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A Monthly Journal of
The Chamber of Tax Consultants

The Chamber's Journal

November - 2013

Vol . II | No. 2

Your Monthly Companion on Tax & Allied Subjects

ESTATE AND SUCCESSION PLANNING

Wealth is built to be enjoyed and to be passed on to the next generation. This is broadly achieved by setting up trusts. The concept of trusteeship has meanwhile now extended itself to cover business ownership too. The introduction of corporate social responsibility and the growing presence of NGOs and other non-profit organisations formally recognise that business is to be for the benefit of not only the promoters and shareholders but also society at large

(Read further from page 17 onwards)

Other Contents

THE CHAMBER OF TAX CONSULTANTS

HEAVEN BE OUR GUIDE

The Chamber's Journal
ESTATE AND SUCCESSION PLANNING
November - 2013 Vol . II | No. 2

TRANSFORMING INFORMATION INTO KNOWLEDGE

CORPORATE MEMBERS COMMITTEE

Two days training workshop on The Making of a CFO jointly with Indian Merchants' Chamber held on 11th & 12th October, 2013 at IMC.

Mr. D. D. Rathi, Director, Grasim Industries inaugurating the workshop by lighting the lamp. Seen from L to R : Mr. Deepak Doshi, Chairman, SME Committee, IMC, Ms. Deena Mehta, Chairperson, Capital Market Committee, IMC, Mr. Prabodh Thakkar, Vice President, IMC, CA Yatin Desai, President, CTC, CA Vipul Choksi, Chairman, Corporate Members Committee, CTC.

CA Yatin Desai, President welcoming the Guests & participants. Seen from L to R : CA Paras Savla, Vice President, CTC, CA Vipul Choksi, Chairman, Corporate Members Committee, CTC, Mr. D. D. Rathi, Director, Grasim Industries, Faculty, Ms. Deena Mehta, Chairperson, Capital Market Committee, IMC, Mr. Prabodh Thakkar, Vice President, IMC, Mr. Deepak Doshi, Chairman, SME Committee, IMC.

CA Vipul Choksi, Chairman, Corporate Members Committee, CTC addressing the participants. Seen from L to R : CA Paras Savla, Vice President, CTC, Mr. D. D. Rathi, Director, Grasim Industries, Faculty, Ms. Deena Mehta, Chairperson, Capital Market Committee, IMC, Mr. Prabodh Thakkar, Vice President, IMC, Mr. Deepak Doshi, Chairman, SME Committee, IMC.

Mr. D. D. Rathi, Director, Grasim Industries giving key note address. Seen from L to R : CA Paras Savla, Vice President, CTC, CA Vipul Choksi, Chairman, Corporate Members Committee, CTC, CA Yatin Desai, President, CTC, Ms. Deena Mehta, Chairperson, Capital Market Committee, IMC, Mr. Deepak Doshi, Chairman, SME Committee, IMC.

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CA M. M. Chitale, Past President, ICAI

Mr. Pradip Shroff, CEO Coach Member CFI Coaching Network

Mr. Sudhir Valia, Director, Sun Pharma Ltd.

CONTENTS

Vol. II No. 2
November – 2013

The Chamber of Tax Consultants
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The Chamber's Journal

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Editorial

Wishing you all a very happy Dipawali and prosperous and peaceful Samvat 2070. The markets had warmed up to welcome the New Year. I am fascinated with the flickering flame of the small earthen lamp which glows without bothering about enormous darkness around it. By the time this issue reaches, you may have forgotten about the vacation you had during the Diwali festival.

George H. Hepwork said "my ambition is not to leave behind me a pile of money for my heirs to quarrel about, but to find out what there is of interest in this world before I cross the border and begin to explore the other world". The sentiments expressed about succession maybe correct. But the same can be warded off by putting in place a proper plan of succession. We chose the topic **Estate and Succession Planning** for the Special Story of the November issue of the Chamber's Journal. Eminent professionals have contributed articles to this month's Special Story. Chamber is grateful for their support. We intend to bring out the December 2013 issue of Chamber's Journal with a Special Story on **Private Trusts**. I hope these two issues of the Chamber's Journal will provide substantial material and clarity on various issues pertaining to succession planning to the members.

I thank all the contributors of this issue for their efforts and specially CA Haresh Chheda for designing the Special Story.

K. GOPAL
Editor

From the President

Dear Readers,

On behalf of the Managing Council members of Chamber, I wish all of you a very Happy and Prosperous New Year. The Hindu New Year is the day on which Lord Krishna killed demon Narkasura. Also, in most of the Northern parts of India, it is celebrated to mark the return of Lord Rama from exile of fourteen years. I am influenced by that belief as presently I am celebrating Diwali coupled with a brief vacation at Binsar, situated in the Northern India. Binsar is a picturesque, sleepy hamlet, one of the most scenic spot in the Kumaon Himalayas at a height of 5,032 feet above sea level. Pitched at the impressive altitude of 2,420 mtrs, 95 kms from Nainital it offers a majestic view of the snow covered Himalayan Peaks, the mesmerising range of Chaukhmba, Trishul, Nanda Devi, Shivling and Panchachuli. From here on a sunny day, one can have glimpse of the holiest shrines in the Himalaya, Kedarnath, Badrinath and Gangotri. It's a fascinating spot, encircled by a vast wildlife sanctuary and many rare birds, animals and flowers. I happen to meet some of the locals and was amazed by their simplicity and contentment. One more thing, while conversing with them, I came to know that at least one member of the their family is in Indian Army. I remembered the few lines from the famous patriotic song sung by Lata Mangeshkar and written by poet Pradeep, जब देशमें थी दीवाली वो खेल रहे थे होली, जब हम बैठे थे घरोंमें वो झेल रहेथे गोली.

Entire tax paying community and tax professionals kept waiting for the extension of time for filing tax audit reports and returns. However, nothing came forward in spite of repeated representation done by Chamber and many other organisations and professional bodies. On the last day of filing e-return of income many found difficulty in uploading returns due to website being crashed several times. Many of them could not file e-return of income on 30-9-2013. This is the example that the authorities bring changes without testing robustness of the infrastructure. Only after a Writ Petition filed in Delhi High Court on 24-10-2013 CBDT notified an extension of time up to 31-10-2013.

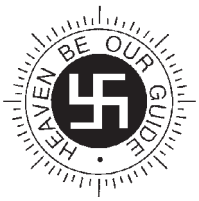
Recently, the Chamber was invited in the meeting with CCsIT, Mumbai. The Chamber along with other sister associations represented and put forward the difficulties faced by the tax payers. In a meeting it has been decided to have a rectification fortnight starting from 18th November. Nodal officers under each CCIT will be appointed to monitor the progress of the applications received for rectification, refunds and orders giving appeal effect. The DGIT (Inv) also assured that since last one year, instruction to the subordinates has been given not to use coercion on assessees to declare income during the search proceedings. Some of the other matters discussed were difficulties faced while obtaining registration u/s. 12A, certificate u/s. 197, etc.

The Chamber continued to organise various programmes for the benefit of its members. By the end of this month, assessees need to file Transfer Pricing reports (including Domestic Transfer Pricing). This year it has gained more importance due to introduction of Domestic Transfer Pricing. The Chamber received an overwhelming response to the full day conference organised on Domestic Transfer Pricing. On receiving request from the members, Study Circle and Study Group Committee has arranged two meetings, one covering nuances of Domestic Transfer Pricing and other to practically benchmarking certain transactions on a given database software. The Chamber has also arranged for database software at its library at Aayakar Bhavan which can be used by the members with prior appointment at nominal charges. It is an endeavor of the Chamber to make possible for its member to practice in this new area.

The current issue of the Journal not only has importance for the professionals but for each and every individual. The topic of the Special Story is 'Estate & Succession Planning' has a wide coverage such as Hindu Succession Act, Muslim Law, Nomination rules, Wills, etc. A special thanks to CA Haresh Chheda for designing and CA Toral Shah for co-ordinating the issue.

I once again wish all the readers a very happy, prosperous and educational new year.

YATIN DESAI
President



The Chamber of Tax Consultants

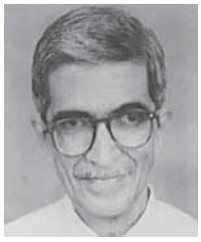
Vision Statement

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

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

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

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



V. H. Patil, *Advocate*

Ved and Vedanta

We have completed the first half part of Bhagavad Gita. As you know Bhagavad Gita has 18 chapters. Out of 18 chapters, we have by now covered 9 chapters. We have yet to cover 9 more chapters. But before proceeding further let us review and digest properly the topics already covered under, the topic of Ved and Vedanta, till now.

This serial Ved and Vedanta was started from July 2012. The reason which prompted me to start this serial was.

It is a great human tragedy that in spite of tremendous achievements of science and technology, the human civilization is on the verge of collapse in all fields of human life.

The bitter truth is that in spite of all great achievements the western, world has failed to provide the basic needs of the individuals and also of the society. The poor are becoming poorer and the rich becoming richer, at the cost of poor people and in spite of these tremendous achievements more and more people in the whole world are denied basic requirements of food, water and shelter over their heads.

It is really a paradox why the great scientific and technical achievements have not fulfilled the basic requirements of the people. The real reason is that these achievements are used to acquire and increase price based holdings, without thinking as to why they are required and for what purposes. If we realise that these achievements should not be used to increase individual holding and further individual luxuries and comforts, but they are to be used for the universal benefit of the human society, to provide to all people, the basic necessities and comforts to all individuals of the society. That is there should be an ideal combination of scientific achievements and the development of value based welfare of the society, as a whole. That is, there should be a combination of western society of price based achievements and the eastern values based outlook for the benefit and welfare of all. The result of combination of these western and eastern cultures would be an ideal remedy to all the evils like poverty and for all round progress of human races and removal of the meladies faced by humanity.

However the more tragic development in Indian society in the recent times is, under the influence of western technology and scientific achievements, we have also made tremendous progress in these fields, even overtaking the western achievements. However under the same influence of western culture, the progress in these spheres has been not used for the welfare of the society, but for one's individual benefit. As such in India also rich are becoming richer and more and more citizens of this country are going below the poverty line and more and more citizens are denied the basic necessities of life like food, clothing and shelter over their heads. This is because we the economically rich class of society and particularly the so called educated and intellectual class have ignored the basis of Indian

philosophy based on the principle of (in sanskrit) `Sarva Jan Sukhaya ! Sarva Jan Hitaya!' for the benefit of all and for the welfare of all. That is why I call it as a great Indian tragedy of the so called modern India.

Now what is the remedy available, to both Indian and the western people, as suggested by Swami Vivekananda there should be an ideaL synthesis of technical and scientific knowledge of the west and the spiritual outlook of Indian people, both the western and Indian cultures will be a `Sanjivani' for the removal of all meladies faced by modern world. That will be a basis for meeting the material and spiritual needs of the society.

In ancient India there was an ideal combination of spiritual outlook and of welfare of the individuals and the society, and of scientific outlook of material and scientific acquisition of production. That was an ideal combination of scientific outlook of western culture and eastern ideals of equal distribution of acquisitions for the benefit of all people. As such ancient India made tremendous progress in both the fields of material gain and spiritual values and with this ideal combination the ancient Indian people led the whole world in both these spheres.

Now therefore the task before the modern India is to acquire western concept of technical knowledge and to make more and more material production but as Swami Vivekanand says, such gain should be deeply rooted in the soil of Indian spirituality characterised by renunciation and co-operation to march forward in both material and spiritual gains.

Then in August 2012 issue, we started with the topic of Vedas.

The Vedas are known to be the primeval source of the scriptures. Sage Badarayana Vyasa classified them as Rig, Sama, Yajur and Atharva Vedas. The Upanishads form the final portion of the Vedas. They contain the sublime philosophy of Vedanta. Vedanta is composed of two words, veda and anta. Veda means knowledge. Anta means end. Thus Vedanta is acclaimed as the uncreated knowledge, the culmination of spiritual wisdom. Indoctrinated by self-realised sages in ancient India.

The sages instilled the knowledge of the supreme self through four aphorisms. The great statements known as mahavakyas. Appearing one in each of the four Vedas.

1. **Prajnanam Brahma – Consciousness is Brahman:** This aphorism appears in Aitareya Upanishad in the Rigveda. It declares that Consciousness in the microcosm is the same Consciousness pervading the macrocosm. The all pervading Consciousness is the supreme Reality, Brahman.

2. **Tat tvam asi – That thou art:** Appears in Chandogya Upanishad in the Samaveda. Tat (That) refers to the supreme God. Tvam (thou) to the self within, the core of your being. Asi (art) indicates that God and yourself are one and the same.

3. **Ayam Atma Brahma – This Self is Brahman:** Is in Mandukya Upanishad in the Atharvaveda. Ayam Atma means this self. It refers to the Consciousness within. Atman, the self within which activates your body to perceive and act, mind to feel, intellect to think. Atman is the same as the all-pervading Consciousness, Brahman.

4. **Aham Brahma asmi – I am Brahman:** Appears in Brhadaranyaka Upanishad in the Yajurveda. This aphorism is the ultimate pronouncement of the spiritually Enlightened. Aham means I, the Self within. Brahman is the Reality, supreme God. The Enlightened declares his Self to be God.

The Vedas thus declare that there is but one Reality. That is your supreme Self. You are that Reality. The world is just a passing phenomenon. Being ignorant of your real Self you are caught up in this world of perception, emotion and thought. You have lost your identity. The mission in life is to liberate yourself from this bondage and regain your supreme Being.

The Vedas fall under four broad divisions:

1. Mantra: Comprises prayer and hymn eulogizing the gods.

2. Brahmana: Contains directories with rule and regulation for observing ritual and sacrifice. Deals with their accessories. Reveals the meaning of the mantras.

3. Aranyaka: Forest-treatise prescribing symbolic worship and contemplation as substitute for sacrifice. Meant for those who took to the life of a recluse.

4. Upanishad: Scriptural-treatise containing the philosophy of Vedanta.

The above distinction, however, is not exclusive since the Brahmana, Aranyaka and Upanishad are closely interwoven.

The knowledge of the Vedas was transmitted orally from preceptor to disciple. A tradition maintained through generations. Hence came to be known as Sruti, derived from the root `sru' to 'hear'. The four divisions of the Sruti may be categorised as utterances successively of poet, priest, philosopher and the enlightened.

The word "Veda" comes from the word "Vid". "Vid" means to know. Therefore. Veda means a book of knowledge. The Vedas are four in number – Rig Veda, Yajur Veda, Sama Veda and Atharva Veda.

Though the Vedas are four in number they are traditionally spoken as "Treyi", the Triple Vidya or the threefold knowledge, because they deal with Gnana, Bhakti and Karma, and also because they are in prose, verse, and song. They are known as "Treyi" for another reason because Atharva Veda is the latest of the four and earlier only three; i.e. Rig Veda, Yajur Veda and Sama Veda were treated as part of the Vedas. At this time the word "Treyi" was used for these three "Vedas" and Atharva Veda was later added as the fourth Veda. The Rig Veda underlines the path of gnana or knowledge, the Yajur Veda that of the karma or of action the and Sam Veda that of bhaktis and Atharva represents the synthesis of all these three. The Yajur and the Sam Veda follow the Rig Veda to a great extent, but the Atharva Veda is a collection of original hymns and borrows little from the Rigveda. These four Vedas together form the foundations of Indian religion, philosophy and cultural systems and observances. Indian culture and civilization have survived the ruthless ravages of time all these millenning only because they are based on the solid rock and foundation of the wisdom of the Vedas. Almost all Indian religious thoughts are derived and based upon the fundamental knowledge of the Vedas. Therefore, though the interpretation of the Vedas, by different sects is different, most of the religious movements of India do accept the authority of the Vedas. All other branches of ancient scriptures are also basically based on the Vedas.

The Vedas are treated as Anadi and Anant: i.e, without beginning and without end. They are treated as the sermons of God himself which were heard and collected by the great sages of ancient India. Therefore, they are known as "*Srutis*"; i.e. what is heard and ***Apporushye*** not written by anybody. Of course the present scientific temper will not accept that there is no beginning for Vedas and that nobody wrote these Vedas and that they only fell from God's lips and were collected by the sages. However, if one takes the real meaning of the word `Veda' in a broader sense meaning books of knowledge and as knowledge as such has no origin and therefore books of knowledge has no beginning. From that angle if one considers that Veda as a book of knowledge and only knowledge is reproduced in books after experiencing and it they are considered as narrating the experience of knowledge and truth, one may accept the concept of no beginning and no one person is the author of these books and experiments with truth. Again for knowledge there is no end. As such, Vedas representing realisation of truth have no beginning nor an end.

In September 2012, issue we continued with the topic of veda. Then we started with Vedanta with the sub-topics of Upanishads. Before starting with specific Upanishads we considered the Vedanta (Upanishad) in its general aspects.

Rig Veda, the oldest of the Vedas is known as Sukhta Veda. Sukhta means Uttam or which is

well said. Therefore Sukhtam means what is told. Therefore, what is well told. As the Rig Veda contains all the noble thoughts, hymns and prayers it is known as Sukhta Veda. These Sukhthas contain various mantras and these mantras are known as *Rukh* or *Rucha*. Therefore, as it contains a lot of Ruchas, this veda is known as Ruk veda.

It must be noted that in the Vedic period, people were worshipping the nature. Therefore, prominence is given to elements of nature, like Surya, Vayu, Bharut, Pushan, Agni, etc. and others for worship and praise in the hymns in Rig Veda which contains ten mandalas and which can be called ten books and Sukhtas and which contains 10,552 mantras. It may be noticed that Rig Veda is mainly Sanhita (prayers and hymns) and there is very little of rituals, ceremonies, sacrifices which are normally dealt in Brahmanas. Aiterya, Koshitaki, Upanishads are found in Rig Veda.

Next in line after Rig Veda is the Yajur Veda. In Yajur Veda unlike Rig Veda in this Veda there is a lot of discussion about sacrifices (Yajn) religious rites, the way in which they have to be performed etc. So unlike Rig Veda Brahmana part of veda predominates in Yajur Veda. Yajur Veda has two parts Krishna Yajur Veda and Shukla Yajur Veda, Yajur Veda closely follows Rig Veda. However, in it there is a lot of poetry Yajur Veda has 40 chapters and 1,975 manthras.

In Sama Veda there are two parts *Purvachit* and *Uttarachit*. In the first there are four chapters and total mantras in this book are 650. In the second book there are 21 chapters and 1225 mantras, so totally Sam Veda has 1,875 manthras. Sam Veda mostly contains the hymns and topics discussed in Rigveda and there is not much origin in this veda. However, the ideas discussed in Rig Vedas have been put in more poetically and therefore, they may be easily recited in musical style.

In the last one Atharva Veda unlike the other three Vedas it has a lot of discussion about day to day affairs of a human life and the society and relations between man and man. Man and the society. Here, social affairs play a predominant role as against the hymns of Gods and Godesses. In this Veda there is a lot of discussion about various kinds of illnesses and about their treatment and medicines.

Celebrated Vedantic Formulae

The following are the celebrated formulae of Vedanta:

Ekam Eva Advitiyam – The Reality is One alone without a second.

Brahma Satyam Jagan Mithya, *Jivo Brahmaiva Na Aparah* – Brahman only exists truly, the world is false, the individual soul is Brahman only and no other.

Sarvam Khalvidam Brahma – All this is, indeed, Brahman.

Satyam Jnanam Anantam Brahma – Brahman is Truth, knowledge and Infinity.

Brahmavid Brahmaviva Bhavati – The knower of Brahman becomes Brahman.

Santam, *Sivam*, *Advaitam* – Brahman is Peace, Auspiciousness and Non-duality.

Ayam Atma Santah – This Atman is Silence.

Asango Ayam Purusha – This Purusha is unattached.

Santam, *Ajaram*, *Amritam*, *Abhayam*, *Param* – This Brahman is Peace, without old age, Immortal, fearless and Supreme.

Before we go to consider the issue relating to Vedanta philosophy and teaching, let us consider, a few characteristics of Upanishad's literature. One of the striking features that one comes across when one studies Upanishads is boldness and adherence to truth and to realise truth, the seers did not compromise with anything. In fact they challenged even some of the conclusions drawn from Vedas. The Upanishads are treated as of highest authority, and it was established later on that, if there is anything said which is contrary to what is stated in Upanishads, that statement has no authority and what is stated in Upanishads would prevail over that statement. However, the seers of Upanishads, were bold enough to challenge what is stated earlier in Vedas. They were bold enough and this boldness sprang from their adherence to truth, to

state boldly as truth whatever they realised as truth. They realised that whatever is stated earlier in Vedas is only guide in your journey towards search for truth, and it is not an end in itself. Thus what is really striking is the strength of conviction with which these seers speak about. As an illustration of their boldness, we notice that it is declared, that a human being is God himself. "*Aham Brahmosmi*" – I am *Brahma*. I think no other religion is bold enough to declare that human being – the *Atma* is nothing but *Brahma*. To the same effect is another *Mahavakya* (great statement) "*Tat Twam Asi*". Again they state "*Atma Khalam Brahma*" – that *Atma* is *Brahma* itself.

Second important feature of statement in Upanishads is, the seers realised and experienced themselves, what they stated later on. What they stated was not just out of study and was out of one's own realisation, out of one's real experience. That is why in Upanishads it is stated that whatever is revealed to them. Thus what is actually realized by them what was really experienced by them was the basis of their statements.

Another striking feature of Upanishad literature is the real detachment and the self-effacing nature of the authors of this immortal literature. Nowhere you find the names of the authors anywhere mentioned in their writings. They gave importance to their experience and not for their name. Thus we are hearing only their voices and we do not know whose voice it is. It is really striking that the persons who gave to the mankind an immortal philosophy were least interested in themselves, in their name and fame. Their desire their aim was the welfare of the society. To give what is good for the humanity. This clearly shows that what they said was out of realisation. The main theme of teachings of Upanishads, the erration of `I' element could not have been better illustrated than their own example. This is an eloquent proof of the fact that they stated what they realised and what they experienced. That is the possible reason that what they stated has still remained true, as what they preached was eternal truth actually realised by them, it is still very relevant. In this ever changing world of ideas and concept, the Vedanta philosophy has withstood, all testing times to remain relevant and useful till today.

Another remarkable feature of the age of Upanishads is the equal status given to women. Like male seers there were realised women in the Upanishad era. They took part in philosophical, religious and spiritual discussions as equals. To give few examples. Lopamudia, Viswaver Sikata, Niwavari, Maitrey and Gargi who was known as *Vachacnavi* (Queen of Speech) were wellknown women philosophers of that age. Gargi challenged one of the greatest seers of that time Yajnavalkya. Gargi's challenge and questions brought out the best in Yajnavalkya.

Another interesting feature of Upanishad literature is its style and language. The high literary quality and their poetic style of these scriptures in the words of Swami Vivekananda:

> "Apart from their merit as the greatest philosophy, from their merit as theology, from their success in showing the path of salvation to mankind, the Upanishadic literature is the most sublime in the word. Here is shown in full force the introspective and intuitive Hindu mind. There are poems of sublimity in all nations, but you will find that almost without exception, their ideal is to grasp the sublime in the material. Take for instance, Milton, Dante, Homer, or any of the Western poets. There are passages in them which express the sublime wonderfully; but there is always the endeavour to grasp it through the senses and the muscles, infinitely expanding them, as it were, in the infinity of space. We find the same attempt in the *Samhita* portion of the Vedas. But there they soon found out that the infinite could not be reached in that way, that even infinite space and expansion and infinite external Nature could not express the ideas that were struggling to find expression in their minds; and they fell back upon other explanation. Henceforth the language became new,

as it were, in the Upanishads; it became almost negative, it appears almost chaotic at times – taking you beyond the senses, sometimes going half way towards the goal, as it were, and leaving you there pointing out to something which you cannot sense, but which at the same time you feel certain is there. The language and the thought of the Upanishads fall upon you like the blade of a sword, like a blow from a hammer, and appeal directly to your heart. And there is no mistaking the meaning. Every tone of that music is true and produces its full effect. If this be human literature. It cannot but be the production of a race still in possession of its national vigour."

Another interesting point of Upanishad's teaching is, it is more by way of dialogue between two persons, normally between a Guru and Shishya or between a realised soul and a person who is keen to learn. To make them more acceptable, they are in the form of stories. Many of these teachings are conveyed through stories. For example, the whole Kathoapanishad, is a dialogue between Nachiketa and Yama, the Lord of death. In the story, young Nachiketa, comes face to face with Yama Lord of death and in the form of dialogue, all the facets of life and death are discussed.

One more striking feature is that they are not in a form of one consolidated book systematically arranged. As they are utterances of various seers, of what they realised or what they experienced, they represent experiences of various seers. As such, we find every principle relating to creator and creatures that is Brahman and Jiva, or of Jiva and Universe, of Monoism, Dualism. Qualified dualism coming across these utterances. As such an ordinary reader may get confused, by noticing these apparent inconsistencies found in Upanishads. However if one reads them in their proper perspective, they only reveal that the one Truth is seen from different angles, that these are the various ways to reach the real goal. As is well remarked "Truth is one – many ways are shown by the learned" *'Ekam Sat Bahavah Vadanti Viprah.'*

As we have seen, Veda and Vedanta deal with science and philosophy of life and the art of living (Jeevan Kala) which discussed in the ways and means of achieving the purpose and the object of living. Before we discussed the particular and specific Vedanta i.e. Upanishads dealt with these ways and methods let us consider as to what should be the real purpose of human life.

The real purpose of human life is to discover oneself and to know and realise and fulfil one`s real self. Now, every human being is essentially Divine in nature and in one's true and real sense one is Divine. To know, realise and fulfil one's original self, that is Divine Self and to live in one's real self Divine is the sole object of a human life.

After dealing with some other topic in November 2012 issue, we reverted back to Upanishad topic and dealt with the main 12 Upanishads.

Upanishads

Upanishads alongwith Brahmasutras and Bhagavad Gita form Prashthantrya the spiritual trinity of `Vedanta Philosophy'. They constitute final authority on scriptural matters. However, it must be noted that the other two, Brahma Sutras and Bhagavad Gita are only elaborating or rearranging the principles contained in Upanishads. Brahma Sutra only collects all scattered utterances and conclusions drawn in Upanishads and rearranges them in a systematic way as "Sutras", the maxims dealing with Brahma Vidya knowledge of Brahma. It has no origin of its own and as such it is essentially based on Upanishads. As far as Bhagavad Gita is concerned, it can be described as a commentary on Upanishad principles. It is also essentially based on Upanishads. As it is well said that Vedas are forests, Upanishads are cows and Lord Krishna takes out milk in the form of Bhagavad Gita from Upanishad cows. We may also notice that later all spiritual movements accept authority of Upanishads. As such, it can safely be said that the entire Hindu philosophy of life and spiritualism is essentially based on Upanishad philosophy.

In all, as many as 250 Upanishads are found and printed. It has been agreed that at least some of these are quite old ones, particularly the principal Upanishad belong to the period prior to the advent of Lord Buddha before seven centuries B.C. The principal Upanishads are accepted to be those on which Shankaryacharya chose to comment upon.

They are ten in number and they are as follows:

1. *Isa*
2. *Kena*
3. *Katha*
4. *Prasna*
5. *Mundaka*
6. *Mandukya*
7. *Taittiriya*
8. *Aitar eya*
9. *Chandogya and*
10. *Brahadaranyaka.*

Before we deal with the various aspects of the Upanishads generally and the analysis of various issues covered by the Upanishads let us briefly deal with the Upanishads which are known as the principal Upanishad.

The oldest of these is Isa Upanishad. It is known as Sanhita Upanishad because unlike the other Upanishads this Upanishad finds place in Rig Veda Sanhita, as against most of the other Upanishads which form part of Brahmana and part of the Vedas. Of all the Upanishads it is not only most important but also most popular one and therefore, compared to the other Upanishads it has attracted more commentaries. Apart from the other aspects this Upanishad in a short space of 18 verses, covers almost the entire Vedic Philosophy. Without any exaggeration this Upanishad can be considered as the basis on which the Bhagavad Gita is narrated and the ideas contained in this Upanishad have been elaborated in more details in the Bhagavad Gita. The very first line of the Upanishad starts with the central theme of the Upanishads viz. the spiritual unity and solidarity of all existence starting with everything that is in existence and is covered by Isa; i.e. God. It preaches that all must compulsorily do the karma with the spirit of detachment and karma for karma's sake and same should be done in the spirit of renunciation. Both basic foundations of Vedanta Philosophy, *Seva* and *Tyaga*; i.e. service and renunciation are very aptly brought in the first two verses of this Isa Upanishad. The unique factor of enjoying with renunciation finds its origin in this Upanishad.

The Kena Upanishad illumines the nature of knowledge by pointing out the eternal knower behind all acts of knowing and purifies man's concept of ultimate reality of all touch of furnitude and relativity by reversing its character as the eternal self of man and the self of the universe. It deals with the ways and means by which a human being would ultimately reach his noble goal of mukti.

Coming to the Katha Upanishad, it is most popular among the students of Upanishads because of its happy blend of charming poetry, deep mysticism and profound philosophy. It contains a more unified exposition of Vedanta than any other single Upanishad. Its popularity is heightened because of the two principal characters as it is a dialogue between the old Yama and the teacher and young Nachiketa the student. It can be said that it is a dialogue between God and human being brought face-to-face.

Coming to Prasna Upanishad, as the name itself suggests, it contains questions and answers. It has got six chapters and the great sage Pippalada replied to the questions put by the six disciples. The Pippalada answers the questions asked by each of these six disciples on various aspects of spiritualism and the answers given by him form part of these six chapters of this Upanishad.

As far a Mundaka Upanishad is concerned, it classifies all knowledge into Para and Apara lower one and describing all science, art, literature, politics and economics, in fact all knowledge relating to

human society which are ever-changing. Therefore, this knowledge is known as Apara. It boldly includes even the sacred Vedas in the category of *Apara Vidya* and boldly proclaims that only one knowledge is Para by which the imperishable changeless reality of the one behind the many is realised. This Upanishad sings in ecstasy the glorious vision of the one in the many. It contains the basic principle of Vedanta Philosophy, that God is in everybody and everybody is in God i.e., One in everybody and everybody in One.

It must be noted that Mundaka is the shortest Upanishad. It has just 12 verses. It is a dialogue between great sages "Angiras" and "Saunak". In a short span of 12 verses the Mandukya surveys the whole of the experience through a study of the three stages of waking, dream and dreamless sleep and reveals that the *Atman*, the true self of man, the Turiya or the fourth stage is beyond the three stages of waking, dream and dreamless sleep i.e. the pure consciousness. It proclaims in its second verse the infinite dimension of a man in a pregnant utterance – one of the four mahavakyas `ayam atma brahma.'. This atma is Brahma. It is declared thereby that this *Atma* is part of Brahma. The Upanishad itself boldly declares that each human being is Brahmas itself.

The next in line is Taittiriya. It majestically proclaims that the real Brahmavidya should attain the supreme Brahma! 'Brahmavidapnoti param' and it describes the five kosas or sheaths that enclose and hides Brahman, and demonstrates the technique of piercing these sheaths of relativity and furnitudes with a view to reach the infinite and the eternal at the core of experience. The main characteristic of this Upanishad is that it provides a scientific definition of Brahman as "That from which all these beings are born, they live, and into which they merge when they cease to be," This, in fact is the essence of Vedantic Philosophy and suggests all pervasiveness and essential unity of all existence and all pervading Brahma.

The *Aitar eya* establishes the spiritual character of the Absolute through a discussion of the nature of the self of man and proclaim this truth in another of the four mahavakyas '*Prajnaman Brahma'* Brahman is pure consciousness.

The Chandogya Upanishad introduces us to charming truthseekers like Satyakama, Svetakatu and Narada and outstanding spiritual teachers like Aruni, Sanatkumar and Prajapati. All these dialogues of the Upanishads help us to discriminate the reality of being from the appearance of becoming. In a brief utterance of deep spiritual and philosophical trend, it includes one of the four Mahavakyas – *tatt tatvam asi* "that thou art". It deals with the knowledge of this innate divinity of man as the one remedy for the deeper ills of life. Tarati Shokam atmmavid. "The knower of the Atman crosses all sorrow." In its profound human episode of the discipleship of Indra under Prajapati, it instructs us in the true nature and technique of man's spiritual quest and the blessings that flow from spirituality. It is an impassive account of man`s spiritual education, his growth from worldliness to spirituality.

Coming to the last of the Upanishads i.e. Brahadaranyaka. It is the longest of the Upanishads and as its name implies, a big forest of philosophical thought and spiritual inspiration. It brings four outstanding personalities in it and notably there are two women – Janaka, the philosopher king (the father of Sita of Ramayana) and Yajnavalkya, the philosopher-sage, Maitreyi, the deeply spiritual wife of Yajnavalkya and Gargi, the vachecnevi, the gifted woman speaker and Philosopher. There was a debate in the darbar of Yajnavalkya and the foremost questioner was Gargi, the leader of all the questionnaires. This Upanishad is especially noted for its dialogues. The central theme of all the Upanishads, namely the divinity of man and the spiritual solidarity of the whole universe in Brahman is well brought out in the Upanishad. It contains another of the four mahavakyas namely aham bramho smi i.e. I am Brahman.

CA Dileep Choksi

Estate and Succession Planning – An Overview

The matters relating to Estate and Succession Planning have been as old as the hills. Often taken for granted and seldom receiving the attention it merits, it has now become the focus of many thinking individuals.

Nothing impresses the inquiring mind more than real life events. The basic reason is that events seem much closer now than they did in the past. Matters which were as exception earlier are now matters of common occurrence. Differences of opinion in the family and the impressions one carries on inheritance and wealth devolution have their share of surprises.

The reported case of the Maharaja of Faridkot is a telling story. As reports say they can well become the basis of a cinema or a novel. It is the story of a Maharaja who when crowned as a youngster was rich beyond imagination. On his growing up he soon had a son and daughters. On the demise of his son he went into deep depression and his entire estate was usurped by his servants and palace officials. They claimed inheritance on the basis of a will. Probably they knew that other than by way of a will there could be no other basis of claiming any rights to the estate. It was on the basis of that will that devolution took place. The daughters got a pittance because the devolution had to be on the basis of a will where one exists. The will was challenged in court on the ground that it was not genuine. It was established that it was forged. The result was that the devolution which had taken place on the basis of a testate inheritance was held inoperative. The inheritance therefore had to be on the basis of an intestate death. The inheritance resulted in the daughters receiving more than two billion pounds. This happy story has a sad ending. The court process took such a long time that it has been beyond the prime time when the inheritance could have been enjoyed by the lawful heirs (daughters). They are each above eighty years of age now. This instance highlights the need for effective planning in the simplest of circumstances. One can well imagine the complexities that can arise in business ownership and when there are inter-generational disputes.

Wealth is built to be enjoyed and to be passed on to the next generation. This is broadly achieved by setting up trusts. The concept of trusteeship has meanwhile now extended itself to cover business ownership too. The introduction of corporate social responsibility and the growing presence of NGOs and other non-profit organisations formally recognise that business is to be for the benefit of not only the promoters and shareholders but also society at large. Presently businesses are held in charity or the fruits of business are set aside for charity or held in trust partly for charity. The significant point being that the spirit of trusteeship and charity form a part of our national ethos. How this can be done or is actually achieved depends on the vision and desire of the family. But it requires planning. More so as the options that are available are many. The time when there was concentration

only on business assets is long past. Wealth has been built and businesses have been created and so have charities been carved from wealth and business assets. The approach of conserving business and the general acceptance of social responsibility has been reason for the formation of some of the greatest institution of modern India. The common manifestations are schools, hospitals, educational and social welfare homes, business trusts and other institutions of national relevance and significance. Their preservation now requires careful thought and preparation. It is not only the Bill Gates and the Azmi Premjis that look upon service to society as being as much a part of business and generation of profit. Today, a vast number of youngsters look upon their future with a sense of obligation to society. Today the matters relating to control of business, adequacy of income for the girl child, encouraging innovation and promoting charity are all business related matters receiving much attention while considering devolution of property and assets.

We may ask ourselves whether this is a matter of change in the outlook of the youth or a process of evolution of society as a consequence of change. When one looks at the changes that have affected society, one finds that the prominent ones are fragmentation of religious authority, the vociferous expression of public opinion and inter-communal dissent with greater recognition of individual rights to life and freedom. It was also not long ago that tribal women in Himachal Pradesh rallied on the streets of the country to protest against an age old law that prohibits women from the right of inheritance. Not only the vast majority but even minorities like Parsis have taken the custom of not allowing non born Parsis from visiting their fire temples, to court. These social issues have a direct impact on succession and rights that devolve on non-testamentary devolution.

These instances of social change have also been a result of sociological and political change which has impacted society. An analysis of the relationship between political instability, policy making and macro-economic outcomes is undoubtedly an academic study. Nonetheless it has relevance in understanding and strategically envisaging the likely outcomes of the business environment of the future. In considering succession and transition an analysis of these matters is fundamental to laying down guidelines or building the devolution model. The events that will have some bearing on this type of analysis can be grouped into two broad categories. The first will include the phenomena of socio-political disturbance such as protests, politically motivated actions and other violent manifestations of unrest. The other is of events such as change in governments and electorate surprises that result from the interaction between competing interests represented in the political institutions and fluctuations in the preferences of the electoral. Both events generate uncertainty about the stability of legal and administrative institutions. This could result in a feeling of uncertainty about the future course of economic policies (tax rates, demand and economic stimulation, provision of public goods, exchange rate policies, inflation, etc.) the security of property ownership, productiveness of capital goods, inflow of investible foreign funds and above all the pattern of socio-economic framework. This uncertainty has a bearing on investible funds. For stability and planning, the feeling of security needs to be instilled in the next generation in spite of these challenges. The matters that affect succession are therefore not confined to meeting wants of the individual or family but extend to preparing for eventualities which may arise in the future. The present day uncertainty of what tomorrow unfolds is a telling illustration in point. While some may feel the present day environment acute, it must be admitted that it also existed in the past. To minimise these effects on the simple citizen, there has been clamour for a uniform civil code which will move in the direction of gender equality. For example, in the case of the un-codified Hindu Law the branch that applies to women has been drastically changed by amendments and fresh legislation equating them to male progeny. It will always be a chicken and egg story of whether those changes were the consequences of social change or vice versa. But what stands out is the fact that the condition of women has vastly changed as a result of these developments. The protection for women through enactments such as the Domestic Violence Act, the amendments to the Indian Divorce Act and

legal obligations on children towards their parents are legislative measures which substantiate these developments.

The growth of business and the shrinking of the world to a village have impacted business legislation too. This in turn impacts personal lives and promotes evolution of business forms and structures to meet challenges such changes pose. The newly introduced concept for listing of companies, the one man company, the revised provisions relating to mergers and acquisitions, domestic transfer pricing are some of such changes. The ones included in regulatory legislation are those relating to corporate social responsibility and corporate governance.

With the narrowing of boundaries and the liberalisation in international business, the Indian business family has vast options for expansion. However attractive these business proposals may seem, it has to be ensured that it is not at the cost of business that has already been built. This is more so if the family business has an ancestry. Succession and devolution are matters that then must be addressed first.

Several studies have been carried on worldwide to see how change affect families. This is to ensure that business control remains in the family.To ensure an understanding among all members, many family owned businesses have the next generation participating in the existing business in one form or another from a very early age. This is good not only because one can then develop a sense of responsibility but one can also be exposed to the culture of the business in the midst of change. It can also help the next generation decide if that is the future that they would want. Once the next generation enters the business research shows that it is the quality of communication between the two generations that determines the success of the transition. The irony is that when the senior generation claims that the next generation is not ready or capable to assume the reigns they should look in the mirror when they are trying to figure out why.

The speed of change has been so fast that the legal developments and evolution of case law poses a baffle to many. For example, there are amendments to the Stamp Act, the Co-operative Law, the Companies Act, the Takeover Regulations, the Insider Trading Regulations, the Foreign Exchange Management Act and issues on repatriation, changing personal laws, interpretation of Taxation Laws, the Contract Law and the widening net of anti-money laundering legislation and reporting requirements. All these stamp the need for a careful analysis of not only social and economic developments but also require legal and accounting analysis for purposefully carrying out any estate and succession planning exercise.

Wills and Trusts have, since almost times immemorial, been effective tools for negotiating ones way in meeting with all these needs. While their use is more prevalent abroad they are now gaining acceptance in India. The need for formal documentation of these was not felt as profoundly in the past as it is today. While in the past the need for trustees and executors was met by friends and the near and dear, the complexities of present day business has given rise to the need to engage with the professionally competent and seek their help in dealing with the end objectives of the families.

The apparently conflicting ends of definitiveness in devolution and flexibility to consider legal variants that may be necessary while taking into account accepted norms of social custom have to be recognised. Awareness of the rights of individuals and the increasing role of the judiciary in such matters highlights more than ever before the need for what one may call family governance. No altruistic ideas or efforts can be really effective unless they are willingly accepted and can be effectively implemented. Implementability is the power of forcing action within limits of authority in a given legal framework. The process of planning for succession, inheritance and asset devolution has become a need. Social change giving rise to political change and the role of the family as the smallest but most important unit of a society finds itself in the centre of this evolution. From that there is no escape.

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Overview of the Hindu Succession Act and Applicability of the Indian Succession Act

In our contemporary society, ordinarily, the property must be owned by someone. At no time, property can remain ownerless. Ownership of property may vest in an individual, a Corporation or State. Thus, when an individual owner of the property dies, immediately on his death, the property vests in his heirs, who are normally his relations, but if he has made testamentary disposition of his property, the heirs will be the persons mentioned by him in his Will, provided the Will is validly executed. If a person has not disposed of his property by Will and has died leaving behind no heirs, then the Government succeeds to his property under the doctrine of escheat.

So long as a person is alive, he is free to deal with his property the way he likes. He can even determine as to who will take his property after his death. Thus he can do so by making a Will in which he lays down the scheme of distribution of property. This is known as testamentary disposition of property. In case, he dies leaving behind no Will (or an invalid Will), his property will devolve by intestate succession on his heirs. Succession opens up at the time of the death of a person and is governed by the law in force at that time. In India, this is determined by the personal law of the intestate; the Hindus are governed by the Hindu Succession Act, 1956; the Muslims by Muslim law of succession, the Christian and the Parsis are governed by the provisions contained for them in the Indian Succession Act, 1925.

Succession is usually discussed under the following two heads: (i) testamentary succession, and (ii) intestate succession. The law of testamentary succession deals with such matters as the drafting of the Will, formal and material validity of the Will, probate or letters of administration, and distribution of the property of the testator in accordance with the scheme laid down by him in the Will. A Hindu has full power of disposing of his separate property by Will.

The law of intestate succession relates to the devolution of the property of a person who dies without making a Will. This is more properly called the law of inheritance. The term 'inheritance' is applied to the devolution of property of a person on his death on his relations. When property of a deceased may devolve on relations or / and on non-relations, the term 'succession' is used. This is the distinction between the terms, inheritance and succession; otherwise in common parlance the two terms are used interchangeably. The law of intestate succession is concerned with such matters as who are heirs, the shares that heirs take, rules of preference among the several categories of heirs, disqualification of heirs, and general rules of succession.

The Hindu Succession Act has drastically changed the old Hindu law of succession. The modern Hindu law of succession is uniformly applicable to all Hindus. No longer are the schools and the sub-schools of Hindu law relevant in respect of the law of succession. The modern Hindu law also overrides the customary mode of succession. However, this does not mean that a total departure from the old Hindu law of succession has been made. The fact of the matter is that the old framework has been retained in which new structures have been constructed so as to give the old framework a modern look. Thus the basic classification of the two-fold rules of succession, one relating to the property of a Hindu male and the other relating to the property of a Hindu female is retained.

The modern Hindu law of succession (as was the Mitakshara law of succession) is a secular law; religious or spiritual considerations are not relevant anywhere.

