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THE CHAMBER OF TAX CONSULTANTS

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APRIL - 2014

VOL. II | NO. 7

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

Judgments in Direct and Indirect Taxes - Recent Trends

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THE CHAMBER OF TAX CONSULTANTS

THE CHAMBER'S JOURNAL   JUDGMENTS IN DIRECT AND INDIRECT TAXES - RECENT TRENDS   APRIL- 2014 VOL. II | NO.7

TRANSFORMING INFORMATION INTO KNOWLEDGE

CORPORATE MEMBERS COMMITTEE

Workshop on Companies Act, 2013 held on 14th, 15th, 28th & 29th March, 2014 at IMC

Dr. S. D. Israni, Advocate addressing the delegates on the subject "Overview of Companies Act, 2013". Seen from L to R: CA Hitesh R. Shah, Hon. Jt. Secretary, CA Vipul Choksi, Chairman, CA Yatin K. Desai, President and CS Kaushik Jhaveri, Course Co-ordinator.

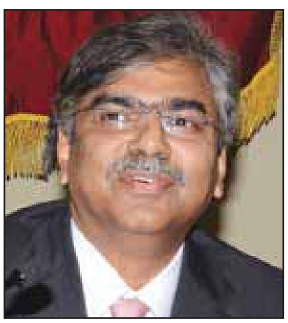
Faculties

CA Himanshu Kishnadwala

CA Nilesh Vikamsey

CS N. L. Bhatia

Dr. V. R. Narasimhan, Chief Regulations – National Stock Exchange of India Ltd.



Shri Nitin Potdar, Solicitor

CA Anup Shah

CA Jayesh Gandhi

Section of delegates

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Editorial

Wish you all a very happy and happening Financial Year 2014-15. Months of April and May will witness the heat and dust of General Elections for the 16th Lok Sabha along with the rising temperatures. The third round of voting has shown that people are eager to exercise their right to vote. On earlier occasions it was seen that the enthusiasm shown by the voters in remote places was lacking in urban centres. This time the third round of polling for the 16th Lok Sabha has shown that the tier I and tier II cities have also witnessed high turnout of voters. Now it is the turn of the financial capital of the country to reciprocate and tell the nation that for Mumbaikars, ballot is also as important as BSE Sensex. I request all professionals to spread awareness in all sections of the voters to exercise their right to vote.

The present issue‘s Special Story is on ‘Judgments in Direct and Indirect Taxes – Recent Trends’. We have selected important decisions of the Apex Court under Direct and Indirect taxes delivered in last one year. An in-depth analysis of these decisions is important to understand the ramifications of these decisions. We have carried out analysis of certain decisions of the Apex Court where the judgment is only of three lines affirming the High Court order. The detailed study of the journey of the matter till the Supreme Court and analysis of the High Court decision in such orders of the Apex Court helps us in determining the ratio laid down by that order. I hope this issue will come in handy to all the professionals in understanding the judgments analysed in this issue of the Chamber’s Journal.

I thank all the contributors of this issue of the Chamber’s Journal for sparing their valuable time for this issue. I once again remind all to vote and then proceed for vacation.

K. GOPAL
Editor

From the President

Dear Members,

By the time you receive this communication, citizens of India would have decided fate in more than hundred constituencies in the Lok Sabha elections 2014. India is the largest Democracy in the world. It is a misconception that the 'Democracy' is the thing of West. The basic principles of democracy are imbedded in Hindu religion. Democracy is not just rule of majority but it is freedom of expression, equal opportunities and protection to all. Hinduism does not believe in converts and allows freedom to select sects / gurus and interpret scriptures. Even a smallest individual has freedom of expression against Guru / faith in ancient India. Tolerant Hinduism even offers freedom to other faiths.

Let us now talk about our right and duty to vote. Many a times it has been seen that the voters develop apathy towards voting. This is a phenomenon both in uneducated and educated voters alike, albeit for different reasons. The effluent people of the society, especially in Mumbai, treat the voting day as a holiday and leave for out of the city. The Western Express Highway and Mumbai-Pune Express way is flooded with traffic by the people travelling for a short holiday on voting day. Impact of the voter's apathy can make democracy less meaningful. Democratic Government is the function of 'active participation' of its stakeholders which includes citizens of the country. When we don't participate in the electoral process it weakens the foundation of the democratic process and results of the election reflect the desires of a small portion of the population. Looking at the calibre of our candidates, I do appreciate that there are genuine reasons and obvious apathy, but it works against the true principles of democracy. I therefore, earnestly request all members of the Chamber and citizens of this largest democratic country to exercise their right and cast their vote on the day of electoral.

The Government has hurriedly notified several sections and rules of The Companies Act, 2013 and made applicable from 1st April, 2014. There are many far reaching changes and it requires a separate study. The Corporate Committee had successfully arranged a workshop which received overwhelming response. Meanwhile, the Government presented a Bill on Direct Tax Code before the Parliament. Again there are far reaching changes. The Law and Representation Committee is planning to make a representation in the near future.

The International Taxation Committee has dominated the months of March and April by arranging many well designed and topical programmes. I understand many members are taking benefit of the same. The month of May is a month of vacation. The activities of the Chamber will slow-down as no big programmes are in the pipeline. I wish all the members and readers a rejuvenated vacation.

I am very glad to inform all the members that the Chamber has released the first payment for repairs and renovation of the school at Uttarakhand out of the funds collected under 'Uttarakhand Flood Relief Fund'. I thank all donors who supported the Chamber for this noble cause.

It is practice of the Chamber to devote one issue of the Chamber's Journal on important judicial pronouncements. Accordingly, the Chamber's Journal for the month is 'Judgements in Direct and Indirect Taxes – Recent Trends'. I congratulate to Shri K. Gopal, Editor of the Journal and Past President of the Chamber to have selected very important decisions and authors for the same.

YA**TIN DESAI**
President

HEAVEN BE OUR GUIDE

The Chamber of Tax Consultants

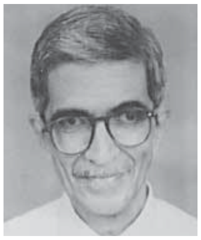
Vision Statement

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

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

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

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



V. H. Patil, *Advocate*

An Introduction to – Ved and Vedanta

CHAPTER VI

The Sixth Chapter, entitled Dhyana Yoga, contains 47 verses. Through proper service and sacrifice one develops sufficient renunciation to enable one to concentrate, meditate and realise the supreme Self. The preceding chapter helps the seeker attain dispassion and thus prepare himself for meditation. This chapter continues with the process of spiritual development culminating in the practice of meditation and the ultimate merging with Brahman.

This chapter has been discussed under six topics.

I.	Yogi (active) rises to jnani (enlightened)…..	1–9
II.	External and internal disciplines for meditation….	10–18
III.	Controlled mind remains peaceful…	19–24
IV.	Meditation reveals Self in one and all	25–32
V.	Can a restless mind be controlled?	33–39
VI	Yogi unities with Brahman	40–47

I. Yogi rises to jnani

The first nine verses reiterate the three stage of spiritual development described in the preceding chapter. A yogi, with worldly vasanas, needs karma yoga, the Path of Action, to evolve spiritually. Through action he sheds his vasanas and becomes a sannyasi. A sannyasi, in a state of renunciation, needs meditation and quietude to reach the ultimate state of a jnani. Both yogi and sannyasi head towards the same goal of Self-realisation but their sadhanas (spiritual practices) differ. Whatever the sadhana, every seeker must put in his own effort to raise himself by himself.

II. External and internal disciplines for meditation

Yogi and sannyasi are both on the spiritual path. However, the sannyasi alone, having developed a dispassion for the world, qualifies for meditation and Realisation. This topic enumerates all the steps that one must take for practicing meditation. It also details the environmental, physical, mental and intellectual preparations necessary to take the seat of meditation. When a seeker follows all these preparations he will become freed from desire, possessiveness and the consequent sorrow. He will then become established in yoga and be fully prepared for plunging into meditation.

III. Controlled mind remains peaceful...

Through physical, mental and intellectual disciplines one must withdraw the mind from its preoccupation with the world and direct it to the Self within. Render the mind introvert. As soon as the mind tastes the bliss of the Self it will know that there is no greater enjoyment. Being established therein, the greatest sorrow in the world cannot disturb its equanimity and peace. One practices that yoga (union with Self) through complete control of the senses and of the thought-lava which produces desires. This sets the stage for the practice of meditation and realisation of the Self.

IV. Meditation reveals Self in one and all

The mind in the state of meditation thinks of the Self. The intellect holds the mind single-pointedly upon the Self without allowing it to slip into any other thought. Whenever the mind wanders away the intellect brings it back through supervision and control. By maintaining single-pointed thought of the Self the mind becomes absolutely tranquil and quiet. The jnani then experiences the infinite bliss of Brahman. Thereafter, he sees the Self in all beings and all beings in the Self. He sees the supreme Being everywhere.

V. Can a restless mind be controlled?

After Krsna has completed his masterly exposition of how to discipline and control the mind Arjuna doubts if the mind can ever be brought under control. He wonders how the mind, a restless, turbulent, strong and obstinate entity, can be controlled. And even if forcefully brought under control, how can the mind continue to remain steady and calm? Krsna assures Arjuna that the intellect can control the mind through sustained practice and dispassion.

Arjuna feels further confusion as to what happens to a seeker and all his efforts if he fails to attain Self-realisation in his lifetime. Will he not be denied both the material and spiritual worlds and left with neither? Krsna answers this question in the last topic of the Chapter.

VI Yogi unites with Brahman

Krsna quells Arjuna's concern that seeker falling short of Realisation in his life will be lost. He assures Arjuna that no yogi seeking the truth will ever suffer either here or hereafter. Even if he fails to attain Self-realisation he will gain a heavenly bliss and reincarnate in a pure and wealthy home or in a family of wise yogi. The later will provide an ideal environment for him to continue his spiritual pursuit and reach the supreme goal of Realisation. Therefore, Krsna advises Arjuna to practise yoga with devotion and determination until he merges with the supreme Brahman.

In the last shloka Lord Krsna declares that the yogi to be superior to the other types of spiritual seekers who practice karma (action), bhakti (devotion) and jnana (knowledge). These three paths help a seeker reach the ultimate state of Brahman, the supreme Reality. However, practitioners find these paths so enchanting that they revel in their practice and lose sight of the goal. They find an end in the path instead of using it as a means to an end. The yogi signifies one whose interest and attention constantly rest on the Self. He uses the spiritual courses for the sole purpose of realising the Self.

Karma, bhakti and jnana undoubtedly help the seeker to cross over from the realm of the terrestrial to the transcendental, from mortality to immortality, from unreality to Reality. But they cannot take one all the way to Brahman. These practices purify the mind. The seeker thereafter applies the purified mind to meditation in order to realise the Self. Therefore, the seeker must not become attached to these courses. He should use them fully, but dispassionately, for crossing over to Brahman. The spiritual courses serve the seeker much the same way as a pole serves a pole-vaulter. No pole-vaulter can jump and cross the bar without the pole. Equally so no pole-vaulter can cross the bar with the pole. He uses it up to the point of climbing the height of the bar, discards the pole and then crosses over. The three types of spiritual practitioners mentioned in verse 46 hang on to the pole, that is, the practice, and therefore do not cross over to Brahman. Whereas, the yogi uses the spiritual practices with complete dispassion to reach the realm of Brahman.

The yogis tread the right path to Reality, but not all of them gain the absolute union with Brahman. Krsna extols the rare one who applies himself consistently until he fully merges with Brahman, the supreme God.

CHAPTER VII – JNANA VIDNANA

The seventh chapter contains thirty shlokas. It is entitled Jnana vidnana Yoga, the Yoga of Knowledge and Wisdom. In the entire chapter Krsna uses the first person singular pronoun `Me' to mean the supreme Reality, Brahman, God. He explains the immanence and transcendence of Brahman. The vicious do not know or seek God while the virtuous worship Him in four different ways. Those deluded from the vision of the supreme Reality seek and gain limited goals in this world. Whereas, those free from delusion strive for liberation and unite with Brahman.

This chapter can be summarised under six topics:

		shloka
I.	Two aspects of Brahman (God)	1 – 6
II.	How Brahman manifests Itself	7 – 11
III.	The Vicious do not know or seek Brahman	12 - 15
IV.	The four Virtuous types who worship God	16 – 19
V.	The Deluded seek and gain finite fruit	20 – 25
VI.	The Wise seek and gain Brahman	26 – 30

I. Two aspects of Brahman (God)

In the first three verses Krsna encourages spiritual seekers on the path of yoga. That He will give them the knowledge and wisdom essential to reach the ultimate state of Brahman. The vast majority of human beings give in to the enchantments of the material and sensual world. A rare one among the deluded masses emerges to strive for spiritual Enlightenment. And among those few who strive rarer still is the one who actually achieves spiritual Enlightenment.

The topic also indicates the omnipresent, omniscient and omnipotent nature of the supreme God, Brahman. Its lower and higher natures are manifest in this world. Transcending these two lies the unmanifest Reality.

II. How Brahman manifests Itself

In this portion Krsna declares Himself as Brahman manifesting as the quintessence of all sentient beings and insentient objects everywhere. Towards the end of the topic Krsna suggests subtly that one can locate Him in one's own ardent desire for the Supreme.

III. The Vicious do not know or seek Brahman

The three gunas (qualities) – Sattva (pure), Rajas (passionate) and Tama (indolent) – emanate from Brahman. But Brahman has no gunas. The gunas merely project an illusion on Brahman. The deluded, caught up in this illusion, have lost sight of the Reality. They do not seek Brahman. Instead they follow the demoniac ways of life.

IV. The four Virtuous types who worship God

Four kinds of virtuous people worship God. They are – the Artharthi (seeker of wealth), Arta (distressed), Jijnasu (seeker of knowledge) and Jnani (wise). The first three approach God only for gaining limited goals in the world. The Artharthi seeks God's blessings for enhancing his material wealth. The Arta resorts to prayer to find solace to his distressed mind. The Jijnasu explores spiritual fields to satisfy his intellectual curiosity. Distinct from these three types of worshippers, the Jnani stands out with his self-oblivious, non-utilitarian worship. He has no desires for any worldly reward. His worship is wholly directed to Self-realisation. To reach Brahman, Krsna admits his deep love and admiration for the Jnani.

V. The Deluded seek and gain finite fruit

The deluded, having lost sight of the transcendental Reality, entertain a variety of desires in this world. They seek and earn the fruits of their desires. The Reality, personified as Lord Krsna, functions in every being as Atman, Atman enlivens all activities, be they material or spiritual. Hence, Krsna states that He supports all actions of individuals pursuing their manifold desires.

VI. The Wise seek and gain Brahman

Speaking as Brahman, the pure Consciousness, Krsna declares He knows the past, present and future. While beings deluded by the pairs of opposites which bind this world, do not recognise the underlying Reality. But the wise, striving for liberation, free themselves from this delusion and reach the supreme Brahman. They realise the whole – the play of Brahman, the individual and the world.

CHAPTER VIII

This chapter entitled Aksarabrahma Yoga, The Yoga of Imperishable Brahman, comprises 28 shlokas. The preceding chapter spoke of the deluded seeking finite fruit while the wise seek Brahman. Herein, you find the detailed procedure to gain Brahman. How you can reach Brahman through concentrated yoga and single-pointed meditation. A path which leads you to the supreme Abode whence none returns. The chapter also mentions the 'path of return' which transports you to a realm of temporary bliss only to bring you back to the world of limitation.

This chapter has been discussed in four topics:

		Shloka
I.	Brahman and world – you gain what you pursue	1 – 7
II.	Through ever steadfast yoga and meditation you reach Brahman	8 – 14
III.	Brahman beyond the manifest and unmanifest world	15 – 22
IV	Paths of Return and Non-return	23 – 28

I. Brahman and world – you gain what you pursue

The topic covers the transcendental and immanent nature of Brahman. How the imperishable Brahman pervades this perishable world of things and beings. Whatever you pursue in this world you gain that alone. By pursuing the Self you realise the Self. Krsna advise mankind to surrender the mind and intellect to the Self while the body is engaged in action. Bringing you to the ultimate state of Brahman.

II. Through ever steadfast yoga and meditation you reach Brahman

Turn your attention from the world to the supreme Self within. Control your senses and mind through spiritual practices. Then let your intellect direct the controlled mind to single-pointed meditation upon the mantra Om. By continuous and sustained meditation you will reach the supreme abode of Brahman.

III. Brahman beyond the manifest and unmanifest world

Every individual being remains as vasanas, unmanifest desires, in deep sleep at night. His vasanas manifest at daybreak upon awaking. This cycle of dissolution and emanation continues until the individual completely exhausts his vasanas, reaching the state of Self-realisation. A similar phenomenon takes place at the macrocosmic level. The entire macrocosm manifests during the day of Lord Brahma. (Lord Brahma, a god of the Hindu Trinity, as distinguished from Brahman, the supreme Reality). Brahma's celestial day consists of 4.32 billion terrestrial years. Similarly, the macrocosm folds back into the unmanifest state during the right of Lord Brahma, covering an equal period as his day. Beyond this unmanifest lies the supreme Unmanifest, Brahman. Humans reach Brahman through spiritual disciplines culminating in single-pointed meditation.

IV. Paths of Return and Non-return

The topic covers the Path of Sun, Uttarayana and the Path of Moon, Daksinayana. The Path of Sun takes a seeker to Brahmaloka, the heaven of Lord Brahma whence he goes to the supreme Brahman. Whereas the Path of Moon takes the individual to Pitrloka only to enjoy heavenly pleasures and return to the cycle of birth and death in this world. The latter path provides only temporary pleasures of heaven for meritorious deeds done here. The former, however, takes the seeker to Brahman through heaven because of having mixed meritorious deeds with his spiritual practice. But the true yogi, through his determined effort on the `path of yoga of meditation', goes directly from here to the supreme abode of Brahman.

CHAPTER IX

The ninth chapter entitled "The Yoga of Royal Knowledge and Royal Secret", contains 34 shlokas. It explains how the Self, Aman pervades the entire world. The wise seek the Self while the ignorant, disregarding the Self, live a senseless life with vain hopes and aspirations. They go through the endless cycle of birth and death. Whatever one strives for, be it material or spiritual, one attains that particular goal. The ignorant gain their limited, mundane ends but never find fulfilment in their lives. Whereas, the wise pursue the ultimate goal of Realisation and find absolute peace and bliss in their own Self. Krsna, therefore, advises Arjuna and all mankind to seek the Self. To oblate all wordly activities to the Self until they reach spiritual Enlightenment.

Chapter IX has been discussed in four topics:

I.	Self pervades the world	1 – 10
II.	The Deluded disregard Self, the Wise glorify and seek Self	11 – 19
III.	One attains what one strives for..	20 – 28

I. Self pervades the world

Krsna begins the chapter by offering to impart the knowledge of Reality that pervades the world. How to achieve this supreme knowledge and free yourself from all agitations and sorrow. People lack this knowledge. Being unknown to all mankind. He refers to It as a supreme secret. Those who fail to pursue this knowledge remain bound to the world of mortality. Krsna appeals to seekers to free themselves from this manifest world and reach the unmanifest Reality. To discover the Divinity that supports the pluralistic phenomenon.

All living beings and inert things arise from the supreme Reality. They exist in the Reality. They ultimately merge into the Reality. The periods of manifestation of the world and its dissolution run into billions of years. The supreme Reality acts as the disinterested Self witnessing entire creation and dissolution.

II. The Deluded disregard Self, the Wise glorify and seek Self...

People remain ignorant of the Self within. They do not recognise the supreme Architect of the cosmic phenomenon. Deluded of the Self, they sink into the quagmire of perceptions, emotions and thoughts. These deluded people live a purposeless life of vain hopes and aspirations in this world.

The wise perceive the Self as the source of this world. They glorify and pursue the Self. Firm in their vows, deep in their devotion, they strive all their lives until they realise the Self. Krsna describes the Self's manifestation in the world as the one Divinity pervading the infinite range of beings and things everywhere.

III. One attains what one strives for

This topic describes the variety of human pursuits and how each gains its particular objective in life. These pursuits fall under three distinct types of activities in the world. The persons belonging to the first type of with self-centred interests in this world. They go about their activities merely fulfilling their ego and egocentric desires. Consequently they suffer from mental agitations and sorrow (papa). Others in the second category work unselfishly for higher and nobler goals in life. They serve and sacrifice for their chosen ideal. They gain the joys of heaven (punya).The third variety seek spiritual Enlightenment. They strive for liberation through their devout offerings to the supreme Being. They oblate all their actions, feelings and thoughts to the altar of Self-realisation. Such seekers become liberated from their mundane existence and gain the ultimate bliss of Realisation.

IV. Dedicated effort leads seekers even the unrighteous, to Self-realisation

A seeker's direction in the spiritual path matters more than his spiritual status. A righteous person may move towards worldly attractions and devolve spiritually. Whereas, an unrighteous person may take to the spiritual path and evolve. Therefore, in your spiritual life what really matters is not where you are but what direction you choose to take. The path of evolution or devolution. The topic concludes with a tone of encouragement even to the unrighteous that anyone can attain Enlightenment through devotion and dedicated effort towards the supreme Self.

Mihir Naniwadekar, *Advocate*

Writ Jurisdiction – Reassessment and Alternative Remedies

CIT vs. Chhabil Das Agarwal 357 ITR 357 (SC)

Introduction

Writ jurisdiction of the High Court is an extraordinary constitutional jurisdiction under Article 226 of the Constitution of India, 1950. Writ proceedings can be invoked to challenge actions which are wholly outside jurisdiction, which suffer from patent failure of natural justice, etc. However, writ remedies are discretionary in nature. One of the salutary rules of practice evolved is that writ remedy will not ordinarily be invoked when the petitioner has an alternative efficacious remedy available. The recent judgment of the Supreme Court in the case of *CIT vs. Chhabil Das Agarwal 357 ITR 257 (SC)* is an illustration of this rule of practice. This decision does not change the law on 'alternative remedy'; nor does it lay down the principle that the bar of 'alternative remedy' is an absolute bar: it is open to the High Courts in appropriate cases to allow writ remedies despite the availability of an alternative remedy.

Typically, in reassessment proceedings, if the assessee wishes to challenge the reopening of assessment, the procedure laid down by the Supreme Court in *GKN Driveshafts vs. Union of India 259 ITR 19 (SC) should be followed.* The assessee is required to seek reasons and file objections. The Assessing Officer is required to pass a speaking order on objections; and only after 4 weeks of receipt of order on objections can the reassessment orders be passed. This 4-week period enables the assessee to challenge the reopening proceedings in writ petition. If the assessee does not so file a writ, and an assessment order is passed, then subsequently, the assessee may be relegated to appellate proceedings. However, if the Assessing Officer passes a reassessment order without first disposing of the objections, or if the Assessing Officer does not wait for a 4-week period thereafter, then even the assessment order can be challenged in a writ petition, as being wholly without jurisdiction. These principles emerge from a reading of cases such as *GKN Driveshafts, Vishwanath Engineers vs. ACIT 354 ITR 211 (Guj.), Asian Paints vs. DCIT 296 ITR 90 (Bom.), Allana Cold Storage 287 ITR 1 (Bom.), etc.*

The argument is sometimes raised by the Department that once an assessment order is passed (even without compliance with the above judgments), then a Court should not interfere in writ petition but should direct the petitioner/assessee to approach the appellate authority. Such an argument, if successful, will definitely lead to great hardship and delays in securing justice. Therefore, Courts have not been inclined to entertain these arguments based on alternative remedy, especially when the assessment order is passed without compliance with mandatory procedures/ safeguards by the assessing officers. For example, in Vishwanath Engineers, the Assessing Officer passed a reassessment order blatantly disregarding the decision of the Supreme Court in GKN Driveshafts, without disposing of the objections to reopening. In writ petition challenging the reassessment, the Department argued that the Petitioner ought to be relegated to the alternative appellate remedy. The Hon'ble High Court rejected this argument, observing, "… by no stretch of imagination can we accept the Revenue's contention that the Assessing Officer having framed the assessment ignoring the Supreme Court's directives, now the assessee must appear before the appellate authority. Firstly, mere finalisation of the assessment does not take away the High Court's jurisdiction under Article 226 of the Constitution to examine the very validity of reopening. Secondly, the Assessing Officer, having ignored the Supreme Court's directives of disposing of the objections before finalising the assessment at least cannot hope to capitalise on his own wrong that the assessee now must go in appeal because rightly or wrongly, he having framed the assessment, the only remedy available to the assessee would be to file an appeal. This would amount to allowing the Assessing Officer to take advantage of his own wrong."

Certain observations of the Supreme Court in Chhabil Das Agarwal's case seem to state, at first glance and contrary to the above principles, that whenever an assessment order is passed, writ petitions cannot be entertained. The Hon'ble Court stated, "… the Act provides complete machinery for the assessment/ reassessment of tax, imposition of penalty and for obtaining relief… the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had an adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals)…" [ITR pages 377-378].

It is respectfully submitted that these observations are required to be understood in the backdrop of the facts before the Supreme Court. If so understood, it is clear that the Supreme Court decision has not changed the position of law. 'Alternative remedy' is a discretionary bar: not an absolute rule to deny relief. Seen in this backdrop, it remains open to challenge even reassessment orders notwithstanding the availability of an alternative appellate remedy, particularly when the same are passed without heeding the principles/ directives laid down in GKN Driveshafts, Asian Paints, etc.

Facts and decision of the Supreme Court

The assessee-respondent was a Sikkim based non-Sikkimese. He filed his first return of income for the assessment year 1997-98. During the assessment for that year, it was discovered that he had a net profit of ` 5,73,832/- during the assessment year 1996-97. However, no return was filed for the assessment year 1996-97. Hence, proceedings u/s. 147 of the Act were initiated against the assessee for the said assessment year. Accordingly, notice was issued u/s. 148 of the Act. Further, it was found out by the Revenue authorities that as on 31st March, 1996, the assessee had brought forward closing capital of ` 1,73,90,397/- including the aforesaid net profit during the assessment year 1996-97. This too remained unexplained as the return of income for the assessment year 1995-96 was also not filed by the assessee. Therefore, another notice u/s. 148 was issued to the assessee for the assessment for the assessment year 1995-96. The assessee did not comply with these notices u/s. 148 of the Act. A further letter was issued to the assessee, reminding the assessee to file his returns for the relevant assessment years. It was clearly mentioned that failure to do so would lead to an ex parte assessment u/s. 144 of the Act. Thereafter, the assessee filed certain written submissions, and notice u/s. 142(1) of the Act was issued along with final show cause fixing compliance for hearing. The assessee sought an adjournment which was not granted. The assessments were completed ex parte u/s. 144 of the Act raising certain demands for the assessment years 1995-96 and 1996-97.

The assessee approached the High Court in its writ jurisdiction challenging the notices issued u/s. 148 and the subsequent assessment orders. The issue raised before the writ court was whether the income of the non-Sikkimese residing in Sikkim was taxable u/s. of the Act. This issue was referred to a Committee for its consideration; and the writ petition was disposed of as withdrawn with the direction to maintain status quo in the matter till the declaration of final decision by the Committee. In the meantime, s. 10(26AAA) of the Act was inserted by section 4 of the Finance Act, 2008. Under this, certain income accruing or arising to a Sikkimese individual was exempted from tax. Thereafter the Central Board of Direct Taxes issued Instruction No. 8, dated 26th July, 2008 in respect of tax liability of the income accruing or arising to a non-Sikkimese individual residing in Sikkim. In the light of the aforesaid amendment and instruction, the writ court by order dated 15th July, 2009, reiterated the earlier order dated 21st July, 2005 and granted liberty to the parties to approach the writ court or any other competent authority/forum for redressal of their grievances. It was in this backdrop that the Assessing Officer passed assessment orders for A.Ys. 1995-96 and 1996-97; which were challenged in writ proceedings.

Thus, it appears that on receiving the reassessment notices, the assessee did not comply with his obligations (such as filing a return in response to the notice). Further, from the facts as recorded in the judgment, it appears that the notice u/s. 148 and the assessment order were challenged before the High Court under Article 226 of the Constitution but the issue raised before the High Court was one on merits: whether the income of a non-Sikkimese residing in Sikkim is chargeable under the Act. The judgment of the High Court (reported in the same ITR) contains the main submissions of the parties; and the challenge raised before the High Court was on the merits/chargeability; and there were no jurisdictional objections based on the jurisdictional conditions of s. 148 as such. The thrust of the assessee's case was based on CBDT Instruction No. 8/2008 read with s. 10(26AAA) of the Act. It is noteworthy that the assessee does not appear to have at all raised any jurisdictional objections to the reopening of assessment (based on the recorded reasons for reopening) in accordance with the procedure laid down in GKN Driveshafts. Despite this, the High Court allowed the petition, and the Department sought to appeal to the Supreme Court.

The only question which arose before the Supreme Court was whether the High Court was justified in interfering with the assessment order in writ jurisdiction, when equally efficacious remedies were available to the assessee by way of statutory appeal. The Supreme Court began its analysis by noticing the settled law that "non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy." The Court then examined the leading cases on the point, including the judgment of the Constitution Bench of the Supreme Court in the case of *State of UP vs. Mohammed Nooh AIR 1958 SC 86*. After examining the relevant precedents, the Court held that when a statutory forum is created by law for the redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. In the facts before the Supreme Court, it was held that the assessee had not described the available alternative remedy as ineffectual and non-efficacious, nor had the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in writ proceedings. In view of this, the appeal was allowed, and it was held in the backdrop of the facts that the writ court ought not to have entertained the writ petition.

Analysis and conclusion

Seen in the backdrop of the facts, it is clear that the assessee had challenged the assessment order in writ jurisdiction; but the grounds taken by the assessee all pertained to the merits of the assessment. Reopening of the assessment was not challenged on the basis of any jurisdictional objections. In fact, the assessee itself does not appear to have followed the procedure laid down in GKN Driveshafts. It was in these circumstances that the Supreme Court held that the assessment order ought not to be interfered with in writ proceedings; and the assessee ought to be relegated to its alternative remedy. It is respectfully submitted that this judgment of the Supreme Court would not at all apply so as to bar writ remedies against assessment orders when the assessment order suffers from a fundamental defect, has been passed without following the procedure of GKN Driveshafts, or is contrary to the directives laid down in Asian Paints. The ratio / principle laid down by the Supreme Court would not at all cover these situations.

It is interesting to note that in at least two cases – both decided after Chhabil Das and both in the context of reopening of assessment – the Bombay High Court has confirmed that 'alternative remedy' is only a discretionary rule of practice, and not an absolute bar to writ jurisdiction. In *Aroni Commercials vs. DCIT (WP 137/2014, decided on 11th February, 2014)*, the Hon'ble Court quashed an assessment order which was passed without waiting for the 4-week period after disposal of the objections. The Court quashed the reopening proceedings and the assessment order, and did not relegate the assessee to the alternative appellate remedy. The Court held that undue haste on part of the assessing authorities to pass an assessment order cannot result in deprivation of the Petitioner's writ remedies. In *Asian Electronics vs. ACIT (WP 350/2012, decided on 14th March, 2014)* the Hon'ble Court found it appropriate on the facts to relegate the assessee-Petitioner to the appellate remedy. In this case, it appears that the assessment order was passed after the 4-week period; and the Assessing Officer had thus followed the relevant guidelines of Asian Paints. Although the Petitioner was relegated to the appellate remedy, the Court specifically held, "We do not suggest that this Court cannot interfere in exercise of the jurisdiction under Article 226 of the Constitution in any matter where the assessment order has been passed irrespective of the facts and circumstances of this case."

Thus, the judgment of the Supreme Court in Chhabil Das's case does not lay down any absolute rule that writ remedies can never be resorted to once an assessment order has been passed. The issue of maintainability of writs remains one within the discretion of the High Court in the exercise of its jurisdiction under Article 226 of the Constitution, to be decided on the facts and circumstances of each case. Chhabil Das's case confirms that while ordinarily a Court will refuse to entertain writ petitions if an efficacious alternative remedy is available, it is still open to the High Courts to intervene and grant relief if the Petitioner makes out an exceptional case warranting such relief. It is respectfully submitted that such an exceptional case will be made out if assessment orders are passed in reopening matters without following the principles of GKN Driveshafts, Asian Paints etc.

Nikhil Ranjan, *Advocate*

Deduction at Source – Compensation under Motor Vehicles Act – Deduction from Salary – S. 192

S. 194C : Sales Contract vs. Works Contract

In *CIT vs. Silver Oak Laboratories P. Ltd. [Special Leave to Appeal (Civil) No. 18012/2009* decided on 17th August 2010], the Supreme Court was dealing with the applicability of S.194C of the Income-tax Act, 1961 ("the Act") as amended by the Finance (No. 2) Act, 2009 ("the Finance Act"). As per the section any person responsible for paying any sum to any resident (i.e. the contractor) for carrying out any "work" in pursuance to a contract between the contractor and the specified person is required to deduct a certain percentage of the said sum at the time of credit of such sum to the account of the contractor or at the time of payment in cash or by cheque or draft, etc., as income-tax.

By the Finance Act, the section was substituted w.e.f. 1st October 2009. The new definition of "work" is enlarged to include "manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer". However, it does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer.

Before the High Court

In *CIT vs. Silver Oak Laboratories P. Ltd. (ITA No. 1259/2007 decided on 11 November 2008)*, the question was whether the assessee-company was required to deduct income-tax at source u/s. 194C. The High Court found that the contracts were in the nature of sale and not in the nature of works contracts. And, hence, the appeal was covered by its own decision in the matter of *CIT vs. Reebok India Company [306 ITR 124].*

In Reebok India's case, the assessee was marketing footwear, apparel accessories and sport goods. The assessee had entered into agreements with various manufacturers who manufactured these items according to the specifications, drawings and designs provided by the former. The question arose whether the payments made by the assessee to the manufacturers attracted TDS u/s. 194C. According to the AO, the arrangement was a works contract and therefore, it fell within the purview of S. 194C. However, according to the assessee it was a sales contract.

Both the CIT(A) and the Tribunal, after reviewing the terms and conditions of the agreement between the assessee and the manufacturers, came to the conclusion that it was a sales contract. The Tribunal also considered the CBDT Circular No. 681 of 8 March 1994, according to which the provisions of S. 194C would not cover the contract for sale of goods. The High Court agreed with the findings of the lower appellate authorities and dismissed the appeal of the revenue.

Before the Supreme Court

After examining the terms and conditions, the invoices, purchase orders and the challans indicating payment of excise duty, the Supreme Court was of the view that there was no material on record to indicate that the transaction in question was a "contract for carrying out works". And, therefore, S. 194C was not attracted.

The Court's attention was also invited to the amendment in the section brought by the Finance Act. The Court clarified that the definition of the word "work" will not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person other than such customer. However, this amendment had no bearing on the present case as it pertained to A.Y. 2003-04. Accordingly, the SLP was dismissed.

Conclusion

After 1st October, 2009, a contract for manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer would be works contract requiring TDS as per S. 194C. However, a similar contract fulfilled using material purchased from a person other than such customer would still remain a contract for sale of goods under the amended provisions, and would not come within the ambit of s. 194C.

Vimal Kanwar vs. Kishore Dan (2013) 216 Taxmann 300 (SC) / 354 ITR 0095

Presumption as to TDS from Salary while Calculating Compensation

In Vimal Kanwar's case [(2013) 35 taxman.com 545 (SC)] the Supreme Court was primarily concerned with the calculation of compensation payable to the relatives of the victim killed in an accident under the Motor Vehicles Act, 1988. An issue incidental to the calculation of compensation was the amount that would be deductible from the victim's last drawn salary. The High Court noticed that the Motor Accident Claims Tribunal had not deducted the income-tax payable from the salary. The Court made a notional deduction of income-tax from the salary. This despite none of the respondents bringing to the notice of the Court that the income-tax payable was not deducted at source by the employer State Government. Neither the Tribunal nor the High Court on perusal of the last pay certificate noticed that the income-tax on the estimated income of the employee was not deducted from the salary.

Before the Supreme Court

One of the many grievances of the appellants before the Supreme Court was that in the absence of any evidence, the Court cannot *suo motu* deduct any amount towards income-tax from the actual salary of the victim. An issue before the Apex Court was "whether the income-tax is liable to be deducted for determination of compensation under the Motor Vehicles Act?"

The court followed its own judgment in *Smt. Sarla Verma vs. Delhi Transport Corporation [(2009) 6 SCC 121]*, where it had held that generally the actual income of the deceased less income-tax should be the starting point for calculating the compensation.

The Court further held that, in case the income of the victim is only from 'salary', the presumption would be that the employer under S. 192(1) of the Income-tax Act, 1961, has deducted the tax at source from the employee's salary. In case if any objection is raised by any party, the objector is required to prove by producing evidence such as the last pay certificate to suggest that the employer failed to deduct the tax at source from the salary of the employee.

In a case, where the victim is not a salaried person i.e. his income is from sources other than salary, and the annual income falls within taxable range, in such cases, if any objection as to deduction of tax is made by a party then the claimant is required to prove that the victim has already paid income-tax and no further tax has to be deducted from the income.

Conclusion

The Court concluded that the High Court was wrong in deducting income-tax from the salary of the deceased for calculating the compensation. As per law, the presumption will be that the employer at the time of payment of salary deducted income-tax on the estimated income of the deceased employee from the salary.

Rahul Hakani, *Advocate*

Charge of Income-tax – Accrual – Res Judicator & Appeal – Supreme Court – Additional Evidence – S. 261

1. CIT vs. Excel Industries Ltd. (2013) 262 CTR 261 (SC)

I. Introduction

The Apex Court in *CIT vs. Excel Industries Ltd. (2013) 358 ITR 295* has held that income arising on obtaining benefits under Advance licensing/ Duty Entitlement Pass Book (DEPB) accrues in the year in which imports are made by utilising the Advance Licence/DEPB and not in the year in which exports are made and Advance Licence/DEPB is obtained. For reaching the said conclusion, the Apex Court has succinctly explained and reiterated the interplay between taxation of Real Income and Accrual of Real Income as well as followed the principle of consistency. For deciding the issue following important principles of Accrual of Income were considered by the Apex Court:

i) If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialise.

[CIT vs. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 (SC)]

ii) Income accrues when there arises a corresponding liability of the other party from whom the income becomes due to pay that amount.

[Morvi Industries Ltd. vs. CIT (Central), [1971] 82 ITR 835 (SC)]

iii) The assessee is obliged to pay tax when the profit became actually due and that income could not be said to have accrued when it is based on a mere claim not backed by any legal or contractual right to receive the amount at a subsequent date.

[Godhra Electricity Co. Ltd. vs. CIT, [1997] 225 ITR 746/91 Taxmann 351 (SC)]

iv) Real accrual of income and not a hypothetical accrual of income ought to be taken into consideration.

[CIT vs. Birla Gwalior (P.) Ltd. [1973] 89 ITR 266 (SC)]

v) One has to look at things from a practical point of view. What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner and dovetailing of these factors together but once the accrual takes place, on the conduct of the parties subsequent to the year of closing an income which has accrued cannot be made "no income".

