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AUGUST - 2014

VOL . II | NO. 11

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

Corporate Governance

CAPITALIZING THE CHALLENGE

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THE CHAMBER OF TAX CONSULTANTS

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THE CHAMBER'S JOURNAL
CORPORATE GOVERNANCE
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CORPORATE MEMBERS COMMITTEE

Lecture Meeting on Post-Budget Impact on Capital Markets and Road Ahead held on 1st August, 2014 at Walchand Hirachand Hall, IMC

CA S.P.Tulsian, addressing the members. Seen from L to R: CA Vipul Choksi, Chairman, CA Paras K Savla, President, CA Neha Gada, Convenor.

Section of members

DIRECT TAXES COMMITTEE

Half Day Seminar on Direct Tax Provisions of Finance (No. 2) Bill – 2014 held on 19th July, 2014 jointly with WIRC of ICAI at M. C. Ghia Hall, Mumbai

Shri Keshav B. Bhujle, chairing the session. Seen from L to R: CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC, CA Shardul Shah, RCM, WIRC of ICAI, CA Paras K. Savla, President, CTC, CA Gautam Nayak, Faculty and CA Priti Savla, RCM, WIRC of ICAI

CA Gautam Nayak addressing the delegates. Seen from L to R: CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC, CA Shardul Shah, RCM, WIRC of ICAI, Mr. Keshav Bhujle, Chairman of the session, CA Paras K. Savla, President, CA Priti Savla, RCM, WIRC of ICAI.

CA Chetan Karia addressing the delegates. Seen from L to R: CA Ketan Vajani, Chairman, Direct Taxes Committee, Mr Keshav Bhujle, Chairman of the session, CA Avinash Lalwani, Vice President, CA Gautam Nayak, faculty, CA Dinesh Poddar, Convenor, Direct Taxes Committee,

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Group Meeting held on 6th August, 2014 on the subject "Recent Judgments under Direct Taxes".

CA Pradip Kapasi addressing the members. Seen from L to R: CA Dilip Sanghvi, Vice Chairman, CA Priti Shukla, Speaker, CA Paras K. Savla, President, CA Ashok Sharma, Chairman

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3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020
Phone : 2200 1787 / 2209 0423 • Fax : 2200 2455
E-Mail: office@ctconline.org • Website : http://www.ctconline.org.

The Chamber's Journal

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Editorial

The month of July brought relief to the rain starved city of Mumbai. Now we all are looking forward for a hectic professional season ahead. The Special Story for this issue of the Chamber's Journal is on Corporate Governance. Sir Adrian Cadbury, U.K., while submitting his report on corporate governance described its scope as "Corporate Governance is concerned with holding balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society". The scope of corporate governance suggested by Sir Cadbury seems to be an utopian proposal if same is considered in the backdrop of various scams in recent past where involvement of big corporate houses is not ruled out. But, that may be rather pessimistic view. There are certain examples of corporate governance. But we have to go a long way. The Companies Act, 2013 is intended to be a step towards induction of corporate governance in Indian companies. However, professionals are sceptical whether the new Act which has replaced the Companies Act, 1956 is a step in the right direction as it has delegated more discretion to the executive than required.

I tend to agree with the view of Mervyn King that good corporate governance is about "intellectual honesty" and not just sticking to rules and regulations. At the same time one cannot lose sight of the observation of Errol Kruger who is Registrar of Banks in South Africa on corporate governance in banking sector. He says the cost of compliance with corporate governance is becoming prohibitively high for the smaller banks. This is very important aspect to be kept in mind especially in India where compliance cost has multiplied over a period of time.

I sincerely thank Mr. Janak Pandya for helping the Chamber in bringing out the Special Story for this issue of the Chamber's Journal. I am grateful to all the authors who helped to bring out this issue.

K. GOPAL
Editor

From the President

Dear Friends,

During the last week of July, 2014 Tax Audit Report Form 3CD has been revised. In the new Form, 15 new line items have been added, 5 line items modified and 1 line item deleted. New Form requires auditor to report on various items viz. receipt of share of private limited company without consideration or for inadequate consideration, receipt of any consideration for issue of shares which exceeds the fair market value of the shares, TDS statement filed on time or not, computation of interest for delayed payment of TDS etc. The requirement places new responsibilities on the auditors as well as on assessees. This also depicts change in taxman's perception to collect information while computing the income. Changes bring the difficulties in case of those assesses where tax audit has already been completed. Retrospective saga continues with the amendment to tax audit form too! To understand minutiae of the revised tax audit Form Lecture meeting has been organised by the Direct Taxes Committee.

All the thirteen committees of the Chamber have chalked activity plan for the year. Each of the Chairmen and the members of the committee are enthusiastic. Various innovative programmes are planned. Continuing the past tradition, post introduction of Finance Bill the Chamber jointly with WIRC of ICAI had organised workshops on Direct & Indirect tax. Corporate Committee has organised novel Lecture meeting on post Budget investment scenario in capital market. Information Technology Committee has organised workshop on uses of audit feature in Tally ERP. Direct taxes committee had also organised Lecture meeting on Purchases from Suspicious Dealers–Impact in Income-Tax (Including Reassessment). Considering the current football fever Membership Committee along with the Students Committee had organised football match. All these programmes have received very good response. Lecture meeting on Purchases from Suspicious Dealers was attended by more the 450 participants and people were sitting on floor. Further for the football enrolment was required to be stopped. Various other programmes are planned by each of the committees in the coming days. International Taxation Committee has planned full day Advance FEMA Conference jointly with BCAS. The distinctiveness of this conference is that it would be addressed by luminaries from the RBI. Students Committee has organised lecture meeting on Tax Audit for students and has also planned for commencing study circle exclusively for students. From this month Journal Committee has planned new series of articles on the burning and tropical issues.

TDS is one of the complicated issues faced by the business community. The Chamber had opportunity to interact with the Commissioner of Income-Tax (TDS) and apprise various issues surrounding TDS. The Commissioner along with his team was very much receptive and the meeting was fruitful.