The woman's estate and reversioners have been done away with, but who will inherit woman's property still depends upon the source from which the woman got the property; thus the concept of reversionary succession lurks in the background. The doctrine of representation has been retained in respect of class I heirs to a Hindu male and category I heirs to the property of a Hindu female; beyond this, the doctrine does not apply.

The Mitakshara dual mode of devolution of property is still retained. The Mitakshara joint family property still devolves by survivorship except in those cases covered by the proviso to Section 6 of the Hindu Succession Act. The separate property devolves by succession.

The Hindu Succession Act deals separately with the succession to the property of a Hindu male and a Hindu female. We would discuss the provisions of the Hindu Succession Act under the following heads in brief:

1. General rules of succession.
2. Succession to the property of a Hindu male.
3. Succession to the property of a Hindu female.
4. Disqualifications.

GENERAL RULES OF SUCCESSION AND DEFINITIONS

Practically, every law of succession lays down certain general rules of succession to meet certain situations arising in the wake of succession. Sections 18 to 23 of the Hindu Succession Act deal with these general rules.

(i) Half-blood, Full-blood and Uterine blood

Section 18 lays down that heirs related to the intestate by full blood are to be preferred to heirs related by half-blood, if the nature of relationship is the same in all other respects. Thus, when a person dies leaving behind a brother by full-blood and a brother by half blood, the brother by full-blood will be preferred. If a person dies leaving behind a son of full-blood brother and a son of a half-blood brother, the former will be preferred over the latter.

When both the parents are the same, the children are related to each other by full-blood. When two persons have the same father but different mothers, they are related to each other by half-blood relationship. When the mother of two persons is the same but the fathers are different, they are related to each other by uterine blood relationship.

(ii) *Per Stirpes* and *Per Capita* Rules

Section 19 of the Hindu Succession Act lays down that if two or more heirs succeed together to the property of an intestate, they shall take the property: (a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes,* and as tenants-in-common and not as

joint tenants. The exception to the *per capita* rule is provided in respect of some class I heirs to a Hindu male and to category I heirs to a Hindu female. Thus when the son, daughter and widow of a pre-deceased son inherit, they inherit *per stirpes*, which means that property devolves on branches and not on individuals. In other words, they together take the same share which the deceased son would have taken, had he been alive. Similarly, when son and daughter of a pre-deceased son or pre-deceased daughter inherit as heirs to a Hindu female, they together take the same share which their deceased parent would have taken, had he been alive.

(iii) Posthumous Child

Succession opens up immediately on the death of a person and property vests in heirs immediately thereupon. This implies that a person who is not in existence when succession opens up and who is born subsequently cannot inherit the property. A posthumous child is a person who was in the womb at the time of the death of the intestate and was subsequently born alive. Section 20 of the Hindu Succession Act provides that a child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

(iv) Presumption in case of simultaneous death of two heirs

It can happen that two persons die in an accident or under the circumstance where it is not possible to ascertain as to which of them died first. In such a situation, two solutions are possible. It may be assumed that both died simultaneously or a fiction may be imported which may lay down that one of them survived the other before he died.

The first mode of resolving the problem has been laid down under the Indian Succession Act, 1925. Illustration (vi) to section 105 of that Act runs: "The testator and the legatee perished in the same shipwreck. There is no evidence to show who died first. The legacy lapses." The second mode has been adopted in Section 21 of the Hindu Succession Act. That Section runs:

"When two persons have died in circumstances rendering it uncertain whether either of them and if so which, survived the other, then for all purposes affecting succession to property, it shall be presumed until contrary is proved, that the younger survived the elder."

'Younger' in Section 21 means younger in status, and where the status is the same, younger in age. Thus if an uncle aged 21 years and his nephew aged 26 years perish in the floods and it is not known which of the two died first, the nephew, though aged 26 years, will be presumed to have survived the uncle. On the other hand, if A and B, two brothers die in a road accident, the brother who is younger in age will be deemed to have survived the brother older in age.

(v) Right of Pre-emption

The Hindu Succession Act has been criticised for introducing too many heirs in class I heirs to a Hindu male with the resultant consequence of fragmentation of the estate and introduction of strangers in the joint family business and estate. This situation is attempted to be eased by giving a right of pre-emption, i.e., a preferential right to purchase the share of a co-heir who wants to dispose it of. The preferential right of the co-owner is enacted in Section 22 of the Hindu Succession Act. That Section runs as under:

"(1) where, after the commencement of this Act, interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjugation with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

"(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties be determined by the Court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental application."

"(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that of the two heirs who offers the highest consideration for the transfer shall be preferred."

"Explanation: In this section, 'Court' means the Court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other Court which the State Government may, by notification in the Official Gazette specify in this behalf."

There has never been anything like a right to pre-emption in Hindu law. It was recognised under customary law and Muslim law. By giving preferential right to a co-heir to purchase the share of the co-heir in case he wants to dispose it of, the fragmentation of property and introduction of strangers in business or estate can be prevented.

In sum, the provision lays down that when Class I heirs of a Hindu male simultaneously succeed to immovable property or business, and if any heir wants to dispose of his share in the immovable property or business, the other heirs will have a preferential right to acquire it. The price of such share may be agreed upon between the two co-heirs. In case they fail to agree, the price may be fixed by the Court on the application of any party. If more than one heir wants to purchase it, the one who offers highest price will have the right to purchase it. If property is sold without making an offer to the co-heirs, the transfer is voidable at the instance of any co-heir interested to purchase it.

(vi) Dwelling house and its partition

The Hindu law has assigned a special position to the dwelling house. The injunction has been that partition of the dwelling house should, ordinarily, be not made. This was particularly so in the then predominantly agricultural society. This is even now so under the modern Hindu law and it is laid down that ordinarily the dwelling house should not be partitioned and some arrangement should be made so that it is kept joint. It is only in exceptional circumstances that the partition of dwelling house is allowed. Under the old Hindu law, the problem relating to dwelling house did not arise on succession, since succession was confined to near male relations of the intestate, such as sons. But under the Hindu Succession Act, there are as many as twelve Class I heirs, and eight of them are females. Two are cognates. Similarly, when a Hindu female dies there are seven heirs, of which three are females. The finger is raised at some of the heirs, like daughter, son's widow, son's son's widow, daughter's daughter or daughter's son who may like to partition the dwelling house which they may inherit along with other heirs, just as they may like to partition the immovable property or business. Section 23 of the Hindu Succession Act has been enacted to meet such a situation. That Section runs as under:

"Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heirs shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house if she is unmarried or has been deserted by or has separated from her husband or is a widow."

The prohibition against the partition of the dwelling house will come into operation on the fulfilment of the following two conditions: (i) dwelling house should be wholly occupied by members of the family of the intestate, and (ii) the female heirs should have a right of residence in the dwelling house. The female heirs have the right of residence in the dwelling house along with the male heirs. But a married daughter has no such right, unless she has been deserted by, or has separated from, her husband or is a widow. Any unmarried daughter obviously has a right of residence in the dwelling house. The provision of Section 23 applies only when some heirs are male and some are female. If all heirs are males or females, the prohibition will not apply.

Escheat

When a person dies relationless, most systems of law follow two principles. First, the property of such person is forfeited to the State. This means that the State takes his property but does not take his liability. The second principle is that the property of such person goes to the Government as heirs, i.e., the Government takes it subject to the liabilities of the deceased. This is known as the doctrine of escheat. English law and Hindu law follow this principle.

Succession to the property of a Hindu male

The heirs of a Hindu male under the Hindu Succession Act are classified as under:

– Class I heirs

– Class II heirs

– Agnates

– Cognates

– Government

CLASS I HEIRS

i. Son

ii. Daughter

iii. Mother

iv. Widow

v. Son of a pre-deceased son

vi. Daughter of a pre-deceased son

vii. Widow of a pre-deceased son

viii. Son of a pre-deceased daughter

ix. Daughter of a pre-deceased daughter

x. Son of a pre-deceased son of a pre-deceased son

xi. Daughter of a pre-deceased son of a pre-deceased son, and

xii. Widow of a pre-deceased son of a pre-deceased son.

Succession to the property of a Hindu female

The Hindus have traditionally dealt with the succession to the property of a Hindu male and Hindu female under two separate heads. This distinction is maintained under the modern law of succession also. It seems that we are maintaining continuity with the old system because we still do not want that the source from which a woman gets property should be irrelevant.

Under the modern Hindu law, conceptually there is no distinction between the woman's estate and stridhan, and so long as the Hindu woman is alive, she can deal with the property in any manner that an owner of property may deal with it. She is free to dispose it of by will also. But for purposes of intestate succession, the source from which she got the property is still material. From this point of view, the property of a Hindu female falls under the following three heads:

1. Property inherited by a female from her father or mother;

2. Property inherited by a female from her husband or father-in-law;

3. Property obtained by her from any other sources, by gift, inheritance or otherwise.

Property inherited from father or mother

In respect of the property inherited by a Hindu female from her father or mother heirs are:

1. Sons, daughters, sons and daughters of a pre-deceased daughter, and sons and daughters of a pre-deceased son;

2. Heirs of the father;

3. Government by escheat.

Property inherited from the husband or the father-in-law

The heirs to this property are as under:

1. Sons, daughters, sons and daughters of pre-deceased daughter, and sons and daughters of pre-deceased son;

2. Heirs of the husband;

3. Government by escheat.

Succession to the property which she got otherwise than by succession from her parents or her husband or father-in-law

The heirs to the Hindu female's property which she has got otherwise than by succession from her parents or husband or father-in-law are specified in section 15(1), which runs as under:

"(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16 —

(a) Firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter);

(b) Secondly, upon the heirs of the husband;

(c) Thirdly, upon the mother and father;

(d) Fourthly, upon the heirs of the father, and

(e) Lastly, upon the heirs of the mother."

The heirs are divided into five entries. The heirs in earlier entry are preferred to heirs in the subsequent entries.

Hindu Succession (Amendment) Act, 2005

Before the Parliament enacted 2005 Amendment Act, some States like Andhra Pradesh, Karnataka, Tamil Nadu and latest Maharashtra had brought changes in the Hindu Succession Act, 1956 and a sum and substance of these changes was to give equal right to daughters and accordingly in the Hindu coparcenary property, daughters were given rights equal to the sons. However, far reaching amendments have been brought in the Hindu Succession Act, 1956 by 2005 Act which is made operative from 6th September, 2005. Section 6 of the Hindu Succession Act, 1956 has been replaced by the new Section 6.

Sub-section (1) of Section 6 declares that the daughter of a co-parcener shall, –

a. By birth become a coparcener in her own right in the same manner as the son;

b. Have the same rights in the coparcenary property as she would have had if she had been a son;

c. Be subject to the same liabilities in respect of the said coparcenary property as that of a son;

By providing that on birth, a daughter becomes a coparcener, on coming into force of this Act, for all purposes, a daughter would be a coparcener just like a son with all the rights and obligations attached to such coparcenarship as in the case of the son. In short, for all purposes, there will be no distinction between a son and a daughter for becoming a coparcener on birth and in all aspects of rights and obligations relating to a coparcenary property this far reaching amendment by conferring equal rights to the daughter as conferred on the son, would lead to strange consequences.

Sub-section (2) of the new section a Hindu female co-parcener is also given a right of disposing of the property by a Will.

Sub-section (3) provides that after the commencement of this Act where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship and the co-parcenary property shall be deemed to have been divided as if a partition had taken place and, –

a. the daughter is allotted the same share as is allotted to a son;

b. the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the children of the pre-deceased son or pre-deceased daughter, as the case may be.

Section 58 of Indian Succession Act provides that the testamentary succession amongst the Hindus is to be governed by the general Hindu law modified by what has been provided for in section 57 and Schedule III of the Indian Succession Act.

Comparative Chart

	Indian Succession Act	**Hindu Succession Act**
To whom applicable :	The Indian Succession Act, 1925, is applicable to all Indians other than Muslims. However certain provisions of the Indian Succession Act are not applicable to Hindus and apply only to non-Hindus such as Christians, Parsis and Jews. Intestate succession to properties of any person other than Hindu, Mohammedan, Buddhist, Sikh or Jain is governed by Part V (i.e., Intestate Succession) of the Indian Succession Act. Rules for Parsis are contained in sections 50 to 56 of the I. S. Act.	The Hindu Succession Act, 1956, applies to any person who is a Hindu, Buddhist, Sikh, Jain and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. Clause (i) of section 5 of the Hindu Succession Act provides that the said Act does not apply to any property, succession of which is regulated by the IS Act by reason of the provisions contained in section 21 of the Special Marriage Act, 1954. Sec. 21 of the Special Marriage Act, 1954, reads as under: "Notwithstanding any restrictions contained in the IS Act, 1925, with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnised under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom."

	Indian Succession Act	Hindu Succession Act
Attesting witness to a Will:	In case of Wills executed by Christians, Jews and Parsis a person named as executor in the Will can be an attesting witness. Attestation by a legatee under the Will is a good attestation. But the bequest in favour of such a legatee or his spouse becomes void. A gift to an attesting witness is void though there may be a sufficient number of attesting witnesses without him, and the undisposed portion of the devised property will devolve according to the law of inheritance. (Section 67 of Indian Succession Act)	In case of Wills executed by Hindus, Buddhists, Sikhs and Jains, the bequest in favour of a legatee is valid though he has attested the said Will. So a legatee under the Will of a Hindu will not lose his legacy by attesting the Will.
Probate:	In the case of Wills made by Christians and Jews and by Hindus, Buddhists, Sikhs and Jains [as provided in clauses (a) and (b) of section 57 of the Indian Succession Act,] no right as an executor or a legatee can be established in a Court of Justice unless Probate is granted by a Court of competent jurisdiction u/s. 213 of the Indian Succession Act. Wills executed outside the cities of Calcutta, Madras and Bombay in respect of immovable properties situate outside these cities are not subject to the condition of obtaining probate before getting advantage of any such Will.	No probate is required to establish right as an executor or a legatee in case of Wills made by Hindus, Buddhists, Sikhs and Jains. The exception to the above rule is provided in clauses (a) and (b) of section 57 of the IS Act which is to the following effect: (i) All Wills and codicils made by Hindus, Buddhists, Sikhs and Jains within the territories of the Lieutenant Governor of Bengal and within the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay have to be probated. ii) All Wills and codicils made outside the territories or limits mentioned in clause (i) above so far as relates to immovable property situate within those territories or limits have to be probated
Letter of Administration:	Where a person dies intestate who was governed by the IS Act, it is obligatory for the executors or legatee to obtain a Letter of Administration.	Where a Hindu dies intestate it is not necessary in every case to obtain a Letter of Administration to the estate of the deceased to establish a right to any part of the property of the deceased.

	Indian Succession Act	Hindu Succession Act
Revocation of Will by testators marriage :	Every Will shall be revoked on the marriage by the maker u/s. 69 of Indian Succession Act. Revocation results not only from first marriage but any subsequent marriage also. The exception to this rule is that a Will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator or to the person entitled in case of intestacy.	This provision does not apply to Hindus, Buddhists, Sikhs and Jains who are governed by the Hindu Succession Act. The statement of objects and reasons of the Hindu Wills Act, 1870 (now repealed) brings out the reasons for a marriage amongst the Hindus, Buddhists, Sikhs or Jains not having the effect of revoking a Will as the marriage does not create such a change in the testators condition as to raise a presumption that he would not adhere to a Will made previously. This presumption is based upon the principle of monogamous marriage (the practice of having only one husband or wife at any one time) in England.
Revocation of Privileged Will or Codicil :	Under section 72 of IS Act, a privileged Will or codicil may be revoked by the testator by an unprivileged Will or codicil, or by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged Will or by the burning, tearing or destroying the same with the intention of revoking the same.	Section 72 of Indian Succession Act, 1925 is not applicable to Hindus, Buddhists, Sikhs and Jains.
Construc-tion of terms/ definitions and interpre-tation :	Section 97 of IS Act lays down the general principles of interpretation of Wills. Though this section is not applicable to Hindus, it can still be equally applied to a Will by a Hindu, if the clear intention of the testator cannot be gathered from such Will. It may, however, be noted that the principle of interpretation enacted by this section, in terms, is applicable to testamentary dispositions and not to gifts or settlement.	Under Hindu Succession Act, 1956 following words are defined and interpreted u/s. 3 of the Act: (a) agnate (b) aliyasantana law (c) cognate (d) custom and usage (e) full blood, half blood and uterine blood (f) heir (g) intestate (h) marumakkattayam law (i) nambudri law (j) related

	Indian Succession Act	Hindu Succession Act
Bequest to religious or charitable use:	Section 118 of IS Act provides that no person having nephew or niece or any nearer relation, shall have power to bequeath any property to religious or charitable uses except the following two conditions are satisfied: (a) a Will by which the testator bequeathed his property to religious or charitable uses was executed not less than twelve months before the death of the testator, and (b) such Will was deposited within six months from its execution in some place provided by law for the safe custody.	Section 118 of the IS Act is not applicable in case of Hindus, Buddhists, Sikhs and Jains. In other words, a Will of a Hindu though not executed before twelve months of his death and though not deposited within six months from its execution for the safe custody, is a valid Will which is containing a bequest of his property for religious or charitable uses.
Words expressing relation-ship:	Section 100 of the IS Act provides that in absence of any intimation to the contrary in a Will the word child, son or daughter would mean legitimate child, son or daughter. The principles laid down in this section is that a testator must be presumed to intend his legitimate relations unless the Will itself contains an intimation to the contrary.	The word son, daughter or child means legitimate as well as illegitimate child. The illegitimate son of a male Hindu of any caste is entitled to claim maintenance from the father and in case of death of the father from his heirs out of his estate inherited by them so long as the illegitimate son remains a minor and does not cease to be a Hindu.
Testa-mentary guardian:	A father, whatever his age may be, may by Will appoint a guardian or guardians for his child during minority. This section provides that a father though he may be a minor may appoint a guardian by Will for his child. (Section 60 of IS Act, 1925)	Under sec. 9 of the Minority and Guardianship Act, a Hindu father, mother and widow may by Will appoint a guardian for his minor legitimate as well as illegitimate children or in respect of minors property or in respect of both, subject to the conditions laid down in that section.

True silence is the rest of the mind, and is to the spirit what sleep is to the body, nourishment and refreshment.

— William Penn

Aditya Bhatt, *Advocate*

What can be Willed and What cannot be Willed

1. Tenancy Rights

1.1 A tenancy is said to exist where one has let real estate to another to hold of him as landlord. When duly created and the tenant put in possession, he is the owner of an estate for the time being, and has all the usual rights and remedies of an owner to defend his possession.

1.2 Earlier, tenancy laws in the state of Bombay were governed by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. However, with effect from 31-3-2000, this legislation was repealed and replaced by the Maharashtra Rent Control Act, 1999. This Act was to apply to all premises let for the purposes of residence, education, business, trade or storage in the State of Maharashtra.

1.3 Section 7(15) of the Maharashtra Rent Control Act, 1999 defines a 'tenant' as follows-

"(15) "Tenant" means any person by whom or on whose account rent is payable for any premises and includes,-

(a) …

(b) …

(c) a person to whom interest in premises has been assigned or transferred as permitted under section 26;

(d) in relation to any premises, when the tenant dies, whether the death occurred before or after the commencement of this Act, any member of the tenant's family, who, –

(i) where they are let for residence, is residing, or

(ii) where they are let for education, business, trade or storage, is using the premises for any such purpose,

with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided, in the absence of agreement, by the court.

Explanation – The provisions of this clause for transmission of tenancy shall not be restricted to the death of the original tenant, but shall apply even on the death of any subsequent tenant, who becomes tenant under these provisions on the death of the last preceding tenant."

Section 26 of the Maharashtra Rent Control Act, 1999 states –

"Notwithstanding anything contained in any law for the time being in force, but subject to any contract to the contrary, it shall not be lawful for any tenant to sub-let or give on licence the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein."

1.4 Therefore, the question which arises on a combined reading of section 7(15) with Section 26 is whether bequest of tenancy rights by way of a will is permitted or not.

This question came up for consideration before the Supreme Court in the case of *Vasant Pratap Pandit vs. Dr. Anant Trimbak Sabnis (1994) 3 SCC 481* while interpreting similar provisions of the erstwhile Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

The Hon'ble Supreme Court held as under –

"15. From a plain reading of Section 5(11)(c)(i) it is obvious that the legislative prescription is first to give protection to members of the family of the tenant residing with him at the time of his death. The basis for such prescription seems to be that when a tenant is in occupation of premises the tenancy is taken by him not only for his own benefit but also for the benefit of the members of the family residing with him. Therefore when the tenant dies, protection should be extended to the members of the family who were participants in the benefit of the tenancy and for whose needs as well the tenancy was originally taken by the tenant. It is for this avowed object, the legislature has, irrespective of the fact whether such members are 'heirs' in the strict sense of the term or not, given them the first priority to be treated as tenants. It is only when such members of the family are not there, the 'heirs' will be entitled to be treated as tenants as decided, in default of agreement, by the Court. In other words, all the heirs are liable to be excluded if any other member of the family was staying with the tenant at the time of his death. When Section 15, which prohibits sub-letting, assignment or transfer, is read in juxta-position with Clause 5(1l)(c)(i) it is patently clear that the legislature intends that in case no member of the family as referred to in the first part of the clause is there the 'heir', who under the ordinary mode of succession would necessarily be a relation of the deceased, should be treated as a tenant of the premises subject, however, to the decision by the Court in default of agreement. The words 'as may be decided in default of agreement by the Court' as appearing in Section 5(1l)(c)(i) are not without significance. These words in our view have been incorporated to meet a situation where there is more than one heir. In such an eventuality the landlord may or may not agree to one or the other of them being recognised as a 'tenant'. In case of such disagreement' the court has to decide who is to be treated as 'tenant'. Therefore, if 'heir' is to include a legatee of the will then the above quoted words cannot be applied in case of a tenant who leaves behind more than one legatee for in that case the wishes of the testator can get supplanted, on the landlord's unwillingness to respect the same, by the ultimate decision of the Court. In other words, in case of a testamentary disposition, where the wish or will of the deceased has got to be respected a decision by the Court will not arise and that would necessarily mean that the words quoted above will be rendered nugatory. What we want to emphasise is it is not the heirship but the nature of claim that is determinative. In our considered view the Legislature could not have intended to confer such a right on the testamentary heir. Otherwise, the right of the landlord to recover possession will stand excluded even though the original party (the tenant) with whom the landlord had contracted is dead. Besides, a statutory tenancy is personal to the tenant. In certain contingencies as contemplated in Section 5(1l)(c)(i) certain heirs are unable to succeed to such a tenancy. To this extent, a departure is made from the general law.

17. Coming now to the meaning of the words 'assign' or 'transfer' as appearing in Section 15 we find that 'transfer' has been qualified by the words 'in any other manner' and we see no reason why it should be restricted to mean only transfer inter-vivos. As has been rightly pointed out by the High Court in the impugned judgment the Transfer of Property Act limits its operation to transfer inter-vivos and, therefore, the meaning of the word 'transfer' as contained there in cannot be brought in aid for the purpose of the Act. On the contrary, the wide amplitude of the words 'in any other manner' clearly envisages that the word 'transfer' has been used therein a generic sense so as to include transfer by testament also."

1.5 The Supreme Court, in another case *Bhavarlal Labhchand Shah vs. Kanaiyalal Nathalal Intawala, AIR 1986 SC 600,* has upheld the view taken by the Bombay High Court in the case of *Dr. Anant Trimback Sabnis vs. Vasant Pratap Pandit AIR 1980 Bom 69* that bequest of tenancy rights

stands on the same footing as any other transfer by sub-lease, sale, assignment gift, volition of the tenant in inducting uncontemplated strangers in the premises and thrusting them on the landlord, being the common element of these dispositions.

1.6 Therefore, from the above, it is abundantly clear that in the absence of a contract to the contrary, no bequest of tenancy rights can be made even in the absence of any members of the tenant's family residing with him at the time of his death. The restriction contemplated in section 26 can be extended to include bequest by way of testamentary succession.

2. Share in HUF as coparcener

2.1 Section 6 of the Hindu Succession Act, 1956 provides a deeming fiction whereby where a Hindu dies, his interest in the property of HUF as coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death.

2.2 Further, section 30 of the Hindu Succession Act, 1956 reads as under –

"30. Testamentary succession

Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation: The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

2.3 Thus, on a combined reading of the above two provisions, it can be seen that under the Hindu Succession Act, a Hindu is empowered to dispose of his share in the HUF as coparcener by way of testamentary succession.

2.4 This view is further strengthened by the decision of Himachal Pradesh High Court in the case of *Kartari Devi and Ors. vs. Tota Ram 1992(1) ShimLC 402* which held as follows-

"7. Therefore, in view of Section 30 of the Act, which specifically provides that interest of a male Hindu in Mitakshara coparcenary property is capable of being disposed of by way of will irrespective of any provision in the Act or any other law to the contrary, read with Section 4 of the Act, I hold without any hesitation that any custom prohibiting testamentary succession by way of will of a coparcenary property stands abrogated. In view of Section 30 read with Section 4 of the Act, a male Hindu governed by Mitakshara system is not debarred from making a will in respect of coparcenary/ancestral property."

3.5 This decision of Kartari Devi (supra) was upheld and approved by a Division Bench of the Supreme Court in *Tek Chand and Anr. vs. Mool Raj and Ors. 1997 (2) H L.R. 306*

3. Share in private trust where share is determinate/indeterminate

3.1 Background

3.1.1 Creation of trusts is a popular mechanism used for succession planning. The creation of a trust is not easily challengeable in a court of law as opposed to a Will. This makes it a widely used vehicle of estate planning. There are various types of trusts – revocable, irrevocable determinate trust and irrevocable indeterminate trusts.

3.1.2 A revocable trust is one where the settlor of the trust has the power to revoke the trust fund settled by him. An irrevocable trust once settled, the settlor does not have the power to revoke the trust. Where the shares of the beneficiaries have been determined or demarcated, such a trust is determinate in character and where the shares of the beneficiaries are not demarcated, the trust is known as a discretionary or indeterminate trust.

3.2 Indeterminate Trust

The primary character of an indeterminate trust is that the share of the trust fund to which a beneficiary is entitled is not specified. In this type of a trust, the trustees have the discretion to make distributions to the beneficiaries in a manner they deem fit. Indeterminate trusts are a popular medium to provide protection from the levy of estate duty because since shares are not specified, the amount of distribution is not considered to form a part of the estate of the beneficiary, it being merely a contingent interest.

A share in an indeterminate trust cannot be disposed of by testamentary disposition as the amount of distribution to be received by the beneficiary, if any, is not certain. It is a mere future interest and hence the same cannot be willed.

3.3 Determinate Trust

3.4 Section 58 of the Indian Trusts Act, 1882 states that the beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest. To this, there is a proviso that when properly is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, she shall not be authorised to transfer such interest during her marriage.

3.5 The Supreme Court, in the case of *Canbank Financial Services Ltd. vs. The Custodian and Ors. AIR 2004 SC 5123*, has reiterated the right of the beneficiary to transfer his beneficial interest, by the following words (at para 56) –

"A beneficial interest indisputably can be transferred. For the said purpose, the only legal requirement will be essence of a trust. The right of a beneficiary to transfer his interest being absolute, the transferee derived rights, title and interest therein."

3.6 It is pertinent to note that the right of the beneficiary to transfer his interest is subject to the intention of the settlor of the trust. If the instrument creating the trust restricts the transfer of the beneficial interest by the beneficiary, the intention of the settlor is bound to prevail.

3.7 A question may arise here as to what constitutes 'transfer' under section 58. In the case of *Commissioner of Income Tax/Wealth Tax vs. Indumathi R. Kirloskar 1988(3) KarLJ 377*, the Karnataka High Court had an occasion to consider the meaning of the word 'transfer'-

"10. Shri Srinivasan, learned counsel for the Revenue, contended that the meaning to be attributed to the expression "transfer" in section 58 of the Indian Trusts Act is one as defined under section 2(47) of the Income-tax Act and not what is given under the Transfer of Property Act. The meaning of the expression "transfer" given in the Income-tax Act is only for the purpose of Income Tax and that is concerned or confined only in relation to a capital asset and not a general meaning of the expression "transfer". Therefore, the argument developed on the basis of importing the definition of the Income-tax Act to the Indian Trusts Act is fundamentally wrong and is devoid of merit. The expression "transfer" is not defined under the Indian Trusts Act. Transfer of property is governed by the provisions of the transfer of Property Act, Even in respect of a trust, if there is any transfer of property, the expression used in the Transfer of Property Act can be looked at because the Indian Trusts Act is not a code and the preamble to the Act provides that "Whereas it is expedient to define and amend the law relating to private trusts and trustees", and, therefore, the same is not exhaustive on all the aspects relating to trusts. Now, it is a well-established principle of interpretation that if the expressions used in an enactment have acquired a legal meaning, the Legislature is presumed to be aware of the same and it must be deemed that the expression used in the prior enactments or the allied enactment or law thereof declared by courts was borne in mind by the Legislature in using the expressions in the later enactments. The use of the expression "define and amend" without the expression "consolidated" in the preamble to the Indian Trusts Act leads one to the conclusion that while the Act is exhaustive in respect of matters provided for in it, it is not exhaustive in

respect of all matters relating to private trusts. In cases where the provisions of the Indian Trusts Act do not cover a situation, then, general principles of law could be invoked. Therefore, the expression "transfer" used in the Indian Trusts Act will have to be understood in the same sense as it is understood under the Transfer of Property Act and the general law applicable to the same."

3.8 Section 5 of the Transfer of Property Act, 1882 defines "transfer of property" to mean an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons.

3.9 Thus, if the meaning of the word 'transfer' as used in the Transfer of Property Act is adopted, it would only mean conveyance of property by a beneficiary during his lifetime, and would not include a situation whereby a beneficiary bequests his beneficial interest on death.

This view was affirmed by the Supreme Court in the case of *Mohd Ismail vs. Sabir Ali [1963] 1 SCR 20*, in the following words-

"Incidentally we may add that use of the words 'inter vivos' in the definition of the word 'transfer' merely emphasises that the transfer must be effective during the lifetime of the transferor as contrasted with a transfer by will which takes effect on the death of transferor."

4. Life interest in property

4.1 A life interest is an interest in estate which determines on the termination of life. In other words, a life interest is an interest in a property that is created for the lifetime of the person or persons concerned. The life interest ends on the death of the person in whose favour it is created. He or she does not have an absolute interest or control over the property and cannot deal with the property independently.

4.2 It is also significant to note the provisions of section 119 of the Indian Succession Act, 1925 which states that where by the terms of a bequest a legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

4.3 From the above, it can be seen that when a person gives a life interest to another person in a property such that after that person's lifetime, the property should vest in another person, that other person is said to have received a vested interest in the property as soon as the person granting the life interest dies.

4.4 The purpose behind giving a life interest to another is to allow him or her to enjoy the usufructs of the property while at the same time assuring that he or she does not alienate the property.

4.5 In the case of *Lakshmana Nadar and Ors. vs. R. Ramier AIR 1953 SC 304*, the question before the Apex Court was whether the estate granted by the testator to his widow was a full woman's estate under Hindu law or merely a limited life estate in the English sense of that expression. The Court, while holding that the widow possessed only a life interest in the property, held as follows –

"8...

She (the widow) had complete control over the income of the property during her lifetime but she had no power to deal with the corpus of the estate and it had to be kept intact for the enjoyment of the daughter. Though the daughter was not entitled to immediate possession of the property it was indicated with certainty that she should get the entire estate at the proper time and she thus got an interest in it on the testator's death. She was given a present right of future enjoyment in the property. According to Jarman (Jarman on Wills), the law leans in favour of

vesting of estates and the property disposed of belongs to the object of the gift when the will takes effect and we think the daughter got under this will a vested interest in the testator's properties on his death."

4.5 Thus, from the above, it can be seen that when a person grants a life interest to another person, a vested interest is also granted to the person to whom the property passes after the life time of the first person. If the person to whom life interest is granted is allowed to dispose of his interest in any way, that may endanger the future enjoyment of the property by the person in whom the property is finally vested.

4.6 However, one must keep in mind the difference between a vested interest and a contingent interest, and the rule of construction to be adopted, as pointed out by the Supreme Court in *Usha Subbarao vs . B. E. Vishveswariah and Others (1996) 5 SCC 201* as follows –

"Although the question whether the interest created is a vested or a contingent interest is dependent upon the intention to be gathered from a comprehensive view of all the terms of the document creating the interest, the Court while construing the document has to approach the task of construction in such cases with a bias in favour of vested interest unless the intention to the contrary is definite and clear (See: Rajes Kanta Roy vs. Santi Devi). As regards Wills, the rule is that "where there is doubt as to the time of vesting, the presumption is in favour of the early vesting of the gift and accordingly it vests at the testator's death or at the earliest moment after that date which is possible in the context."

4.7 In other words, if a bequest is made to a person for life and after his death to his children, the bequest becomes vested in each child as and when it is born and vesting is not postponed till the death of his life tenant. The expression 'after his death' is taken to indicate merely the time when the gift becomes reduced to possession and not the time where the right to such possession vests. A bequest made to a legatee, who is not entitled to immediate possession of the bequest, gets vested in such legatee on the date of death of testator. For instance, where a person bequests a house to his wife, and after her death, to his legal heirs, the legacy to the legal heirs of the testator becomes vested in them at the death of the testator. There is no question of the heirs being divested therefrom or of them getting the property prior to the death of the wife.

5. Agricultural Land – If the holding for the beneficiary goes beyond the limit prescribed by the applicable statute

5.1 The Ceiling Acts enacted in various States are aimed at assuring that the ownership and control of the agricultural resources of the community are so distributed as best to subserve the common good, and also that the operation of the agricultural economic system does not result in the concentration of wealth and means of agricultural production to the common detriment.

5.2 These legislations aim at fixing the ceiling acres for different areas or regions in the State and any person holding land in excess of the ceiling area fixed for any particular area is deemed to be a surplus holder and under the provisions of the respective Ceiling Acts the land in excess of the ceiling area is delimited as surplus land and it is taken over by the State in which the title vests on possession of such surplus land being taken.

5.3 The main purpose of the Ceiling Acts, therefore, seem to be to distribute agricultural land amongst the landless and other persons to subserve the common good and for the purpose, to limit the extent of land to be held by a person and to take away the land in excess of the land which is allowed to be retained by the holder which is called a ceiling and the land in excess of the ceiling area is then to be distributed by the State to certain categories of persons according to priorities.

5.4 In furtherance of this object, the Maharashtra Agricultural Lands (Ceiling on

Holdings) Act, 1961 came into effect from 26-1-1962 in the state of Maharashtra.

5.5 The question that arose before the Bombay High Court in the case of *Dadarao Son of Kashiram and Anr. vs. State of Maharashtra and Ors AIR 1970 Bom 144.* was whether the provisions of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act affect the persons who got the property either by inheritance or as legatees under a will from the holder who was alive on the appointed day, but died during the enquiry proceedings and before the declaration of surplus land was made. The Court held as follows –

"15. The Legislature has made specific provisions which will be found in Sections 8 and 10 of the Ceiling Act inhibiting any person from transferring or partitioning only land on or after the appointed day until the land in excess of the ceiling is determined under the Ceiling Act. Even with respect to transfers between 4-8-1959 and the appointed day, 26-1-1962, a provision has been made throwing the burden on the holder to show that such transfers were not made in anticipation of, or in order to avoid or defeat, the objects of the Ceiling Act. However, these transfers relate only to transfers inter vivos made by act of parties. That means the Legislature did not want the holders of excess land to divest themselves of the excess land after the Ceiling Act came into force or in anticipation of the Ceiling Act coming into force in order to defeat the objects of the law, by voluntarily transferring their excess lands either by transfer or partition as that would prompt the holders to defeat the objects of the Ceiling Act by entering into nominal or fraudulent transactions or to benefit their relations or friends, who would not otherwise be entitled to the property and defeat the very purpose of the Ceiling Act namely distribution of the surplus land to the landless persons. If the Legislature wanted to extend this inhibition even to heirs or the legatees, it would have been very easy for the Legislature to include those contingencies also and it was open to the Legislature to specifically provide that the surplus land will be determined in relation to the property held by a person who was alive on 26-1-1962 and died subsequently before the declaration is made. In the absence of any such provision, it will be stretching the language of the Ceiling Act too far to include even such cases where the persons taking the property on the death of the holder have no hand in getting such property which comes to them because of the accident of their being the heirs or the legatees and in the latter case on account of the voluntary act of the testator to which the legatee is not a party."

5.6 Thus, the Bombay High Court held that section 8 and section 9 of the Maharashtra Agricultural Lands Act, 1961 do not include transfers by way of testamentary disposition.

5.7 However, section 10 of the Act provides as under –

"10. Consequences of certain transfers and acquisitions of land.—

1) …

2) If any land is possessed on or after the commencement date by a person, or as the case may be, a family unit in excess of the ceiling area or if as a result of acquisition (by testamentary disposition or devolution on death or by operation of law) of any land on or after that date, the total area of land held by any person or as the case may be, a family unit, exceeds the ceiling area, the land so in excess shall be surplus land."

5.8 Therefore, it can be seen that after the commencement date, i.e. 2-10-1975, if any land is possessed as a result of acquisition by will or devolution or by operation of law such that the total area of land exceeds the ceiling area, such excess land is liable to be demarcated as surplus land, and the beneficiary may be liable to surrender the same to the State.

6. What is 'Ancestral' Property

6.1 Mulla's Principles of Hindu Law 14th Edition, 1974, lays down that it is well settled that the only property that can be ancestral is property inherited by a male Hindu from any

one of his three immediate paternal ancestors, namely, his father, father's father and father's father's father; and the only persons who are entitled to an interest in it by birth are the sons, sons' sons, and sons' son's sons, of the inheritor.

6.2 Courts in India, ever since the 19th century, have time and again felt it essential to discuss the term 'ancestral' property.

Back in the year 1886, in *Jugmohandas Mangaldas vs. Sir Mangaldas Nathubhoy ILR (1886) Bom 528,* the Bombay High Court had considered the question on whether a property acquired under a Will by 'A' was ancestral property in which A's son, grand-son and great grand-son had a right by birth. At pages 579, 580, Sargent C. J. said: "But it was said that, even if the texts referred to in *Muddun Gopal vs. Ram Buksh (1866) 6 Suth WR 71,* did not establish the plaintiff's right to partition, the property given by will was ancestral as between him and his sons; which it was said, included everything that had ever formed part of the grandfather's estate. But this broad interpretation of the term ancestral is inconsistent with the very principle upon which grandsons are said to have by birth a right in the grandfather's estate equally with the sons, viz., that they constitute a coparcenary for the due performance of sacred rites, and as such, have a common interest in the enjoyment of the grandfather's property, a principle which can have no application to property which the grandfather of his own free will, and acting ex hypothesi within his power, separated from his estate. In other words, the son has acquired by the gift of his father a title in which the grandson has no concern, except as the possible heir when his father dies."

6.3 The position in law was further discussed in *Muhammad Husain Khan vs. Babu Kishva Nandan Sahai MANU/PR/0067/1937,* that: *"The rule of Hindu Law is well-settled that the property which a man inherits from any of his three immediate paternal ancestors, namely, his father, father's father and father's father's father, is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it."* However, the question raised in the appeal was whether the son acquires by birth an interest jointly with his father in the estate which the latter inherits from his maternal grandfather. The Court held that word 'ancestor' in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the 'ancestral' estate, in which, under the Hindu Law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line.

6.4 Thereafter, the *Hon'ble Bombay High Court in Jamarathbee and Ors. vs. Pralhad Dattatraya Dadpe and Ors. AIR 1978 Bom 229* stated that *"…In order that the property is ancestral it need not belong necessarily to the ancestors. In other words, it is not necessary to the party to prove with all possible details that his ancestors were really the owners of the property. The word ancestral is not given any technical meaning. It means only the property which flows from generation to generation by succession or by survivorship…the property becomes ancestral as soon as a man gets it from his ancestors."*

6.5 To sum up, ancestral property is property inherited by a male Hindu from any one of his three immediate paternal ancestors, namely, his father, father's father and father's father's father.

CA Anup P. Shah

Intestate Succession

1. Introduction

"Mors certa est, vita non est"

The above Latin phrase meaning "Death is Certain, Life is Not" sums up the reality of life. With death comes myriad succession issues. Succession to a person's estate, after his demise, has been a field which has always attracted a lot of importance. Ironic, as it may sound, in spite of this importance of succession planning, a vast majority of people, especially in India, do not plan for the same. End result? Disputes and court litigations in several cases where the legal heirs of the deceased fight one another for a share of the estate. The term "succession" ordinarily means the transmission of the property and the transmissible rights and obligations of the deceased. The transmission could either be by way of a Will (Testate Succession) or by the operation of Law (Intestate Succession).

The Law on intestate succession in India is different for different communities, for instance, Hindus, Sikhs, Buddhists and Jains are governed by the Hindu Succession Act, 1956 ("the Act"). Let us examine the provisions of this Act in cases where a Hindu dies without making a valid Will. The Act governs the law relating to intestate succession among Hindus.

It is essential to note that the Hindu Succession Act would have no application in case a Will is made. In that case, the provisions of the Indian Succession Act, 1925 take over. The Act would thus, only apply in a case where a Hindu male or female dies without making a Will and leaves behind any property, movable or immovable or both.

2. Male Intestate Succession

2.1 The Act lays down how the property of a Hindu male will pass on to his heirs in case he fails to make a valid Will – *Manshan vs. Tej Ram (1980) Suppl SCC 367*. The property of an intestate Hindu male devolves on the following heirs in the order specified below:

(a) Firstly, upon his Class I heirs

(b) Secondly, if there is no Class I heir, then upon his Class II heirs

(c) Thirdly, if there is no Class II heir, then upon his Agnates

(d) Fourthly, if there is no Agnate, then upon his Cognates

2.2 Order of Succession

The order of succession is in the order specified above. Thus, if there are Class I heirs, then they take the property in exclusion to all others. If there are no Class I heirs, then the Class II heirs take the property in exclusion to all others. If there are no Class II heirs, then the Agnates take

the property in exclusion to all others. Finally if there are none of the aforesaid heirs, then and only then the Cognates take the property.

2.3 Class I heirs

The Schedule to the Act specifies the following 12 heirs as Class I heirs:

Son, daughter, widow, mother, son / daughter of a predeceased son / daughter, widow of a predeceased son, son / daughter / widow of a predeceased son of a predeceased son. Children of a void marriage are treated as legitimate children of their father for inheriting the separate property of their father – *Govind Manohar Jadhav vs. Smt Rukmininai Jadhav AIR 2009 (NOC) 2366 (Bom).*

The above Class I heirs take the property simultaneously and in priority succession to all other heirs. Amongst themselves the distribution is as follows:

(i) The intestate's widow and if there are more than one such widow, then all of them taken together, take one share. The widow is permitted to receive this share even if she subsequently remarries. In the case of *Cherotte Suganthan (D) vs. Cherotte Bharathi AIR 2008 SC 1467* it was held that the subsequent remarriage does not divest the widow of her property.

(ii) The intestate's children, mother and widow each take one equal share. It does not matter whether the daughter is unmarried or married. She gets an absolute share equal to that which the son gets.

(iii) The heirs in the branch of each predeceased child take one share between them.

(iv) The distribution of the share among the heirs in the branch of the predeceased son is so made that his widow / s and the sons and daughters each get an equal share. Further, the branch of his predeceased sons also get the same portion.

It may be noted that the terms 'son' and 'daughter' include both those which are natural and those which are adopted.

2.4 Class II heirs

The following heirs are Class II heirs –

I. Father

II. Son's daughter's children; Brothers; Sisters

III. Daughter's grandchildren

IV. Children of Siblings

V. Father's parents

VI. Father's widow (step-mother), Brother's widow

VII. Father's siblings

VIII. Mother's parents

IX. Mother's siblings

Among the heirs specified in Class II, those in the first entry take the property simultaneously and in exclusion to those in the subsequent entries and so on and so forth. Thus, if the father is surviving, he takes the property in exclusion to all other Class II heirs. All the heirs specified in one entry get an equal share in the property.