[State Bank of Travancore vs. CIT [1986] 158 ITR 102/24 Taxmann 337 (SC)]

II. Facts of the case

The assessee maintained its accounts on mercantile basis. In its return (revised on 31st March, 2003) the assessee claimed a deduction of ` 12,57,525/- under the head advance licence benefit receivable. The assessee also claimed a deduction in respect of duty entitlement pass book benefit receivable amounting to ` 4,46,46,976/-. These benefits related to entitlement to import duty free raw material under the relevant import and export policy by way of reduction from raw material consumption. According to the assessee, the amounts were excluded from its total income since they could not be said to have accrued until imports were made and the raw material consumed.

The Assessing Officer did not accept the assessee's claim on the ground that the taxability of such benefits is covered by section 28(iv) of the Income-tax Act, 1961 which provides that the value of any benefit or perquisite, whether convertible into money or not, arising from a business or a profession is income.

The assessee took up the matter in appeal and by an order dated 15th September, 2008 the Commissioner of Income Tax (Appeals) referred to an earlier appellate order in the case of the assessee relevant to the assessment years 1999-2000 and 2000-01 and following the conclusion arrived at in those assessment years, the appeal was allowed and it was held that the advance licence benefit receivable amounting to ` 12,57,525/- and duty entitlement pass book benefit of ` 4,46,46,976/- ought not to be taxed in this year.

Feeling aggrieved, the Revenue preferred a further appeal before the Income Tax Appellate Tribunal. The Tribunal held that the issues were covered in favour of the assessee by earlier orders of the Tribunal in the assessee's own cases. It had been held by the Tribunal in the earlier cases that income does not accrue until the imports are made and raw materials are consumed by the assessee. As regards the accounting year under consideration, it was found that there was no dispute that it was only in the subsequent year that the imports were made and the raw materials consumed by the assessee.

The Revenue then preferred an appeal under section 260-A of the Act in respect of the following substantial question of law:

"Whether on facts and in circumstances of the case and in law ITAT is justified in law in holding by following its decision in the case of *Jamshri Ranjitsinghji Spg. & Wvg. Mills Ltd. vs. Inspecting Asstt. Commissioner [1961] 41 ITD 142 (Bom)*, that advance licence benefit and DEPB benefits are taxable in the year in which these are actually utilised by the assessee and not in the year of receipts."

The High Court declined to admit the appeal filed by the Revenue under section 260-A of the Act.

III. Decision of the Ssupreme Court

The question for consideration before the Apex Court 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 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. The Apex Court decided the said issue as under:

i) Principle of accrual

The Apex Court held that Income tax cannot be levied on hypothetical income. That income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee. Even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee u/s. 28(iv).

ii) Principle of consistency

The Apex Court held that a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee.

It appeared from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it.

iii) Tax neutral

The Apex Court held that the real question concerning them was the year in which the assessee is required to pay tax. There was 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 was not as if the Revenue had been deprived of any tax. Therefore, the dispute raised by the Revenue was entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with the 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.

iv) The Apex Court required the Revenue to implement its litigation policy a little more practically and a little more seriously.

IV. Conclusion

The above decision can be useful where deductions u/s. 80-IB etc. on export incentives are not allowed, by contending that DEPB may have not accrued at all in the year of claim. Further, by reiterating the theory of Real Income, this decision will be useful in cases where additions are made on notional basis on surmises and conjectures such as in real estate transactions, etc. without any incriminating materials. Recently it is observed that by adopting a different view, principles of consistency are not followed by the Revenue authorities such as by treating capital gains as Business Income or denial of exemptions to trusts who are enjoying exemption for several years or denial of deductions to various industrial undertaking in subsequent years though deduction is allowed in initial years, etc. without there being any change in facts or existence of new facts. The decision of Apex Court by reiterating the principles of consistency and reprimanding the revenue for not observing the same has sent a strong signal towards cutting down on unnecessary and futile tax litigation. Further, this decision will also be useful where certain expenses are claimed though not accrued or wrongly claimed in subsequent years or certain income is wrongly offered in subsequent years if tax rates are same in the relevant assessment years as such transactions are tax neutral.

Tek Ram (Dead) through LRS. vs. CIT (2013) 262 CTR 118 (SC)

I. Introduction

The Apex Court in the case of *Tek Ram (Dead) through LRS vs. CIT (2013) 262 CTR 118 (SC)* accepted the additional evidence produced before it and remanded the matter back to the High Court for fresh disposal. Section 261 of the Income-tax, Act, 1961 deals with appeals to the Supreme Court from the judgment of the High Court u/s. 260A. As per section 262 of the Income-ax Act, 1961 the provisions of Code of Civil Procedure, 1908 applies in the case of appeals covered u/s. 261. Order 41 Rule 27 of the Code deals with production of additional evidence in the Appellate Court. As per the said Rule the parties in appeal shall be entitled to produce additional evidence if:-

a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

b) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

c) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

II. Facts of the case

1. An appeal was filed by the assessee to the Apex Court against the judgment and order passed by the High Court of Punjab and Haryana at Chandigarh in I.T.A. No. 109 of 2005, dated 23-11-2010.

2. While issuing notice to the respondent, the Supreme Court by its order dated 3-2-2012, had passed the following order:

   "....... Issue notice as to why the matter should not be sent back to the High Court as, today, learned counsel for the petitioner has placed before us number of documents which earlier were not placed before the High Court."

III. Findings of the Supreme Court

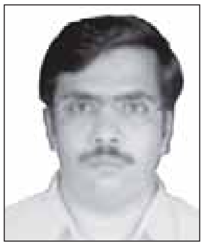
1. The documents, which the assessee had filed before the Apex Court were of some relevance and those documents should be looked into by the High Court before it comes to a conclusion whether the appeal requires to be allowed or to be rejected.

2. Hence, taking that view of the matter, the Supreme Court set aside the order passed by the High Court and remanded the matter back to the High Court for fresh disposal of I.T.A. No.109 of 2005, after accepting the documents that were/may be filed by the appellants.

3. All the contentions of both the parties were left open.

IV. Conclusion

As per section 112 of the Code nothing contained in the code shall be deemed to affect the powers of the Supreme Court under Article 136 or any other provision of the Constitution of India. As per Article 142 of the Constitution of India the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Hence, the Supreme Court may admit additional evidence in the interest of justice even if the conditions under order 41 Rule 27 are not strictly complied with. However, grounds of mere in advertence or lack of proper legal advice may not be sufficient by themselves for admission of additional evidence at appellate stage as held by the Supreme Court in *Haryana State Industrial Development Corporation vs. M/s. Cork Manufacturing Co., (2007) 8 SCC 120.*



Sameer Dalal, *Advocate*

Free Trade Zone – Computation of Profits – S. 10A

Himatsingka Seide Ltd. vs. CIT – (2014) 100 DTR (SC) 37

Facts

The Assessee was a 100 per cent Export Oriented Industrial Unit in terms of the provisions of section 10B of the Income-tax Act, 1961 ('the Act'). The operations of the assessee's undertaking were commenced in the assessment year 1988-89. The assessee however, did not claim the benefits under section 10B of the Act in assessment years 1988-89, 1989-90 and 1990-91. The assessee started claiming the benefits under section 10B of the Act for a consecutive period of 5 (five) years starting from assessment year 1992-93. For the assessment year 1994-95, the assessee had derived business income from other sources beyond the profits and gains of the Export Oriented Industrial Unit. The assessee filed return for the assessment year 1994-95, in its computation of total income after making disallowance of various expenses arrived at a figure of ` 11,17,87,315/- and claimed the entire amount as exempt under section 10B of the Act. The income from other source was worked out at ` 41,09,497/- against this income, it adjusted unabsorbed depreciation available to the assessee in assessment year 1988-89 which was carried forward to the current year. Accordingly, the income of the assessee was reduced for assessment purposes at ` 'Nil'.

The Assessing Officer, in the assessment order passed on 17-3-1995 accepted the claim of the assessee and assessed the total income at ` 'Nil'. The Commissioner of Income Tax ('the CIT') exercised its power under section 263 of the Act considered the action of the Assessing Officer adjusting the brought forward unabsorbed depreciation against the income from other sources of the assessee to be wrong and bad in law and causing loss/prejudice to the Revenue. Accordingly, the CIT *vide* his order dated: 25-3-1996 directed that the unabsorbed depreciation and unabsorbed investment allowance should be adjusted against the income of the export oriented business undertaking while determining exempted income under section 10B of the Act and the total income of the assessee should accordingly be recomputed afresh.

Aggrieved by the order of the CIT, the assessee preferred an appeal before the Tribunal. The Tribunal allowed the appeal filed by the assessee holding that the assessee was right in adjusting the brought forward unabsorbed depreciation against the income from other sources and not adjusting the same against the profit and gains of the Export Oriented Industrial Unit.

Before the High Court

CIT vs. Himatasingka Seide Ltd. – [(2006) 286 ITR 255 (Karn.)]

Aggrieved by the order of the Tribunal, a Reference Application was filed by the Revenue. The Tribunal accepting the Reference Application framed a question of law as below for the consideration of the Hon'ble High Court:

"Whether, on the facts and in the circumstances of the case, the Income- tax Appellate Tribunal is right in law in holding that the assessment order passed by the Assessing Officer allowing the claim of the assessee for adjustment of the unabsorbed depreciation against the income from other sources was in order and hence cannot be considered to be erroneous or prejudicial to the interests of revenue and in cancelling the order under section 263?"

Before the High Court the Revenue authorities argued that:

(a) the unabsorbed depreciation ought to have been taken note of for the purpose of exemption under section 10B of the Act;

(b) the assessee cleverly has chosen to show 'nil' income for the purpose of tax by way of novel method unknown under the Income-tax Law.

The assessee on the other hand argued that:

(a) section 10B of the Act provides for total exemption and the method adopted by the assessee to compute its income was on commercial basis;

(b) the assessee also relied upon the decision of *CIT vs. HMT Ltd. – [(1993) 199 ITR 235 (Karn.)]* wherein it was held by the High Court that computation of profits and gains of a unit may be made without deducting depreciation and investment allowance.

The High Court reversed the order of the Tribunal and held that to arrive at a profit and gain, one has to necessarily take into consideration, the total income in terms of the Act and one has to take into consideration, various additions and deletions in terms of the Act. Section 10B of the Act cannot be read in isolation of other provisions of the Act. Section 10B is only an exemption provision, exemption cannot be fanciful and there has to be some rationale with other provisions of the Act. Therefore, after a combined reading of the definition of exemption, total income-tax liability, deductibility, etc., the High Court concluded that calculation as far as possible is to be in terms of the Act. The High Court further held that it may be true that even after taking into consideration, the unabsorbed depreciation, the assessee may get exemption, nonetheless assessee cannot take only a portion of depreciation just to suit his income for the purpose of nil tax liability and adjust the balance of unabsorbed depreciation against other business income to show nil tax liability.

Further, the interpretation of any provision of the statute has to be meaningful and acceptable and it cannot be against the intention of the Legislature. The Legislature never intended that the entire income of the assessee should be exempted by taking advantage of section 10B of the Act. The intention of the Legislature is only to provide 100 per cent exemption for export income and not for other income. Thus, according to the High Court the computation of taxable income cannot be at the whims and fancies of an assessee for exemption of tax, it has to be in accordance with the provisions of the Act. The High Court noted that the assessee, by providing depreciation contrary to section 32, had taken exemption from payment of tax even for other business income which is not permissible under the Act. Thus, the High Court concluded that the brought forward depreciation has to be adjusted against the profits of the Export Oriented Industrial Unit before computing the exemption allowable under section 10B of the Act.

Before the Supreme Court

The Apex Court dismissed the civil appeal filed by the assessee holding the same to be devoid of merits for consideration of the Court. The order of the Apex Court confirmed the order of the High Court wherein the High Court held that unabsorbed depreciation of the Export Oriented Industrial Unit brought forward from earlier years has to be set off against the profits of the current year before computing exempt profits under section 10B of the Act.

Conclusion

The Apex Court has now concluded that brought forward unabsorbed depreciation has to be adjusted against the profits of the 100 per cent Export Oriented Industrial Unit before computing the exemption allowable under section 10B of the Act. However, this case relates to assessment year 1994-95 and the brought forward depreciation related to A.Y. 1988-89. Section 32(2) of the Act, was amended by the Finance Act, 2001 w.e.f. 1-4-2002, and it provided that brought forward unabsorbed depreciation should be added to the current year depreciation allowance and be deemed to be part of that allowance. The issue now arises as to, whether as per amended section 32(2), is it possible to set-off brought forward unabsorbed depreciation in respect of eligible export business against income from other sources, instead of export business income.

Further, the Delhi Tribunal in case of, *Aithent Technologies (P.) Ltd. vs. ITO - [(2012) 134 ITD 521 (Del.)]* where the assessee claimed deduction of profit from one of its export oriented units under section 10B of the Act and carried forward the loss of other units, following the decision in the case of, *Hindustan Unilever Ltd. vs. Dy. CIT – [(2010) 325 ITR 102 (Bom.)]* restore the matter to the file of the assessing officer to recompute the deduction under section 10B of the Act in respect of profits of the eligible unit while the loss sustained by the other units was held to be setoff against the normal business income. The Tribunal also referred to the decision of the High Court in the case of, Himatsingka Seide Ltd. (supra) and distinguished the same by observing that, the High Court in the above case was concerned with determining the business profit and in this context the High Court held that business profits have to be first determined based on sections 32 to 43D of the Act as provided under section 29 and it is with reference to the profits so determined, deduction eligible under section 10B(4) of the Act has to be computed. In the case before it the Tribunal noted that the issue related to deduction under section 10B(4) of the Act in respect of each unit separately without setting of losses of other units thus, the decision of Himatsingka Seide Ltd. (supra) was not applicable in case before it.

Neelam Jadhav, *Advocate*

Incentive Bonus of a Development Officer is Salary Income u/s. 15 & Provisions of Section 234D could not be applied as assessment was completed prior to 1-6-2003

T. K. Ginarajan vs. CIT [2013] 356 ITR 618 (SC)

Introduction

1. The Sections 15, 16 and 17 of the Income tax Act talks about the important source of Income of each and every employee or person or assessee who earns salary income. As regards perquisites are concerned under Income-tax Act, that four places where the definition specifically includes perquisites, which are listed under:

(i) Section 2(24)(iii) dealing with the value of perquisites or profits in lieu of salary taxable under sections 17(2) and 17(3) of the Act.

(ii) Section 2(24)(iv) any benefit or perquisite, whether convertible into money or not, obtained from a company by a director or one having substantial interest in company, etc.

(iii) Section 2(24)(iva), introduced by the Finance Act, 1980 with effect from April 1, 1980, on the value of perquisite or benefit, whether convertible into money or not, obtained by a 'representative assessee' as per Section 160(1)(iii)/(iv) of the Act.

(iv) Section 2(24)(va) on the value of any benefit or perquisite taxable under section 28(iv) of the Act.

2. As per the Income-tax Act Section 15 provides the definition of the salaries that

(a) Any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not.

(b) Any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him.

(c) Any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to Income-tax for any earlier previous year.

3. Section 16 of the Act, deals with deduction available to the employee or assessee who can take benefit of that deduction while filing return of income.

4. Section 17 of the Act talks about the differences and relation between the salary, perquisite and profit in lieu of salary.

5. Section 10(13A) and section 10(14) talk about the special allowance towards payment of house rent and expenses incurred in performance of official duties.

Issue

6. Perquisites allowance or incentive bonus received by an employee from employer is allowable for permissible deduction.

Facts

7. The assessee is employed under the Government Undertaking Company which is known as Life Insurance Corporation of India (LIC of India) as a Development Officer. As a Development Officer he was entitled for an incentive bonus during the relevant year. He received the same as Incentive bonus from the LIC of India prior to 1-4-1989. The assessee claimed deduction of 40% of the incentive bonus paid to him in his Return of Income-Tax for the various years prior to 1-4-1989 he had incurred expenditure to the extent of 40% of the incentive bonus for canvassing business. LIC of India had requested the Central Board of Direct Taxes for a clarification on deduction explaining that the Development Officers had actually incurred some expenditure in the performance of their duty, to the tune of at least 40% of the incentive bonus paid to them. However, the CBDT affirmed that the incentive bonus paid by the LIC to the Development Officers formed part of their income towards salary. The Incentive bonus paid by the LIC of India to the Development Officer for duties of office can be exempted from the tax if LIC of India made payment against expenses incurred by the assessee by way of reimbursement of expenses.

8. The LIC of India has issued a clarification w.e.f. 1-4-1989 that the Development Officers would be entitled to claim reimbursement of expenses of 30% of the incentive bonus granted to them.

9. In this case the main issue was related to the period of payment of incentive bonus to the Development Officer i.e. the incentive bonus paid to Development Officer was for the period prior to 1-4-1989 for various years.

10. The assessee claimed as expenses in respect of the incentive bonus received. During the assessment proceedings the A.O. disallowed such claim on the ground that there was a clear employee-employer relationship between the assessee and LIC. The Commissioner (Appeals) allowed the assessee's claim.

11. The Hon'ble ITAT held that such expenses beyond standard deductions were allowable and that incentive bonus could not fall within the definition of salary. The Tribunal relied on the definition of 'annual remuneration' was given in Schedule III of the LIC Act and amount received was not 'addition to salary' as contemplated under Section 15 and, therefore, only the excess of incentive bonus over the expenditure was to be taken. The Hon'ble ITAT held that claim of 40% of the expenses from the incentive bonus was allowable.

Before the High Court

The substantial question of Law relates to:

i. Whether incentive bonus is salary? and

ii. Whether the assessee is entitled to claim any deduction over and above standard deduction available in respect of salary Income?

12. The Revenue had put the importance of Sections 15, 16 and 17 before the Hon'ble High Court. And also contended on the observation of the ITAT, that ITAT had relied on the definition of 'annual remuneration' which is given in Schedule III to the LIC Act, but in reality, it is in relation to a regulation which is not statutory in nature. The definition of 'Annual Remuneration' as given in Schedule III to the Life Insurance Act does not include incentive bonus and additional conveyance allowance. The definition reads as follows :

> *'"Annual Remuneration" means the basic pay, special pay, personal pay, dearness allowance, and all other allowances and non-profit sharing*

> *or ex gratia bonus due or paid to a Development Officer during the appraisal year and includes the expenses payable or reimbursed to him or incurred by the Corporation during that year in respect of travelling, residential telephone and insurance premium and taxes on motor vehicles, but does not include incentive bonus and additional conveyance allowance paid to him."'*

Again, clause (j) of Schedule III defines 'gross yearly salary' is as follows :

> *"The aggregate of the monthly basic pay, special pay, personal pay, dearness allowance and all other allowances which may be allowed to a Development Officer for any succeeding year if the terms of his appointment are fulfilled, and shall include any non-profit sharing or ex gratia bonus payable in that year and an estimate of the expenses that may be allowed during that year in respect of travelling, residential telephone, an insurance premium and taxes on motor vehicles, but shall not include any incentive bonus or additional conveyance allowance that may accrue to him."*

13. Incentive bonus and additional conveyance allowance are not included or defined in the definition of the term 'gross yearly salary'. Thus, the Life Insurance Act has treated incentive bonus and additional conveyance allowance as not forming part of the either remuneration or gross salary and not forming part of the components of cost in the computation of cost for the performance of the Development Officer."

14. The Hon'ble High Court by referring the various decisions concluded that incentive bonus earned by the Development Officer from the LIC of India is nothing but a salary and no deduction over and above the standard deduction provided u/s. 16 is permissible under the Income-tax Act. Also observed that the Tribunal has not examined the factual position correctly and has not even referred to the decisions which throw light on the controversy.

15. On the other side, on the same issue the Gujarat High Court in the case of *CIT vs. Kiranbhai H. Shelat* has taken a contrary view by heavily placing reliance on the section 10(14) as it stood prior to 1-4-1989. Prior to 1-4-1989 the section 10(14) read as follows :

> *"any allowance or benefit, not being in the nature of an entertainment allowable or other perquisites within the meaning of clause (2) of section 17, specifically granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, to the extent to which such expenses are actually incurred for that purpose."*

Before the Supreme Court

16. The Appellant before the Hon'ble Supreme Court relied on the decision of the *State of West Bengal vs. Texmaco Ltd. (1999) 1 SCC 198.* In that case the incentive bonus referred to in the said decision is the special scheme of the company. The question considered in the said decision was as to whether the said bonus would form part of salary as defined under the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979. The Court held, placing reliance on the definition of 'salary' in the said Act that only in case there was remuneration on a regular basis, the same was exigible to tax under the said Act, in facts it was found that there was no regular payment of incentive bonus. The Hon'ble Supreme Court observed that it is not the factual or legal position in the case of the appellant under the Act.

17. By observing the arguments and finding of the present case the Hon'ble Supreme Court held that being a salaried person, the incentive bonus received by Development Officer prior to 1-4-1989 has to be treated as salary and he is entitled only for the permissible deduction which was allowable under section 16 subject to expenses incurred in performance of developing or canvassing the business.

Conclusion

18. The Development Officer incurred expenses towards performance of his business and he

received Incentive Bonus for generating the business. The said incentive for the period prior to 1-4-1989 treated as salary and is entitled for the permissible deduction under section 16. With effect from 1-4-1989, the LIC issued a clarification that the Development Officers would be entitled to claim reimbursement to the extent of 30% of the incentive bonus. After 1-4-1989 only part of the incentive bonus after reimbursing the expenses to the extent of 30% will appear in the salary certificate.

CIT vs. Reliance Energy Ltd. [2013] 358 ITR 371 (SC)

Introduction

1. The provisions of section 234D in the Income-tax Act were introduced for the first time by the Finance Act, 2003, with effect from 1st June, 2003, Sub-section (1) of the section enjoins that where any refund is granted to the assessee under sub-section (1) of section 143 which exceeds the amount refundable on regular assessment, then, the assessee shall be liable to pay simple interest at the rate applicable on the whole or the excess amount so refunded for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment.

2. As per the provision stated above, interest would be levied on fulfilment of two conditions :

(i) on the amount of refund granted on intimation and

(ii) no refund or part of interest is withdrawn, on regular assessment

It can be seen from the above that both the conditions are combined together by the conjunctive "and" and, therefore, it necessarily implies that both of the above conditions came into force with effect from 1-6-2003 and be given effect simultaneously.

3. Further, the provisions of section 234D, inserted by the Finance Act, 2003, are substantive provisions and the same are not, clarificatory in nature and therefore, the section is not retrospective.

4. In case where the refund was granted on intimation prior to the date of insertion of provision of section 234D, but regular assessment was completed after the insertion of section 234D, the provision of section 234D will not be applicable because one of the above conditions is not satisfied.

5. This section provides that in cases where the assessees claim refund of a substantial portion of advance tax or TDS or TCS treated as paid by them on the basis of the total income as declared in returns of income furnished under section 139, such refund has to be granted to them at the time of processing of the returns under section 143(1) of the Act. Subsequently, if regular assessment is made on a total income much higher than the returned income, the refund earlier granted to the assessee or a substantial portion of it is treated as tax payable. But while the assessee pays interest for shortfall in payment of advance tax with effect from the first day of assessment year, nothing is charged from the assessee for having utilised the refund amount, till the date of regular assessment. Section 234D was inserted (with effect from June 1, 2003) to charge interest on excess refund granted at the time of summary assessment. *Vide* sub-section (2) the provision also covers situations whereas a result of an order under section 154 or 155 or 250 or 254 or 260 or 263 or 264 or an order of the Settlement Commission under section 245D, the amount of refund granted under section 143(1) is held to be correctly allowed, either in whole or in part, as the case may be, then, the interest chargeable, if any, under section 234D(1) shall be reduced accordingly.

Issue

6. Interest under section 234D – Chargeable retrospectively when assessment completed prior to 1-6-2003

Facts

7. The Assessment Order passed under section 143(3) r.w.s. 147 of the Income-tax Act, the Assessing Officer had disallowed the benefits of Article 8 of Double Taxation Avoidance Agreement (DTAA) between India and USA to the assessee. The appeals filed by the assesse were allowed by the CIT(A) by holding that the assessee is entitled to the benefit of

Article 8 of DTAA. Challenging the aforesaid order the revenue had filed an appeal before the ITAT and the Hon'ble ITAT had set aside the order of the CIT(A) to the Assessing Officer. While giving effect to the order of the ITAT, the Assessing Officer apart from levying interest u/s. 234A and u/s. 234B of the Act also levied interest u/s. 234D of the Act.

The assessee challenging the levy of the interest u/s. 234D of the Act, filed appeal before the CIT(A). The CIT(A) held that interest u/s. 234D is chargeable when refund has been granted to the assessee on processing return of income u/s. 143(1). And such refund is found to be excessive under regular assessment. The CIT(A) was in the opinion that interest u/s. 234D was attracted to the assessee's case. The CIT(A) relied on the Special Bench decision of *ITO vs. Ekta Promoters (P) Ltd. (2003) 305 ITR 1* where stated that section 234D would not apply where the assessmentwas prior to 1-6-2003. The revenue had filed appeal against the order passed by the CIT(A) before ITAT. The Hon'ble ITAT again placing reliance on *Ekta Promoters (P) Ltd. (2003) 305 ITR 1 (supra)* dismissed the appeal of the Revenue.

Before the Honorable High Court

8. The appeal of the revenue was covered by the judgment in the case of Delta Air Lines Inc. on the same the question of law that the section 234D would not be applicable to the present case as the assessments are made u/s. 147 r.w.s. 143(3) of the Act.

9. In the case of Delta Air Lines Inc. the revenue relied on the Explanation of section 234D State about an assessment is made for the first time u/s. 147 or u/s. 153A, the assessment so made shall be regarded as a regular assessment for the purpose of this section. Section 234D is attracting only when the refunds granted to the assessee u/s. 143(1) of the Act becomes refundable to the revenue on the regular assessment. The revenue further submits that refund was not granted even under the assessment order passed u/s. 143(3) r.w.s. 147 of the Act, but same was granted pursuant to order passed by the CIT(A) therefore the Special Bench decision referring by the Hon'ble ITAT would not applied to the case. By observing all the legal facts of the case the Hon'ble High Court upheld the order of the Tribunal by stating that section 234D has no retrospective operation but section 234D has no application to the facts of the present case.

10. On the same issue referring in the case of Delta Air Lines Inc. the Hon'ble High Court in the case of present appeal disposed the appeal of the revenue.

Before the Hon'ble Supreme Court

11. The Special Leave Petition in respect of the retrospective of section 234D of the Income-tax Act. The revenue submits that the decision of the *DIT (International) vs. Delta Air Lines Inc. (2011)245 CTR 16 (Bom).*

The assessee submits the Explanation 2 of the section 234D inserted by the Finance Act, 2012 w.e.f. 1-6-2003

"Explanation 2.— For the removal of doubts, it is hereby declared that the provisions of this section shall also apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date."

The assessee further explaining about the cases related to the assessments year 1989-99 and it is admitted that the High Court was concerned with the assessment year was completed prior to 1-6-2003. By having regards to the legal position it's clarified that Explanation 2 of the section 234D does not arise as the present case is concerned with the AY. 1989-99. The Hon'ble Supreme Court having regards to the decision of the Delta Air Lines Inc. states that the said decision is not erroneous. And the SPL filed by the Revenue has been dismissed by the Supreme Court.

Conclusion

12. The legal position which has been clarified by insertion of Expln. 2 in sec. 234D by Finance Act, 2012, w.e.f. 1-6-2003 there is no question of retrospective applicability of sec. 234D to case where the assessments for Asst. Yr. 1989-99 was completed prior to 10-6-2003.


Asifa Khan, *Advocate*

Depreciation – Ownership of asset and used for business

Industrial Credit and Development Syndicate Ltd. vs. CIT – 350 ITR 527 (SC)

Introduction

The tax regime ought to be simple, reasonable, stable and compliable for the accelerated growth and development of any country, however, unfortunately, in our country in spite of our aim to make it so our tax laws have still to reach these goals. Sometimes the enacted legislation leads to long drawn litigation, which is unnecessary. Like, in the present case the issue of claim of depreciation the matter travelled up to the Supreme Court. The term 'depreciation' has not been defined under the Income-tax Act, 1961. In common parlance, depreciation is the monetary equivalent of the wear and tear suffered by a capital asset that is set aside to facilitate its replacement when the asset becomes dysfunctional. In *P.K Badiani vs. CIT (1976) 105 ITR 642*, the Apex Court observed that allowance for depreciation is to replace the value of an asset to the extent it has depreciated during the period of accounting relevant to the assessment year and as the value has, to that extent, been lost, the corresponding allowance for depreciation takes place. Under the Act, the claim of depreciation is allowable under section 32 as a deduction from the profits of the business or profession at a particular percentage as prescribed under the Income Tax Rules depending on the class of asset and on satisfying twin requirements, firstly that the asset must be "owned" wholly or partly by the assessee, and secondly, that the asset must be used for the purpose of business. Both the components of ownership and usage for business as provided in section 32 of the Act has been dealt with by the Supreme Court in a very elucidate and elaborate manner. The Apex Court has adopted a very expansive view of both the components of allowability of depreciation claim. It has interpreted the law in the manner enacted in the statute by the Legislature.

Facts

The assessee was a public limited non-banking finance company, which was engaged in business of financing hire purchase, leasing and real estate, etc. The vehicles on which the assessee claimed depreciation was purchased by the assessee by making direct payment to the manufacturers. The assessee leased out these vehicles to its customers, who were charitable and educational institutions and trusts, and thus, the assessee ceased to have any physical affiliation with the vehicles. The lessees got themselves registered as the owners of the vehicles in the certificate of registration issued under the Motor Vehicles Act, 1988. The assessee claimed depreciation in relation to the leased vehicles as it was owned by the assessee. The assessee also claimed depreciation at a higher rate on the ground that the vehicles were used for the business of running on hire.

The Assessing Officer noted the fact that the person interested in the assessee company, which was the lessor, was the trustee of the charitable institution, which was the lessee, and the assessee had received refundable security deposits, which sums were equivalent to the purchase value of the vehicles from these educational and charitable institutions i.e. the lessees. The refundable security deposits were interest bearing. The lease rentals payable by the lessees were equal to the interest payable on the security deposits.

The Assessing Officer disallowed both the claims of the assessee i.e. depreciation and higher rate of depreciation, on the ground that the assessee was not the owner of the vehicles as it had merely financed the purchase of these assets, that too out of the funds received from the lessees, and the vehicles were registered in the name of the lessees under the Motor Vehicles Act and also that the assessee was not the actual user of the vehicles. The Commissioner of Income Tax (Appeals) partly allowed the claim of the assessee of depreciation but not at a higher rate. On appeals by both the assessee and the Revenue the Appellate Tribunal agreed with the assessee on both counts depreciation as well as higher rate of depreciation.

Before the Karnataka High Court

The Karnataka High Court reversed the order of the Tribunal on both aspects. The High Court rejected the claim for depreciation by taking note of the fact that the person interested in the assessee company which was the lessor was the trustee of the lessee. The assessee had received refundable security deposit which could have well been used by the trust itself for direct purchase of vehicles. By this arrangement, the assessee was able to claim depreciation, while it was the trust, which had made the payment out of its own funds for the vehicle, such funds being routed through the company as a refundable deposit thereby conferring the benefit of depreciation to a company in which trustee was interested by what it characterised as self cancelling transaction. The arrangement was considered as "blatantly geared to evade the tax liability". The Court treated it as a case of unacceptable tax avoidance bordering on tax evasion.

Before the Supreme Court

The Supreme Court ruled and enlarged the scope of section 32 of the Act, and, *inter alia*, held that legally speaking, the provision of section 32 required that the assessee would use the assets for the "purpose of business". It did not in essence mandate usage of the asset by the assessee itself and therefore as long as the asset was utilized for the purpose of business of the assessee, the requirement of section 32 was complied with notwithstanding non usage of the asset itself by the assessee. Further, the entire lease rent received by the assessee was assessed as business income of the assessee and thus it is an income earned in the course of business which has to be so assessed. The Apex Court followed its earlier decision in the case of *CIT vs. Shaan Finance Pvt. Ltd. (1998) 231 ITR 308* wherein while interpreting the words "used for the purposes of business" in case of analogous provisions of section 32A(2) and section 33 of the Act, dealing with investment allowance and development rebate held that the provisions does not specify that the assessee himself should use the machinery, the person who hired the machinery uses it for specified purposes as envisaged under section 32A(2)(b)(iii), it amounts to "used for the purpose of assessee's business. The agreement between the parties did not involve any element of sale. Further, rejecting the contention of the Revenue that since the vehicles were registered in the name of the lessees therefore, the ownership lies with the lessees, the Apex Court after perusing provisions of the Motor Vehicles Act held that the said Act mandates that during the lease period the vehicle be registered in the certificate of registration in the name of the lessee and on conclusion of the leased period the vehicle be registered in the name of the lessor as owner. The definition of ownership in section 2(30) is a deeming provision that creates a legal fiction of ownership in favour of lessees only for the purpose of the Act and not for the purpose of law in general. Thus, no inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle

Thus, the Apex Court held that the assessee i.e. the lessor was the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of section 32 of the Act, and hence, is entitled to claim depreciation in respect of the vehicles leased to the lessees.

As regards the claim for a higher rate of depreciation the Court held that, the interpretation of the term "purposes of business", used in the second proviso to section 32(1) of the Act would not be any different from that ascribed to it under section 32(1) of the Act. Therefore, the assessee fulfilled even the requirements for a claim of a higher rate of depreciation and was entitled thereto.

Conclusion

In the present case the Supreme Court although referred to the High Court's claim of the transaction being not genuine and that the transaction was intended to pass right to claim depreciation from a taxable entity to non-taxable entity, it still chose to go by the documentation and the law in respect of genuine transactions and the right to depreciation for the legal owners with reference to the various judgments on the subject. The Apex Court enlarged the scope and application of the concept of depreciation and allowed it liberally.

"Meditation is the ultimate mobile device; you can use it anywhere, anytime, unobtrusively."

— Sharon Salzberg


Aarti Sathe & Kalpesh Turalkar, *Advocates*

Refunds – Interest on Refund – S. 244A

Commissioner of Income-tax, Gujarat vs. Gujarat Fluoro Chemicals. (2014) 42 Taxmann.com 1 (S.C.)

Introduction

Section 244A of the Income-tax Act, 1961 (hereinafter referred to as the 'Act) was brought onto the statute book by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1-4-1989. This section applies in respect of assessments for the assessment year 1989-1990 and thereafter. This section grants substantive right to interest and is not procedural, and is therefore not applicable for pending assessments prior to assessment year 1989-1990.

Under this section an assessee is entitled to interest on the refund of excess amount of advance tax paid as well as tax deducted at source. The assessee is also entitled to interest as a result of refund arising out orders passed under sub-section (3) of section 115WE or section 115WF, Section 154 or section 155, or section 250 or section 254 or section 263 etc., of the Act.

Sub-section (2) of section 244A specifies that if the proceedings resulting in the refund are delayed for reasons attributable to the assessee, whether wholly or in part, the period of the delay so attributable to him shall be excluded from the period for which interest is payable.

Facts before the Supreme Court in the case of SANDVIK ASIA Ltd.

In the backdrop of the above provisions of section 244A, an important judgment was passed by the Apex Court in 2006, in the case of *Sandvik Asia Ltd vs. CIT (SC) reported in 280 ITR 643.*

The facts of the above case were as follows

For the A.Y. 1977-1978, for which the assessee had paid advance tax, the assessee was granted refund of tax on the basis of the assessment order and was asked to pay additional tax after rectification. The Commissioner (Appeals) gave substantial relief and the assessee received refund only of the excess amount paid as advance tax. The assessee was not granted interest on the amounts refundable. For the assessment year 1978-79 the assessee was granted refund of tax on the basis of the assessment order but no interest was paid on the refund. After the Commissioner (Appeals) gave substantial relief the assessee received refund only of the excess amount paid as advance tax. But no interest was granted. For the assessment year 1981-82 the assessee was granted refund as well as interest on the amount under section 214. After the Commissioner (Appeals) granted substantial relief the asessee was allowed interest only under section 214 but no interest was granted under sections 214(1A) and 244(1A) For the assessment year 1982-83, the assessee paid further tax on assessment; but the Commissioner (Appeals) gave substantial relief and the assessee received refund of the excess tax paid but no interest was granted under section 214 or section 244. Pursuant to the order of the Supreme Court the Department granted interest up to March 27, 1998 but the Department refused interest on interest. The assessee filed writ petitions in the High Court challenging the orders; but High Court dismissed the Petitions.

The Supreme court reversed the order of the Bombay High Court and held as follows:-

(1) In view of the express provisions of the Income-tax Act, 1961 (hereinafter referred to as the 'Act') an assessee is entitled to compensation by way of interest for the delay in the payment of amounts lawfully due to the assessee which are withheld wrongly and contrary to him.

(2) The Government is liable to pay interest, at the rate applicable to the excess amount refunded to the assessee, on the interest amount which becomes due under section 214(1) Section 214(1) itself recognizes in principle the liability to pay interest on the amount of tax paid in excess of the amount of assessed tax and which is retained by the Government. Interest on the excess amount is payable at the rate specified therein from the first day of the year of assessment to the date of regular assessment. Once the interest becomes due, it takes the same colour as the excess amount of tax which is refundable on regular assessment. The Supreme Court in Modi Industries (1995) 216 ITR 759 has clarified that advance tax has to be treated as paid pursuant to an order of assessment and hence interest is payable thereon but under section 244.

(3) Interest is payable on the amount to be refunded under section 244(1) within three months from the decision of the appellate or other authority specified in section 240. The expression "amount" in the earlier part of section 244 (1A) refers not only to the tax but also to the interest; it is a neutral expression and it cannot be limited to the tax paid in pursuance of the order of assessment.

(4) Even assuming the that there is no provision for payment of compensation, compensation for delay is required to be paid as the Act itself recognizes in principle the liability of the Department to pay interest when excess tax was retained and the same principle should be extended to cases where interest was retained.

Narendra Doshi's case [2002] 254 ITR 606 was clearly a decision on the merits albeit proceeding on the assumption that there was no provision in the Act granting interest on unpaid interest.

(5) There is no question of the delay being "justifiable", and even if the Revenue takes an erroneous view of the law, that cannot mean that the withholding of monies is "justifiable" or "not wrongful". There is no exception to the principle for an allegedly justifiable" withholding. When the claims of the authority are found to be unsustainable or erroneous by the courts it follows that the authority has acted wrongfully in the sense of not in accordance with law and compensation to the party deprived must follow.

(6) Section 240 which was inserted by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989 will not apply to assessment years prior to that date. Section 240 clearly lays down that what is relevant is whether any amount has become due to an assessee, and further that the phrase, "any amount " will also encompass interest.

Therefore by the above judgment, the Supreme Court held that the assessee was entitled for interest on interest as claimed by it, since the refunds were granted after a long time, reversing the judgment of the Bombay High Court which had held that there is no provision in the Act to pay interest on interest due to the assessee.

