd April, 2013 on the Subject "***Recent Decision under Direct Taxes***". The meeting was led by Shri Keshav Bhujle, Advocate.

b. The **Study Circle Meeting** was held on 25th April, 2013 on the Subject ***"Rectification, Refund and Tax credits in relation to e-filing of Tax Returns"***. The meeting was led by CA Mahendra Sanghvi.

III. Future Events

1. 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 eminent faculties.

2. 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 member is ₹ 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.

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 that being planned to include are: Treaty Entitlement, Inbound & Outbound Tax Structuring; Royalty, FTS, etc.

We request you to take part of this unique in-depth study on International Taxation. Members can join the study group by making a payment of ₹ 1,124 for the period April, 2013 to March, 2014 at the Chamber's office.

3. JOURNAL COMMITTEE

The Committee has planned to bring special story **"Recent Controversies in Income-Tax Assessments"** in the forthcoming issue for the month of June, 2013.

4. MEMBERSHIP & EOP COMMITTEE

Stock exchanges are essential part of today's financial market. Hence, it has become essential to be aware about the activities of stock exchange, its role in today's market and do's & don'ts of share market, with a view to help the students the half day Students workshop is organised on 24th May, 2013 at National Stock Exchange, BKC.

5. STUDY CIRCLE & STUDY GROUP COMMITTEE

i) Study Group Meeting is scheduled on 28th June,2013 on the Subject ***"Recent Decision under Direct Taxes".*** The meeting will be led by Shri Nitesh Joshi, Advocate.

ii) Study Circle Meetings is scheduled

a) on 11th June, 2013 on the subject ***"Taxation of Builders & Developers"***. The meeting will be lead 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 lead by Shri Mandar Vaidya, Advocate. The meeting is in continuation of earlier meeting held on 31st October, 2012 and 17th January, 2013.

6. NOTICE OF ELECTION

Please refer CITC News Vol. No. XIII No. 7 of May, 2013.

7. RENEWAL NOTICE-2013-14

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 falls 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/-	₹ 1,461/-
2	The Chamber's Journal Subscription (Life Members)	₹ 550/-	–	₹ 550/-
3	The Chamber's Journal Subscription (Non-Members)	₹ 1,000/ -	–	
4	Associate Membership	₹ 2,000/-	₹ 247/-	₹ 2,247/-
5	Student Membership Fees	₹ 250/-	₹ 31/-	₹ 281/-
6.	Study Group (Direct Taxes)	₹ 1,250/-	₹ 155/-	₹ 1,405/-
7.	Study Circle (Indirect Taxes)	₹ 700/-	₹ 87/-	₹ 787/-
8.	Study Circle (International Tax)	₹ 1,000/-	₹ 124/-	₹ 1,124/-
9.	Study Circle (Allied Laws)	₹ 700/-	₹ 87/-	₹ 787/-
10.	Study Circle (Direct Taxes)	₹ 700/-	₹ 87/-	₹ 787/-
11.	Study Circles **(Direct Tax & Allied Laws Combined)**	₹ 1,000/-	₹ 124/-	₹ 1,124/-
12.	Self Awareness Series	₹ 350/-	₹ 43/-	₹ 393/-
13.	Intensive Study Group on Direct Tax	₹ 1,000/-	₹ 124/-	₹ 1,124/-

(*) The amount of Service Tax and Cess may change if there is change in the rate.

(For Enrolment and further details of all the Future Events, please refer to the May, 2013 issue of CITC News or visit the website www.ctconline.org)

INTERNATIONAL TAXATION COMMITTEE

Chairman : Hinesh Doshi **Vice-Chairman** : Paresh Shah

Convenors : Devendra Mehta, Rutvik Sanghvi

INTERNATIONAL TAXATION
– *A Compendium*

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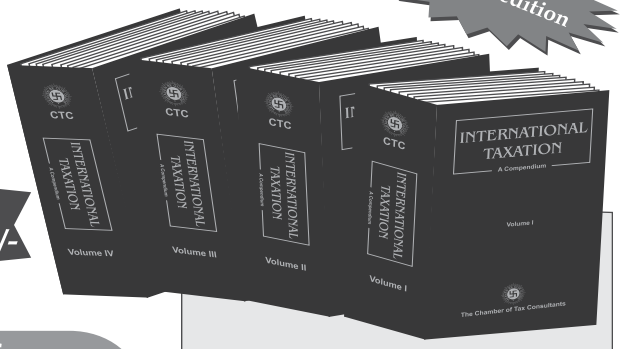

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- Contains Industry specific articles such as Taxation of Telecom Sector, Broadcasting & Telecasting industry, Electronic Commerce, Foreign Banks, Offshore Funds, FIIs, etc.
- Contains Articles on FEMA and other related Domestic Laws such as PMLA & FCRA, various Anti-Avoidance Measures and other specialised articles.
- Balanced collection of Articles by recognised experts in the field, by young as well as eminent professionals and also by Revenue Officials and Senior Ex-Revenue Officials.

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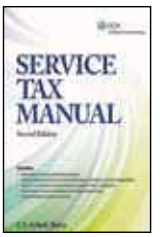

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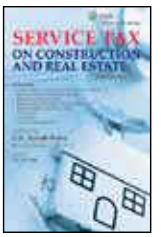

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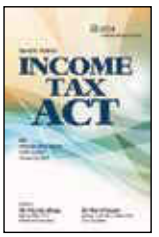

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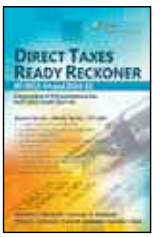

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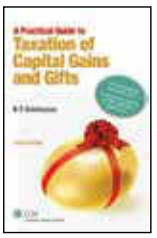

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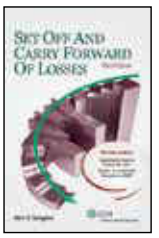

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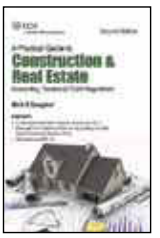

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