Finance Minister in his budget speech has announced various policy decisions. It is also understood that Finance Ministry has communicated to other ministries and departments seeking their road map for implementation of budget proposals. Actions on various fronts have been initiated viz. insurance amendment bill, raising limits of FDI, amendment on labour laws etc. Proposed steps would not only instil greater confidence in the Government but also create conducive environment for all sections of society.

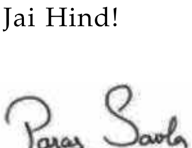
Online retail space is creating a buzz viz. recent acquisition of Myntra by Flipkart, Flipkart raised US$ 1 billion, Amazon announced its additional investments plan of US$ 2 billion. There are various small players in this sector. Many either focus on specific product or sector or area. It is interesting to note that larger space is owned by international player rather Indian competent business houses. Online businesses are housed with various challenges and issues surrounding exchange control regulations, taxes, competition laws etc. It provides several professional opportunities.

During the month of June, scanty rains were received. Various theories about El Nino were prevailing. Sword of water crises was hanging. But optimistic statements were released by the Hon'ble Finance Minister and other Government quarters. Rain gods have been very kind and rains till now has been more as compared to the corresponding period last year. However we need to understand importance of water conservation and need to take effective steps in this direction.

On 15th August, 2014 we would be celebrating India's 68th Independence Day. On this day I salute the great freedom fighters, who laid down their lives so that we can breathe in independent India. We remain indebted to them for their contribution. On political front, the Hon'ble Prime Minister, Shri Narendra Modi's long silence would be broken at the maiden Independence Day address. This would be bellwether event where, we can expect further policy thrusts, laying way forward from him. I on my behalf and also on behalf of whole Managing Council send Greetings on the Independence Day.

I would like to end with the famous German born Philologist and Orientalist, Max Müller's quote, "If I were asked under what sky the human mind has most fully developed some of its choicest gifts, has most deeply pondered on the greatest problems of life, and has found solutions, I should point to India."

Jai Hind!



Paras Savla
President

Chairman's Communication

Dear Readers,

At the outset, a very Happy Independence Day to all our readers. Incidentally quite a few festivals fall in and around this month which coincide with the month of Shravan this time – starting with Ramzan Eid, Janmashtami, Pateti, Paryushan and Ganesh Chaturthi. Quite a spiritual month! Best wishes to all the readers on the occasion of all these festivities.

This month's special story centres around the topic of 'Corporate Governance'. The responsibilities on the corporate citizens and those charged with their management and governance has increased manifold in the last few years and especially after a legal mandate under the new Companies Act. Corporate Governance also involves balancing the interests of many stakeholders in a company. It is utmost necessary to understand some of the matters connected therewith, for professionals as advisors and auditors, as these have wide ramifications. I thank the authors for the special story for their articles in time and am sure the readers shall be greatly enriched by their exposition on the subject. I also thank and recognised the efforts of Shri Janak C. Pandya for the design of this special story.

While the feature of special story each month has been one of the most appreciated features of The Chamber's Journal, it was felt at the Committee that we are sometimes not able to address the current issue based developments in taxation. Accordingly, from this month we are starting a new feature 'Hot-Spot' for the benefit of our readers. In the current issue we have three such articles on – Reopening of Assessments by Shri Keshav Bhujle, Analysis of Place of Provision of Service by Shri Udayan Choksi and Amendments to Finance (No. 2) Bill, 2014 by Shri Kiran Nisar. I thank all the learned professionals for providing these articles within a short span of time. I hope the readers shall also like this feature and find it useful.

For most of the professionals the period up to September is going to be very hectic and the recently notified tax audit report forms are going to add to this pressure. The forms cast many additional reporting requirements and will be keeping all the auditors very busy. Let us hope better sense prevails on the authorities and implementation of the new forms is deferred by a year.

Once again, I wish all the readers happy festivities and enjoyable reading!

Sanjeev Lalan
Chairman – Journal Committee

Yogesh Bhattarai, *Advocate*

Overview of Corporate Governance in India

The opinions expressed in this article are the author's own and do not reflect the view of Trilegal.

Since the 1990's significant efforts have been made, predominantly by Securities and Exchange Board of India (SEBI) and Industry bodies, to introduce standards of corporate Governance.

A voluntary corporate governance code was published in 1998 by the Confederation of Indian Industries (CII) which made several recommendations pertaining to the board of directors, desirable disclosures, capital market issues and creditors' rights.

In 1999, SEBI set up a committee under Kumar Mangalam Birla (Birla Committee) to prepare a 'code' to promote and raise the standards of the prevailing corporate governance. The report of the Birla Committee was approved by SEBI in 2000. The Birla Committee made several mandatory and non-mandatory recommendations. It made specific recommendations regarding independence of board of directors. The key recommendations were implemented in a phased manner by SEBI, through amendment to Clause 49 of the Listing Agreement of the stock exchanges (Clause 49).

In 2002, the Ministry of Finance appointed the Naresh Chandra Committee (Chandra Committee) to examine various corporate governance issues primarily relating to auditor-company relationship, rotation of auditors and defining independent directors. The Chandra Committee made recommendations regarding CEO/CFO Certification, internal code of conduct for companies, and remuneration of independent directors along with an overview of the Sarbanes-Oxley Act, 2002. The Chandra Committee made recommendations relating to financial and non-financial disclosures, grounds of disqualification of directors, prohibited non-audit services and emphasised on the need for compulsory rotation of audit partners. However, the Companies Act could not be amended to incorporate the recommendations.

In the backdrop of collapse of Enron and WorldCom, SEBI set up a committee under the chairmanship of N. R. Narayana Murthy (Murthy Committee) to review Clause 49. Some of the key recommendations relate to audit committee, related party transactions, director compensation and financial disclosures. The Murthy Committee, *inter alia*, recommended that nominee directors of financial institutions should be excluded from the definition of independent directors, audit committees be composed of financially literate members and whistle-blowers should be able to approach the audit committee directly without approaching their supervisors. Some of these recommendations were later incorporated in the revised Clause 49.

All the above changes in corporate governance were predominantly the initiative of the SEBI. In contrast, despite various attempts made by the

Ministry of Company Affairs (MCA) to amend the Companies Act, Clause 49 remained the most significant corporate governance reform.