The decision in the case of Sandik Asia was doubted by the Supreme Court and the Court felt that the same needed reconsideration. In view thereof, the matter was referred to a larger bench in the case of Gujarat Fluoro.

Facts Before the Gujarat High Court

Before setting out the principles as enunciated by the Apex Court in Gujarat Fluoro, it is important to state the facts of the case, which were before Gujarat High Court.

Facts before the Hon'ble High Court in the case of *Gujarat Fluoro Chemicals vs. Commissioner of Income-tax reported in 300 ITR 328 (Guj. HC)* were as follows:-

The Petitioner-Company entered into a technical collaboration agreement with a company based in the U.S.A, and paid a sum to its collaborator and intimated the Income-tax Officer regarding payment and requested him to issue a no objection certificate. The Income-tax Officer directed the Petitioner to deduct and pay taxes at the rate of 30 per cent., on the amount remitted to the collaborator. Accordingly, the Petitioner deducted the amount and paid the tax. Subsequently, it claimed refund in view of the amended provision under which, no grossing was required to be made as the payment was remitted under an agreement approved by the Government of India. The Income-tax Officer held that the Petitioner was entitled to refund of ` 10,26,868/-. The Petitioner requested him to grant interest on the excess amount of tax refunded. As there was no response from him, the Petitioner applied to the Commissioner. The Commissioner declined to entertain the claim of interest on the ground that it was not admissible either under section 243(1)(b) or section 244(1A) or under section 214(2) of the Income-tax Act, 1961. Thereafter, the Petitioner approached the Chief Commissioner of Income-tax who refused to entertain the claim of the Petitioner on the ground that excess amount of tax deducted at source was not as a result of any order passed by an authority under the Act. The Petitioner approached the Central Board of Direct Taxes and it also refused to accept the claim made by the Petitioner. On a petition under Articles 226 and 227 of the Constitution of India praying to set aside the orders of the Commissioner, Chief Commissioner of Income-tax and the CBDT and for a direction to award interest on the amount of refund, the Hon'ble High Court held that "the petitioner would be entitled to compensation by way of interest for the delay in payment of amounts lawfully due which were withheld wrongly and contrary to law. Therefore, the orders passed by the Commissioner, Chief Commissioner of Income-tax and the Government of India were to be set aside and the petitioner was entitled to compensation by way of interest at the rate of 9 per cent."

Before the Supreme Court: Principles as laid down in Gujarat Fluoro's case

On Appeal by the Revenue to the Apex Court, the Court held as follows:

In the case of Sandvik Asia, the Apex Court had granted interest, as it thought it fit that the assessee should be properly and adequately compensated, for the inordinate delay on the part of Revenue. The Apex Court therefore awarded interest to the assessee for 2 periods i.e for Assessment Years 1977-78, 1978-1979, 1981-1982 and 1982–1983 in a sum of ` 40,84,906/- and interest @ 9% from 31st March, 1986 to 27th March, 1998 and in default to pay the penal interest @15% p.a. for the aforesaid period.

However the Apex Court has further held that in the facts of Sandvik Asia's case, as the delay was inordinate on the part of the Revenue the court felt it fit to compensate the assessee, but the same principle cannot be applied in every case. The court further held that the assessee cannot mis-interpret the ratio laid down in the case of Sandvik Asia, to mean that interest is payable on interest which is not paid within the statutory period. The Apex court has clarified that an assessee is only entitled to the interest provided for under the statute, which may be claimed by the assessee and no other interest on such statutory interest is payable. The Apex Court, therefore, has remitted the matters back to the lower authorities to grant interest depending upon the facts of each case.

Mandar Vaidya, *Advocate*

Penalty – Concealment – S. 271(1)(c)

Analysis of the decision of the Hon'ble Apex Court in Makdata Pvt. Ltd. vs. CIT-II Civil Appeal No. 9772 of 2013 {2013} 358 ITR 593

The decision in *MAK Data 358 ITR 593 (SC)* is the latest pronouncement (dated 30th Oct., 13) of the Hon'ble Apex Court, involving the issue of penalty u/s. 271(1)(c) viz. concealment penalty under the Income-tax Act and is another landmark decision. It is landmark because it lays down that in absence of a *bona fide* and a plausible explanation of the assessee, penalty u/s. 271(1)(c) would be levied, notwithstanding the fact that AO may not have rendered any satisfaction of concealment and the assessee may have (in quantum proceedings) offered the income for tax to 'buy peace and/or avoid litigation' and subject to the condition that no penalty proceedings would be initiated.

The facts leading to the issue were as follows. A survey u/s. 133A was conducted, on 16-12-2003, in the case of one M/s Marketing Services which was a sister concern of the assessee. During the course of the said survey proceedings, certain documents like share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns, assessment orders and blank share transfer deeds duly signed, were found. The AO confronted the assessee with these documents and sought information regarding the documents pertaining to share applications, particularly the bank transfer deeds signed by persons who had applied for the shares. In reply, the assessee made an offer to surrender a sum of ₹ 40.74 lakhs with a view to avoid litigation and buy peace and to make an amicable settlement of the dispute. The assessee, however, denied any concealment of any nature and made the offer subject to the condition that no penalty/prosecution would be levied/initiated. The AO initiated penalty proceedings u/s. 271(1)(c).

The assessee contended that penalty proceedings were not maintainable since the AO had not recorded his satisfaction to the effect that there has been concealment of income/furnishing of inaccurate particulars of income by the assessee and that the surrender of income was a conditional surrender before any investigation in the matter. The AO did not accept those contentions and imposed a penalty of ₹ 14,61,547/- under section 271(1)(c) of the Act. The CIT(A) upheld the order of the AO. On appeal to the Tribunal by the assessee, the Tribunal allowed the appeal by holding that the surrender of income had been made conditional upon non-initiation of penalty and imposition of penalty solely upon the statement of the assessee, could not be sustained.

The Department carried the matter in appeal before the High Court (Delhi Court). The High Court allowed the appeal of the Revenue on the ground that there was absolutely no explanation by the assessee for the concealed income of ` 40,74,000/-. The High Court took the view that in the absence of any explanation in respect of the surrendered income, the first part of clause (A) of Explanation 1 stood attracted. The assessee carried the matter before the Supreme Court. The Hon'ble Apex Court upheld the view of the High Court. The Apex Court held as follows:

1) In the absence of any explanation by the assessee, as provided under Explanation 1 to section 271(1)(c), the presumption under the said Explanation 1 stood attracted.

2) The AO shall not get carried away by phrases like "to buy peace" or "avoid litigation" or "amicable settlement" etc. What has to be seen is, whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation 1 to section 271(1)(c) 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.

3) Reverting to the facts of the case, the Apex Court observed that assessee has only stated that it had surrendered the additional sum of ` 40,74,000/- with a view to avoid litigation, buy peace and to channelise 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 the Explanation 1 to section 271(1)(c) of the Act; the voluntary disclosure does not release an 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.

4) The surrender of income by the assessee in the case in hand was NOT voluntary since the offer of surrender was made in view of detection made by the AO in the survey proceedings conducted, u/s. 133A, on the sister concern of the assessee. Hence it cannot be said that the surrender of income was voluntary. The survey proceedings under section 133A were conducted on 16-12-2003, in the case of a sister concern of the assessee viz. more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Hence it had to be concluded that the assessee had no intention to declare its true income. The finding of the AO that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under section 271 read with section 274 of the Income Tax Act, 1961, was sufficient for levy of penalty; the AO is not required to record his satisfaction in a particular manner or reduce it into writing.

Analysis

Explanation 1 to section 271(1)(c) raises a presumption (undoubtedly a rebuttable one) in favour of the Revenue. The said Explanation 1 holds that where either of the following two conditions are satisfied, the amount added or disallowed in quantum proceedings shall be deemed to be income whose particulars have been concealed:

a) if the assessee fails to provide any explanation regarding any fact(s) material to his computation of total income or the explanation provided by the assessee is found to be false by the AO or CIT or CIT(A) OR

b) the assessee offers an explanation which he is not able to substantiate and fails to prove that the explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him.

In this case the assessee had offered no explanation for concealing the particulars of income and/or filing inaccurate particulars. And hence the presumption of Explanation 1 (which is otherwise rebuttable) became conclusive. Further it was also found that the surrender by the assessee was NOT truly voluntary; it was made because certain material was found during the survey proceedings of the sister concern. It follows that had there been no survey or had the relevant information not been available to the Department, the assessee would not have surrendered the amount.

However, the ratio of the decision in MAK Data is NOT that the *bona fides* of the explanation offered by the assessee should not be considered; the bonafides of the explanation offered by the assessee has to be taken into consideration. Since the assessee had not offered any explanation, there was no question of considering its bonafides. The decision in MAK Data was distinguished by the Hon'ble Madras High Court in *CIT vs. Gem Granites 2013-TIOL-951-HC-MAD-IT*. In this case, the facts were that the assessee owned quarries and was also a dealer in granite. There was a search conducted under section 132 of the Act, and in which it was revealed that in a real estate dealings, there were "on-money" transactions and some cash was seized. The assessee offered to admit the "on-money", but claimed that they will do so on completion of the projects under the 'completed contract method' and therefore, no income was offered by the assessee in the year under consideration. The assessee took a stand that the cash found at the time of search represented "on-money" and the notings and workings made in the slips of paper (found during the search) related to only one purchaser. The Assessing Officer found the explanation of the assessee as not credible. Accordingly, the AO based on the evidence included "on-money" component and completed the assessment. Penalty proceedings were also initiated under section 271(1)(c) of the Act. The quantum proceedings reached up to the High Court and the assessee failed right up to the High Court, in the quantum proceedings.

In the penalty proceedings u/s. 271(1)(c) of the Act, the Assessing Officer levied penalty. On appeal, the Commissioner of Income Tax (Appeals) held that the seized documents clearly evidenced the fact that the assessee was in the habit of receiving "on-money" in respect of sale of each and every flat at the rate of 50% of the sale consideration and the same was borne out by various entries in the seized documents. The entries also clearly revealed that the assessee had accepted "on-money" in case of one J. B. Exports to the tune of ` 86,50,000/-. The CIT(A) took note of the findings recorded by the Tribunal in its order in the quantum appeal and upheld the imposition of penalty.

Before the Tribunal, the assessee contended that there was a mistake in the entries regarding the sale of flats to J. B. Exports and the assessee also filed copies of the entry register in respect of two flats and also in respect of other similar flats, which were sold to other parties. Therefore, it was contended that even J.B. Exports produced the documents before the Assessing Officer, which were examined by the department wherein, it was stated that no "on-money" was paid to the assessee. Therefore, it was contended that the onus is on the department to prove that the non-disclosure of the said income was deliberate and intentional on the part of the assessee. The Tribunal accepted the assessee's explanation and allowed the appeal.

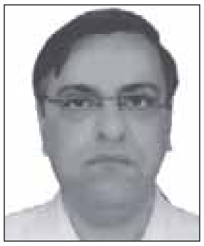
The Tribunal observed that onus to prove that there was a concealment of income with a view to avoid the tax, is on the department and penalty is not automatic and merely because the addition is confirmed, it does not *ipso facto* attract the penalty proceedings. The Tribunal noted that there were discrepancies in the entries of the documents seized and this *prima facie* supported the contention of the assessee that there may be a mistake in recording the rate and there may be a possibility that the rate of two flats are merged and recorded. Considering the facts and circumstances, the Tribunal observed that the possibility of wrong entry cannot be ruled out and the department having failed to prove concealment without any doubt, by relying upon the decision of the Hon'ble Supreme Court in the case of Dharmendra Textile Processors, (supra), allowed the assessee's appeal.

The Revenue carried the matter in appeal before the High Court. The High Court held that firstly the Tribunal is the last fact finding Authority. Therefore, unless it is shown that findings of the Tribunal is/are perverse, the same cannot be interfered, while considering an appeal which can be entertained only on a question of law. Secondly, by drawing support from authorities like *Reliance Petroproducts Pvt., Ltd. 322 ITR 158 (SC)*, the Hon'ble Court held that the position in law is that in order to penalise an assessee, the assessee must have furnished inaccurate particulars of his income and unless the case is strictly covered by the provision, the penalty provision could not be invoked. Thus, mere making of a claim, which is not sustainable in law, by itself, would not amount to furnishing of inaccurate particulars regarding the income of the assessee. It was held that in view of the decision in Reliance Petroproducts (supra), for sustaining penalty, the *bona fide* explanation of the assessee must be looked at, so that the contumacious conduct of the assessee for the purpose of sustaining the penalty would be taken as condition that is the main requirement under section 271(1)(c) of the Act. In the light of the Explanation 1 to section 271(1)(c), penalty being a multiple liability, the *bona fide* of the conduct of the assessee necessarily assumes significant and even though wilfulness of the assessee may not be a criteria, the conduct is to be considered. Even though the explanation of the assessee may not be good for quantum proceedings, the same may be a good explanation in penalty proceedings.

The Hon'ble High Court distinguished the decision in MAK Data, by observing that unlike in case of MAK Data, in the case in hand, the onus cast upon the assessee by Explanation 1 of sec. 271(1)(c) had been discharged by giving a cogent and reliable explanation. Therefore, if the department did not agree with the explanation, then the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. And such onus, which shifted on the department had not been discharged and hence no penalty could be levied.

Author's view

In a nutshell the decision in MAK Data went against the assessee primarily because there was no explanation worth the name offered by the assessee and the surrender was made only after certain materials were found during survey at the assessee's sister concern. However the said ratio will not apply where the assessee offers a *bona fide* explanation. For example, the decision of the Hon'ble Apex Court in *PriceWaterHouse Cooper 348 ITR 306 (SC)*, accepting the explanation of the assessee that there was a *bona fide* error, is still good law. It is incumbent on the Department to consider the explanation of the assessee, reasonably. Further the said ratio (in MAK Data) will not apply where addition is done on an estimate basis and which is assented to by the assessee. This is because in case of addition on estimate basis, it is ultimately a matter of estimate and guess work; no concrete material pointing to definite attempt to conceal can pointed out much less a precise figure of income concealed.



CA Jagdish T. Punjabi

Meaning of 'actual cost' – Implication in Determining Written Down Value

CIT vs. Gujarat State Fertilizer Co. Ltd. (37 Taxmann.com 77)(SC)

Introduction

For the purpose of Sections 28 to 41 and s. 43 the term "actual cost" is defined in Section 43(1) of the Income-tax Act, 1961 ("the Act"). This definition is *inter alia* relevant for computing depreciation allowance and also for computing the `written down value' of the block of assets. The term `actual cost' is defined to mean actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority.

In case an asset is acquired for a deferred consideration fixed in foreign exchange and after installation of the asset if the liability of the assessee increases or reduces as a result of change in rate of exchange or if funds are borrowed in foreign exchange for acquiring an asset and subsequent to installation of the asset the liability to pay the loan increases or reduces as a result of change in rate of exchange, a question could arise as to tax consequence of such an increase or decrease. It could have been argued that the actual cost of the asset can only be the original purchase price in the year of acquisition of the asset and that even if there is any subsequent increase in the liability, it cannot be added to the actual cost at any stage and that, for the purposes of all statutory allowances, the amount of actual cost once determined would be final and conclusive. However, Section 43A of the Act clearly provides that, notwithstanding anything contained in any other provisions of this Act, such increase or decrease of the nature described herein (i.e. increase or decrease in liability to pay the consideration which was fixed in foreign currency or increase or decrease in liability to pay the loan taken for the purpose of acquisition) shall form part of original cost in the year of payment of such increase or decrease. This is notwithstanding the method of accounting followed by the assessee.

Section 43A has been amended by Finance Act, 2002 w.e.f. 1-4-2003. The section as amended provides that the increase or decrease is to be given effect to in the year in which the assessee makes the payment of the liability irrespective of the method of accounting followed by him. Prior to the amendment, the section provided that increase or decrease was to be effected in the year in which the liability to pay increased or decreased. As has been stated earlier, the provisions of Section 43A begin with a *non-obstante* clause and therefore are notwithstanding anything to the contrary contained in any other provision of the Act.

Section 43A thus provides that the increase or decrease of the nature described earlier shall form part of the original cost and it also provides for the year in which such adjustment shall be made. Prior to 1-4-2003 the adjustment was required to be made in the year in which the increase or decrease in liability arose on account of the fluctuation in the rate of exchange. With effect from 1-4-2003 the adjustment is required to be made in the year in which the increased or decreased liability is paid on account of the fluctuation in the rate of exchange.

Section 43A stipulates that it shall override any other provision of the Act. It means that it is something akin to a provision which enacts a fiction. It is well established that a fiction has to be permitted to operate to its logical end and one cannot permit the mind to be boggled at any intermediate stage. That in case of conflict between two provisions, overriding effect has to be given to the provision which opens with a *non obstante* clause. To put it differently, the *non obstante* clause is a legislative device adopted to modify or override the ambit of the provisions mentioned in the *non obstante* clause. In this case all the provisions of the Act.

Provisions of Investment Allowance

An assessee upon satisfying the conditions laid down in Section 32A of the Act was entitled to claim deduction on account of investment allowance. The section *inter alia* provided for conditions like the asset should have been acquired / installed and put to use in the year of acquisition or subsequent year, assessee should have created a reserve, assessee should within a period of ten years have acquired a new plant, etc. Creation of reserve was linked to profitability. In case an assessee due to want of profits could not claim investment allowance in the year of acquisition / installation / first put to use then he could claim it any time within a period of eight years. The deduction of investment allowance was a certain percentage of original cost of the asset.

Facts of the case

Gujarat State Fertilizer Co. Ltd. entered into a contract for purchasing plant and machineries from a Japanese company on deferred credit basis. The assessee was required to make payment in installments over a period of 12 years. The liability for installments towards the cost of assets for the calendar years 1976, 1977 and 1978 increased by reason of fluctuation in the foreign exchange rate. The assessee claimed the liability as an allowable business expenditure. In the alternative, the assessee claimed that the expenditure on account of fluctuation in rate of exchange went to increase the actual cost of the plant and machinery and therefore, the assessee was entitled to get additional investment allowance under Section 32A of the Act.

Action on the part of AO and CIT(A)

The ITO and the CIT(A) negatived this claim also on the ground that the years under consideration were not the years when the assets were either installed or first put to use.

Decision of the Tribunal

However, the Tribunal upheld the claim of the assessee on the basis of its orders in earlier years when the development rebate had been granted to the assessee and directed the ITO to allow depreciation / development rebate / investment allowance on the items of expenditure arising from difference in foreign exchange rates, provided the necessary conditions were fulfilled.

Question referred by the Revenue to the High Court

At the instance of the Revenue the following question was referred to the High Court for its opinion –

> *"Whether the Tribunal has been right in law and on facts in holding that the assessee is entitled to investment allowance on account of additional expenditure in the cost of the plant and machinery on account of realignment of currency?"*

Before the Division Bench, the Revenue relying on the decision of another Division Bench of Gujarat High Court in the case of *CIT vs. Windsor Foods Ltd. (235 ITR 249)(Guj.)* argued that the claim of investment allowance is a one time allowance and it is not an allowance which is recurring that is to say an allowance which is required to be calculated year after year. If the machinery or plant is first put to use later than the previous year immediately succeeding he previous year of its installation, the right to claim investment allowance would be completely lost. Therefore, the actual cost of machinery or plant in the previous year in which it is installed and first put to use, would be the basis of working out the investment allowance at an amount equal to 25 per cent of that actual cost. The amount of investment allowance so worked out would get crystallized in that year and thereafter the only question that remains is whether the investment allowance which is so worked out, should be actually allowed by way of deduction. It was contended that since investment allowance was already worked out on the basis of the actual cost that quantified allowance cannot be varied by giving back effect to subsequent alteration in the exchange rate in the subsequent years and hence there can arise no question of working out any additional investment allowance in any subsequent year in which the fluctuation takes place.

Though, the decision in the case of Windsor Foods Ltd., was clearly in favour of the Revenue, the counsel of the assessee argued that since Section 43A commences with a *non-obstante* clause and deals with special provision consequential to changes in rate of exchange of currency, it had an overriding effect over the provisions of Section 32A of the Act. Accordingly, reference was made to the Full Bench.

Ratio of Full Bench of Gujarat High Court 259 ITR 526 (Guj.) (FB)

The Full Bench overruled the decision of the Division Bench in Windsor Foods case (*supra*), in so far as the Division Bench held that the amount of investment allowance under section 32A of the Act gets crystallized once and for all in the year of installation and first user and that any fluctuation in the rate of exchange in a subsequent year will not have any impact on the amount of investment allowance allowable to the assessee under section 32A of the Act.

The Bench held that the correct principles for grant of investment allowance, in the context of variations in the rate of foreign exchange, are as stated below:

(i) In view of the *non obstante* clause with which sub-section (1) of section 43A commences, the investment allowance which the assessee acquiring a specified asset from a country outside India on deferred payment basis or by taking a loan repayable in foreign currency is entitled to claim under section 32A of the Act would vary depending on the increase / decrease in the existing liability of the assessee for the cost of acquisition of the asset in question arising from fluctuation in the foreign exchange rate, provided such fluctuation takes place within a period of maximum eight years from the expiry of the previous year in which the asset in question was installed and first put to use, as stated in sub-section (3) of section 32A of the Act (emphasis supplied).

(ii) There will, however, be no change in the amount of investment allowance which the assessee would be entitled to get under section 32A of the Act on account of any fluctuation in the rate of foreign exchange which takes place after expiry of the aforesaid period of eight years (emphasis supplied).

(iii) Additional investment allowance on account of fluctuation in foreign exchange rate will be computed only in respect of the additional liability on the principal amount of cost or loan repayment towards the cost price, and not in respect of interest component of the payment [*vide* Expln. 8 to section 43(1)], for which deduction would be available as business expenditure under section 36(1)(iii).

(iv) Even if the assessee had claimed full investment allowance before the date of fluctuation on the basis of the cost of the asset as earlier worked out for the period prior to the date of fluctuation, the assessee, who had taken loan or credit in foreign currency for purchasing the plant/ machinery, would be entitled to claim additional investment allowance on the basis of any such fluctuation in foreign exchange which takes place within the aforesaid period of eight years, provided there was an outstanding liability in foreign currency towards payment of the cost of the asset on the date immediately prior to the date of fluctuation. In other words, if the cost of the asset goes up on account of any fluctuation in the foreign exchange rate within the aforesaid period of eight years, the assessee would be entitled to claim investment allowance on such additional cost paid by it in foreign currency, notwithstanding the fact that the assessee had already availed of the full investment allowance before the date of fluctuation on the basis of the cost earlier worked out.

(v) Even when the fluctuation takes place within the aforesaid period of eight years, the day-to-day fluctuation in the rate of foreign exchange will not have any bearing on the liability as such. The crucial day is the date of payment of the installment under the deferred payment scheme or the date of repayment of the loan or a part thereof obtained for the purpose of acquisition of the asset. If a capital asset has been acquired by obtaining a loan or by deferred payment of the purchase price, and if, on the date of repayment of the loan or payment of any installment of purchase price, any additional liability is imposed because of fluctuation in the rate of exchange, the assessee will be entitled to capitalise such liability [vide *CIT vs. Century Enka Ltd. (supra)*].

Ratio of the decision of Supreme Court

Substantial question of law referred to in an appeal by the Revenue to the Supreme Court was as under:

> *"Whether the Tribunal has been right in law and on facts in holding that the assessee is entitled to investment allowance on account of the additional expenditure in the cost of plant and machinery on account of realignment of currency (fluctuations in currency rate)?"*

The Apex Court held that in view of the decision of Apex Court in the case of *CIT vs. Gujarat Siddhi Cement Ltd. (307 ITR 393) (SC)* the aforesaid question of law is no more a debatable issue. The Court answered the question of law raised and canvassed by the Revenue against the Revenue and in favour of the assessee. The decision of the Full Bench of Gujarat High Court has, thus, become final.

Conclusion

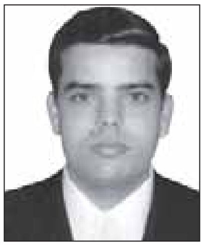
While it was held that the exchange fluctuation will form part of original cost in the year in which liability is incurred (post amendment it will be in the year in which such increase is paid) it was also held that in spite of the *non-obstante* clause the conditions, if any, prescribed by section 32A will have to be complied with. It was held that if the fluctuation occurs after a period of 8 years mentioned in section 32A then the assessee would not be entitled to claim investment allowance in respect of fluctuation which has occurred after a period of 8 years (being the limit mentioned in section 32A). Therefore, in spite of *non-obstante* clause in section 43A the Court held that the conditions prescribed by section 32A would prevail and would have to be complied with.

Depreciation is allowed on written down value of the block of assets. The term `written down value' is defined in Section 43(6)(c)(ii) to mean "...... the written down value of that block of assets immediately preceding the previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i). (emphasis supplied).

Item (i) refers to increase by the actual cost of any asset falling within that block, acquired during the previous year; the reduction referred to in item (i) is reduction of the moneys payable in respect of any asset falling within that block, which is sold, or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased.

In this connection (i.e. in connection with computation of depreciation), a question may arise as to whether the increase in original cost on account of exchange fluctuation can be said to be asset acquired during the previous year in which such increased liability (on account of exchange rate fluctuation) is paid?

While the additional payment made on account of fluctuation in exchange rate will increase the original cost in the year of payment, can such an increase be said to have been acquired during the previous year in which the payment is made so as to qualify this increase to enter the written down value of the block for the purposes of computation of depreciation. While considering the object of the provisions of Section 43A and also considering the fact that the electronic form of tax audit report in Form No. 3CD specifically take exchange rate fluctuation as an addition and also that the *non-obstante* clause in Section 43A overrides all the other provisions of the Act, it can be argued that the increase should be regarded as qualifying for addition to the block but the literal interpretation would suggest that the increase is deemed to be original cost but the asset cannot be deemed to have been acquired during the previous year and therefore the condition specified in Section 43(6)(c)(i) is not satisfied. An item of asset can be acquired only once and not at multiple points in time. Also, in case there is a reduction on account of exchange rate fluctuation becoming favourable to the assessee there appears to be no mechanism to reduce the same except by way of contending that decrease is nothing but negative increase and therefore the increase is of a negative amount. Also, a negative amount cannot be the original cost of asset acquired during the previous year. It would be better if the position is clarified by way of a circular.



Jitendra Singh, *Advocate*

Nature and Scope of enquiry by Department – S. 133(6) of I.T. Act, 1961

Kathiroor Service Co-operative Bank Ltd vs. CIT (2013) 263 CTR 129 (SC)

Introduction

Section 133 of the Income-tax Act, 1961 corresponds to Section 38 of the 1922 Act. Section 133 of the Act was amended from time to time. The word 'enquiry' in sub-Section (6) of section 133 and the second proviso was inserted by Finance Act, 1995 w.e.f. 1-7-1995. With the above amendment the effect of provisions of Section 13(3) of the Act has completely changed. The effect and scope of the amendment is explained by the CBDT in Circular No. 717 dated 14-8-1995 reported in (1995) 215 ITR (ST.) 70. The impact of the amendment is that earlier the notice under Section 133(6) can be issued only if proceedings are pending before the authorities. However, after the amendment, the tax authorities are empowered to call upon any person including a banking company to furnish information in relation to any person which in his opinion is useful or relevant to any inquiry or proceedings under the Act. The notice under Section 133(6) can be issued by the A.O. after obtaining prior approval from the Director or the Commissioner as the case may be.

Facts

The assessee was a Service Co-operative Rural Bank. The A.O. issued notice dated 2-2-2009 to the assessee under Section 133(6) calling for general information regarding details of all persons (whether resident or non-resident) who had made (a) cash transactions of ` 1 lakh and above in any account and/or (b) time deposits (FDs, RDs, TDs, etc.) of ` 1 lakh or above for the period of three years between 1-4-2005 and 31-3-2008. In the notice it was made clear that failure to furnish the aforesaid information would attract penal consequences.

In response to the above notice, the assessee filed a letter dated 26-2-2009 and objected to the issuance of above notice on the ground that the notice under Section 133(6) of the Act cannot be issued in the absence of any existing or pending proceeding. The assessee therefore requested the A.O. to withdraw the same.

The A.O. rejected assessee's objection and held that the notice under Section 133(6) of the Act was validly issued. The A.O. while coming to the above conclusion relied upon the decision of Hon'ble Kerala High Court in the case of *M.V. Rajendran vs. ITO (2003) 260 ITR 442 (Ker.)* and other two decision of Hon'ble Kerala High Court in the case of *Alanallur Service Co-operative Bank*

Ltd. vs. CIT [2004] 186 CTR 310 (Ker.) and *Kechery Service Co-operative Bank Ltd. vs. CIT [2003] 263 ITR 161 (Ker.).*

Before the High Court:

The assessee challenged the notice dated 2-2-2009 and the above order of A.O. by way of writ before the Hon'ble Kerala High Court. The Hon'ble Single Judge of the Kerala High Court concluded that the impugned notice was validly issued under the provisions of the Act. Thereafter, the assessee approached the Division Bench of the Hon'ble Kerala High Court questioning the said notice on grounds that the issuance of such notice under Section 133(6) is bad in law as Section 133(6) only provides for power to seek information in case of pending proceedings under the Act and does not contemplate the powers to seek fishing information which is unrelated to any existing proceedings or which may enable the Assessing Authority to decide upon institution of proceedings under the Act. The Division Bench dismissing the Writ Petition filed by the assessee has observed that the questions raised therein are no longer *res integra* in view of the decision of Hon'ble Supreme Court in the case of *Karnataka Bank Ltd. vs. Secretary, Government of India [2002] 255 ITR 508 (SC).* Aggrieved, the assessee filed appeal before the Supreme Court.

Before the Supreme Court: Reasons and decisions

Dismissing the appeals, the Court held as follows:

(i) Before the introduction of amendment to Section 133(6) in year 1995, the Act only provided for issuance of notice in case of pending proceedings. As a consequence of the said amendment, the scope of Section 133(6) was expanded to include issuance of notice for the purposes of enquiry.

(ii) The object of the amendment of Section 133(6) by the Finance Act, 1995 shows that the legislative intention was to give wide powers to the officers, of course with the permission of the CIT or the Director of Investigation to gather general particulars in the nature of survey and store those details in the computer so that the data so collected can be made use for checking evasion of tax effectively.

(iii) The powers under Section 133(6) are in the nature of survey and a general enquiry to identify persons who are likely to have taxable income and whether they are in compliance with the provisions of the Act. It would not fall under the restricted domains of being "area specific" or "case specific."

(iv) Section 133(6) does not refer to any enquiry about any particular person or assessee, but pertains to information in relation to "such points or matters" which the assessing authority issuing notices requires. This clearly illustrates that the information of general nature can be called for and names and addresses of depositors who hold deposits above a particular sum is certainly permissible.

Conclusion

The provisions of Section 133(6) of the Act give wide powers to income tax authorities to call for information from any person for the purposes of making any enquiry. The decision of the Hon'ble Apex Court revolves around the interpretation of the word 'enquiry' and held that as per the provisions of section 133(6) notice can validly be issued even when no proceedings are pending. Thus the income tax authorities can make fishing enquiries by issuing notices under Section 133(6) of the Act. However, there is no mechanism provided to the assessee who may be subjected to the hardships to the fishing enquiries conducted by the income tax authorities. Thus, the Supreme Court should have provided certain guidelines under which circumstances notice under section 133(6) can be issued and no hardships should be caused to the general public at large.

CA Hitesh R. Shah

Contribution to Approved Gratuity Fund Interpretation of Sec. 36(1)(v)

CIT vs. Textools Co. Ltd. 216 Taxmann 327(SC)

Before we proceed to analyse above said judgment it is essential to understand various provisions enacted wrt payment or provisions made towards approved gratuity fund in **Ss. 36(1)(v), 40(A)(7)** and **43(B)** of the Income-tax Act 1961.

(a) Section 36(1)(v)

It allows deduction of any sum paid by an employer towards an **approved gratuity fund** created by him **for the exclusive benefit of his employees** under an **irrevocable trust**.

(b) Section 40A(7)

S. 40A deals with expenses or payments which are not deductible in certain circumstances.

S. 40A(7)(a) does not allow deduction of any provision made towards payment of gratuity.

S. 40A(7)(b) allows deduction in respect of any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund or for the purpose of payment of any gratuity, that has become payable during the previous year. Further once provision is allowed, any amount paid therefrom shall not be allowed as deduction.

(c) S. 43B allows certain deductions only on actual payment.

S. 43B(b) any provision made by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed as deduction if such sum is paid by the assessee on or before the due date for furnishing the return of income u/s. 139(1).

S.40A and **S.43B** both contain non obstante clause.

It is necessary to reconcile all the three provisions concerning provision or payment of gratuity. **S.36(1)(v)** allows deduction if the payment is made by assessee towards approved gratuity fund. **S. 40A(7)(a)** does not allow deduction in respect of any provision for the payment of gratuity to employees on their retirement or on termination of employment. **S. 40A(7)(b)** carves out an exception providing that this restriction or disabling section will not apply to provision made for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund or for the purpose of payment of any gratuity, that has become payable during the relevant previous year **S. 40A(7)** is **special provision** which specifically denies deduction of provision made for the payment of gratuity unless such provision is towards contribution to approved gratuity fund u/s 40A(7)(b). Therefore the deduction will also not be available u/s. 37.

S. 43B allows deduction of provision made towards gratuity fund only on payment basis. **S. 43B** though contains non obstante clause still **S. 40A(7)(b)** and **S. 43B(b)** co-exists.

In *CIT vs. Commonwealth Trust (I) Ltd. (2004) 269 ITR 290 (Ker.)* it has been held that there is no clear inconsistency between the two provisions, viz., **S. 40A(7)** and **S. 43B. S. 40A(7)** is in negative terms and S. 43B is in positive terms. Effect of both these provisions is that in order to claim deduction in respect of payment to a gratuity fund there must be actual payment and that deduction cannot be allowed on the basis of any provision. The only exception to the above rule is with regard to the provision for payment to an approved gratuity fund. It cannot be interpreted that the later provision in **S. 43B** by introducing the non obstante clause would abrogate the special provision with regard to provision made for payment to an approved gratuity fund contained in **S. 40A(7)(b).** A harmonious construction of the aforesaid two provisions would clearly indicate that the legislature never intended to take away the benefit conferred under cl. (b) of **S. 40A(7)** by the provisions of **S. 43B(b).**

2. What is approved gratuity fund?

Fourth Schedule of the Income Tax (I.T.) Act prescribes certain condition for approval of Gratuity Fund.

(a) To be an approved gratuity fund it is necessary that Chief Commissioner or Commissioner may accord its approval subject to certain conditions as under :

(i) The fund shall be a fund established under an **irrevocable trust** and not less than **ninety per cent** of the employees shall be employed in India.

(ii) The fund shall have for its **sole purpose** the provision of a gratuity to employees on their retirement or otherwise.

(iii) The employer shall be a contributor to the fund and all **benefits** granted by the fund shall be **payable only in India.**

(b) **If any alteration in the rules**, constitution, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund **shall forthwith communicate** such alterations to the Assessing Officer and in default of such communication, any approval given shall, unless the Chief Commissioner or Commissioner **otherwise orders**, be **deemed to have been withdrawn** from the date on which the alteration took effect.

(c) Rule 99 of the IT Rules, 1962 states that the fund and the trust governing the **Gratuity Fund should be established in India.**

3. Prescribed limit

The ordinary contributions by the employer to a fund shall be made on a reasonable basis as approved by the Chief Commissioner or Commissioner having regard to the length of the service of each employee concerned subject to a limit of 8-1/3% of the salary of each employee during each year *vide* rule 103 of IT Rules, 1962. Similarly, the amount of initial contributions shall not exceed 8-1/3% if the employee's salary for each year of his past service with the employer vide rule 104 of IT Rules, 1962.

4. Facts of the case

In A.Y. 1983-84, the assessee claimed a deduction of ` 92,06,978/- as contribution/provision towards the approved gratuity fund.

As per the breakup, ` 5,84,754/- was paid as annual premium to LIC, ` 50,00,000/- was paid as initial contribution in the group Life Assurance Scheme framed by the LIC and the remaining amount of ` 36,22,224/- was shown as provision for initial contribution. Assessee's gratuity fund, viz., the Textool Company Ltd. Employees Group Gratuity Fund was approved by the Commissioner of Income Tax, Coimbatore, w.e.f. 25th February, 1983. While completing assessment, the Assessing Officer allowed a deduction of ` 36,22,224/- under **S. 40A(7)** of the Act.

*However, deduction for the balance amount was disallowed on the ground that payment towards the gratuity fund was made by the assessee directly to the LIC and not to an approved gratuity fund and, therefore, it was not allowable under **S. 36(1)(v)** of the Act.*

5. Before CIT(A)

CIT(A) allowed the appeal in favour of assesse on following ground:

(i) The initial payment of ` 50,00,000/- and the annual premium of ` 5,84,754/- aggregating to ` 55,84,754/- was made by the assessee directly to the LIC on behalf of the Group Life Assurance Scheme for the exclusive benefit of the employees of the assessee under the policy issued by it.

(ii) As per the original Master policy issued by the LIC, the initial contribution as well as annual premium had been credited by the LIC to the Group Life Assurance Scheme on behalf of the Textool Company Ltd. Employees Group Gratuity Fund only, meaning thereby that the insurance policy had been taken in the name of the approved gratuity fund only;

(iii) This fund was shown as the payee in the policy;

(iv) In subsequent assessment years the assessee had contributed funds to the Employees Group Gratuity Fund and the trustees in turn had made payment to the LIC in respect of the Textool Co. Ltd. Employees Group Gratuity Assurance Scheme under the said policy:

(v) It was only the initial payment and first annual premium that had been made directly to the LIC against the said policy.

CIT(A) also concluded that the assessee had not violated any of the conditions stipulated in **S. 36(1)(v)** of the Act and the objective of the fund was achieved. He further mentioned that a narrow interpretation of the provision would be straining the language of **S. 36(1)(v)** of the Act so as to deny the deduction claimed by the assessee.

6. Before Tribunal

Relying on its earlier decision in the case of Janambikai Mills Ltd. (SC), the Tribunal dismissed the Revenue's appeal.

7. Observation by High Court

"In our opinion, the Commissioner of Income Tax (Appeals) as well as the Tribunal have correctly held that merely because the payments were made directly to the LIC, the company could not be denied the benefit under **S. 36(1)(v)** and the amount had to be credited in favour of the assesse . Both the Commissioner (appeals) as well as the Tribunal have correctly read the law and have correctly relied upon the aforementioned Supreme Court judgment. In our opinion, since the finding of fact is that all the payments made were only towards the Group Gratuity Fund, there would be no question of finding otherwise."

8. Supreme Court:

Dismissing the appeal Supreme Court held as under:

(i) True that a fiscal statute is to be construed strictly and nothing should be added or subtracted to the language employed in the Section, yet a strict construction of a provision does not rule out the application of the principles of reasonable construction to give effect to the purpose and intention of any particular provision of the Act. *(ShriSajjan Mills Ltd. vs. Commissioner of Income Tax, M.P. &Anr. (1985) 156 ITR 585).*

(ii) From a bare reading of **S. 36(1)(v)** of the Act, it is manifest that the real intention behind the provision is that the employer should not have any control over the funds of the irrevocable trust created exclusively for the benefit of the employees.