2.5 Agnates and Cognates

Agnates – people related wholly through males. Thus, a father's brother's daughter is an Agnate but a father's sister's son is not an Agnate because the relation is not entirely through males.

Cognates – people related but not wholly through males. A mother's brother's daughter or a father's sister's son is a Cognate because the relationship is not wholly through males.

2.6 Illustrations

(a) A Hindu male dies without a Will, leaving behind his mother, father, wife, son, daughter-in-law, daughter and son-in-law.

- His mother, wife and children each are Class I heirs and each of them take an equal 25% share in his estate.
- It does not matter whether the daughter is married or unmarried.
- Daughter-in-law would get a share only if her husband (i.e., the son has expired prior to the male).
- Father, even though alive, would not get a share because he is a Class II heir.

(b) A Hindu male dies without a Will, leaving behind his wife, brother, sister, son's widow, and predeceased daughter's son.

- His wife, son's widow and predeceased daughter's son, being Class I heirs would each take an equal 33% share.
- Siblings are Class II heirs. Since Class I heirs are present, Class II heirs get nothing.

(c) A Hindu male dies intestate and leaves behind his 2 brothers, 3 sisters and his mother's parents. Each of his siblings would get a 1/5th share to the exclusion of his maternal grandparents.

(d) A Hindu male dies intestate and leaves behind his son's daughter's (i.e., his granddaughter's) daughter and his daughter's daughter's (again his granddaughter's) son. The granddaughter of his son gets the entire property in preference to the grandson of his daughter since she is a Class II heir of a higher order.

3. Female Intestate Succession

3.1 Prior to the coming into force of the Hindu Succession Act, a Hindu widow had a very limited interest in property inherited by her and she had no power on disposition over the said property. Now, a female Hindu has absolute power to deal with her property and she can dispose of her property by way of a will, gift, etc.

3.2 Devolution of Property

Under s. 15(1), the property of an intestate Hindu female devolves on the following heirs in the order specified below :

(a) Firstly, upon her sons and daughters (including the children of any predeceased children) and husband;

(b) Secondly, upon the heirs of her husband;

(c) Thirdly, upon her parents;

(d) Fourthly, upon the heirs of her father;

(e) Fifthly, upon the heirs of her mother.

The succession is in the order specified above. Thus, the heirs in the first entry take the property simultaneously and in exclusion to all others and so on and so forth. Thus, the children and husband of a female Hindu take the property in preference to all other specified heirs.

However, there are certain exceptions in the case of a female when the heirs of her husband do not receive the property and instead it goes to her father's heirs. In the case of a Hindu female dying intestate, without any children or any children or any predeceased children, any property inherited by her from her parents shall devolve upon the heirs of her father.

Similarly, in case a Hindu female dies intestate, without any children or any children or any predeceased children, then any property inherited by her from her husband or her father-in-law shall devolve upon the heirs of her husband.

3.3 Illustrations

(a) A Hindu female dies intestate and leaves behind her husband, two sons and parents. Her husband and her two sons

are entitled to an 1/3rd share each in preference to her parents.

(b) A Hindu female dies intestate. She was divorced from her husband and her only other relatives are her parents. A divorce leads to a total severance of relationship. Hence, her ex-husband is no longer entitled to her property. The property would go entirely to her parents.

(c) A Hindu female dies intestate and leaves behind the following heirs of her predeceased husband: brother and sister's son. The property devolves on her husband's heirs as if it was his property and he died intestate in respect of the same. Since her husband's brother is a Class II heir who is in preference to his sister's son, the brother would take the property entirely.

(d) A Hindu female inherits a farmhouse from her father. She dies intestate and without a child leaving behind her husband, father's brother and father's sister and husband's sister. Her husband and husband's sister would not be entitled to this farmhouse since it is a property inherited from her father and she died without leaving any children. Hence, the property inherited from her father would devolve equally upon her father's heirs, i.e., his brother and sister.

(e) A Hindu female inherits certain property each from her father-in-law, husband and parents. She dies intestate leaving behind her son, brother, sister and her father-in-law's nephew and niece. All her estate including the property inherited by her from her father-in-law, husband and parents would devolve upon her son. The exception only applies if the Hindu female does not have any child. In this case, since she has a son and so all her property would go to him.

4. Interest in HUF Property

4.1 Share in HUF

On the death of a male / female Hindu, his / her interest in a Hindu Undivided Family (HUF) passes by any one of the following two modes:

(a) If no Will is prepared in respect of the undivided share, then it devolves by survivorship upon the other surviving members and is not governed by the succession rules laid down under the Act. Thus, if a father dies, then his interest in the HUF will devolve by survivorship upon the other HUF members.

(b) As per the Hindu Succession Act, share in the HUF can be willed away. The Act now expressly permits a Hindu to make a testamentary disposition of his HUF interest.

4.2 Position of Daughter in HUF

The Central Government amended the Hindu Succession Act, 1956 by the 2005 Amendment Act which was made operative from 9th September 2005. This Amendment has altered the succession pattern but also changes the way HUFs were hitherto managed. Section 6 of the Hindu Succession Act, 1956 provides that a daughter of a coparcener shall:

a) by birth become a coparcener in her own right in the same manner as the son;

b) have the same rights in the coparcenary property as she would have had if she had been a son;

c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.

Thus, the amendment has by one stroke put all daughters at par with sons and they can now become a coparcener in their father's HUF. She would have all rights and obligations in respect of the coparcenary property, including testamentary disposition. A married daughter

would continue to be a coparcener in respect of her father's coparcenary, even after she ceases to be a member of that family on marriage.

Since her rights and obligations are at par with a son, then the daughter can also become a karta of her father's HUF even after her marriage. Thus, you have a situation wherein a daughter gets married, ceases to be a part of her father's family, does not live in her father's family but yet she would become the karta of her father's HUF.

Various decisions have upheld the proposition that the amendment to the Act is prospective and not retrospective:

- *Vaishali Satish Ganorkar vs. Satish Kesaroa Ganorkar, AIR 2012 Bom 110*
- *Pravat Chandra Patnnaik and Others vs. Sarat Chandra Patnaik, AIR 2008 Orissa 153*
- *Sugalabai vs. Gundappa A. Maradi, 2008(2) Kar LJ 406*
- *N Jangi Reddy vs. Yellaram Narsimha Reddy (AP) (Second Appeal No. 630 of 1998)* Judgment delivered on 3rd October, 2007.

Based on these and several other judgments, it is submitted that all daughters living as on 9th September 2005 would become coparceners in their father's HUF.

The Supreme Court has also, albeit in the context of a different section of the 2005 Amendment Act, clarified that the 2005 Act does not seek to reopen vesting of a right where succession has already taken place. According to the Supreme Court, "the operation of the Statute is no doubt prospective in nature.... Although the 2005 Act is not retrospective its application is prospective" – *G. Sekar vs. Geetha (2009) 6 SCC 99.*

It may be noted that the Amendment only alters the succession pattern of daughters in their father's HUF and not his personal succession pattern.

5. Intestate Succession to Specific Assets

5.1 Let us examine the position of intestate succession of heirs in case of certain specific assets:

(a) **Share in Partnership Firm** – A partnership is a creation of a contract, and hence, unless the Partnership Deed expressly provides for the same, the legal heirs of a deceased partner do not have an automatic right to become partners in place of the deceased. It is not uncommon for Deeds to provide that the heir of a deceased would be appointed as a partner. However, a question which arises in the case of an intestate succession is that which of the legal heirs should be appointed as a partner?

The position in the case of a share in an LLP would also be the same. Thus, the provisions of the LLP Agreement would be relevant to ascertain whether the deceased partner's legal heir can be appointed in his place.

(b) **Agricultural Land** – U/s. 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, any transfer, i.e., sale, gift, exchange, lease, mortgage with possession of agricultural land in favour of any non-agriculturist shall not be valid unless it is in accordance with the provisions of the Act. An important exception to this is in the case of succession to agricultural land by a non-agriculturist. Thus, if the legal heirs of an agriculturist are non-agriculturists or if the legatees under his will are non-agriculturists, even then the succession / bequest in their favour would be valid. In law, succession to property cannot lie in a vacuum and the BTALA would not override succession laws – *Ghanshyambhai vs. State of Gujarat, (1999) 2 Guj., LR 1061.*

Similarly, any transfer in favour of an agriculturist but of any land exceeding the ceilings fixed under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 shall not be valid unless it is in accordance with the provisions of that Act. For instance, there is a person who is holding land up to the maximum limit permissible. His major son is also independently holding another piece of land up to the maximum limit permissible. The father dies and his sole legal heir is his son. On his death, the land becomes that of the son. Can the son contend that since he has received the land by inheritance, the ceiling should not apply to the second land received by him? The Supreme Court had an occasion to consider this issue in the case of *State of Maharashtra vs. Annapurnabai and others, AIR 1985 SC 1403.* It held that the heirs and legal representatives of a deceased holder cannot be treated as independent tenure holders for fixing ceiling. Therefore, each heir would not be treated as independent tenure holders for fixing the ceiling.

Similarly, in *Bhikoba Shankar Dhumal vs. Mohan Lal Punchand Tathed 1982 SCR (3) 218* it was held that the persons on whom his 'holding' devolves on his death would be liable to surrender the surplus land as on the appointed day because the liability attached to the holding of the deceased would not come to an end on his death.

(c) **Ancestral Property** – A Hindu male inheriting property from his father, grand father or great grandfather was treated as ancestral property and he inherited the property, subject to the interest of his son, grandson or great grandson. Thus, he could not deal with such property as he deemed fit. However, this position of Hindu Law has now been modified by the Hindu Succession Act. Various decisions of the Supreme Court have held that ancestral property inherited by the son as a Class I Heir of his father would be his own self acquired property. Judgments such as, *CWT vs. Chandra Sen, 2+2 ITR 370 (SC), Yudhister vs. Ashok Kumar, AIR 1987 SC 558, CIT vs. Karuppan Chettiar, 197 ITR 646 (SC),* etc., have laid down this principle.

(d) **Beneficial Interest in a Trust** – Section 58 of the Indian Trusts Act, 1882 provides that the beneficiary of a Trust may, transfer his beneficial interest in the Trust. Thus, a beneficiary can transfer his interest by sale, gift, Will, etc. However, there is no express provision on whether the beneficial interest in a Trust is inheritable? It is submitted that since the beneficial interest may be transferred, it should also be inheritable. This view is also supported by the decisions in the cases of *Ranjit Mullick, 198 ITR 348 (Cal.); Gopaldas T. Aggarwal, 6 ITD 451 (Bom.), Vastal Parikh, 14 ITD 208 (Ahd.).*

6. Epilogue

Unlike in the West, most of us in India prefer not to prepare a Will. It is often considered inauspicious to even think of these things. The Law of Intestate Succession is complex and even strange at times. Sometimes people get a shock or surprise (depending on which side of the table they are) while dealing with succession without a Will. If there's no Will then the Law takes over and there's no discretion on who gets what! Even someone who the deceased did not like when he was alive, may succeed to his estate after his death, much to the annoyance of the deceased's immediate family members. So if one wants control over his affairs, even once he is no more, then plan today and I leave you with my modified version of a famous saying:

"Where there's No Will, there's usually a Dispute, Where there is a Dispute, there's usually a Law Suit!!"

Ajay R. Singh, Advocate

Right in testamentary and intestate succession for various relations under Hindu Law

I. Introduction

1. The term 'Hindu' is used to signify persons who are Hindus by birth and by faith and this is the basis for the applicability of Hindu Law. Ancient sources are Sruti, Smritis, Commentaries and Digests, Sadachara or Custom and Doctrine of factum valet. The rights and obligations of a Hindu are determined by Hindu law i.e. his traditional law. Subject to the exception that any part of that law may be modified or abrogated by statute.

2. The power of the courts of India to apply Hindu law to Hindu is derived from and regulated by certain statutes of the British Parliament and by imperial and provincial legislation passed during the period of British rule, which unless altered or repealed are to continue in force under the express provisions of Article 372 of the Indian Constitution.

II. Extent of application of Hindu Law

(A) The Hindu law as administered by the courts of India is applied to Hindus in some matters only.

(B) Throughout India, questions regarding succession, inheritance, marriage and religious usages and institutions, are decided according to Hindu law, except insofar as such law has been altered by legislative enactment.

(C) Besides the matters referred to above, there are certain additional matters in which Hindu law is applied to Hindus, in some cases by virtue of express legislation and in others, on the principle of justice, equity and good conscience. These matters are adoption, guardianship, family relations, wills, gifts and partitions. As to these matters also, Hindu law is to be applied subject to such alternations as have been made by legislative enactment.

III. Modifying and abrogating rules of Hindu Law

1) After the partition of India in 1947, Hindu law was changed in India. Fundamental and radical changes were made in 1955 and 1956 by the following Acts:

A) Hindu Marriage Act, 25 of 1955.

B) Hindu Succession Act, 30 of 1956.

C) Hindu Minority and Guardianship Act, 32 of 1956.

D) Hindu Adoptions and Maintenance Act, 78 of 1956.

2) The modern Hindu law is divided in two parts. One, codified Hindu law, and the other is uncodified Hindu law. As per Clause (a) of sub-section (1) of section 4 of Hindu Succession Act,

1956 any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act. Therefore, after coming into force of Hindu Succession Act, any customs or usage as part of that law prevailing in the family automatically ceased to have effect.

The succession of a property of a Hindu who has died intestate, is governed by the Hindu Succession Act, 1956. Section 30 of the Hindu Succession Act, 1956 provides that disposition of any property by a Hindu through will or other testamentary disposition is governed by the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus. Section 30 of the H. S. Act, permits a member of a Mitakshara coparcenary to dispose of by will, his undivided interest in the coparcenary property.

IV. Rights of Various Persons are dealt hereunder:

I. ADOPTED CHILD

1) Although adoption is referred to in almost all ancient laws, it was not until the advent of the Roman empire with its highly organised institutions that we find a full account of the evolution of adoption in society. Adoption is defined as a process by which people take a child who was not born to them and raise him/her as a member of their family.

The legislature, while passing the Hindu Adoption and Maintenance Act, 1956, has taken into consideration only the secular objects of adoption, as under the Act, a daughter can also be adopted. Also, this is the only codified law available on the subject of adoption in India.

2) In *Devgouda Rajgouda Patil vs. Shamgouda Patil (AIR 1992 Bom 189),* the Bombay High Court held that a lunatic can also be adopted under the present law. There is no such incapacity with such child which prevents him from being adopted. In an act of adoption, motive is irrelevant.

The legal effect of an adoption cannot be avoided on the ground that the adoption was intended to deprive the adopted child from getting property in the family of his/her birth. An adopted son is placed on equal footing with a natural son.

Capacity of male to take a child in adoption

3) Section 6 of the Act enumerates the essentials of a valid adoption and one of the conditions is that a person taking in adoption must have the capacity as well as the right to adopt. The conditions which establish the capacity of a male Hindu to take a child in adoption are given in sec. 7.

There are two qualifications necessary for a Male Hindu to be capable to take a child in adoption:

i. the person must be of sound mind,

ii. he must not be a minor

In *Prafulla Kumar Biswal vs. Sasi Beura (AIR 1971 Ori 299),* the Orissa High Court held that the capacity of a Hindu to adopt a son or a daughter is circumscribed insofar as he has no right to adopt except with the consent of the wife, although the consent need not necessarily be expressed and may be implied or can be inferred from the facts and circumstances of the case. When the first wife while living, neither consented for adoption nor participated in the proceedings of adoption being made by a male Hindu, such adoption was held to be not valid in *Kashibai vs. Parvatibai 1995 (6) SCC 213,* in view of section 7 of the Hindu Adoptions and Maintenance Act.

In *Lalitha Ubhayankar vs. Union of India (AIR 1991 kant 186),* it was held by the Karnataka High Court that before adoption by wife under section 7 of the Hindu Adoptions and Maintnance Act, consent of husband is required and this is not violative of Article 14 of the Constitution.

Capacity of a female Hindu to take a child in adoption

4) Under old Hindu law, the power of a female Hindu to adopt a son was very restricted. She could not adopt without the assent of her husband; she had no right herself but was deemed to act merely as an agent, delegate or representative of her husband or as an instrument through whom he was supposed to act. Where adoption by a widow with the consent of a specified person was made a condition precedent, an adoption without such consent was invalid.

Under the Act, a widow gets a right to adopt a child even in the absence of any authority from her deceased husband. An unmarried woman has an independent right to adopt a child, while under the old Hindu law no such right was given. The Act authorises a maiden, a divorced woman or a widow to take a child in adoption. Section 8 of the Act deals with the capacity of a female Hindu to take in adoption.

5) Person capable of giving in adoption

Section 9 of the Act prescribes the capacity of a person who gives a child in adoption to another.

Under this section, three persons have been given the right to give a child in adoption –

1. Natural father,
2. Natural mother,
3. Guardian (whether testamentary or appointed by the court).

6) Effects of adoption

Section 12 deals with the effects of a valid adoption. It states that –

"An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that –

a. the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

b. any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

c. the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

6.2 The main effect of adoption is to transplant the child adopted from the family of his birth to the adoptive family. As from the date of adoption the child will be considered to be the natural child of the adoptive family and all ties with the original family are severed. Exceptions are given in the section. The main object of the present section is to modify the old Hindu law which was founded on the doctrine of relation back. The Act does away with the theory of relation back and confers on the child adopted a status equivalent to that of a natural born child in the adoptive family only from the date of adoption. The expression "effects of adoption refers to all the legal consequences flowing from an adoption."

6.3 However, in *A. S Sailaja vs. Kurnod Medical College AIR 1986 AP 209*, it was held by the A.P. High Court that a Brahmin girl adopted by a person belonging to the backward class cannot claim the status of a backward class candidate for admission to a medical college under the seats reserved for backward classes. Justice Raman Swami observed that, the legal status of a higher class child adopted by a member of a backward class did not make him eligible as a member of the adoptee caste merely on satisfying the conditions of the adoption law. It is submitted that when a person is adopted

validly the legal effect of the adoption has to be cognised for all purposes. He becomes a part of the family of the adopter and has to be considered as belonging to the same caste or class as the adopter. It is true that if the adoption is a sham and nominal transaction and is a make believe affair, the court is entitled to ignore the adoption. But as long as the adoption is validly made, the motive for the adoption (in this case to get a seat under the reservation quota for backward classes) is entirely immaterial.

6.4 Apart from the above important sections, there are also provisions relating to adoption in the Juventile Justice (Care and Protection) Act, 2000.

In a series of cases, the courts are framing a uniform set of guidelines so that adoption does not become a form of trafficking.

6.5 In a decision in the case of *Basavarajappa vs. Gurubasamma & Others (2005) 12 SCC 290* the Supreme Court held that:

"11. On adoption, the adoptee gets transplanted in the family in which he is adopted with the same rights as that of a natural-born son. The legal effect of giving a child in adoption is to transfer the child from the family of his birth to the family of his adoption. He severes all his ties with the family from which he is taken in adoption."

6.6 The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in section 14(1) namely:

(a) where a wife is living, adoption by the husband results in the adoption of child by both the spouses; the child is not only the child of adoptive father but also of the adoptive mother.

(b) In case of there being two wives, the child becomes adoptive child of the seniormost wife in marriage, the junior wife becoming the stepmother of the adopted child.

(c) Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the stepmother of the adopted child.

(d) When the widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the stepfather of the adopted child.

The Scheme of sections 11 and 12, therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with a child through that deceased husband of the widow. For instance the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and in this way, the adopted son would become a member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. It is true that section 14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of sections 12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that in sub-section (4) of section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the 'stepfather' of the adopted child, is made.

6.7 The true effect and interpretation of sections 11 and 12 of Act of 1956 therefore is that when either of spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words the result of

adoption by either spouse is that the adoptive child becomes the child of both the spouses. This view is borne out by the decision of the Bombay High Court in *Ankush Narayan Shingate vs. Janabai Rama Sawat.*

6.8 The introduction of a member into joint family, by birth or adoption, may have the effect of decreasing the share of the rest of the members of the joint family, but it certainly does not involve any question of divesting any person of any estate vested in him. The joint family continues to hold the estate, but with more members than before. There is no fresh, vesting or divesting of the estate in anyone.

6.9 In my view, if the coparcenary of the joint family is in existence in the family of birth on date of adoption then the adoptee cannot be said to have any vested property. The property does not vest and therefore provision of S. 12 proviso (b) is not attracted. In the context of S. 12 proviso (b) 'vested property' means where indefeasible right is created. In other words where full ownership is conferred in respect of a particular property. But this is not the position in case of coparcenary property which is not owned by a coparcener and all the properties vest in the joint family and are held by it.

6.10 The rights of an adopted son of a Hindu were held to be the same in every respect as those of a natural born son. Section 12 of the Act was apparently designed to remove the hardship and injustice caused to persons by the operation of the said rule of relation back. It states that although the adopted child shall be deemed to be child for all purposes with effect from the date of adoption, he shall not divest any person of any estate which vested in him or her before the adoption. There is thus no relation back to the death of the adoptive father and the legislature has expressly abolished that doctrine. The adopted child shall, however, be deemed to be the child of the adoptive family for all purposes with effect from the date of adoption.

II. RIGHTS OF DEPENDANTS AND OF UNMARRIED DAUGHTER

7.1 Section 18 read of The Hindu Adoptions and Maintenance Act, 1956. Section 18 governs the scheme for providing maintenance to the wife. Section 20, on the other hand, deals with the regime of providing maintenance of children and aged parents.

7.2 Under clause (v) of section 21 of the Act the term 'Dependants' encompasses unmarried daughter. Therefore, an unmarried daughter was entitled to receive maintenance amount from her father or mother, as the case may be, so long as she is unable to maintain herself out of her own earnings or other property. *Vijay Kumar Jagdishrai Chawla vs. Reeta Vijay Kumar Chawla 2011 Vol. 113 (5) Bom. L.R. 3098*

V. Mother

Section 8 of Hindu Succession Act, 1956 provides general rules of succession and devolution of property of a male Hindu dying intestate.

In order to find out the distinction between devolution of property, and vesting of property it would be useful to refer to a decision in *Devgonda Raygonda Patil vs. Shamgonda Rayagonda Patil and Another : AIR 1992 Bom. 189.*

The Hon'ble Court in case of *Mahendrakumar Ramrao Gaikwad vs. Golbhai Ramrao Gaikwad and Anr. 2000(2) Mh. L. J. 378 (Bom)* held that the son cannot be absolved from his own responsibility to maintain his mother even though the husband may be alive, son is one of those persons from whom a woman can claim maintenance u/s. 125 of Cr.P.C.

The mother would be entitled to claim maintenance from the son under section 125 of Cr.P.C. irrespective of the fact that the husband is alive. [See. *Rafuddin vs. Smt. Salecha Khataon AIR 2008 NOC 776 (Bom)*].

VI. Adopted parents

Parents fall in the class I of the heirs i.e. mother or father. Parents also have rights of maintenance.

Under Section. 10 of the Hindu Adoptions and Maintenance Act, 1956 a married person or a person who has completed 15 years of age cannot be adopted unless a custom or usage permits the same. Thus, a situation of adopting parents is not contemplated by the Act.

VII. Grandmother

Under Hindu Adoptions and Maintenance Act, 1956, as grandsons have been made liable to pay maintenance under sec. 22(1) of the Hindu Adoptions and Maintenance Act, 1956, provided their father are not alive. The primary responsibility is of a son .

As per sec. 20(b) of the Domestic Violence Act, the maintenance includes even medical attendance and treatment.

VIII. Step children

Under section 14 of the Hindu Succession Act, 1956 any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner;

Whether the expression "daughter" as appearing in section 15(1)(a) includes a step daughter i.e. the daughter of the husband of the deceased by another wife. The word "daughter" and "step-daughter" have not been defined in the Hindu Succession Act, 1956.

The expression "daughter" in section 15(1)(a) of the Act would thus include:

(a) daughter borne out of the womb of the female by the same husband or by a different husband and includes an illegitimate daughter; this would be in view of section 3(j) of the HSA.

(b) adopted daughter who is deemed to be a daughter for the purpose of inheritance.

Children of a pre-deceased daughter or an adopted daughter also fall within the meaning of the expression "daughter" as contained in section 15(1)(a). If the legislature intended the word "daughter" to include the word "step-daughter", it could have said so in express terms. Thus, the word "daughter" appearing in section 15(1)(a) would not include a "step-daughter" and such a step-daughter would fall in the category of a heir of her husband as referred to in Clause 15(1)(b). When once a property becomes the absolute property of a female Hindu it shall devolve first on her children (including children of the predeceased son and daughter) as provided in section 15(1)(a) of the Act and then on other heirs subject only to the limited change introduced in section 15(2) of the Act. The step-sons or step-daughters will come in as heirs only under clause (b) of section 15(1) or under clause (b) of section 15(2) of the Act.

The expression "daughter" in section 15(1)(a) does not make reference to a "step-daughter" i.e. a daughter borne to the husband of the deceased female Hindu with another woman i.e. out of the wedlock. *(See Raj Rani & Anr vs. Bimla Rani AIR 2011 Delhi 170).*

IX. Minor

Section 8 speaks of powers of natural guardian in respect of separate property of the minor. Section 8 has no application to cases where the minor has an interest in Hindu undivided family.

The Hon'ble court observed that the permission of the court under section 8 of the Hindu Minority and Guardianship Act read with the provisions of Guardian and Wards Act would not be necessary where an interest in the joint family is sought to be disposed of.

Right of Guardian to sell the property of minor –Permission of the court under section 8 of the Hindu Minority and Guardianship Act read with the provisions of Guardian and Wards Act

would not be necessary where an interest in the joint family is sought to be disposed of.

A minor has no legal competence to enter into a contract or authorise another to do so on his behalf. A guardian, therefore, steps in to supplement the minor's defective capacity. The limit and extent of the guardian's capacity (authority) are conditioned by Hindu law. He can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor. Even the personal liability arising out of the guardian's contract is a liability of the minor's estate only. Since the guardian under the Hindu law has the legal competence to enter into a contract on behalf of the minor for necessity or for the benefit of the estate of the minor, the contract is valid from the time of its inception, and since either party can enforce this contract, the test of mutuality is satisfied.

A contract to purchase immovable property by a competent guardian acting within his authority on behalf of a minor is specifically enforceable by or against the minor. Thus, a guardian has the power to enter into a contract on behalf of a minor and it could be so enforced against the minor. However it will always be for the minor to decide to repudiate or not to repudiate such a contract on attaining majority.

X. Illegitimate children

Children of a void marriage would be treated as legitimate children of their father for the purpose of inheriting separate property of father. *[See Govind Manohar Jadhav & Ors. vs. Smt. Rukhminibai Manohar Jadhav & Anr. AIR 2009 (NOC) 2366 (Bom.)]*

Section 20 of the Hindu Adoption and Maintenance Act, 1956 now provides that a Hindu father or mother is bound during his or her life time to maintain his or her illegitimate children and that an illegitimate child can claim maintenance from his or her father or mother so long as the child is a minor.

XI. Widow

Word 'widow' mentioned among Class–I heirs is lady who was validly married under provisions of Hindu Marriage Act and who has acquired status of widow by virtue of death of her husband. Class I heir includes a widow. "Widow" means woman whose husband is dead and who has not married again. "Wife" means a woman married to a man.

Without marriage there cannot be widow. That marriage should be valid marriage under law. Therefore, word widow mentioned among Class I heirs is lady who was validly married under the provisions of Hindu Marriage Act and who has acquired the status of widow by virtue of death of her husband. If her marriage is void under law, on the death of her husband, she would not get status of widow under Class–I of Schedule of Hindu Succession Act, 1956.

If there are more widows than one, all the widows together shall take one share, this was the position prior to the Hindu Succession Act came into force, as there was no prohibition for Hindu marrying more than one woman, it is possible that a male had married and was having more than one wife. After coming into force of the Act, if such Hindu male dies leaving behind two wives, both of whose marriages were valid before coming into operation of the Act, it was provided that those wives will take one share of her husband's estate under section 8 of the Act. Under the Hindu Marriage Act, the Parliament declared that if a person marries during the subsistence of an earlier marriage i.e. a person who marries while he has spouse living at the time of the marriage and such marriage is solemnised after the commencement of this Act, it shall be null and void and provisions of Ss. 494 and 495 of Indian Penal Code apply to the subsequent marriage and the person is punishable under the Hindu Marriage Act. Certainly, the Parliament had no intention of conferring any right on the wife who is a party to the offence of bigamy and give her a share in

the property of her deceased husband. Any such interpretation to the provisions of the Hindu Succession Act would nullify the object with which the Hindu Marriage Act was enacted. In other words, it runs contrary to the concept of bigamy being punishable and the marriage being void, which the Parliament wanted to eradicate by legislation.

Unchastity of widow is no bar to inherit her deceased husband's estate under the old Hindu Law, a widow who is unchaste at the time of her husband's death was not entitled to inherit his estate. But section 28 of the Hindu Marriage Act, 1956 discards almost all the grounds, which imposed exclusion from inheritance. It rules out disqualification on any ground whatsoever excepting those expressly recognised by any provisions of the Act. Unchastity of a widow is not a disqualification under the Act of 1956.

The unchastity of a wife is certainly a ground for divorce but in the absence of a decree of divorce, cannot be pressed into service to disinherit even an unchaste wife from claiming her rights as a widow. A decree of divorce can only be granted by a Court of competent jurisdiction exercising powers under the Hindu Marriage Act. The mere fact that a woman is abandoned by her husband or that a woman after being abandoned by her husband lives with another man, would not raise an inference that their marriage stands dissolved *(See Ranjana Kamble vs. Smt. Ranjana alias Vimaltai & Ors. AIR 2012 Chhattisgarh 167).*

XII. Second Wife

"Wife" means a woman married to a man legally. The marriage should be a valid marriage under law.

Under the Hindu Marriage Act, the Parliament declared that if a person marries during the subsistence of an earlier marriage and such marriage is solemnized after the commencement of the Hindu Marriage Act, it shall be null and void . The Parliament had no intention of conferring any right on the wife who is a party to the offence of bigamy and give her a share in the property of her deceased husband.

Also if her marriage is void under law, on the death of her husband, she would not get status of widow under Class-I of Schedule of Hindu Succession Act, 1956. Thus, she will not be able to claim any right in the property etc.

Conclusion

The Rajya Sabha has approved a proposal to make divorce friendly for women as it provides for the wife getting share in the husband's immovable property even after "irretrievable breakdown" of marriage. The Marriage Laws (Amendment) Bill seeks to empower the courts to decide the compensation amount from the husband's inherited and inheritable property for the wife and children, once the marriage legally ends.

Replying to a debate on the bill, Law Minster Shri Kapil Sibal referred to the Bill as "a historic peace of legislation" in a patriarchal society like India where women, who constitute 50 per cent of the population, own only two per cent of the assets.

He said divorce is "gender neutral" as either the wife or the husband can seek divorce. However, the right over property will not be gender netural as wife can lay claim on husband's immovable property.

Yuvraj P. Narvankar, *Advocate*

Muslim Law

The Muslim Law is admitted to be based upon a well recognised system of jurisprudence providing many rational and revolutionary concepts which could not be conceived by other systems of law in force at the time of its inception. Sir Amir Ali in his book of Mohammedan Law, Tagore Law Lecturer, 4th Edn., Vol. I has observed that the Islamic System, from a historical point of view was the most interesting phenomenon of growth. The small beginnings from which it grew up and the comparatively short space of time within which it attained its wonderful development marked its position as one of the most important judicial systems of the civilised world. The Concept of 'Muslim Law' is based upon the edifice of the Shariat.[1]

Introduction

Fiqh (Arabic: فقه [fiqh]) is Islamic jurisprudence. Fiqh is an expansion of the code of conduct expounded in the Qur'an, often supplemented by tradition (Sunnah) and implemented by the rulings and interpretations of Islamic jurists.

The term "Shariat" (Arabic شـــريعة Šarī a; "way" or "path") is the sacred law of Islam. Shariat (Sharia also known as Shariat) law literally means religious code of life. It is used to refer both to the Islamic system of law and the totality of the Islamic way of life. Shariat guides and regulates all aspects of Muslim life including politics, daily routines, foods, clothing, entertainment, sports, familial and religious obligations, and financial dealings. Traditional Muslims (all mullahs, Mawlanas, Muftis, and Islamic scholars) who understand the Qur'an and the Hadith earnestly believe that Shariat (Islamic Law) expresses the highest and best goals and it being the "law of Allah" is bound to be the best of all.

Shariat and its origin and sources

The "Shariat Law" in all the four Madhabs are essentially the same. The principal sources of Shariat are: the Qur'an, Hadiths, and Sunnah (the sayings, practices, and teachings of the Prophet Mohammed). The secondary sources are: Ijma (consensus), Kiyas (analogy), Ijtihad (responsible individual opinion), and Istihsan (Juristic references).

There are four main schools of Shariat law:

Hanbali: This is the most conservative school of Shariat. It is used in Saudi Arabia and some states in Northern Nigeria. Maliki: This is based on the practices of the people of Medina during Muhammad's lifetime. Shafi'i: This is a conservative school that emphasizes on the opinions of the companions of the Prophet

1 *Lily Thomas and Others vs. Union of India and others, (2000) 6 SCC 224*

Mohammed. Hanifi: This is the most liberal school, and is relatively open to some limited modern ideas.

Muslims consider that, Shariat law was founded on the words of Allah as revealed in the Qur'an, and traditions gathered from the life of the Prophet Mohammed. Shariat continued to undergo fundamental changes, beginning with the reigns of caliphs Abu Bakr (632–34) and Umar (634–44), during which time many questions were brought to the attention of Mohammed's closest comrades for consultation. Therefore, Quran and Sunnah (Sunnah is the way of life prescribed as normative for Muslims on the basis of the teachings and practices of Islamic prophet Mohammed and interpretations of the Quran) were the principal guidance to formulate the core issues of "Islamic Shariat".

The diverse opinions and human interpretations have played such a key role in shaping the traditional inheritance rules and the modern codifications of inheritance laws, that the standard articulation of these rules cannot be considered divinely revealed Shariat but rather man-made fiqh.

Since Muslim inheritance rules are incredibly complicated and there are significant differences between the major schools of law and between the laws of modern Muslim nations, the following is simply a general overview of the basic traditional rules governing the succession and inheritance among Muslims.

Position in India

In India, the concept of Shariat is well recognised and is also legally sanctioned by the Muslim Personal Law (Shariat) Application Act, 1937.[2] It is pertinent to note that the said Act was limited in its applicability and extent. The Miscellaneous Personal Laws (Extension) Act, 1959 was enacted to extend certain personal laws to specific parts of India in which they were not in force earlier. On account of the said Act, the Muslim Personal Law (Shariat) Application Act, 1937 was made applicable to all the territories except the State of Jammu and Kashmir. The Shariat Law was not only made applicable to the prospective but also pending causes.[3] However the position of Muslim law in the Valley of Kashmir, is interest-arousing as almost two-thirds population of the said state forms part of Islamic fraternity. In pre-independence era, the Shariat Law was administered by the early Sultans of Kashmir and later by their successors under Mughal regime. However it is fascinating to note that no law corresponding to the central Shariat Act of 1937 has ever been enacted in the valley. Until today, the rule laid down under the Sri Pratap Consolidation of Laws Act,1920 placing custom over personal laws, reigns supreme. As the law of Shariat is predominantly customary, it maintains the supremacy of Islamic Personal Law in the Valley.[4] There are some laws in force pertaining to the Muslim Law which were locally re-enacted during the regime of Maharaja Sri Pratap Singh and his successors. During those days, the rulers in Kashmir used to locally re-enact the laws enforced in British India.[5]

2 Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937: "Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardiaship, gifts, trusts and trust properties, and wakfs (other than chartities and charitable institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

3 The Hon'ble Supreme Court in *Mohammad Yunus vs. Syed Unnissa. AIR 1961 SC 808*, Interpreting the force or effect of the words in section 2 of the Shariat Act to the effect that" in all matters enumerated therein, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law, observed that the statute would apply not only to suits and proceedings instituted subsequent to the coming into force of the statute but also to suits and proceedings pending on that date whether in original courts or tribunals or in appeal.

4 AIR 1972 J&K 8; AIR 1977 J&K 44.

5 E.g. earlier during Maharaja Ranbir Singh's regime, Lord Macauley's Indian Penal Code 1860 had been adopted in the state of Jammu and Kashmir under the title of 'Ranbir Penal Code'.

General Principles of Succession

The Inheritance is considered as an integral part of Shariat Law and its application in Islamic society is mandatory.

A vast majority of Muslims in India follow Hanafi doctrines of Sunni law. Muslims inherit from one another as stated in the Qur'an.[Qur'an 4:7]. Hence, there is a legal share for relatives of the decedent in his estate and property. The major rules of inheritance are detailed in Qur'an, Hadith and Fiqh. When a Muslim dies there are four duties which need to be performed. They include paying funeral and burial expenses, paying debts, executing the testamentary will of the deceased (which can only be to the extent of one-third of the property) and distributing the remainder of estate and property to the relatives of the deceased according to Shariat Law.

Therefore, it is necessary to determine the relatives of the deceased who are entitled to inherit, and their shares. There are three categories of heirs under Muslim Law viz. sharers, residuaries and distant kindred.

Sharers: The Qur'an contains only three verses [4:11, 4:12 and 4:176] which give specific details of inheritance and shares, in addition to few verses dealing with testamentary power. Qur'an says that "There is a share for men and a share for women from what is left by parents and those nearest related, whether, the property be small or large – a legal share." Thus it becomes clear that there are certain near relations who get prescribed share of the inheritance. There are twelve heirs designated in the Qur'an to receive fixed shares of the decedent's estate viz. father, mother, husband, wife, grandfather, grandmother, daughter, son's daughter, full sister, paternal half-sister (Consanguine sister), maternal half-sister (Uterine sister), and maternal half-brother (Uterine brother). Such shares range from 1/6 to 2/3 of the estate for designated individuals or groups of individuals. The share allottable to each sharer depends on certain conditions. In some case, these shares may reduce proportionately. Although the sharers inherit first, they generally do not take all of the inheritance. Instead, they receive their fixed portions and the rest of the estate is passed to the male agnates (residuaries).

Thus, after the fixed shares are distributed, the balance of the estate goes to the residuaries.

Residuaries: In relation to residuaries, the Qur'an says, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased." Thus "Residuaries" are those who take no prescribed share, but succeed to the residue after the claims of the sharers are satisfied. The agnatic heirs in the residuary class are generally male, including the decedent's son(s), any son of that son (howsoever low in the order of descent), his father (in certain instances), his brother, and his paternal uncle. When there is a male counterpart who has the same relationship to the deceased, some of the women sharers, such as the decedent's daughter, son's daughter, sister, and paternal half-sister, turn into 'asaba' or residuary heirs and receive one-half of the share of their male counterpart instead of the fixed share laid out in the Qur'an. The relatives who are nearer in degree to the decedent generally exclude those farther in degree, and those of full blood relationships with the decedent are preferred over those related only through the father.

Distant Kindred: This class includes all those relations by blood who are neither sharers nor residuaries. Though the said Distant Kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the husband or wife of the deceased.

The Qur'an introduced a number of different rights and restrictions on matters of inheritance, including general improvements to the treatment

of women and family life. The Qur'an also presented efforts to fix the laws of inheritance, and thus forming a complete legal system. This development was in contrast to pre-Islamic societies where rules of inheritance varied considerably. Furthermore, the Qur'an introduced additional heirs that were not entitled inheritance in pre-Islamic times, mentioning nine relatives specifically of which six were female and three were male. The laws of inheritance in the Qur'an also included other male relatives, like the husband and half-brothers from the mother's side, which were excluded from inheritance in old customs. The heirs mentioned in the Qur'an are the mother, father, husband, wife, daughter, uterine brother, full sister, uterine sister, and consanguine sister.

Basic Doctrines

Doctrine of Aul (Increase)

When the inheritance is distributed among the Qur'anic sharers, sometimes the total exceeds unity. So the share allottable to each sharer is proportionately reduced. The formula adopted for this purpose is to bring all the fractional shares to one common denominator. Then the denominator is increased so as to be equal to the sum of the numerators. Thus by increasing the denominator, the fractional shares are all proportionately reduced. This is known as Doctrine of Aul.

Doctrine of Radd (Return)

When the inheritance is distributed among the sharers, the total of the shares is less than unity. The remainder should go to the residuaries. But there may not be any residuaries among the relations of propositus (deceased owner of the property). In such case the residue reverts to the sharers and their shares are proportionately increased. This is known as the doctrine of Radd.

Thus in general, the Qur'an improved the status of women by identifying their share of inheritance in clear terms. Mr. Joseph Schacht states that "this is not meant as a regular legal ordinance, but is part of the Qur'anic endeavour to improve the position of women." The Qur'an does not explicitly mention the shares of male relatives, such as the decedent's son, but provides the rule that the son's share must be twice that of the daughter's.[6] Muslim theologians explain this aspect of inheritance by looking at Islamic law in its entirety, which bestows the responsibility and accountability on men to provide safety, protection and sustenance to women [Qur'an 4:34].

It would not be out of context to mention few basics also about the Shia Law of Inheritance. The Shias divide heirs into two groups, namely, (1) heirs by consanguinity, that is blood relation, and (2) heirs by marriage, husband and wife. For the purpose of determining the shares of heirs, the Shias divide heirs into two classes, namely, Sharers and Residuaries. There does not exist separate class of Distant Kindred unlike the Hanafi Law. The Sharers are nine in number who take fixed share asigned to them under certain specified conditions.

The Hanafi Law recognises the principle of representation whereas the Shia Law does not recognise it. There exist numerous differences in the technical aspects of various schools of Muslim Law of inheritance.

Most importantly a person who according to Muslim Law is an heir of the deceased remains so and gets his legal due. He or she cannot be excluded either by other heirs and survivors of the deceased or even under a specific direction left in that behalf by the deceased himself. One can be excluded from inheritance only under a rule of Muslim Law, if applicable in India.[7]

6 Quran verse 4:11 A male shall inherit twice as much as a female .
7 Smt. Ashabi v Smt. Faziyabi And Ors., ILR 2004 KAR 3599

Testamentary Succession

In addition to the above changes, the Qur'an grants testamentary powers to Muslims in disposing their property. [Qur'an verses 2:180-182, 2:240, 4:33, 5:106-107]. Muslim law requires no specific formalities for creation of a will. It may be made in writing or oral or even by gestures. Though it is in writing, it need not be signed by the testator and attested by the witnesses[8]. It is necessary that the intention of the testator should be clear and unequivocal.

Though the Will is generally regarded as voluntary disposition of the property, there is an interesting verse in the Qur'an which provides "When death approaches any one of you and you are leaving behind some wealth, it is incumbent upon you to make a Will in favour of your parents and relatives according to the conventions of society. [Qur'an, 2:180-182]". In their Will, called vasiyat, Muslims are allowed to give out a maximum of one third of their property and rest of the property has to go by non-testamentary succession. Muslims are also encouraged to give money to the orphans and poor if they are present during the division of property. This directive of making a Will in favour of one's parents and relatives mentioned in this verse was contingent upon the conventions of the society, and was given in the interim period when the Islamic society had not become stable enough to be given the directives which were later revealed in Surah Nisa. According to scholars, it had two basic objectives: first, to immediately safeguard the rights of those relatives which were being usurped by influential relatives[9] and second to revive once again the noble conventions of the society.

There is also another concept of Marz-ul-maut which means gift made by a Mohammedan during death-illness. When a person creates/ makes a gift out of an apprehension (fear) of imminent death and dies later, it is called "Death-Bed-Gift". In other words, if a person makes a gift during illness and dies later, it is called Death-Bed-Gift or Marz-ul-maut. The Death-Bed-Gift is valid only when the donor dies of illness during which the gift was made. Such gift also cannot take effect beyond a one-third of his estate after payment of funeral expenses and debts, unless the heirs give their consent to the excess, after the death of the Donor.[10] Similarly such gift cannot take effect if made in favour of an heir unless other heirs consent thereto after the Donor's death. Section 129 of T.P. Act deals with Death-Bed-Gift or Donatio Mortis Causa. Similarly, Section 191 of the Indian Succession Act. 1925 deals with Death-Bed-Gift with regard to movable property.