In 2004, the Central Government, constituted an expert committee on company law under the Chairmanship of Dr. J. J. Irani (Irani Committee) to advise on a new companies bill. The Irani Committee focused on combining internationally accepted best practices in corporate governance. It constructed a single framework of governance provisions applying to all companies so that all the companies would be required to comply with uniform set of governance provisions.

After much delay and deliberation of almost 10 years the majority of the provisions of the Companies Act, 2013, (new Act) along with the rules was finally notified on April, 1 2014.

The new Act has been made more concise by deletion of redundant provisions and regrouping related provisions of the 1956 Act. Attempt has been made to segregate the procedural aspects from the substantive provisions.

The new Act, incorporates several significant provisions for improving corporate governance in Indian companies. Some of the key areas of corporate governance relating to financial statements and audits, board of directors, investor protection are discussed below.

To balance greater autonomy to companies in relation to operation and self-regulation, a requirement for greater transparency through better disclosures and improved compliances has been introduced. Such transparency becomes relevant where there is significant public interest involved. The new Act mandates preparation of consolidated financial statements for all companies that have one or more subsidiaries, in addition to the separate financial statements. Earlier, preparation of consolidated financial statements was mandatory only for listed companies. To avoid conflict of interest between auditors of the relevant companies, rotation of auditors has been stipulated over a specified period of time. Further auditors are prohibited from rendering specified non-audit services to the auditee company and its affiliates. Additional obligation on the auditors include, report of any fraud which the auditor may believe is being committed against the company by employee/ directors to the Government.

Such a requirement would pose challenges for unlisted and private limited companies and large groups. The linkage of these provisions to paid-up capital may not be right criteria for applicability of these provisions. Closely held companies with no significant public interest should be allowed to have a lower compliance standards. Having said the above, move towards a stricter accounting standards and reporting norms seems to be a move in the right direction, though certain relaxation should be granted by the government to companies which do not have a significant "public interest".

The new Act has now define duties and liabilities of directors, placing greater responsibility and accountability on the board and strengthens the role of independent directors. The definition of an independent director has been considerably tightened and the definition now not only includes positive attributes of independence, every independent director is also required to declare that he meets the criteria of independence. The new Act contemplates a nomination and remuneration committee as a mandatory requirement. The committee is required to consider candidates for appointment as independent director and to recommend them to the board. This would bring about greater objectivity in appointment of directors to some extent.

The new Act has introduced the concept of class action suits whereby certain members or depositors could initiate action on behalf of the other members or depositors against the company, its directors, auditors and/or advisors, experts, consultants seeking a wide variety of reliefs including damages. Class action litigation will change how companies are doing business today as they will have to now become very sensitive to potential liability issues.

A concept of interested shareholders has been introduced in the new Act, in relation to certain companies having a paid up capital of Rupees 10 crores, which will disallow interested shareholders from voting on the special resolutions of the prescribed related party transaction. This is intended to protect minority and diffused shareholders in companies from abusive related party transaction. Interestingly, this was originally a recommendation which was made by SEBI, presumably in the background of the Satyam scandal in relation to listed companies. While the original recommendation was in the context of listed companies, this provision under the new Act would apply in situations where there is no dominant shareholder, like a joint venture arrangement between two or more joint venture partners, in relation to any contract which could be construed to be not in the ordinary course or not in an arm's length basis, which may not have been the original intent behind this provision.

The aforesaid philosophy of "uniform governance, has resulted in the overarching provisions in the new Act which today apply to private, public and listed company equally. A mistake which is currently being reviewed and corrected now by the MCA.

There have been differences between the MCA and SEBI on the issue of jurisdiction, specifically in relation to regulation of listed companies, which continue till date. The recent amendment to Clauses 35B and 49 of the Listing Agreement is a case in point (brought about to bring the provisions of the listing agreement in line with the new Act) where while the MCA has suspended the application of the e-voting provisions till the end of the year, SEBI did not provide any respite from the scope of their amendment relating to e-voting. Be that as it may, it has been reported that the companies which had shareholders meetings and provided for e-voting saw a significantly higher participation of shareholders.

There have always been questions on rule making powers of the MCA and the certain recent changes made under the rules (relating to CSR and loans to related parties) by the MCA has raised the issue of whether the MCA has gone beyond its scope of delegated legislation.

After the notification of the Act, the MCA has brought about 30 clarifications on interpretation issues under the Act. There have been approximately 7 amendments which have already been made to the various rules. The foregoing clearly shows that while the proposed legislation has taken a very long time to evolve, it was in the end a very rushed job. Recently there have been representations made by various Industries bodies on the changes to the new Act, be it inconsistencies, drafting issues, lack of clarity or onerous provisions.

Further the implementation of the Act itself is incomplete given that not all the provisions specifically linked with the proposed National Company Law Tribunal and National Financial Reporting Authority are not notified, as a result there are two Companies in force right now.

The corporate governance provisions introduced through the new Act are very progressive and go a long way in improving financial reporting and disclosures, board responsibility and stakeholder protection. It has been a great effort, however requiring some adjustment and calibration. The new Government appears to be alive to the issues involved and one can hope that with the removal of the various hurdles discussed above we will soon have an Act which is modern, incorporates international standards of corporate governance which have been localised for the specific Indian scenario (large promoter groups and small public shareholding) and balances business autonomy with the adequate protection of the various stakeholders.


Rabindra Jhunjhunwala & Stuti Galiya, *Advocates*

Directors' Duties and Liabilities under Companies Act, 2013

Introduction

Corporate failures in the recent past such as satyam, Sahara, Kingfisher brought out the fact that the Companies Act, 1956 ("1956 Act") which existed over a period of 50 years was ineffective at handling some of the present day challenges of a growing industry and interests of increasing classes of sophisticated stakeholders. The Companies Act 2013 ("2013 Act") has been enacted with a view to meeting the present day challenges of corporate governance arising from stakeholders' expectations. The 2013 Act has ushered in a new era of corporate governance, by increasing the roles and responsibilities of the board, protecting shareholders' interests, bringing in a disclosure based regime and built-in deterrence through self-regulation.