(iii) It is evident from the findings recorded by the Commissioner and affirmed by the Tribunal that the assessee had absolutely no control over the fund created by the LIC for the benefit of the employees of the assessee and

(iv) All the contribution made by the assessee in the said fund ultimately came back to the Textool Employees Gratuity Fund, approved by the Commissioner with effect from the following previous year. Thus, the conditions stipulated in **S. 36(1)(v)** of the Act were satisfied.

9. Conclusion

The judgement is old and has a great relevance. Though **S. 36(1)(v)** requires direct payment to the approved gratuity fund, payment to the LIC Group Gratuity Scheme is also allowable. The cardinal principle emerging from the above said judgement is that employer should not have any control over the funds of the irrevocable trust created exclusively for the benefit of the employees and contribution made by employer ultimately needs to come back to the approved gratuity fund.

Further this judgement assumes more importance in the context of whether the payments to LIC towards leave encashment scheme is allowable u/s. 43B(f). **S. 43B(f)** was inserted by Finance Act 2001 wef 1-4-2002. It denies deduction of any provision made by assessee as an employer in lieu of any leave at the credit of his employee except the year in which it is actually paid by him.

Issue involved here is whether contribution made to LIC towards leave encashment scheme can be considered as actual payment for the purpose of claiming deduction u/s. 43B(f)?

In case of *CIT vs. Hindustan Latex Ltd. 74 DTR (Ker) 212* Kerala High Court held that leave encashment is not a statutory liability. Liability; being covered by a valid insurance policy, is solely that of the insurer. Even if **S. 43B(f)** stands, in the case of the assesse, where the liability is borne by the insurer, there can be no situation wherein assessee could make a valid claim for deduction under **S. 43B(f)** since the actual liability is not incurred in any of the years. However deduction u/s. 37 was allowed.

In light of aforesaid judgment of Supreme Court, in *CIT vs. Textools Co Pvt. Ltd.*, provisions of **S. 43B(f)** needs to construe liberally in case of contribution made by assessee towards Group Leave Encashment Scheme of LIC where assessee does not have any control over said fund.

In case of *Exide Industries Ltd. and Another vs. Union of India and Others 2007 292 ITR 470* the Calcutta High Court examined the constitutional validity of clause 43B(f) and held that leave encashment is not a statutory liability. **S. 43B(f)** being inconsistent with the original provision of **S. 43B** which was incorporated to plug deduction without discharging statutory liability is struck down by the Court being arbitrary and unconscionable and *de hors* the Apex Court decision in the case of *Bharat Earth Movers 245 ITR 428*. Appeal is now pending before the Supreme Court against the said decision.

CA Ketan Vajani

Method of accounting – Valuation of Stock

CIT vs. Shri Ram Honda Power Equipment Ltd. (2013) 352 ITR 481 (SC)

Introduction

The importance of accounting principles, Accounting Standards and Guidance Notes of ICAI for determination of taxable income of an assessee is a matter of debate for considerable number of years now. Certainly one cannot ignore the basic principles of accounting while determining the taxable income of an assessee. The Institute of Chartered Accountants of India has prescribed various Accounting Standards to codify these basic principles of accounting. The ICAI has also issued Guidance Notes on various complex accounting issues from time to time. These Accounting Standards and Guidance Notes are binding for the assessee while preparing the financial statements. If the same are not followed, the true and fair status of the financial statements is likely to be deviated which will not be approved by any auditor. At the same time fact also remains that whenever there is a conflict between the accounting principles and taxation laws, the taxation laws will prevail at least for the purpose of determining the taxable income of the assessee.

Supreme Court of India has time and again held that the Accounting Standards prescribed by the ICAI are a valuable guiding factor for determining the commercial profits of a business and as long as there is no conflict between the accounting principles and tax laws, the accepted accounting principles have to be respected and the profits determined following such accounting principles have to be adopted for the purpose of computing the Profits and Gains of Business or Profession.

Valuation of inventories is very crucial for determining correct taxable profit of an assessee. There are many controversies surrounding valuation of inventories. One of such controversy which arose was as to whether the MODVAT Credit available on input shall form part of the closing stock for the purpose of determination of closing stock. Hon'ble Supreme Court has once again dealt with this issue recently in the case of *CIT vs. Shri Ram Honda Power Equipment Ltd. (2013) 352 ITR 481 (SC)*. This article seeks to analyse this decision which has reaffirmed the earlier view of the Supreme Court on the very same issue.

CIT vs. Shri Ram Honda Power Equipment Ltd. (2013) 352 ITR 481 (SC)

In this decision the Supreme Court was dealing with an issue of valuation of closing stock. The Supreme Court has approved the decision of the lower courts that for the purpose of valuation of closing stock, MODVAT Credit is akin to excise duty paid and accordingly the same shall not be forming part of the valuation of closing stock in a case where the assessee is following net method of valuation of inventories i.e. in a case where the assessee is following exclusive method of accounting for taxes.

While holding so, the Supreme Court has basically followed its earlier decision in the case of *CIT vs.*

Indo Nippon Chemical Co. Ltd. (2003) 261 ITR 275 (SC) which decision has in fact approved the decision of the Hon'ble Bombay High Court in the case of *CIT vs. Indo Nippon Chemical Co. Ltd. (2000) 245 ITR 384 (Bom.)*.

The decision of the Supreme Court in the case of Shri Ram Honda Power Equipment Ltd. is a short decision from which the facts of the case and the reasons are not emerging clearly. The Supreme Court has basically followed the earlier decision in the case of *Indo Nippon Chemical Co. Ltd.* Accordingly it would be worth to understand the facts of that case, arguments of both the sides and reasons for reaching the conclusion as held in the decision of the Indo Nippon Chemical Co. Ltd.

CIT vs. Indo Nippon Chemical Co. Ltd. (2000) 245 ITR 384 (Bom.)

The issue before the Bombay High Court in this case was : "Whether the MODVAT credit on the raw materials not consumed shall form part of the cost of raw material at the end of the accounting year" ?

Facts of the case

The assessee was following Net Method of Accounting i.e. the Opening Stock and Closing Stock of raw materials were shown net of MODVAT Credit. The purchases were also shown net of MODVAT credit. This method followed by the assessee was in accordance with the Guidance Note on Accounting treatment of MODVAT issued by the Institute of Chartered Accountants of India.

The AO held that the Net method of accounting resulted in understatement of profits. He therefore invoked the proviso (1) to section 145 and made an Addition of ` 43,15,657/- on account of valuation of closing stock on the basis of the MODVAT Credit availed by the assessee during the year.

Before CIT(A)

The CIT(A) came to the conclusion that in the net method adopted by the assessee, MODVAT credit which is available to the assessee has not been accounted for, although, in fact, it is availed of by way of deduction in the Central Excise duty liability insofar as the credit related to the closing stock of the raw materials.

However amongst various other arguments, the assessee also argued before CIT(A) that the addition on the basis of valuation of the closing stock without increasing the value of the opening stock, would give a distorted figure. It was contended that if the closing stock is valued inclusive of MODVAT credit, the opening stock should have also been valued by the AO on the same basis so as to work out the net additions to be made to the profits of the relevant year. This last argument appealed to the appellate authority. Accordingly, the assessee succeeded.

Before Tribunal

The revenue's appeal before the Tribunal was dismissed following the decision of the Special Bench in the case of *S.H. Kelkar & Co. vs. Dy. CIT (1993) 44 ITD 170 (Bom.)*

Before the Bombay High Court

The revenue was not satisfied with the decision of the Tribunal and carried the matter to the Bombay High Court.

Department's Arguments

The object of MODVAT credit under the excise law was to avoid the cascading effect. Under the excise law and in particular Rule 57A, the credit accrued to the assessee when it purchased the raw material since the cost of raw material included the excise duty. However, the said credit was only on account and it could be availed of only at the time of clearance of the excisable final product. The said credit cannot be utilised till the final product is manufactured. There was a vast difference between the accrual of credit and utilisation of credit. The meaning of modified value added tax (MODVAT) itself indicates that the tax was levied at each stage in the production and distribution on the basis of the value added to the goods or services passing through that stage. The MODVAT scheme laid down a procedure under which specified goods which are used in the manufacture of final products were eligible for credit of a specified duty on inputs. The scheme was to operate only when excise duty became payable on the final product.

Under the Income-tax Act, each year was a self-contained unit and the profits could not be postponed to the next year. It was the duty of the AO to deduce the profits. The Department relied on the judgment of the Supreme Court in the case of *CIT vs. British Paints India Ltd. (1991) 188 ITR 44 (SC)* for the proposition that if the system adopted by the assessee does not disclose the true and proper income, the AO was entitled to adopt appropriate computation to determine the true income. In the said judgment, it has been further laid down that in any system of accounting where profit of one year was likely to be shifted to another year, such method would be an incorrect method of computing the profits as each year was a self-contained unit and the taxes of a particular year being payable with reference to the income of that year, the method adopted by the assessee under which the profit of one year was likely to be shifted to another year, would result in understatement of profits of the year in question.

The department also argued that although the ICAI has prescribed the net method, the same should not be followed as it resulted in understatement of profits. The ICAI has given alternatives in the guidance note. The basic difference between the net and the gross method was that, in the net method, the rate per unit of the raw material did not include the element of MODVAT credit whereas, in the gross method, the rate per unit included MODVAT credit. Under the above circumstances, the net method adopted by the assessee resulted in understatement of the profits and therefore the AO was right in applying the gross method. The department also contested that even the illustrations given in the guidance note of the ICAI did not depict the correct picture. Under the gross method accepted by the ICAI, the MODVAT credit which is taken into account is only to the extent of the raw materials consumed whereas, according to the Department, the MODVAT credit is relatable to the full purchase cost and not only to the extent of raw materials consumed which has resulted in understatement of profits.

Assessee's Arguments

The assessee has been regularly following a correct method of accounting in respect of MODVAT credit of input duty against excise duty on finished products in accordance with the recommendations of the ICAI and therefore, the AO erred in disregarding the net/exclusive method followed by the assessee. Under Rules 57A to 57J of the Central Excise Rules, a manufacturer gets an instant credit of the input duty on goods (raw material) used in the manufacture of the final product. Under Rule 57A MODVAT credit is taken at the stage of receipt of inputs and such credit can be utilised at any stage thereafter. Such credit can be availed of even before consumption of units even though such inputs (raw material) may remain in stock. Credit entitlement arises on payment of input duty and not on consumption of inputs. Accordingly, the input duty was nothing but an advance towards the excise duty on the finished products and, therefore, cannot form part of the cost of inputs.

According to the ICAI, the cost of raw materials could be debited net of MODVAT or they could be debited at gross cost (inclusive method). The illustrations given by the guidance note of the ICAI show that under both the methods, the gross profit remains same. Hence, even if the gross method is correctly applied, then there would be no revenue effect because the profit would remain the same. The AO has not correctly applied the gross method. The method followed by the AO, contains an arithmetical fallacy and if the said fallacy is removed then, in that event, there is no question of understatement of profits, whether one follows the exclusive method or the inclusive method. Therefore, whichever method is applied the end result is the same. Hence, s. 145(1) read with the proviso has no application.

The valuation of inventory is not affected by MODVAT credit. If the inventory is valued at gross rate then the purchases will also have to be recorded at the gross rate. For this proposition, reliance was placed on the judgment of the Supreme Court in the case of *CIT vs. British Paints India Ltd. (1991) 188 ITR 44 (SC)*. Whatever component forms part of purchase should also form part of the closing stock and if duty paid is excluded from purchase, it cannot be included in the closing stock.

Reliance was also placed on the judgment of the Supreme Court in the case of *Collector of Central Excise vs. Dai Ichi Karkaria Ltd. (1999) 156 CTR (SC) 172* in which, *inter alia*, it has been laid down that excise duty paid on raw material, if modvated, shall not be included in the cost of production of the excisable product. In other words, if the assessee pays purchase price of ` 100 for the input and gets back ` 10 by way of MODVAT credit the input cost would be ` 90 which would be the cost of raw material. The Supreme Court has accepted the Guidance Note of the ICAI in the said judgment. Under the circumstances, the assessee was entitled to follow either of the two methods. The assessee has been following the net method particularly in view of the judgment of the Supreme Court under which the MODVAT credit taken on inputs is of the nature of set off available against payment of excise duty on final products.

Reliance was also placed on the judgment of the Supreme Court in the case of *Challapalli Sugars Ltd. vs. CIT (1975) 98 ITR 167 (SC)*, in which it has been laid down that the meaning of the words "actual cost" should be as the common commercial man would understand. The Court accepted the accountancy rules for deciding the cost of fixed assets so as to include all expenditure necessary to bring such assets into existence.

The assessee also relied on the judgment of the Supreme Court in the case of *Chainrup Sampatram vs. CIT (1953) 24 ITR 481 (SC)* in which it has been laid down by the Supreme Court that profits do not arise out of valuation of closing stock. Valuation of unsold stock at the close of an accounting period is a necessary part of the process of determining the trading results of that period and such valuations do not constitute source of profits. The source of profits is business. The true purpose of crediting the value of the unsold stock is to balance the cost of the goods entered on the other side of the account at the time of their purchase so that cancelling out of the entries relating to the same stock from both sides of the account would leave only the transaction on which there is actual sale in the course of the year showing profit or loss realised on the year's trading.

Decision of the High Court

The High Court accepted the contention of the assessee that the MODVAT credit arises on purchase of raw material. It is attributable to purchase cost. It is, therefore, used to reduce the purchase cost. There is no provision under the excise rules which stipulates that MODVAT credit can be taken only on the final product

It is a well settled principle of law that valuation of closing stock has to be on the basis of purchase cost. If the purchases include an element of MODVAT benefit then the closing stock should also correspondingly include the MODVAT benefit.

The High Court also accepted that the calculations made by the AO were erroneous on the facts of the case and that made by the assessee was correct. The AO's calculations resulted in violation of the balancing principle, whereas the same is followed correctly in the calculation of the assessee. Reading the two methods given by the ICAI the court held that it is clear that in both cases the MODVAT credit is related only to the raw material consumed. Following the decision of the Supreme Court in the case of *Collector of Central Excise vs. Dai Ichi Karkaria Ltd.*, the High Court held that whether one applies the net method or the gross method as calculated by the assessee the gross profit remains same and hence there is no understatement of profit as envisaged by the assessing officer.

The High Court declined to comment on applicability of section 145A of the Act since the case related to the period prior to introduction of section 145A. However, I believe that even after introduction of section 145A, the ratio of the decision remains unaltered since section 145A provides for inclusion of taxes for both the purchases, sales and inventories.

CIT vs. Indo Nippon Chemical Co. Ltd. (2003) 261 ITR 275 (SC)

On Revenue's appeal to Supreme Court, the Supreme Court dismissed the appeal and held that whatever method the AO adopts for the purpose of valuation of inventory, the same has to be consistent with the accepted principles of accountancy. The AO was not justified in adopting gross method at the time of purchase and net method at the time of valuation of the closing stock and thereby assuming that the income, to the extent of the MODVAT credit on the unconsumed raw material, was generated.

The Supreme Court also held that merely because MODVAT credit is an irreversible credit available to the manufacturers upon purchase of duty paid raw material, it would not amount to income which is liable to be taxed.

CA. Hasmukh Kamdar

Valuation of Excisable Goods

Commissioner of Central Exise, Mumbai vs. Fiat India Pvt. Ltd. [2012 (283) ELT 161 (S.C.)]

Introduction

Following issues were considered by the Hon'ble Supreme Court in this case.

a. Whether the price declared by assessee for their cars which is admittedly below the cost of manufacture can be regarded as 'normal price' for the purpose of excise duty in terms of section 4(1)(a) of the Act.

b. Whether the sale of cars by the assessee at a price, lower than the cost of manufacture in order to penetrate the market, can be regarded as 'extra commercial consideration' for the sale to their buyers which could be considered as one of the vitiating factors to doubt the normal price of the wholesale trade of the assessee.

The 'value' in relation to excisable commodity means 'normal price' or the price at which the goods are ordinarily sold by the manufacturer to a buyer in the course of wholesale trade at the time and place of removal where the buyer is not related person and price is the sole consideration for sale. The assessable value is arrived on the basis of section 4 of the Central Excise Act 1944 and the Central Excise Valuation Rules 1975/2000. Generally speaking the expression 'normal price' occurring in Section 4(1)(a) and (b) means the price at which goods are sold to the public. Where the sale to public is through dealers, the 'normal price' would be the 'sale price' to the dealer. In this case the Apex Ccourt, after discussing valuation provisions in detail has held that assessable value for excise purposes 'normal price' need not be sale price but, depending upon facts, the assessable value could consist of manufacturing cost and manufacturing profit, where goods are sold at a loss.

Facts

The assessee M/s. Fiat India Pvt. Ltd. manufactured Fiat Uno cars. They filed several price declarations in terms of Rule 173C of the Central Excise Rules 1944, during the period 27-5-1996 to 4-3-2001. Wholesale price at their depot was declared as 'normal price' for excise purposes and had paid excise duty accordingly.

Central Excise Authorities, *prima facie*, found that the wholesale price declared by the assessee is much less than the cost of production, and, therefore, the price so declared by them could not be treated as a normal price for the purpose of quantification of assessable value under section 4(1) (a) of the Act for levy of excise duty as it would amount to short payment of duty.

Central Excise officer, *vide* his order in original dated 31-1-2002, held that assessee has undervalued the cars for excise purposes. In order to penetrate the market, the assessee had sold the cars at a price which was lower than manufacturing cost. Therefore, price at which they were selling the cars in the market could not be considered to be 'normal price' in terms of section 4(1)(a) of the Act. It was held that since the cost of production of the Fiat Uno cars is much higher than the price at which the assessee is selling them to general public, the price is artificial and arrived at without any basis just to capture the market and drive out the opponents from business. The declared price therefore cannot be accepted as normal price and assessment has to be done in terms section 4(1)(b) of the Act read with 1975 Valuation Rules.

Department also relied on the observation of Apex Court in the case of Bombay Tyre and MRF case to the effect that all costs incurred to get the goods saleable / marketable should be taken into account for determining the assessable value. Loss incurred by the assessee to penetrate the market should be borne by the assessee and in the process government should not lose revenue. It was further observed that when normal price cannot be ascertained as per Section 4(1)(a)of the Act, alternative procedure under the Valuation Rules, i.e., cost of production and profit has to be applied. The demand of differential duty was confirmed.

Being aggrieved by the Order passed by the adjudicating authorities the assessee had carried the matter in Appeal before the Commissioner Appeals. The Commissioner (Appeals) sustained the order passed by the adjudicating authority and rejected the Appeal.

The assessee, being aggrieved by the Order passed by Commissioner (Appeal) carried the matter further by filing Appeal to the Tribunal. The Tribunal reversed the findings and conclusions reached by the Adjudicating authorities and Commissioner Appeal, on the ground that there is no allegation that the wholesale price charged by the assessee was for extra commercial consideration and that dealing of the assessee and their buyers was not at arm's length or that there is flow back of money from the buyers to the assessee and therefore, price declared by the assessee is the ascertainable normal price in view of the decision in the case of *Commissioner of Central Excise, New Delhi vs. Guru Nanak Refrigeration Corporation [2003 (153) E.L.T 249 (S.C.)].*

Department has preferred this Appeal to Hon'ble Supreme Court.

Submissions by the Department

On behalf of the Department following submissions were made:

a. The assessee is not fulfilling the conditions enumerated in section 4(1)(a) of the Act i.e. 'normal value' is , where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale and therefore the valuation has to be done in accordance with Section 4(1)(b) of the Act read with 1975 Valuation Rules.

b. The price fixed by the assessee does not reflect the true value of goods as manufacturing cost and profit is much higher than the sales price.

c. Sole reason for lowering the price by the assessee below the manufacturing cost is just to penetrate the market and compete with other manufacturers and therefore such price cannot be treated as 'normal price' in terms of Section 4(1)(a) of the Act. Therefore price is not the sole consideration.

d. Since price of the cars sold by the assessee was not ascertainable, the revenue is justified in computing the assessable value of the goods for the levy of excise duty under section 4(1)(b) of the act and the relevant Rules.

e. A normal price, as per section 4(1)(a), is a price at which the goods are ordinarily sold. A loss making price cannot be the price at which goods are ordinarily sold and a loss making price cannot be 'normal price'.

f. Decision in the case of *Union of India vs. Bombay Tyre International [1983 (14) ELT 1896 (SC)]* makes it abundantly clear that for arriving at the assessable value, the Department is entitled to take into account the manufacturing cost plus manufacturing profit.

Submissions by the Assessee

a. The 'normal price' as found in Section 4(1)(a) of the Act is nothing but the price at which the particular assessee sold his goods to his buyers in the ordinary course of business. Reason for the assessee selling the cars for lower price than manufacturing cost was because the assessee had no foothold in the Indian market and therefore had to sell at a lower price than the manufacturing cost in order to compete in the market.

b. Department's contention that price is not the sole consideration in this case is not true. The word 'consideration' is used in the section in the same sense as used in section 2(d) of the Indian Contract Act, and it is only the monetary consideration from the buyer to the assessee that requires to be taken note of for the purpose of valuation under the Act. Intention and consideration cannot be treated as same. It is only intention of the assessee to penetrate the market and only consideration for the assessee from the buyer was the sale price. No additional consideration is received from the buyer over and above the sale price.

c. Assessable value has to be gathered from the normal price and not from cost of manufacture, which is irrelevant when normal price is ascertainable. When normal price is not ascertainable in terms of section 4(1)(a), then only section 4(1)(b) read with 1975 Valuation Rules would come into play to determine nearest equivalent assessable value of the goods.

d. Valuation Rules have to be applied sequentially, namely Rules 4 and 5 of the 1975 Rules be invoked first in order to determine the assessable value and if Rules 4 and 5 are not applicable or assessable value cannot be ascertained by applying the said rules, then only Rule 6/7 can be invoked. Rule 6(b)(ii) of 1975 Valuation Rules which contemplates determination of assessable value on the basis of cost of manufacture can be invoked only when goods are captively consumed by the assessee.

e. It is not practical to go into cost of manufacture in each and every case in order to determine whether goods are sold below the cost of production. If wholesale price under Section 4(1)(a) is not ascertainable, then assessing authority can go to the nearest equivalent to determine assessable value for the purpose of levy of excise duty.

f. In terms of Rule 5, in case the price is not the sole consideration then value of goods can be determined by taking into account the monetary value of additional consideration flowing directly or indirectly from buyer to seller. Additional consideration should flow from buyer to seller. Intention of the assessee to penetrate the market cannot be treated as additional consideration as no money consideration flows from buyer to seller. Therefore there is no additional consideration from buyer to seller and whole transaction is *bona fide.*

g. Show cause notices for the period April 1998 to June 2001, there is no mention of cost auditor's report. All the show cause notices are identical and same while alleging that assessee has not adopted any basis to determine the price and goods are sold at loss to penetrate the market. Allegation on the basis of cost auditor's report and price being not sole consideration amounts to issuance of new show cause notice which is not justified. Copy of cost auditor's report has not been furnished to the assessee. Revenue is not justified in rejecting assessee's price as the price is a benchmark in order to sell the goods in market and it is even higher in comparison to other similar cars, although it is less than the cost of manufacture.

h Section 4 of the Act was amended on 1st July 2000 to incorporate 'transaction value' as assessable value instead of 'normal price'. Therefore amended section 4 is applicable to the transactions which took place during the period from July 2000 to June 2001.

i. If the provisions of section 4(1)(b) are applied, it will cause serious hardship to the assessee.

Discussion

It can be construed from the plain reading of section 4 of the Act that 'normal value' is where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale.

In the present case, it is the stand of the revenue that 'loss making price' cannot be the 'normal price' and that too when it is spread over five years and the consideration being only to penetrate the market and to compete with other manufacturers who are manufacturing more or less similar cars and selling at a lower price. It is true that revenue does not allege that buyer is a related person or that there is an element of flow back from the buyer to seller but it is alleged that the price was not the sole consideration. No prudent businessman would continuously suffer huge loss only to penetrate market. A prudent businessman or woman and in this case a company is expected to act with discretion to seek reasonable income, preserve capital and in general avoid speculative investments. It is admitted fact that the price of the car was not based on manufacturing cost and manufacturing profit, but has been fixed at artificially depressed lower price to penetrate the market, though normal price of their cars is higher. Therefore merely because the assessee has not sold the cars to related person and element of flow back is not alleged, the price at which the assessee has sold its goods to the wholesale trader cannot be accepted as 'normal price' for the sale of cars.

It is alleged that the loss price at which goods are sold by the assessee clearly indicates that these goods are not 'ordinarily sold' in terms of section 4(1)(a) of the Act. Assessee is selling goods at loss continuously for five years i.e. from 1996 to 2001 cannot fit into description of expression 'ordinarily sold'. Assessee contends that selling price at which goods are sold in the ordinary course of business by the assessee to all buyers is the same and therefore these goods are 'ordinarily sold' in terms of section 4(1)(a) of the Act.

The word 'ordinarily' by no stretch of imagination can include extraordinary or unusual. In the instant case, the assessee sells their cars in the market continuously for a period of five years at a loss price and claims that it had to do only to compete other manufacturers of cars and to penetrate the market. If such sales are taken as sales made in the ordinary course, it would be anathema for the expression 'ordinarily sold'. There could be instances where a manufacturer may sell his goods at a price less than the cost of manufacture and manufacturing profit, when the company wants switch over its business for any other manufacturing activity, or where goods could not be sold within a reasonable time. In this case since the price charged for the sale of cars is exceptional, such sales cannot be considered as being done in the in the ordinary course of business. If the price charged to the purchaser at the factory gate is fair and reasonable and has been arrived at only on purely commercial basis, then that should represent the wholesale cash price under section 4(1)(a) of the Act. If there is extra ordinary or unusual price, especially low price, charged because of extra commercial consideration, such price charged could not be considered as price charged in ordinary course of business.

When price is not the sole consideration and there are some additional considerations either in the form of cash, kind, services or in any other way, then according to Rule 5 of 1975 Valuation Rules, the equivalent value of that additional consideration should be added to the price shown by the assessee. The important requirement under section 4(1) (a) is that the price must be the sole consideration and only consideration for sale. If the sale is influenced by consideration other than price, then, section 4(1) (a) will not apply. In the instant case, the main reason for assessee to sale their cars at a lower price than the manufacturing cost and profit is to penetrate the market and this will constitute extra commercial consideration and not the sole consideration. The duty of excise is chargeable on goods with reference to its value then, normal price on which the goods are sold shall be deemed to be the value, provided (1) the buyer is not a related person and (2) the price is the sole consideration. These twin conditions have to be satisfied for the case to fall under Section 4(1)(a) of the Act. In this case price is not the sole consideration when the assessee sold their cars in the wholesale trade. Therefore assessing authority is justified in invoking clause (b) of section 4(1) of Act to arrive at the value of the excisable goods for the purpose of levy of the duty of excise, since the proper price could not be ascertained. Since, section 4(1)(b) of the Act applies; the valuation requires to be done on the basis of the 1975 Valuation Rules.

After amendment of section 4, w.e.f. 1-7-2000, duty is chargeable on 'transaction value'. Different 'transaction value' may be charged by the assessee to different customers for assessment purposes. However if one of the requirements namely (a) where the goods are sold for delivery at the time and place of delivery; (b) the assessee and buyer are not related; and (c) price is the sole consideration for sale, is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which are made effective from 1-7-2000. Since price is not the sole consideration for the period even after 1-7-2000, in this case, the assessing authority was justified in invoking provisions of the 2000 Rules.

As regards contention of the assessee that assessing authority before invoking Rule 7 of the 1975 Valuation Rules, ought to have invoked Rules 4, 5 and 6 of the said Rules, the Hon'ble Supreme made the following observation;

Rule 2 of 1975 Rules provides for determination of certain terms, such as 'proper officer', 'value' etc. Rule 3 provides that the value of any excisable goods, for the purpose of clause (b) of sub-section 1 of section 4 of the Act be determined in accordance with these Rules. Rule 4 provides that the value of the excisable goods shall be based on the value of such goods by the assessee for delivery at any other time nearest to the time of removal of such goods under assessment. Rule 5 provides that when goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act, except that the price is not the sole consideration, the value of such goods shall be based on the aggregate of price and the amount of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. Rules 6 provides that, if the value of the excisable goods under assessment cannot be made, then to invoke the provisions of rule 6 of the Rules wherein certain adjustments requires to be made as provided therein. Rule 7 is in the nature of residuary clause. It provides that if value of excisable goods cannot be determined under Rule 4, 5 and 6 of the Rules, the adjudging authority shall determine the value of such goods according to the best of his judgment and while doing so, he may have regard to any one or more methods provided under the aforesaid Rules. A bare reading of these Rules does not give any indication that the adjudging authority, while computing the assessable value of the excisable goods, has to follow the Rules sequentially. The Rules only provides for arriving at the assessable value under different contingencies. Again Rule 7 of the Valuation Rules which provides for the best judgment assessment gives an indication that the assessing authority , while quantifying the assessable value under the said Rules, may take assistance of the methods provided under Rules 4, 5 and 6 of the Valuation Rules. Therefore contention of the assessee that the assessing authority before invoking Rule 7 of the 1975 Valuation Rules, ought to have invoked Rules 4, 5 and 6 of the said Rules cannot be accepted.

The Hon'ble Supreme Court also observed that hardship cannot be a ground for deciding tax issues and since the assessing authority could not do the valuation with the help of the other Rules, has resorted to the best judgment method and while doing so has taken the assistance of the Report of Cost Accountant who was asked to conduct the special audit to ascertain the correct price that requires to be adopted during the relevant period.

Conclusion

The Hon'ble Supreme Court held that no exception can be taken of the assessable value of the excisable goods quantified by the assessing authority. As a result revenue Appeal was allowed and order in original passed by the adjudicating authority was restored.

Comments

The judgment of the Hon'ble Supreme Court is based on the particular facts of this case, wherein the manufacturer had sold the excisable goods at a loss price for a continuous period of five years, with deliberate intention to penetrate the market. No prudent businessman would do this. However it cannot be construed from this judgment that in each and every case when a manufacturer suffers a loss, the sale price should be ignored and assessable value should be arrived at on the basis of manufacturing cost. As the Supreme Court itself has pointed out in the judgment, there may be many other reasons for a manufacturer incurring a loss. It is only when loss is incurred by artificially charging lower price with a specific intention in mind, that receipt of additional consideration can be presumed and sale price be ignored.

"Mainstream medicine would be way different if they focused on prevention even half as much as they focused on intervention…"

— *Anonymous*

CA Janak Vaghani

Maharashtra Value Added Tax Act, 2002

Larsen & Toubro Ltd. vs. State of Karnataka, [2013] 65 VST 1(SC)

Introduction

Under the VAT Laws, tax is payable on transfer of property in goods involved in execution of a works contract. The larger bench of SC in the case of Larsen & Toubro Ltd. delivered a landmark judgment to decide the nature of agreement for sale of flat during the construction of building for the purpose of levy of VAT.

The SC had approved the decisions given by it in case of *K. Raheja Development Corporation (2005) 141 STC 298 (SC)* and also approved the decisions of the Bombay High Court in case of MCHI upholding the constitutional validity of the amendment made to section 2(24) of the Maharashtra Value Added Tax Act, 2002 from 20-6-2006. The SC laid down test to determine when an agreement is considered as works contract liable for VAT.

Facts

The two-judge Bench of SC had referred following issues for consideration by the Larger Bench after considering provisions of the Karnataka Sales Tax Act, 1957 and noticing the distinction between a contract of sale and works contract.

i) Whether the ratio of judgment of the Division Bench of SC in case of *K. Raheja Development Corporation (2005) 141 STC 298 (SC)* as enumerated in Para 20 of the Said judgment is correct?

ii) Whether the development agreement is a works contract and if not could the department rely upon the Second Contract, which is the tripartite agreement and interpret it to be a works contract, as defined under the Karnataka Sales Tax Act, 1957?

iii) Whether the petitioner company was the contractor for prospective flat purchasers?

Further, the Bench also considered 12 more appeals arising out of judgment of the Bombay High Court given under the Maharashtra Value Added Tax Act, 2002.

Facts of Larsen & Tourbo

The L & T entered into a development agreement with land owner for construction of multistoried apartment complex. The owner was to contribute his land and L & T to construct the apartment complex. After development 25 per cent of the total space was to belong to the owner and 75 per cent to L & T. The L & T entered into an agreement with intended purchaser who will get apartment upon completion of construction and an undivided interest in the land also. The Karnataka Sales

Tax department treated it as works contract and demanded VAT on it.

In a Writ Petition filed by the L & T, the Karnataka High Court following judgment of SC in case of K. Raheja dismissed the writ petition.

Facts of MCHI

The Bombay High Court in a writ petition filed by MCHI and others challenging the constitutional validity of Section 2(24) of the Maharashtra Value Added Tax Act, 2002 as amended from 20-6-2006 initially by the Maharashtra Act, XXXII of 2006 and thereafter by the Maharashtra Act XXV of 2007 and rule 58(1A) of the Maharashtra Value Added Tax, Rules, 2005.The Division Bench of the Bombay High Court on examination of rival contentions had, *inter alia*, held: (a) works contract have numerous variations and it is not possible to accept the contention either as a matter of principle or as a matter of interpretation that a contract for works in the course of which title is transferred to the flat purchaser would cease to the works contract; (b) the provisions of MOFA recognise an interest of the purchaser of the apartment, not only in respect of the apartment which forms the subject-matter of the purchase, but also an undivided interest, described as a percentage in the common areas and facilities; (c) the amendment to section 2(24) clarifies the legislative intent that a transfer of property in goods involved in the execution of works contract including an agreement for building and construction of immovable property would fall within the description of sale of goods within the meaning of that provision and it brings within the ambit of that expression "transactions of that nature" which are referable to Article 366(29A)(b); (d) by amended definition of the expression "sale" in clause (b)(ii) of the Explanation to section 2(24), the transactions which involve works contract have been covered; (e) the amendment in section 2(24) does not transgress the boundary set out in Article 366(29A); (f) rule 58(1A) of the MVAT Rules provides that in the case of construction contract where the immovable property, land or as the case may be, interest therein is to be conveyed and the property involved in the execution of the construction contract is also transferred, it is the latter component which is brought to tax; the value of the goods at the time of transfer is to be calculated after making the deductions which are specified under sub-rule (1); and (g) rule 58(1A) provides for a measure for the tax by excluding the cost of the land.

Decision of SC

1) The SC explained the term works contract for the purpose of levy of sales tax as under:-

(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.

(ii) For the purposes of Article 366(29-A) (b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366(29-A) (b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366(29-A)(b) serves to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.

2) The SC approved the judgment of K. Raheja. However, the SC clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the

goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser. That the building is intended for sale ultimately after construction does not make any difference.

3) The SC also approved the judgment of the Bombay High Court given in case of MCHI and others upholding the constitutional validity of the amendment made to section 2(24) of the Maharashtra Value Added Tax Act, 2oo2. However, did not approve the constitutional validity of rules 58(1) and (1A) providing rules to determine sale price of goods in case of a construction contract, where along with the immovable property, the land or, as the case may be, interest in the land, underlying the immovable property is to be conveyed, and the property in the goods (whether as goods or in some other form) involved in the execution of the construction contract is also transferred to the purchaser and such transfer is liable to tax under the Act. The value of the goods which can constitute the measure of the levy of the tax has to be the value of the goods at the time of incorporation of goods in the works even though property in goods passes later. Taxing the sale of goods element in a works contract is permissible even after incorporation of goods provided tax is directed to the value of goods at the time of incorporation and does not purport to tax the transfer of immovable property. The mode of valuation of goods provided in Rule 58(1A) has to be read in the manner that meets this criteria. The SC read down Rule 58(1-A) accordingly and directed the Maharashtra Government to bring clarity in Rule 58(1-A) as indicated above. Subject to this, the SC sustained the constitutional validity of Rule 58(1-A) of MVAT Rules.

The Advocate General for Maharashtra clearly stated before the SC that implementation of Rule 58(1-A) shall not result in double taxation and in any case all claims of alleged double taxation will be determined in the process of assessment of each individual case.

The SC send all matters back to the Regular Bench for final disposal.

Conclusion

The judgment of SC has explained the scope of the term works contract involving transfer of property in goods for the purpose of levy of sales tax. However it has not decided in any particular case to hold that the particular contract is taxable under the VAT laws being an indivisible works contract liable to VAT. The SC has explained the term works contract for the purpose of levy of VAT to be decided by the assessing authorities in a given case. Therefore, each and every contract for sale of immovable property may not be a works contract liable to VAT.

The Maharashtra Government has amended rule 58 to bring out clarity to give effect to the judgment of SC but it has not given full effect to it as it has provided for deduction of value of work completed before the date of agreement arbitrarily with reference to the completion of stages of construction of building without providing for deduction based on actual work done after the date of entering into the agreement for sale of flat.

This judgment may also apply to determine the nature of works contract for the purpose of levy of service tax and also for the purpose of deduction of tax under the Income-tax Act, 1961. Not only that this judgment has also raised certain issues to determine the rights of the buyer of flat in respect of incomplete portion of flat. One has to wait and watch development of law in this respect to be decided by the courts in a time to come to understand the implication of it to determine the levy of tax under the direct and indirect tax.

CA Rajiv Luthia & CA Jinal Shah

Applicability of Service Tax on "Free Supplies"

Analysis of judgment of Larger Bench of Delhi in case of M/s. Bhayana Builders vs. CST Delhi – 2013 TIOL 1331 - CESTAT Del – LB

Introduction

Commercial/Industrial construction service was notified for payment of service tax w.e.f. 10th September, 2004. *Vide* Notification No. 15/2004 –ST dated 10th September, 2004, exemption was granted to the tune of 67% of the value of the taxable service under this category subject to the conditions that (i) no credit of duty paid on inputs or capital goods has been taken under CCR, 2004 or (ii) no benefit of exemption notification 12/2003–ST dated 20th June, 2003 was availed by service provider. This notification 15/2004 was amended *vide* notification 4/2005-ST dated 1st March, 2005 and thereby explanation was inserted which reads as "For the purpose of this notification "the gross amount charged" shall include the value of goods and materials supplied or provided or used by the provider of commercial or industrial construction service for providing such services".