However a Muslim who marries under the Special Marriage Act is entitled to bequeath his entire property. There would be no restriction on him to bequeath only 1/3 of his property as is provided under the Muslim Personal Law. Moreover, such a person would not have to obtain the consent of the heirs in order to bequeath in excess of the legal third of his property. However, once a Muslim who is married under the Special Marriage Act is treated on par with persons of other communities, married under the Special Marriage Act, all the rigours of the Section 4 of the Act would be applicable to him.[11]

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8 Ramjilal vs. Ahmed, AIR 1952 MP 56

9 Qur'an Verse 4.11 "You know not who among your children and parents are nearest to you in benefit. This is the law of God. Indeed, God is Wise and All-Knowing. "

10 Gulam Mohammad vs. Gulam Iiussain, AIR 1932 PC 81

11 Sayeeda Shakur Khan & others vs. Sajid Phaniband and another, 2006 (5) Bom.C.R.7

Applicability of Indian Succession Act, 1925

Though a Will by Mohammedan is not required to be probated under the Indian Succession Act, 1925, there is nothing in the act which prevents the court from granting probate of the Will. In such a case it is not a function of the probate court to see whether Will purports to dispose of only one third share of the property and the Will can be granted though it seeks to dispose of more than the one third share of the property.[12] The estate of Muslim Testator vests in his executor though no probate has been obtained by him[13]. And he has the right to alienate the said estate for the purpose of administration and thus can validly sell and convey the testator's property without obtaining the probate and consent of the heirs. However such power is limited only to the extent of one-third.

Under Mohammedan Law an executor appointed by Will can in his turn appoint an Executor who takes the same place and exercises the same power as the original executor.[14]

It is interesting to note that the Khoja Muslims are governed by Hindu Law in the matters of succession and inheritance and hence can dispose of whole property by Will. Similar was the position of Kutchi Memons before passing of Kutchi Memons Act 46 of 1920.

Administration of the estate of a deceased Mohammedan

The executor or administrator, as the case may be, of a deceased Mohammedan, is under the provisions of Indian Succession Act, 1925, his legal representative for all the purposes, and all the property of the deceased vests in him. But since a Mahomedan cannot dispose of by Will more than one-third of his estate, the Executor/ administrator is an active trustee only to the extent of such one-third and for the remainder of the property, he is regarded as bare-trustee for the heirs.

Except as regards recovery of debts due to the estate of a deceased Mohammedan, no Letters of Administration are necessary to establish any right to the property of a Mohammedan who has died intestate, as noted in Section 212(2).[15]

Thus the Muslim religious scriptures provide in-depth and pervasive annotations guiding the day-to-day life events and finally promises well-being to its virtuous followers..

"…As for the righteous, they shall be lodged in peace together amid gardens and fountains, arrayed in rich silks and fine brocade…"

Quran 44:51-54.

12 Abdul vs. Dr Syed Minhazal (1939) Nag. 413

13 Sir Mohomed Yusuf vs. Hargovandas 47 Bom 231

14 Abdul Rezk vs. Ali Baksh 26 Lah 544

15 Section 212(2): This Section shall not apply in the case of intestacy of Hindu, Mohammedan, Buddhist, Sikh, Jaina, Indian Christians or Parsi. (Indian Succession Act, 1925).

Rest when you're weary. Refresh and renew yourself, your body, your mind, your spirit. Then get back to work.

— Ralph Marston

Manoj Dedhia, *Advocate*

Law relating to succession

Every person in this world one day would leave for heavenly abode. Properties held by the deceased at the time of his death are dealt with in accordance with the personal law applicable to him.

From the point of view of testamentary law, deceased persons are classified into testate and intestate. A person is said to have died testate when he dies leaving behind a Will. In case of testamentary succession, deceased's property is dealt with in accordance with his Will subject to the personal law applicable to him at the time of his death. Death without making a Will is known as intestate death and in such case deceased's property is dealt with in accordance with his personal law. This is known as intestate succession.

Testamentary Succession

Probate

Probate is the Court's order confirming the genuineness and validity of the Will.

Letters of Administration with the Will Annexed

In the absence of the deceased appointing any person as the executor under his Will or the person appointed as the executor is incapable to act as such executor or has refused to act as such, then any of the heirs of the deceased may apply for the court's order confirming genuineness and validity of the Will and order granted by the Court in such case is known as the Letters of Administration with the Will Annexed.

As per section 211 of Indian Succession Act, 1925 (the "Act"), Will operates immediately upon death of its creator i.e. deceased testator. Deceased's properties vest in the executor appointed under the Will forthwith upon death of the deceased and for such vesting, it is not necessary that probate is previously obtained. An executor can act under the Will even without previously having obtained probate.

However, section 213 of the Act provides that no right as executor or legatee can be established in any court of justice, unless a court of competent jurisdiction in India has granted probate of the Will or letters of administration with the Will annexed under which the right is claimed. This provision regarding necessity of probate of letters of administration with the Will annexed does not apply in the case of Wills made by Muhammadans or Indian Christians and apply only in case of:

(a) Wills made by any Hindu, Buddhist, Sikh or Jain :

   i. within the local limits of the ordinary original civil jurisdiction of the Bombay and Madras High Courts;

ii. within the territories that were subject to Lieutenant-Governor of Bengal on 1st September 1870; and

iii. outside the above jurisdiction/territorial limits, so far as relates to immovable property situate within those limits;

(b) Wills made by any Parsi:

i. within the local limits of the ordinary original civil jurisdiction of the Bombay, Madras and Calcutta High Courts; and

ii. outside the above jurisdiction limits, so far as relates to immovable property situate within those limits;

Executor applies to the court for probate of the Will. Upon the executor proving the Will, by issuing probate order the court confirms executor's administration rights in relation to the deceased's estate in accordance with the Will. Probate is granted only to the Executor/Trustee appointed under the Will by the deceased.

When the executor or legatee do not expect any contradictory claims to the estate of the deceased testator or when there is no need to establish their rights as such executor or legatee in court of justice, they do not opt for obtaining probate.

Intestate Succession

Letters of Administration

When the deceased dies intestate i.e. without making any Will but leaving behind immovable property, any of the heirs of the deceased may apply for the Court's order to administer the estate of such deceased in accordance with the rules of intestate succession applicable to such deceased at the time of his death. Order passed by the Court in such case is known as Letters of Administration.

Even in case of Intestate Succession, section 212 of the Act provides that no right to any part of the property of a person who has died intestate can be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction. However this section does not apply in the case of intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jain, Indian Christian or Parsi.

We saw that in case of testamentary succession i.e. if Will is available, the deceased's property vest in the executor immediately upon death. However, so far as intestate succession is concerned, deceased's property vests in Administrator only upon the grant of letters of administration (Section 211 r/w section 220 of the Act). However all intermediary acts of the Administrator not tending to the diminution or damage of the intestate's estate are rendered valid from the date of grant of letters of administration (Section 221 of the Act).

Other Options for Court's Recognition and Orders

Succession Certificate

In the cases where sections 212 and 213 of the Act are not applicable to the deceased's estate in the manner that necessitates probate or letters of administration, application can be made for the court's order for administration of securities such as shares, cash, bank deposits, PPF, promissory notes, debentures, etc. held by the deceased at the time of his death.

Heirship Certificate

Under Bombay Regulation No. VIII of 1827, where a person dies leaving behind property, movable or immovable, a legal heir, executor or legal administrator may assume management or sue for the recovery of the property, in conformity with the law or usage applicable to the disposal of the said property, without making any previous application to the Court to be formally recognised. However, if the heir, executor and/or administrator is desirous of having his rights recognised by the Court, for the purpose of rendering him more safe for the person in possession of, or indebted to, the estate

to acknowledge and deal with him, may apply to a District Court or the Bombay City Civil Court for grant of certificate of heirship, executorship or administratorship, as the case may.

Upon grant of probate or letters of administration under the Act, the same will supersede the certificate granted under Bombay Regulation No. VIII of 1827.

Procedure for Obtaining Probate, Letters of Administration, Heirship Certificate, etc.

In Maharastra, for obtaining Probate of a Will or Letters of Administration with or without the Will Annexed or Succession Certificate, a petition is required to be filed with the High Court, Bombay or the Principal Civil District Court.

For obtaining Heirship/Executorship/Administratorship Certificate, application is required to be filed with the Principal District Court.

In the High Court, Bombay, the Petition is required to be filed in the form in accordance with the rules mentioned in the Bombay High Court (Original Side) Rules. The other governing laws are the personal laws, the Indian Succession Act, the Hindu Succession Act, etc. The Court Fees (Judicial stamp) payable on the Petition will depend on the value of the properties of the deceased. The maximum court fees payable as on date is ` 75,000/-. Brief information on procedure to be followed in Bombay High Court for the above is tabulated as under:

<table>
<tr><th>Probate</th><th>Letters of Administration with Will Annexed</th><th>Letters of Administration</th><th>Succession Certificate</th></tr>
<tr><td>Petition in Form No. 97 and in accordance with Rule 374</td><td>Petition in Form No. 105 and in accordance with Rule 375</td><td>Petition in Form No. 103 and in accordance with Rule 376</td><td>Petition in Form No. 110 and in accordance with Rule 377</td></tr>
<tr><td>Executor's Oath with the Original Will Annexed in Form No.101 in accordance with Rule 374 to be filed separately and kept by the Prothonotary & Senior Master in the strong room of his office</td><td>Administrator's Oath with the Original Will Annexed in Form No.106 in accordance with Rule 375 to be filed separately and kept by the Prothonotary & Senior Master in the strong room of his office</td><td>Administrator's Oath in Form No. 104 in accordance with Rule 376</td><td>Petitioner's Oath in Form No.112</td></tr>
<tr><td colspan="2">Affidavit of Attesting Witness to the Will in Form No.102</td><td>–</td><td>–</td></tr>
<tr><td colspan="3">Schedule to be annexed to the Petition:
Schedule of Properties – Form No. 98
Schedule of Debts – Form No. 99
Schedule of Trust Properties – Form No. 100</td><td>Schedule of Debts & Securities in Form No.111</td></tr>
<tr><td>–</td><td>–</td><td>Administration Bond of the Petitioner with one Surety in Form No.118</td><td>Administration Bond of the Petitioner with one Surety in Form No.120</td></tr>
<tr><td colspan="2">Citation to be affixed on High Court and Collector's Notice Board</td><td></td><td>Citation to be affixed on High Court's Notice Board</td></tr>
<tr><td colspan="3">Affidavit as to affixation of the Citation on the High Court & Collector's Notice Board</td><td>–</td></tr>
<tr><td colspan="4">To obtain consenting Affidavit of all the heirs and next of kin of the deceased</td></tr>
<tr><td colspan="4">Service of Citation through Bailiff by Registered AD on non consenting heirs</td></tr>
<tr><td colspan="4">Affidavit of the Bailiff as to service of Citation on non consenting heirs</td></tr>
</table>

If non consenting heir files a caveat, the Petition is converted into Suit and the Petitioner becomes the Plaintiff and the Caveator/non consenting heir becomes the Defendant			If non consenting heir opposes the grant of Succession Certificate, the Petition will be placed on the board of the Judge in Chambers for hearing. At the hearing of the Petition, the Judge will make such orders as he may deem fit
If all office objections / requisitions are removed / complied with and more than 14 days having passed since the affixation of Citation on the High Court and the Collector's Notice Board and service of Citation on the non consenting heir (provided no caveat filed by the non consenting heir and the Petition not converted into Suit), the Will shall be said to have been proved and Probate of the Will will be granted to the Executor / Petitioner.	If all office objections / requisitions are removed / complied with and more than 14 days having passed since the affixation of Citation on the High Court and the Collector's Notice Board and service of Citation on the non consenting heir (provided no caveat filed by the non consenting heir and the Petition not converted into Suit), the Will shall be said to have been proved and Letters of Administration with the Will annexed to the property and credits of deceased will be granted to the Administrator / Petitioner.	If all office objections / requisitions are removed / complied with and more than 14 days having passed since the affixation of Citation on the High Court and the Collector's Notice Board and service of Citation on the non consenting heir (provided no caveat filed by the non consenting heir and the Petition not converted into Suit), then Letters of Administration to the property and credits of the deceased will be granted to the Administrator / Petitioner.	If all office objections/ requisitions are removed / complied with and more than 14 days having passed since the affixation of Citation on the High Court's Notice Board and service of Citation on the non consenting heir (provided no objection is filed by the non consenting heir), then Succession Certificate will be granted

In case of Heirship Certificate an application has to be made with the court. Court issues proclamation inviting all persons, who dispute the right of the Applicant, to lodge their objection in the Court within one month of the proclamation. If no objection is received the court will issue certificate of heirship, executorship or administratorship, as the case may be. In case of any objection received, court would take its decision after hearing all the relevant parties. Provisions of this archaic law are not much put to use. However, it is useful when merely a certificate of being heir, executor and or administrator is enough without expressly being granted a right to administer the estate of the deceased.

Deed of Transfer of immovable property in favour of the legatee / heirs

For the purpose of transferring the immovable properties in favour of the legatees/beneficiaries/ heirs, the Executor or the Administrator, as the case may be has to sign, execute and register with the concerned Sub-Registrar of Assurances a Deed of Transfer in favour of legatees/beneficiaries /heirs. Stamp duty payable on such Deed of Transfer is ` 200/- (Article 59(d) of Schedule I to the Bombay Stamp Act, 1958) and registration fees shall not be more than ` 1,000/-.

Pravin Veera, *Advocate & Solicitor*

Essential features of Will (including main clauses in a Will and Model Will and Codicil)

Q.1 What is a Will ?

Ans. Definitions of Will under various Acts is as under :

'Will' means a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death. **Indian Succession Act, 1925, S.2(h).**

'Will' shall include codicil and every writing making a voluntary posthumous disposition of property. **General Clauses Act, S. 3(64).**

'Will' denotes any testamentary document. Indian **Penal Code, 1860, S.31.**

The Will takes effect only after the death of the testator (i.e. the author of the Will). The Will is revocable during the life time of the testator.

Q.2 What are the essential characteristics of a Will ?

Ans. The Essential Characteristics of a Will: The essential characteristics of a Will are as under :

(i) The document purporting to be a testament or a will must be legal, i.e., in conformity with the provisions relating to the execution and attestation of will as laid down in section 63 of the Act and it must be made by a person competent to make it.

(ii) The most unique and essential character of every will is that it is revocable at any time during the life-time of the testator.

(iii) The declaration should relate to the properties of the testator which he wants to dispose of.

(iv) The declaration as regards the disposal of the properties of the testator must be intended to take effect only after the death of the testator. It may be noted that if the declaration seeks to effectuate the intention of the testator immediately, i.e., *inter vivos*, then it is a not a will. A will operates from the date of the death of the testator and not from the date of its execution.

Q.3 What are the important general terms relating to a Will ?

Ans. The Important General Terms relating to a Will are as under :

(1) **Testator :** The person who makes a will is called the testator. If the maker of the Will is a Female then she is called 'Testatrix'.

(2) **Legatee or Beneficiary :** The person to whom the testator gives some property or benefits in the Will is called legatee or beneficiary.

(3) **Legacy :** The benefit which passes under a Will to the beneficiaries is called legacy.

(4) **Executor :** "Executor means a person to whom the execution of the last Will of a deceased person is, by the testator's appointment confided." [Sec. 2(c)] In other words an executor is a person appointed by the testator to give effect to his Will i.e. to administer his Will.

(5) **Attestation :** The act of witnesses placing their signature on the Will is called attestation.

(6) **Administrator** : "Administrator means a person appointed by competent authority to administer the estate of a deceased person when there is no executor". [Sec. 2(a)] Where the testator does not appoint an executor under the Will the court may at the instance of the interested persons appoint a person called the administrator to administer the Will.

(7) **Residue** : Residue is that part of the estate of the testator which remains after paying debts, charges and legacies mentioned in the Will.

(8) **Residual legatee** : The person to whom the testator give the residue under the Will is called the residual legatee.

(9) **Probate** : "Probate means the copy of a Will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator". [Sec.2(f)]

(10) **Bequest** : The benefit bestowed under a Will is called bequest. The bequest may be conditional or contingent. A bequest that is bestowed only upon fulfilment of any stated conditions is called conditional bequest. A bequest that pass only upon occurrence or non-occurrence of an event is called a contingent bequest.

(11) **Codicils** : Amendments made by the testator in his Will during his life time are called codicils.

Q.4 Why a person should make a Will ?

Ans. Reasons for making a Will : A person should make his Will for the following important reasons :

(1) If a person desires that after his death, his property should be peacefully transferred without any dispute and complications to his heirs, relatives, friends, etc. in the manner he wishes he should make a Will.

(2) The Will being an extremely personal document a person making a Will is able to express his feelings, views and opinions about his relationship with his family members, relatives, friends, etc. in his Will.

(3) A person who makes a Will is said to have died testate. If a person does not make a will, he dies intestate and, in that case his property will be inherited by his legal heirs in accordance with the law of inheritance applicable to him. The law of inheritance applicable to the person concerned determines the legal heirs and their share in the properties left by the person irrespective of whether such heir deserve any share or not.

(4) By making a Will a person can :

(a) provide for the special needs and requirements of the specific members of his family i.e. a widowed daughter, aged parents, handicapped child, etc.;

(b) make some provisions for a friend or faithful servant in need of money and so on;

(c) take away the right of a characterless wife or a disobedient son / daughter to get share in the properties left by him.

(5) In view of increase in early death, due to heart attack or unnatural death due to motor accidents, etc. at young age it is advisable to make a Will.

(6) Some tax planning can also be done by making of a Will.

Q.5 Who can make a Will ?

Ans. Person capable of making Wills:

Section 59 of the Indian Succession Act which contains provision as to person capable of making wills reads as under:

Person capable of making wills : Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1: A married woman may dispose of by Will any property which she could alienate by her own act during her life.

Explanation 2: Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3: A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4: No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him or in whose favour it would be proper that he should make his Will. A cannot make a valid Will.

(ii) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.

(iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property makes a Will. This is a valid Will.

(iv) For making a Will a person i.e. a testator should have testamentary capacity and he must be in a sound disposing state of mind. It must be noted that soundless of mind does not depend upon age. A Will made by a testator of full capacity is not revoked by the fact that subsequently he became incapable of making a Will or insane. What is necessary for the validity of the will is that the person making the Will should have been able to comprehend the nature and effect of the disposition and intelligence to form a proper judgment regarding it, and he should have freely decided to make it. The testator must have the knowledge of the contents of the Will which he executes. If the testator makes the Will without knowing the contents of the Will such a Will cannot be said to be a valid will. The will must be testator's own voluntary act. It must be noted that as per Indian Law a person attains majority when he completes 18 years of age. However in case of a person for whom guardian is appointed by a person or his person or property then in that case such person attains majority upon attending age of 21 years.

Q.6 What are the precautions to be taken while drafting a Will ?

Ans. Precautions in drafting a Will:

Drafting of a Will requires not only the good knowledge of the law of succession and experience but also the quality of good imagination because the person drafting the Will has to consider the circumstances of the testator at the time of drafting the Will and he has also

to imagine and foresee the circumstances which may prevail at the time of the death of the testator.

The following precautions should be taken while drafting a Will :

1. Before drafting a Will the draftsman should ascertain (i) the domicile of the testator and (ii) the various movable and immovable properties owned by the testator and the geographic locations of such properties.

2. Before drafting the Will it is essential to study carefully the law of the country which is to govern the Will of the testator. Usually the disposition of movable properties is governed by the law of the country where the testator is domiciled and the disposition of immovable properties in most of the countries is governed by the law of the country in which the immovable properties are situated. As such in the case where the testator is domiciled in one country and has immovable property in another country it would be advisable to draft two separate Wills – one Will relating to immovable properties and another Will relating to movable properties.

3. It is advisable to give the brief history of the family of the testator and to explain why the bequest is made in favour of only one beneficiary or some of the beneficiaries to the exclusion of the other legal heirs or close relatives.

4. A list should be prepared of all the assets and properties of the testator as well as all debts and liabilities of the testator.

5. The Will should be drafted in a simple, clear and unambiguous language. There is no need to use any legal or technical words and phrases. It is sufficient if the intention of the testator is clearly recorded.

6. As far as possible the Will should be drafted in the language best understood by the testator so as to give the impression that the contents of the Will were fully understood by the testator and the Will is the proper expression of wishes and intentions of the testator.

7. When the testator is an illiterate person the Will should be prepared in a language which is usually spoken and understood by the testator. In such case some third person preferably a lawyer/chartered accountant should read out the Will to the testator before its execution in the presence of the attesting witnesses.

8. If the Will is prepared in a language which is not usually used by the testator an exact translation of the Will should be read out by a third person, preferably a lawyer / chartered accountant to the testator before its execution. It is desirable that the translation of the Will is read out in the presence of attesting witnesses who understand both the languages. The fact that the Will has been read out to the testator in a particular language before execution should be recorded in the Will.

9. If there is any unusual thing in the Will same should be explained and clarified in the main body of the Will itself to avoid misunderstanding or doubt about it.

10. A residuary clause for property and distribution should be included in the Will.

Q.7 What are the main provisions in a Will ?
Ans. Main provisions in a Will

The main provisions which usually find place in a simple unprivileged Will are as follows :

1. **Name** : The name and description of the testator (i.e., the person making the will) i.e. his age, religion, community, etc. so as to determine by which personal law the testator is governed.

2. **Revocation of earlier Wills** : A declaration that the present writing (i.e., the particular Will) is his last Will and testament and that he thereby revokes all other wills, codicils and other disposition of a testamentary nature which are made by him earlier.

3. **Appointment of Executors** : An executor is a person named by the testator in the Will to whom the testator has confided the execution of his Will. The testator may also appoint more than one executor.

4. **Direction to pay dues** : This provision is not compulsory because in any case, the executors of the Will are bound to pay the dues of the testator. Usually specific directions are given by the testator as regards the money to be spent on the funeral and obsequial ceremonies of the testator.

5. **Legacies and Bequest** : These are the most important clauses in the Will, because under these clauses the testator makes the disposition of his property.

6. **Gift Clause** : Sometimes for the sake of clarity a mention is made in the Will about the gifts made by the testator during his lifetime, along with a declaration that the estate of the testator has nothing to do with such gifts. This is to avoid confusion or dispute among the heirs/legatees whether particular items belonged to the deceased at the time of his death or were disposed of during his life time.

7. **Trust Clause** : When the testator wants to create a trust of his property under the will then this clause is inserted. Under this clause the testator directs for creation of a trust of his property, appoint the trustees for such trust and specifies the names of the persons (i.e., the beneficiaries) for whose benefit such trust is to be created.

8. **Residue Clause** : It is always advisable to have residue clause disposing of the residue of the testator's property. i.e., disposition of the remaining properties belonging to the testator at the time of his death which are not specifically disposed of under any other provision of the Will. If there is no residue clause such remaining property will go to the legal heirs of the testator as per the law of succession applicable to the testator. Even the legacy which lapse go back to intestacy if there is no residue clause.

9. **Explanation** : Sometimes if necessary clarifications or explanations are made as regards the investments which stand in the joint names of the testator and some other person or persons.

10. **Donation of Eyes, Kidney, etc.** : If the testator is desirous of donating his eyes, kidney, body, etc. for medical use a separate clause to that effect should be included in the Will and the testator should inform the near and dear ones about the same in advance as otherwise they will never come to know about it. It will be advisable that during his life time the testator should make an affidavit recording his desire to donate his eyes, kidney, body, etc. and inform his relatives about the same so that his relatives can act upon it and do the needful in time immediately upon the death of the testator. Such affidavit will be very useful as usually the Will is not opened and read immediately on the death of the testator and it takes some time to do so whereas the necessary steps for donation of the eyes, kidney, body etc. are required to be taken immediately upon death of the testator to make proper utilisation of such parts of the body of the testator.

11. **Testimonium Clause** : The Testimonium clause is as under: "IN WITNESS WHEREOF I said Shri A.B.C. have hereunto set and subscribed my hand at Mumbai this ____ day of _____ 201__".

12. **Execution Clause** : This is the last clause of the Will which begins with "Signed and acknowledged by the withinnamed Testator as his last Will and Testament.....". The execution clause should be signed by the Testator in the presence of two witnesses who should also subscribe their signatures as witnesses in the presence of the Testator.

Q.8 What are the important legal requirements for making a Will ?

Ans. Important Legal Requirements for making a Will are as under :

(1) The testator must sign or affix his mark to the Will, or the Will shall be signed by some other person at the direction of the testator.

(2) The signature or mark of the testator, or the signature of the other person signing for the testator shall be placed on the Will in such a manner that it shall appear that it was intended thereby to give effect to the instrument as a Will.

(3) It is necessary that the Will must be attested by two or more witnesses each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person signing the Will in the presence of and under the direction of the testator, or has received from the testator a personal acknowledgement of the testator's signature or mark, or of the signature of such other person, and each of the witnesses should sign the Will in the presence of the testator. (For the execution and attestation clause of the Will please see the Model Wills given at the end).

Q.9 What is the importance of the attesting witnesses and what care should be taken in selection of the attesting witnesses?

Ans. Selection of the Witnesses

Causal selection of the witnesses to the Will should be avoided as it may create difficulty in proving the execution of the Will in future. It should be kept in mind that the attesting witnesses may on some future occasion be required to appear as a witness in the Court to prove the execution of the Will. In selection of the attesting witness the following points should be considered;

(1) The attesting witness as well as his wife or her husband must not be a beneficiary under the Will because the bequest in their favour would be invalid. (Sec. 67 of the Indian Succession Act, 1925.) However the validity of other bequests made under the Will are not affected.

(2) As far as possible select the attesting witnesses selected should be some years younger to the testator because in such a case there is every likelihood that at least one of the attesting witnesses would survive the testator and would be available for proving the execution of the Will by the testator.

(3) If any of the attesting witness dies during testator's life time, it is better to execute a fresh Will with new attesting witnesses.

(4) In the event the testator is aged, infirm or suffering from physical illness, it is advisable that the family doctor of the testator should be an attesting witness. It is also advisable that the advocate and solicitor / chartered accountant who has drafted the Will should be an attesting witness.

(5) The attesting witnesses should be of integrity and sound status.

Q.10 Explain the importance of executors of a Will. What points should be considered in selection of executors ?

Ans. Executors

(1) The Executor has been defined under section 2(c) of the Indian Succession Act as under:

Executor means a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided.

An executor is entrusted with the duty and conferred with the power to carry out the directions of the testator contained in the Will. The executor has to collect and realise the estate of the deceased, pay the debts of the testator and distribute the legacies as directed under the Will.

(2) Points to be considered for selection of Executors:

(a) It is advisable that the executor should be younger to the testator in age so that there is greater possibility of the executor outliving or surviving the testator.

(b) It is preferable if the executor selected live in same city where the testator lives as this can facilitate the process of obtaining probate from the court because the executors have to apply to the court for obtaining the probate of the Will of the testator.

(c) It is advisable that the executor is a person known to the beneficiaries under the Will and is their well-wisher so that the executor can easily get the co-operation of the legal heirs of the testator as well as the beneficiaries under the Will.

(d) Executor should be faithful, honest and man of integrity.

(3) There is no restriction placed by law on the number of executors whom a testator might appoint as the executors of his Will. It is always advisable to have more than one executor.

(4) When a professional person such as an Advocate or a Solicitor or a Chartered Accountant is appointed as Executor it is desirable to provide in the Will that they can charge their usual professional fees for the work done by them in their professional capacity. If such provision is not made in the Will then they cannot charge any professional fees even if they work in their professional capacity in connection with the Will of administration of the estate of the testator as provided under the Will.

(5) If the testator wants to give wide powers of investments to his executors then the testator should do so by specifying the extra powers to be given to the executors. In the absence of such specific extra powers for investments the executors cannot invest anywhere they like but they will have to do so in Trust investments only in accordance with the provisions of the Indian Trust Act.

(6) The executors are not entitled to get any remuneration for the work done by them as executors unless the testator has specifically provided under the Will that the executors shall be paid remuneration and specifies the same. Usually well respectable and responsible persons decline to act as executors because they find it encumbersome and many a times it is more a liability than a pleasure. In order to overcome such difficulty the testator should provide in the Will that the executors of his Will shall not be liable personally so long they act on the expert's advice.

(7) It may be noted that a legatee can be an executor of the Will. However, when a legacy or bequest is given to an executor, and it is not the intention of the testator that such legacy or bequest is to be given to the executor in compensation of his service, it should be mentioned in the Will that the executor would be entitled to the legacy or bequest even if he does not accept to act as the executor of the Will.

(8) It may be noted that the executors cannot delegate their duties as their appointment is in the nature of the trustees. If the

testator wants the executors to delegate any of their duties then the testator should write so in his Will.

(9) There are certain banks like Bank of India, State Bank of India, Central Bank Executor & Trustee Co. who undertake the work of execution of the Will and administration of the estate of the deceased and they levy some charges for doing such work. In case such banks are to be appointed as executors of the Will such Banks should be contacted first and the testator should obtain their consent in advance as such banks will not act as executors unless certain specific clauses regarding their remuneration, etc. are properly incorporated in the Will.

(10) It is advisable that an Advocate or a Solicitor or a Chartered Accountant who is going to act as executor under the Will and charge his remuneration should not be an attesting witness to the Will as it may disqualify such Advocate or Solicitor or Chartered Accountant to get remuneration.

Q.11 Explain the provisions relating to registration of a Will. Is it compulsory to register a Will ?

Ans. Registration of a Will

(1) Section 17 of the Registration Act, 1908 which deals with documents of which registration is compulsory does not mention of Will as a document compulsorily registerable. Section 18 of the Registration Act mentions Will as a document whose registration is optional. In other words the registration of a Will is not compulsory and as such no inference can be drawn against the genuineness of a Will on the ground of its non-registration. The Will can be registered with the office of the Sub-Registrar concerned. For registration of the Will the attesting witnesses should also go along with the testator for attesting the Will. A will can be registered by the testator himself during his lifetime or by the executor of the Will or the legatees after the testator's death. It is advisable that the revocation of a Will which is registered should also be duly registered in the same manner as has been provided for registration of wills. Once a Will has been registered, it is advisable that any subsequent Will made by the testator should also be registered.

(2) Though the registration of Will is not compulsory under the law for proving the genuineness of the Will, registration of a Will has following advantages :

(a) A Will which is duly registered cannot be tampered with, destroyed, lost or stolen.

(b) When the Will is kept in the safe custody in the office of the Registrar it ensures the protection of the Will.

(c) Secrecy of the Will is maintained because nobody can examine the will and copy the contents of it without the express permission in writing or until the death of the testator because as provided under section 57(2) of the Registration Act, 1908 the certified copy of a Will can be given only to the testator or his agent.

(d) It may be noted that only after the death of the testator a certified copy of the Will made by him can be given to any person who applies for it and produces the death certificate of the testator issued by the authority concerned.

Q.12. What is the safe custody of a Will ?

Ans. To ensure that the Will is acted upon after the death of the testator, it is necessary that after the execution of the Will it should be deposited by the testator in some safe custody such as with his banker or advocate and solicitor or chartered accountant or any other person of his confidence.

Q.13 What is Deposit of Will and what is the procedure on Deposit of Will ?

Ans. Sections 42 and 43 of the Registration Act, 1908 contains provisions relating to deposit of wills and the procedure on deposit of wills respectively.

Section 42 – Deposit of Will : Any testator may, either personally or by duly authorised agent, deposit with any Registrar his Will in a sealed cover superscribed with the name of the testator and that of his agent (if any) and with a statement of the nature of the document.

Section 43 – Procedure on Deposit of Will:

(1) On receiving such cover, the Registrar, if satisfied that the person presenting the same for deposit is the testator or his agent, shall transcribe in his Register-book No. 5 the superscription aforesaid, and shall note in the same book and on the said cover the year, month, day and hour of such presentation and receipt, and the names of any persons who may testify to the identity of the testator or his agent, and any legible inscription which may be on the seal of the cover.

(2) The Registrar shall then place and retain the sealed cover in his fire-proof box.

Q.14 Whether a trust can be settled under a Will? What are the important points to be considered for settling a trust under a Will? Whether such Will must be registered?

Ans. Under the Income-tax Act as well as under the other laws relating to succession specific guidelines for creating a trust under a Will are not clearly provided for. If the testator is desirous of settling a trust through the Will he can insert the necessary provisions in his Will to that effect and for that purpose the testator can settle a specified sum of money or a particular property upon trust for the benefit of the specified persons who may be his relative also and can give directions about the user thereof as well as the income arising therefrom. The testator can also provide for the appointment of the trustees, rules for management of such trust, the period for which such trust is to be created and distribution upon dissolution of such trust.

Though the registration of Will is not compulsory under the Registration Act, 1908 it will be advisable to register a Will if a charitable trust is created under the Will because such trust requires registration under the Bombay Public Trust Act, 1950 as well as the Income-tax Act, 1961 upon the trust coming into force as provided under the Will if such trust wants to get the benefits provided under the the Bombay Public Trust Act, 1950 as well as the Income-tax Act, 1961.

Q.15. Whether a separate Deed of Trust is necessary to give effect to the creation of trust under the Will after the death of the testator ?

Ans. If under the Will detailed provisions of creation of trust are made including complete specifications about the names and appointment of trustees, beneficiaries for whom the trust is created and exhaustive terms and conditions as well as rules and regulations for management for such trust then in that event the will itself can serve as a Deed of Trust. However in most of the cases where a trust is created under the Will usually upon the death of the testator the executors of the Will enter into the Deed of Trust with the trustees of such trust for handing over the possession of the trust property whereby the acceptance of the trustees to act as the trustees of the trust and receipt of the legacy is duly recorded and all the necessary terms and conditions as well as the rules and regulations for management of such trust are recorded.

Q.16 Whether it is necessary to prepare a Will on a stamp paper ?

Ans. The Will does not attract any stamp duty. Therefore it is not necessary to prepare a Will on a stamp paper. There is misconception in the minds of people that if a Will is prepared on the stamp paper then it becomes more genuine and authentic.

MODEL WILL AND CODICIL

MODEL WILL

(SIMPLE WILL)

1. I, Shri A.B.C. of Mumbai Indian Inhabitant aged _____ residing at _____ Mumbai – 400 0___ do hereby revoke all former wills and codicils hitherto fore made by me, if any, and declare this to be my last Will and Testament.

2. I appoint my brother Shri X.Y.Z. and my wife Smt. P.A.C. to be the Executors of this my Will. For brevity's sake they are hereinafter referred to as "my Executors".

3. There are several shares, securities, fixed deposits, bank accounts and other monies which are standing in the joint names of myself and my wife Smt. P.A.C. I declare that the shares, securities, fixed deposits, bank accounts and other monies which shall stand at the date of my death in the joint names of myself and my wife Smt. P.A.C., my name standing first belong to me absolutely and shall form part of my estate on my death, the name of my wife Smt. P.A.C. having been added thereto for the sake of facility only. However, all shares, securities, fixed deposits, bank accounts and other monies which shall stand at the date of my death in the joint names of my wife Smt. P.A.C. and myself, my wife's name standing first in respect thereof, are and shall be her own property as my name having been added thereto only for the sake of convenience.

4. I direct my Executors to spend a sum not exceeding ` 10,000 for my funeral and obsequial ceremonies. My Executors shall not be liable to account for such expenses to any person whatsoever.

5. I direct my Executors to recover all my assets and outstanding and to pay out of my estate all my just debts and liabilities, if any as well as the probate duty and other liabilities, which may become payable in respect of my death.

6. I give, devise and bequeath a sum of ` 1,00,000/- (Rupees One Lakh only) to my daughter Smt. D.E.F.

7. I give, devise and bequeath my ownership office being Office No. 303 on the third floor of Yash Towers, Ambedkar Road, Mulund (West), Mumbai - 400 080 along with the furniture, fixtures, computers and other equipments, office machines etc. therein to my son Shri G.A.C.

8. I give, devise and bequeath all the rest and residue of my property, both movable as well as immovable, of whatsoever nature and kind and wheresoever situate (hereinafter called "my residuary estate") unto my wife Smt. P.A.C. absolutely.

9. In the event of my wife Smt. P.A.C. predeceasing me or dying simultaneously with me or within a period of six months from the date of my death, then and in such case, notwithstanding anything contained in the last preceding clause of this Will, no part of my residuary estate shall vest in or otherwise belong to my wife Smt. P.A.C. and she shall have no interest in such property or the income thereof nor be entitled to the beneficial interest thereof, and in such case my residuary estate shall go and belong, as from the date of my death to my son Shri G.A.C. and my daughter Smt. D.E.F. in equal shares absolutely.

IN WITNESS WHEREOF I the said Shri A.B.C. have hereunto set and subscribed my hand at Mumbai this _____ day of _____ 2012.

SIGNED AND DECLARED by the abovenamed Testator SHRI A.B.C. as and for his last Will and Testament in the presence of us both, both being present at the same time who at his request and in his presence and in the presence of each other have hereunto set and subscribed our names as witnesses :) (Signature of A.B.C.)

1.

(Signature of First Witness)

2.

(Signature of Second Witness)

CODICIL FOR CORRECTING MISTAKES IN A WILL

1. I Shri X.Y.Z. of Mumbai Indian Inhabitant aged ____ residing at _____ _____ Mumbai - 400 0__ hereby declare this to be the First Codicil to my last Will and Testament dated 1st January, 2012.

2. I declare that my said Will dated 1st January, 2012 shall stand corrected as follows :

   (1) In the second line in clause 4 on page 2 of my said Will, the word and figure "` 2,00,000/- (Rupees Two Lakhs only)" shall be substituted for the word and figure "` 20,000/- (Rupees Twenty Thousand only)".

   (2) In the second line in clause 5 on page 2 of my said Will the name "DINESH K. SHAH" shall be substituted for the name "DIPESH K. SHAH" appearing therein.

   (3) In the fourth line in clause 7 on page 3 of my said Will, the words "and situated at Ganesh Gawde Road" shall be substituted for the words "and situated at Sevaram Lalvani Road".

   (4) I direct that my said Will shall, except as hereinabove altered and amended, be valid and operative and I hereby confirm the same.

IN WITNESS WHEREOF I, Shri X.Y.Z. have set my hand to this Codicil this 5th day of August, 2013.

SIGNED AND DELIVERED by the Testator SHRI X.Y Z. as the First Codicil to be annexed to his last Will and Testament dated 1st January, 2012 and to be treated as part thereof in the presence of us both, both being present at the same time who upon his request and in his presence and in the presence of each other have hereunto set and subscribed our names as Witnesses:

1.

2.

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Rohit Das, *Advocate*

Nomination Rules in India

The building of assets is something that almost everyone has to do at some time in their lives. Asset building is done to consolidate investments and manage property along with providing financial security to one's near and dear ones. However, asset building is not enough as assets too need to be protected and safeguarded so that no problems arise in the future. This is where estate planning comes into the picture.

Estate planning, simply put, is a process through which an individual's or a family's wealth can be managed in the event of an individual or key family member becoming incapacitated or passing away. Essentially, estate planning is needed so that an individual's or a family's succession and financial affairs are adequately planned and arranged.

The primary goal of estate planning is ensuring that the estate of the individual passes to the estate owner's intended beneficiaries. Such planning often includes succession planning with the dual objective of minimising applicable taxes and avoiding or minimising court proceedings in succession matters.

Unlike many advanced market economies, today India does not have any estate tax or estate duty. First introduced here in 1953, Estate Duty was abolished in 1985. Estate Planning by Trust Structures was primarily done to minimise Estate Duty/Tax which is imposed on all property transferred at death.

For movable assets, such as deposits, shares, mutual funds, bank accounts etc., if it is not possible to make the investment in joint names, it is advisable to have a nominee in the name of an heir. Doing this minimises the documentation that is required to transfer assets from the name of the deceased to that of his/her heirs.

Except in certain cases discussed below, a nominee is, however, not entitled to be the owner of the asset to which he has been nominated. According to law, a nominee is a trustee not the owner of the assets. He is expected to act as an executor for the estate. In other words, he is only a caretaker of your assets. The nominee collects all such sums to which he has been nominated and is legally bound to transfer the same to the legal heirs or if there is a will, the nominee is bound to distribute the proceeds according to the wishes expressed by the deceased through his/her or as directed by law, if the deceased died intestate, i.e. without having made a will.

While explaining the concept of Nomination under the Insurance Act, 1938, the Hon'ble Supreme Court of India has held in *Sarbati Devi vs. Usha Devi AIR 1984 SC 346* that "a mere nomination made under section 39 of the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only

indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy, The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them."

For most investments, a legal heir is entitled to the deceased's assets, in spite of nomination. For instance, Section 39 of the Insurance Act says the appointed nominee will be paid, though he may not be the legal heir. The nominee, in turn, is supposed to hold the proceeds in trust and the legal heir can claim the money.

A legal heir will be the one whose name is mentioned in the will. However, in case of intestate succession, where a will has not been made, the legal heirs of the assets are decided according to the applicable succession laws, where the structure is predefined on who gets how much.

Nominations cannot be made for an investment made in immovable properties except in certain cases where the immovable property is part of a co-operative group housing society. In all other cases if the immovable property is in a single name it is advisable to make and register a will.

In this article, we have tried to outline the various nomination rules and regulations under various laws covering areas which we come across in day-to-day life.

Land

Considering India's vast population spread across various religious lines, the laws governing the succession of a person's immovable property at the time of his death are heavily dependent on upon the religion of the person, along with the succession law applicable to the person's religion. The various codified and personal laws by religion are given below:

(a) Hindus, Buddhists, Sikhs and Jains are governed by the Hindu Succession Act, 1956 and some provisions of Indian Succession Act, 1925.

(b) Muslims are governed by their Personal Law.

(c) Christians, Jews, Parsis and persons whose marriages are solemnised under Special Marriage Act, 1954 are governed by the Indian Succession Act, 1925.

In the event of marriages being solemnised under the Special Marriage Act, 1954 even when both the spouses are Hindus, Buddhists, Sikhs or Jains, the succession of all immovable property owned by either spouse is governed by the Indian Succession Act, 1956. It must, however, be borne in mind that the provisions given in the Indian Succession Act, 1925 apply only to the persons whose marriages are solemnised under Chapter II of the Special Marriage Act, 1954, in which the conditions that relate to the solemnisation of the marriages are given in section 4. The Indian Succession Act, 1925 does not apply to those persons whose marriages are registered under Chapter III of the Special Marriages Act, 1954, under which spouses that are already married get their marriage registered.

The Hindu Succession Act, 1956 makes a distinction between Male and Female for deciding the manner of distribution of their estates. For a Hindu male, heirs are classified as Class I, Class II, Agnates and Cognates. As per section 3(1)(a) of the Hindu Succession Act, 1956, a person is said to be an 'agnate' of another "if the two are related by blood or adoption wholly through males." Section 3(1)(c) says that a person is said to be a 'cognate' of another "if the two are related by blood or adoption but not wholly through males."

The devolution of the property of a Hindu male dying intestate, i.e. without a will, is governed by the general rules of succession in case of males as provided in section 8 of the Hindu Succession Act, 1956 and that of distribution of property of a Hindu female dying intestate is governed by the general rules of succession in case of females as provided in sections 15 and the order

of succession and manner of distribution among heirs of a female as provided in section 16 of the Hindu Succession Act, 1956.

As per section 8 of the Hindu Succession Act, 1956, the property of a Hindu male devolves upon his Class I heirs, which include his widow, children (including heirs of a predeceased child through such child) and mother in equal share. In the event none of his Class I heirs are present, the property passes on to his relatives that have been specified as Class II heirs. Class II heirs are divided into nine categories consisting of the father, if he is alive, failing which the property will pass to his son's or daughter's children, brother, sister and any other relatives that are specified in the schedule to the Hindu Succession Act, 1956. In situations where none of the Class II heirs are present, the property devolves to the agnates, followed by the cognates.