The 2013 Act has introduced several measures which have the effect of considerably enhancing the duties and liabilities of directors and imposition of stringent penal provisions in case of breach of any statutory provisions. While some of the requirements already existed for listed companies as part of the Listing Agreement, the new requirements under the 2013 Act apply to all companies. This article provides an insight on the duties and liabilities of the directors under the 2013 Act and the practical measures which may be adopted by them, for complying with these duties.

Meaning of the term "Director"

The term "director" has been defined under Section 2(34) of the 2013 Act to mean a director appointed to the board of a company.

The 2013 Act provides for different categories of directors, including, whole time directors, managing directors, independent directors, nominee directors, alternate directors and women directors.

The 2013 Act for the first time recognises the concept of an independent director (though the Listing Agreement provided for the same). The term 'independent director' means a director other than a managing director or a whole time director or a nominee director and who fulfils certain other criteria (such as relevant expertise, experience, integrity etc.) as provided under Section 149 of the 2013 Act.

Also, there is a new requirement under the 2013 Act to mandatorily appoint at least one women director for certain categories of companies (being listed companies and certain categories of public unlisted companies).

Directors' Duties Under Section 166

The 2013 Act has now codified directors' duties (similar to the UK Companies Act) under Section 166. The provisions of this Section apply to all categories of directors, including independent directors.

Section 166 of the 2013 Act stipulates the following:

(a) Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of a company.

(b) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

(c) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

(d) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

(e) A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain of the company.

(f) A director of a company shall not assign his office and any assignment so made shall be void.

The duties set out in this Section are not exhaustive. Apart from the duties set out in Section 166, directors are also responsible for various obligations provided under other Sections of the 2013 Act. For example:

- The board needs to lay the financial statements for approval and adoption at the annual general meeting of the shareholders (Section 129);
- The directors are responsible for devising proper systems to ensure compliance with the provisions of all applicable laws and to ensure that such systems are adequate and are operating effectively (Section 134);
- Director needs to ensure that the company complies with obligations relating to corporate social responsibility provided under Section 135;
- The board is responsible for appointing first auditors (Section 139);
- A director needs to disclose his interest in a contract with the company (Section 184);
- A director is prohibited from engaging in forward dealing of securities (Section 194);
- The board is responsible for appointment of whole time key managerial personnel (Section 203);
- The directors are responsible for issuance of notice ad holding of board meetings and general meetings etc.

Reiteration of common law principles

The duties which have been listed in Section 166 are essentially codification of the existing equitable and common law principles of the fiduciary duties of directors. These duties have been already laid down by the courts in several of its judgments under the 1956 Act.

The purpose of codification seems to provide all directors with access and to enable them to understand their basic duties easily.

The scope of duties under Section 166 is reliant on subjective tests and could be open to wide debate. The courts will need to refer to standards laid down by the various judgments delivered under the 1956 Act, when determining whether or not a breach of duty has occurred. Accordingly, the courts will need to rely on 'reasonability test' and will need to consider the facts and circumstances of each case, whilst pronouncing judgment.

Balancing conflict of interests

Under the 1956 Act, a director's primary duties were to the company and its shareholders. Although employees and creditors interests were recognised in matters pertaining to insolvency, but the law was settled that a director should primarily act in the best interests of all shareholders. With the 2013 Act, there is an attempt to shift the focus for directors from looking solely at shareholders' interests to taking into account interests of other stakeholders as well. Though the idea may seem convincing from a corporate governance perspective, several practical difficulties could arise. For example, no guidelines for order of preference have been provided and accordingly, it is not clear whose interests should take precedence in case of conflicting interests. Thus, in such situations, would it be prudent for a director to act in the interest of employees ignoring the interests of the shareholders?

Also, since the 2013 Act also requires the director to take into account environmental and community concerns, will an interpretation that a director who is on the board of a tobacco company or cigarette manufacturing company is in breach of the provisions of the 2013 Act right from day one, hold good?

Further, this provision would also have a significant impact on nominee directors. In exercising their fiduciary duties, nominee directors often seek instructions from the appointing shareholder in relation to decisions that need to be taken, for example, the manner in which to vote during a particular resolution. It would be difficult for a nominee director to act where the instructions of his nominating shareholder run inconsistent with the interests of a class of stakeholders.

Such practical situations would make balancing act difficult for directors. To minimise risks, the board should consider seeking inputs from its different categories of stakeholders to identify what stakeholders believe may be an appropriate course of action.

Independent Directors

Apart from the duties mentioned above, which are applicable to all directors, independent directors are also additionally required to comply with code of conduct specified under Schedule IV of the 2013 Act.

The Schedule has stipulated 13 (thirteen) different duties to be performed by an independent director. Some of these duties include:

(a) Regularly updating and refreshing the skills, knowledge and familiarity with the company.

(b) Strive to attend and participate actively in all meetings of the Board and the committees and general meetings.

(c) Keeping well informed about the company and the external environment in which it operates.

(d) Not to unfairly obstruct the functioning of a proper board or committee.

(e) To pay sufficient attention and ensure that adequate deliberations are held before approving related party transactions and assure himself that the same are in the interest of the company.

(f) To ensure that the company has an adequate and functional vigil mechanism and also to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use.

(g) Not to disclose confidential information, including commercial secrets, technologies, unpublished price sensitive information, etc., unless such disclosure is expressly approved by the board or is required by law.

Apart from the duties, the code also covers other aspects, such as it provides guidelines for professional conduct, role and functions of independent directors, manner of appointment, reappointment, resignation/removal, need for separate meetings of independent directors and evaluation of independent directors by the entire board.

As seen from the above, various duties and responsibilities have been cast on independent directors, including protecting interests of minority shareholders, harmonising conflict of interests of stakeholders, acting as a mediator in cases of conflicting interests etc. considering the importance of their role from a corporate governance perspective.

Concept of 'Officer in Default'

As provided under the 1956 Act, the definition of the term "officer in default" includes directors. Various penal provisions in the 2013 Act, which seek to penalise a company's officers would accordingly include company's directors and charge them for offences committed under the Act.