Facts of the case and issue involved

Hon'ble Bengaluru CESTAT in the case of *Cemex Engineers vs. CST, Kochi (2009-TIOL-2208-CESTAT-Bang.)* has held that the value of goods supplied and provided by the client free of charge would not be included for calculating gross amount charged by the service provider for claiming exemption under notification 15/2004-ST as amended from time to time. The Hon'ble tribunal relied on an observation of the Madras High Court in an interim order in the case of *Larsen & Toubro Ltd., Chennai vs. UOI (2007-TIOL-176-HC-Mad-ST)*

Later, Hon'ble Ahmedabad CESTAT in the case of *Jaihind Projects Ltd vs. CST Ahmedabad (2010-TIOL-124-CESTAT-AHM)* has pronounced a contrary view in similar situation. The Hon'ble Tribunal held that section 67 of the Act read with Rule 3 of the Service Tax (Determination of Value) Rules, 2006, envisages that consideration other than in the form of money must be included in gross value to be offered for taxation. In order to arrive at "gross amount charged" referred in notification 15/2004, the assessee opting for the benefit of abatement must include the value of the goods used for providing services. Another reason recorded by the Tribunal is that by not including the free supplies in the gross amount charged it will turn out to be discriminatory results between two pipeline service providers; where one such provider uses pipes provided by himself and the other uses pipes provided by the service recipient. According to the Tribunal, where goods or material are supplied free of cost by a third party or a recipient, the expression "used" comes into play and the objective of the explanation and the proviso is to ensure that in different situations the liability to service tax would remain the same.

Noticing the above conflicting decisions of two division benches, *vide* order dated 5th April, 2013 the, matter was referred for consideration to the Larger Bench of Delhi CESTAT in case of *Bhayana Builders vs. CST* along with other similar cases.

The appellants (Bhayana Builders) were engaged in construction of civil structure & were liable to service tax under the category of "Commercial or Industrial Construction Services". The appellants were given a composite contract for construction i.e. inclusive of all materials except steel & cement which is issued by the principal as free supply. The appellants paid service tax on the 33% of the value of consideration received from their principal without including value of free supply, after availing the benefit under notification 15/2004-ST as amended from time to time.

Appellant's contention

Section 67 of the Act deals with value of taxable service and intend to define what constitutes value received by the service provider as "consideration" from the service recipient for service provided. As per said section, any consideration whether monetary or otherwise should flow from service recipient to the service provider and should accrue to the benefit of service provider. The "free supplies" would not constitute non-monetary consideration since no part of the goods or materials, so supplied accrues to or is retained by the service provider.

The Hon'ble Delhi High Court in the case of *Intercontinental Consultants and Technocrats Pvt. Ltd. vs. Union of India (2012-TIOL-966-HC-DEL-ST)* held that value of taxable services shall be gross amount charged by service provider, and nothing more or nothing less as consideration paid as *quid pro quo* for the service can be brought to charge. The provisions of Rule 5 of the Service Tax Valuation Rules are *ultra vires* to the sections 66 & 67 of the Act.

It was also argued that mere enlargement of the contours of "gross amount charged" in a condition incorporated in an exemption Notification would not amount to bringing to the tax net a value which is not taxable under section 67 of the Act. Such a condition would normally indicate that the specified exemption is granted subject to a condition which requires a wider incorporation into the value of the taxable service, for the limited purpose of computing the extent of exemption. A condition expanding the scope of "gross taxable value" for the limited purpose of granting exemption would therefore only mean that the exemption provided is not so generous as facially appears. Any such condition in an exemption Notification would not therefore and *per se* violates the provisions of section 67 of the Act.

The expression "used" in the explanation to the notification 15/2004-ST is preceded by two other expressions "supplied" and "provided". The expression "used" would bear a meaning based on noscitur principle, which propound that a statutory term is recognised by its associated words. The words supplied and provided are closely associated words. "Provided" also means to supply; furnish. "Supply" bears a similar connotation. The word "used" is structurally associated (in the Explanation) with the earlier two words and the three words are employed to define the meaning of the expression gross amount charged, an expression that occurs in the preamble to Notification No. 15/2004-ST. The word "used" variously means cause to act or serve for a purpose; avail oneself of; exploit for one's own ends; the right of power of using.

The expression gross amount charged means an amount charged on the service recipient, received by the provider and accruing to the benefit of the provider in relation to the taxable service provided and the Explanation seeks to define gross amount charged, an expression occurring in the preamble, by employing three words to contextualise the definition – supplied, provided, used.

The appellants also argued that the value of free supplies is incapable of computation (since no principle of computation of free supplies is indicated and the provisions of section 67(1)(iii) would not apply as free supplies would not fall within section 67), the computation provision fails and consequently this restriction on the availability of the benefits of exemption under the said Notification would be nugatory.

Revenue's contention

The department proclaimed that the appellants have not correctly valued their services, inas much as they have not included the value of the free materials like cement, steel, etc. supplied by their principal in the "gross amount charged" for discharging their service tax liability.

The department contended that if the assessee opts for the abatement benefit under notification 15/2004 as amended by notification 4/2005, they must include the value of all the goods used for the purpose of the construction activity. The word "used" in the Explanation clearly means that irrespective of the source of supplies, if some material or goods were used in the construction service, the value of such goods must be included, for arriving "gross amount charged" as referred in Notification No. 15/2004-ST.

The department further argued that in terms of contract between the parties, the free supplies constitute the consideration by the promisor/the service recipient to the promisee/the service provider for providing the taxable construction service. Since cement and steel are integral components of construction services, their value would be included in arriving at gross amount charged.

Revenue also contended, that even if one of the literal meanings of the expression "used", namely free supplies used is considered as the legal meaning as well, construction service providers may not be handicapped as they may seek benefits under Notification No. 12/2003-ST.

CRITICAL ANALYSIS OF THE VALUATION PROVISIONS & PRONOUNCEMENT BY HON'BLE DELHI LB

The Larger Bench while deciding the above appeal carefully evaluated the following service tax provisions:

- Section 67 of the Finance Act, 1994
- Exemption Notification 12/2003-ST dated 26th June, 2003
- Exemption Notification 15/2004-ST dated 10th September, 2004
- Board TRU Circular dated 17th September, 2004

Scope of section 67 of the Act

- The Hon'ble Bench observed that the valuation provision u/s. 67 has undergone amendment w.e.f. 18th April, 2006, wherein the service tax is chargeable on any taxable service with reference to its value.
    - o Sub-clause (i) provides that if the consideration is money, then value shall be the gross amount charged.
    - o Sub-clause (ii) provides that when provision of service is for a consideration not wholly or partly consisting of money, the value shall be such amount in money as, with the addition of service tax charged, is equivalent to the consideration.
    - o Sub-clause (iii) provides that if service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

- The Act clearly intends to define what constitutes the value received by the service provider as "consideration" from the service recipient for the service provided. Implicit in this legislative architecture is the concept that any consideration whether monetary or otherwise should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the service provider.

- The department's argument that the value of "free supplies" to a construction service provider ought to be included in the value of taxable services for determination of the liability to tax under section 67 of the Act in view of sub-clause (ii) of section 67(1), is not a appropriate construction of the provision. Considering "Free Supplies" used in the construction activity as a non-monetary consideration would be a highly unreasonable inference of the provision, since no part of the goods and materials so supplied accrues to or is retained by the service provider.

- The ratio held in case of Jaihind Projects Ltd., the interpretation that goods supplied by service recipients are essential components for providing the agreed service, these must be treated as non-monetary consideration and included in the value of the taxable service, proceeds on a flawed interpretation of the provisions of section 67.

- Further in regards to the other reason of explanation being intended to bring parity among all service providers providing such services, it appears that such analyses endeavours identify equities in a fiscal legislation (the Act) or in an exemption Notification issued thereunder. In *Union of India and Others vs. Bombay Tyre International Ltd. & Others 1983 (14) ELT 1986 (SC) 2002-TIOL-374-SC-CX-LB* the Court negated the assessee's contention that uniformity of incidence is a basic character of excise (tax/duty). Rejecting this contention the Court held that levy in this country has the status of a constitutional concept and the point of collection is located where the statute declares it will be and the legislature is free to adopt any standard for determining the value.

Scope of exemption Notifications

- *Vide* Notification 12/2003-ST, exemption is granted from the levy of service tax in respect of the value of goods & materials sold by service provider to the service recipient, subject to the documentary evidence.

- Further, *vide* notification 15/2004-ST, exemption is granted in respect of taxable service provided in relation to construction service specifically for 67% of the gross amount charged. CBEC Circular No. 80/10/2004-ST dated 17th September, 2004 in para 13.5 clarified the reason for issuance of notification 15/2004. It being that earlier notification 12/2003 was issued to provide benefit to a service provider to take credit of the excise duty paid on inputs by building contractors which include material costs as are that incurred for cement, steel, fittings and fixtures, tiles, etc., which are normally procured from the market. However, it was observed that these materials, normally procured from the market and are not covered by any duty paid documents; and since Notification No. 12/2003-ST requires furnishing of documentary proof specifically indicating the value of goods sold, such proof is difficult to obtain in the context of market realities and since in a composite contract, bifurcation of goods sold is difficult, the generic abatement of 67% is provided in the case of composite contracts, where the gross amount charged includes the value of material costs, *vide* Notification No. 15/2004-ST

- However, the core issue of the current appeal arises on account of appended "explanation" inserted in notification 15/2004 by amended notification 4/2005. The idea of the inserting the said explanation was to explain the meaning of the expression "gross amount charged" to include the value of goods and materials supplied or provided or used by the provider of construction service for providing such service. The 'Explanation' purports to define the expression "gross amount charged" occurring in the preamble to Notification No. 15/2004-ST. In the context of the preamble, it is clear that abatement of 67% of tax (subject to exceptions enumerated therein) is in respect of the "gross amount charged" by the service provider and remitted to such provider by the recipient, an intention that resonates the identical expression employed in section 67(1)(i) of the Act.

- The question therefore is whether Notification No. 04/2005-ST expands the scope of the expression "gross amount charged", since this expression in the preamble to Notification No. 15/2004-ST does not and cannot comprehend value of "free supplies" by a construction service recipient.

- The thrust of the principle "noscitur a sociis" is spelled out in various ratio lead down by judicial authorities. Hon'ble Supreme Court in the case of Rohit Pulp and Paper Mills Ltd. held that the Court has first to keep in mind the object and purpose of the notification. All parts of it should be read harmoniously in aid of, and not in derogation of that purpose. If the items mentioned in the group were totally dissimilar and it were impossible to see any common thread running through them again, it may be permissible to give the expressions their widest latitude.

- The Hon'ble Larger Bench held that goods and materials, supplied/provided/used by the service provider for incorporation in the construction, which belong to the provider and for which the service recipient is charged towards the value of such supply/provision/use and the corresponding value whereof was received by the service provider, to accrue to his benefit, whether independently specified as attributable to the specific material/ goods incorporated or otherwise, would alone constitute the "gross amount charged". If the intention of the statute to include value of free supplies into the gross amount charged, for valuation of the taxable service, then the phraseology must be specific and without any ambiguity.

Conclusion

In the case of free supplies of goods, the service provider neither receives any monetary or non-monetary consideration nor any benefit accrues to him. Therefore, it should not form part of consideration. However, when such contracts specifically provides for deduction of equivalent amount of value of supply of goods from the contract price, the matter will be completely on different footing and the entire amount of such value should be included for arriving the gross amount charged. The benefit under notification 12/2003 will be available only in case of material or goods sold by the service provider to the service recipient in the course of providing of services.

Case Laws Index

B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

A trust carrying on its objectives with dual purposes, i.e., charitable and religious purposes would not be denied registration under section 12AA by virtue of exception provided under the provisions of section 13(1)(b) unless its activities are exclusively meant for a particular religious community

CIT vs. M/s. Dawoodi Bohra Jamat Civil Appeal No. 2492 of 2014 (Arising out of S.L.P.(C) No. 9004 of 2010, dated 20th February, 2014) [(2014) 43 taxmann.com 243 (SC)]

The assessee, a registered Public Trust, filed an application for registration before the CIT for registration u/ss. 12A/12AA to avail exemption u/ss 11. The CIT held that though the assessee was a charitable trust, since its object and purpose was confined only to a particular religious community (Dawoodi Bohra), the bar u/s. 13(1)(b) was attracted. On appeal, the Tribunal set aside the order of the CIT and directed it to grant trust registration to the assessee under sections 12A & 12AA. On appeal by the department, the High Court declined to entertain the appeal on the ground that the Tribunal had given a finding of fact that the assessee was a religious trust. On further appeal by the department the Supreme Court had to consider (i) whether the issue as to whether the assessee was a charitable/religious trust was a finding of fact & (ii) whether the assessee was hit by the bar u/s. 13(1)(b). The Supreme Court held that:

i) The establishment of Madrasas or institutions to impart religious education to the masses would qualify as a charitable purpose under the head of education under the provisions of section 2(15). The Madrasas do not confine themselves to only dissipation of religious teachings but also contribute to the holistic education of an individual. Therefore, the objects of the trust exhibited the dual tenor of religious and charitable purposes and activities.

ii) From the phraseology in section 13(1)(b), it could be inferred that the Legislature intended to include only the trusts established for charitable purposes in such provision. That, however, would not mean that if a trust was a composite one, i.e., one for both religious and charitable purposes, it would not be covered by clause (b); The objects of trust did not channel the benefits to any community and, thus, would not fall under the provisions of section 13(1)(b). Thus, assessee was a charitable and religious trust which did not benefit any specific religious community and, therefore, it would be eligible to claim exemption under section 11.

iii) Normally a finding of fact as decided by the last fact finding authority is final and ought not to be lightly interfered by the High Court in an appeal. The exceptions to the said rule have been well delineated by this Court and for the present case do not require to be noticed. The appellate Courts however ought to be cautious while weeding out such questions and should the question in examination involve examination of finding of fact, *ex cautela abundanti* the appellate Courts would require to examine that whether the question involves merely the finding of fact or the legal effect of such proven facts or documents in appeal. While the former would be a question of fact which may or may not be interfered with, the latter is necessarily the question of law which would require consideration. It is often that the questions of law and fact are intricately entwined, sometimes to the extent of blurring the domains in which they ought to be considered and therefore, require cautious consideration. The question where the legal effect of proven facts is intrinsically in appeal has to be differentiated from the question where a finding of fact is only assailed;

iv) The legal effect of proved facts and documents is a question of law. The determination of nature of trust as wholly religious or wholly charitable or both charitable and religious under the Act is not a question of fact. It is but a question which requires examination of legal effects of the proven facts and documents, that is, the legal implication of the objects of the trust as contained in the trust deed. It is only the objects of a trust as declared in the trust deed which would govern its right of exemption u/s. 11 or 12. It is the analysis of these objects in the backdrop of fiscal jurisprudence which would illuminate the purpose behind creation or establishment of the trust for either religious or charitable or both religious and charitable purpose. Therefore, the High Court has erred in refusing to interfere with the observations of the Tribunal in respect of the character of the trust;

v) In certain cases, the activities of a trust may contain elements of both: religious and charitable and thus, both the purposes may be overlapping. More so when the religious activity carried on by a particular section of people would be a charitable activity for or towards other members of the community and also public at large;

vi) On facts, the objects of the assessee are not indicative of a wholly religious purpose but are collectively indicative of both charitable and religious purposes. The fact that the said objects trace their source to the Holy Quran and resolve to abide by the path of godliness shown by Allah would not be sufficient to conclude that the entire purpose and activities of the trust would be purely religious in colour. The objects reflect the intent of the trust as observance of the tenets of Islam, but do not restrict the activities of the trust to religious obligations only and for the benefit of the members of the community. In judging whether a certain purpose is of public benefit or not, the Courts must in general apply the standards of customary law and common opinion amongst the community to which the parties interested belong to. Customary law does not restrict the charitable disposition of the intended activities in the objects. Neither the religious tenets nor the objects as expressed limit the service of food on religious occasions only to the members of the specific community. The activity of

Nyaz performed by the assessee does not delineate a separate class but extends the benefit of free service of food to public at large irrespective of their religion, caste or sect and thereby qualifies as a charitable purpose which would entail general public utility. Even the establishment of Madrasa or institutions to impart religious education to the masses would qualify as a charitable purpose qualifying under the head of education u/s. 2(15). The institutions established to spread religious awareness by means of education though established to promote and further religious thought could not be restricted to religious purposes. The assessee is consequently a public charitable and religious trust eligible for claiming exemption u/s 11;

vii) The interpretation of the Tribunal & High Court that s. 13(1)(b) would only be applicable in case of income of a trust for charitable (& not religious) purpose established for benefit of a particular religious community is not correct. Section 13(1)(b) applies also to composite trusts set up for both religious and charitable purposes if it is established for the benefit of any particular religious community or caste.

viii) On facts, though the objects of the assessee-trust are based on religious tenets under Quran, according to religious faith of Islam, the perusal of the objects and purposes of the assessee would clearly demonstrate that the activities of the trust are both charitable and religious and are not exclusively meant for a particular religious community. The objects do not channel the benefits to any community if not the Dawoodi Bohra Community and thus, would not fall under the provisions of s. 13(1)(b).

Prosecution for offence u/s 276CC for failure to file ROI can be initiated during the pendency of assessment proceedings

Sasi Enterprises vs Assistant Commissioner of Income Tax Criminal Appeal No. 61 of 2007 dated 30th January, 2014 [(2014) 98 DTR (SC) 329]

The assessee, a registered partnership firm, of which Ms. J. Jayalalithaa and Mrs. N. Sasikala are partners, did not furnish returns of income despite several opportunities. The AO made a best judgment assessment u/s. 144 and filed a complaint with the Megistrate against the assessee for committing offences punishable u/s. 276CC. The assessee challenged the filing of the complaint on the ground that as the assessment had not attained finality no offence had taken place and so the complaint was pre-mature. It was also pointed out that in the individual returns of the partners it was stated that as the accounts of the assessee-firm had not been finalised, its return of income could not be filed. The Magistrate and High Court dismissed the challenge to the complaint. On appeal by the assessee to the Supreme Court, held dismissing the appeal:

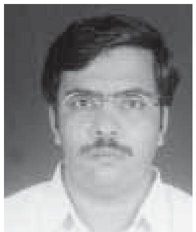
(i) The offence u/s. 276CC is attracted on failure to comply with the provisions of s. 139(1) or failure to respond to the notice issued u/s 142 or s. 148 within the time limit specified therein. The contention that pendency of the appellate proceedings is a relevant factor for not initiating prosecution proceedings u/s. 276CC is not acceptable. S. 276CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for second part of the offence for determination of the sentence of the offence, the department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of s. 276CC is clear so also the legislative intention. If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed by way of appeal or otherwise the same would have been provided in s. 276CC itself. Therefore, the contention that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the appellant had not filed the return as per s. 139(1) of the Act or following the notices issued u/s 142 or s. 148 does not arise;

(ii) Court has indicated that on failure to file the returns by the appellants, income tax department made a best judgment assessment under section 144 of the Act and later show cause notices were issued for initiating prosecution under section 276CC of the Act. Proviso to section 276CC nowhere states that the offence under section 276CC has not been committed by the categories of assessees who fall within the scope of that proviso, but it is stated that such a person shall not be proceeded against. In other words, it only provides that under specific circumstances subject to the proviso, prosecution may not be initiated. An assessee who comes within clause 2(b) to the proviso, no doubt has also committed the offence under section 276CC, but is exempted from prosecution since the tax falls below ` 3,000/-. Such an assessee may file belated return before the detection and avail the benefit of the proviso. Proviso cannot control the main section, it only confers some benefit to certain categories of assessees. In short, the offence under section 276CC is attracted on failure to comply with the provisions of section 139(1) or failure to respond to the notice issued under section 142 or section 148 of the Act within the time limit specified therein.

(iii) The declaration or statement made in the individual returns by partners that the accounts of the firm are not finalised, hence no return has been filed by the firm, will not absolve the firm in filing the statutory return u/s. 139(1) of the Act. The firm is independently required to file the return and merely because there has been a best judgment assessment u/s. 144 would not nullify the liability of the firm to file the return as per s. 139(1) of the Act. The contention that since they had in their individual returns indicated that the firm's accounts had not been finalised, hence no returns were filed would mean that failure to file return was not wilful, cannot be accepted;

(iv) S. 278E deals with the presumption as to culpable mental state. The question is on whom the burden lies, either on the prosecution or the assessee u/s. 278E to prove whether the assessee has or has not committed wilful default in filing the returns. Court in a prosecution of offence, like s. 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the appellants have to prove the circumstances which prevented them from filing the returns as per s. 139(1) or in response to notices u/ss. 142 and 148 of the Act;

(v) The details of the various proceedings reveal the dilatory tactics adopted in these cases. Courts must be guarded against those persons who prefer to see it as a medium for stalling all legal processes. The Criminal Court is directed to complete the trial within four months from the date of receipt of this Judgment.

Jitendra Singh & Sameer Dalal
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DIRECT TAXES
Tribunal

REPORTED

1. Registration – Charitable or Religious trust – Section 12AA read with Proviso to section 2(15) of the Income-tax Act, 1961 – Gross receipts of assessee, charitable institution, from its business activities exceeds limit of ` 10 lakhs – Assessee will not be entitled for exemption or other admissible tax benefits for relevant year only – It does not result in cancellation of its registration as Charitable Institution. A.Y. 2009-10

Ghatkopar Jolly Gymkhana vs. DIT (E) – (2014) 99 DTR 41 (Mum.) (Trib.)

Assessee a club was engaged in encouraging and promoting sports, athletics and social contract amongst its member. The assessee was registered as a charitable trust, falling in the category of 'advancement of any other objects of general public utility' as per the definition of 'charitable purpose' under section 2(15) of the Act.

The Director of Income Tax (Exemption) cancelled the registration of assessee by taking resort to the newly added proviso w.e.f. 1-4-2009 to section 2(15) of the Act as according to him the assessee was carrying out activities in the nature of trade, commerce or business, etc, and gross receipts therefrom were in excess of ` 10 lakhs.

On appeal Tribunal held that under section 12AA(3) the registration of a trust/institution can be cancelled if its activities have become non-genuine or it is not carrying out activities as per objects of the institution. The limit of receipt up to ` 10 lakhs during the 'previous year' as mentioned in the second proviso to section 2(15) of the Act, has made the section 2(15) further liberal mandating that the charitable character of the concerned trust/institution has to be examined on year-to-year basis, for the previous year, during which the gross receipt income crosses limit of ` 10 lakhs, the trust will not get exemption or benefit of its being charitable in nature despite its carrying out charitable activities. However, it will get such benefit in subsequent year if it is registered as charitable institution and income from business activities, as mentioned in first proviso to section 2(15), does not cross limit of ` 10 lakhs. Thus, the Tribunal held that the action of the DIT (E) cancelling the registration of the trust relying upon the newly inserted proviso from 1-4-2009 was not correct.

2. Charitable Trust – Registration – Section 12AA read with proviso to section 2(15) of the Income-tax Act, 1961

– Admission fees, monthly subscription and registration fees, etc., charged by assessee utilised only for promotion of its aims and objects – Services rendered without profit motive – Element of trade commerce or business disappears when there is no profit motive – Assessee society not hit by the newly inserted proviso to section 2(15) of the Act.

Japanese Chamber of Commerce & Industry vs. DIT (E) – (2014) 99 DTR 145 (Chennai) (Trib.)

The assessee society was formed to undertake, encourage, facilitate and promote relationship between India and Japan in general without any element of profit. The DIT (E) passed order under section 12AA(3) of the Act and rejected the rejected the application of the assessee seeking registration under section 12A of the Act. Apart from other reasons, the DIT (E) cancelled the registration of the assessee society as it was charging fees for rendering services in relation to trade, commerce or business for a cess or fee which is according to him was covered by the proviso to section 2(15) of the Act.

On appeal the Tribunal held that the fees charged by way of admission fee, monthly subscription, admission and registration fee, etc., are utilised only for the promotion of the aims and objects of the Society. Further, the objects of the Society puts a complete embargo on earning profit from any of the activities of the Society. Profit is the essence of any trade, commerce or business. When services are rendered without profit motive, the element of trade, commerce or business disappears from such activities. Therefore, the activities of the assessee are not hit by the newly added proviso to section 2(15) of the Act.

3. Interest on borrowed capital – Section 39(1)(iii) of the Act – availability of own funds in a short period of time from the date of advancement of loan – Presumption would be that the loan was advanced out of own funds – no disallowance of interest called for. (A.Ys. 2007-08 & 2008-09)

Devkinandan Gupta HUF vs. JCIT – [2014] 43 taxmann.com 230 (Mumbai - Trib.)

The assessee during the relevant assessment year paid interest at the rate of 18% on the borrowed funds whereas on the funds advanced, the assessee charged interest @ 9-12%. On being asked the assessee submitted that it had adequate own funds which were more than the amounts advanced and thus no disallowance is called for. The A.O. however not satisfied with the submission of the assessee made disallowance on proportionate basis by observing that amounts advanced had arisen out of interest bearing fund. On appeal, the Learned CIT(A) upheld the disallowance made by the A.O.

Being aggrieved by the order passed by Learned CIT(A), the assessee carried the matter before the Appellate Tribunal, Mumbai. The Appellate Tribunal allowed the appeal of the assessee by observing that where assessee was able to show the possibility and anticipation of availability of own funds, may be exactly not on date of investment or advancement of loan but, in a very near future date or within a reasonable short period of time from date of such investment, presumption would be that advancement of loan/investment was made by assessee from his own funds.

UNREPORTED

4. Capital gains – Section 2(29A) of the Income-tax Act, 1961 – Long-term capital asset – Period of holding flat has to be reckoned from date of allotment letter for the purpose of computing capital gain. A.Y.: 2009-10

Asstt. CIT vs. Sanjay Kumath – [I.T.A. No. 448 / Ind. / 2013; Order dated 19-12-2013; I.T.A.T., Indore Bench]

The assessee was allotted a flat by a builder by way of allotment letter dated 22-1-2005. Payments were made by assessee and balance payment was made in installment over a period of years. After payment of full consideration by assessee, agreement to sell was executed between assessee and builder on 27-2-2009. Thereafter, the assessee sold said flat on 5-3-2009 and deposited the sale consideration in capital gain account with bank and claimed exemption under section 54F of the Act treating asset sold by it as long-term capital asset.

The Assessing Officer disallowed the assessee's claim by observing that assessee had acquired the right in the said flat by way of agreement executed on 27-2-2009, accordingly, the said asset was a short-term capital asset, as the period of holding of said asset was less than three (3) years or thirty six (36) months.

On appeal the Tribunal held that the assessee was allotted a flat in a building *vide* allotment letter dated 22-1-2005, by which the builder agreed to sell the flat to the assessee. After signing the said letter of allotment and paying the booking amount, the assessee acquired the right in the flat. Thus, all the rights in the flat were duly acquired by the assessee on 22-1-2005, when he was given letter of allotment which clearly described the precise number of flat so allotted to him. As the assessee had acquired all the rights in the flat on 22-1-2005, the period of holding is to be computed with respect to the date of allotment that is, 22-1-2005. Accordingly, when the assessee sold the flat on 5-3-2009, the holding period of the right in flat with the assessee was more than 36 months, therefore, the assessee was right in claiming exemption under section 54F of the Act, by treating the capital assets so sold by it as long-term capital asset.

Note:

Recently, the Hon'ble Delhi High Court in the case of, *Gulshan Malik vs. CIT - [I.T.A. No. 55 of 2014; Order dated: 14-3-2014;* Delhi High Court] held that the period of thirty six (36) months under section 2(42A) of the Act for deciding whether booking rights are short-term capital asset or long-term capital asset should be counted from date of buyer's agreement and not from the date of booking or date of allotment application where the allotment or confirmation letter states clearly that no right to provisional or final allotment accrues until the agreement is signed between the buyer and the builder. Thus, in such a case capital asset of booking rights accrues to buyer only on the date of signing buyer's agreement and not on date of allotment application or confirmation letter.

5. Capital Gain – Exemption – Section 54 EC of the Income-tax Act, 1961 – Time limit of 'six (6) months' in section 54EC of the Act means 'six British Calendar months' in view of the General Clauses Act, 1897. A.Y.: 2009 – 10

Alkaben B. Patel vs. ITO [I.T.A. No. 1973 / Ahd / 2012; Order dated 25-3-2014; I.T.A.T, Ahmedabad Special Bench]

In the present case, the issue before the Special bench was, "Whether for the purpose of section 54EC of Income-tax Act, 1961, the period of investment of six months should be reckoned after the date of transfer or from the end of the month in which transfer of capital asset took place".

The assessee sold a flat and computed the Capital Gain at ` 'Nil'. The Capital Gain at ` 'Nil' was worked out as the assessee had made the investment in NHAI Bonds and claimed the deduction under section 54 EC of Act. During the assessment proceedings the Assessing Officer noted that the investment made in NHAI Bonds for the purpose of claim of deduction under section 54EC of the Act was made on 17th of December of 2008 as per the statement of the bank and the sale document of the flat was registered on 10th of June, 2008. Thus, according to him, the assessee was required to purchase the NHAI Bonds within six months from the said date of registration, that is on or before 10th December, 2008. Accordingly, the Assessing Officer disallowed the assessee's claim of exemption under section 54 EC of the Act.

On appeal the Special Bench of the Tribunal held that section 54EC of the Act prescribes that an investment is required to be made within a period of six (6) months from the transfer of capital asset for claiming exemption under the section. Thus, one has to see whether the intention of the legislator was to compute six calendar months or to compute 180 days. The word 'month' is not defined in the Act therefore the definition of General Clauses Act, 1897 shall be applicable. Further, the Tribunal observed that the Legislature has in its wisdom has chosen to use the word 'month' and not used the number of days to prescribe a specific period. This was done by keeping in mind the definition as prescribed in General Clauses Act, 1857. Therefore the word 'month' has to be read within the recognised ways of interpretation. A General Rule is that the period of a month ends on the last day. Thus, the Investment in NHAI Bond made in the month of December, 2008 which, is a few days late from the date of transfer in the month of June, 2008 was eligible for exemption under section 54 EC of the Act.

6. Tax effect in appeal filed by Revenue before Tribunal – Section 268A of the Income-tax Act, 1961 – Instruction No. 3 of 2011, dated 9-2-2011 – Revenue should not have filed appeal where the tax effect in the appeal is less than amount prescribed by relevant CBDT Circular – CBDT Circular is applicable to pending cases also. A.Y.: 2009-10

Asstt. CIT vs. Rajesh Nalwaya – [I.T.A. No.: 525 / Jd. / 2013; Order dated 5-12-2013; I.T.A.T., Jodhpur Bench]

Revenue filed appeal before Tribunal against order of Commissioner of Income Tax (Appeals). Tax effect in appeal was less than ` 3 (three) lakhs as prescribed by relevant Central Board of Direct Taxes Instruction No. 3 of 2011, dated 9-2-2011.

The Tribunal dismissing the Appeal of the Revenue held that the instructions or directions issued by the CBDT to the other income-tax authorities are binding on Revenue authorities, therefore, the department should not to file the appeal in view of the section 268A where the tax effect in the case is less than the amount prescribed for not filing the appeal. The Tribunal further held that the instructions / directions issued in the Circulars by CBDT are applicable even for pending cases also.

7. Disallowance under section 40(a)(ia) – Business disallowance – Amounts already paid during the year – no disallowance called for. A.Y.: 2007-08

Vivil Exports P. Ltd. vs. ITO – [I.T.A. No.: 509 / Mum / 2011; Order dated 26-2-2014; I.T.A.T. Mumbai 'F' Bench]

The assessee during the relevant previous year made payment towards transportation charges, export freight charges and export freight charges to the Indian agents of foreign shipping without deduction of tax at source. The A.O. while passing the assessment order disallowed the same invoking the provisions of section 40(a)(ia) of the Act. On appeal the First Appellate Authority upheld the action of the A.O. The assessee being aggrieved by the above order preferred an appeal before the Hon'ble Appellate Tribunal. The tribunal allowed the appeal of the assessee by observing that the provisions of section 40(a)(ia) is not attracted to the payments already made by the end of the previous year.

CA Sunil K. Jain

DIRECT TAXES

Statutes, Circulars & Notifications

Notifications

Eligible projects or schemes, – Expenditure – Constitution of National Committee for Promotion of Social and Economic Welfare – Appointment of specified persons as Chairman and members of said committee for a period of 3 years w.e.f. 4-3-2014 – Section 35AC of the Income-tax Act, 1961, read with rule 11G of the Income Tax Rules, 1962

The Central Government constituted the National Committee for Promotion of Social and Economic Welfare *vide* notification of the Government of India, Ministry of Finance – dated the 1st February, 2011. In terms of sub-rule (1) of Rule 11G of the Income Tax Rules, 1962, by the aforesaid notification, fourteen persons were appointed by the Central Government as Chairman and members of the said committee. The term of the Chairman and members of the aforesaid committee ended on 31st January, 2014.

Now the Central Government appointed persons as Chairman and Members of the National Committee for Promotion of Social and Economic Welfare for a period of three years commencing on the date of this notification.

(Notification No. 1/2014, dated 4-3-2014)

Special Deposit Scheme for non-government provident, superannuation and gratuity funds – Rate of interest on deposits made under said scheme w.e.f. 1-4-2014 until further orders

Government notified that the deposits made under the Special Deposit Scheme for non-Government Provident, Superannuation and Gratuity funds, announced in the Ministry of Finance (Department of Economic Affairs) shall with effect from 1st April, 2014 and until further orders, bear interest at 8.7% (eight point seven per cent) per annum.

(Notification No. 5(4)-B (PD)/2014, dated 4-3-2014)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Agreement for Avoidance of Double Taxation and prevention of fiscal evasion with foreign countries

- **Latvia**

An Agreement was entered into between the Government of the Republic of India and the Government of the Republic of Latvia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income was signed on 18th day of September, 2013 with the date of entry into force of the said

Agreement being 28th day of December, 2013. The Agreement provided that the provisions of the said Agreement shall have effect in India in respect of income derived in any fiscal year beginning on or after the first day of April next following the calendar year in which the said Agreement enters into force;

Now the Central Government notified that all the provisions of said Agreement between the Government of the Republic of India and the Government of the Republic of Latvia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, as set out in the Annexure thereto, shall be given effect to in the Union of India with effect from the lst day of April, 2014.

(Notification No. 12/2014 both dated 5-3-2014)

- **Romania**

Further the Agreement between the Republic of India and Romania, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income which was signed on the 8th day of March, 2013 with the date of entry into force of the said agreement being the 16th day of December, 2013.

Now the Central Government notified that all the provisions of said Agreement between the Republic of India and Romania for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, as set out in the Annexure thereto, shall be given effect to in the Union of India with effect from the 16th day of December, 2013.

(Notification No. 13/2014 dated 5-3-2014)

Deductions – Section 80-IA, sub-clause (iii) of sub-section (4) of the Income-tax Act, 1961 – In respect of profits and gains from industrial undertakings – Notified undertakings

The Central Government had framed and notified a scheme for industrial park, by the notifications dated the 8th January, 2008 subsequently amended *vide* dated 2nd , 2008 and dated 21-5-2010.

The company named M/s. Rupa Infotech & Infrastructure Limited having its registered office at 401, Rupa Plaza, Jawahar Road is developing an Industrial Park named "Platinum Techno Park IT Park" placed at Plot Nos. 17 & 18, Sector No. 30A, Village Vashi, Navi Mumbai. Now in exercise of the powers conferred by clause (iii) of sub-section (4) of section 80-IA of the said Act, the Central Government notified the above undertaking from the date of its commencement i.e. 2-2-2009. being developed, maintained and operated by M/s Rupa Infotech and Infrastructure Limited, as an undertaking and the project named "Platinum Techno Park IT Park" placed at Plot Nos. 17 & 18, Sector No. 30A, village Vashi, Navi Mumbai for the purposes of the said clause (iii) subject to the terms and conditions mentioned in the annexure of the said notification.

(Notification No. 14/2014 dated 13-3-2014)

Section 43(5)(iii) – Explanation 2 to Clause (e) of Proviso, of the Income-tax Act, 1961 – Speculative transaction – Notified recognised stock exchange

The Central Government hereby notified the Ace Derivatives and Commodity Exchange Limited, Ahmedabad as a recognised association for the purposes of clause (e) of the proviso to clause (5) of the said section, with effect from the date of publication of this notification in the Official Gazette. The Central Government shall withdraw the said recognition if any of the conditions specified in rule 6DDC of the Income-tax Rules, 1962, is violated.

(Notification No. 15/2014 dated 20-3-2014)

Section 10(46) of the Income-tax Act, 1961 – Exemptions – Notified Authority – Andhra Pradesh State Aids Control Society

The Central Government for the purposes of section 10(46) notified the Andhra Pradesh State

AIDS Control Society a body constituted by the Government of Andhra Pradesh in respect of the specified income arising to that Society, "in the form of grants-in-Aid from the Government of India." for the period 1-6-2011 to 31-3-2013 and shall apply with respect to the Financial Years 2013-14, 2014-15 and 2015-16 and effective subject to the conditions mentioned in the said notification.

(Notification No. 17/2014 dated 20-3-2014)

Circulars

Section 200 of the Income-tax Act, 1961 – Deduction of Tax at Source – Duty of person deducting tax – Ex-post facto extension of due date for filing TDS/TCS statements for F.Ys. 2012-13 and 2013-14 in case of Govt. deductors

The Central Board of Direct Taxes had received several petitions from deductors/collectors, being an office of the Government regarding delay in filing of TDS/TCS statements for various reasons and procedures involved, beyond control which resulted in consequential levy of fees under section 234E of the Income-Tax Act, 1961.

The Board decided to, ex-post facto, extend the due date of filing of the TDS/TCS statement prescribed under sub-section (3) of section 200 / proviso to sub-section (3) of section 206C of the Act read with rule 31A/31AA of the Income-tax Rules, 1962. The due date extended to 31-3-2014 for a Government deductor.

(i) F.Y. 2012-13 – 2nd to 4th Quarter

(ii) F.Y. 2013-14 – 1st to 3rd Quarter

Any fee under section 234E of the Act already paid by a Government deductor shall not be refunded. The circular further stated that timely filing of TDS/TCS statements is essential to ensure timely reconciliation of Government accounts and for providing tax credit to the assessees while processing their Income-tax Returns. Therefore, it is clarified that the above extension is a one time exception in view of the special circumstances involved.

(Circular No. 7/2014 – dated 4-3-2014)

Instructions

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

A clarificatory Circular No. 01/2013 dated 17-1-2013 was issued by CBDT to address various contentious issues leading to tax disputes in cases of entities engaged in export of computer software which are availing tax-benefits under sections 10A, 10AA and 10B of the Income-tax Act, 1961.

Thereafter, Instruction No. 17/2013 was issued on 19-11-2013 to the field authorities advising them to follow the aforesaid Circular in letter and spirit so that the cases which are covered by the above instruction are not contested in further appeal. The objective was to avoid frivolous litigation on issues which stand clarified by the Circular No. 01/2013 dated 17-1-2013.

In continuation thereof the CBDT now conveyed that the said clarificatory Circular No. 01/2013 dated 17-1-2013 be brought to the notice of all Departmental Representatives (DRs) and Standing Counsels of the Department who plead such matters before the ITATs and the Courts, respectively so that such appellate authorities/courts are duly appraised of the clarifications issued by CBDT on various contentious issues pending before them.