After the commencement of the Hindu Succession (Amendment) Act, 2005, when a Hindu male dies, his interest in the joint family properties governed by the Mitakshara school of Hindu Law shall devolve by testamentary or intestate succession instead of survivorship. The interest of a Hindu Mitakshara coparcener (a person who shares equally with others in the inheritance of an undivided estate or in the rights to it) shall deemed to be share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether or not he was entitled to claim partition.

Under the Muslim Law of Succession, the devolution of property takes place separately. There are two types of heirs that are recognised under Muslim Law – (i) sharers, and (ii) residuaries. Any relative who is a 'sharer' will take a specified portion of the deceased's estate and a relative who is a 'residuary' will take whatever is left over.

There are 12 sharers and they are – husband, wife, daughter, son's son / daughter / grandchild, father, paternal grandfather, mother, paternal grandmother, full sister, cosanguine sister (having the same father but different mothers), uterine sister (having the same mother but different fathers) and uterine brother.

The share of the property taken by each sharer fluctuates in different circumstances. A wife takes a one-fourth share in the event of the couple not having lineal descendants, and a one-eighth share otherwise. A husband (in the case of succession to the wife's estate) takes a half share in a case where the couple are without lineal descendants, and a one-fourth share otherwise. An only daughter gets to takes half share. Where the deceased has left behind more than one daughter, all daughters jointly take two-thirds. However, these two rules apply only in cases where the deceased has left behind no sons. If the deceased had left behind son(s) and daughter(s), then, the daughters cease to be sharers and become residuaries instead, with the residue being distributed in such a way each son gets double of what each daughter gets. Lineal descendants (such as sons) exclude brothers and sisters, and therefore, the share of brothers and sisters (whether full, consanguine or uterine) will become nil in the presence of such descendants.

There is no concept of ancestral property or rights by birth in the case of Muslim succession. The rights that a Muslim person's heirs acquire upon his death are fixed and determined with certainty on that date and do not fluctuate.

Part IV of the Indian Succession Act, 1925 talks about consanguinity too but this part does not apply to intestate or testamentary succession to the property of any Hindu, Muslim, Buddhist, Sikh, Jain or Parsi.

Property in Co-operative Societies

With respect to the nomination of property in co-operative societies, it must be noted that different states of India have their own state laws in this regard. For the purpose of this article, we will be considering the local laws for the states of Maharashtra and West Bengal dealing

with the nomination of property in co-operative societies mainly to focus on the difference of interpretations of the provisions dealing with nomination under the two state Acts.

Section 30(1) of the Maharashtra co-operative Societies Act, 1960 states that:

"30. Transfer of Interest on Death of Member
(1) On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in interest on accordance with the rules or, if no person has been so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member:

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society:

Provided further that, nothing in this sub-section or in section 22 shall prevent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest or a deceased member in a society."

The High Court of Bombay, in *Ramdas Shivram Sattur vs. Rameshchandra & Ramchandra Popatlal Shah and Others 2009 (111) BOMLR 1578,* held that section 30 of the Maharashtra Co-operative Societies Act, 1960 does not provide for a special rule of succession altering the rule of succession laid down under the personal law. In the process, the Court relied upon an earlier judgment by the Division Bench of the High Court of Bombay in First Appeal No. 116/1989, wherein the Hon'ble Court held the following:

> *"In our view, Mody, J. has correctly held that section 30 does not lay down any special rule of succession of properties of a deceased member overriding the general rules of inheritance prescribed by the personal law of the member of a co-operative society……..In other words, section 30 of the said Act does not at all deal with devolution of immovable properties of deceased members. The learned Single Judge in case of Gopal Vishnu Ghatnekar vs. Madhukar Vishnu Ghatnekar AIR 1982 Bom 482, has correctly pointed out that upon the plain reading of the section, it is clear that the intention is to provide for who has to deal with the society on the death of a member and not to create a new rule of succession. The learned Single Judge proceeded to observe that the purpose of nomination is to make certain the person with whom the society has to deal and not to create interest in the nominee to the exclusion of those who in law are entitled to the estate of a deceased member. Equally pertinent is the observation made in judgment Mody, J. that the society has no power except provisionally and for a limited purpose to determine the dispute about who is the heir or legal representative of a deceased member. The section 30 only provides for a proper discharge of the society without involving the society in a litigation which may take place as a result of disputes between the heirs."*

Further, the Division Bench had placed reliance on the judgment of the Supreme Court in case of *Smt. Sarbati Devi and Anr. vs. Smt. Usha Devi AIR 1984 SC 346* dealing with the scope of sections 39 and 44 of the Insurance Act, 1938 wherein it held that:

> *"A mere nomination made under section 39 does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them."*

Hence it appears from the above stated judgments that the provisions of the Maharashtra Act does not provide for beneficial interest on the nominee. However, an opposite view has been taken by the Hon'ble High Court of Calcutta with respect to the West Bengal Co-operative Societies Act, 1973. In *Sri Abinash Chandra Chakraborty vs. State*

of West Bengal and Ors. (1992) 1 CALLT 423(HC), the Court held that *"[I]f a member of a Co-operative Society appoints a nominee as per section 69 of the West Bengal Co-operative Societies Act, 1973, on the death of such member, the membership and the flat held by the deceased member are to be disposed of by the Society by transferring those in favour of the nominee and accordingly, the same also vests in the nominee to the exclusion of all others, because of the overriding character of the Act over other laws."*

The Court further held that there is a marked difference between the status of a nominee as appointed under section 39 of the Insurance Act and one appointed under section 69 of the West Bengal Co-operative Societies Act, 1973 and therefore the judgment of the Hon'ble Supreme Court in the Smt. Sarbati Devi Case will not be applicable in the present case. Hence, from the above, it is clear that unlike the Maharashtra Act, the West Bengal Act provides for beneficial nomination of the nominee to the exclusion of all others.

Shares

Section 72 of the Companies Act, 2013 states that:-

> *"72. (1) Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.*
>
> *(2) Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.*
>
> *(3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.*
>
> *(4) Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.*

The section makes if amply clear that in the event of the death of the shareholder, the nominee would become entitled to all the rights in the shares to the exclusion of all other persons. This section excludes the application of all other laws, including testamentary and intestate succession laws. The nominee would be made beneficial owner thereof. Upon such nomination, therefore, the entire rights incidental to ownership of the shares would follow including the right to transfer, pledge or hold the shares. The above viewpoint has been approved by the High Court of Bombay in *Harsha Nitin Kokate v. The Saraswat Co-op. Bank Ltd. & Ors. [2010] 159 Comp. Cas. 221 (Bom.),* wherein the Court held that the nominee of shares would become entitled to all the rights in the shares to the exclusion of all other persons and that the nominee would be made beneficial owner thereof.

Hence, it can be concluded that in case of shares, a will does not necessarily ensure the beneficiaries getting hold of them once the owner dies, something that is all the more a cause of worry if nominations have been made for the same. When it comes to shares, it is the nominee of the shares who inherits them and not the person named in the will.

Public Provident Fund (PPF) & Employees' Provident Fund (EPF) Account

If the subscriber to a PPF account dies and he/she has nominated one or more nominees, the

nominee(s) may make an application to the bank or post office where the account has been opened along with the proof of the subscriber's death. On the receipt of this application, the Account Officer shall by itself repay all amounts standing to the credit of the subscriber after making adjustments, if any, in respect of interest on loans taken by the subscriber.

If there are multiple nominees and one of them has passed away, the remaining nominees have to furnish the death certificate of the nominee in question, post which the Account Officer will repay the PPF funds to the surviving nominee(s).

A PPF account is not transferable from one individual to another, which means that a nominee cannot continue the account of a deceased subscriber in his/her own name.

Section 10(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 states that *"Any amount standing to the credit of a member in the Fund or of an exempted employee in a provident fund at the time of his death and payable to his nominee under the Scheme or the rules of the provident fund shall, subject to any deduction authorised by the said Scheme or rules, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member or of the exempted employee."*

Para. 61 of the Employees' Provident Fund Scheme, 1952 further states that *"(1) Each member shall make in his declaration in Form 2, a nomination conferring the right to receive the amount that may stand to his credit in the fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made.*

(2) A member may in his nomination distribute the amount that may stand to his credit in the fund amongst his nominees at his own discretion."

The above paragraphs lay down the provisions with respect to the nomination of Provident Fund Accounts. However, there is a difference of opinion among various high courts on the question whether the nominee nominated under section 10(2) gets the amount absolutely to the exclusion of other heirs.

The Hon'ble High Court at Calcutta in its judgment in *Usha Majumdar vs. Smriti Basu, AIR 1988 Cal 115*, has held that *"From section 10(2) it is abundantly clear that immediately upon the death of the member the provident fund money becomes part of the asset of the nominee whereas under the Insurance Act after the death of the assured the money continues to be his asset; and the money which was standing to the credit of the member becomes free even from the debt or liability incurred by the nominee before the death of the member. Only because the money vested in and thereby became the property of the nominee after the death of the member such a provision was required to be incorporated as, otherwise, being estate of the nominee, it was liable to be attached for debts or liabilities incurred by him prior to the death of the member. That the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, gets a right to the money also has been made clear by the provisions of paras 61 and 70 of the Scheme quoted earlier."*

However, the Bombay High Court in *Nozer Gustad Commissariat vs. Central Bank of India & Ors. 1993 (2) BomCR 8* has taken the view that that the use of the word "vest" in section 10(2) of the Act of 1952 does not clothe a nominee with absolute title or beneficial title in respect of provident fund amount lying to the credit of the deceased. The Court further held that the nominee is merely authorised to receive the amount for the benefit of heirs of the deceased and vesting of the amounts in the nominee is for limited purpose of receiving the amount from employer and handing over the same to the heirs entitled thereto. The Court referred to the case of *Smt. Sarbati Devi vs. Smt. Usha Devi, Supra* which was in relation to the interpretation of section 39 of Insurance Act, 1938 and reiterated that the Apex Court held that the nomination only indicated the hand which was authorised to receive the amount, on the payment of which the insurer gets a discharge of its liability under the policy and noted that it was

held by the Apex Court that the amount can be claimed by the heirs of the assured in accordance with law of succession governing them. The Court after taking note of other two dissenting judicial opinions expressed in *Shaikh Dawood vs. Mahmooda Begum AIR 1985 AP 321* and Smt. Usha Majumdar vs. Smt. Smriti Basu ultimately came to the conclusion that the principle laid down by the Hon'ble Supreme Court in the case of *Smt. Sarbati Devi vs. Smt. Usha Devi* are applicable to the cases under the Provident Funds Act also and that it was not correct view to hold that the principles laid down in this case are liable to be restricted to cases under section 39 of the Insurance Act only. The Nozer Gustad Commissariat judgment was subsequently followed by another the Bombay High Court in *Mr. Antonio Joao Fernandes vs. The Assistant Provident Fund Commissioner and Ors. 2010 (4) Bom. C.R. 208.*

Bank Accounts and Fixed Deposits in Banks

Section 45ZA of the Banking Regulation Act, 1949 states that:

> ***"45ZA. Nomination for payment of depositors' money***
>
> *(1) Where a deposit is held by a banking company to the credit of one or more persons, the depositor or, as the case may be all the depositors together, may nominate, in the prescribed manner, one person to whom in the event of the death of the sole depositor or the death of all the depositors, the amount of deposit may be returned by the banking company.*
>
> *(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.*
>
> *(3) Where the nominee is a minor, it shall be lawful for the depositor making the nomination to appoint in the prescribed manner any person to receive the amount of deposit in the event of his death during the minority of the nominee.*
>
> *(4) Payment by a banking company in accordance with the provisions of this section shall constitute a full discharge to the banking company of its liability in respect of the deposit:*
>
> ***Provided** that nothing contained in this sub-section shall affect the right or claim which any person may have against the person to whom any payment is made under this section."*

The similarity in the languages of sub-section (2) of section 45ZA of the Banking Regulation Act, 1949 and sub-section (3) of section 72 of the Companies Act, 2013 may be noted with respect to the non-obstante nature of both the clauses, giving them overriding effect over any other law, for the time being in force, whether testamentary or otherwise. However, unlike the Companies Act, 2013, which confers upon the nominee the rights of a beneficial nominee, under the Banking Regulation Act, the nominee is conferred the states of a collector nominee. This view was confirmed by the Hon'ble Supreme Court in *Ram Chander Talwar and Anr. vs. Devender Kumar Talwar and Ors. (2010) 10 SCC 671,* wherein Hon'ble Justices Aftab Alam and R.M. Lodha held that "Section 45ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by

virtue of section 45ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed."

Hence, the money lying deposited in the account of the original depositor should be distributed among the claimants in accordance with the succession laws of the respective community and the nominee cannot claim any absolute right over it.

Corporate Fixed Deposits

Nominees of fixed deposits in companies under section 58 of the Companies Act, 1956, can be the claimants of to them on the event of the death of the original deposit holder along with his / her legal heirs. The method of claiming is similar to that in the case of a PPF account, with the death certificate being submitted together with the consent statement of all concerned legal heirs.

Life Insurance Policies

Section 39(1) of the Insurance Act, 1938 says that *"the holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death." As per section 39(6), "Where the nominee or if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors."*

This provision was looked at in detail by the Hon'ble Supreme Court in the matter of *Sarabati Devi vs. Usha Devi Supra*. The primary issue, here, was whether nomination in respect of a life insurance policy operates as a "third mode of succession (i.e. in addition to testamentary and intestate succession)." The Court held that nominee of a life insurance policy does not get any beneficial right in the policy proceeds. It must, however, be noted that the Court did not lay down any sort of general rule with regard to the effect of a nomination. The Court, instead, arrived at this conclusion by analysing specific provisions of the Insurance Act, 1938. The Court held that it was of the view that "the language of section 39 of the Act is not capable of altering the course of succession under law." The Court this by referring to section 60 of the Code of Civil Procedure, 1908 which provides that that all moneys payable under a policy of insurance on the life of the judgment debtor shall be exempt from attachment by his creditors. The Court reasoned that if the nominees were beneficially entitled to the policy proceeds, this exemption would become superfluous. This provision implies that the policy proceeds form part of the estate of the life assured, which could be attached by his creditors, but for the specific exemption provided.

Joint Owners and Beneficial Owner

Joint ownership refers to two parties owning property together. Joint ownership can be beneficial if one partner dies, as property does not have to go through probate. It can also be problematic, particularly in the area of intellectual property, or property jointly owned by a parent and a child.

Joint ownership is most often applied in the real estate market, where it refers to two people who jointly own a home. In most cases, these two people are a married couple. This type of joint ownership can reduce hassles. It is not necessary for a person to wait for a probate in order to own the whole house if his or her spouse dies.

A beneficial owner is a person who enjoys the real benefits of ownership, even though the title to the property is in someone else's name. The most common instance of beneficial ownership, is the case of trusts, where the trustees are considered the legal owners of an asset, while the beneficiaries are considered the beneficial owners of an asset.

CA Paras K. Savla

Estate and Succession : Filing of Return and Compliances

1. Background

1.1 Benjamin Franklin said that ".... The only things certain in life are death and taxes...". The above lines by Benjamin Franklin reflect the sacrosanct universal truth that we all have to live with. Section 139 of the Income-tax Act, 1961 (the Act) casts duty on every person to file return of income (ROI). It states that every person (other than company, firm or category of person as expressly provided), is required to file ROI if the income of such person exceeds maximum amount not chargeable to tax. Section 139 provides no exception in filing of ROI, in case of deceased person. Unlike as said by Benjamin Franklin, a tax law doesn't stop when life stops. It applies even after the death.

1.2 Death of the person would give rise to technical and procedural issues in case of following situation:

i. Income earned by the deceased till the date of his death and received by him;

ii. Income of the deceased received upon his death received by legal heirs, executors or administrators;

iii. Upon death, income earned by the heirs or legatees in specie or in specified share from the assets transmitted by virtue of testate (where valid will was made) or intestate (where no will was made) succession;

iv. Upon death, the estate vests in the executors or administrators for the purpose of administration and pending such administration, the executors or administrators are in receipt of income of the estate.

1.3 Chapter XV provides for liability in special cases. Various situations specified in para 1.2 supra would be covered by the provisions of –

- Section 159
- Section 168 &
- Section 176(3A)/(4)

In this write up we shall attempt to answer the key issues that arise with respect to filing of return in respect of a deceased assessee from the above specified situations.

2. Section 159

2.1 Section 159 creates legal fiction and provides for machinery provision for assessment or giving of refunds in respect of the income of deceased persons[1]. Provisions of section 159 are complete code in itself. As per this section, the legal representatives of the deceased assessee will be

1. Arvind Bhogilal vs. CIT [1976] 105 ITR 764 (Bom.)

treated as deemed assessees and will be personally liable in respect of any taxes payable in the same manner and to the same extent as the deceased assessee would have been had he not died.

2.2 Act confers power on the revenue to make the assessment and determine the tax payable by the deceased on the basis of the assessment and for that purpose to issue appropriate notice which would have had to be served upon the deceased had he survived and in that behalf to require from the legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of law require from the deceased person[2]. The words "his legal representative shall be liable to pay" occurring in the Section are not words creating a charge or an additional liability, but it merely indicate the person or persons by whom the tax payable by a deceased person is to be paid[3]. The legal representative for the purposes of this section cannot be construed to mean only the legal heirs of the deceased. Legal representatives have a much wider connotation and will also include the executor and administrator of the estate.

2.3 The liability of the legal representatives under this section is restricted to the previous year in which the demise has taken place[4]. Further, the liability under this section is only restricted up to the date of demise and only in respect of the income that has accrued to the deceased assessee up to the date of death.[5] The tax liability under this section in respect of which the legal representatives are liable is restricted not only to self-assessment tax but also includes liability towards advance tax and interest. Legal representative who submits ROI of the deceased person is also liable for penalty in cases falling u/s. 271(1)(c)[5]. It is specifically provided that liability of a legal representative under this Section shall be limited to the estate is capable of meeting liability and is not a person liability[6]. However in certain circumstances it shall be personal liability of the legal representative where, legal representative pending tax liability, disposes of or parts with any assets of the estate of the deceased. However liability is restricted to the value of assets parted or disposed. Upon death of the assessee prosecution proceeding initiated against him will abate. Prosecution could not be launched against legal representative for the offence committed by the deceased.

2.4 For the purposes of assessment of the income of deceased notice is required to be issued in the name of legal representative. On the face of the notice it should specifically state that notice is issued in the capacity of the legal representative of deceased person and assessment is proposed to be made in respect of the income of the deceased[7]. Further in respect of the assessment made on the legal representative, the name of such legal representative must be specified on the assessment order. It will not be suffice to describe him as successor-in-estate[8]. Post completion of assessment on deceased or legal representative, reassessment can be initiated against legal representative. Further notice of assessment or reassessment on the deceased person can be continued once notice was issued during his life time. However continuation of such proceeding is possible only after bringing all the legal representatives on record by issue of notice to them. Otherwise such assessment can be set aside but not annulled.

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2. Estate of Late Rangalal Jajodia vs. CIT [1971] 79 ITR 505 (SC)
3. CIT vs. Hukumchand Mohanlal [1971] 82 ITR 624 (SC)
4. Raghunathdas Kakani vs. ACIT [1979] 2 Taxman 584 (MP)
5. Maddula Appa Rao v ITO [1959] 36 ITR 140 (AP)
6. UOI vs. Sarojini Rajah [1974] 97 ITR 37 (Mad)
7. CIT vs. Sumantbhai C. Munshaw [1981] 128 ITR 142
8. Shasrangshu Kanta Acharya vs. Collector Malda [1963] 47 ITR 754 (Cal.)

3. Section 168

3.1 This Section comes into effect from the date of death and continues to remain in effect in respect of every year or part thereof from the date of death up to the date of complete distribution of the estate. Section makes obligatory that the estate of a deceased person is charged to tax in the hands of an executor. The provision in section 168(1) does not leave any discretion to the income-tax authorities in respect of assessing the income of the estate of a deceased person to tax. Such income is to be taxed in the hands of the executor only[9].

3.2 Section 168 provides that the income of the estate of a deceased person shall be chargeable to tax in the hands of the executor, if there is only one executor, then, as if the executor were an individual and if there are more than one executors then, as if the executors were an association of persons. It further provides that residential status of the executor shall be derived from the residential status of the deceased person during the previous year in which his death took place.

3.3 The 'estate' referred to in Section 168 is an estate succession to which is governed by a Will executed by the deceased and is not the estate of a person who dies intestate. The applicability of this Section arises only in the event where the deceased assessee has passed away testate[10]. In other words Section 168 is inapplicable to income from the estates of persons who have died intestate. The estate of the deceased situate within and outside the country is to be treated as one and indivisible for the purposes of the levy of tax under section 168, irrespective of the fact that there are separate sets of executors appointed under two different wills in respect of the property situate within and outside the country[11].

3.4 The word "executor" is not to be understood in the restricted sense of the term because by the Explanation it has been given an extended meaning to include an administrator or other person administering the estate of a deceased person. A person who is actually administering the estate of a deceased person, therefore, would for the purposes of Section 168 be an executor in whose hands the income of the estate of the deceased person must be charged to tax. The extended definition is intended to include a person who is in de facto management of the property of the deceased person. The assessment of an executor under this section shall be made separately from any assessment that may be made on him in respect of his own income.

3.5 Separate assessments shall be made under this section on the total income of each completed previous year or part thereof as is included in the period from the date of the death to the date of complete distribution to the beneficiaries of the estate according to their several interests. In computing the total income of any previous year under this section, any income of the estate of that previous year distributed to, or applied to the benefit of, any specific legatee of the estate during that previous year shall be excluded. But the income so excluded shall be included in the total income of the previous year of such specific legatee.

3.6 Executor is responsible for filing of ROI and payment of taxes under the Act. Only for statistical purposes that the executors of the estate of the deceased are assessed as AOP otherwise, as already stated, for the purpose of rates, etc., the assessment has to be deemed to be on the assessee or the actual beneficiaries. In other words Assessment made on the executor is an continuation of assessments on deceased. The

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9. CIT vs. Usha D Shah [1981] 127 ITR 850 (Bom)
10. CIT/CWT vs. P. Manonmani [2000] 245 ITR 48 (Mad.) (FB)
11. Maharani Vijaykunverba Saheb vs. CIT [1982] 8 Taxman 60 (Guj.)

executors are entitled to claim the set off of loss incurred by the deceased against their income from the estate of the deceased notwithstanding their status as AOP as against the deceased's status as individual[12].

4. Section 176(3A)/(4)

In case of person carrying on profession is discontinued due to his death, any sum received after the discontinuance would be taxed as the income of recipient and charged to tax accordingly in the year of receipt. Similarly income of the discontinued business would also be taxed in the hands of recipient in the year of receipt.

5. Intestate demise

Issue may now arise how tax liability is determined in case of intestate demise of the assessee. In case of intestate demise unlike Section 168(3) & (4) no specific protection is available to legal heirs i.e., as to taxability in the hands of legal heirs only on distribution of income and not otherwise. In case of intestate demise, the property would get devolved on the legal heir immediately on death. Hence each legal heir would be assessable on the income from his share of the property from the date of death. However such intestate death would give rise to various legal and practical complications for filing of ROI.

Above legal provisions can be summarised as under:

Sr. No.	Particulars	Tax treatment
1	Income arising to and received by the deceased during his lifetime	Would be assessed in the hands of the legal representative u/s. 159
2	Income arising to and received by the legal representative from the date of death	i) In case where estate need to be administered – would be taxed in the hands estate u/s. 168 ii) In case of where assets are directly inherited – would be taxed on their hands
3	Income arisen in the hands of deceased but received after his death by the legal representative	It would be assessed in the hands of legal representative u/s 159 along with the other income of the deceased which is received before the end of the accounting year in which he died
4	In case of person carrying on business / profession is discontinued due to his death	Any sum received after the discontinuance would be taxed as the income of recipient, in the year of receipt u/s 176(3A)/(4)

6. Period of filing of return of income

In case of demise of the assessee, two ROI is required to be filed in the year of demise. The period and scope of filing of ROI is as under:

Sr. No.	ROI	Scope of income	Onus of tax payment & filing of ROI
1	ROI – 1	Income arising between April 1 XXXX and up to the date of demise	Legal Representatives
2	ROI – 2	Income accruing to the deceased between from date of demise and March 31, XXXX	Testate Demise – Executor(s)of the estate; Intestate Demise – Legal heirs

12. CIT vs. G B J Seth [1981] 6 Taxman 318 (MP)

7. Procedural aspects to file the ROI electronically

7.1 To be able to file the ROI of a deceased assessee, the legal representatives are first required to get themselves registered on portal www.incometaxindiaefiling.gov.in. The following are the steps involved in the process of registration of the legal representative on the portal:

7.1.1 Access the Income Tax e-filing portal, www.incometaxindiaefiling.gov.in and logon to the e-filing application.

7.1.2 Go to 'My Account' tab and select the option 'Register as legal heir'.

7.1.3 Fill in the required details and attach a zip[13] file containing the following documents:

a. Copy of death certificate

b. Copy of PAN card of the deceased assessee

c. Self-attested copy of PAN card of the legal heir

d. Legal Heir Certificate

7.1.4 Click on submit to update and send the details to the e-filing administrator who will review and accordingly approve / reject the registration of legal heir. A confirmation mail for the same will be sent to the registered e-mail ID.

7.1.5 Once the application for registration has been submitted, the status of the same can also be checked from the 'My Request List' tab.

7.1.6 On being granted the approval from the e-filing administrator, the ROI of the deceased assessee can be filed by the legal representative.

7.2 The documents that can be accepted as legal heir certificate are:

1. Legal Heir Certificate issued by court
2. Legal Heir Certificate issued by Local Revenue Authorities
3. Surviving Family Members issued by Local Revenue Authorities
4. Registered Will
5. Family Pension Certificate issued by Central / State Government

7.3 E-filing of ROI portal has not considered the requirements of Act u/s. 159 and executor's u/s. 168. It allows registration only to legal heir. In view of this in case executor u/s 168 is not the legal heir he would not be able to file ROI electronically. Hence return would be required to be filed mandatorily in physical form. This is a one area where representation need to be made to CBDT for allowing executor to file ROI. Further obtaining legal heir certificate itself is cumbersome and time consuming procedure. Here too representation is required to be made for simplifying the process.

Conclusion

In the end I would like to leave with the quote from Herman Wouk Pulitzer Prize-winning American author. He said that "Income tax returns are the most imaginative fiction being written today".

13. The size of the zip file should not exceed 1 Mb

Good health is not something we can buy. However, it can be an extremely valuable savings account.

— *Anne Wilson Schaef*

Prof. Parimal Merchant

Importance of Family Constitution and Family MOU

In 1990, immediately on completion of his B. Com, Rajesh joined the family business. He was 20 years old. The business at that time was small with annual turnover of ` 5 cr. and profit of ` 20 lakhs. Over the years the business flourished with turnover in 2013 of ` 500 cr. and profit of ` 30 cr.

His cousin, Suresh has just returned after four years BBA programme in UK and has expressed his desire to buy an Audi car for his personal use.

When the topic came for discussion, Rajesh was not comfortable. He remembered his days of joining the business when he had to rough it out by travelling in the bus. Today he believes that those experiences had a great value and would want Suresh also to go through the same. Suresh would not agree.

Suresh made this demand strongly to his mother and then both of them together made a case to his father. All his friends who have returned after study in UK have Audi and above version and if he has a car of lower standard what will happen to his status? The father had nothing to argue and he decided to take up the matter with Rajesh and his father.

Rajesh was a soft spoken person and generally never argued strongly with his father and uncle, so when uncle came with the proposal, despite his reservations, he could not say much.

It so happened that Rajesh's wife had been reminding him about the need to replace their car as it had become very old and was giving repeated problems. He had been postponing the discussions as the company despite good profit had severe working capital crunch and as a family they did not believe in taking loans.

Now that the purchase of a car for Suresh is almost sanctioned by his father and uncle, he was worried about the reaction of his wife. She is bound to get furious that despite Rajesh being in business for over 15 years, when the issue of replacing his car came up, the firm does not seem to have cash, but Suresh who has just arrived, not even joined the business and yet the firm has money to buy an Audi car worth ` 70 lakhs for him.

Rajesh spoke about the issue with his father in person, but the father refused to intervene saying that he can't fight with his brother, Suresh's father for such issues as he wants peace in the family.

How could Rajesh handle the situation? His wife did take up the issue. He failed in convincing her and now there is a rift between the two.

Is this situation unavoidable? Who could have done what so that this situation could have been avoided? Rajesh was thinking and as he started thinking further he realised that this is just the beginning. If it goes this way, obviously more serious issues are likely to arise in the future.

Rajesh has one younger brother who is also likely to complete his graduation next year. Today his father and uncle have fifty per cent share each in the business. Eventually how it will be distributed? In his family, being two sons the father's share of fifty per cent is likely to be divided between two of them as twenty five per cent each and on the other hand, being the only son of the uncle, Suresh will be entitled to fifty percent share.

Rajesh was thinking. He spent 15 years of his life. He believed that it is because of his contribution that the business has grown from ` 5 cr. to ` 500 cr. And yet at the end, he is going to get only twenty five per cent shares. Instead of joining the family business, would it not have been better if he had started a separate business of his own? He felt that, if he had done that, by now it would have grown with total ownership of his own and he would have got twenty five per cent share in the family business as inheritance from his father in any case.

Situation like that of Rajesh is nothing new. Majority of the family businesses in India are either facing similar situation or are likely to face similar situation in near future.

The reason is that when they started the business, it being small, they focused on building the business and did not bother to clarify internal relationship issues. They did witness problems in other families for lack of clarity on such issues, yet they believed that the love and affection within their family is so high that such issues will never arise.

They thought that trying to define clarity on such issues would mean lack of trust with family members and that itself would be like inviting the trouble. By talking on such issues they do not want to 'rock the boat'.

On the other hand when the issues eventually do come up, by that time it is too late. Each side has developed a hardened perspective with their own point of view in mind and it becomes virtually impossible to make them agree. Eventually it results in separation and that also in majority of the cases with severe bitterness.

Some families having foresight, tend to invest time and energy in defining the common stand on such issues and document it well in time. Such document is known as family constitution or we could call it simply as a family MOU.

Contents of a family MOU

There is nothing like fixed and standard contents of an MOU. It could vary from family to family. For the purpose of reference one possible list of contents is shown below. However it is neither exhaustive nor is it the only possible list. It can be used for reference and the family should eventually create their own list of contents based on their specific context and the needs.

1. **Background and introduction**: It is good to specify here the context of the family within which the MOU is being made. The MOU should be dynamic and should not become a dogmatic or bureaucratic document. As such in the future, as and when required, this section will help in adapting the MOU to the changed context.

2. **Business objectives:** It is here where the family members who are running the business define the broad objectives of the business. Generally it could be in terms of wealth creation, creating work opportunities for the next generation and finally building a family legacy. The business may be small at the time of preparing the MOU but the family could indeed have aspirations to become a 'house' or a group that would outlive the founders.

3. **Values and vision:** The family's core values are stated here. Whenever there are business or family dilemmas this section becomes a guidepost and would help the present as well as future family members to remain within the course envisioned by the founding family members. This section includes clarity on the values such as ethics, risk taking, cost control, desired level of profile, borrowing, investment policy, relationship within the family, etc. It includes business philosophy with reference to customers, employees, level of business control, reinvestment and dividend, etc. This section also clarifies the family-business relationship, whether it is business first or family first and the resultant commitment of the family towards business in terms of ensuring its long term prosperity with multi-generations perspective and commitment towards organisation building.

4. **Management Philosophy:** This section lays out the outline of the desired management style. It could be in terms of meritocracy, transparency, accountability, fairness, role of non-family top management and even the desired role of external help in management.

5. **Role of family members in the business and family:** In the family business there are several roles specifically to be fulfilled by family members only. Such roles should be identified and clarity brought about by defining who will be playing the same. The roles could be such as figurehead, leader, liaison, controller, disseminator, allocator etc.

6. **Next generation of family members:** The MOU should clarify the stand and the desired process for the next generation family members. It should clarify about the level of freedom to join the business and in case of joining business, the process of induction. It should specify the eligibility criteria the role, responsibility, compensation and eligibility of perquisites at the different stages of induction. There are issues such as the induction of daughter and daughter-in-law which continues to remain unaddressed in majority of Indian family businesses.

7. **Role of family members working in business:** It is important to specify the framework for work, age competence required for different roles, compensation, performance evaluation and the actions to be taken on the failure in effective handling of the required task.

8. **Responsibility of the working members towards the family:** The working members are operating the business but they are the trustees for the interest of the non-working members of the family. There should be methods laid down for sharing the information, accountability as well as decision making on the matters affecting the family as a whole.

9. **Non-working family members:** The process should be laid out to ensure

that the non-working family members understand the broad aspects of the business and their responsibility towards the business. There should be provision for ownership education programme to explain them about the implication of being a part of the family as well as the minimum standards that they need to comply with.

10. **Share ownership:** It is important to clarify who is eligible to the ownership share of the business. Whether it will be only the working members or all male members or all family members including female. The eventuality of the expansion of the family and the transfer to the subsequent generations should be foreseen. The issues such as on inheritance, whether the transfer will be only of the wealth or it will be also of the voting power should be defined. Whether daughters should be given the ownership share or not as eventually her in-laws may influence the family business and some families may not desire such influence.

11. **Family business governance:** Mechanism needs to be laid out about governance of the business by establishment of the Board and the role of non-family advisors on such board. On the other hand it is equally important to define how the family will be governed, the process of decision making and mechanism for grievance resolution.

12. **Management succession:** The MOU should lay down the criteria for succession process and plan about who should be leading the business, the eligibility, the process of selection, the process of transition, the accountability and finally the process of removal in case of non-effectiveness.

13. **Family relationship:** The desired relationship of the family members towards each other, the process of ensuring the atmosphere of mutual respect and support, the management of eventually growing diversity and finally the dispute resolution mechanism need to be outlined.

14. **Exit policy:** The permissibility and the process in case some family member desires to encash their ownership right. As the family grows, there will be various branches of the family and different branches may have different views about running the business. In case there is no agreement some branch or individual may want to exit. In such case issues such as right of first refusal, method of arriving at the compensation figure and the time frame over which the same is to be paid etc. are the issues that would need to be defined in the MOU.

Process of creating an MOU

While a standard MOU may be available off the rack, or one can get a copy of MOU made by some other family, it is not likely to be adequate. There are two reasons. One is the specific context of the business and second, the more important is the fact that it is the process of jointly creating the MOU which is going to make the difference.

It is important that all family members are involved at appropriate stages and during the discussion of appropriate aspects of the MOU so that they own up the document. This process of engagement is a crucial aspect for the success of the MOU.

During discussions there are possibilities of disagreement and finally the decision may be made but what is important is that if it is a joint process and that atleast the logic is explained.

In the process of discussions, the expectations of different family members will surface and also expectations from other family members will get spelled out.

Some family members take help of legal firms to draft the MOU and there are also consultants who facilitate the process of discussions and guiding the creation of the MOU. However the fact is that it is not a rocket science and each family can make atleast the initial MOU by themselves and go on revising it over the years.

Advantages of creating an MOU

For a successful long life of family business, trust on each other among family members is an essential condition. In other words a well-meaning ongoing family business will start getting into problems the day the trust on each other is lost.

Individuals are likely to trust each other if they believe that the process is fair. Thus if the process is perceived to be created impartially and is very well laid out in the MOU then it is likely to provide a foundation for trust and through that long-term healthy relationship.

Thus not only a good MOU but one made with the proper inclusive process, is the one which will ensure healthy family business relations.

Situations like the one of Rajesh above could have been avoided, in case his family had clearly stated the process of induction of the next generation member, the compensation and their perquisites. In case the MOU was in place before Suresh arrived, he would have known whether he is entitled to the Audi car or not and neither he nor his father would be in a position to violate the process well-defined in the MOU. In case the family MOU have spelled out clearly the policy for rewarding the working family members in form of salary as well as shares for effective years of working in the company, then even Rajesh's concern about feeling ill-rewarded would have been addressed.

Thus the MOU clarifies the expectations to each family member and since it is created jointly and without bias the probability of the acceptance of the outcome is also very high.

Limitations of the MOU

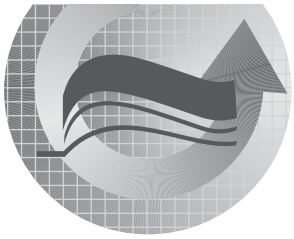
MOU is like a statement of intentions and it is as good as it is observed in the spirit. It can lay out the possibilities that can be anticipated and which can be articulated. However there are many other reasons of differences within family which can't be so well articulated and as such governed by such MOU.

As the business and family evolve new dimensions and new considerations emerge. One may agree to some clauses at the time of creation of MOU but as life evolves and the situations change one may disown the clause inconvenient to them.

There can be serious differences in the operational matters. One family member is extremely bullish and pushes his way for the proposal of expansion and the other way equally bearish and shivers at the likely damage such expansion will cause. There may be method of resolution in the MOU, but any way one of the two is likely to be unhappy and likely to somehow sabotage the decision. In such cases howsoever well made it may be, the MOU can be of little help.

The MOU is like any legal document. There are provisions but if the parties decide they can twist the interpretations to suit their interest and the argument can go on.

Thus MOU is useful, it is useful for retaining the trust. It is necessary but not sufficient. Good faith and willingness to go the extra mile for keeping family business spirit healthy and alive is equally important.



Case Laws Index

B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Accrual of income in respect of advance licence benefits and DEPB benefits

CIT vs. Excel Industries Ltd. – Civil Appeal No. 125 of 2013 dated 8th October, 2013

The question for consideration was: whether the benefit of an entitlement to make duty free imports of raw-materials obtained by the assessee through advance licences and duty entitlement pass book (DEPB) issued against export obligations is income in the year in which the exports are made or in the year in which the duty free imports are made.

In the A.Y. 2001-02 the assessee had not offered for taxation ` 12,57,525/- being the advance licence benefits receivable and ` 4,46,46,976/- being the duty entitlement pass book benefits receivable on the ground that they could not be said to have accrued until the imports were made and the raw-materials consumed. According to the Assessing Officer along with an obligation of export commitment, the assessee gets the benefits of importing raw materials duty free. When the exports are made, the obligation of the assessee is fulfilled and the right to receive the benefits becomes vested and absolute, in the year under consideration, the export obligation has been made and the accounting entries were passed on such fulfilment. Following the decision for the earlier years the Tribunal held that income does not accrue until the imports are made and raw materials are consumed by the assessee which were effected in the subsequent years and therefore, the said benefits are not taxable in the year under consideration. The High Court did not admit the appeal u/s. 260A of the Act.

Before the Supreme Court the Revenue contended that in view of Section 28(iv) of the Act, the value of the benefits obtained by the assessee is its income and is liable to tax under the head "Profits and gains of business or profession".

Rejecting the aforesaid contention the Supreme Court held that the moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately. The income accrued becomes due but it must also be accompanied by a corresponding liability of other party to pay the amount. Only then can it be said that for the purposes of taxability that income has really accrued to the assessee and it is not hypothetical.

Their Lordships further held that even if it is assumed that the assessee was entitled to the benefits under the advance licence as well as under the duty entitlement pass book, there was no corresponding liability on the Customs Authorities to pass on the benefits of duty free imports to the assessee until the goods are actually imported and made available for clearance.

Their Lordships further held as under:

"32. Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue

is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."

Carry Forward and Set-off of unabsorbed depreciation against income other than the income from export oriented units

M/s. Himatsingka Seide Ltd. vs. CIT – Civil Appeal No. 1501 of 2008 dated 19th September, 2013

Dismissing the Civil Appeal of the assessee the Supreme Court approved the decision of the Karnataka High Court reported in 286 ITR 255 wherein the High Court held that carried forward unabsorbed depreciation and investment allowance is to be adjusted against the profits and gains of the export oriented unit and the balance amount can only be adjusted against the income from other business. The Court rejected the plea of the assessee company that income from export-oriented unit was fully exempt u/s. 10B and therefore, unabsorbed depreciation and investment allowance of the earlier years can be adjusted against income from other sources to reduce the said income to Rs. Nil. In this respect the High Court relied on the following decisions to reverse the decision of the Appellate Tribunal:

(i) *Distributors (Baroda) Pvt. Ltd. vs. Union of India [155 ITR 120 (SC)]*

(ii) *Cambay Electric Supply Co. (134 ITR 89 SC)*

(iii) *CIT vs. Virmani Ind. Pvt. Ltd. (216 ITR 607 SC)*

(iv) *CIT vs. Sun Stone Engineering Ind. P. Ltd. [220 ITR 182, Raj.]*

(v) *CIT vs. Surendra Textiles [258 ITR 387, Raj.]*

(vi) *Indian Rayon Corporation Ltd. vs. CIT [261 ITR 98, Bom.]*

(vii) *Cambay Electric Supply Ind. Co. Ltd. [113 ITR 84 (SC)]*

Larger Bench explains the decision in the case of Sandvik Asia Ltd.

CIT vs. Gujarat Flouro Chemicals (Supreme Court) – SLP (Civil) No.11406 of 2008 Judgement dated 18th September, 2013

The Division Bench of the Supreme Court doubting the correctness or otherwise of the decision of the Supreme Court in the case of *Sandvik Asia Ltd. vs. CIT (280 ITR 643)*, referred the following question of law to the Larger Bench of three Judges:

"Whether interest is payable by the Revenue to the assessee if the aggregate of instalments of advances or TDS paid exceeds being the assessed tax?"

Reversing the decision of the Bombay High Court, the Supreme Court held that the appellant (i.e., M/s. Sandvik Asia Ltd.) was undisputedly entitled to interest u/ss. 214 and 244 of the Act as held by the various High Courts and also the Supreme Court. The appellant's money had been unjustifiably withheld by the Department for 17 years without any rhyme or reason. The interest was paid only at the instance and the intervention of the Supreme Court in Civil Appeal No. 1887 of 1992 dated 30th April, 1997. Interest on delayed payment of refund was not paid to the appellant on 27th March, 1981 and 30th April, 1986 due to the erroneous views that had been taken by the officers of the Respondents. Interest on refund was granted to the appellant after a substantial lapse of time and hence it should be entitled to compensation for this period of delay.

The Supreme Court further observed that by allowing the appeal, the Income-tax Department would have to pay a huge sum of money by way of compensation at the rate specified in the Act varying from 12% to 15% which would be on high side. Though the Department was solely responsible for the delayed payment, the interest of justice would be amply met if the simple interest @ 9% per annum is paid from the date it became payable till the date it is actually paid.

The aforesaid decision of the Division Bench of the Supreme Court was explained by the Bench of three Judges in the aforesaid case as under:

"6. In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assessees and also by the Revenue. They are of the view that in Sandvik case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

"7. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether an assessee

who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.

"8. Further it is brought to our notice that the Legislature by the Act No. 4 of 1988 (w.e.f. 1-4-1989) has inserted section 244A to the Act which provides for interest on refunds under various contingencies. We clarify that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest."

Retrospective Applicability of section 234D

CIT vs. Reliance Energy Ltd. [(2013) 93 DTR (SC) 361]

In view of the legal position which has been clarified by insertion of Explanation 2 in section 234D by the Finance Act, 2012, w. e. f. 1st June, 2003, there is no question of retrospective applicability of section 234D to a case where the assessment for assessment year 1998-99 was completed prior to 1st June, 2003.