The term "officer who is in default" has been defined under Section 2(60) of the 2013 Act as:

"Officer who is in default for the purposes of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely –

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the board or participation in such proceedings without objecting to the same, or where such contravention has taken place with his consent or connivance."

It is pertinent to note here that the term 'officer in default' now seeks to implicate every director (including nominee director) who is aware of the contravention. He need not even participate in any meetings of the board, but if the information as to a contravention is contained in any of the proceedings of the board received by him, he is deemed liable. Also, in view of the aforesaid provisions, a director needs to ensure that any objection raised by him at a board meeting is duly recorded in the minutes.

Liability of Directors

Contravention of provisions of Section 166 (relating to codified duties) is punishable with a fine which shall not be less than ₹ 1 lakh but which may extend to ₹ 5 lakhs.

Further, penal provisions throughout the 2013 Act have been made more stringent and provide for increased penalties as compared to the 1956 Act. On an average, the minimum amount of fine that is imposed under certain Sections is ₹ 25,000 which in certain cases extends to ₹ 25 crores or even more. Set out below is the list of few contraventions, where the penalties are Rs 1 crore or more:

(a) Violation of provisions relating to not-for-profit companies (Section 8);

(b) Violation of provisions relating to subscription of securities on private placement (Section 42);

(c) Issue of duplicate share certificates with an intent to defraud [Section 46(5)];

(d) Failure to repay deposits within specified time [Section 74(3)];

(e) Contravention of provisions relating to insider trading [Section 195(2)].

Apart from monetary penalties, certain offences even attract imprisonment. Most of the offences leading to imprisonment under the 2013 Act are non-cognisable (that is would need warrant to arrest) but there are certain serious offences which are cognisable in nature and would not require a warrant to arrest. These offences are mainly connected to fraud or intent to defraud. Some of such offences are listed below:

(a) Furnishing of any false or incorrect particulars of any information or suppressing any material information in any of the documents filed with the Registrar of Companies in relation to the registration of a company. [Section 7(6)];

(b) Including in the prospectus any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead (Section 34);

(c) Fraudulently inducing persons to invest any money (Section 36);

(d) Default under Section 56 relating to transfer and transmission of shares with an intent to defraud;

(e) Offences relating to reduction of share capital (Section 66).

The company has the right to initiate legal action against directors, in case of breach of their duties. Apart from this, the 2013 Act has also introduced the novel concept of 'class action suits' under Section 245. Under this concept, a group of shareholders (constituting a minimum of 100 shareholders or such minimum percentage of total shareholders as may be prescribed) can bring an action on behalf of all affected parties, against the company and/or its directors, for any fraudulent or wrongful act or omission of conduct on its/their part. Further, the 2013 Act proposes to set up a National Company Law Tribunal which is expected to provide speedier and more efficient remedy.

Apart from the 2013 Act, there are several other statutes, such as Negotiable Instruments Act, Consumer Protection Act, which lay down increased liabilities on directors. In case of default on the part of the Company, there are several instances where the complainant as a strategy, would make all the directors party to the suit, to put pressure on the company. Once a director is made a party, he will have to go through the time consuming and cumbersome court procedures to prove his innocence. This will no doubt cause lots of hardship and inconvenience to an innocent director.

Exemptions for Independent Directors

Section 149(12) of the 2013 Act, *inter-alia,* states that notwithstanding anything contained in this Act an independent director shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. This carve out has been provided to independent directors considering the limited degree or involvement of an independent director in the day-to-day affairs of the company.

The term 'attributable through Board processes' would normally be interpreted to mean that a director would be deemed to have knowledge of all matters that are taken at the board level. However, the term is not clearly defined and accordingly would be open to judicial interpretation and uncertainties. Further, the term 'knowledge' is also subjective and would be open to judicial interpretation.

Since now the Act would hold independent directors for any action taken with their consent, it would be extremely important for independent directors to be extremely cautious when it comes to giving consent to any proposal. Else, they will have to be prepared to face the consequences of their actions.

Further, although, the law is attempting to limit the scope of offences in respect of independent directors, at the time of prosecution, all directors irrespective of their category are issued summons. Thereafter, the burden of proof lies on the independent director to prove that he was diligent in the discharge of his duties and that he had acted in a *bona fide* manner. However, till such a conclusion is drawn, the independent director suffers a lot of inconvenience and embarrassment.

Considering the importance attached to their role, it is important that independent directors act in a more proactive manner, attend board meetings regularly and question all decisions which appear inappropriate.

Practical Recommendations

The 2013 Act has endowed directors with enhanced duties and liabilities, to make them more accountable and be personally liable in case of wrongs committed by them.

Considering the stringent penal provisions imposed even for not so grave non-compliances, it is necessary that directors adopt an extra cautious approach. They will need to ensure that they always act in the best interest of all stakeholders. Even a slight laxity on their part may be a good reason to put them behind bars. Here are some of practical recommendations which directors may find useful, whilst discharging their duties:

(a) All directors (including independent directors) need to attend as many board meetings as possible to ensure that they are fully aware of the company's business. For improving attendance, they may consider proposing that the company should at the beginning of each year, tentatively set up agreed dates, timings and venues for meetings of the board and committees (except in exceptional circumstances).

(b) Directors should read all necessary papers and relevant background information made available to them for meetings to enable their meaningful participation and contribution.

(c) Directors must ensure that any questions raised by them in a board meeting or any dissent expressed is properly recorded in the minutes of the meeting so as to provide *prima facie* evidence, in case the role of the director is questioned at any time.

(d) Directors (especially new directors) need to ensure that they receive appropriate training on governance and directors' legal duties.

(e) Directors need to ensure that they take legal advice, in cases of doubt.

(f) Directors need to ensure that they have obtained directors' and officers' liability insurance to provide them with some degree of comfort.

Conclusion

Becoming a company director has become a very serious business and should not be undertaken lightly or unadvisedly. If you are invited to become a company director or are already a director, it is very important that you understand your duties and responsibilities and the potential consequences of their breach.