(Instruction No. 3/2014 – dated 14-3-2014)

Press Releases

National Small Savings Fund (NSSF) Schemes – Revision of interest rates for Small Savings Schemes for the Financial Year 2014-15

With the approval of the Finance Minister, the rates of interest on various small savings schemes for the Financial Year 2014-15 effective from 1-4-2014, on the basis of the interest compounding / payment built-in in the schemes, shall be as under :

Scheme	Rate of interest w.e.f. 1-4-2013	Rate of interest w.e.f. 1-4-2014
1	2	3
Savings Deposit	4.0	4.0
1 Year Time Deposit	8.2	8.4
2 Year Time Deposit	8.2	8.4
3 Year Time Deposit	8.3	8.4
5 Year Time Deposit	8.4	8.5
5 Year Recurring Deposit	8.3	8.4
5 Year SCSS	9.2	9.2
5 Year MIS	8.4	8.4
5 Year NSC	8.5	8.5
10 Year NSC	8.8	8.8
PPF	8.7	8.7

The necessary notifications will be notified separately in this regard in due course.

(Press Release, dated 4-3-2014)

Date of payment of the March instalment of advance income tax extended from 15-3-2014 to 18-3-2014

The final instalment of Advance Tax for Financial Year 2013-14 is required to be paid on or before 15th March, 2014 by the tax-payers who are liable to pay advance tax. These tax-payers can make payments in the designated branches of the authorised banks, electronically or physically, as per law. The banks are open for half day on 15th March, 2014, being a Saturday. Accordingly, to facilitate payment of this instalment of Advance Tax for the Financial Year 2013-14, the CBDT issued an order to extend the time limit to make such payments of Advance Tax, from 15th March, 2014 to 18th March, 2014. Taxpayers, therefore, can now pay their advance tax instalment by 18th March, 2014 without entailing any consequential interest for deferment.

(Press Note No. 402/92/2006-MC, dated 14-3-2014)

Section 139D of the Income-tax Act, 1961 – Return in electronic form – Extension of date for receipt of ITR – vs. in CPC, Bengaluru, for cases of A.Ys. 2012-13 and 2013-14 received/ e-filed in F.Y. 2012-13

There are many taxpayers who have uploaded their Income Tax Returns (without digital signature Certificate) for A.Y. 2012-13 [filed between 1-4-2012 and 31-10-2013] and for A.Y. 2013-14 [filed between 1-4-2013 and 31-10-2013], but have either not filed the corresponding ITR-V or have filed it with the local Income-Tax Office. ITR-V is accepted only at CPC, Bengaluru by ordinary or speed post. Therefore an opportunity has been given to such taxpayers to regularise their Income-tax returns.

All such taxpayers can now mail the ITR-V, by 31st March, 2014, by ordinary post or speed post at Post Bag No. 1, Electronic City Post Office, Bengaluru – 560 100 (Karnataka). (Taxpayers may note that no other place or form of delivery will be accepted.) Taxpayers who have filed their ITR-V with the local Income-tax office may again mail their ITR-V to the CPC by 31st March, 2014. Those taxpayers who have earlier mailed their ITR-V, but have not received the acknowledgement e-mail from the CPC, may mail their ITR-V to the CPC again. Taxpayers may also note that without acknowledgement of the ITR-V from the CPC it would not be possible for the Income-tax Department to process the Income-tax returns or issue any refunds therefrom, as these would be treated as not having been filed with the Department.

(Press Release, dated 19-3-2014)


CA Tarunkumar Singhal & CA Sunil Moti Lala

INTERNATIONAL TAXATION
Case Law Update

I) India – Philippines DTAA – Absence of FTS Article – Payments to a Philippine company for providing business information services – Whether taxable in India in the absence of FTS clause under the tax treaty and absence of PE in India – Held : No.

IBM India Private Limited vs DDIT [TS-78-ITAT-2014 (Bang.)] – Assessment Years: 2009-10 to 2011-12

Facts

i) The assessee, an Indian company, was engaged in the business of providing information technology services and was a wholly owned subsidiary of IBM World Trade Corporation, USA. The assessee made certain payments to IBM Business Services, Philippines for certain business information services, work force management, web content management and human resources accounting services rendered by them to the assessee.

ii) The assessee contended that as the tax treaty did not have an Article on FTS, such payments constituted 'business profit' under Article 7 of the tax treaty. Further, IBM Philippines did not have a PE in India hence, income of the IBM Philippines was not chargeable to tax in India. Accordingly, the assessee did not deduct tax at source (TDS) on such payments.

iii) The Assessing Officer (AO), relying on the CBDT Circular No. 333 dated 2 April 1982 and Article 24 – Elimination of Double Taxation, held that since there is no Article in the tax treaty dealing with FTS, domestic law will govern the taxation of the sums paid by the assessee to IBM Philippines and therefore, the assessee is an 'assessee in default' for not deducting tax on such payments.

Decision

The Tribunal held in assessee's favour as follows:

i) Payments to IBM Philippines, for providing services in the course of its business would be covered by Article 7 since the specific Article dealing with FTS is absent in the tax treaty. The services provided by IBM Philippines were in the course of its business and therefore, the payments received by it from the assessee partake the character of 'business profit' under Article 7 of the tax treaty.

ii) As per Article 7(1) of the tax treaty, business profits of an enterprise of a contracting state shall be taxable only in that State, unless the enterprise carries on business in the other Contracting State through a PE situated therein. The assessee has submitted before the AO and the Commissioner of Income-tax (Appeals) that IBM Philippines does not have a PE in India and the same has not been negated by these authorities. Consequently, as per Article 7(1) of the tax treaty, the business profits arising out of payments made by the assessee to IBM Philippines are not chargeable to tax in India in the absence of a PE in India.

iii) Article 23 of the tax treaty deals with 'Other Income' and provides that items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of the tax treaty, shall be taxable only in that State. An item of income is said to have been dealt with other Articles of the tax treaty if such income can be classified as taxable or not under any of the Articles of the tax treaty.

iv) In the present case, the payments are dealt with by Article 7 of the tax treaty and therefore, Article 23 has no application even though the business profits are not chargeable to tax in India in the absence of a PE of IBM Philippines in India. In support of this ruling, reliance was placed on various decisions as under:

- *Christiani & Nielsen Copenhagan vs. ITO [1991] 39 ITD 355 (Bom.)*
- *Parsons Brinckerhoff India (P) Ltd. vs. ADIT [2008] 118 TTJ 214 (Del.)*
- *Golf in Dubai vs. DIT [2008] 306 ITR 374 (AAR)*
- *Channel Guide India Ltd. vs. CIT [2012] 153 TTJ 432 (Mum.)*
- *PT McKinsey Indonesia vs. DDIT (ITA No. 7624/Mum/2010)*
- *Tekniskil (Sendirian) Berhard vs. CIT [1996] 221 ITR 551 (AAR)*
- *Exotic Fruits (P.) Ltd. vs. ITO [2013] 40 taxmann.com 348 (Bang.)*

v) Further, in the case of *DCIT vs. Andaman Sea Food P. Ltd. [2012] 18 ITR (Trib.) 509 (Kol.)*, the Kolkata Tribunal held that income from consultancy services, which cannot be taxed under Articles 7, 12 or 14 because conditions laid down therein are not satisfied, cannot be taxed under Article 23 either.

vi) In the case of *Bangkok Glass Industry Co. Ltd. vs. ACIT [2013] 257 CTR 326 (Mad.)*, the Madras High Court held that the FTS earned by the Thailand Company in the course of business was covered under Article 7 of the India-Thailand tax treaty and in the absence of a PE in India the income was not chargeable to tax in India. Further, the income was not chargeable to tax under Article 22.

vii) Even if it is assumed that payments to IBM Philippines are not covered by Article 7 but are covered by Article 23 of the tax treaty dealing with 'Other Income', the payments would be chargeable only in Philippines since as per Article 23, items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing articles of the tax treaty shall be taxable only in that State (i.e. Philippines in the present case).

viii) Article 24(1) of the tax treaty provides that the law in force in either of the Contracting State shall continue to govern the taxation of income in the respective contracting state, except where provisions to the contrary are made in the tax treaty.

ix) Even though the tax treaty does not have an Article dealing with FTS, its taxation would be governed by Article 7 or Article 23 as the case may be. If Article 24(1) of the tax treaty is interpreted as dealing with taxation of items of income not dealt within the foregoing Articles 6 to 23 of the tax treaty, as per domestic laws, it would render Article 23 thereof redundant.

x) The contention of the tax department, that Article 24 confers a right to tax FTS in accordance with the respective domestic law, would render Article 23 redundant since it ceases to be a residuary/ omnibus clause covering items of income not dealt with in the foregoing Articles of the tax treaty. It is a well settled principle that a clash is to be avoided while interpreting the provisions of the domestic law or tax treaty. *CIT vs. Hindustan Bulk Carriers [2003] 259 ITR 449 (SC)*. The Central Government's Notification [Notification No. 173 (E) dated 2 April 1996] by which the tax treaty was brought into force has directed that all the provisions of the tax treaty shall be given effect to in the Union of India and therefore, no redundancy can be attributed to either Article 23 or Article 24(1) of the tax treaty.

xi) On reference to the Mumbai Tribunal's decision in the case of *BNP Paribas SA vs. DCIT 2013] 33 taxmann.com 83 (Mumbai - Trib.), t*he Tribunal in the present case held that Article 24(1) of the tax treaty, which is similar to Article 25(1) of the India-UAE tax treaty, does not confer a right to invoke the provisions of domestic laws for classification or taxability of income which is governed by Articles 6 to 23 of the tax treaty.

xii) Article 24 does not provide any separate mechanism for quantification or computation of 'Philippine tax payable' or 'Indian tax payable' which is the starting point for claiming foreign tax credit. Accordingly, Article 24(1) operates in the field of computation of double taxed income and tax thereon in accordance with the domestic tax laws of each Contracting State, and is not a part of Articles 6 to 23 which deals with the classification of income into different heads.

xiii) Under Articles 24(4) and 24(5) of the tax treaty, 'Philippine tax payable' or 'Indian tax payable', includes *inter-alia* the tax which would have been payable but for an exemption or reduction of tax granted by the special incentive provisions which are designed to promote economic development of the country. Thus, in cases where the above exceptions apply, the computation of doubly taxed income and tax thereon would be made in accordance with Articles 24(3)/24(5) of the tax treaty.

II) Transfer Pricing – Intra group Financing Transactions – Issues arising from issuance of Corporate Guarantee, Loans to Associated Enterprises and Share Application Money/Capital Contribution to AEs – Impact of Amendments made by the Finance Act, 2012 – Various issues decided in favour of the assessee

Bharti Airtel Ltd. vs. ACIT [2014] 43 taxmann.com 150 (Delhi - Trib.) Assessment Year : 2008-09

Facts

i) The assessee is an Indian company engaged in the provision of telecommunication services. The assessee had the following international transactions: (a) issuance of a corporate guarantee on behalf of its AE; (b) interest on the loan advanced to its AEs and (c) contribution to share capital in its AEs. During audit proceedings, the TPO made adjustments to the above international transactions.

Re: Corporate Guarantee

ii) With respect to the corporate guarantee issued by the assessee on behalf of its

AE guaranteeing the repayment of a working capital facility advanced by a bank, the assessee contended that it had not incurred any costs or expenses on account of issue of such guarantee and the guarantee was issued as a part of the shareholder activity. Accordingly, there was no requirement to charge a guarantee fee under the TP provisions.

iii) The Assessee, however, in its TP documentation study determined 0.65% as an arm's length guarantee fee based on market quote for such corporate guarantee and offered this income to tax.

iv) During the TP audit, the TPO observed that by issuing the corporate guarantee, the AE's credit rating benefited from association to the assessee and the assessee, was therefore, required to receive arm's length consideration. The TPO relied on Para 7.13 of the OECD TP Guidelines (OECD TPG), which state that "but an intra–group service would usually exist where the higher credit rating were due to a guarantee by another group member." The TPO benchmarked the transaction by applying the CUP method, and accordingly, determined the arm's length price of the guarantee commission income at the rate of 2.68% plus a mark-up of 200 basis points. In applying the CUP method, the TPO relied on data obtained from various banks by exercising power granted under the IT Act to obtain information not publicly available. The TPO also relied on the decision of the Tax Court of Canada in the case of *GE Capital Canada Inc. vs. The Queen (2009 TCC 563).* Accordingly, a TP adjustment was made with respect to the differential guarantee fee.

Re: Corporate Loan

v) With respect to the loan given by the assessee to its AEs, the TPO determined the arm's length interest rate to be the interest rate that could be earned by the assessee by advancing a loan to an unrelated party in India with the same financial health as that of the Assessee's subsidiaries. The assessee contended that the loans were in foreign currencies and in the international market, the bank lending rates are based on LIBOR rates. Hence, the LIBOR at 7.33% should be considered as the arm's length interest rate.

vi) The TPO, however, proceeded to determine the arm's length interest rate at 14%. The TPO determined the rate by adding a mark-up of 400 basis points to LIBOR to account for the credit rating of the AE, a further mark-up of 300 basis points to LIBOR to account for transaction costs and an additional upward adjustment to account for certain other differences. The TPO also relied upon the corporate bond rates on Indian Rupee denominated debt to support the determination of the arm's length interest rate.

Re: Share Application Money

vii) The assessee made a contribution to the share capital of its foreign subsidiaries. The assessee did not benchmark the said transaction as the payments were in the nature of capital contributions. However, during the course of the Transfer Pricing proceedings, though TPO did not question the character of payment, the TPO noted there was a significant delay in allotment of shares to the assessee. Hence, the TPO treated the contributions as interest free loans for the period between the dates of payment and the date on which shares were actually allotted. The TPO thereafter imputed an arm's length interest on the amounts deemed as an interest free loan at 17.26%.

viii) In response to the TPO order, the assessee filed its objections with the Dispute

Resolution Panel (DRP), an alternate dispute resolution mechanism under the ITL. The DRP upheld the TP adjustment proposed by the TPO. The assessee filed an appeal before the Tribunal, against the TP adjustments.

Decision

The Tribunal held in favour of the assessee as follows:

A. Re: Corporate Guarantee

i) Reviewing the definition of the term "international transaction", the Tribunal held that in order for the transaction to be an "international transaction" subject to TP, the transaction should be such as to have a bearing on profits, income, losses or assets of such enterprise. In other words, in a situation in which a transaction has no bearing on profits, incomes, losses or assets of such enterprise, the transaction will be outside the ambit of the term "international transaction." The Tribunal held that the precondition of a transaction having bearing on profit, losses or assets of an enterprise cannot be dispensed with even after the explanations added to the definition of the international transaction by Finance Act, 2012 since such explanations are merely clarifications.

ii) The Tribunal further held the onus is on the revenue authorities to demonstrate the transaction has a "bearing on profits, income, losses or assets" of the enterprise. Such an impact on profits, income, losses or assets has to be on a real basis, whether in the present or in the future, and not on a contingent or hypothetical basis. Taking into consideration the facts of the case, the Tribunal held that such conditions were not satisfied. The Tribunal also observed that in the facts of the case the AE had not resorted to any borrowings from the bank.

iii) Accordingly, the Tribunal held that a corporate guarantee issued without a charge is outside the ambit of 'international transaction' and transfer pricing provisions do not apply to such arrangements, even after the amendment introduced by the Finance Act, 2012.

B. Re: Interest on Corporate loans

i) The Tribunal observed the identical issue had come up for adjudication in the immediately preceding year and held the same judgment would apply for the current year as well. The Tribunal in its earlier judgment held that the advances to subsidiaries were in foreign currencies. In these circumstances, the interest rates on Rupee bonds and debts have no relevance at all. It is a fundamental principle that interest is time value of money and when inflation pressure on a currency is lower, as is the case with most strong currencies, the time value of money, i.e., interest, tends to be lower too. Therefore, interest, rates on Rupee loans cannot be compared with interest rates on strong foreign currencies.

ii) As for TPO's observation that since the tested party, i.e., lender, was the assessee, India is the relevant market to determine interest that could be earned by the assessee by advancing a loan to an unrelated party, the Tribunal held that the interest rate on foreign currency loans are qualitatively different, and therefore, one has to compare the interest that the assessee would have earned on foreign currency loans and not on Rupee denominated loans. The Tribunal also observed the basis of determining the mark-up on LIBOR by the TPO and other adjustments made by the TPO are not cogent and therefore not sustainable. Hence, there was no merit in the approach of the TPO to determine the arm's length interest rate by reference to Indian currency loans given in India.

C. Re: Share Application Money

i) The Tribunal held there was no dispute on the characterisation of the payment made by the assessee to its AEs as the TPO accepted these were in the nature of payments for share application money, and thus, of capital contributions. The question before the Tribunal was whether there is a deeming fiction envisaged under Indian transfer pricing legislation on treating part of share application money as an interest free loan to AEs. In this regard, the Tribunal noted there was no provision enabling deeming fiction under the Indian transfer pricing regulations.

ii) Further, the Tribunal observed there is no finding about what is the reasonable and permissible time period for allotment of shares. Even if one was to assume there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest free loan for such a period of "inordinate delay" and not the entire period between the date of making the payment and date of allotment of shares. This aspect of the matter is determined by the relevant statute, which is different than that of an interest free loan on a commercial basis between the share applicant and the company to which the capital contribution is being made.

iii) Hence, the Tribunal held it was unreasonable and inappropriate to treat the transaction as partly in the nature of an interest free loan to the AE since the TPO did not bring any evidence an unrelated share applicant would be paid any interest for the period between making the share application payment and allotment of shares. Accordingly, the Tribunal held an ALP adjustment based on that hypothesis was not legally sustainable on its merits.

III) Transfer Pricing – Comparability Analysis – Segregation of ITeS into BPO and KPO Services – Selection of TNMM as the Most Appropriate Method – Exclusion of Abnormally High Profit Margin Companies – Indian TP Regulations analysed – Special Bench decision

Maersk Global Centres (India) (P.) Ltd. vs. ACIT [2014] 43 taxmann.com 100 (Mumbai – Trib.) (SB) Assessment Year : 2008-09

Facts

i) The assessee, an Indian company, part of the Maersk Group engaged in the provision of ITeS as well as IT services to its AEs. The assessee selected comparables in the field of BPO to ascertain the arm's length price and concluded by applying TNMM as the MAM that its international transactions were at arm's length.

ii) The TPO observed that the assessee was operating with more than 2,000 employees out of a "state of art" facility and was providing services such as documentation, finance, operations, logistics, global information systems etc. The TPO noted that assessee was largely rendering logistic outsourcing services and business analytic services, which involved transfer of knowledge intensive process and significant domain expertise. Accordingly, TPO classified the services as knowledge/ expertise based and characterised the same as KPO services. The TPO rejected the assessee's transfer pricing study and proceeded to re-determine arm's length price by conducting a search for fresh comparables and using appropriate filters, made an adjustment. The TNMM was however accepted as the MAM.

iii) The assessee then filed objections with the Dispute Resolution Panel (DRP). The assessee objected to its characterisation as a KPO and also raised various other objections. The DRP directed the assessing officer (AO) to exclude a few companies and grant the benefit of an adjustment for differences in working capital. However, the DRP rejected the Assessee's argument on *BPO vs. KPO* and did not give relief on some of the other grounds. The assessee thereafter filed an appeal before the Tribunal against the TP adjustment. As the Tribunal was of the view that the issue raised by he assessee was contentious, the matter was referred to a SB.

Issues before the Tribunal

i) Whether for the purposes of determining the arm's length price of international transactions of the assessee providing back office support services to their overseas associated enterprises, companies performing KPO functions should be considered as comparable?

ii) Whether, in the facts of the assessee's case, companies earning abnormally high profit margins should be included in the list of comparable companies for the purposes of determining the arm's length price of an international transaction?

Decision

The Special Bench of the Tribunal held as follows:

A. Most appropriate method for ITeS sector

i) The TP rules provide the manner and circumstances in which different methods are to be applied for determining the arm's length price and also provides for factors governing selection of the MAM. Based on the facts and circumstances of each case, any of the prescribed methods can be regarded as the MAM.

ii) Considering the peculiarities of the sector and in the facts of the case, the Tribunal held that TNMM should be regarded as the MAM because in the TNMM, characteristics of property / services is less sensitive while evaluating comparability, as it considers "net margin" realised.

iii) The Tribunal also recognised that one of the strengths of TNMM is that "net profit" indicators (e.g., operating income) are less affected by transactional differences. TNMM affords a practical solution to otherwise insoluble transfer pricing problems, if used appropriately, and with adequate adjustments to account for differences.

iv) Therefore, in the case of TNMM, broad functionality can be taken into consideration for selecting potential comparables. However, it does not mean that standard of comparability is diluted merely because the method followed is TNMM. Placing reliance on the Delhi High Court's decision in the case of *Li and Fung India Pvt. Ltd vs. CIT [2013] 40 taxmann.com 300 (Delhi)* and the OECD Transfer Pricing Guidelines (OECD TPG), the SB ruled that the standard of comparability for application of TNMM is no less than that for application of any other method.

B. Comparability analysis for ITeS sector

i) There are peculiar issues governing ITeS sector such as absence of relevant financial data in public domain. Accordingly, it is appropriate to find a practical solution that assists in performing comparability analysis for cases belonging to ITeS sector. This problem can be resolved by splitting the comparability exercise into two steps in order to attain relatively equal degree of comparability.

a) First step is to select potential comparables at ITeS sector level by applying "broad functionality" test. Thus, all entities providing ITeS can be taken as potential comparables. OECD TPG also indicates "broad-based analysis" as an essential step in comparability analysis and can be defined as an analysis of the industry, competition, economic and regulatory facts and other elements that affect assessees and their environment, but not looking at the specific transactions in question.

b) Subsequent step is to ascertain whether "bifurcation" / "classification" of ITeS are possible for rejecting/selecting comparables from the list of potential companies.

ii) Indian transfer pricing rules permit exclusion of certain entities selected as potential comparables by applying a broad functional test at the micro level to attain a relatively equal degree of comparability. OECD TPG also advocates that uncontrolled transactions having a lesser degree of comparability be eliminated. Accordingly, "bifurcation" / "dissection" of ITeS can be done, depending on the facts and circumstances of each case, in order to select entities having a relatively equal degree of comparability.

C) "Bifurcation" of ITeS into BPO and KPO services

i) As further "bifurcation"/"classification" of ITeS may be required to bring in relatively equal degrees of comparability, a question that arises is whether such "bifurcation" can be done between BPO and KPO services so as to say that BPO services are not comparable with KPO services.

ii) Referring to various industry reports submitted, the Tribunal observed that BPO services are generally referred to as low end services, while KPO services are referred to as high end and thus, there exists some differences between the two. However, the range of services rendered by the ITeS sector is so wide that a classification of all services, either as low end or high end may not always be possible. One of the key success factors of the BPO industry is its ability to move up the value chain through KPO service offerings. While KPO is termed as an upward shift of the BPO industry and the evolution of the majority of Indian BPOs has given rise to KPO, in this process, BPOs trying to upgrade as KPO are likely to render both, BPO and KPO services, and such entity therefore, cannot be considered strictly either as a BPO or a KPO. Considering the nature of mixed services, it is difficult to classify them as BPO or KPO. Further, determination of the exact portion of BPO and KPO services may not be possible, and in such circumstances, it may not be possible to create a "third" alternative, which is somewhere in between BPO and KPO.

iii) The Tribunal observed that there could exist significant overlap between ITeS activities with some activities being very fact sensitive. Therefore, introducing an artificial segregation within ITeS may create more problems in comparability analysis than resolving the same. Accordingly, it held that ITeS cannot be further bifurcated/classified as BPO and KPO services for purposes of comparability analysis.

D) Whether assessee qualifies as BPO or KPO service provider?

i) The Tribunal held that a perusal of the functional profile of the assessee indicated that services such as process support/optimisation and technical support are not in the nature of low end services, as they require some degree of specialized knowledge and domain expertise.

However, the revenue generated from such services was only about 10% of the total revenues generated by the assessee during the FY 2007-08.

ii) The Tribunal observed that the assessee also rendered services such as contract drafting, audit functions based on different business strategies, tender handling etc. which cannot be, strictly considered as low-end services, as they involve some degree of special knowledge/ expertise. However, such services are "incidental" to the main services involving data entry, transcription, consolidation, co-ordination, preparation, processing and review of shipping documents and such other similar support services. Further, the profile of work – force employed comprised of 96% of graduates/ postgraduates whereas only 4% workforce was highly skilled professionals (such as chartered accountants), which indicates that functions performed were mainly in the nature of providing back office support services of a low-end nature.

iii) The Tribunal held that, considering the functional profile, the assessee was only a captive contract service provider, mainly rendering back office support services. Some services may involve a certain degree of special knowledge/expertise but those were only an insignificant portion of the total services performed and essentially in the nature of incidental services. Accordingly, SB ruled that potential comparables to be selected should also be low end service providers and not high end KPOs.

iv) Using the above principle, the Tribunal examined two companies namely Mold-Tek Technologies and Eclerx Services being disputed by the assessee. The SB directed the exclusion of these two companies on the grounds of them being involved in providing high end services involving specialised knowledge and domain expertise in the field.

E) Exclusion of abnormally high profit margin companies

i) The Tribunal observed that the Indian transfer pricing regulations specifically deviate from the OECD TPG, which provides for interquartile range of benchmark results that automatically excludes outliers compared with use of the arithmetic mean provided in the Indian regulations for determination of the arm's length price. It held that merely because a comparable has shown abnormal profits, the same cannot be grounds for its exclusion. Potential comparables earning abnormally high profit margins should trigger further investigation. This will help in ascertaining whether earning of high profit reflects a normal business condition or whether it is the result of some abnormal conditions prevailing in the relevant year.

ii) Further, the profit margin earned by such entity, in the immediately preceding year(s), may also be taken into consideration. The functional, asset and risk analysis in such cases may be reviewed to ensure that the potential comparable earning high profit satisfies comparability conditions. If it is found that the high profit margin making entity does not satisfy the comparability criteria, or the high profit margin earned by it does not reflect normal business condition, then such comparable should be excluded.

IV) Transfer pricing – Whether TPO not justified in recalculating royalty based on his own interpretation of term, 'Net Sales' – Held : No – in favour of the assessee

Akzo Nobel Chemicals (India) Ltd. vs. DCIT [TS-45-ITAT-2014 (Pun.)-TP]

Facts

i) Akzo Nobel Chemicals (India) Limited, the assessee, was a subsidiary of Akzo Nobel N.V Netherlands. The assessee was primarily engaged in the business of manufacturing and sale of speciality chemicals which acted as polymerisation initiators.

ii) The international transactions between ANCIL and AEs were segregated into (i) Manufacturing segment which comprised import of raw materials, export of finished goods, import of bulk raw material for trading and repacking and payment of royalty; and (ii) Marketing and Sales support segment, for the purposes of benchmarking under the transaction net margin method (TNMM).

iii) The assessee entered into a technical collaboration agreement with its AE and paid royalty on net sales at the rate of 5% for domestic sales and 8 for export sales. These rates were approved by the Authorities for a period of seven years. The royalty amounts paid to the AE were computed on 'Net Sales' in accordance with the provisions of Foreign Exchange Control Manual of Reserve Bank of India (RBI).

iv) During assessment proceedings, with respect to the royalty payment, the Transfer Pricing Officer (TPO) made an addition by rejecting the method adopted by the assessee for computing 'Net Sales' for the purpose of computing royalty amount and concluding that the cost of certain raw materials, which were constituent chemicals (not having any value addition during the manufacturing process followed by the assessee) and equivalent to the expression of bought out components, should be deducted from the sales value to arrive at the 'Net Sales' on which royalty is to be computed.

v) The TPO disregarded the assessee's contention that the 'Net Sales' computation adopted by the TPO was in contradiction to the prescribed formula for 'Net Sales'.

vi) The TPO also disregarded the royalty rate(s) agreed by another group company, i.e. Tianjin Akzo Nobel Peroxides China (TANPC), with its AE as comparable rate(s) for determining the arm's length price of the royalty payment made by the assessee.

vii) As regards transactions pertaining to export of finished goods, in respect of a product 'Trigonox 25C75', which had been sold to the AE as well as to third parties in India, the TPO concluded that an internal CUP existed, and had accordingly made an addition of INR 1,134,000 to the export price of this product sold to the AE (after comparing prices charged to the AEs with those charged to third parties).

viii) The DRP upheld the TPO's order without providing any cogent reasons.

Decision

The Tribunal held partly in favour of the assessee, as follows:

Re: Payment of royalty

i) The action of the TPO in re-working the amount of royalty based on his interpretation of 'Net Sales' was incorrect and impermissible. The terms and conditions of the royalty agreement used for computing the royalty amount were approved by the Government of India and it was mandated for the assessee that the calculations of royalty be subject to the relevant provisions of Foreign Exchange Control Manual of RBI.

ii) Further, relying on the principles laid down by Delhi High Court in the case of *CIT vs. EKL Appliances Ltd. [2012] 345 ITR 241 (Del.)*, which in turn relied on the OECD guidelines, the Pune Tribunal held that in the facts of the case of the assessee, TPO had to examine the international transactions as entered into by the assessee, and should not have disregarded the actual transaction.

iii) The Tribunal took cognisance of the fact that the entire gamut of royalty payment by the assessee to the AE was in accordance with the Foreign Technology Collaboration agreement, which was duly approved by Government of India in accordance with its policies which were applicable across the spectrum (i.e, to all enterprises in the country).

iv) Accordingly, the Tribunal held that the TPO was not justified in recalculating royalty based on his own interpretation of term 'Net Sales' as the 'Net Sales' formula considered by the assessee was not found to be inconsistent with, or violative of, the respective Government or RBI guidelines.

v) The Tribunal held that bought-out components meant such material on which no further processing was required and were directly fitted into the final product. In this regard, the Tribunal stated that the relevant raw materials in the instant case, which were classified as constituent materials by TPO, underwent processing and were irretrievable once the final product was manufactured, and hence these raw materials could not be equated with bought-out components.

vi) With respect to application of CUP method by the TPO for benchmarking the royalty transaction, the Tribunal held that the comparable transaction picked by the TPO was a controlled transaction and could not be considered for comparability analysis under the CUP method. In addition to the same, the Tribunal also held that on account of differences in the agreement period and the list of products covered in the two agreements, the royalty rates of TANPC could not be considered.

B) Re: Export of finished goods

i) The Tribunal held that there was no infirmity on the TPO's part in invoking the CUP method because identical products were sold to the AE and to third parties. However, the Tribunal held that certain level of adjustments were required to be made to the comparable uncontrolled price considered by the TPO for comparison purposes. The following were the differences for which an adjustment should have been made:

(a) volume of sales;

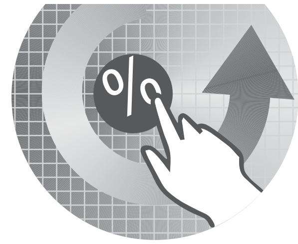
(b) export to AE vis-a-vis domestic sale to third party being to the direct customer (difference in position in the value chain);

(c) a portion of the profit being retained by the AE for its functions performed;

(d) the benefit on account of export linked schemes;

(e) incurrence of marketing / selling cost on domestic sales;

(f) difference in credit terms; etc..



CA Janak Vaghani

INDIRECT TAXES
VAT Update

1. Furnishing details of TIN wise sales and purchases in Annexure J-1/J-2 before Furnishing periodical VAT returns

Trade Circular No. 9T of 2014, dated 29th March, 2014

The Commissioner of Sales Tax, Maharashtra has issued above-mentioned trade circular whereby it is informed that from return period April 2014 onwards every dealer shall have to furnish TIN wise details of sales and purchases on which tax is charged separately in Annexures J-1/J -2 before furnishing periodical VAT returns.

The dealers who are required to get their accounts audited u/s. 61 of the Act shall have to furnish it annually at the time of furnishing VAT audit report Form 704 in addition to furnishing it with periodically with VAT returns.

The Annexure in J-2 is required to be filed by those dealers who opted for composition including builders who opted 1% option although not eligible to claim set off.

For non-filers of VAT audit report they will have to file it annually in addition to periodically furnished with returns before furnishing last VAT return for the period ended on March.

While furnishing revised return if necessary it can be revised also.

2. Extension of last date for furnishing VAT Audit Report by Builders/Developers

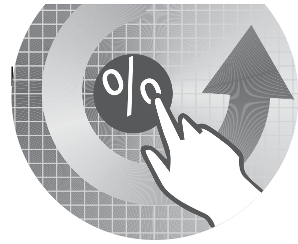
Trade Circular No. 10T of 2014, dated 29th March, 2014

The Commissioner of Maharashtra has issued above circular to clarify that if the developers filed their VAT audit report in form 704 for the period 2012-13 up to 10th May 2014 then no penalty u/s. 61 of the Act shall be levied.

3. Rate of tax – S. S. wire – SC Judgment in case of M/s. Bansal Wire Industries, 42VST 372 – Shall apply prospectively

Trade Circular No. 11-T of 2014, dated 4th April, 2014

The Commissioner of Sales Tax has issued above circular to clarify that the SC in case of M/s. Bansal Wire Industries held that the Stainless Steel Wire is not covered by the term Iron and Steel within the entry (ix) of clause (iv) of section 14 of the CST Act as such not declared goods as a result of which the rate of tax on sale of those goods is not 5% under the MVAT Act. However, aforesaid judgment of SC shall not apply to all transactions of sales effected prior to the date of judgment of SC and it shall apply prospectively to all transactions of sales effected from the date of judgment of SC i.e. 26th April, 2011.



CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

The Commissioner of Service Tax, Mumbai – I has issued a Trade Notice on payment of service tax by Indian banks under reverse charge for services received from foreign banks on import/export transactions. As per the Trade Notice, the bank in India is a recipient of some service from the foreign bank in relation to forwarding of documents and realisation of sale proceeds by way of remittance of money. Therefore, under erstwhile section 66A, the bank in India is required to pay tax as the recipient of service prior to 1-7-2012 and under Notification No. 30/2012-ST thereafter.

The Trade Notice thus exhorts the Indian Banks to follow the impugned clarification and pay tax for the current and past period in case where the foreign banks are recovering certain charges for processing of import/export documents regarding remittance of foreign currency.

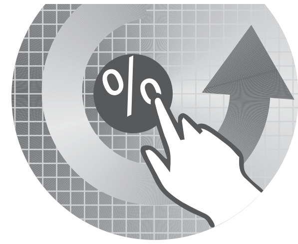
[Trade Notice No. 20/13-14-ST-I [F.No.V/ST-I/TECH-II/Trade Notice/ 2013-14/827/13/250 (CST-1, Mumbai)], dated 10-2-2014]

"A good laugh and a long sleep are the best cures in the doctor's book."

— *Irish Proverb*

"A man too busy to take care of his health is like a mechanic too busy to take care of his tools."

— *Spanish Proverb*



CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Clearing and Forwarding Service

1.1 Talera Logistics Pvt. Ltd. vs. CCE, Pune-III 2014 (33) STR 514 (Tri.-Mumbai)

The appellant in this case providing services in relation to receiving and warehousing of goods, receiving dispatches orders from M/s. Ford India Ltd., arranging dispatch of goods, maintaining records of incoming shipment and deliveries. The Tribunal held that, facts of warehouse or place of activity owned by M/s. Ford, computer and software provided by M/s. Ford and transport arranged by M/s. Ford do not make any difference in nature of service, and the impugned service is liable under Clearing and Forwarding Agent Service. It is further held that, there is clear cut suppression of activities and wilful intention to evade tax as registration has been obtained belatedly, non-payment of service tax, non-filing of returns and disputing leviability of service tax.

Management Consultancy Service

1.2 HSBC Securities & Capital Markets (I) P. Ltd. vs. CST, Mumbai 2014 (33) STR 530 (Tri.-Mumbai)

The appellant in this case provided advisory services in the field of finance and claimed that, they are not liable to service tax under Management Consultancy Service. The Tribunal observed that, the executory functions are consequent to advices and therefore main function advisory in nature and executory function is incidental to advisory function. It is held that, definition of Management Consultant is very wide and not restricted to any particular field of management and order issued under section 37B of CEA, 1944 also clarified that, services in relation to merger and acquisition are in nature of management.

Storage & Warehousing Service

1.3 CCE, Pune vs. Kumbhi Kasari SSK Ltd. 2014 (33) STR 539 (Tri.-Mumbai)

The assessee in this case maintained buffer stock of sugar as per directions of Government and received subsidy from Government. The department sought to tax them under Storage & Warehousing Service. The Tribunal observed that, subsidy received from Government not on account of service rendered but on account of loss of interest, cost of insurance, etc. It is held that, the assessee stored goods owned by them and nobody can provide service to themselves. Hence, the appeal is liable to be dismissed.

1.4 Shipping Corporation of India Ltd. vs. CCE & ST (LTU) Mumbai 2014 (33) STR 552 (Tri.-Mumbai)

The appellant in this case supplied vessels on charter hire basis, where the primary object of hiring was transportation of crude from place of production to refineries. The Tribunal observed that, assessee is not providing any security for goods, nor loading, unloading, stacking or maintaining of inventories of goods undertaken and mother vessels are used only as temporary storage space apart from transportation. Therefore it is held that, services cannot be classified under Storage & Warehousing Service. It is also held that said services are liable to service tax under Supply of Tangible Goods Service w.e.f. 16-5-2008 and tax paid to be appropriated and accounted for under the said taxable service.

Commercial Training and Coaching Service

1.5 Actor Prepares vs. CST, Mumbai 2014 (33) STR 546 (Tri.-Mumbai)

The appellant running vocational training institute provided services to individuals who wish to perform in entertainment industry. The department raised demand on the ground that, assessee not covered by definition as defined in Notification No. 3/2010-ST. The Tribunal held that, Notification No. 24/2004-ST exempted services provided by vocational training institute and Notification No. 3/2010-ST altering definition of vocational training institute requiring affiliation to National Council can only have prospective effect. It is further held that, it is impermissible for an authority to interpret the Act or exemption notification by resorting to assumptions.

1.6 Sadhana Educational & People Dev. Services Ltd. vs. CCE, Pune-III 2014 (33) STR 575 (Tri.-Mumbai)

The appellant in this case engaged in providing two years course in Post Graduate Diploma in Management, wherein the training was pertaining to marketing, finance, human resource, etc. They have claimed that, they are vocational training institute and therefore entitled for benefit under Notification No. 24/2004-ST. The Tribunal held that, courses in academic in nature covering broad spectrum of subjects and contents of course not to be called vocational. These professional management courses are not imparting any skill to enable trainee to seek employment or self-employment after course. In view of above, the benefit of Notification No. 24/2004-ST is not available.

Mandap Keeper Service

1.7 Acharya Jialal Vasant Sangeet Niketan vs. CCE, Mumbai 2014 (33) STR 550 (Tri.-Mumbai)

The appellant in this case hired/leased out premises in consideration for an interest free deposit. The Tribunal held that, since premises having not given for temporary occupation, not covered by definition of Mandap Keeper Service.