Under Explanation 1 to s. 271(1)(c), voluntary disclosure of concealed income does not absolve assessee of s. 271(1)(c) penalty if the assessee fails to offer an explanation

MAK Data Pvt. Ltd. vs. CIT dated 30th October, 2013 (SC)

The assessee filed a return of income for AY 2004-05 declaring the total income of ` 16 lakhs. In the course of the assessment proceedings, the AO noticed that documents comprising share application forms, bank statements, blank share transfer deeds, etc. had been impounded in the course of the survey proceedings conducted at the premises of the assessee. The AO sought specific information regarding the documents from the assessee. In reply to the show-cause notice, the assessee made an offer of ` 40.74 lakhs with a view to avoid litigation and buy peace and to make an amicable settlement of the dispute. The AO assessed the said sum of ` 40.74 lakhs and levied penalty u/s 271(1)(c) for concealment of income and not furnishing true particulars. The CIT(A) upheld the penalty. The Tribunal reversed the order of the CIT(A) and deleted the penalty on the ground that the surrender was without admitting any concealment. On appeal by the department, the Delhi High Court reversed the order of the Tribunal on the ground that as there was absolutely no explanation by the assessee for the concealed income of ` 40.74 lakhs, the first part of clause (A) of Explanation 1 to s. 271(1)(c) is attracted.

On appeal by the assessee, the Supreme Court dismissing the appeal held that:

(i) The Tribunal has not properly understood or appreciated the scope of Explanation 1 to sec. 271(1)(c). The AO shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to s. 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise;

(ii) The assessee has only stated that he had surrendered the additional sum of ` 40.74 lakhs with a view to avoid litigation, buy peace and to channellise the energy and resources towards productive work and to make amicable settlement with the income tax department. The statute does not recognise those types of defences under Explanation 1 to s. 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.



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

1] Derivative transactions carried on through National Stock Exchange even prior to recognition of NSE as recognised stock exchange are entitled to benefit under proviso (d) to Section 43(5)

CIT vs. Nasa Finelease (P.) Ltd. [2013] 38 Taxmann.com 108 (Delhi)

The assessee was engaged in the business of dealing in securities and investment. During relevant previous years, the assessee incurred loss in derivative transactions conducted in National Stock Exchange (NSE). The Assessing Officer held that loss was speculative loss and since NSE was notified as recognised stock exchange *vide* notification dated 25-1-2006, derivative loss incurred for transaction undertaken between July 2005 to September 2005 was not eligible for benefit under proviso (d) to section 43(5). The Commissioner (Appeals) upheld the order of the Assessing Officer. The Tribunal held that the assessee was entitled to benefit under Section 43(5) proviso (d), even in respect of transactions carried out with effect from 1-4-2006 because Parliament had enacted the provision with effect from the said date and delay, if any, in the issue of rules and notification, cannot nullify the legislative mandate of the enactment. On appeal in High Court, the High Court dismissed the appeal of the revenue and held that the Notification No. 2/2006, dated 25-1-2006 issued by the Central Board of Direct Taxes did not specify any particular date and simply notified the National Stock Exchange India Ltd., and Bombay Stock Exchange, Mumbai under proviso (d) to clause (5) to section 43. The said proviso had become applicable with effect from 1-4-2006. Issue of notification obviously had to take some time as it involved processing and examination of applications etc. This was a matter relating to procedure and the delay in issue of notification or even framing of the rules was due to administrative constraints. The Tribunal was right that the delay occasioned, as procedure and formalities have to be complied with and same should not disentitle and deprive an assessee, specially, when the transactions were carried through a notified stock exchange. The court also held that the aforesaid delay was not attributable to the assessee. The notification, therefore, merits acceptance and should be given retrospective effect. Notification was procedural and necessary adjunct to Section 43(5)(d) enforced with effect from 1-4-2006. The rule and notification issued in the present case effectuated the statutory and the legislative mandate. There was no good ground or reason why the notification in question should not be given effect from 1-4-2006. No reason or ground was alleged or argued to contend that National Stock Exchange India Ltd., could not and should not have been notified from 1-4-2006.

In view of the aforesaid, there was no ground or reason to interfere with the findings of the Tribunal. As regards the question of applicability of Section 73, since the Tribunal has not decided said issue, same to be remitted to the Tribunal for adjudication.

2] Where Revenue succeeded on merit on issue that was remanded, Revenue's appeal against remand order would be infructuous

CIT vs. Abdul Kareem Ladsab Telgi [2013] 38 Taxmann.com 186 (Karnataka)

The assessment order was passed whereby the Assessing Officer determined the income of assessee at ` 4.09 crore. On appeal, the Commissioner (Appeals) rejected appeal on the ground that the assessee did not pay/deposit the admitted tax as provided under section 249(4). Then, the assessee filed a writ petition which was also disposed of by holding that the assessee was bound to pay the admitted tax. Thereafter, the Revenue auctioned one of the properties of the assessee and recovered ` 1.43 crore. Since the admitted tax was ` 23.01 lakh which was much less than the sale proceeds, the assessee filed an Application for recalling Order of the Commissioner (Appeals) but the same was rejected by him and, subsequently, on appeal, by the Tribunal. Against that Order, the assessee filed Miscellaneous petition for recalling the above Order which was allowed by the Tribunal and restored matter to the first Appellate Authority for deciding issue on merit. Against the Order of the Tribunal, the revenue filed an appeal before the High Court. During pendency of the above appeal before the High Court, the First Appellate Authority disposed of the issue on merit by which the assessee's appeal was dismissed. The said order was confirmed by the Tribunal. The assessee filed an appeal before High Court against order passed by the First Appellate Authority and the Tribunal on merit. The High Court allowed the appeal and held that from bare perusal of the sequence of events narrated above, it was clear that the order under challenge in these appeals had virtually rendered infructuous, in view of the order on merits passed by the Appellate Authority after remand and confirmed by the Tribunal. The orders passed by the First Appellate Authority and the Tribunal were challenged on merits, which is pending for final disposal by the High Court. It is in this backdrop; the answers to the questions formulated by this Court would be academic and not serve any useful purpose to the Revenue. As a matter of fact, the Revenue after remand has succeeded before both the authorities below i.e., the First Appellate Authority and the Tribunal and the orders passed therein are subject matter. Hence, there was reason to keep these appeals pending any further and therefore, they were to be held infructuous.

3] Tribunal has comprehensive jurisdiction which gives discretion to allow a new ground to be raised

CIT vs. Sam Global Securities Ltd. [2013] 38 Taxmann.com 129 (Delhi)

The assessee declared his taxable income of ` 1,72,910 in his return of income, subsequently notice for scrutiny assessment under section 143(2)(ii) was issued. The assessee filed its revised computation of Income claiming exemption of dividend of ` 80,48,977 from the units of mutual fund under section 10(35) and loss on sale of unit amounting to ` 85,18,583 as a business loss. The Assessing Officer rejected the claims on the ground that the assessee had not filed revised return within time allowed under Section 139(5). Secondly dividend was received from mutual funds, which was not included in list approved by the SEBI and thirdly Income/loss from shares/unit was speculative loss and not business loss. On appeal, the Commissioner (Appeals), however, observed that (i) mutual funds was duly approved mutual fund under Section 10(23D) and (ii) as unit of mutual funds were sold and not shares. Explanation to Section 73 was not applicable. However, he did not

allow the appeal on ground that assessee had not filed a revised return within time allowed under Section 139(5). On second appeal, the Tribunal had reversed the finding on basis that the Supreme Court's decision in *CIT vs. Mr. P. Firm [1965] 56 ITR 67* and circular No. 114 XL 35 of 1955 that an officer must not take advantage of ignorance of the assessee as to his right. Judgment of the Supreme Court in *Goetze India Ltd. vs. CIT [2006] 284 ITR 323/157 Taxman 1* was distinguished on the ground that the said case was limited to the power of the assessing authority and did not impinge upon the power of the Tribunal. The matter was remanded to Assessing Officer for fresh adjudication on merit. On Revenue's appeal in High Court the Court dismissed the appeal of the Revenue by affirming the findings of tribunal by relying on the decision of Goetze (India) Ltd. wherein deduction claimed by way of a letter before the Assessing Officer, was disallowed. In *National Thermal Power Co. Ltd. vs. CIT [1998] 229 ITR 383*, the Supreme Court held that the Tribunal cannot be prevented from considering questions of law arising in assessment proceedings although not raised earlier. In *CIT vs. Natraj Stationery Products (P.) Ltd. [2009] 312 ITR 22/177 Taxman 168 (Delhi)* reliance placed on Goetze (India) Ltd. (supra) by the Revenue was rejected, as the assessee had not made any 'new claim' but had asked for re-computation of deduction. The Court held that the said decision may not be squarely applicable but the Courts have taken a pragmatic view and not the technical view as what was required to be determined is the taxable income of the assessee in accordance with the law. In this sense, the assessment proceedings are not adversarial in nature. In *CIT vs. Jindal Saw Pipes Ltd. [2010] 328 ITR 338 (Delhi)*, it was observed that the Tribunal's jurisdiction is comprehensive and assimilates issues in the appeal from the Order of the Commissioner (Appeals) and the Tribunal has the discretion to allow a new ground to be raised. In view of the aforesaid discussion, the Order passed by the Tribunal was upheld.

4] Where legal question was raised even first time before Tribunal, Tribunal was required to consider same in accordance with law

Sankeshwar Printers (P.) Ltd. vs. DCIT [2013] 38 taxmann.com 210 (Karnataka)

The assessee-company was engaged in the business of printing and publishing. It purchased shares from its shareholders. The Assessing Officer held that the amount paid by the assessee-company to purchase the shares from the shareholders amounts to distribution of dividend and the same has to be considered as accumulated profits in the hands of the assessee within the meaning of Section 2(22)(d). On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. On second appeal, the assessee contended that since the provisions of Section 77-A of the Companies Act had been applicable to buyback of shares of the assessee-company, Section 2(22)(d) of the Income-tax Act would not attract to consider as deemed dividend in order to apply the provisions of Section 115-O. The Tribunal however, did not consider the said contention on the ground that the said point was not canvassed before the Commissioner (Appeals) and the same was not raised as a ground in the appeal memo. On further appeal, the High Court allowed the appeal of the assessee and held that legal question can be raised at the stage of the appeal and such a question need not be raised as a ground. When the legal question is raised, the Tribunal has to consider the same in accordance with law. The Court also held that the Tribunal has committed an error in not considering the question of law raised by the appellant. It is for the Tribunal to consider only the question of law raised by the appellant in accordance with law and on merits.

5] Section 2(22)(e) – Deemed Dividend

CIT vs. Bikaner Cuisine Pvt. Ltd. ITA/475/2013 dated 4th October 2013 (Delhi High Court)

Assessee had acquired a loan from a Company of which the assessee was NOT a shareholder but the assessee and BIPS Systems Ltd., had common shareholder. The common shareholder held 10% shares in the lender company and more than 20% voting rights in the assessee company. On that basis, the AO held that provisions of Section 2(22)(e) were applicable and made the addition as deemed dividend in the hands of assessee. It was held that since the assessee was not a shareholder, the rigours of Section 2(22)(e) are not applicable in the hands of the assessee. However, it has been observed by the Hon'ble Court that the Revenue is at liberty to take appropriate action in the hands of the shareholders of the assessee company.

6] Section 234B – Interest for Default on Advance Tax – No liability to pay interest where law is amended retrospectively

CIT vs. SAB Industries ITA/15/2012 (P & H High Court) dated 22nd October 2013

The assessee had claimed exemption u/s. 80IA. By virtue of an amendment made by the Finance Act, 2007 with retrospective effect, the assessee became ineligible for the said exemption – the amendment being made after the filing of return by the assessee . The question was whether the assessee was liable to pay interest u/s. 234B for the addition by virtue of the addition on account of disallowance of benefit u/s. 80-IA. It was held that the assessee could not be expected to know on the date of filing the return, that the exemption u/s. 80-IA would not be available in view of the retrospective amendment. In other words, at the time of filing the return, the assessee was not liable to pay advance tax. As the assessee was not liable to make the payment of advance tax, the case of the assessee would not come within the ambit of Section 234B. The assessee was under a *bona fide* belief that this claim for deduction u/s. 80IA is valid. Hence the assessee was not liable to interest u/s. 234B.

7] Section 260A – Genuineness of Share Transactions

CIT vs. Hede Consultancy Co. Pvt. Ltd. Income Tax Appeal (ITXA) No. 54 of 2006 dated 23-10-2013 (Bombay High Court)

Assessee had transferred some shares to its group concern at a price less than the market value and claimed set off of long term loss. The AO disallowed the claim of long term capital loss (LTCL) of ` 1,17,87,564/- and, consequently, a sum of ` 45,99,337/- was brought to tax on the ground that the transfer of the shares was a colourable transaction and hence the LTCL ought not to be set off against the STCG made by sale of sharesof. The Tribunal and the CIT(A) had held in favour of the assessee. In appeal by the Department, before the High Court, there was no challenge to the findings of the Tribunal that the transactions were genuine and that the price at which the shares were sold was not inflated and hence it was observed that the findings of facts arrived at by the Tribunal could not be re-assessed by the High Court in Appeal u/s. 260A. The Hon'ble Court further observed that one of the cardinal principles accepted in the corporate and tax laws, is the 'separate entity principle' i.e. to treat a company as a separate person. The Income Tax Law, in the matter of corporate taxation, also accepts & adheres to this principle. And hence a subsidiary and its parent are totally distinct entities/taxpayers. Consequently, the entities subject to income tax are taxed on profits derived by them on stand-alone basis. On the facts, the Hon'ble Court observed that there was nothing on record to suspect that the transaction was dubious and that the exercise was to avoid tax by resorting to a colourable device. The Tribunal found that the transactions were in accordance with law and have been duly implemented. Hence, the Department's appeal was dismissed.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Section 35AC of the Income-tax Act, 1961 – Eligible projects or schemes, expenditure on – Notified eligible projects or schemes

The Central Government notified the institutions approved by the National Committee and approved the eligible projects or schemes specified to be carried on by the said institutions and the estimated cost thereof and also specified the maximum amount of such cost which may be allowed as deduction under the said Section 35AC for the period of approval in the states of Gujarat, Andhra Pradesh, Maharashtra, New Delhi, Rajasthan, Jammu and Kashmir and Tamil Nadu.

The notification shall remain in force for a period of three years in relation to financial years 2013-14, 2014-15 & 2015-16 in respect of the projects or schemes mentioned in the said notification.

(Notification No. 2/2013, dated 7-10-2013)

Reverse Mortgage (Amendment) Scheme, 2013 – Amendment in Paragraphs

In exercise of the powers of section 47 of the Income-tax Act, 1961, the Central Government made the Scheme to amend the Reverse Mortgage Scheme, 2008 called the Reverse Mortgage (Amendment) Scheme, 2013, which shall come into force on the date of its publication in the Official Gazette. In the Reverse Mortgage Scheme, 2008 the insertions have been made regarding defining "annuity sourcing institution" as Life Insurance Corporation of India or any other insurer registered with the Insurance Regulatory and Development Authority established under sub-section (1) of section 3 of the Insurance Regulatory and Development Authority Act, 1999.

(Notification No. 79/2013, dated 7-10-2013)

Circulars

Income-tax deduction from salaries during the Financial Year 2013-14 under section 192 of the Income-tax Act, 1961

The present Circular contains the rates of deduction of income-tax from the payment of income chargeable under the head "Salaries" during the financial year 2013-2014 and explains certain related provisions of the Act and Income-tax Rules, 1962. The relevant Acts, Rules, Forms and Notifications are also available at the website of the Income Tax Department – www.incometaxindia.gov.in

(Circular No. 08/2013 dated 10-10-2013)


CA Tarunkumar Singhal & CA Sunil Moti Lala

INTERNATIONAL TAXATION
Case Law Update

A] HIGH COURT JUDGMENTS

I TDS not applicable on discount / commission payment to non-resident without TDS in view of Circular No. 23 dated 23rd July, 1969 and Circular No. 786 dated 7th February, 2000 which were in force for the relevant A.Y. – Circular No. 7 dated 22nd October, 2009, withdrawing relief given in Circular No. 23/1969 and 786/2000, applicable prospectively

CIT vs. Angelique International Ltd. [ITA Nos. 280/2013 & 454/2013 (Delhi High Court) Order dated 23rd September, 2013] – Assessment Year: 2009-10

Facts

1. The assessee defaulted and failed to deduct tax at source on commission / discount paid to non-residents situated outside India for having procured or obtained export orders, clearance of goods abroad, support in scheduling timely inspection of goods, insurance, clearance, follow up, arranging payments, etc.

2. The non-residents did not have any office or permanent establishment in India.

3. The AO accepted that the payments were made and are genuine payments but disallowed the same under section 40(a)(i) of the Income-tax Act ("the Act").

Judgment

1. The Hon'ble High Court observed that as per Circular No. 23 dated 23rd July, 1969 and Circular No. 786 dated 7th February 2000, commission / discount to the foreign party was not chargeable to tax in India u / s 9(1)(vii) of the Act.

2. Referring to the Hon'ble Supreme Court ruling in *Catholic Syrian Bank Ltd. (2012) 3 SCC 784*, it held that a circular may not override or detract from the provisions of the Act but can seek to mitigate the rigour of a particular provision for the benefit of an assessee in specified circumstances.

3. It held that withdrawal of earlier circulars *vide* Circular No. 7 / 2009 dated October 22, 2009 cannot be held to be retrospective and cannot be classified as explaining or clarifying the earlier circulars issued in 1969 and 2000. Circular No. 7 / 2009 did not clarify earlier circulars, but withdrew them.

4. The Hon'ble High Court further held that Circulars in force for relevant Assessment Year ("A.Y.") must be considered. It observed that the assessee was not in default since payments were made prior to issue of Circular No. 7 / 2009. Therefore, reliance placed on those circulars

which were in effect and which aided in uniform and proper administration and application of the provisions of the Act, was valid.

5. Accordingly, it upheld the decision of the Hon'ble Tribunal deleting the addition made by the AO under section 40(a)(i) of the Act.

II. Section 144C – For A.Y. 2008-09, final assessment order cannot be passed without complying with provisions of Sec. 144C(1) relating to Disputes Resolution Panel – High Court not bound by CBDT Circular providing that DRP provisions applicable only from AY 2010-11 as it is contrary to express language in section 144C(1)

Zuari Cement Ltd. vs. ACIT [Writ Petition No. 5557 of 2012 (Andhra Pradesh High Court) Order dated 21-2-2013] – Assessment Year: 2008-09

Facts

1. The assessee, a company registered under the provisions of Companies Act, 1956 was engaged in the business of manufacture and sale of cement.

2. During the year under consideration, the assessee had reported certain international transactions which were referred to the Transfer Pricing Officer ("TPO") under section 92CA of the Act. The TPO passed an order under section 92CA(3) on 20-9-2011 recommending an adjustment of ` 52.14 crores as Transfer Pricing Adjustment under section 92CA of the Act.

3. The AO after receiving the above order of the TPO passed final assessment order under section 143(3) of the Act on 23-12-2011 and issued consequent demand notice under section 156 of the Act.

4. The assessee submitted a letter dated 20-1-2012 raising objections to the assessment order contending that the provisions of section 144C of the Act were not followed. The AO *vide* letter dated 3-2-2012 informed that as per CBDT circular No. 5/2010 the provisions of section 144C would apply from AY 2010-11 onwards and not for AY 2008-09 and requested the assessee to appear before him on 15-2-2013 and make its submissions.

5. Subsequently, the assessee filed a writ petition before the Hon'ble High Court contending that the impugned assessment order was in violation of section 144C of the Act and thus was liable to be set aside.

Judgment

1. The Hon'ble High Court observed that a reading of section 144C(1) shows that if the AO proposes to make, on or after 1-10-2009, any variation in the income or loss returned by an assessee, the AO shall first pass a draft assessment order, forward it to the assessee and after assessee files his objections, if any, the AO shall complete the assessment within one month.

2. It observed that in the instant case, admittedly the TPO suggested an adjustment under section 92CA of the Act on 20-9-2011 and forwarded it to the AO and to the assessee. The AO accepted the variation submitted by the TPO without giving the assessee any opportunity to object to it and passed the impugned assessment order. As this had occurred after 1-10-2009, the cut off date prescribed in section 144C(1), the AO was mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. It held that as this had not been done and the AO passed a final assessment order dated 23-12-2011 straightaway, the same was contrary to section 144C of the Act and thus without jurisdiction, null and void.

3. It further held that the CBDT Circular No. 5/2010 stating that section 144C(1) would apply only from A.Y. 2010-11 and subsequent years and not for A.Y. 2008-09 was contrary to the express language in section 144C(1) and the said view of the Revenue was not acceptable. It observed that circular may represent only the

understanding of the Board/Central Government of the statutory provisions, but it will not bind the High Court/Supreme Court. Relying on *Ratan Melting & Wire Industries [2008-TIOL-194-SC-CX-CB]* and *Indra Industries [2001] 122 STC 100 (SC)* it held that the jurisdiction of and power of the court to declare what the legislature says and take a view contrary to that declared in the circular of the CBDT cannot be interfered with.

4. The Hon'ble High Court also observed that as the impugned order was without jurisdiction, even though the petitioner has a statutory appellate remedy, it will not come in the way for this Court to entertain the writ petition and grant relief.

[Note: The Special Leave Petition filed by the Revenue in Hon'ble Supreme Court against the above High Court order was dismissed vide SLP No. CC 16694/2013 order dated 27th September, 2013]

III. Section 172 – Charterer of ship (Netherlands entity) not entitled to relief under DTAA on Indian freight income since in substance, ship's owner (an Iranian entity) was substantial freight beneficiary, not the charterer

Marine Links Shipping Agencies vs. CIT [ITA No. 424/2012 (Karnataka High Court) Order dated 17th September, 2013]

Facts

1. The assessee, Marine Links Shipping Agencies, was an agent of Puyvast Chartering BV ('the charterer'), a Netherland based shipping company who had taken a ship on charter basis from Islamic Republic of Iran Shipping Lines, Iran (owner of the ship).

2. The ship was engaged to carry granite blocks from Mangalore to Antwerp, Belgium and other places, and it reached Mangalore port on 7th November, 2008 and sailed from there on 10th November, 2008.

3. The assessee claimed to be an agent of the charterer and filed returns of income under section 172(3) on behalf of the charterer showing the charterer as beneficiary of the freight. Copy of the tax residency certificate (TRC) issued to the charterer by the authorities in Netherlands was also filed.

4. The AO noted that as per the "charter party" agreement, Islamic Republic of Iran Shipping Lines was the owner of the ship. However, in the return of freight, the charterer was shown as the beneficiary of the freight. Notice u/s 172(5) was issued seeking certain clarifications.

5. In reply to the notice, the assessee submitted that the charterer was the beneficiary of the freight. The AO, however, held that the India-Netherlands DTAA could not be applied in favour of the charterer.

Judgment

1. The Hon'ble High Court observed that 100% freight charges minus 3.75% commission was payable by the charterer to the owner's bank account. Clause 24 of the "charter party" agreement further showed that out of the commission of 3.75%, 2.5% would go to the charterer and 1.25% to M/s. Trading Marine Global ("the ship broker").

2. The Hon'ble High Court agreed with the findings of the Hon'ble Tribunal and held that Tribunal had considered the assessee's submissions and facts in proper perspective. It was observed by Hon'ble Tribunal on consideration of Clause 13 of the "charter party" agreement that the owner of the ship was not only entitled to freight of a minimum M. tonnes of 19,500 but also an addition freight depending an intake of the cargo. Therefore, the risk and liabilities undertaken by the charterer was only in the event of the tonnage being less than 19,500 tonnes and the substantial freight beneficiary was the owner of the ship, the Iranian entity.

3. It further observed that the reliance placed by the assessee on section 163 of the Act to

contend that the assessee was acting as an agent of the charterer and not of the owner was misplaced and of no avail. Admittedly, the appellant was acting as an agent. His status as an agent was not in dispute. The question 'whether the appellant was acting as an agent of the charterer or of the owner of the ship?', could be determined only on the basis of the materials placed on record and not by raising dispute about his status and such question is not within the scope of Section 163 of the Act.

4. It held that it was clear that the assessee was acting as an agent of the owner and not of the charterer. Further, based on the "charter party" agreement, the charterer was also acting as an agent of the owner and not as an independent charterer within the meaning of section 172, as the charterer was also entitled for only commission.

IV. Section 44BB – Arbitrator's award against loss of equipment/tools while carrying out well logging operation in oil taxable under section 44BB – No appeal lies against Tribunal's order under section 44BB passed at assessee's instance

M/s Halliburton Offshore Services Inc. vs. JCIT [Income Tax Appeal No. 4 of 2009 (Uttarakhand High Court) Order dated 3-10-2013]

Facts

1. The assessee engaged in the business of well lodging operations in oil wells, was in receipt of an award given by an arbitrator.

2. The AO found that the award was on account of loss of tools and equipments while carrying out well logging operation in oil well and held that such loss of equipment / tools while executing the job assigned under the contract was very much incidental to the assessee's business activities and thus considered the same in determining deemed profits and gains @ 10% under section 44BB of the Act.

3. On appeal, before Hon'ble ITAT the assessee drew the attention of the Hon'ble ITAT to judgment of the Hon'ble Uttarakhand High Court in assessee's own case *CIT vs. Halliburton Offshore Services Inc [300 ITR 265]* and submitted that the present case was covered by the above judgment.

4. Accordingly, the Hon'ble ITAT upheld the Revenue's stand. Aggrieved by the same, the assessee preferred an appeal before Hon'ble High Court.

Judgment

1. The Hon'ble High Court observed that in *CIT vs. Halliburton Offshore Services Inc* it was held that from a perusal of section 44BB of the Act it is clear that all amounts either paid or payable (whether in India or outside) or received or deemed to be received (in India or outside India) are mutually inclusive and this amount is the basis of determination of deemed profits and gains of the assessee @ 10% and also that the amount paid or received refers to the total payment to the assessee or payable to the assessee or deemed to be received by the assessee.

2. It further observed that it was the assessee, who led the Hon'ble Tribunal to pass the order under appeal. It thus held that no appeal should lie against the order of Hon'ble Tribunal which was passed at the instance of the assessee.

3. It further held that there was no denial of fact by the assessee in grounds of appeal that it had brought to the notice of Hon'ble Tribunal the decision of Halliburton (supra) and that it had submitted before Hon'ble Tribunal that the issue was covered by the said judgment.

4. Accordingly, it upheld the decision of Hon'ble Tribunal and dismissed the appeal of the assessee.

V. Sections 48 & 112 – Non-resident seller eligible for lower rate of 10% on capital gains, on sale of listed shares,

as per proviso to section 112(1) – AAR should follow their earlier view, unless there are strong grounds and reasons to take a contrary view

Cairn UK Holdings vs. DIT [2013] 38 taxmann.com 179 (Delhi)

Facts

1. The assessee, a private limited company registered in Scotland transferred its 4,36,00,000 equity shares of ` 10/- each of Cairn India Limited ('CIL') to Petronas International Corporation Limited, Malaysia. The said transaction was an off-market transaction i.e. not through a stock exchange.

2. The above transaction resulted in long-term capital gain of US$ 85,584,251 in the hands of the assessee, after applying the benefit under first proviso to section 48 of the Income-tax Act, 1961 ("the Act").

3. The assessee filed an application for advance ruling before the Hon'ble AAR on the question as regards the applicability of rate of tax on long term capital gains arisen on sale of equity shares of CIL as per proviso to section 112(1) of the Act?

4. The Hon'ble AAR ruled that lower rate of 10% under proviso to section 112(1) shall not apply and capital gains shall be taxed at 20%.

5. The assessee then filed a Special Leave Petition before Hon'ble Supreme Court against the Hon'ble AAR's ruling who directed the assessee to first approach the Hon'ble High Court under Article 226. Accordingly, the assessee filed a Writ Petition before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court considered the provisions of section 48 and section 112(1) of the Act and the reasoning given in the case of the assessee by the Hon'ble AAR and the case of *Timken France SAS, In re [2007] 294 ITR 513 (AAR).* It observed that the decision of AAR in assessee's case and in Timken (supra) could not be reconciled and were diametrically opposite. After the due consideration of both the decisions, it accepted and approved the legal position in Timken's case (supra).

2. It held that the proviso to section 112(1) of the Act does not state that an assessee, who avails benefits of the first proviso to section 48, is not entitled to benefit of lower rate of tax. The said benefit cannot be denied because the second proviso to section 48 is not applicable.

3. In case the Legislature wanted to deny the said advantage/benefit where the assessee had taken benefit of the first proviso to section 48, it was easy and this would have been specifically stipulated, that an assessee, who takes advantage of neutralisation of exchange rate fluctuation under the first proviso to section 48 would not be entitled to pay lower rate of tax @10%.

4. The Hon'ble AAR rejected the contention of the Revenue that if an assessee covered by the first proviso to section 48 is allowed benefit of the proviso to section 112(1) then a non-resident becomes entitled to two or double deductions. Firstly, under the first proviso to section 48 and then benefit of lower rate of tax under the proviso to section 112(1); and (ii) this interpretation would discriminate between the assessees covered by the first proviso and residents covered by the second proviso to section 48 who is not entitled to lower rate of tax under section 112(1).

5. It observed that the first and second proviso cannot be equated as granting same relief or benefit. They operate independently and have different purpose and objective. It is difficult to state that benefits under the first proviso and the second proviso to section 48 are identical or serve the same purpose.

6. It further held that even though there is some merit in the contention that if proviso to section 112(1) is applied, then almost all assessees covered by the first proviso to section

48 would be liable to pay tax @ 10% only and not @ 20% on long-term capital gains which appears to be correct and a logical consequence of the proviso to section 112(1) but it cannot be a ground to contextually read the proviso to section 112(1) differently.

7. The Hon'ble High Court further noted that ratio of Timken ruling was followed by the Hon'ble AAR in several cases over last 3-4 years. However, Hon'ble AAR's diametrically reverse view in assessee's own case brought uncertainty in understanding impact and effect of proviso to section 112(1) of the Act. Relying on Hon'ble Supreme Court observations in *Vodafone International Holding B.V. vs. Union of India [2012] 341 ITR 0001* that certainty and stability form basis foundation of any fiscal laws, it held that Hon'ble AAR should follow their earlier view, unless there are strong grounds and reasons to take a contrary view, but in the present case there is no compelling justification and reason to override and disturb the earlier view.

B) Tribunal Decisions

VI. Royalty or Business Income – Payment made for the licence granted for making use of the copyright in respect of the shrink wrapped software amounts to royalty

Reliance Infocom Ltd. vs. DDIT – TS-433-ITAT-2013 (Mum.) / 2013-TII-164-ITAT-MUM-INTL – Assessment Years: 2003-04, 2004-05, 2005-06 & 2007-08.

Facts

i) The assessee, an Indian company, entered into a Wireless Software Contract, for purchase of certain software for the purposes of operation of wireless telecommunication network in India, with Lucent Technologies Hindustan Pvt. Ltd. (LTHPL), an Indian company of Lucent Group, USA.

ii) Subsequently the assessee also entered into a Wireless Software Assignment and Assumption Agreement with LTHPL and Lucent Technologies GRL LLC (LTGL) USA towards supply of software required for telecom network. Similarly, the assessee also entered into a software supply contract with other foreign companies.

iii) LTGL was also responsible to provide service for correcting the defective software and providing software and updates without any additional consideration.

iv) The assessee made application under section 195(2) of the Act before the Assessing Officer (AO) for seeking nil withholding tax order on payments for purchase of the software.

v) The AO held that the assessee was getting only licence to use the software and it was in the nature of royalty taxable under the Act and tax treaty. Therefore, withholding of tax was required on payment to foreign supplier. Subsequently, after deducting tax as directed by the AO, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) [CIT(A)].

vi) The CIT(A) observed that the assessee was forbidden to decompile, reverse engineer, disassemble, decode, modify or sub-licence the software, as per the agreements. Accordingly, CIT(A) held that the amounts paid cannot be considered as royalty as the assessee purchased 'goods' which was a copyrighted article and it was not taxable.

Decision

The Tribunal held in Revenue's favour as follows:

i) In the case of *DIT vs. Erickson AB [2012] 204 Taxmann 192 (Del.)* and *DIT vs. Nokia*

Networks OY [2013] 212 Taxman 68 (Del.), the software was supplied along with hardware as part of equipment and there was no separate sale of software. Software was integral part of supply of equipment for telecommunications in those cases. However, in the instant case, software was supplied separately and not along with the equipments.

ii) Separate agreement for supply of software was not only with LTGL but also with various other foreign companies for use in the telecom network by virtue of separate agreements and it indicates that software was not supplied along with hardware.

iii) In this case the software works on hardware, but the software supplied was neither an integral part of purchase of equipment required nor was embedded software and therefore, the facts in the case of Motorola and Nokia are entirely different. The delivery of the software was separate in the form of CD and was installed in India separately.

iv) LTGL has not been supplying software as part of equipment purchased but as a standalone software agreement entered into as per the EULA.

v) The Karnataka High court in the case of *CIT vs. Synopsis International Old Ltd. [2013] 212 Taxman 454 (Kar.)* held that in terms of the tax treaty the consideration paid for the use or right to use the confidential information in the form of computer programme software itself constitutes royalty and attracts tax. It is not necessary that there should be a transfer of exclusive right in the copyright. It was held that payment for supply of software and granting of end user software licence amounts to 'royalty'.

vi) The Karnataka High Court in the case of *CIT vs Samsung Electronics Ltd. 2011-TII-43-HC-KAR-INTL* has held that a right to make a copy of the software and use it for internal business by making copy of the same and storing it on the hard disk amounts to use of the copyright under section 14(1) of the Copyrights Act because in the absence of such a licence, there would have been an infringement of the copyright.

vii) In the case of Samsung Electronics Ltd. it was further held that the transaction did not involve a sale of a copyrighted article. The amount paid for supply of the 'shrink-wrapped' software is a combination of the price of the CD, software and the licence granted. The right that was transferred was the transfer of copyright and payment made in that regard would constitute royalty.

viii) The Tribunal held that the principles laid down by the High Court in the cases of Samsung and Synopsis was applicable to the facts of the present case. The Tribunal also relied on AAR ruling in the case of *Citrix Systems Asia Pacific Pte. Ltd. [2012] 343 ITR 001 (AAR).*

ix) Further, the decision in the case of *Lucent Technologies International Inc. vs. DCIT [2009] 28 SOT 98 (Del.)* has not been upheld by the High Court. Subsequently, the Karnataka High Court in the case of *CIT vs. Sunray Computers (P) Ltd. [2012] 348 ITR 196 (Kar.)* held that supply of software was to be considered as royalty.

x) Karnataka High Court in the case of Sunray Computers (P) Ltd. on same terms of agreement as against the decision of the Delhi Special Bench Tribunal's decision in the case of Motorola which was rendered in a different fact situation.

xi) In all the tax treaties of India with the countries from where the assessee purchased software, the terms of tax treaty are similar, though restricted in meaning when compared to the definition of royalty under the Act.

xii) Under various agreements, entered into by the assessee, licence to use the copyright belonging to the non-resident was transferred, subject to the terms and conditions of the agreement and the non-resident supplier continues to be the owner of the copyright and all other intellectual property rights.

xiii) It is well settled that copyright is a negative right and it is an umbrella of many rights. Licence was granted for making use of the copyright in respect of shrink wrapped software under the respective agreement. This licence authorises the end user (i.e., the customer) to make use of the copyright contained in the said software, which is purchased off the shelf or imported as shrink wrapped software.

xiv) This amounts to transfer of part of the copyright and transfer of right to use the copyright as per the terms and conditions of the agreement. Therefore, there was transfer of copyright under the agreements entered into by the assessee with the non-resident supplier of software.

xv) Accordingly, the payments made by the assessee to LTGL / other suppliers can be said to be payment for the use of or right to use copyright and it constituted royalty under Article 12(3) of the tax treaty. Therefore, withholding of tax was required under section 195 of the Act.

VII. The phrase 'may be taxed', used in the business income related Article under the India-Oman tax treaty and in the capital gains related Article under the India-Qatar/Oman tax treaty, also entitles the resident country to tax the income earned in the source country

Essar Oil Limited vs. ACIT 2013-TII-159-ITAT-MUM-INTL Assessment Year: 2004–05

Facts

i) The assessee, an Indian company was engaged in the business of contract drilling, off–shore construction, exploration of mineral oil and gasses and trading of petro products. The assessee carried out contract work of drilling oil wells in its branches at Oman, Qatar and Baroda (India) through its energy division.

ii) During the year under consideration, the assessee earned net business profit from its Permanent Establishments (PE) at Oman and Qatar. According to the assessee, the phrase used in the Article 7(1) of the tax treaties 'may be taxed in other contracting State' means that the country of residence (i.e., India) loses its right to tax if the assessee has paid taxes in the source country (i.e., Oman and Qatar) and therefore, the net profit was not offered to tax. In support, reliance was placed on various case laws :

- *CIT vs. R.M. Muthaiah [1993] 202 ITR 508 (Kar.), CIT vs. P.V.A.L. Kulandagan*
- *Chettiar [2004] 267 ITR 654 (SC), CIT vs. S.R.M. Firm and Others [1994] 208 ITR 400*
- *(Mad.), Union of India vs. Azadi Bachao Andolan & Anr., [2003] 263 ITR 706 (SC)*

iii) Also during the year under consideration, the assessee sold the energy divisions at Oman, Qatar and Baroda, and earned long-term capital gains. Long-term capital gain for Oman and Qatar has been claimed as exempt as per Article 15 of India-Oman tax treaty and Article 13 of India-Qatar

tax treaty. Here also, the phrase used in the said Articles is 'may be taxed in other contracting State'.

iv) The Assessing Officer (AO) did not accept the assessee's contentions on the ground that Article 7 of these tax treaties deal with profit attributable to the PE which is treated as distinct and separate. However, the Indian resident is taxed on his global income in India in view of section 5(1) of the Act, and therefore the income earned by the assessee from foreign countries has to be included in the total income to determine the liability for tax purposes. If the tax has been paid as per the taxation law of that country then the relief for tax paid or tax credit is to be given in India.

v) The AO rejected the assessee's contentions in relation to capital gains and held that the assessee was liable to pay capital gains tax in India also since Article 15 of the India-Oman tax treaty provides that gains derived by a resident of a contracting State (India in present case) from alienation of property referred to in Article 6, forming part of a business property of a PE situated in other contracting State (Oman in the present case) may also be taxed in other contracting State.

vi) The phrase 'may also be taxed' means that India has also right to tax on the income of its resident, and whatever tax has been paid in other contracting State, the credit shall be given as per Article 25 of the India–Oman tax treaty. Based on analysis of various paragraphs of Article 15 of India–Oman tax treaty, the AO observed that wherever the word 'may' has been used, the taxability of that particular income lies in both the countries and where the word 'shall' is used then the taxability of that income is with one particular country.

Decision

The Tribunal held in favour of the Revenue as under:

i) The words and the phrase 'may be taxed' are not appearing in the statute but are appearing in the tax treaties. This phrase has not been defined or explained either in the Act, or in the respective tax treaties.

ii) In the case of S.R.M. Firm and others the Madras High Court, *inter alia*, held that (a) the phrase 'may be taxed' means that the income which has been taxed in the country of source, precludes the State of Residence for taxing the same and (b) the OECD Commentary and other views taken by the international jurist cannot be referred to and relied upon.

iii) In view of the decision of the Supreme Court in the case of Azadi Bachao Andolan & Anr., relying upon the foreign decisions and international views including that of the OECD Commentary on Model Convention, such observation and findings of the Madras High Court judgment in S.R.M. Firm cannot be held as a law that OECD Commentary cannot be relied upon at all.

iv) All the decisions of the High Court and Supreme Court including those in assessee's case have been rendered in the context of issues involved on interpretation of section 90 of the Act, prior to A.Y. 2004-05.

v) By virtue of section 90(3) of the Act, the legislature empowered the Central Government to define such term used in the tax treaty which has not been defined either in the Act or in the tax treaty, by issuing notification in the Official Gazette. Such notification defining the term should not be inconsistent with the provisions of this Act or the tax treaty.

vi) In pursuance of section 90(3) of the Act, the Central Government has issued the notification wherein it has been expressly provided that where the tax treaty provides that any income of a resident of India 'may be taxed' in other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of Act, and relief shall be granted in accordance with the method of elimination or avoidance of double taxation provided in such tax treaty.

vii) As a result of the introduction of sub-section (3) to section 90 of the Act, which has been brought in the statute from the A.Y. 2004-05, there would be a clear departure from the earlier position wherein various Courts have interpreted the expression 'may be taxed'. Now the Central Government which is one of the contracting parties to the tax treaty with the other sovereign States has been empowered to assign meaning to the various terms and expressions used in the agreement.

viii) The interpretation and the clarification given by the Central Government have to be given precedence over the interpretation given by the Courts; at least once the Government, in exercise of statutory power has issued a notification clarifying its intent.

ix) The notification does not impose any kind of a tax liability as it merely clarifies the particular expression used in the tax treaty hence, all the case laws, which has been referred to by the assessee will not be applicable in the present case.

x) The notification has to be reckoned as mere clarificatory in nature and will relate back from the effective period of the statute under which such notification has been issued. Since the provision under which such a notification has been issued, has come with effect from 1st April, 2004, (i.e., the A.Y. 2004-05), such a notification will have retrospective effect from the A.Y. 2004-05.

xi) The notification is not against the provision of the statute and therefore, substitution of section 90 of the Act with effect from 1st October, 2009, will not obliterate the earlier section 90 of the Act and specifically sub-section (3) of section 90 of the Act, which has come into effect from 1st April, 2004, and notification issued therein shall continue to hold at least up to 1st October, 2009.

xii) In view of aforesaid conclusion, the earlier decisions given by the Tribunal in assessee's case and confirmed by the High Court will not be applicable.

xiii) When the model convention of the treaty or OECD Model has been made the basis of the tax treaty (which here in this case both the treaties, Oman and Qatar are based on OECD Model, though they are not OECD members) then the commentaries given under these conventions act as an external aid and a guiding factor for interpreting certain words and expression used, and it is assumed that the parties to the tax treaty understood the same in the manner provided by the commentaries.

xiv) The phrase 'may be taxed' has to be understood in a way to mean that the country of source has a right to tax without removing the right of tax to the country of resident.

xv) Based on the above, the business income from PE in Oman and Qatar and also the capital gain from sale of assets in these countries will be included in the total income of the assessee in India. Further, the credit of taxes paid there will be given

as per the relevant provisions of the tax treaty.

VIII.Transfer Pricing – Activities of trading intermediary (Sogo Shosha) are akin to trading activities, not provision of support service

Mitsubishi Corporation India Private Limited v. ACIT 2013-TII-189-ITAT-DEL-TP – Assessment Year 2006-07

Facts

i) The assessee is a wholly-owned subsidiary of Mitsubishi Corporation (MC) Japan, which is one of Japan's leading 'Sogo Shosha' or general trading companies. Sogo Shosha is Japanese trading conglomerates, engaged in general trading of diversified range of products and commodities in every major market in the world, playing the role of trade intermediaries.

ii) The assessee in this case was engaged in import of products from associated enterprises and further resale. Also, the assessee took a position that it effectively performs as a provider of support services to the 'Sogo Shosha' activities of Mitsubishi Corporation Japan.

iii) The Transfer Pricing Officer (TPO) and the Dispute Resolution Panel (DRP) disagreed with the assessee's position. They were of the view that the transactions in question were trading transactions. The TPO adopted Operating Profit/Total Cost as the Profit Level Indicator (PLI) to review the arm's length nature of transactions, wherein the total cost was computed including cost of goods sold.

Decision

The Tribunal held as follows:

i) The Tribunal upheld the findings of the tax department. It held that both purchases and sales made by the assessee are recorded in its books of account. The title in the goods is held by the assessee for some time and that the transactions were done on a principle to principle basis. Such activity cannot be bracketed with that of a commission agent or a broker. Thus, the activities in question are akin to trading activities.

ii) The comparables in this case have not been selected keeping in view the functional profile of a trading entity. Both the assessee and the TPO have benchmarked the transactions by using comparables which have the functional profile of a service provider. Such an exercise cannot be sustained. Based thereon, the Tribunal set aside the issue to the file of the AO for fresh adjudication in accordance with law.