> The greatest of follies is to sacrifice health for any other kind of happiness.
>
> — Arthur Schopenhauer

CA Amit Maru

Corporate Governance and M & A

In recent times, a vital cog in the corporate world is to carry out business in an ethical manner which evolves from good corporate governance practices. It takes an isolated instance of misdemeanour to spark off renewed demands for improved corporate governance. The need is felt more acutely in times of slowing demand; when the going is good, caution–and, indeed, good corporate governance – is thrown to the winds. Everybody swims along with the tide, and the whistle blowers are branded society's curmudgeons.

With increasing focus on corporate governance in recent times, regulators in India are aligning themselves with each other to implement the practice of corporate governance. The Companies Act 2013 provisions for corporate governance provide a modern regulatory framework for companies. Recently, SEBI also amended Clause 49, which outlines corporate governance norms for listed companies, to align itself in sync with the extant corporate law provisions resulting in a well-laid down corporate governance framework for India Inc. For instance, an amendment in Clause 49, which minority shareholders would welcome, is that all related party transactions have to be approved by audit committee and also by shareholders via special resolution where related parties shall abstain from voting. The new Companies Act brings related party transactions within greater scrutiny. Transactions not undertaken during the normal course of business with related parties are mandated to be at arm's length.

As the dust settles down on newly incorporated provisions of the Companies Act 2013 coupled with SEBI's announcement of revised corporate governance norms for listed companies in India, it may be prudent to delve deeper to analyse the possible multidimensional impact in the mergers and acquisitions environment.

An important aspect relating to corporate governance in the newly introduced Companies' Act 2013 is regarding the sale/disposal of an undertaking. A special resolution is required under the new laws for the disposal of any whole or substantially the whole of an undertaking where undertaking is defined to a 20% threshold in terms of net worth or total income. Such provisions garner greater participation in decision making process for minority shareholders as compared to erstwhile provisions where only an ordinary resolution was required. In the recent past, there have been cases where Indian listed companies have transferred their profitable business to a third party or related party by way of slump sale and it was not viewed favourably by minority shareholders.

For instance, a company in the pharmaceutical space had transferred its major business to a global player in the sector by way of slump sale at what market believed to be a very attractive price. This faced some criticism since minority shareholders did not really get a chance to consider and oppose the transaction as the resolution for transfer was undertaken by a postal ballot which requires only simple majority and promoter holding in the company was over 50%.

Similarly, few months back, another Indian listed company transferred one of its businesses to a subsidiary wholly owned by its MNC parent at valuations that the market touted to be lower than expected thereby affecting minority shareholder interests. Under revised framework ie new Companies Act 2013 and revised clause 49, minority shareholders' may be benefited in such situations as their approval may have become necessary.

It is worthwhile to examine how the corporate governance provisions pan out in case of a transfer of business from a company to its wholly owned subsidiary. Such transactions would fall within the purview of related party transactions under the new corporate laws. Rules provide that a special resolution of the holding company should be sufficient to carry out the transaction. Further, a director interested in any contract or arrangement with a related party shall not be present at the meeting during said discussions. Both Companies Act 2013 and clause 49 also provide that related parties shall abstain from voting in such resolutions. For instance, should the holding company and subsidiary have common director who is also a shareholder in holding company; such person may need to abstain from voting on the proposed hive off.

Corporate governance questions have also arisen on changes in business strategies by listed companies where promoters are perceived to be benefiting more than the minority shareholders. A multinational car manufacturer's direct investment in manufacturing plant in India as against the Indian listed company under which the plant was housed was under radar of scrutiny by stakeholders recently. Concerns were raised that this may result in shift of value to the overseas parent rather than the listed company thereby affecting shareholders' interests in the listed company. The Company then proceeded to clarify that new plan does not effectively dilute shareholder interests as the listed entity will earn the same margins on sales. The company further clarified that the plan was primarily to effectively utilise idle cash of the group.

There could also be situations where an Indian listed company acquires shares of an overseas company in partnership with promoters and all necessary corporate guarantees are provided by the listed company to the lenders. It would also be interesting to legally evaluate the viability of such deals from a corporate governance perspective.

In recent times, corporate governance is also increasingly becoming a parameter in internal restructurings. For instance, by virtue of a demerger proposed by a large retail chain of one of its business verticals from two listed companies into a new listed entity, shares were to be issued by new entity to existing shareholders. Proxy advisory firms were apprehensive of such an arrangement since this resulted in a dilution in overall minority shareholding in these businesses as the ratio of promoter to public shareholding in both entities was not the same. The application of scheme of arrangement was made prior to the introduction of the SEBI circular which mandated majority of minority shareholders to vote in favour of a scheme of arrangement and therefore no favourable vote from minority shareholders was required at the time of the deal.

Cash extraction mechanisms often come under scrutiny of other shareholders on grounds of corporate governance. For instance, a proxy advisory firm acting on behalf of minority shareholders heavily criticised a deal in the cement sector where an Indian listed company ('List Co A') having strong valuations acquired the Indian holding company of a global cement manufacturer coupled with its majority stake in another Indian listed company ('List Co. B'). Further, as part of the plan, it was envisaged that the holding company would be merged with the acquirer. The minority shareholders were afraid of having got a raw deal of the transaction as the large cash reserves of List Co. A were used to acquire List Co. B which they believe could have been utilised for future expansion plans or for dividend distribution. However, with new corporate laws in place, the majority of the minority shareholders were required to vote for the deal and eventually did so.

Few months back, an announcement by a large MNC to increase the share of royalty income from its Indian listed subsidiary was viewed by the market as negative which resulted in a sharp decrease in its share price. Soon after such announcement, the parent announced an open offer to acquire shares of the Indian listed subsidiary at a premium. The shareholders felt that the increase in royalty impacted the premium in this case.

Delisting is one of the big challenges which MNCs face in India. There have been news articles linking the offloading of promoter stake through OFS route to comply with minimum 25 per cent public holding, with eventual delisting. Concerns of minority shareholders were that, the institutional investors who acquired shares of listed company through OFS route from promoters tendered their entire holding which caused reduction of retail participation in the delisting process. Two transactions of this manner have come under scrutiny of SEBI recently. Whilst investigation is under progress for one, the other matter was decided in favour of the company by the Securities Appellate Tribunal.