Business Auxiliary Service

1.8 Sodexho Pass Services India P. Ltd. vs. CST, Mumbai 2014 (33) STR 550 (Tri.-Mumbai)

The appellant in this case engaged in promotion of sales of goods and services of affiliates by issuance of meals/gifts vouchers, wherein the vouchers were purchased by employers and purchase of goods and services by employee from affiliates promoting sale of goods and services. The Tribunal held that, vouchers are substitute for carrying cash such as credit/debit cards and publication of directory was important link in overall activity therefore liable to tax under BAS.

1.9 In Re: International Travel House Pvt. Ltd. 2014 (33) STR 606 (Commr. Appln.)

The appellant in this case, received incentives/commission for using software provided by other firm for booking of air tickets. The Commissioner held that, there was no service provider-receiver relationship and the amount given by the firms to appellant was royalty/incentive for using their software for booking tickets and was not linked to or billed for services rendered by the appellant to their clients in providing service of booking air tickets. The appellant was only using the software and it could not be said that they promoted business of firm that supplied them the software. Hence, activity of appellant could not be classified as BAS.

Tour Operator/Rent-a-Cab Service

1.10 Friends Tour & Travels vs. CCE, Noida 2014 (33) STR 585 (Tri.-Del.)

The appellant in this case engaged in providing buses to LG Electronics for dropping of staff. The Tribunal held that, activity carried out by the appellant is covered under Tour Operator category.

It is further held that, rent-a-cab operator means any person engaged in rent-a-cab business and ownership of vehicle or procurement of vehicle on hire is irrelevant to decide the coverage of the service.

1.11 CCE, Meerut-I vs. Usha Breco Ltd. 2014 (33) STR 619 (Uttarakhand)

The High Court in this case held that, transportation service provided from one establishment to another is an ancillary to main business of providing ropeway service and therefore, the assessee did not carry out tour operation and therefore not liable to service tax as Tour Operator.

1.12 Transport Solution Group vs. CCE, Mumbai-IV 2014 (33) STR 683 (Tri.-Mumbai)

The appellant in this case supplied cabs for transportation of staff but contested demand alleging non-ownership of cabs rented. The Tribunal held that, there is no stipulation either in Act or Rules requiring person to own cabs / vehicle and liability to service tax arise so long cabs are rented either owned or procured from elsewhere.

Leased Circuit Service

1.13 TCS E-Serve Ltd. vs. CST, Mumbai 2014 (33) STR 641 (Tri.-Mum)

In this case, department raised demand under reverse charge mechanism under section 66A of FA, 1994 under leased circuit service. The Tribunal after relying on AP High Court decision in *Karvy Consultants Ltd. 2006 (1) STR 7 (AP)* and *CBEC Instructions F. No. 137/21/2011 dated 15-7-2011* held that, in order to be liable under leased circuit service, the service provider has to be Telegraph Authority as defined in the Act and the foreign vendor in the present case is not a telegraph authority hence question of levy of service tax does not arise.

Works Contract Service

1.14 Essar Projects (India) Ltd. vs. CCE&ST Rajkot 2014 (33) STR 696 (Tri.-Ahmd.)

The appellant in this case entered into two different contracts for supply of goods and construction services. The department alleged that, appellant has artificially bifurcated the single contract into two contracts. The Tribunal observed that, as per clauses of contract, separate defects liability clause providing separately for defects in balance in plant and defects in working of facility by service provider and the ownership is transferred to service recipient on delivery by supplier at site. It is held that, adjudicating authority cannot go beyond the CBEC Circular No. 150/1/2012-ST dated 8-2-2012 clarifying for works contract executed before 7-7-2009, free of cost supplies not to be included in gross amount. Further, there is no evidence conveying both contracts are artificially bifurcated after introduction of explanation to Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Hence, value of supply contract not to be added to value of construction contract.

2. Interest/Penalties/Others

2.1 JMJ Constructions vs. ACCE, Salem-I 2014 (33) STR 496 (Mad.)

The High Court in this case held that, as per section 85 of FA, 1994, no power is vested in the appellate authority to condone the delay of over six months in preferring the appeal.

2.2 MCI Leasing (P) Ltd. vs. CCE, Mysore 2014 (33) STR 497 (Kar.)

The appellant registered as a service provider, paid the tax voluntarily by mistake, claimed refund of the same under section 11B of CEA, 1944, after realising that it was not liable to pay tax. The Adjudicating Authority allowed the claim, however in revisionary proceedings order passed that claim could only be partly allowed, as balance was barred by limitation. The said order upheld by the Tribunal. On appeal to the High Court, it is held that invocation of section 11B, the appellant has chosen the forum for claiming refund, such that the provision of general law were excluded. Amount of tax not having been paid under protest, any payment of which refund sought, same had to be done within 1 year of the date of payment. Since claim for refund not having been made within the period prescribed under the Act, order of the Tribunal is in accordance with law.

2.3 Rishi Shipping vs. CCE, Rajkot 2014 (33) STR 595 (Tri.-Ahmd.)

The appellant in this case adjusted excess amount of tax more than the amount specified in rule

6(4B) of STR, 1994 and also failed to inform the jurisdictional CEO. The Tribunal held that, extent of adjustment was permissible up to ` 1 lakh and intimation required to be given to jurisdictional CEO, which is not done, hence the order of First Appellate Authority is to be upheld. Penalty under section 76 has been set aside by invoking section 80 as there was *bona fide* belief that, entire service tax payable can be adjusted against excess service tax paid.

2.4 ACL Education Centre (P) Ltd. vs. UOI 2014 (33) STR 609 (All.)

The High Court in this case held that, rule 5A(2) facilitates conduct of special audit stipulated by section 72A of FA, 1994. In case of private assessee, for purpose of audit, material can be collected either by officer authorised by Commissioner or by Auditor himself, but audit will be performed only by Chartered Accountants. It is pious duty of assessee to make available record stipulated in rule 5A i.e. trial balance, income tax audit report, etc. for scrutiny of officer or audit party. The manner for conducting audit is as per accounting standard provided by ICAI and audit report is to be made available to assessee, as per law.

2.5 CCE & C, Belgaum vs. Mahakoshal Beverages Pvt. Ltd. 2014 (33) STR 616 (Kar.)

The High Court in this case held that, imposition of service tax under a particular category of service is not permissible when, the imposition under said head is not proposed in show cause notice.

2.6 Zenith Rollers Ltd. vs. CCE, Noida 2014 (33) STR 678 (Tri.-Del.)

The services provided in the nature of re-rubberisation of old, worn out rubberised rollers is amounting to processing of goods and also as reconditioning of used rollers. The Tribunal observed that, the service is equally classifiable under Business Auxiliary Service and Management, Maintenance or Repair Service. It is held that, under such circumstances, section 65A(c) of FA, 1994 is attracted and services to be classified under sub-clause of clause (105) of section 65 which comes first. Since BAS comes first the said services are classifiable under BAS.

2.7 Sen Brothers vs. CCE, Bolpur 2014 (33) STR 704 (Tri.-Kolkata)

The appellant in this case paid service tax and interest before issuance of SCN. The Tribunal observed that, there is no element of fraud, suppression, misstatement, etc. and no additional liability adjudged in adjudication proceedings. It is held that, section 73(3) of FA, 1994 is applicable and no penalty is imposable.

3. CENVAT Credit

3.1 CCE&C vs. Ultratech Cement Ltd. 2014 (33) STR 501 (Guj.)

The High Court in this case held that, CENVAT credit of service tax paid on insurance of vehicles provided by the appellant for use by residents of the colony maintained for its workers is not admissible as such vehicles are not used for business purpose.

3.2 CCE, Ludhiana vs. DRP Malleables Pvt. Ltd. 2014 (33) STR 521 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on commission paid to commission agent and accounting and auditing services provided by CA.

3.3 DCM Engineering Products vs. CCE & ST, Chandigarh-II 2014 (33) STR 522 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on insurance premium of company's vehicle which, were used by senior official of company from commuting from residence to factory and for other work of the company as same cannot be called welfare activity and is to be treated as activity related to business.

3.4 Tata Consulting Engineers Ltd. vs. CST, Mumbai 2014 (33) STR 655 (Tri.-Mumbai)

The department in this case sought to reverse the CENVAT credit availed on input services used for providing output service rendered to SEZ unit/developer. The Tribunal held that, in view of retrospective amendment to CCR, 2004, the assessee is not required to reverse credit availed.

CA. Mayur Nayak, CA. Natwar Thakrar &
CA. Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Circulars issued by RBI:

1. Money Transfer Service Scheme – 'Direct to Account' facility

RBI has now decided to allow foreign inward remittances received under MTSS to be transferred to the KYC compliant beneficiary bank account through electronic mode, such as NEFT, IMPS etc. The procedure to be followed for the purpose is as under:

Foreign inward remittances received by the bank acting as Indian Agent under MTSS (termed as 'Partner Bank'), may be electronically credited directly to the account of the beneficiary, held with a bank other than the Indian Agent Bank (termed as 'Recipient Bank'), subject to the following conditions:

a) The Recipient Bank will credit the amount transferred by the Partner bank only to KYC compliant bank accounts.

b) In respect of the bank accounts which are not KYC compliant, the Recipient Bank shall carry out KYC/CDD of the recipient before the remittance to such account is credited or allowed to be withdrawn.

c) The Partner Bank shall appropriately mark the direct-to-account remittances to indicate to the Recipient Bank that it is a foreign inward remittance.

d) The Partner Bank shall ensure that accurate originator information and necessary beneficiary information is included in the electronic message while transferring the fund to the Recipient Bank. This information should be available in the remittance message throughout the payment chain i.e. the overseas principal, the Partner Bank and the Recipient Bank. The Partner Bank should add an appropriate alert in the electronic message indicating that this is a foreign inward remittance and should not be credited to KYC non-compliant account and NRE/NRO account.

e) The identification and other documents of the recipient shall be maintained by the Recipient Bank as per the provisions of Prevention of Money Laundering (Maintenance of Records) Rules, 2005. All other requirements under KYC/AML/CFT guidelines issued by the Reserve Bank of India for MTSS from time to time shall be adhered to by the Partner Bank.

f) The Recipient Bank may seek additional information from the Partner Bank and shall report suspicious transactions to the FIU-IND with details of the Partner Bank through which they received the remittances.

(A.P. (DIR Series) Circular No. 110 dated 4th March, 2014)

2. Rupee Drawing Arrangement – Increase in trade related remittance limit

RBI has now decided that in case of Permitted Transactions under the Rupee Drawing Arrangements (RDAs), the limit of trade transactions shall be increased from the existing ` 2,00,000/- (Rupees Two Lakh only) per transaction to ` 5,00,000/- (Rupees Five Lakh only) per transaction, with immediate effect.

(A. P. (DIR Series) Circular No. 111 dated 13th March, 2014)

3. Foreign Portfolio Investor – Investment under Portfolio Investment Scheme, Government and Corporate debt

Pursuant to Notification of Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 by SEBI, RBI has now put in place a framework for investments by such Foreign Portfolio Investors. The scheme for investments by such Investors would be called 'Foreign Portfolio Investment' scheme.

The salient features of the new scheme are:

- The portfolio investor registered in accordance with SEBI guidelines shall be called 'Registered Foreign Portfolio Investor (RFPI)'. The existing portfolio investor class, namely, Foreign Institutional Investor (FII) and Qualified Foreign Investor (QFI) registered with SEBI shall be subsumed under RFPI;
- RFPI shall purchase and sell shares and convertible debentures of Indian companies through registered broker on recognised stock exchanges in India as well as purchases shares and convertible debentures which are offered to public in terms of relevant SEBI guidelines/ regulations.
- RFPI can sell shares or convertible debentures so acquired:
  a. In open offer in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011; or
  b. In an open offer in accordance with the SEBI (Delisting of Equity shares) Regulations, 2009; or
  c. Through buyback of shares by a listed Indian company in accordance with the SEBI (Buy-back of securities) Regulations, 1998.
- RFPI can also acquire shares or convertible debentures:
  a. In any bid for, or acquisition of, securities in response to an offer for disinvestment of shares made by the Central Government or any State Government; or
  b. In any transaction in securities pursuant to an agreement entered into with merchant banker in the process of market making or subscribing to unsubscribed portion of the issue in accordance with Chapter XB of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.
- The individual and aggregate investment limits for the RFPIs shall be below 10% (per cent) or 24% (per cent) respectively of the total paid-up equity capital or 10% (per cent) or 24% (per cent) respectively of the paid-up value of each series of convertible debentures issued by an Indian company. Further, where there is composite sectoral cap under FDI policy, these limits for RFPI investment shall also be within such overall FDI sectoral caps;

- RFPI shall be eligible to open a Special Non-Resident Rupee (SNRR) account and a foreign currency account with Authorised Dealer bank and to transfer sums from foreign currency account to SNRR account at the prevailing market rate for making genuine investments in securities. The Authorised Dealer bank shall transfer repatriable proceeds (after payment of applicable taxes) from SNRR account to foreign currency account;
- RFPI shall be eligible to invest in government securities and corporate debt subject to limits specified by the RBI and SEBI from time to time;
- The investment by RFPI will be made subject to the SEBI (FPI) Regulations, 2014, modified by SEBI/Government of India from time to time;
- RFPI shall be permitted to trade in all exchange traded derivative contracts on the stock exchanges in India subject to the position limits as specified by SEBI from time to time;
- RFPI shall offer cash or foreign sovereign securities with AAA rating or corporate bonds or domestic Government Securities, as collateral to the recognised Stock Exchanges for their transactions in the cash as well as derivative segment of the market.
- Any foreign institutional investor who holds a valid certificate of registration from SEBI shall be deemed to be a registered foreign portfolio investor (RFPI) till the expiry of the block of three years for which fees have been paid as per the Securities and Exchange Board of India (Foreign Institutional Investors) Regulations, 1995. A QFI may continue to buy, sell or otherwise deal in securities subject to the SEBI (FPI) Regulations, 2014 for a period of one year from the date of commencement of these regulations, or until he obtains a certificate of registration as foreign portfolio investor, whichever is earlier.
- However, all investments made by that FII/QFI in accordance with the regulations prior to registration as RFPI shall continue to be valid and taken into account for computation of aggregate limit.
- RFPI shall report the transaction to RBI as being reported by FII in LEC Form as per extant practice.

(A. P. (DIR Series) Circular No. 112 dated 25th March, 2014)

(Securities Exchange Board of India notified "FPI" regulations in January 2014. The FPI regime seeks to club together the multiple existing categories of foreign portfolio investors in Indian markets, including FIIs and Qualified Foreign Investors (QFIs).

Different categories of Foreign Portfolio Investors are now combined into one category of Registered Foreign Portfolio Investors (RFPI) is a welcome step as it simplified the portfolio scheme to a great extent. Moreover, RBI has now clarified that the limits under Portfolio Investment Schemes will be within the overall sectoral cap. Also permission to open special Rupee and Foreign Currency Account for the portfolio investors would facilitate investments and would also attract many investors)

4. External Commercial Borrowings (ECB) for Civil Aviation Sector

Earlier, External Commercial Borrowings (ECB) could be raised by airline companies for working capital as a permissible end-use, under the approval route, subject to the conditions stipulated in the said Circular. The scheme was extended till December 31, 2013 *vide* A.P. (DIR Series) Circular No. 116 dated June 25, 2013.

It has been now decided that this scheme of raising ECB for working capital for Civil Aviation Sector will continue till March 31, 2015.

(A. P. (DIR Series) Circular No. 113 dated 26th March, 2014)

5. Risk Management and Inter-Bank Dealings

Under extant guidelines relating to hedging of currency risk of probable exposures based on past performance by residents, all forward contracts booked under the facility by both exporters and importers were required to be on fully deliverable basis. Further, in case of cancellation, exchange gain, if any, was not allowed to be passed on to the customer.

In order to provide greater operational flexibility, RBI has decided to relax the aforesaid restriction as follows:

- Contracts booked up to 75 per cent of the eligible limits for exporters and importers could be cancelled with the exporter/importer bearing/being entitled to the loss or gain as the case may be.
- Contracts booked in excess of 75 per cent of such eligible limits should be on a deliverable basis and cannot be cancelled, implying that in the event of cancellation, the exporter/importer would have to bear the loss but would not be entitled to receive the gain.

(A. P. (DIR Series) Circular No. 114 dated 27th March, 2014)

(It seems RBI has provided this flexibility in light of stabilising value of Rupee.)

6. Merchanting Trade Transactions – Revised guidelines

Vide A. P. (DIR Series) Circular No. 95 dated 17th January, 2014, RBI had recently modified the guidelines for merchanting trade transactions in the light of the recommendations of the Technical Committee on Services/Facilities to Exporters (Chairman: Shri G. Padmanabhan) to liberalise and simplify the procedure. After receiving various suggestions from merchanting traders and trade bodies, RBI has once again accordingly issued modified guidelines as below:

i. For a trade to be classified as merchanting trade following conditions should be satisfied:

   a. Goods acquired should not enter the Domestic Tariff Area and

   b. The state of the goods should not undergo any transformation.

ii. Goods involved in the merchanting trade transactions would be the ones that are permitted for exports/imports under the prevailing Foreign Trade Policy (FTP) of India, as on the date of shipment and all the rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry), are complied with for the export leg and import leg respectively;

iii. AD bank should be satisfied with the bona fides of the transactions. Further, KYC and AML guidelines should be observed by the AD bank while handling such transactions ;

iv. Both the legs of a merchanting trade transaction have to be routed through the same AD bank. The bank should verify the documents like invoice, packing list, transport documents and insurance documents (if originals are not available, non-negotiable copies duly authenticated by the bank handling documents may be taken) and satisfy itself about the genuineness of the trade;

v. The entire merchanting trade transactions should be completed within an overall period of nine months and there should not be any outlay of foreign exchange beyond four months;

vi. The commencement of merchanting trade would be the date of shipment/export leg receipt or import leg payment, whichever is first. The completion date would be the date of shipment/export leg receipt or import leg payment, whichever is the last;

vii. Short-term credit either by way of suppliers' credit or buyers' credit would be available for merchanting trade transactions, to the extent not backed by advance remittance for the export leg, including the discounting of export leg LC by an AD bank, as in the case of import transactions;

viii. In case advance against the export leg is received by the merchanting trader, AD bank should ensure that the same is earmarked for making payment for the respective import leg. However, AD bank would allow short-term deployment of such funds for the intervening period in an interest bearing account;

ix. Merchanting traders would be allowed to make advance payment for the import leg on demand made by the overseas seller. In case where inward remittance from the overseas buyer is not received before the outward remittance to the overseas supplier, AD bank should handle such transactions by providing facility based on commercial judgment. It has to be ensured by AD bank that any such advance payment for the import leg beyond USD 200,000 per transaction, the same should be paid against bank guarantee/LC from an international bank of repute except in cases and to the extent where payment for export leg has been received in advance;

x. Letter of credit to the supplier would be permitted against confirmed export order keeping in view the outlay and completion of the transaction within nine months;

xi. Payment for import leg would also be allowed to be made out of the balances in Exchange Earners Foreign Currency Account (EEFC) of the merchant trader;

xii. AD bank has to ensure one-to-one matching in case of each merchanting trade transaction and report defaults in any leg by the traders to the concerned Regional Office of RBI, on half yearly basis in the prescribed format, within 15 days from the close of each half year, i.e. June and December;

xiii. The names of defaulting merchanting traders, where outstandings reach 5% of their annual export earnings, would be caution-listed.

xiv. The merchanting traders have to be genuine traders of goods and not mere financial intermediaries. Confirmed orders have to be received by them from the overseas buyers. AD banks have to satisfy themselves about the capabilities of the merchanting trader to perform the obligations under the order. The overall merchanting trade should result in reasonable profits to the merchanting trader.

RBI has also clarified that the contents of this circular would come into effect in respect of merchanting trade transactions initiated after January 17, 2014.

(A. P. (DIR Series) Circular No. 115 dated 28th March, 2014)

(Perhaps for the first time, RBI has defined 'Merchanting Trade'. Further, RBI has provided additional operational flexibility when compared to guidelines issued vide A. P. (DIR Series) Circular No. 95 dated 17th January, 2014. Significant changes include:

- ***Modifying the requirement of back to back letter of credit both for imports and exports and allowing advance payment for import leg up to USD 2,00,000 per transaction;***
- ***Allowing payment for import leg to be made even from EEFC account;***
- ***Changing the criteria/threshold of default from thrice or more in a year to outstanding to the tune of 5% of annual export earnings.)***


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Domestic relationship – Definition recognises only 5 types of relationship – Marriage legal requirements – Formality, publicity, exclusivity – Protection of Women from Domestic Violence Act, 2005, S. 2(f)

Appellant and Respondent started living and had a live-in-relationship. The Appellant preferred Criminal case under Section 12 of the Domestic Violence Act, 2005 for prohibiting respondent from committing domestic violence under the Domestic Violence Act, 2005. The Magistrate took the view that the plea of "domestic violence" had been established, due to non-maintenance of the appellant . The Respondent aggrieved by the order of the Magistrate filed appeal before the Session Court under Section 29 of the Domestic Violence Act, 2005. Appellate Court also confirmed the order of the Magistrate. The respondent took the matter to the High Court wherein the High Court allowed the appeal and set aside the order of the Courts below. The appellant challenged the said order of the High Court.

The Supreme Court held that live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal. In this case, the question concerned was whether a "live-in relationship" would amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" under Section 2(f) of the Protection of Woman from Domestic Violence Act, 2005 (for short "the DV Act") and the disruption of such a relationship by failure to maintain a women involved in such a relationship amounts to "domestic violence" within the meaning of Section 3 of the DV Act. Three elements of common law marriage are (1) agreement to be married (2) living together as husband and wife, (3) holding out to the public that they are married. Sharing a common household and duty to live together form part of the 'Consortium Omnis Vitae" which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, succession ship, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences flow out of that relationship. "Relationship in the nature of marriage" which falls within the definition of Section 2(f) of the DV Act. The third enumerated category that is "relationship in the nature of marriage" which means a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognised, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage.

Distinction between the relationship in the nature of marriage and marital relationship is that relationship of marriage continues, notwithstanding the fact that there are differences of opinions, marital unrest etc., even if they are not sharing a shared household, being based on law. But live-in-relationship is purely an arrangement between the parties unlike, a legal marriage. Once a party to a live-in-relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the legislature has used the expression "in the nature of".

Section 2(f) of the Domestic Violence Act though uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognise the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act.

The Apex Court has given some guidelines for testing under what circumstances, a live-in-relationship will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the Domestic Violence Act. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.

(1) Duration of period of relationship: Section 2(f) of the Domestic Violence Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household: The expression has been defined under Section 2(s) of the Domestic Violence Act and, hence, need no further elaboration.

(3) Pooling of Resources and Financial Arrangements Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long-term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements: Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship: Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring, etc.

(6) Children: Having children is a strong indication of a relationship in the nature

of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialisation in Public: Holding out to the public and socialising with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties: Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

Thus Supreme Court uphold the order of the High Court and dismissed the appeal.

Indra Sarma vs. V. K. V. Sarma AIR 2014 SC 309.

2. Release of land from acquisition – Not permissible once possession of land is taken – On possession being taken land vest in State free from all encumbrances – Equitable doctrine – Does not bind party to suit from dealing with suit property – But makes transfer subject to rights of other party under decree that may be passed – Land Acquisition Act, 1894, Ss. 48, 16, 17

A preliminary notification under Section 4(1) of the Land Acquisition Act, 1894 was issued in respect of huge chunk of land including Survey No. 49/1 admeasuring 15 acres on 6-8-1991 for the benefit of the State Government Houseless Harijan Employees Association (Regd.) In respect of the same land declaration under Section 6 of the Act 1894 was issued. At the behest of the then owners of the suit land the Government denotified the land from acquisition *vide* order issuing notification under Section 48(1) of the Act 1894. Aggrieved the respondent No.3 – Society challenged the said order of de-notifying the land from acquisition by filing Writ Petition which was dismissed by the learned Single Judge. The said order was also affirmed by the Division Bench dismissing the Writ Appeal preferred by the Society.

The Society approached Supreme Court which held that Doctrine of lis *pendens* is based on legal maxim '*ut lite pendente nihil innovetur*' (During a litigation nothing new should be introduced). This doctrine stood embodied in Section 52 of the Transfer of Property Act 1882. The principle of '*lis pendens*' is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee *pendente lite* is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. However, it must be clear that mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property *pendente lite*.

The law on the issue can be summarised to the effect that a person who purchases land subsequent to the issuance of a Section 4 notification with respect to it, is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour does not confer upon him, any title and at the most he can claim compensation on the basis of his vendor's title. The Supreme Court dismissed the Petition.

K. N. Aswathnarayana Setty (D) Tr. LRs. And Ors. vs. State of Karnataka and Ors. AIR 2014 SC 279

3. Power of Commission – Slump sale of sugar units to private entrepreneurs – Audit report of CAG showing lack of competitive process in sale – No prejudice can be caused to bidder by show cause notice requiring to furnish necessary documents – Competition Act, 2003, Ss. 26(1), 19, 3(3)(d) and S. 36(2)

The petitioner filed writ petition to quash the impugned order/notice issued by the Director General, Competition Commission of India, New Delhi under Section 41(2) read with Section 36(2) of the Competition Act, 2002, and further a direction has been sought for upon the Competition Commission of India to keep the said proceedings in respect of the petitioner in abeyance till the decision of *Rajiv Kumar Mishra vs. State of U.P. and Others)* pending before the Supreme Court of India.

The petitioner is a company registered under the provisions of the Companies Act, 1956. The company is engaged in the business of production and sale of the sugar. It has four subsidiaries; they are also carrying on the same business. On 29th June, 2009 the Government of Uttar Pradesh/respondent No. published an "Expression of Interest-cum-Request for Qualification" as well as a "Request for Proposal" inviting bids for sale of 11 sugar mills of the Uttar Pradesh State Sugar Corporation Limited /respondent No. 4, in slump sale. Pursuant to aforesaid, the petitioner also participated and was found successful bidder for 4 sugar mills. The respondent No. 1 i.e. the Competition Commission of India on its own motion has initiated investigation on the allegation that in the slump sale there was bid rigging and other serious irregularities.

The decision of the State Government for disinvestment of its shares in the Sugar Corporation was challenged in the High Court by means of Civil Misc. Writ Petition in above-mentioned case, for quashing the request for proposal of strategic sale of entire equity of the Government of Uttar Pradesh in the Sugar Corporation.

The High Court observed that the object of the Competition Act is to promote economic efficiency using competition as one of the means of assessing the creation of market responsibility to the consumer preferences. Briefly stated the objects of the competition law are: (i) to promote efficiency, (ii) to protect the interest of the consumers, and (iii) to avoid the monopoly of a group of industries.

In dealing with the point involved in this case, it is necessary to read Sections 19 and 26 of the Competition Act. Section 19 of the Competition Act empowers the Commission to make enquiry into any contravention of the provisions of sub-Section (1) of Section 3 or sub-section (1) of Section 4 thereof, on its motion or upon the receipt of any information or upon a reference made to it by the Central Government or the State Government or the statutory authority, as the case may be. A simple reading of Section 19, makes it clear that if the Commission is *prima facie* satisfied that the information needs investigation, it will ask the Director-General to make the necessary inquiry/investigation in respect of violation of Section

3 or 4 of the Competition Act. Pertinently, the Director General is appointed by the Central Government in terms of Section 16 of the Competition Act to assist the Commission in conducting inquiry into contravention of the provisions of the Act. Section 26 of the Competition Act, enacted for procedure for enquiry under Section 19. Thus, a full reading of Sections 3, 4, 19 and 26 of the Competition Act make it clear that the Commission may form its opinion with regard to the prima facie case for contraventions of the provisions of Section 3 or Section 4. The Commission can form its opinion on its own motion or from a reference received from the Central Government, the State Government or a statutory authority. In case the Commission initiates the proceeding under Section 19 of the Competition Act on its own motion, it examines the material and if it is satisfied prima facie from such enquiry that there is any alleged contravention of the provisions in sub-section (1) of Section 3 or sub-section (1) of Section 4, it shall ask the Director General to cause an investigation. The function of the Director General is to assist the Commission in conduct of enquiry into contravention of any provision of the Competition Act. The Director General, on receipt of direction from the Commission under sub-section (1), makes an enquiry and submits a report on his findings to the Commission. Thereupon, the Commission shall forward a copy of its report to the parties concerned. If the investigation was initiated on the reference of Central Government or the State Government or the statutory authority, it shall forward the report to such authority. If the report finds that there is no contravention of Section 3 or 4 of the Competition Act, the Commission invites objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on the report of the Director General, and after considering the objections/suggestions received from the concerned party if the Commission agrees with the recommendation of the Director General, it closes the matter. However, if the Commission is of the opinion that further investigation is required, it may direct further investigation in the matter by the Director General or it may itself make further inquiry in accordance with the provisions of the Act.

The impugned notice issued by the Director General is in the nature of a show cause notice. The Supreme Court in a long line of decisions has held that the writ petition against the show cause notice is not maintainable. In the present case, the petitioner has not challenged the impugned notice on the ground that the Commission does not have power to investigate or enquire into the matter. The Supreme Court in the case of *Special Director and Another vs. Mohd. Ghulam Ghouse and Another, (2004) 3 SCC 440*, has deprecated the practice of the High Courts in entertaining the writ petitions against the show cause notice.

The writ petition was dismissed.

Namrata Marketing Pvt. Ltd. vs. Competition Commission of India and Others. AIR 2014 Allahabad 11

4. Agreement to sell – Chargeability – Possession delivered to buyer after receiving full consideration – Agreement for sale cannot be received in evidence unless proper stamp duty and penalty are paid – Stamp Act, 1899, S. 35 – Registration Act, 1908, S. 17

The petitioner is the plaintiff in the suit. She filed the said suit for a perpetual injunction restraining the respondents from interfering with her alleged peaceful possession and enjoyment of the plaint schedule property and for costs. She pleaded that she is the absolute owner of the plaint schedule property and her grandfather had executed a settlement deed in her favour settling item No. 1 of the plaint schedule property in her favour; that she purchased the remaining part of the plaint schedule property and some other property under a registered sale deed; that she is in possession and enjoyment of the same; she engaged the 1st respondent as her clerk to assist her in cultivating the plaint schedule property for the year 2006-07; thereafter, she was dissatisfied with his work and removed him; for the said reason the 1st respondent and his two sons bore a grudge against her and attempted to trespass into the plaint schedule property. A written statement was filed by respondents denying the plaint averments.

By order, the Trial Court held that the agreement of sale did not require payment of stamp duty and penalty under Article 47-A and that it is admissible in evidence. Challenging the said order Revision has been filed.

The question is whether the Explanation – I to Article 47-A of the Stamp Act is attracted and if so, whether the respondents are liable to pay stamp duty and penalty by treating the agreement in question as a sale.

There is no recital in the agreement filed by respondents about the delivery of possession. However, there is an endorsement on the reverse of the said agreement to the effect that the balance sale consideration was paid on the said date and possession of the property was delivered to the respondents on the said date allegedly by the petitioner.

A Proviso to Section – 49 of the Indian Registration Act, 1908, and the law laid down the following would emerge: (1). An unstamped or insufficiently stamped document is inadmissible in evidence. (2). As per the proviso to Section – 49 of the Indian Registration Act, an unregistered document affecting immovable property and required to be registered can be received as evidence either in cases referred to therein or to prove any collateral transaction. (3). If an unstamped or insufficiently stamped document coupled with the infirmity of being unregistered can be received as evidence for a collateral purpose, provided, the first defect under the Indian Stamp Act, 1899, is corrected. In other words, an unstamped or insufficiently stamped document after duly impounded as prescribed under Section – 33 of the Indian Stamp Act, 1899 can be relied in evidence for collateral purpose." The High Court held that the agreement of sale cannot be received in evidence unless proper stamp duty and penalty are paid as per Explanation-I of Article 47-A of the Act. The agreement of sale attracts the said explanation and has to be stamped as a "Sale". As admittedly possession was delivered after receiving the balance sale consideration as per it's terms. Accordingly, the Civil Revision Petition is allowed

Vanapalli Jayalaxmi @ Venkata Jayala vs. A. Kondalarao, S/o. Satyam and two others. AIR 2014 Andhra Pradesh 1

5. Interpretation of statute – Appeal provision – Construction – Not to be too strict or too liberal

The appeal was against the judgment and order passed by the Division Bench of High Court wherein single Judge's order holding that the order passed by the Assistant Provident Fund Commissioner under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("for brevity "the Act") requiring the appellant to remit a sum towards interest under Section 7Q of the Act for belated remittances, was to be assailed in appeal before the Employees' Provident Funds Appellate Tribunal (for short "the Tribunal") and, therefore, it was appropriate on the part of the appellant to take recourse to the alternative remedy and not to approach the High Court under Article 226 of the Constitution of India.

The facts giving rise to the present appeal are that the appellant-company has a textile factory established in the year 1964 and with passage of time it took steps for modernisation but it suffered a setback in the year 1997 due to slump in the cotton industry. The financial constraints compelled the company to make a reference to the BIFR under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 and the BIFR by order declared the appellant-company as a sick industrial company and appointed Industrial Development Bank of India (IDBI) as the Operating Agency.

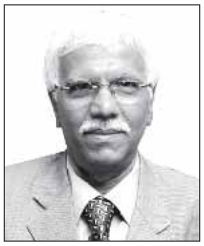
The Assistant Provident Fund Commissioner, the second respondent herein, issued a demand requiring the appellant to deposit a sum towards interest under Section 7Q of the Act for belated remittances. An order came to be passed under Section 8F of the Act demanding the amount of interest and an order was passed by the Assistant Provident Fund Commissioner taking certain coercive measures to realise the amount.

Being aggrieved by the aforesaid action the appellant approached the High Court. The single Judge, came to hold that it was appropriate to approach the Tribunal under Section 7I of the Act and, accordingly, dismissed the writ petition. The said order of the single Judge was assailed before the Division Bench which concurred with the view expressed by the learned single Judge opining that the order impugned charging interest on the belated payment of Provident Fund is appealable and, granted liberty to the appellant to move the Appellate Authority. The said order is the subject-matter of challenge in the appeal before the Supreme Court.

About the maintainability of an appeal against an order passed under Section 7Q of the Act, the Apex Court observed that a right of appeal cannot be assumed to exist unless expressly provided for by the statute and a remedy of appeal must be legitimately traceable to the statutory provisions. If the express words employed in a provision do not provide an appeal from a particular order, the court is bound to follow the express words. To put it otherwise, an appeal for its maintainability must have the clear authority of law and that explains why the right of appeal is described as a creature of statute. An order under Section 7A is an order that determines the liability of the employer under the provisions of the Act and while determining the liability the competent authority offers an opportunity of hearing to the concerned establishment. At that stage, the delay in payment of the dues and component of interest are determined. It is a composite order. To elaborate, it is an order passed under Section 7A and 7Q together. Such an order shall be amenable to appeal under Section 7I. The same is true of any composite order a facet of which is amenable to appeal and Section 7I of the Act. But, if for some reason when the authority chooses to pass an independent order under Section 7Q the same is not appealable.

The demand notice manifestly has been issued in exercise of power under Section 7Q of the Act and is an independent action and against such an order or issue of demand no appeal could have been filed. Therefore, the conclusion of the learned Single Judge as well as by the Division Bench on the said score is not sustainable. The appeal is allowed.

M/s. Arcot Textile Mills Ltd. vs. The Regional Provident Fund Commissioner and Others.



Kishor Vanjara, *Tax Consultant*

TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxmann, Current Tax Report (CTR), The Tax Referencer (TTR), The Chamber's Journal (CJ), Sales Tax Review (S. T. Review), The Bombay Chartered Accountant Journal (BCAJ), All India Federation of Tax Practitioners Journal (AIFTPJ), The Chartered Accountant (CAJ), The Chamber's Journal (C J), Sebi And Corporate Laws (S & Co Laws), Company Case, Times of India, Economic Times for the period February to March 2014 has been arranged and indexed topic-wise.

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CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

SENTIMENTS ARE RUNNING AHEAD

The Indian stock markets were expecting a pre-election rally and it has set in. The month of March has seen sudden improvement in the sentiments in the Indian stock markets without much change in the visible fundamentals. A stock market rally emerged on the back of heavy inflow of funds from Foreign Financial Institutions (FIIs). They poured in about ` 195,000/- crores in the Indian stock markets and it had the required positive result. The stock markets surged about 7% during the month, which was quite impressive considering the plight of many other emerging markets, which was due to improved fundamentals in the developed economies. These markets started sucking back the funds earlier parked in the emerging markets for earning better returns. The exodus of funds from the emerging markets back to the developed markets has large global repercussions. The developed economies of the US, Canada and a number of West European countries have started growing again after a long slowdown and even a recession in many of the economies. The growth tempo in the US is much better than most of the other developed countries but still it seems that the developed economies have made a decisive turnaround. Some economies are growing slowly than others and they will take a longer time to show impressive growth but at least their de-growth has been arrested, which is a very positive sign for the world. The developed economies of the world contribute a large part of the global growth pie and improvement therein can result in a major increase in the global growth rate and the outlook. The developments of the last few months are very encouraging and are showing new rays of hope for the developed world. Stimulus such as 'Quantitative Easing' in the US and similar measures by the Governments and Central banks of many countries have borne fruits. Though these temporary measures injecting liquidity will have to be removed over a period and are yet to be removed in many economies, the required traction is probably achieved by most of the economies and the going may be much smoother here onwards. The pains, which started after the severe recession in Europe and the US about five years back, have probably come to an end and it is likely that the world may sustain growth for many years to come on the back of improvement in the developed economies.

However, newer risks are emerging with the changing order. There is an outflow of capital from many developing economies back to the developed economies, which has started slowing down the economic growth in those developing countries. Many of them are dependent on foreign capital and foreign purchases to a major extent and improved economic outlook in the developed countries can reduce the opportunities in those countries. Improved consumption in the developed countries on the back of improvement in growth rate may create some new opportunities for the exports from some countries but at the same time, outflow of capital can create economic imbalances such as erosion of currency values. The developing economies gained at the cost of the developed ones in the last recession and now it is their turn to pay back.

The developments in China, which has become the second largest economy in the world, have also started causing concerns. To safeguard against formation of economic bubbles in that country, the Government has come down heavily on the excess liquidity in that economy, which is resulting in a slowdown. The Government has already forecasted subdued growth numbers; and cooling of the economy can throw some new surprises as well. China has been the major growth engine for the world over the last few years. It was one of the best growing major economies in the world, especially when the developed world was in a major recession. It is expected that the Chinese economy will grow at about 7% in 2014 and it may even grow slower. Higher expected growth in the US economy will balance out and make the world grow overall at a better rate than in the recent past. However, any major negative development in the Chinese economy can be a major dampener to the global growth as a large number of smaller economies in Asia and specially Asia Pacific are very much dependant on Chinese economy for their economic upliftment.