IX. Transfer Pricing – Sourcing Support Service Provider – Cost plus remuneration model is more appropriate in case the assessee is merely a low risk bearing sourcing support service provider, no additional allocation for location savings required; and Profit Level Indicator adopted should not yield absurd results

GAP International Sourcing (India) Private Limited vs. ACIT 2012-TII-111-ITAT-DEL-TP – Assessment Years: 2006-07 & 2007-08

Facts

i) The assessee is a wholly owned subsidiary of GAP International Sourcing Inc., USA, (GIS Inc). The assessee was engaged in the business of sourcing of apparel merchandise from India for GAP Group.

ii) The assessee used Transactional Net Margin Method (TNMM) to substantiate cost plus 15% remuneration to be the

Arm's Length Price (ALP). The Transfer Pricing Officer (TPO), based on the Functions, Assets and Risk (FAR) analysis rejected such approach and held that commission @ of 5% on the Free on Board (FOB) value of goods sourced by the foreign enterprise through Indian vendors was the most appropriate ALP.

iii) The Dispute Resolution Panel (DRP) upheld the TPO / Assessing Officer (AO) order.

Decision

The Tribunal held in favour of the assessee as follows:

i) The tax department has not been able to substantiate that the assessee has borne any business risks and how the assessee's routine activities led to development of any valuable supply chain or human asset intangible.

ii) Location savings arise to the industry as a whole and there is nothing to prove that the assessee was sole beneficiary. The objective of sourcing from low cost countries is to survive in stiff competition by providing a lower cost to its end-customers. The advantage of location savings is passed onto the end-customer via a competitive sales strategy. Thus, no separate / additional allocation is called for on account of location savings.

iii) The Tribunal acknowledged the fact that the procurement support service providers work on various models and the remuneration model followed (percentage of value of goods procured and the cost plus mark-up model) would depend on the facts. Market forces would interact in any business model and lead to reasonably acceptable profitability.

iv) The Tribunal further held that the PLI of percentage of FOB value of goods procured by AE results in net profit / total cost of assessee at 830 per cent and 660 per cent for A.Y. 2006-07 and A.Y. 2007-08. Use of this PLI has resulted in absurd and distorted results. If a particular PLI results in abnormal results then another method and PLI should be chosen so as to provide rational results. The tax department has not produced comparables which are procurement service providers which follow percentage based model and earn exorbitant mark-up over costs. Thus, Tribunal concluded that for non risk bearing procurement facilitating functions, the appropriate PLI will be net profit / total cost and not the percentage of FOB value of goods sourced by AE.

v) The tax department relied on the Li & Fung case wherein the assessee was not able to establish that the AE was carrying out the critical functions. However, the facts in the assessee's case are different as all the significant functions are performed by the AE. The assessee follows and executes instructions as a service provider. Thus, the Tribunal concluded that the assessee cannot be held to be entitled to remuneration on the basis of Li & Fung case (i.e., on FOB value of goods procured).

vi) The Tribunal accepted assessee's suggestion that even if the Li & Fung ruling is applied, then the OP / total cost of Li & Fung India worked out to 32.43 per cent, as opposed to 15 per cent adopted by the assessee. Thus, the cost plus mark up in assessee's case cannot be stretched beyond 32 per cent. Since the observations of the TPO and the DRP are not based on any cogent reasoning, the Tribunal held that assessee's TP adjustments be made by adopting the 32 per cent cost plus mark up of the assessee for A.Y. 2006-07 and 2007-08.

CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

Penalty

Commissioner of Central Excise, Ahmedabad vs. Ratnmani Metals and Tubes Ltd. [2013(296) ELT 327 (Guj.)]

Facts in this case are as follows:

The assessee was a manufacturer of MS Tubes & pipes. They availed CENVAT Credit on the inputs/capital goods used for manufacture and clearance of dutiable and exempted finished goods. A show cause notice was issued for recovery of wrongly availed CENVAT Credit amount of ` 41,84,290/- under Rule 12 of the CENVAT Credit Rules, 2002 read with proviso to Section 11A(1) of the Central Excise Act, 1944 and Rule 13 of the CENVAT Credit Rules, 2002 read with Section 11AC of the Central Excise Act, 1944.

The adjudicating authority confirmed the demand and imposed penalty. Aggrieved by such Order in Original dated, the assessee approached the Commissioner, Central Excise (Appeals) which also rejected the appeal.

The assessee filed an Appeal to Hon'ble CESTAT which held against the assessee on merit by holding that it cannot claim the benefit of Rule 6 by debiting the amount equal to 8% of the value of the exempted goods as also cannot avail the CENVAT credit on the HR coils received by them which were to be exclusively used for manufacturing pipes by claiming exemption under Notification No. 6/2006-C.E.

The Tribunal, however, while concurring with the findings of the first appellate authority on limitation, on imposition of penalty, directed the respondent to pay the differential duty within thirty days from the date of its order with interest and in that event, gave an option of paying penalty equivalent to 25% of the amount of duty liable, confirmed and upheld by the Tribunal, following the decision of this Court in case of *M/s. Akash Fashion Limited [2009 (239) E.L.T 439 (Guj)].*

Aggrieved by the above order of the Hon'ble Tribunal the Department referred the following substantial questions of law to the Hon'ble Gujarat High Court.

(A) Whether the Hon'ble Customs, Excise & Service Tax Appellate Tribunal [CESTAT], West Zonal Bench, Ahmedabad while passing Order No. A/803/WZB/AHD / 2012, dated 31-5-2012 [2012 (285) E.L.T 274 (Tri-Ahmd.)], is right in holding that the benefit of reduced penalty to the extent of 75% of the duty liability is available to the assessee as per the provisions of Section 11AC of the Central Excise Act, 1944 when the duty, interest and the penalty to the extent of 25% of the amount of the duty

was not paid within 30 days of the order of the adjudicating authority?

(B) Whether the Hon'ble Customs, Excise and Service Tax Appellate Tribunal [CESTAT], West Zonal Bench, Ahmedabad can award such option to the assessee when Section 11AC of the Central Excise Act, 1944 is clear and provides no such scope for the Tribunal?

On behalf of the Department it was submitted that such leniency granted in payment of penalty was acting contrary to the very object of the law and therefore, it was urged that the Hon'ble Court should quash and set aside the order of the Tribunal permitting payment as directed in the order impugned. It was further submitted that the decision of this Court has not been rightly construed by the Tribunal and at the appellate stage such an offer of reduction of penalty could not have been made.

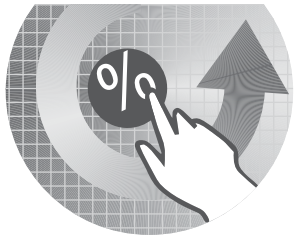
The Hon'ble High Court observed that at no stage, either in the Order in Original or in the Order of Commissioner (Appeals), the assessee –respondent has been given the benefit of payment of reduced penalty. Instead of giving independent reasons on the issue, it would be appropriate to refer to the decision of this Court rendered in case of *Commissioner of Central Excise & Customs, Surat – I vs. M/s. Krishnaram Dyeing & Finishing Works [OJMC No. 11/2013]* dealing with identical question of law, after discussing various case laws, concluded this,

> *"14. As can be noted from the decisions mentioned hereinabove, this Court has followed a consistent view that the assessee is required to be given the option by the adjudicating authority where he is asked to pay a duty demand with interest and 25% of penalty within 30 days from the date of adjudication of the order in such case, he would be liable to pay only 25% of the penalty. Wherever such option had not been given, the remand had been made to the concerned authorities. And period of 30 days is being considered, if in case option is not given earlier, from the date of availing such option.*
>
> *In the present case also, the remand had been made to the Tribunal and in the order of remand, it was also directed to consider the provision of section 11AC and the Tribunal had specifically noted that none of the two authorities below had availed any option to the assessee to pay duty demand with interest and penalty of 25% of the duty within 30 days from the date of adjudication, and therefore, the Tribunal in its order impugned maintained that the case of the assessee is squarely covered by the explanation to Section 11AC. The Tribunal also noted that the duty determined under Section 11AC (2) was subsequent to the year 2000 and, therefore, the case would be covered by the explanation to Section 11AC of the Central Excise Act.*
>
> *When no option was given by any of the adjudicating authorities after determination for payment of duty, interest and penalty of 25% of the duty, what all Tribunal had done, pursuant to the direction in remand order, was to avail option to the respondent – assessee and this was in consonance with the ratio laid down by the Court time and again".*

The Hon'ble High Court for the aforementioned reasons dismissed the Revenue Appeal.

Early to bed and early to rise, makes a man healthy wealthy and wise.

— *Benjamin Franklin*



CA Janak Vaghani

INDIRECT TAXES
VAT Update

1. Guidelines Regarding Cross Checks – Period 2008-09

Internal Circular No. 1A of 2013, dated 11-1-2013

The Commissioner of sales tax had issued above referred internal circular to provide guidelines for cross checks of set-off claim of dealer for the period 2008-09 which is now uploaded on the website of the department.

2. Procedure for cross checks of transactions of sellers who have filed incomplete J-1 for the F.Y. 2009-10 and 2010-11

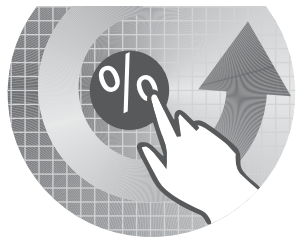
Internal Circular No. 9A of 2013, dated 19-8-2013

The Commissioner of Sales Tax had issued above referred internal circular providing procedures for cross checks of transactions of sellers who have filed incomplete J-1 for the year 2009-10 and 2010-11 which is now uploaded on the web site of the department.

3. Uploading of PAN/TAN And Other Contact Details for Maharashtra Profession Tax Act

Trade Circular No. 6T of 2013, dated 1-10-2013

The Commissioner of Profession Tax, Maharashtra has issued above trade circular for furnishing of details of PAN/TAN and other contact details by all PT EC and RC holders electronically. It is clarified therein that the department has made available Profession Tax Information Form on the web site of the department and all persons enrolled as well as all employers registered under the profession Tax Act, MVAT and CST Act are requested to fill the said form and upload it. All other professionals/persons who are in receipt of notice for getting registration/enrollment under the Profession Tax Act are also requested to fill and upload the said PT Information Form.




CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute update

1. Services provided by air-conditioned or centrally air heated canteen in a factory

The service provided in relation to serving of food or beverages by a restaurant, eating joint or mess having air- conditioning or central air-heating facility was liable to service tax. Even factory canteen having such facilities was covered under service tax levy till 21-10-2013.

Vide insertion of clause 19A in Mega exemption Notification No.25/2012, an exemption is granted w.e.f 22-10-2013 to Services provided in relation to serving of food or beverages by a canteen having air-conditioning or central air-heating facility where such canteen is maintained in a factory covered under the Factories Act , 1948.

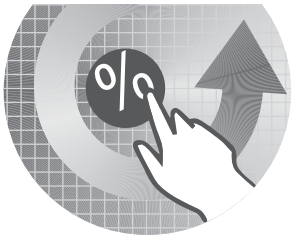
(Notification No. 14/2013-ST dated 22-10-2013)

2. Clarification on Restaurant services

Tax research unit, CBEC has provided following clarification in respect of Restaurant services.

Issue	Clarification
In a complex where air conditioned as well as non - air conditioned restaurants are operational but food is sourced from the common kitchen, will service tax arise in the non-air conditioned restaurant?	In a complex having more than one restaurant which are clearly demarcated and separately named but food is sourced from a common kitchen, only the service provided in restaurant having air conditioning or central heating facility (specified restaurant) is liable to service tax. The service provided in a non air-conditioned or non centrally air- heated restaurant will not be liable to service tax. Such service provided in the non air- conditioned / non- centrally air- heated restaurant will be treated as exempted service and credit entitlement will be as per the Cenvat Credit Rules.
In a hotel, if services are provided by a specified restaurant in other areas e.g. swimming pool or open space area attached to the restaurant, will service tax arise?	Yes. Services provided by specified restaurant in the other areas of the hotel are liable to service tax.
Whether service tax is leviable on goods sold on MRP basis across the counter as part of the Bill/invoice.	Goods sold on MRP basis (fixed under the Legal Metrology Act) are to be excluded from the total amount for determination of value of service portion.

(Circular No 173/8/2013 – ST dated 7-10-2013)



CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Franchise/ Intellectual Property Service:

1.1 Malabar Gold Pvt. Ltd. vs. CTO. Kozhikode 2013 (32) STR 3 (Ker.)

The appellant in this case trading in jewellery under its trade mark "Malabar Gold". They have received Royalty from franchisees for use of trade mark and Service Tax paid on it under category of Franchise Service. Under the agreement, the franchisee was licensed to use trade mark and transfer of its use was not to exclusion of the appellant, who retained right to transfer it to others also. The appellant having other franchisees with same type of agreement with others also. The agreements *inter alia*, stipulated (i) provision of various services by appellant to franchisees including feasibility studies, project plan, selection of site, design of interiors and operation of showrooms, (ii) franchisee had no right to sub-let/lease, sell, transfer, discharge, distribute or delegate or assign rights under the agreement to third party, (iii) on termination of agreement, franchisee forfeited all rights and privileges conferred on them by agreement and they were not entitled to use trade name or materials of "Malabar Gold". The High Court after going through the agreements held that, terms of franchisee showed that appellant retained right, effective control and possession of their trade mark and it was not a case of transfer of possession of exclusion of transferor. Allowing use of trade mark by franchisees on products did not give franchisees effective control of trade mark. Franchisee's rights were limited and they were bound to sell products of the appellant. The said franchisee agreements are liable to service tax and not under VAT as transfer of right to use any goods.

1.2 Delhi Public School Society vs. CST, New Delhi 2013 (32) STR 179 (Tri. - Del.)

The appellant in this case having brand image and experience in establishing and managing schools that provide quality education. They have entered into Education JV agreement with other parties for setting up schools. The Tribunal after going through the various clauses of agreement held that, entire financial burden of establishing and maintaining of the school was on the other party, and remaining assets on determination of agreement would revert to them. In totality of circumstances neither indicia of partnership nor joint venture was discernible. It was especially so there was neither contribution of assets nor a sharing of profits and /or losses. The dominant component of enterprise was provision of service by the appellant of four ingredients of franchise service. Therefore, the impugned transaction falls more appropriately within the framework of taxable franchise service.

Cargo Handling Service

1.3 Anupama Coal Carriers Pvt. Ltd. vs. CCE, Raipur 2013 (32) STR 41 (Tri.-Del.)

The appellant in this case engaged in movement of coal from mine surface to tip head within mine area by deploying pay loaders. Further, railway sidings were used within geographical territory of mining area. The Tribunal held that, entire activity to discharge obligation of assessee, which was for merely loading of coal within mining area. These activities are not adjunct to actual transportation of coal, and did not amount to cargo handling service, even if coal was brought to railway siding.

Copyright Service

1.4 AGS Entertainment Private Limited vs. UOI 2013 (32) STR 129 (Mad.)

In this case, the producer of film owning its intellectual property rights, to distributor or any other person, who in turn directly or indirectly agreeing with sub-distributor, area distributor, exhibitor or theatre owner. The distributor gets only few positive prints or cubes of picture for exhibition of picture in specified area and the effective control remains with producer. Further, distributor was not free to use them for other works like satellite rights, TV channels, exploitation of songs, audio/video, DVD, etc. The High Court on the basis of above facts held that, distributor cannot make use of film according to his wishes, but there was only temporary transfer or permission to use or enjoyment for limited period in specified area, for consideration as per terms of agreement. The exclusive right of copyright vested in producer of film. Service provider was producer, who was owner of Intellectual property and service receiver was distributor who temporarily got right to use them. The said transaction was liable to service tax as it was temporary transfer or permitting use or enjoyment of copyright.

2. Interest/Penalties/Others

2.1 Larsen & Toubro Ltd. vs. CCE, Vadodara-II 2013 (32) STR 113 (Tri. - Ahmd.)

In this case, two units of assessee located in SEZ carried out work inhouse for its unit located in DTA. The department sought to demand service tax on SEZ units on the ground that units located in SEZ and DTA units of the appellant are separate legal entities and services provided by SEZ units are taxable service. The Tribunal held that, SEZ units do not have separate balance-sheet and audited accounts and they are considered as division of L&T for all statutory and SEZ purposes. Merely because invoices have been issued and agreement has been entered into, SEZ units do not become separate legal entities. In terms of definition of person, it cannot be said that the units in SEZ and DTA units can be considered as separate person.

2.2 Bhayana Builders (P) Ltd. vs. CST, Delhi 2013 (32) STR 49 (Tri. – LB.)

The Larger Bench of Tribunal in this case held as under:

- Free supplies to construction service provider are outside taxable value or gross amount charged, within meaning of expression section 67 of FA, 1994. Section 67(1)((ii) applies where taxable service is provided for consideration which is not either wholly or partly, for money and hence, non-monetary consideration must still be a consideration, accruing to benefit of service provider, from the service recipient and for service provided. "Free supplies", incorporated into construction, even on extravagant inference, would not constitute non-monetary consideration remitted by service recipient to service provider for providing service, particularly since no part of goods and materials so supplied accrues to or is retained by service provider.

- Value of "Free supplies" by construction service recipient, for incorporation in construction would neither constitute non-monetary consideration to service provider nor form part of gross amount charged for service provided. Hence, the contrary conclusion in *Jaihind Projects Ltd. 2010 (18) STR 650 (T)* found to be incorrect, proceeding on flawed interpretation of section 67.

- Goods / Materials supplied / provided / used by service provider for incorporation in construction, which belongs to provider and for which service recipient is charged and corresponding value whereof received by service provider, to accrue to his benefit, whether independently specified as attributable to specific material / goods incorporated or otherwise. The said value alone constitutes gross amount charged. However, the exemption notification cannot enjoin condition that, value of free supplies must also go into gross amount charged for valuation of the taxable service. If such intention is to be effectuated, phraseology must be specific and denuded of ambiguity. Mere enlargement of contours of 'gross amount charged' in condition incorporated in Exemption Notification could not amount to bringing to tax net value which is not taxable under section 67.

- The expression 'used' in explanation appended to Notification No. 15/2004-ST is preceded by expressions 'supply' and 'provided' and all the three expressions are interspersed by disjunctive 'or' to define the meaning of gross amount charged. The expression 'used' has multiple connotations and bears different meaning depending upon the context. Hence, 'used' is *per se* ambiguous or obscure and for the potential meaning of 'used' *noscitur* principle has to be applied. Etymologically supplied and provided are closely associated words and meaning of 'used' is to be ascertained from the associated words.

- In the absence of definition of consideration in statute its meaning as in section 2(d) of Contract Act, 1872 could be considered, which is defined to mean reasonable equivalent for other valuable benefit passed on by promisor to promisee or by transferor to transferee.

2.3 Gopinath & Sharma vs. CESTAT Chennai 2013 (32) STR 172 (Mad.)

The appellant in this case applied for condonation of delay in filing appeal before Commissioner on the ground that, appeal filed before wrong forum by mistake. However, the lower authorities observed that, there is no entry in the IC register of Service Tax Commissionerate of the receipt of appeal. The High Court held that, once the period of limitation has run itself out, the Appellate Authority does not have power to condone the delay in filing the appeal beyond the maximum period prescribed under the Act.

2.4 Vippy Industries Ltd. vs. CCE&ST, Indore 2013 (32) STR 213 (Tri. - Del.)

The appellant in this case claimed refund of service tax paid on onward transportation of containers of specified goods for export and return of empty containers to factory premises under Notification No. 17/2009-ST. The department sought to reject refund of charges attributable to return of empty containers to factory premises. The Tribunal relying on *Tata Coffee Ltd. 2011 (21) STR 546 (Tribunal)* and other decisions held that, refund claimed in entirety is admissible in terms of Notification No. 17/2009-ST.

2.5 Surya Consultants vs. CCE, Jaipur-I, 2013 (32) STR 217 (Tri. - Del.)

The appellant in this case relied upon Punjab and Haryana High Court decision in *First Flight Courier Ltd. 2011 (22) STR 622 (P&H)* to set aside

penalty under section 76, whereas Revenue relied upon Kerala High Court decision in *Krishna Poduval 2006 (1) STR 185 (Ker)*. The Tribunal held that, Delhi Benches covered under P&H High Court jurisdiction therefore, bound by declaration of law by High Court. Further, the P&H High Court decision is in later point of time and both decisions have been discussed in *Mittal Technopack Pvt. Ltd. 2012-TIOL-1507-CESTAT-Kol*. and therefore, order imposing penalty is set aside.

3. CENVAT Credit

3.1 Oil & Natural Gas Corpn. Ltd. vs. CCE, ST& Cus., Raigad 2013 (32) STR 31 (Bom.)

The High Court in this case *inter alia* held that, the expression "used whether directly or indirectly" in the definition of input service has wide import. Service need not be a service which is directly used in manufacture of final product. Use which is indirect and in or in relation to manufacture of final product is sufficient. Further, the expression "in or in relation to" has widened scope and purview of entitlement. The expression "directly or indirectly" and "in or in relation to the manufacture of final products" used in conjunction is indicative of comprehensive sweep and ambit of rule 2(l) of CCR, 2004.

3.2 Lyka Labs Ltd. vs. CCE, Surat 2013 (32) STR 79 (Tri. - Ahmd.)

The appellant in this case proposed to enter into manufacturing of herbal products, for which they had engaged services of consultant for ascertaining the market requirement, research requirement, standardisation of materials and preclinical studies and claimed CENVAT credit of service tax paid on such services. However, subsequently, the appellant abandoned the idea of venturing into the manufacturing of herbal products due to business exigencies. It is held that, having abandoned the plan of diversification in the manufacturing of herbal products, the services rendered by consultant on these specific products, credit of service tax paid would not be available. It is further held that, since the appellant was under *bona fide* belief no penalty is imposable under rule 15 of CCR, 2004.

3.3 Endurance Technologies Pvt. Ltd. vs. CCE, Aurangabad 2013 (32) STR 95 (Tri. - Mum.)

The appellant in this case availed CENVAT credit of service tax paid on Mandap Keeper services availed to celebrate the Annual Day function of their company which was attended by employees and their family members as well as the employees of their sister units. The Tribunal held that, Annual Day function of the appellant company is an integral part of the business activity and it is also found that appellant is the manufacturer of assessable goods therefore entitled to CENVAT credit.

3.4 Goodluck Steel Tubes Ltd. vs. CCE, Noida 2013 (32) STR 123 (Tri. - Del.)

The Tribunal in this case held that, CENVAT credit of service tax paid on Air Travel Agent Service is admissible as air travel is performed for company business.

3.5 Heubach Colour Pvt. Ltd. vs. CCE, Surat 2013 (32) STR 225 (Tri. - Ahmd.)

In this case, department denied CENVAT credit of service tax paid on outdoor catering service for buyers delegation and conference. The Tribunal held that, it cannot be said that providing lunch / dinner is not a part of business promotion and the activity is relatable to manufacture of goods and therefore, CENVAT credit is admissible.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2013] 180 Comp Cas 115 (Guj.) [In the Gujarat High Court] Kantilal Sakarlal Gandhi vs. Income Tax Officer

Under section 179 of the Income-tax Act, the director cannot be held liable for interest and penalty due by the company and thus cannot be treated as an assessee under section 2(7) of said act.

Brief facts

The petitioner is a director in Giplion Texurising P. Ltd. ("Company"). In one of the meetings of the Board of Directors, it was held that one of the family members Mr. Pravin Sakarlal Gandhi will be responsible for all management of the company. It was also resolved that all other family members would be absolved of all the existing and future liabilities.

There were some notices from the Income Tax department u/s 271(1)(c) of the Income-tax Act ("IT") against the Company for payment of penalties. The said demand was fought till Supreme Court.

The dues of income tax were on account of closure of business operation of the company and office premises. The company had made no provisions for the payment of government dues. Thus conditions mentioned under section 179 of the IT are satisfied to initiate the proceedings against the directors.

The petitioner, being one of the directors of the company, he is also liable for the payment of tax as mentioned above. He is treated as assess in default in respect of tax, interest and penalty recoverable from the company as assessee.

The said notices were challenged by the petitioner in the present petition. The ground of challenging the said notices is that under section 179 of IT, department has no authority to seek recovery of dues of the company arising out of the penalty order under section 271(1)(c) of IT.

The question before the court is whether "tax due" also includes the penalties and interest also. The Court has considered various judgments in this regards. Some of them are case decided by the division bench of this court in *Maganbhai Hansrajbhai Patel vs. Asst. CIT [2013] 180 Comp Cas 97 (Guj.).* Supreme Court decision in *Harshad Shantilal Mehta vs. Custodian [1998] 92 Comp Cas 936 (SC); [1998] 231 ITR 871 (SC).* Court has also looked at the Bombay High Court judgment in the case of *Dinesh T. Tailor vs. TRO [2010] 326 ITR 85 (Bom).*

Judgments and reasoning

Court has upheld the petition challenging the notices issued by the tax department under section 179 of the IT and quashed the said notices.

The Court has analysed the various judgments including the Supreme Court Judgment in Harshad Mehta cases and Kerala High Court judgment in *Ratanlal Muraka vs. ITO [1981] 130 ITR 797 (Ker.),* were court has concluded that under section 179, tax includes interest and penalties also. Court has noted that the Harshad Mehta case was a special case under the provisions of section 11(2) (a) of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. Under said Act, all revenue taxes, cesses and rates due as notified by government have to be paid. Court has also analysed the definition of tax as defined under section 2(43) of the IT. Court has also reviewed the provisions of section 220 of the IT on 'when tax payable and when assessee is deemed to be in default".

Case Law No. 2

[2013] 180 Comp Cas 1 (Cal) [In the Calcutta High Court] Ganesh Commercial Co. Ltd. and Others vs. Arun Kumar Mohata

When in a petition for oppression and mismanagement, it is held that a finding of facts based on no evidence is perverse and thus, it becomes a question of law and CLB cannot pass an order without any evidence.

Brief case

This application is filed by Ganesh Commercial Co. Ltd. ("Appellant" or "company") has filed this appeal against the order of the Company Law Board ("CLB"). CLB order was made with reference to the petition filed under sections 397 and 398 of the Companies Act, 1956 ("Act") for oppression and mismanagement. The petition was filed by the respondent Mr. Arun Kumar Mohata ("AKM") who was the petitioner before CLB. The question before CLB was (1) removal of AKM and his sons as directors (2) further issue of shares and (3) funds misappropriated.

CLB order is in favour of AKM and quashed the various corporate actions taken by the Appellant. As per CLB order, proceedings of AGM dated 2004 is declared null & void, allotment of additional shares set aside, AKM and his son were allowed to continue as a directors and deposit of funds on account of misappropriation of funds.

From appellant side, it has been submitted that

1. The allegations are baseless.
2. AKM and his son had remained absent for three consecutive board meetings despite sending notices to his last known address and thus vacated office under section 283 of the Act.
3. Publication of notice was also made in newspapers; thus AKM cannot claim that no notice was served on him.
4. CLB has not considered the relevant facts for serving of notice as allowed under section 53 of the Act. The reliance was placed on judgments made in *V.S. Krishnan vs. Westfort Hi-Tech Hospital Ltd. [2008] 142 Comp Cas 235 (SC); [2008] 3 SCC 363, and Samittri Devi vs. Sampuran Singh [2011] 3 SCC 556.*
5. Allegation of misappropriation of funds was wrong, same was on account of travelling and sale of plants and machineries, for which proper justification was already given.
6. Expenses were made for incurring legal expenses for arbitration proceedings

and partition suit filed. Same was paid by another family member PKM and thus company had to allot shares to him. The reliance was placed on the judgments related to family settlement in *Kale vs. Deputy Director of Consolidation [1976] 3 SCC 119/125* and *Hari Shankar Singhania vs. Gaur Hari Singhania, AIR 2006 SC 2488.*

7. Assets were sold by unit which is under AKM. Recovery of money for said sale of assets was raised by PK against AKM.

8. All payments were made by cheques.

9. CLB did not verify the allegation of AKM and such allegation without verification does not warrant any order. The relevant judgments in the case of *Mohta Bros. P. Ltd. vs. Calcutta Landing and Shipping Co. Ltd. [1970] 40 Comp Cas 119 (Cal).*

10. Company had stopped functioning from 1999 and family settlement was made in 2001. AKM did not honour his part of family settlement.

From AKM side, the above submissions were contended. On increase in capital, it is submitted that provisions of sections 264 and 266 have not been followed. Form 23 for increase in capital was filed but Form 5 not filed. Compliance of sections 75 and 192 related to filing of return of allotment not complied with. Notice of meetings not served. For removal of directors, correct procedures were not followed and real facts have not been presented and reliance was placed as held in *Atyam Veerraju vs. Pechetti Venkanna, AIR 1966 SC 629.*

Judgments and reasoning

The Court has allowed the appeal and set aside the CLB order.

Court has observed that copies submitted to this courts discloses that attempt were made for serving notice to AKM as per usual practice followed by the company. Further, notice was also issued under certificate of posting as well as published in newspaper. This is valid under section 286 and section 53(2) of the Act. Further under section 173(2), non-receipt of notice dose not invalidate the meeting. CLB has not considered this and acted perversly. Thus, serving of notice of meeting cannot be disputed.

On misappropriation of funds, court has observed that CLB has not verified the accounts. On sale of plant and machinery, AKM has not challenged the authority of PKM to sell the same. Further, when all details of receipt of payment is being provided, CLB has not taken correct views. On further issue of shares, court has observed that being a quasi-partnership and private company as family company; section 81 of the Act would not apply. Court noted that proper notice was given for issue of capital. AKM did not attend the meeting. Court has also relied on the judgments in *Shanti Prasad Jain vs. Kalinga Tubes Ltd. [1995] 35 Comp Cas 351,* where shares were allotted to strangers and it was held that when a resolutions is passed in accordance with law, there will be no contravention and therefore no oppression. Court also noted that CLB failed to consider that in the event all the parties had complied with the family settlement, company could have sold and proceeds divided amongst its heirs. Court has further observed that it is the act of AKM which created a situation where it become impossible to sell the company. Court has also relied on Supreme Court recent judgment in *Dale and Carrington Invt. P. Ltd. vs. P.K. Prathapan [2004] 122 Comp Cas 161 (SC); [2005] 1 SCC 212* where it was held that a finding of facts based on no evidence is perverse and this becomes a question of law. CLB has also ignored the family settlement.


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Probate – Grant of – Executor, beneficiary deposed that will was in handwriting of his father and duly identified signature of testator – Attesting witnesses testified signatures of executants of Will – Attesting witnesses put their signatures on Will *animo attestandi* – Will proved in manner provided u/s. 68 of Evidence Act read with Section 63 of Succession Act

Application for grant of probate was filed by one Rabindra Nath Kundu as an executor of Will duly made and published by Rakhal Chandra Kundu being the testator. One Rathindra Nath Kundu lodged a caveat and filed an affidavit in support of a caveat. The said caveator did not, however, contest the proceeding. After filing the said caveat no step was taken by the said caveator to resist the probate in favour of the executor.

The court observed that in support of the probate three witnesses had been examined. The executor who also happens to be the beneficiary deposed that the said Will was in the handwriting of his father and has duly identified the signature of the testator. The attesting witnesses also appeared and deposed. They have duly identified their signature and further deposed that the testator put his signature in presence of the attesting witnesses. The attesting witnesses testified the signatures of the executants of the Will. The attesting witnesses put their signatures on the Will *animo attestandi*. The attesting witnesses not only had deposed about the testator's signature on the Will but also with regard to the fact that each of the witnesses had signed the Will in the presence of the testator. The evidence of the witnesses would show that the testator had put his signature out of his own free will having sound disposition of mind. Sufficient evidence with regard to the due execution of the Will and mental dispositions of the testator having been brought on record and in absence of any contrary evidence the Will is proved. The Will has been proved in the manner as provided under Section 68 of the Evidence Act read with Section 63 of the Succession Act.

The executor was thus entitled to grant probate of the last Will and testament duly published by Rakhal Chandra Kundu. Accordingly, the probate of the said last Will and testament of the deceased was granted in favour of the executor. Petition was allowed.

Rakhal Chandra Kundu vs. Rathindra Nath Kundu AIR 2013 Cal. 185

2. Lease or licence – Determination – Transfer of Property Act, 1882, Section 105 – Easements Act, 1882, Section 52

The respondent as the plaintiff filed a suit praying for eviction of the defendant (now appellant) being a licensee from the suit premises. The plaintiff's

case, in short, was that he was the trustee to the Estate of Durga Rani Saha and that after demise of Durga Rani Saha he became the sole trustee of said Estate. Under repeated request of the defendant to occupy the suit premises as a licensee on payment of licence fee per month as maintenance charges, a formal agreement of licence was executed between the parties in presence of witnesses. Though as per terms of said agreement the licence expired on particular date but plaintiff permitted the defendant to occupy on the same terms and conditions as per request of the defendant. As defendant did not vacate the suit premises even after expiry of said extended period of three months plaintiff revoked the licence and also sent a notice to quit. In spite of sending of those notices, defendant did not vacate the suit premises and hence was the suit. Trial Court framed several issues and decreed the suit for eviction treating the defendant as licensee and not a tenant in respect of the suit premises. The Title Appeal preferred by the defendant, was also dismissed by the impugned judgment and decree after contested hearing. The defendant preferred the Second Appeal before the High Court.

The High Court held that though the defendant appellant was found to possess said residential flat exclusively by enjoying electricity but this by itself along with other circumstances as pointed out by the learned counsel for the defendant appellant cannot negate the clear terms of licence agreement which was voluntarily executed by the defendant after knowing its contents and after coming into possession of the suit premises. It is true that there was perhaps scope of treating the possession of the defendant / appellant in the suit premises as that of a tenant from the surrounding circumstances by treating the agreement as an agreement of tenancy in the garb of licence provided said agreement was executed prior to handing over possession of the suit premises to the defendant / appellant. In view of the concurrent findings of fact of courts below that the agreement between the parties was an agreement of licence being based on evidence and peculiar circumstances of the case, the High Court dismissed the appeal.

Tarak Nath Manna vs. Nityanand Saha AIR 2013 Cal. 181

3. Interpretation of statutes – External aid – Statement of objects and reasons – Helps in appreciating background and purpose of legislation – Personal Liberty – Constitution of India

In the writ petition preferred under Article 32 of the Constitution of India, the petitioner was undergoing trial before the Special Judge. The Court had called in question the constitutional validity of number of provisions of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 being violative of Articles 14, 21, 22(4) and 300A of the Constitution of India. Precedence is given by section 12 to the Special Court trial over trial in other court.

The Supreme Court held that Section 12 clearly mandates that the trial under Act of any offence by the Special Court shall have precedence and shall be concluded in preference to the trial of other courts. The legislature thought it appropriate to provide that the trial of such other case shall remain in abeyance. The emphasis in Section 12 is on speedy trial and not denial of it. The legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not linger owing to clash of dates in trial. As the trial under the Act would be in progress, the accused would have the fullest opportunity to defend himself and there cannot be denial of fair trial. Thus, Section 12 does not frustrate the concept of fair and speedy trial which are the imperative facets of Article 21 of the Constitution. Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders, it is controlled by the concept of "rational liberty". In essence, liberty of an individual should not be allowed to be eroded but every individual has an obligation to see that he does not violate the laws of the land or affect others' lawful liberty to lose his own. The cry of liberty is not to be confused with or misunderstood as unconcerned senile shout for freedom. The protection of the collective is the

bone-marrow and that is why liberty in a civilized society cannot be absolute. It is the duty of the Court to uphold the dignity of personal liberty. It is also the duty of the Court to see whether the individual crosses the "Lakshaman Rekkha" that is carved out by law is dealt with appropriately.

The accused under the Act is in a distinct category and the differentiation between the two, namely, a person arrayed as an accused in respect of offences under other Acts and an accused under the Act is a rational one. It cannot be said to be arbitrary. It does not defeat the concept of permissible classification.

The Court further observed that reference to the Statement of Objects and Reasons and the Preamble of the Act is meant to appreciate the background and purpose of the legislation. In this context the court referred with profit to the dictum in *Gujarat University and Another vs. Shri Krishna Ranganath Mudholkar and Others, AIR 1963 SC 703* where the majority observed as follows:

"Statements of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the Legislature to enact a Statute, in interpreting the Statute they must be ignored."

"For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady.

The Statement of Objects and Reasons and Preamble make it quite clear that the Legislature felt the compulsion to make special provisions against gangsterism and anti social activities.

Dharmendra Kirthal vs. State of U.P. and Another AIR 2013 SC 2569

4. Criminal conspiracy – Legal opinions – The criminal conspiracy is not established merely on suspicion surmise or inference unsupported by cogent and acceptable evidence. Indian Penal Code, Section 120-B

The Petitioner is Advocate and she gave legal opinions on titles to immovable property. It is in the context of one such set of transactions, involving a group of constituents or borrowers from Indian Bank, that Mrs. Nair was accused of various criminal offences by the 1st Respondent, the Central Bureau of Investigation (CBI).

In 2003–2004, she was asked by Indian Bank's King's Circle Branch, Mumbai, to give legal opinion in relation to the title documents for five row houses in Friends Co-operative Housing Society, Airoli, Navi Mumbai. These row houses were said to have been purchased by five different individuals, who had approached Indian Bank's King's Circle Branch for housing loans. The five individuals submitted separate title documents. The Chief Manager of the branch concerned sought Mrs. Nair's legal opinion on each of the five sets of title documents sent on to her. She was not required to cause a search to be taken in the land records, but was only asked to opine on the documents forwarded to her. On examining the documents, Mrs. Nair found that additional documents, common to all five cases, were required. She called for these. Some were sent to her. She gave five separate opinions. In these she set out the documents placed before her and also listed those not provided. Her opinions were stated to be based on the documents provided (notably, the builders' letter that the properties involved were encumbrance-free) and contained caveats, being said to be subject to the documents not provided, on which she rightly declined to express any opinion. Her opinions also said that valid mortgages could be created "if the original of the Agreement for Sale" and certain other documents were deposited with the Bank.

The borrowers also submitted the same title documents to four other banks to obtain loans.

Four of the five banks were defrauded by the borrowers. The CBI launched prosecutions. Among those involved at various stages in the transactions between the Indian Bank and the borrowers were valuers on that bank's panel, and its own officers. Indian Bank refused sanction to prosecute its own officers, and there was no prosecution against the empanelled valuers. The CBI also did not proceed against the lawyers who acted for the other defrauded Banks. It must be note here that the panel Advocates for the other banks gave statements to the CBI explaining the procedure they followed. Briefly, these explanations or statements are to the effect that Advocates are not required to make 'site visits', nor to meet builders/ developers; that their opinions as to title are always only ever based on the documents furnished to them, and, further, that land records are only checked if specifically required by their clients (viz., the banks). The CBI seems to have accepted these statements and chosen not to proceed against those advocates. Mrs. Nair's opinions, demonstrate that she, too, followed the same procedure. It was not shown anything to distinguish Mrs. Nair's work from that of the other lawyers. The learned Advocate appearing for the CBI, insisted that Mrs. Nair's 'omissions', as he called them, were deliberate and intentional, and indicated sufficient criminality in intent, design and execution to warrant prosecution. He attempted to establish a link between the borrowers, the errant officer of Indian Bank (for whose prosecution the bank refused sanction) and the borrowers.

The Hon'ble Court observed that Mrs. Nair's opinions were sufficiently caveated. They were based on documents given to her by her clients. She could not be expected to conjure up new and additional material not sought or given to her by Indian Bank. There is nothing to show that she ever had any form of contact, direct, indirect, express or implied, with a single one of the borrowers. The bank did not once ask her to certify or vouch for the authenticity of the title documents given to her. Indian Bank did not commission her to cause a search to be taken in the land registries. Had it done so, the scope of her work might have been very different. She was only asked if, in her professional opinion, the documents supplied to her were sufficient for the creation of equitable mortgages as security and the advancement of loans to the borrowers.

The High Court held that the allegations against Mrs. Nair do not prima-facie constitute any offence or make out even a vestige of a case against her. No material discloses the commission of any offence by her. To the contrary: the allegations against her are both absurd and inherently improbable. There is no ground whatever for proceeding against her. Mrs. Nair is being Victimised and that the entire criminal proceeding against her is actuated by mala fides and malice. Nothing else explains her being singled out for such special treatment when other lawyers who did exactly the same work following precisely the same protocols were excluded, their explanation being found to be adequate.

The charge sheet of CBI was quashed against the Petitioner.

Smt. Mohana Raj Nair vs. CBI & Ors. Bombay High Court, Criminal Writ Petition No. 727 of 2012 decided on 24th September, 2013.

5. Deed : Construction : A document should be read as a whole

A document has to be read as a whole and the spirit of it should be taken note of and not to be carried away by the mere letters found therein. Anyone who tries to rely on mere wordings but without keeping in mind the object and spirit of the document would be considered as a person who has thrown the baby along with the bath water.

J. Chandrasekaran vs. V. D. Kesavan (Madras High Court) decided on 8th October, 2012 AIR 2013 (NOC) 316 (Mad.)

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TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxman, Current Tax Report (CTR), The Tax Referencer (TTR), Sales Tax Review (S. T. Review), The Bombay Chartered Accountant Journal (BCAJ), The Chartered Accountant (CAJ), The Chamber's Journal (C J), All India Federation of Tax Practitioners Journal (AIFTPJ), Sebi And Corporate Laws (S & Co Laws), Company Case, Economic Times and Times of India for the period August to September 2013 has been arranged and indexed topic-wise.