During the course of business sale transactions, a non-compete fee is sometimes paid by the acquirer to the promoters of the seller entity in order to refrain them from operating in the same space. It will be interesting to see how such payments are dealt with under new corporate governance norms.

The measures related to corporate governance have been traditionally viewed in India only from a compliance perspective and not from a business strategy viewpoint. Corporate governance measures then would seem like a dead albatross heavily weighing on businesses. A change in mind-set will happen only when businesses begin to view corporate governance requirements as an integral part of business strategy to help to grow the business ethically.

To sum up, whilst the current laws mandate stringent corporate governance provisions, a fair and effective corporate governance framework must evolve in the light of changing circumstances of business over time. The past few years have witnessed a silent revolution in Indian corporate governance where managements have woken up to the power of minority shareholders who vote with their wallets. In response to this power, the more progressive companies are voluntarily accepting tougher accounting standards and more stringent disclosure norms than are mandated by law. They are also adopting more healthy governance practices resulting in better investor outlook. Corporate governance is a very important aspect to segregate better from the best coupled with the aspiration of putting India on an internationally accepted platform. At the same time, it is hoped that minority shareholders do not abuse such corporate governance provisions for wrongful gains creating hindrances in commercial deals.

CA Rajan Kamat

Corporate Governance and Auditor

Corporate Governance

The notion of Corporate Governance was not very clear or pronounced in India until Securities and Exchange Board of India introduced a code for Corporate Governance for listed Companies in India around 2002.

Different committees have from time-to-time been constituted to recommend measures for enhancing 'Corporate Governance' – a term easy to understand for the experienced but difficult to define. The Narayan Murthy committee alluded to the term thus: "adherence by management to Corporate Governance, transcends mere fulfilment of requirements of law and is an acceptance by management of a set of self-regulatory processes and procedures for ensuring the conduct of the business in a transparent manner, fully protecting the rights of shareholders as true owners of the Company and recognising their own fiduciary capacity as trustees".

The Enron episode brought it into limelight and by the time the light appeared to fade, the melt down in financial sector in 2008 revived the global interest. The subject has been a matter of focus the world over. OECD believes that the problem in India and certain other Asian countries is more acute in view of promoter holdings and control in listed companies. All said, the context was till now confined to listed companies through the instrumentality of 'listing agreement'- there was thus a code to follow; not necessarily a legislated prescription. It is apt to quote Martin Luther King Jr. here:

"Morality cannot be legislated, but behaviour can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless".

The absence of rigour and discipline was perhaps evident and the government thought it fit to bring many elements of the code in the new Company legislation. This article is confined to the implications to the audit profession.

Auditor's Role in Corporate Governance

In the famous case of Kingston Cotton Mills Co. (1896), Lord Justice Lopes defined an auditor's duty of care thus: "It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably careful, cautious auditor would use.... An auditor is not bound to be a detective, or, as was said to approach his work with suspicion, or with a forgone conclusion that there is something wrong. He is a watchdog, not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest and rely upon their representations, provided he takes reasonable care."

The observations of Justice P. T. Raman Nair in the case of *"The Official Liquidator, Palai Central Bank Ltd. vs. Joseph and Others, (1960)* however were not as sympathetic: "..very lengthy arguments have been addressed regarding the duties (of auditor) on the familiar bloodhound as opposed to watchdog lines. But this much I suppose one would not deny and counsel for the 8th respondent has not been disposed to deny it namely, that even the tamest of watch dog has a duty not to connive with the thief."

Whenever things go wrong on corporate reporting – as they sometimes do – it is customary to ask "what were the auditors doing?" Apparently, there is a GAP between what was expected by the stakeholders and what got delivered. The GAP often is a combination – in varying degrees – of two elements – i) Expectation GAP i.e. stakeholders wrongly expecting 'assurance' about things that they should not (from the audit) and ii) Performance GAP i.e. failure of the audit to meet the appropriate prescribed standards.

The auditor's role in Corporate Governance is two-fold. One aspect is about 'true and fair' opinion to the users of financial statements alluded above. The second but equally important is 'communicating certain matters to those charged with governance i.e. the audit committee/Board. Audit standards specifically prescribe matters/situations that must be so communicated. Apart from the auditor's expertise and credibility of 'those charged with governance', an audit is based on corroborative inquiry and tests of controls and documents; an audit so conducted even by a diligent and independent auditor may not reveal facts that a custodial interrogation and investigation would – if there was a fraud perpetrated by the management. That said, how well an auditor performs his role is also largely influenced by the following two factors:

a) Evolution of Financial Reporting: In a bid to make the Financial Statements 'relevant' to the needs of the users, Accounting Standards (also referred as GAAP – generally accepted accounting principles) have brought about a marked shift towards use of estimates and judgments in preparing Annual Financial Statements. Provisions towards probable outgo (including but not limited to employee benefits and warranties), onerous contract provisions, impairment of intangibles (including goodwill), mark-to market accounting of derivatives contracts, 'other than temporary' diminution in investments, Deferred tax accounting, hedge accounting and even revenue accounting in certain cases are all replete with subjectivity that was unimaginable when Luca Pacioli enunciated principles of double entry book-keeping. When judgments influence numbers, human brain inflicts bias even in the minds of those who aspire for the 'right and honest' answer; what of those who do not? Limited time and limited information for validation of judgments sometimes obscure the audit process and result in untrue and unfair Financial Statements.

b) Independence of auditor: While the Courts have been sympathetic in cases alleging auditor negligence, the *ratio decidendi* changed when auditors were suspected to be 'hand in gloves' with those who wrote the cheques for their fees viz. the management. This raises a very critical question in the context of Corporate Governance – the independence of auditor? The frameworks for auditor independence used by Accounting Bodies the world over commonly recognise the following threats to auditor's independence:

- Self-interest. The threat that arises when an auditor acts in his or her own emotional, financial or other personal self-interest.
- Self-review. The threat of bias arising when an auditor audits his or her own work or the work of a colleague.

- Advocacy. The threat that arises when an auditor acts as an advocate for or against an audit client's position or opinion rather than as an unbiased attestor.
- Familiarity (or trust). The threat that arises when an auditor is being influenced by a close relationship with an audit client.
- Intimidation. The threat that arises when an auditor is being, or believes that he or she is being, overtly or covertly coerced by an audit client or by another interested party.