The US economy is continuing its positive momentum and is showing all round improvement over the last few months. In spite of gradual withdrawal of Quantitative Easing, the economic sentiment in the US remains positive and growth numbers are optimistic. Unemployment in the US has reduced due to better economic outlook, which is causing improvement in the demand and consumption. The US economy being consumption based, improved demand will give the needed respite to it. The outlook of the US economy is robust and the expectations are high. It is likely that the US, which has large economic interests in Europe will positively impact European economies. Most of the economies will start growing faster, causing positive impact on the smaller economies of Eastern Europe, Western Asia and North Africa.

Though the fundamentals of the Indian economy do not seem to have changed much, the sentiment has definitely improved. There are great expectations from the new Government, which will emerge after the forthcoming elections. Many Indians and most of the global investors are expecting that a clear mandate will emerge for an alliance, which can come in power and take more bold steps to improve the economy of the country. Foreigners expect that the business environment in India will improve and with reforms, doing business in India will become easier than before. There will be a rationalization of tax laws and more certainty can be expected from the laws. It is also expected that the level of corruption will start receding, which will give relief to the businesses in the country and can lure more foreign investments. On the back of this very positive thinking, the current turbulent economic scenario is fairly discounted. Undoubtedly, there are a few positive indicators such as improvement in current account deficit due to increase in import and slow down of exports. The control on Government spending is likely to curtail the budgetary deficits of the economy and slowing inflation can make a positive impact on the currency as well as investment. The liquidity is being sucked out and will probably continue to be sucked by various measures deployed by the Reserve Bank of India (RBI), and that is likely to control the inflationary pressure in the economy. Lower inflation can give a head room for RBI to reduce the interest rates, which can stimulate the economic growth. Though, the expected improvements will take some time to happen, investors are positive that those things will happen soon. This will give a fillip to the corporate earnings, dividends, retained profits and investments.

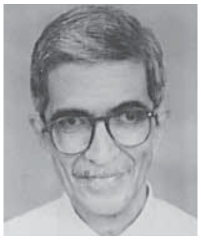
The developments in global economies as well as the Indian economy are very positive for stock markets around the world. Expectations from stock investments have suddenly started improving and it has started pushing stock prices across the world. The stock markets in the US are hovering around their all time high levels. Even the Indian stock indices have broken their historical tops. The markets are surging with great expectations and there is hardly any global factor other than the risk due to possible hiccups in the Chinese economy. Indian stock markets will continue to remain strong at least till the election results in the month of May and the political mandate given by the countrymen will impact the course of the economy as well as the stock markets. Currently, the odds are looking less and evens are strong. Soaring expectations can see Indian stock markets achieve higher levels in the month of April. It may be appreciated that at the current levels, stock markets are not undervalued but still there is some head room for growth in the immediate future, if the new Government takes the reform process in proper earnest. There are good opportunities in the Indian stock markets and valuations of some mid range stocks are reasonably attractive. There exists an opportunity for the investors to take advantage of the current scenario and increase their investments in well managed mid size companies as well as companies involved in cyclical industries. It is likely that many cycles will turn positive and will give good returns over the medium term. Investors need to be cautious in the month of May just before the election results, as they can throw open opportunities but can also create risks and dangers. So partial booking of profit in the first week of May, before the election results are out, may be a good strategy for investors. However, short selling should not be indulged into as the risks are high. Systematic investment plan for equity investment via mutual fund route is recommended. Investment in equity shares of the companies, who are industry leaders quoting at lower than industry PE can also give good returns.

The debt market continues to give good yield, but it seems that the interest rate cycle is about to change its course. If the inflation remains in control and CAD continues to contract, RBI will reduce the rate of interest soon. As soon as the first rate cut happens, the change of interest cycle will be assumed and that in turn will start reducing the bank interest rates. Once this indicator gets flashed, even the bond yields will start falling and the bond investors will start making money not only by way of interest but also by appreciation of bond prices. Though the micro economic indicators in the country have not shown clear positive signals, there are a number of reasons to believe that the worst is over for the Indian economy. It is expected that things will be positive hereafter due to the actions to be taken by the new Government and the pace of reforms. The economy which was slowing down for last number of quarters has probably stopped deteriorating and it is likely to turn positive in the forthcoming future. Reduction of interest rates will also improve the corporate earnings and the health of the businesses in the country and therefore the current optimism may not be misplaced.

Property prices continue to remain subdued and they may remain so in spite of large bets dangled by the property developers to the purchasers. The expected reduction of prices has not taken place and the industry has survived the recent fund crunch better than expected. Now on the back of improving economy, it is difficult to expect a further drop in prices and if the interest rates start reducing, a possibility of gradual improvement in prices cannot be ruled out. Investors need to be cautious before plunging in and they should concentrate only in such markets, where the demand is good and the supply is insufficient. Investors with risk appetite can restart considering investment in properties for long-term gains.

Appreciating Rupee has taken sheen out of gold and its price in India has started coming down, irrespective of the global movement of the precious metal. Silver prices have also softened due to appreciating Rupee and in tandem with gold price. There does not seem to be any immediate trigger for the precious metals to appreciate from the current levels. There can be short-term rallies due to hardening of prices on account of international tensions or on account of depreciating currency. But on an overall basis, the chances of appreciation of these metals in a meaningful way in the near future do not seem to be great. Investors are advised to stay away from fresh investments in these precious metals. Even diamonds are likely to remain subdued and underperform many other classes of investments such as stocks, deposits, bonds and even real estate.

The sentiments are positive and opportunities are expected to emerge, subject to the forthcoming election results of the Parliament. Investors have reasons to be optimistic and may start investing in stocks and bonds. Over-enthusiasm can get risky and till the election results are out, cautious approach is a must. However, staying away from the market and waiting for the results may prove to be a loss of opportunity. Based on the respective risk appetite, the investors should take their call.



V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Q.1 Wealth Tax

Facts & Query

Any residential house if let out for more than 300 days in a year is excluded from the definition of assets u/s. 2 (ea) of the Act.

Now if a landlord lets out such a house against refundable deposit but without charging any rent, will he still be entitled to such exclusion?

Ans. Now under S. 3 of W.T. Act all the asset held by an assessee are liable for Wealth Tax. Now asset in definition under S. 2(ea) of the Act:

2(ea) "Assets", in relation to the assessment year commencing on the 1st day of April, 1993, or any subsequent assessment year, means —

(i) Any building or land appurtenant thereto (hereinafter referred to as "house"), whether used for residential or commercial purposes or for the purpose of maintaining a guest house or otherwise including a farm house situated within twenty-five kilometres from local limits of any municipality (whether known as Municipality, Municipal Corporation or by any other name) or a Cantonment Board, but does not include —

(1) A house meant exclusively for residential purposes and which is allotted by a company to an employee or an officer or a director who is in whole-time employment, having a gross annual salary of less than ten lakh rupees;

(2) Any house for residential or commercial purposes which forms part of stock-in-trade;

(3) Any house which the assessee may occupy for the purposes of any business or profession carried on by him;

(4) Any residential property that has been let-out for a minimum period of three hundred days in the previous year.

Now if a particular property does not fall under the said definition of an asset it will not be liable for W.T. liability.

Now a provision relevant for our purpose is that if an asset being a House property let out for more than 300 days in the relevant Previous Year, it is not taxable as an asset and is not liable for W.T.

Now letting out of property may not be for consideration of charging of any rent. And if as a safeguard of the let out property if some amount is taken as a security deposit, such letting out does not cease to be a property let out and as such, such let out property is not liable to tax under W.T. Act.

Q.2 Amalgamation

Section 2(1B)(iii) reads as under "shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation."

Query

Consider 3 Companies A Ltd., B Ltd. and C Ltd. All the Companies are closely held companies. B Ltd. and C Ltd. are getting merged with A Ltd. through a same scheme of amalgamation. The shareholding pattern of the aforesaid Companies is given below:

Shareholders of A Ltd.	Shareholders of B Ltd.	Shareholders of C Ltd.
Promoters – 98%	A Ltd. – 45%	A Ltd. – 45%
B Ltd. – 1%	C Ltd. – 45%	B Ltd. – 45%
C Ltd. – 1%	Others – 10%	Others – 10%

On amalgamation of B Ltd., shares held by A Ltd. and C Ltd., will stand cancelled whereas on amalgamation of C Ltd shares held by A Ltd. and B Ltd. will stand cancelled. As a result only 10% shareholders of B Ltd. and C Ltd., will be issued shares of A Ltd. wherein the section mentions that shareholders holding not less than 3/4th in value in amalgamating companies should become shareholders of amalgamated company. Whether it will qualify as a tax compliant amalgamation or not?

Ans. Under the provisions of Section 54 of the I.T. Act, a transfer of a Capital Asset leads for liability for Capital Gain. However there are transfers of Capital Assets enumerated under Section 47 of the Act, transfer of such assets do not lead for any liability for capital gain under Section 45 of the Act.

Now one of such provisions under Section 47 is as under:

S.47 (vi) Any transfer, in a scheme of amalgamation, of a capital asset by the amalgamating company to the amalgamated company if the amalgamated company is an Indian company.

In the case of the querist, all these conditions of merger and demerger of companies are fulfilled and 75% of the shares continue to be held by the shareholders of the merging company, in the merged company. As such in the case of the querist there will be no liability for capital gain in the case of such merging of the companies.

Q.3 Gift

Facts

Mr. A has purchased/booked a flat in 2010 by paying earnest money of ` 1,00,000/- by cheque. The flat was booked in the saleable building of a SRA project. The builder has given an allotment letter in which the amount of consideration and the rate per sq. ft. was also mentioned. Subsequently payments were made from time-to-time and approx. 55% of the total price is paid as of now. All payments are made by cheques. The rate at the time of booking of the flat was ` 2,700/- per sq. ft and the stamp duty valuation as on that date comes to ` 3,100 / sq. ft. The Stamp Duty value as on today is ` 6,000/- per sq. ft. The Agreement for the flat is to be prepared and registered now.

Queries

(a) *Whether the Section 56(2)(viib) which is introduced by the Finance Act, 2013 and applicable from A.Y. 2014-15 can be applied to such cases where the booking was done earlier and only agreement is pending as of now?*

(b) *If the provision applies to such bookings, which stamp duty value shall be adopted for the purpose of this section i.e. whether the stamp duty value as on the allotment letter or the stamp duty value as on the current date i.e. agreement date?*

(c) *Whether the allotment letter issued in 2010 fixing the amount of consideration can be said to be an agreement fixing the consideration for the purpose of the section?*

Ans. For the purpose of Section 56(2)(viib) the relevant date is the date on which a formal agreement to purchase is entered into and not the date when a final written agreement is entered into. As such the rates applicable will be when a formal agreement was entered into and not the date on which an actual agreement is entered into will be the relevant date for rate purposes.

As such in the case of the querist the rates applicable on the date of when a party entered into formal agreement to purchase and sell, would be a relevant date and not the date in which an actual agreement in writing was entered into. As such in the case of the querist it is not rate in the year 2013-14 but rate in the year 2010-11 for the purpose of Section 56(2)(viib) of the Act.

Q.4 Capital Gain

The assessee invested LTCG in Capital Gain Account scheme for constructing a new house property within 3 years of the sale of original Residential House property.

The project is delayed by the builder and goes beyond 3 years. Is the assessee liable to LTCG at the end of 3 years for no fault of his? What if the full amount of Scheme is paid to the builder in year 4?

Ans. Now the purchase of a new house or construction of new house is a condition for exemption under Section 54 or 54F would be deemed to have been complied with if there is a substantial compliance. If the actual purchase and sale of the property is not completed within the time allowed, for no fault of the assessee who has substantially complied with the said condition and only because of no fault of his the construction or purchase is delayed, he will not be disentitled from claiming the benefit of investment under the said sections.

Now in the case of the querist as he had paid the full purchase consideration in time and only because the builder delayed the construction of the querist flat he cannot be denied the benefit of investment under Section 54. He would be entitled to the benefit of investment under Section 54 of the Act.

Q.5 Change in constitution of firm

Mr. A Mr. B are partners in a firm, Mr. A retires on say 1-1-2013, from which date Mr. C is also admitted.

Queries

1. *Does this amount to continuation of the firm without dissolution?*

2. *Whether two returns 1-4-2012 to 31-12-2012 and 1-1-2013 to 31-3-2013 are to be filed? Or one return of Income?*

Ans. A partnership firm is not a separate legal entity independent of its partners. Two or more persons carrying on business together are called a partnership firm. As such any change in the constitution of the firm by some partners retiring from the firm and any new person joining it as a partner will not affect the continuation of a firm. However at the time of admitting a new partner for its continuation a firm should have at least two partners. If however, out of the two partners if one retires from the firm it comes to an end.

As such in the querist's case, if a new partner comes into the firm and then one of partners retires, there is no dissolution of the firm. However the after retirement of one of the two partner a new partner is brought in it does not amount to continuation of the firm, but it is only new partnership firm after dissolution of the existing firm.

The querist has to admit a new partner before an old partner retires, it will be a continuation of the firm.

CA Hitesh R. Shah & CA Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Important events and happenings that took place between 9th March, 2014 to 8th April, 2014 are being reported as under.

I. Admission of New Members

1) The following new members were admitted in the Managing Council Meetings held on 21st March, 2014.

LIFE MEMBERSHIP

1	Shri Iyer Ramesh (Tr. from Ord. to Life)	CA	Mumbai
2	Shri Patki Shyamkant Madhukar (Tr. from Ord. to Life)	CA	Pune
3	Shri Sejpal Nehal Amrutlal	CA	Mumbai
4	Mrs. Padwal Sanjita Vinayak	CA	Mumbai
5	Shri Khandelwal Neelkanth Rajiv	CA	Mumbai
6	Shri Shah Mukesh Punamchand	CA	Mumbai
7	Shri Mota Gautam Rajesh	CA	Mumbai
8	Mrs. Lalwani Divya Avinash	CA	Mumbai
9	Shri Gandhi Nirmal M.	CA	Pune

ORDINARY MEMBERSHIP

1	Shri Patel Manish Girish	ITP	Ahmedabad
2	Shri Chheda Mulraj Kalyanji	CA	Mumbai
3	Shri Ramchandran Vinod	CA	Mumbai
4	Ms. Jadhav Neelam Chandrakant	Advocate	Mumbai
5	Shri Sivaswamy N. S.	CA	Coimbatore
6	Shri Shah Siddharth Vijay	CA	Mumbai
7	Shri Sheth Jimmy Vinaychandra	CA	Mumbai
8	Shri Shah Devang Kishor	CA	Mumbai
9	Shri Dedhia Champak Kalyanji	CA	Mumbai

10	Mrs. Daga Madhu Aniruddha	CA	Mumbai
11	Shri Jain Vinod Jaisingh	CA	Mumbai
12	Mrs. Garg Shikha Gaurav (Oct. 2013 to Mar. 2014)	CA	Mumbai
13	Shri Bhosle Santosh	ITP	Mumbai

STUDENT MEMBERSHIP

1	Ms. Dalmia Sweta Santosh	CA Student	Thane
2	Ms. Vira Vidhi Jayesh	CA Student	Mumbai
3	Shri Godhani Ashish B.	CA Student	Mumbai

ASSOCIATES MEMBERSHIP

1	Hindalco Industries Limited	Mumbai
2	KCPL And Associates LLP	Mumbai
3	Shaparia & Mehta	Mumbai
4	ASA & Associates LLP	Mumbai

II. Past Programmes

Details of programmes conducted by the Chamber are given below:

Sr. No.	***Programme Name / Committee/Venue***	***Date / Subjects***	***Chairman / Speakers***
1.	**Allied Laws Committee**		
	Full Day Seminar on Charitable Trusts: (Jointly with BCAS) Venue – M. C. Ghia Hall, Kalaghoda, Mumbai – 400 023.	**22nd March, 2014** 1. Key Note Address / Recent Issues in Case of Charitable Trusts	CA Arvindbhai Dalal, Chairman Shri Rajiv Nabar, Director Income Tax (Exemption) Shri Pradeep Ashturkar, Deputy Charity Commissioner
		2. Important Provisions of Bombay Public Trust Act, Drafting of Trust Deed, etc.	Shri Baburao C. Yevle, Advocate
		3. Formation of Trust, Provisions relating to Accounts & Audit, etc.	CA Vipin Batavia

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		4. Registration with I. T. Dept. u/s. 12AA, u/s. 80-G & under section 10(23)(c).	CA Paras Savla
		5. Taxation of Charitable Trust	CA Gautam Nayak
		6. Foreign Contribution Regulation Act provisions of DTC	CA Anil Sathe
2.	**Corporate Members Committee**		
	Workshop on Companies Act, 2013:	**14th, 15th, 28th & 29th March, 2014**	
	Venue – Babubhai Chinai Hall, IMC.	• Overview of Companies Act, 2013	Dr. S. D. Israni, Advocate
		• Amendments pertaining to Accounts & Audit	CA Himanshu Kishnadwala
		• Important definitions Company Formation & Management & New Concepts like OPC, Small Company	CS N. L. Bhatia
		• Important Amendments affecting Private Companies & unlisted Public Companies	CA Nilesh Vikamsey
		• Provisions relating to BoD, Independent Directors (ID), Audit Committee, N & R Committee & other mandatory committees	Dr. V. R. Narasimhan, Chief – Regulations National Stock Exchange of India Ltd
		• Merger & Acquisition	Shri Nitin Potdar, Solicitor
		• Corporate Social Responsibilities (CSR)	CA Anup Shah
		• Companies Act, 2013 vis-à-vis IFRS	CA Jayesh Gandhi

Sr. No.	***Programme Name / Committee/Venue***	***Date / Subjects***	***Chairman / Speakers***
3.	**Direct Taxes Committee**		
	9th Intensive Study Group (Direct Tax) Meeting: Venue - CTC Conference Room	**18th March, 2014** Recent Important Decisions under Direct Taxes	CA Nimesh K. Chothani
4.	**Indirect Taxes Committee**		
A)	***Indirect Tax Study Circle Meeting:*** Venue : 2nd Floor, Babubhai Chinai Hall, IMC.	**12th March, 2014** Circulars and Notifications issued during 2013-14 under Service Tax Laws	Chairman : CA Naresh Sheth Group Leader : CA Jinal Shah
B)	Workshop on MVAT Act & Allied Laws : (Jointly with STPAM, BCAS, AIFTP(WZ) & WIRC of ICAI) Venue – Mazgaon Library, Vikrikar Bhavan, Mumbai.	**15th, 29th March & 5th April, 2014** • Issues in Place of Provision of Service Rules, 2012	CA Rajiv Luthia
		• Issues in Point of Taxation Rules,2011.	CA Girish Raman
		• Issues in Definition of Service, Exempt & Declared Service.	CA Manish Gadia
		• Issues in Valuation of Service, Abatement & Reverse Charge Mechanism.	Shri Vidyadhar Apte, Advocate
		• Issues in Interest, Penalties and Show cause Notices/Summons.	CA Jayesh Gogri
		• CENVAT Credit Rules.	CA Naresh Sheth
5.	**International Taxation Committee**		
A)	***4th Intensive Study Course on Transfer Pricing:*** (Including Domestic Transfer Pricing) **24 Sessions – 6 Days** Venue – West End Hotel	**22nd March, 2014 (Saturdays)** **4th & 5th April, 2014 (Friday & Saturday)** **A)** Benchmarking • Search on database with case studies, includes benchmarking analysis and documentation	CA Jiger Saiya

Sr. No.	***Programme Name / Committee/Venue***	***Date / Subjects***	***Chairman / Speakers***
		• Live example of carrying out search analysis on database with practical approach.	Shri Kumar Sampat
		B) Industry Specific Sessions	
		• Financial Services – banks, private equity investment, brokerage, etc., and Information Technology / Information Technology Enabled Services.	CA Darpan Mehta
		• Pharmaceuticals / Manufacturing.	CA Karishma Phatarphekar
		C) Key Controversy Areas – Recent TP Audit experience	
		• Financial Transactions comprising loans, guarantees, Intra group re-imbursements.	CA Waman Kale
		• Definition, Different nuances between specified domestic transaction and international transaction, Understanding the different transactions covered under section 40A(2) with case studies.	CA Ameya Kunte
		D) Practice Areas	
		• How to prepare for TP Litigation [viz Transfer Pricing Assessments, Dispute Resolution Panel, Commissioner of Income-tax (Appeals) and Income-tax Appellate Tribunal].	CA Samir Gandhi

Sr. No.	***Programme Name / Committee/Venue***	***Date / Subjects***	***Chairman / Speakers***
		• Preparation of new Form No. 3CEB, issues relating to online e-filing, etc., Audit procedure, management representation, with examples, etc.	CA Maulick Doshi
		E) Other areas having TP implications	
		• Transfer Pricing aspects of Business Restructuring.	CA Bipin Pawar
		• Business Reorganisations such as Mergers, Demergers, Slump Sale, Transfer of Shares, discussion with examples.	CA Arun Saripalli & CA Rachesh Kotak
		F) Domestic Transfer Pricing	
		• (a) Legal aspects of Intangibles – an Indian perspective. (b) Transfer of Intangibles, Cost contribution, Management services / Cost Allocation etc.	Mr. Freddy Daruwala, Advocate
		• Different nuances of other transactions covered under section 92BA i.e. 80-IA(8)/ 10, 10A, etc. with case studies	CA Hasnain Shroff
B)	***Transfer Pricing Study Circle*** Venue – Kilachand Hall, IMC.	**20th March, 2014** *Overview of T. P. Provisions in India & Provisions of Chapter X (Sec. 92 Definition of Associated Enterprise and International Transactions)*	CA Ganesh Rajgopalan Ms. Rukhsar Sidhwa
C)	***Intensive Study Group on International Taxation Meeting:*** Venue – CTC Conference Room	**11th March, 2014** Royalty Taxation – Software	Shri Devendra Mehta, CA Shreyas Shah, & Shri Rajesh Lakhara

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
6.	**Study Circle & Study Group Committee**		
	Study Circle Meetings: Venue: 2nd Floor, Babubhai Chinai Committee Room, IMC.	***10th March, 2014*** Issues related to Survey (including TDS Survey) under the Income-tax Act, 1961.	CA Bhupendra K. Shah
III.	**FUTURE PROGRAMMES** Future programmes of the Chamber's are as follows:		
1	**Direct Taxes Committee**		
	Intensive Study Group (Direct Tax) Meeting: Venue – CTC Conference Room	**23rd April, 2014** Recent Important Decisions under Direct Taxes	CA Dilip Sanghvi
2.	**Indirect Taxes Committee**		
A)	***Workshop on MVAT Act & Allied Laws*** (Jointly with STPAM, BCAS, AIFTP(WZ) & WIRC of ICAI) Venue - Mazgaon Library, Vikrikar Bhavan, Mumbai.	**19th April and 3rd May, 2014** • Assessment of Builders and Developers under MVAT Act 2002 • E-filing of Returns and Declaration Forms under MVAT/CST Act	Shri Deepak Bapat, Advocate CA Pranav Kapadia
B)	***Indirect Tax Study Circle Meeting*** Venue: 2nd Floor, Babubhai Chinai Hall, IMC	**16th April, 2014** Issues in Place of Provision of Services Rules, 2012	Chairman Shri Naresh Thacker, Advocate Group Leader: Shri Jitendra Motwani, Advocate
3.	**International Taxation Committee**		
A)	***Intensive Study Group on International Taxation Meeting:*** Venue – CTC Conference Room	**10th April, 2014** Royalty – Equipment Leasing	CA Natwar Thakrar & CA Kirit Dedhia
		22nd April, 2014 Royalty – Copyright (other than software)	Shri Devendra Mehta & CA Shreyas Shah

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
B)	**Intensive Study Course on FEMA**	**18th, 19th, 25th & 26th April, 2014**	
	Venue – West End Hotel	• Inaugural Session – History and origin, Cardinal principles, Liberalisation with FEMA, Rationale of Sec. 3 on statute, recent trend, penalties and appeal	CA Rashmin Sanghavi
		• Introduction and Overview of FEMA Overall Scheme and structure of FEMA Regulatory Framework	CA Manoj Shah
		• Important Definitions, structure of the Act, Rules and Circulars, powers of RBI and Government	CA Mayur Nayak
		• Entry strategy, Establishment of branch / project office by Non-residents in India, procedure with RBI, ROC, Income Tax, FRO, Commissioner of Police.	CA Hinesh Doshi
		• Import and Export of Goods and Services	Shri Ajit shah, LLM
		• Bank Accounts and Deposit Regulations	CA Amit Purohit
		• Miscellaneous Remittances, Import, Exports and retention of currencies, Repatriation of Foreign Exchange, remittances in case of change in Residential status such as employment, self employed, etc.	CA Zulfiqur Shivji

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• Investment in India of Immovable Property and outside India by Residents	CA Naresh Ajwani
		• Inbound Investment – Foreign Direct Investment, portfolio and other avenues of Investment	CA Shabbir Motorwala
		• Inbound Investment – other than FDI	CA N. C. Hegde
		• Outbound Investment	CA Nishit Parikh
		• Borrowings and Lendings in Rupees and Foreign Currency	CA Prakash Kotadia
		• Change in Residential Status under FEMA	CA Dhishat Mehta
		• Adjudication and Compounding of Contraventions procedure, Penalty & Appeal	Chairman CA Dilip J. Thakkar Speaker – RBI official
		• Case Studies on FEMA	Eminent Faculty
		• Brain Trust	CA Anup Shah and CA Hitesh Gajaria.
C)	***4th Intensive Study Course on Transfer Pricing*** (Including Domestic Transfer Pricing) Venue – West End Hotel	**11th & 12th April, 2014 (Friday & Saturday)** **A)** Other areas having TP implications • Critical Issues in Transfer Pricing surrounding incurrence of Advertising and Marketing Expenses, Valuation, Issue of shares, etc.	CA Arun Saripalli

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		B) The Road Ahead–	
		• Advance Pricing Arrangements, MAP and Safe Harbour	Ms. Alpana Saxena
		C) Attribution Issues, experiences, recent rulings and Revenue's perspective	
		• Recent Landmark decisions on Transfer Pricing	CA Amol Tibrewala
		• Convergence between Custom and Transfer Pricing / Application of Transfer Pricing to Sections 10A / 10B, Corporate Governance	CA Milind Kothari
		• Approach of the Revenue and their expectations.	Shri R. S. Srivastava, Additional Commissioner of Income-tax – TPO 2(4), Mumbai
		• International developments, BEPS Report of OECD, GAAR and their inter-play with transfer pricing	CA Sanjay Tolia
		• Panel Discussion.	Shri C. S. Gulati / CA Vispi T. Patel (Moderator), Shri Kuntal Kumar Sen, CA Rohan Phatarphekar
		• Closing session	CA Vispi T. Patel
D)	***8th Residential Conference on International Taxation, 2014*** Venue – Novotel Hyderabad Convention Centre.	**19th June, 2014 to 22nd June, 2014** A) Group Discussion • Case Studies on taxability of EPC contracts and related issues of AOP, Consortium, offshore services and presumptive tax provisions including Sections 44BBB, 44DA & 44BB	 Dr. Anita Sumanth, Advocate

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• Structuring of FDI – Interplay with other laws	CA Anup P. Shah
		• Case Studies on International Taxation and Transfer Pricing	CA H. Padamchand Khincha
		B) Brains' Trust	
		• On Practical Issues in International Taxation	Eminent Professionals
		C) Papers for Presentation	
		• Emerging controversies in Taxation of Software, IPRs & E-Commerce (Tax and Non-Tax Issues)	Shri Arvind Datar, Sr. Advocate
		• International Tax structuring under GAAR and other Anti Abuse Provisions including OECD's BEPS action plan – Way Forward	CA Shefali Goradia
		• Recent issues, trends and jurisprudence in Transfer Pricing – Indian & Global perspective	CA Vijay Iyer
4.	**Study Circle & Study Group Committee:**		
A)	***Study Circle Meeting:*** Venue – 2nd Floor, Babubhai Chinai Committee Room. IMC.	9th April, 2014 Issues u/s. 45 (3) and 45(4) of Income-tax Act	Chairman : Shri Vipul B. Joshi, Advocate Group Leader : CA Ashok L. Sharma
B)	***Study Group Meeting:*** Venue – 2nd Floor, Babubhai Chinai Committee Room. IMC	**21st April, 2014** Recent Judgment under Direct Taxes	Group Leader : CA Mahendra Sanghvi Latin Term Speaker : Shri Mandar Vaidya, Advocate
C)	***Study Circle on International Taxation Meetings:*** Venue: 2nd Floor, Kilachand Hall, IMC.	**30th April, 2014** Selected issues in Taxation of Capital Gains for Non-residents	CA Rutvik R. Sanghvi

IV. Renewal Notice – 2014-15

The renewal fees for Annual Membership, Subscription of The Chamber's Journal, Study Group and Study Circles meeting and Other Subscription for the financial year 2014-15 falls due for payment on 1st April, 2014.

The details of the Fees are as under:

		Fees	Service Tax & Cess *	Total
1.	Membership Renewal Fees (for 1 year including Chamber's Journal)	` 1,900/-	` 235/-	` 2,135/-
2.	The Chambers Journal Subscription (For Life Members)	` 900/-	—	` 900/-
3.	The Chambers Journal Subscription (For Non-Members)	` 1,800/-	—	` 1,800/-
4.	Associate Membership	` 2,000/-	` 247/-	` 2,247/-
5.	Student Membership	` 250/-	` 31/-	` 281/-
6.	The Chambers Journal Subscription (For Students)	` 700/-	—	` 700/-
7.	Study Group (Direct Taxes)	` 2,200/-	` 272/-	` 2,472/-
8.	Study Circle (Direct Taxes)	` 1,500/-	` 186/-	` 1,686/-
9.	Study Circle (Indirect Taxes)	` 1,200/-	` 148/-	` 1,348/-
10.	Study Circle (International Tax)	` 1,500/-	` 186/-	` 1,686/-
11.	Study Circle (Allied Laws)	` 1,200/-	` 148/-	` 1,348/-
12.	Self Awareness Series	` 600/-	` 74/-	` 674/-
13.	Intensive Study Group on Direct Tax	` 1,500/-	` 186/-	` 1,686/-
14.	Intensive Study Group on International Taxation	` 2,000/-	` 247/-	` 2,247/-
15.	All Study Circle & Study Group Meetings ` 11,700/- Less : 10% Discount ` 1,170/- (*) (Sr. Nos. 7 to 14)	` 10,530/-	` 1,303/-	` 11,833/-
16.	Study Circle (Sr. Nos. 8 and 11) (Direct Tax & Allied Laws Combined)	` 2,200/-	` 272/-	` 2,472/-

V. Forthcoming Journal by Journal Committee

The Chamber's Journal for the month of May, 2014 will cover topic on **"Hospitality Industry"**.

VI. Extra Ordinary General Meeting convened on 25th April has been postponed.

VII. Publications for Sale

A) International Taxation – A Compendium

Four hardbound volumes set containing approx. 4000 pages.

B) Study Material of 37th Residential Refresher Course

Held on 13-16 February, 2014 at Pondicherry.

(For Enrollment and further details of all the Future Events, please refer to the April, 2014 Issue of CITC News or visit the website www.ctconline.org)

Workshop on MVAT Act & Allied Laws held on 18-1-2014 to 5-4-2014 Jointly with AIFTP, BCAS, MCTC, STPAM & WIRC of ICAI

CA Hitesh R. Shah, Hon. Jt. Secretary, CTC lighting the lamp. Seen from L to R: S/Shri C. B. Thakar, Speaker; Dharman Shah, Convenor, Workshop Committee, STPAM; Vishal Shah, President, MCTC; J. D. Nankani, National President, AIFTP; Mahesh Madkholkar, WIRC of ICAI and CA Pankaj K. Parekh, President, STPAM.

Seated from L to R: S/Shri Vishal Shah, President, MCTC; Hitesh R. Shah, Hon. Jt. Secretary, CTC, J. D. Nankani, National President, AIFTP; C. B. Thakar, Speaker; Govind Goyal, BCAS, Pankaj K. Parekh, President, STPAM and Mahesh Madkholkar, WIRC of ICAI

Faculties

CA Rajat Talati

CA Janak Vaghani

Shri Ratan Samal, Advocate

Shri C. B. Thakar, Advocate

CA Vikram Mehta

CA Ashit Shah

CA Naresh Sheth

CA Manish Gadia

Shri Vidyadhar Apte

CA Rajiv Luthia

CA Girish Raman

CA Jayesh Gogri

ALLIED LAWS COMMITTEE

Full Day Seminar on Charitable Trusts jointly with BCAS held on 22nd March, 2014 at M. C. Ghia Hall

CA Yatin K. Desai, President, CTC welcoming the delegates. Seen from L to R: CA Ashok Sharma, Chairman, Allied Laws Committee, CTC, Shri Rajiv Nabar, Director-Income-tax (Exemption), CA Arvind Dalal, Session Chairman, CA Naushad Panjwani, President, BCAS, Shri Pradeep Ashturkar, Deputy Charity Commissioner, CA Suhas Paranjpe, Convenor, IND, BCAS.

CA Arvind Dalal inaugurating seminar by lighting the lamp. Seen from L to R: CA Yatin K. Desai, President, CTC, CA Ashok Sharma, Chairman, Allied Laws Committee, CTC, CA Vipin Batavia, Past President, CTC & Faculty, Shri Rajiv Nabar, Director – Indirect Tax (Exemption), CA Naushad Panjwani, President, BCAS and CA Suhas Paranjpe, Convenor, IND, BCAS.

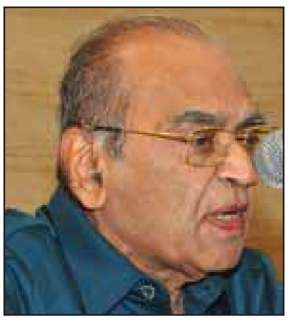
CA Arvind Dalal giving inaugural address to the delegates. Seen from L to R: CA Ashok Sharma, Chairman, Allied Laws Committee, CTC, Shri Rajiv Nabar, Director-Income-tax (Exemption), CA Yatin K. Desai, President, CTC, CA Naushad Panjwani, President, BCAS, Shri Pradeep Ashturkar, Deputy Charity Commissioner, CA Suhas Paranjpe, Convenor, IND, BCAS.

Shri Rajiv Nabar, Director-Income Tax (Exemption) giving Keynote address. Seen from L to R: CA Ashok Sharma, Chairman, Allied Laws Committee, CTC, CA Yatin K. Desai, President, CTC, CA Arvind Dalal, Session Chairman, CA Naushad Panjwani, President, BCAS, Shri Pradeep Ashturkar, Deputy Charity Commissioner, CA Suhas Paranjpe, Convenor, IND, BCAS.

ALLIED LAWS COMMITTEE

Full Day Seminar on Charitable Trusts jointly with BCAS held on 22nd March, 2014 at M. C. Ghia Hall.

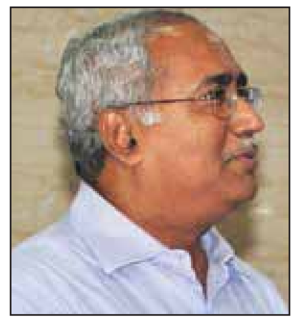
Shri Pradeep Ashturkar, Deputy Charity Commissioner addressing the delegates. Seen from L to R: CA Ashok Sharma, Chairman, Allied Laws Committee, CTC, Shri Rajiv Nabar, Director – Income-tax (Exemption), CA Yatin K. Desai, President, CTC, CA Arvind Dalal, Session Chairman, CA Naushad Panjwani, President, BCAS, Shri Pradeep Ashturkar, Deputy Charity Commissioner, CA Suhas Paranjpe, Convenor, IND, BCAS.



Shri Baburao C. Yevle, Advocate

CA Vipin Batavia

CA Paras K. Savla



CA Gautam Nayak

CA Anil Sathe

Section of delegates

DIRECT TAXES COMMITTEE

Intensive Study Group on Direct Taxes Meeting held on 18th March, 2014 on the subject "Recent Important Decisions under Direct Tax".

CA Nimesh K. Chothani addressing the members. Seen from L to R: CA Ajay Singh, Chairman and CA Dinesh Poddar, Convenor.

INTERNATIONAL TAXATION COMMITTEE

4th Intensive Study Course on Transfer Pricing (Including Domestic Transfer Pricing) held on 8th & 22nd March, 2014 and 4th & 5th April, 2014 at Hotel West End, Mumbai

CA Yatin K. Desai, President addressing the delegates. Seen from L to R: CA Hinesh Doshi, Hon. Jt. Secretary, CA Vispi T. Patel, Faculty, Shri Mahendra Singh, Chief Guest, CIT(A) TP, CA Paresh P. Shah, Chairman and CA Naresh Ajwani, Vice Chairman.

CA Paresh P. Shah, Chairman welcoming the delegates. Seen from L to R: CA Hinesh Doshi, Hon. Jt. Secretary, CA Vispi T. Patel, Faculty, Shri Mahendra Singh, Chief Guest, CIT(A) TP, CA Yatin K. Desai, President and CA Naresh Ajwani, Vice Chairman.

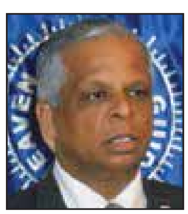
Shri Mahendra Singh, Chief Guest, CIT(A) TP inaugurating course by lighting the lamp. Seen from L to R: CA Hinesh Doshi, Hon. Jt. Secretary, CA Yatin K. Desai, President, CA Vispi T. Patel, Faculty and CA Paresh P. Shah, Chairman.

Shri Mahendra Singh, Chief Guest, CIT(A) TP giving keynote address to the delegates. Seen from L to R: CA Hinesh Doshi, Hon. Jt. Secretary, CA Vispi T. Patel, Faculty, CA Yatin K. Desai, President, CA Paresh P. Shah, Chairman and CA Naresh Ajwani, Vice Chairman.

Speakers

CA
Vispi T. Patel

CA
Vaishali Mane



CA
Vishwanath
Kane

CA
Shuchi Ray

CA
Jiger Saiya

Shri Kumar
Sampat

INTERNATIONAL TAXATION COMMITTEE

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CA Darpan Mehta

CA Karishma Phatarphekar

CA Waman Kale

CA Ameya Kunte

CA Samir Gandhi

CA Maulik Doshi

CA Bipin Pawar

CA Arun Saripalli

CA Rachesh Kotak

Mr. Freddy R. Daruwala, Advocate

CA Hasnain Shroff

INDIRECT TAXES COMMITTEE

Study Circle Meeting held on 12th March, 2014 on the subject "Circulars and Notifications issued during 2013-14 under Service Tax Laws"

CA Naresh Sheth addressing the members. Seen from L to R: CA Alok Mehta, Convenor, CA Ashit Shah, Chairman, CA Jinal Shah, Faculty and CA Pranav Kapadia, Vice Chairman.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting held on 10th March, 2014 on the subject "Issues related to Survey (including TDS Survey) under the Income Tax Act, 1961"

CA Bhupendra K. Shah addressing the members

INTERNATIONAL TAXATION COMMITTEE

Intensive Study Group on International Taxation Meeting held on 11th March, 2014 on the subject "Royalty Taxation – Software"

CA Shreyas Shah addressing the members

THE CHAMBER'S JOURNAL

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