Topic	Author	Magazine	Volume	Page
'A'				
Accounting Standards / Accounts				
GAP in GAAP – Accounting of Tax effects on dividends received from foreign subsidiary	Dolphy D'Souza	BCAJ	45-A / Part 5	92
GAP in GAAP – Fair Value of Revenue	Dolphy D'Souza	BCAJ	45-A / Part 6	75
Recent Developments in IFRS	Adwait Morwekar	CAJ	62 / No. 3	422
Comparison of IFRS, Indian GAAP and IND AS – Simplified	Rakesh R. Agarwal	CAJ	62 / No. 3	428
Impact of IFRS on Reported Results of Companies – A Sectoral Analysis	Koosai Lehery & Aniruddha Godbole	CAJ	62 / No. 3	434
AOP				
Taxability of EPC Contracts as an AOP – A vexed issue and the consequences threreto	Tirthesh M Bagadiya	Taxman	216	125
Authorised Representatives				
How far an Authorised Representative's action can bind taxpayers	T. N. Pandey	CTR	260	41
Advance Ruling				
Advance Ruling is Subjected to Writ Jurisdiction of High Court	M. Govindarajan	CAJ	62 / No. 2	292

Topic	Author	Magazine	Volume	Page
Assessment/Reassessment				
No reassessment if alleged escaped income not in recorded reasons	R. Santhanam	CTR	261	17
Whether it's fair to revise an assessment on deficient enquiry by AO?	Gopal Nathani	Taxman	216	1
Whether the Income-tax Authority can ask from the loan acceptor the source of funds of loan giver ?	Akhilesh Kumar Shah	Taxman	216	27
MAT assessments for A.Ys 2001-02 and 2002-03 – Interest charged under section 234B/C may be reclaimed	Gopal Nathani	Taxman	216	29
Problems in assessment of housing projects	T. C. A. Ramanujam	CTR	261	9
Agricultural Taxation				
Stirring up debate surrounding the need for agricultural taxation in India	Prashant Pranjal & Abhinav Kumar	Taxman	217	157
Arbitration Act, 1996				
Forfeiture of right to appoint arbitrator under section 11 of the Arbitration Act, 1996	Vishal Mishra	Company Cases	179	27
Audit				
E-filing of Tax Audit Report	Hiten Shah	STR	60	47
Government may rethink compulsory cost audit as industry not keen	Ramakrishna Kashelkar	ET	8/12/2013	6
Social Audit : An Indian Experience	Anandaraj Saha	CAJ	62 / No. 2	266
Affidavit				
Affidavit..."Satyameva Jayate"	Anilkumar K. Asher	STR	60	66
Annual Information Return				
Annual Information Return – Law and Procedure Regarding	Arundhati Kulshreshtha	TTR	132	462
'B'				
Business Expenditure				
Capital expenditure or revenue expenditure	D. S. Walia	CTR	260	22
Due Date of Payment for Allowability of Employee PF Contribution	Pradip Kapasi & Gautam Nayak	BCAJ	45-A/Part 5	43
Beneficial Owner				
Beneficial Owner – The debate continues	Ajit Korde	BCAJ	45-A/Part 5	16

Topic	Author	Magazine	Volume	Page
'C'				
Company / Corporate Law				
Tax holiday for MAT and DDT for SEZ companies	R. Santhanam	CTR	261	1
Corporate Social Responsibility under the Companies Act, 2013	T. Ramappa	Company Cases	180	49
One Person Company : The new entrant in the Indian Corporate World	T. C. A. Ramanujam & T. C. A. Sangeetha	Company Cases	180	56
Corporate Litigation Risk Management : "Repair the house before it rains"	Kailash Jeenger	Company Cases	179	65
Director's Liability	Kiran Mukadam	S & Co Law	120	59
Corporate Law	Anup P. Shah	BCAJ	45-A/Part 5	11
Corporate Social Responsibility and Role of Professionals	Naresh Kumar	CAJ	62 / No. 3	477
Cash Credits				
Cash Credits – Discharge of burden of proof by assessee	V. Pattabhiraman	Taxman	217	85
CBDT				
Scope of CBDT Instruction No. 1916 dt. 11-5-1994 Not only for providing relief from seizure of jewellery but also for providing relief vis-à-vis unexplained investment	V. K. Subramani	TTR	132	447
Capital Gains				
No capital gains tax liability on the firm under section 45(4), in case of retirement of its partner	S. K. Tyagi	ITR	356	38
Exemption under s. 54EC – Investment spread over to two financial years	T. N. Pandey	CTR	261	12
Exemption from capital gains for investment in multiple residential units	R. Raghunathan	CTR	260	33
Is benefit of sections 54 and 54F available on acquisition of residential house abroad?	T. N. Pandey	ITR	355	53
Consent Settlement				
Consent Settlement under the Indian & US Securities Regulation Regimes	Suvir Sharma & Siddhartha Sharma	S & Co Law	120	103
'D'				
Donation				
Anonymous Donations – Section 115BBC Analysed	K. Kumar	ITR	356	1

Topic	Author	Magazine	Volume	Page
Is corporate donation meant to gain local support and not for business purpose?	Gopal Nathani	ITR	355	1
Dividend				
Dividend as return on investment : No longer an enforceable right ?	Sahil Arora & Chitwan Deep Singh	Company Cases	179	75
Dividend as Return on Investment : No longer an enforceable right?	Sahil Arora & Vivek Mathur	S & Co Law	120	97
Deduction				
Section 10B deduction to 100% EOU set up under STP scheme	Gopal Nathani	ITR	355	37
Eligibility for Deduction u/s 80-IB(10) in respect of Amount Disallowed u/s 40(a)(ia)	Pradip Kapasi & Gautam Nayak, Ankit Virendra, Sudha Shah	BCAJ	45-A/Part 5	51
Double Tax Avoidance				
Applicability of surcharge and education cess on foreign remittances	Rama Gupta & Nisha Malpani	CTR	260	60
Tax Residency Certificate and relief under Double Taxation Avoidance Agreement	R. Raghunathan	CTR	261	27
The Limitation of Benefits Clause in Double Taxation Avoidance Agreements	Abhinav Kumar & Devanshu Sajlan	Taxman	216	163
Deemed Income				
Taxability of deemed income under section 2(24)(x) of the Income-tax Act	T. R. Nagarajan	Taxman	216	130
Derivative/Hedging Transactions				
Treatment of derivative/Hedging Transactions in income tax	Mukesh Soni	Taxman	217	1
'E'				
Exemption				
Income-tax exemption for institutions holding properties for public religious purposes	T. N. Pandey	Taxman	216	71
'F'				
FIIs and FDIs				
Taxation of FIIs and FDIs	Siddhant Bhatt & Tanya Nayyar	AIFTP Journal	16/ No. 6	24

Topic	Author	Magazine	Volume	Page
'H'				
High Court				
Determination of substantial question of law – Is proviso to s. 260A (4) obnoxious	Minu Agarwal	CTR	261	6
A recent case where assessee's belated plea of natural justice violations was rejected by High Court	V. Pattabhiraman	Taxman	217	47
'I'				
Insider Trading				
Law and economics of insider trading in India	Kumar Harshwardhan	Company Cases	179	17
Crime without Victims	Parag Adhiya	CAJ	62 / No. 2	324
Interpretation				
Finance Minister's Speech in Parliament – Can a decision be based on such speech	T. C. A. Sangeetha	CTR	261	22
Interest				
Interest claims in winding up petitions	Darryl Paul Barretto	Company Cases	179	41
Income				
Incentive for currency exchange gain – A necessitated strategy	Minu Agarwal	CTR	261	33
'J'				
Judicial Intervention				
Tempering the judicial intervention in grant of Government contracts	Vishal Mishra	Company Cases	179	15
'K'				
"Keyman Insurance Policies"				
Critical appraisal of measures proposed to plug loopholes in tax planning in case of "Keyman Insurance Policies"	Dindayal Dhandaria	ITR	355	44
'L'				
Local Body Tax				
LBT – In the Scheme of the Constitution of India	P. C. Joshi	C J	I / No. 11	24
Important Definitions applicable to LBT and Exemptions	Dilip Phadke	C J	I / No. 11	26
Registration, Amendment and Cancellation of Registration Certificate	Vikram Mehta	C J	I / No. 11	33

Topic	Author	Magazine	Volume	Page
Valuation of Articles and Rate of Tax	Rajat Talati	C J	I / No. 11	37
Payment of LBT including Composition Scheme and Interest	Sujata Rangnekar	C J	I / No. 11	40
Returns, Records to be maintained and Penalties under Local Body Tax	C. B. Thakar	C J	I / No. 11	46
Assessment, Reassessments, Refunds and Appeals under the Local Body Tax Act	Nikita R. Badheka	C J	I / No. 11	53
Losses				
Case Studies vis-à-vis carry forward and set-off of losses and unabsorbed depreciation	Manoj Gupta	TTR	132	449
'M'				
"Media – A voice of..."				
The Dastur Essay Competition – "Media – A voice of..."	Saurabh Rajendra Wagle	C J	I / No. 12	141
Morality and Profession				
The Dastur Essay Competition – Morality and Profession	Dhavnish Jagdip Shukla	C J	I / No. 11	56
'N'				
NRIs				
Don't give NRIs a raw deal	Sudhir Kaushik	TOI	8/5/2013	18
New Companies Bill				
New Companies Bill is a step forward	Dhirendra Kumar	ET	8/12/2013	12
New Banking Licences				
New Banking Licences-the way forward	Vishal Laheri & Asokan Arumugam	BCAJ	45-A/Part 6	17
Non-Resident				
Taxability of Market Development Fee received by Non-resident for Services Rendered Outside India	Prashant Kumar	Tax Referencer	132	603
'O'				
Other Sources				
Section 43CA & Section 56(2) (vii) – A Critical Analysis	Sahil Garud	CAJ	62 / No. 3	461
'P'				
Participatory Note				
A blend of foreign investment in the Indian regime	Gayatri Chadha & Amitabh Tewari	Company Cases	180	10

Topic	Author	Magazine	Volume	Page
Penalty				
Penalty under s. 271(1) (c) for breach of s. 50C	R. Raghunathan	CTR	260	52
Property				
How to transfer your property	Sakina Babwani	TOI	8/26/2013	16
Things to check while opting for co-tenancy	Amit Shanbaug	TOI	9/2/2013	16
Public Finance				
Consulting Opportunities for CAs on Donor Funded Engagements	Anjan Roy	CAJ	62 / No. 2	307
'R'				
Return				
You can still file your tax returns	Preeti Kulkarni	ET	8/7/2013	11
E-filing of Tax Returns goes to the next level	Ameet Patel	BCAJ	45-A/Part 6	10
Retro-Active Amendments				
Retro-Active Amendments to tax law (recent developments)	V. N. Muralidharan	Taxman	217	121
Reverse Merger				
Tax Perspective	Vivek Pathak	Company Cases	179	33
Refund				
Delhi High Court Directs Income-tax Department to be reasonable in matters of refunds to the Taxpayers	T. N. Pandey	Taxman	217	172
'S'				
Service Tax				
Voluntary Compliance Encouragement Scheme (VCES)-2013	Vikrant Mehta	STR	60	38
Value of goods and materials supplied free of cost by a service recipient to provider of taxable construction service	Pranav Mehta	STR	60	60
Service Tax exemption to SEZ	Pranav Mehta	STR	60	72
Right to use is a legal issue	Dr. Sanjiv Agarwal	CTR	261	45
Judicial interpretation on interest payable on delayed refunds	Sanjiv Agarwal	CTR	260	46
Recovery circular thrashed by judicial forums	Sanjiv Agarwal	CTR	260	13

Topic	Author	Magazine	Volume	Page
Franchise : 'Service' or "Deemed Sale" of Transfer of Right to Use Trademark?	Puloma Dalal & Bakul B. Mody	BCAJ	45-A/Part 5	68
Levy on Restaurants & Hotels Held Unconstituional	Puloma Dalal & Bakul B. Mody	BCAJ	45-A/Part 6	47
Exemptions under Service Tax	Rajkamal Shah	AIFTPJ	16/ No. 6	30
Voluntary Compliance Encouragement Scheme, 2013	Rajkamal Shah	C J	I / No. 11	15
Shipping Income				
Taxability of Income Derived Through Independent Agent in India by French Company	Manoj Gupta	Tax Referencer	132	405
Special Economic Zones				
Taxation of Special Economic Zones (SEZ) – An assessment	C. S. Balasubramaniam	Taxman	216	81
Tax on sale to SEZ – A ticklish issue	Ratan Kumar Samal	STR	60	22
Search & Seizure				
Credibility of confessional statements made during search proceedings	Ananya Kapoor	CTR	260	28
Search assessment – Opening floodgates for controversies	Minu Agarwal	CTR	260	1
Requirement for approval of Joint Commissioner where assessment is completed under section 153C	Vinod Shankar	TTR	132	454
Securities Law				
Anxious days for NBFCs – Some policy reversals, some amendments	Jayant M. Thakur	BCAJ	45-A/Part 5	85
Ordinance empowers SEBI even more – and brings some ambiguities	Jayant M. Thakur	BCAJ	45-A/Part 6	63
SEBI				
"Nirma Industries Ltd v. Securities and Exchange Board of India – In the spirit of safeguarding and endangering investor's rights"	Aishwarya Jha & Abhyuday Bhotika	Company Cases	180	1
SEBI New Circular : Revised Requirements for Scheme of Arrangement under the Companies Act, 1956	Karandeep Makkar & Shobhit Koshta	S & Co Law	120	51
'T'				
Tax Free Bonds				
Get ready for tax-free bonds	Narendra Nathan	TOI	9/2/2013	16
Trusts				
Whether trust imparting education and training in management aspects is entitled to exemption?	Mukesh M. Patel	Taxman	216	6

Topic	Author	Magazine	Volume	Page
Six months time limit for section 12AA(2) applications is mandatory, not directory	T. N. Pandey	ITR	355	6
Tax Reforms				
Whither tax reforms	T. C. A. Ramanujam & T. C A. Sangeetha	ITR	356	15
Role of enquiries, committees and commissions in tax reforms	Dr. M. N. Haque & Brijesh Kumar Singh	CTR	261	34
Transfer Pricing				
Arm's length rate of interest for loans advanced in foreign currency	R. Raghunathan	CTR	260	17
The multi million dollar puzzle – Recovery of income-tax on allotment of shares	V. N. Murlidharan	CTR	261	42
TDS Statement late fee u/s 234E can be waived ?	Rajesh Mehta	AIFTPJ	16/ No. 6	49
Domestic Transfer Pricing – An Overview	Sunil Jhunjunwala & Hiten Shah	STR	60	45
Specified Domestic Transactions – Beginning of a new Transfer Pricing Era	Swapnil Bafna & Sachin Agrawal	CAJ	62 / No. 2	301
'V'				
Valuation under Indirect Tax Laws				
Central Excise Act, 1944				
Central Excise Act, 1944 – A Broad Overview	Bakul B. Mody	C J	I / No. 12	15
Concept of 'Transaction Value' under Central Excise	Shailesh P. Sheth	C J	I / No. 12	18
MRP based system (Now RSP)	Madhukar N. Hiregange	C J	I / No. 12	26
Valuation Rules under Central Excise Law	Vinod Awtani	C J	I / No. 12	30
Valuation under Central Excise – Related party transaction	Yogesh S Patki	C J	I / No. 12	40
The "Cost"ing "Flat"ality	Bharat Raichandani	C J	I / No. 12	45
Valuation under Central Excise – Snapshot of Key Judicial Pronouncements	Jayesh Gogri	C J	I / No. 12	48
The Customs Act, 1962				
The Customs Act, 1962-Valuation System (General)	Suresh Nair	C J	I / No. 12	56
Customs Valuation Rules	Udayan Choksi	C J	I / No. 12	60
Customs Valuations – Related party transactions	Nishant Shah	C J	I / No. 12	69

Topic	Author	Magazine	Volume	Page
Special Valuation Branch Cell – Operational Issues and Challenges	Santosh Dalvi	C J	I / No. 12	73
Summary of Key Judicial Prouncements on customs valuation	Vishal Agarwal	C J	I / No. 12	76
Service Tax				
Valuation of Taxable Services – Section 67	Sunil Gabhawalla	C J	I / No. 12	85
Service Valuation – Cross Border Transactions	Naresh K. Sheth	C J	I / No. 12	89
Valuation under Works Contract Service	Rajkamal Shah	C J	I / No. 12	92
Money Changing Services	Ashit Shah	C J	I / No. 12	95
Taxability of reimbursements – Impact of Recent Delhi Court Ruling	Girish Raman	C J	I / No. 12	97
Snapshot of Key Judicial Decisions under Valuation of Services	Rajiv Luthia	C J	I / No. 12	103
Other Indirect Tax Laws – Valuation under Central Sales Tax Act, 1956	C. B. Thakar	C J	I / No. 12	115
Valuation under MVAT Act, 2002	Nikita R. Badheka	C J	I / No. 12	119
Valuation under Bombay Tax on Luxuries Act, 1987	Kantilal P. Jain	C J	I / No. 12	127
Valuation under the Bombay Stamp Act, 1958	Anup P. Shah	C J	I / No. 12	129
Valuation for Levy of LBT	Janak Vaghani	C J	I / No. 12	135
VAT				
Changes in Form 704 – Version 2.0.0 – An Analysis	Mayur R. Parekh	STR	60	32
VAT issues (in redevelopments, in repairing properties)	Kishor T. Lulla	STR	60	28
Nature of Lease Transaction vis-à-vis Intangible Goods	G.G. Goyal & C.B. Thakar	BCAJ	45-A/Part 5	74
Whether 'F' Forms are Required on Monthly Basis?	G.G. Goyal & C.B. Thakar	BCAJ	45-A/Part 6	53
VAT and Service Tax Planning	S. Ranga Swamy	CAJ	62 / No. 2	279
'X'				
XBRL				
Third Year of Indian XBRLisation	Vivek Baid & Sonia Taneja	CAJ	62 / No. 3	440
Ah…Again There is an Error in XBRL	Vinod Kashyap & Naveen Garg	CAJ	62 / No. 3	444
Comparison of Different XBRL Taxonomies	Ashwin Robin & Nisha Venugopal	CAJ	62 / No. 3	449

CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

RISKS OF AGGRESSIVE LEGISLATION

The month of October turned out to be a bit soothing for the world economies as well as for India. The US economy churned out better numbers for the quarter ended September, 2013 and that gave solace, not only to the US, but to the whole world aspiring for stabilisation. The US is the biggest economy in the world and it plays a dominant role in global commerce. There was a fear that the quantitative easing by the US FED will be tapered off soon and that would impact the liquidity in the world markets. However, post nomination of Ms. Janet L. Yellen to be the next FED chief, the fear receded, as she was one of the proponents of quantitative easing in the US. The world has started believing that though the quantitative easing will be tapered off eventually, the process will happen gradually and it will not have a drastic impact on the economies of the world; and especially of the developing countries. Therefore, the month of October brought back confidence, in the developed as well as developing economies. Stock prices kept on improving across the markets and many volatile currencies stabilised to an extent. As the picture appears today, the confidence level of the world is much better than what it was at the end of September.

The current indicators also suggest that the world economy is in a positive economic phase and the growth rate will continue to pick up, at least for some more time. In the current era of global economic co-operation and interdependence, fortunes of many developing countries get linked up with the fortunes of one or more developed countries as these countries are providers of goods and services to them. Increased consumption in developed countries can improve the economic health of developing countries and can increase the employment and standard of living. Vice versa, a slowdown in developed countries can badly affect the economies of developing countries due to their heavy dependence on them. This phenomenon has been very well demonstrated by the recent recession, which initially started in the US, quickly plagued European economies and soon affected the rest of the world resulting in an economic collapse and recession in many countries.

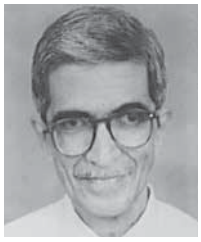
The current economic improvements in the developed countries like the US and Japan will auger well for the economic wellbeing of the world. It is expected that the positivity will continue for at least a few more years. The individual economies will have their own issues but the overall picture and sentiment will remain positive and will help to normalise the world in the years to come. A concern is the huge amount of information flowing across the world, which is making the investors pro-active and capricious. It is not only resulting in volatility in the stock markets and in currency markets worldwide, but is playing extreme on the sentiments. This phenomenon seems to be here to stay. The world has just started coming back to normalcy after a prolonged recession but, the stock markets across the world have already reached to or are near their highest levels in the last number of years and therefore it is difficult to ascertain their future course of action as sentiments are soaring higher than the reality. It can germinate seeds of asset bubble and a possible collapse.

Currently, liquidity is driving the markets around the globe. As soon as there developed a fear of reduction in liquidity by pruning of the quantitative easing by the US, the world markets went into a tailspin. This indicates the risk levels which the world currently harbours. It also indicates that the world is out of the recession more on the back of the liquidity than fundamentals. Some old concerns such as ageing population, heavy social security and medicare burden continue to hamper the economies of the developed countries. As their demography cannot change in the near future, these economies will continue to suffer from the phenomenon and will continuously need to find out solutions for the same. In the month of September, a deadlock developed in the US Government and the resultant negative repercussions on the world markets were very evident. Therefore, the world political leaders need to keep in mind that their domestic moves and politics can affect not only their own countries but even rest of the world and entire humanity in certain cases. Therefore, they need to balance their approach as well as their acts for the betterment of the world. Any crisis such as wars, governmental deadlocks and even terrorist activity will make the world vulnerable and they need to be avoided or fought back together by the global community to keep the economic balance and global prosperity intact.

Fortunately, the Indian currency has stabilised for now and it may even strengthen a bit over the next few months. The current economic environment and policies in India are driven more by political considerations due to the ensuing elections. So there may not be any major changes forthcoming till the election results are out and a newly elected Government is put in place. Till then, the Indian economy is likely to struggle as no aggressive policy decisions are likely to be taken due to the political considerations.

The current trend in the economic laws in India is also becoming aggressive on the back of emerging scandals. The penalties are getting harsher and the prosecution provisions are getting stricter. Fundamentally, the prosecution provisions are to be invoked more in extreme cases but nowadays, the invoking of these provisions is getting routine, which is increasing the risk to businesses and commercial activities in the country. Aggression of bureaucracy is also playing as a dampner on the spirit of enterprise and such a situation is detrimental to the economic development of a country. A maze of complicated aggressive laws can cause deterrence for the spirit of the enterprise. It has to be appreciated that the spirit is the biggest wealth creator and it needs to be rightly nurtured for economic well being of people. It is not the function of the bureaucracy to create wealth but it is supposed to control the possibility of harmful outcome of unbridled freedom to enterprise. Therefore, a balance has to be kept in mind for the economy to sustain its growth trajectory. For the betterment of a country, not only the citizens but also the bureaucracy and the politicians need to live in harmony.

Indian stock markets are currently strong and the Sensex has crossed 21,000 level and ruling at an all time high. Though the stock markets are buoyant, the economy continues to struggle and may remain so for some more time to come. Therefore, the future course of action of the Indian stock markets is difficult to predict. Currently, the Indian stock markets are ruled by the Foreign Institutional Investors (FIIs) who are continuously pumping money in them. In the month of October, they pumped in ` 18,000/- crores and the trend is continuing in November as well. This enormous flow of funds is keeping the Indian stock markets high, in spite of weak fundamentals. The foreign investors are believing that though the markets are at an all time high, they can move up further and Sensex may reach the level of 22,000 by the end of the current calendar year. If the stock market reaches that level, it will give 5% return on investment in the next two months, which is fairly good. However, considering the current fundamentals of the economy and ensuing elections, investors need to be cautious and selective. As the FIIs invest more in the frontline stocks, a further rise will be more pronounced in those stocks. The risk in these stocks is limited and returns can be reasonable. It will be advisable for the investors to concentrate on such stocks than to select low value stocks, which may be laden with higher risk, especially due to high interest rates and low liquidity in the economy. Investors need to watch the latest quarterly results of the companies before extending their commitments. There will be a good chance of making money on the stock market over the next few months.



V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Facts & Query

Q.1 *ABC P. Ltd. has incurred a business loss of ` 1.00 Crore during the Assessment Year 2013-14. Due to technical problems in the internet connectivity, the assessee company was unable to upload the return of income by 30-9-2013 12.00 midnight. Return of income was uploaded by the company at 12.10 am on 1-10-2013. Will the assessee be eligible to avail the carry forward of the loss? If not, what alternative remedy is available to them?*

Ans. As far as the return of Income of A.Y. 2013-14 is concerned, the due date of furnishing return of Income which was 30th September, 2013 is extended to 31st October, 2013 vide Notification No. F.No. 225/117/2013-ITA.II dated October 24, 2013. Therefore the return of Income will be treated as filed within due date of filing return of Income and the Loss will be allowed to be carried forward.

Q.2 *ABC P. Ltd. is a partner in LLPs and partnership firms which are carrying on construction activity. It proposes to demerge these investments in partnership firms into another company XY P. Ltd. The CFO of the company is of the opinion that as the investments in partnership firms is a business Undertaking as defined in the Income Tax Act, 1961 and thus the condition of S. 2(19AA) is fulfilled. Is the stand of the CFO correct?*

Alternative, the CFO is of the opinion that even if it is not considered as a business undertaking there is no mechanism available under the Income Tax Act to charge the demerger to tax. What is your view on the matter?

Ans. As far as the 1st opinion of querist's CFO is concerned, he is right in his opinion. To be a partner in LLP in various LLPs carrying on similar business, it itself constitutes an undertaking and as such it falls within the definition of demerger as defined under S.2(19AA) of the Act and as such as the case of the querist falls under S.47(vib) of the Act, there would be no liability for capital gain in view of the said provisions of Sec. 47(vib) of the Act.

However, in his second opinion, the CFO may not be right. As in demerger the business or the assets of the demerged company are transferred to the resulting company, there is a transfer of capital asset, and if the conditions of Sec. 47(via) are not fulfilled there would be liability for capital gain u/s. 45 of the Act.

Q.3 *Mr. A holds 8% shares in a private limited company in his individual capacity and another 5% share as Karta of his HUF. For the purpose of S.2(22)(e), will he be considered as having 13% voting rights or only 8%?*

Ans. For the purpose of S.2(22)(e) a shareholder should be the real shareholder. If one is a shareholder on behalf of another person or on behalf of another entity, he is not a real shareholder. In the case of the querist, the querist is a shareholder in his individual capacity and is a also holding some shares as a karta of his HUF. The share he is holding in his individual capacity, alone should be considered for the purpose of Sec. 2(22)(e). As such in the case of the querist only the 8% shareholding should be taken into account.

Q.4 *A partnership firm has purchased leasehold rights of a land for Rs.50 L and the balance term of lease available is 8 years. At the end of 8 years the land will have to be surrendered to the municipal corporation who is the owner. The firm is of the opinion that it should be eligible for 1/8th deduction of the land every year as a revenue expenditure. However, their consultant has advised that the lease rights are capital expenditure and no deduction can be claimed. Please advice.*

Ans. Whether an amount paid for acquiring a leasehold interest in the land or it is a payment of rent in advance, one has to consider. In the case of the querist, it appears that the payment of ` 50 lakhs is for acquiring leasehold interest in the land and it is not a payment of rent in advance. However the issue has to be considered on the facts of each case. We have to consider, the area of the land, the nature of the interest the person from whom the querist has purchased the interest, the amount of the consideration which that person had paid for acquiring the interest in the land, the market value of the land, and on these factors taken together one has to decide as to whether the payment in question is by way of advance payment of rent or it is for acquiring leasehold interest in the land. One has to consider the real nature of the transaction and mere phraseology used is not final. If it is an advance payment rent, then the querist is right. If it is for acquiring lease hold interest in the land, then the tax consultant is right.


Hitesh R. Shah & Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Important events and happenings that took place between 8th October, 2013 and 8th November, 2013 are being reported as under.

I. ADMISSION OF NEW MEMBERS

1) The following are the new members, who were admitted in the Managing Council Meeting held on 18th October, 2013.

LIFE MEMBERSHIP

1	SHRI JADHAV KIRAN MARUTI	ADVOCATE	MUMBAI
2	MRS. SHROFF JAYNI CHINTAN	CA	MUMBAI
3	SHRI DEDHIA NILESH TALAKSHI	CA	MUMBAI

ORDINARY MEMBERSHIP

1	SHRI SHARMA MILIND DEENDAYAL	CA	PUNE
2	SHRI CHULAWALA KAUSHAL BHUPENDRA	CA	MUMBAI
3	MS. PHANSE VIDYA SHIVRAM	CA	MUMBAI
4	SHRI AGARWAL AMIT VINOD	CA	MUMBAI
5	SHRI KENKRE AKSHAY UDAY	CA	MUMBAI
6	SHRI BIRLA RAHUL GOKULCHANDRA	CA	THANE

ASSOCIATE MEMBERSHIP

1	HURIX SYSTEMS PRIVATE LIMITED	MUMBAI

II. PAST PROGRAMMES

Details of programmes conducted by the Chamber are given below:

Sr. No.	Programme Name/ Committee/Venue	Date/Subjects	Speakers
1	**Allied Laws Committee** Lecture Meeting at IMC	**22nd October, 2013** Provisions of Stamp Duty Including for Business Restructuring	CA Anup Shah

Sr. No.	Programme Name/ Committee/Venue	Date/Subjects	Speakers
2	**Corporate Members Committee** *(Jointly with IMC)* A training workshop at IMC	**11th October, 2013 & 12th October, 2013** Making of CFO	Mr. D. D. Rathi, Director, Grasim Industries Mr. Paresh Mehta, CFO, Ashoka Buildcon Mr. Ajay Thakur, Head – SME Segment, Bombay Stock Exchange Mr. Anil Rustogi, Sr. President and Deputy CFO of Adhitya Birla Group Global Pulp & Fibre Business Mr. B. R. Jaju, CFO, Welspun Corp. Ltd. CA Amrish Shah, Partner & National Leader, Transaction Tax, Ernst & Young Ltd. CA Rajeev Pai, CFO, JSW Steel Ltd. Mr. Yogesh Dhingra, CFO, Blue Dart Dr. V. R. Narasimhan, Chief of Regulatory Affairs, National Stock Exchange of India Limited Mr. Pramod Menon, Director (Finance) JSW Energy Ltd. CA M. M. Chitale, Past President, ICAI Mr. Pradip Shroff, CEO Coach Member CFI Coaching Network Mr. Sudhir Valia, Director, Sun Pharma Ltd.
3	**Direct Taxes Committee** *4th Intensive Study Group (Direct Tax) Meeting* at CTC Office	15th October, 2013 Recent Important Decisions under Direct Taxes	Mr. Rahul Hakani, Advocate

Sr. No.	Programme Name/ Committee/Venue	Date/Subjects	Speakers
4	**Information Technology Committee** Info Tech Update Series Workshop at IMC	**17th October, 2013** Google – Not Just a Search Engine (Effective use of Google in your workspace)	CA Sanjay Chheda CA Samir Kapadia
5	**Indirect Taxes Committee** Study Circle Meeting	**23rd October, 2013** *Assessment of Builders & Developers under MVAT Laws*	CA Deepak Thakkar
6	**International Taxation Committee & Direct Taxes Committee** *Domestic Transfer Pricing Conference* jointly with Direct Taxes Committee at Maharashtra Chamber of Commerce Hall	**19th October, 2013** The Law of Specified Domestic Transfer Pricing provisions under Income-tax Act, 1961.	Mrs. Malathi Sridharan, DIT (TP)–I, Mumbai CA Karishma Phatarphekar CA Nihar Jambusaria CA Sanjay Kapadia CA Pramod Joshi CA Vispi Patel Mr. Ajit Kumar Jain, CIT-DR (TP) CA Rohan Phatarphekar CA Sanjay Tolia Mr. Vineet Agrawal (* Subject to Confirmation)
7	**Membership & EOP Committee** *Self Awareness Series* at CTC office	**24th October, 2013** Information Technology for Business Innovation & Growth	Mr. Nilay Yajnik, Professor & Chairman Information Systems Area, Narsee Monjee Institute of Management Studies, Mumbai
8	**Study Circle & Study Group Committee** *Study Circle on International Taxation Meeting* at IMC	**16th October, 2013** Foreign Tax Credit Mechanism	CA Jimit Devani
	Study Circle Meeting at Jai Hind College	30th October, 2013 Deemed Dividend u/s 2(22) (e)	CA Mayur Desai

III. FUTURE PROGRAMMES

Future programmes of the Chamber's are as follows:

Sr. No.	Programme Name / Committee / Venue	Day / Subjects	Speakers / Chairman
1	**Allied Laws Committee** *Study Circle Meeting* at Jai Hind College	**18th November, 2013** Provisions relating to Pvt. Ltd. Companies Under Companies Act, 2013	Chairman : Mr. S. D. Israni, Advocate, Sr. Partner, S.D. Israni – Law Chambers Speaker : CA Nilesh Vikamsey
	Half Day Seminar on Labour Laws at Gulmohar Hall, BCAS *Jointly with BCAS*	**23rd November, 2013** • Employees State Insurance Act, 1948 • The Payment of Bonus Act, 1965 • The Employees Provident Fund & Miscellaneous Provisions, 1952 • The Payment of Gratuity Act, 1972 • The Contract Labour and abolition Act, 1970.	Shri Ramesh Soni, Labour Law Consultant
2	**Direct Taxes Committee** *5th Intensive Study Group (Direct Tax) Meeting* at CTC Office	**19th November, 2013** Recent Important Decisions under Direct Taxes	Shri Ajay Singh, Advocate
	Seminar on Search & Seizure and Survey at West End Hotel	**7th December, 2013**	Dr. K. Shivaram, Advocate CA Sunil Talati, Ahmedabad CA Reepal Tralshawala Shri Vipul Joshi, Advocate* *Confirmation awaited
3	**Indirect Taxes Committee** *2nd Residential Refresher Course on Service Tax* At The Lagoona Resort, Lonawala – 410 403.	**3rd January, 2014 to 5th January, 2014** • Paper – I : *Service Tax & VAT on Composite Transactions* • Paper – II : *Cenvat Credit Mechanism for Service Providers* • Paper – III : *Case Studies under Service Tax* • Presentation : *Prosecution, Arrest and Recovery provisions under Service Tax Legislations*	Mr. P. K. Sahu, Advocate, Delhi Mr. V. Raghuraman, Advocate, Bangalore CA Parind A. Mehta Mr. V. Sridharan. Advocate

Sr. No.	Programme Name / Committee / Venue	Day / Subjects	Speakers / Chairman
	Study Circle Meeting at IMC	**20th November, 2013** Issues in CENVAT Credit	Group Leader: CA Sameer Kapadia Chairman: Eminant Faculty
	Study Circle Meeting at Seminar Hall, All India Local Self Govt. Juhu.	**5th December, 2013** Intricate Issues in MVAT Audits	Group Leader : CA Prashant Vora Chairman : CA Rajat Talati
4	**International Taxation Committee** *Workshop on Taxation of Foreign Remittances* at M. C. Ghia Hall	**13th, 14th, 20th & 21st December, 2013** The workshop will comprise of about 13-14 sessions spread over three and half days	Shri Vispi Patel Shri Milind Kothari Shri Sudhir Nayak Shri Anup Shah Shri Chandrahas Gupta Shri N. C. Hegde Shri Sushil Lakhani Shri Shabbir Motorwala Shri Radhakrishan Rawal Shri Sanjay Sanghvi
	Transfer Pricing Study Circle At CTC office	**The Period January 2014 to December 2014** The Study Circle is aimed at in-depth analysis of Law, Procedure and Jurisprudence with case studies.	Mentors – Shri Samir Gandhi, Shri Sanjay Tolia and Ms. Karishma Phaterphekar
5	**Membership & EOP Committee** *Self Awareness Series* at CTC Office	**3rd December, 2013** "કર્મોથી લય પ્રાપ્તિ" (Lecture will be in Gujarati) It is possible to achieve Rhythm and Harmony in personal and Professional life while performing our mundane duty? If yes, how? The speaker will enlighten us through lessons of Gita and tell us how to perform action to achieve such Rhythm & Harmony.	Shri Shailesh P. Sheth, Advocate

Sr. No.	Programme Name / Committee / Venue	Day / Subjects	Speakers / Chairman
6	**Residential Refresher Course & Public Relation Committee** *37th Residential Refresher Course* at Anandha Inn Convention Centre & Suites, Pondicherry	**13th February, 2014 to 16th February, 2014** • Re-assessments / Revision / Rectification • Case Study under Direct Taxes • Case Study in Taxation of Real Estate Transactions [Secs. 2(1A), 2(14), 43CA, 50C, 50D,56(2)(vii)(b),145 & TAS and 194IA) • Brains' Trust : Direct Tax	Paper Writer : CA Mahendra Sanghvi Chairman : Shri Keshav Bhujle, Advocate Paper Writer : Ms. Anita Sumanth, Advocate (Chennai) Chairman : Shri S. N. Inamdar, Sr. Advocate Paper Writer : CA Pradip Kapasi Brains Trustees : Eminent Faculties
	Boat Cruise from Gateway of India Jointly with Membership & EOP Committee	**14th December, 2013**	The other details shall be announced soon via email and on the website.
7	**Study Circle & Study Group Committee** *Study Circle Meeting* at 2nd Floor, Babubhai Chinoy Committee Room, IMC	**8th November, 2013** Practical issues on Domestic Transfer Pricing	CA Karishma Phatarphekar
	Study Circle Meeting at Jai Hind College	**11th November, 2013** Benching marking of Domestic TP Transactions using TP Database with live Search	by Capitaline

III. FORTHCOMING JOURNAL BY JOURNAL COMMITTEE

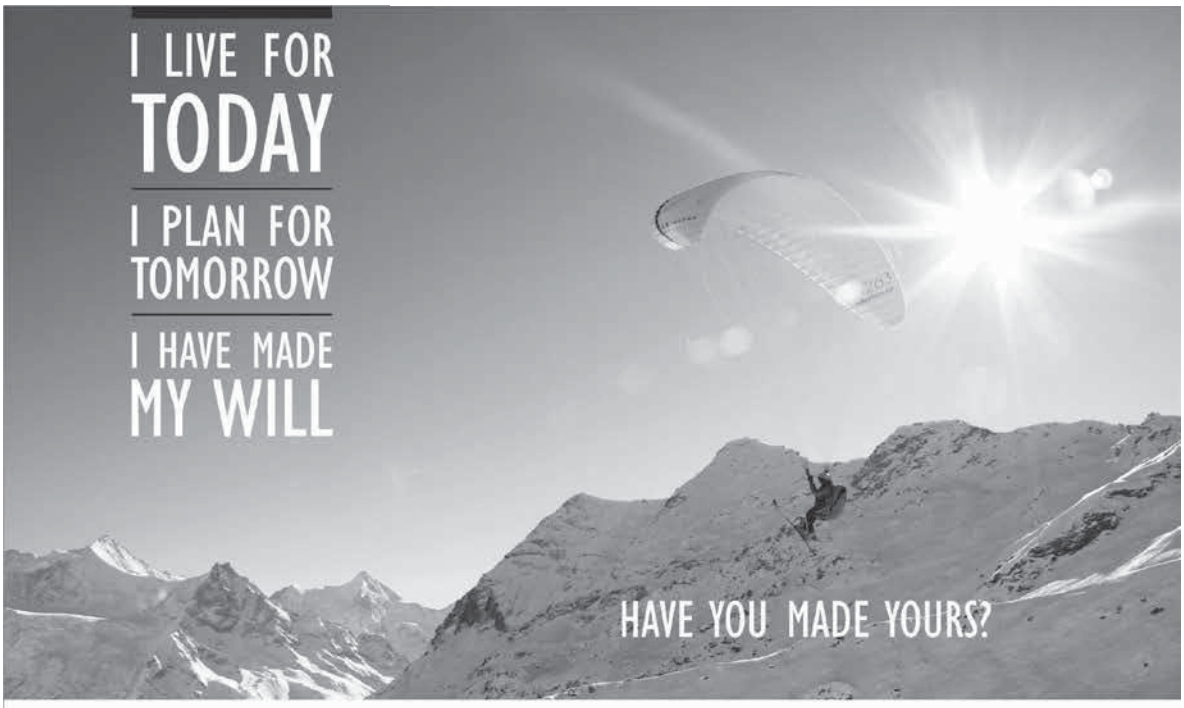
The Chamber's Journal for the month of December, 2013 will cover topic on "Private Trusts".

IV. PUBLICATIONS FOR SALE

A) International Taxation – A Compendium

Four hardbound volumes set containing approx. 4000 pages.

(For Enrollment and further details of all the future Events, please refer to the November, 2013 Issue of CITC News or visit the website www.ctconline.org)



Highlights

Comprehensive	- Close to 30 different asset products can be captured (NO VALUES required) - Loans and liabilities; guarantees and other payables addressed - Possible to have institutional beneficiaries in addition to individuals
Easy	- Step by step, guided approach with contextual help
Expert help	- One of India's premier law firms answers Will related queries on the platform itself
Alerts	- Making sure nominee and beneficiaries are in sync
Safe	- Secure platform (https), asset value data not sought

(willsecure)

Read more at https://www.willsecure.in , write in to us: contactus@willsecure.in

DIRECT TAXES COMMITTEE & INTERNATIONAL TAXATION COMMITTEE

Full Day Conference on Domestic Transfer pricing held on 19th October, 2013 at IMC.

CA Yatin Desai, President welcoming the Guests & participants. Seen from L to R : CA Naresh Ajwani, Vice Chairman, International Taxation Committee, CA Paresh Shah, Chairman, International Taxation Committee, CA Karishma Phatarphekar, Faculty, Mrs. Malathi Sridharan, DIT (TP)-I, Mumbai, Guest Speaker and CA Ketan Vajani, Vice Chairman, Direct Taxes Committee.

Mrs. Malathi Sridharan, DIT (TP) – I, Mumbai inaugurating the conference by lighting the lamp. Seen from L to R : CA Hinesh Doshi, Hon. Jt. Secretary, CA Paresh Shah, Chairman, International Taxation Committee, CA Ketan Vajani, Vice Chairman, Direct Taxes Committee, CA Yatin Desai, President, CA Karishma Phatarphekar, Faculty.

Section of delegates

Mrs. Malathi Sridharan, DIT (TP) – I, Mumbai giving key note address. Seen from L to R : CA Naresh Ajwani, Vice Chairman, International Taxation Committee, CA Paresh Shah, Chairman, International Taxation Committee, CA Karishma Phatarphekar, Faculty and CA Ketan Vajani, Vice Chairman, Direct Taxes Committee.

Faculties

CA Karishma Phatarphekar

CA Nihar Jambusaria

CA Sanjay Kapadia

CA Pramod Joshi

CA Vispi T. Patel, panellist replying the queries. Seen from L to R : CA Hinesh Doshi, Hon. Jt. Secretary, CA Yatin Desai, President, CA Anil Kumar Jain, CIT – DR (TP), Panelist, CA Rohan Phatarphekar, Panelist and CA Rajesh L. Shah, Convenor, International Taxation Committee.

DIRECT TAXES COMMITTEE

4th Intensive Study Group (Direct Tax) Meeting held on 15th October, 2013 on the subject "Recent Important Decisions under Direct Taxes".

Mr. Rahul Hakani, Advocate addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle on International Taxation Meeting held on 16th October, 2013 on the subject "Foreign Tax Credit Mechanism".

CA Jimit Devani addressing the members.

ALLIED LAWS COMMITTEE

Lecture meeting held on 22nd October, 2013 on the subject "Provisions of Stamp Duty including for Business Restructuring".

CA Anup Shah addressing the members. Seen from L to R : CA Ashok Sharma, Chairman, CA Yatin Desai, President, CA Jagdish Punjabi, Vice Chairman and Ms. Varsha Galvankar, Member.

Section of members.

INDIRECT TAXES COMMITTEE

IDT Study Circle Meeting held on 23th October, 2013 on the subject "Assessment of Builders & Developers under MVAT Laws".

CA Deepak Thakkar addressing the members. Seen from L to R : CA Aalok Mehta, Convenor, CA Ashit Shah, Chairman, CA Pranav Kapadia, Vice Chairman

MEMBERSHIP & EOP COMMITTEE

Self Awareness Series held on 24th October, 2013 on the subject "Information Technology for Business Innovation & Growth".

Mr. Nilay Yajnik, Professor addressing the members.

DIRECT TAXES COMMITTEE & INTERNATIONAL TAXATION COMMITTEE

Full Day Conference on Domestic Transfer pricing held on 19th October, 2013 at IMC.

CA Yatin Desai, President welcoming the Guests & participants. Seen from L to R : CA Naresh Ajwani, Vice Chairman, International Taxation Committee, CA Paresh Shah, Chairman, International Taxation Committee, CA Karishma Phatarphekar, Faculty, Mrs. Malathi Sridharan, DIT (TP)-I, Mumbai, Guest Speaker and CA Ketan Vajani, Vice Chairman, Direct Taxes Committee.

Mrs. Malathi Sridharan, DIT (TP) – I, Mumbai inaugurating the conference by lighting the lamp. Seen from L to R : CA Hinesh Doshi, Hon. Jt. Secretary, CA Paresh Shah, Chairman, International Taxation Committee, CA Ketan Vajani, Vice Chairman, Direct Taxes Committee, CA Yatin Desai, President, CA Karishma Phatarphekar, Faculty.

Section of delegates

Mrs. Malathi Sridharan, DIT (TP) – I, Mumbai giving key note address. Seen from L to R : CA Naresh Ajwani, Vice Chairman, International Taxation Committee, CA Paresh Shah, Chairman, International Taxation Committee, CA Karishma Phatarphekar, Faculty and CA Ketan Vajani, Vice Chairman, Direct Taxes Committee.

Faculties

CA Karishma Phatarphekar

CA Nihar Jambusaria

CA Sanjay Kapadia

CA Pramod Joshi

CA Vispi T. Patel, panellist replying the queries. Seen from L to R : CA Hinesh Doshi, Hon. Jt. Secretary, CA Yatin Desai, President, CA Anil Kumar Jain, CIT – DR (TP), Panelist, CA Rohan Phatarphekar, Panelist and CA Rajesh L. Shah, Convenor, International Taxation Committee.

DIRECT TAXES COMMITTEE

4th Intensive Study Group (Direct Tax) Meeting held on 15th October, 2013 on the subject "Recent Important Decisions under Direct Taxes".

Mr. Rahul Hakani, Advocate addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle on International Taxation Meeting held on 16th October, 2013 on the subject "Foreign Tax Credit Mechanism".

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