The Companies Act, 2013 now prescribes that the auditor should be mandatorily rotated out after prescribed term (5 years for partner/10 years for the firm). It also imposes restrictions in terms of other services that an auditor can provide to an audit client. It may be noted that such and even harsher measures got introduced for companies listed in the U.S. after Enron debacle, through Sarbanes Oxley legislation in 2002.

Auditor's role in the new dispensation

Sec. 227 (1A) and (4A) were introduced in Companies Act 1956 in response to scams and the typical auditors' plea about their role being of a watchdog – not a bloodhound – as quoted above. Sec. 143 of The Companies Act 2013 dealing with auditor's report (which will apply to Financial Statements pertaining to periods commencing on or after 1st April 2014) embody these provisions with extra rigour plus another radical one. Sub-section (12) now requires that if an auditor in the course of the performance of his duties has reason to believe that an offence involving fraud is being or has been committed against the company (emphasis supplied) by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.

The famous author of the 'Black Swan' and 'Fooled by Randomness' – Nassim Taleb famously said "if you see fraud and don't say fraud, you are a fraud". The law makers have indeed jumped to follow the advice but the words 'against the company' have sprinkled in enough ambiguity to make the provision a game spoiler. What if false representations to auditors were considered as fraud? Would it not have strengthened the audit process ? This is a matter that accounting bodies have failed to assert.

Quite often accounting frauds take the form of window dressing of Financial Statements. Such acts if pertain to amounts which can be considered material would constitute fraud if there is *mens rea* (guilty mind). It is noteworthy that the Companies Act, 1956 did not have a definition of 'fraud'.

Section 447 of the new Act provides for the definition of fraud and also the punishment for committing fraud. Fraud is defined inclusively as: "Fraud in relation to affairs of a company or any body corporate includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss."

The menace of regulatory overlap that is often seen in scams ranging from Harshad Mehta to Satyam i.e. too many cooks spoiling the broth – has hopefully been overcome with the Companies Act, 2013 designating Serious Fraud Investigation Office (SFIO) as the sole agency to investigate corporate frauds.

Regulator for auditors: The Institute of Chartered Accountants of India (ICAI) has for long, been the accepted standard setter for Accounting and Auditing Standards. The amendment to Companies Act 1956 created National Advisory Committee on Accounting Standards (NACAS) as the body to approve Accounting Standards under Sec. 211 (3C) of the Companies Act. Standards issued by ICAI with certain minor edits were accordingly notified in 2006. The new Companies Act 2013 has created National Financial Reporting Authority (NFRA) to approve not only Accounting Standards, but also the auditing standards which are currently in the ICAI domain. While ICAI has been cribbing about wrongful (as they believe) deprivation of the powers it was vested with, this is again not unprecedented internationally. Public Companies Accounting Oversight Board (PCAOB) –a creation of Sarbanes Oxley Act in the U.S. is an institution that auditors of Companies listed on U.S. exchange dread. The dread is universal – whether the auditors are based in U.S. or 'the rest of the world'. Will the auditors in India now get used to the scare and dread of being hauled up with the benefit of hindsight and second guessing by NFRA with prosecuting powers? That is the real issue.

In Conclusion: There is a story about a farewell meeting at the bar to honour a retiring Chief Justice. When a young lawyer asked 'his highness' what were the three qualities he would look for in a person taking his position, the answer was revealing. "First one is independence…second, is independence and third is independence" and then with a twinkle in his eyes, he added "some knowledge of law would be good". How apt when one talks of an auditor of a public interest entity!. The attributes of "those charged with governance" –read independent directors is indeed very important for the auditor to discharge his role effectively. Both the players in the game of corporate governance complement each other. The regulators need to well calibrate the yardsticks used to measure performance – of the auditor and the auditee. The Supreme Court's observations in *JK Industries vs. Union of India, [2008]* discussed the role of Accounting Standards in arriving at the "true and fair" view as envisaged in the Company law. The Court, perhaps for the first time, referred to the three dimensions of reporting – recognition, measurement and disclosure. The focus needs to be calibrated on reporting rather than only accounting this will fairly deal with subjectivity and judgments implicit in the accounting standards and ICAI/NFRA have a significant role to play to achieve this.

Is there a need for ICAI to revisit the audit training, experience and accreditation process it adopts while issuing Certificate of Practice as Associate or Fellow member? Can a fresh Chartered Accountant be appointed as an auditor of a huge non-listed company? The answer in the current Company law as amended is, yes. For listed companies ICAI instituted and SEBI has recognised the 'Peer Review' certification as essential but much more credibility and rigour needs to be built in the peer review process. For one, ICAI may move away from the notion that years post qualification is a good denominator of experience because quality of experience is of paramount importance. The requirements of certification of Internal Controls over Financial Reporting got implemented long back through clause 49 of the listing agreement; but the rigour and methodology of validation is far from what PCAOB expects and indeed what auditors of companies listed in US actually do. Would ICAI act before NFRA starts roaring? Should SEBI recognise that shortening of the time allowed for reporting by listed companies may in fact affect the time available and the quality of audit? All these are questions that the professional bodies and regulators need to address with candour and rigour. If they do in right earnest, the payback to Corporate India would be immense. We would also then hopefully see young talent aspiring to make a career as auditors.

Keshav B. Bhujle, *Advocate*

Reopening of Assessment

1. Introduction

This article on "Reopening of assessment" is intended to cater to the need of the professionals and the asessees who are required to deal with and face the recent drive of the Income Tax Department or the arbitrary reopening of assessments with an object of collecting more revenue to meet the targets set by the superior authorities. Such a reopening of the assessment leads to the reassessment of the income u/s. 147 of the Income-tax Act, 1961. The proceedings for reassessment u/s. 147 are initiated by issuing a notice u/s. 148. The provisions relevant for such reopening and reassessment are to be found in sections 147, 148, 149, 150, 151, 152 and 153 of the Act. An attempt is made to briefly explain the relevant provisions and to deal with important issues and aspects concerning reopening of assessment and reassessment of escaped income.

2. Conditions for valid reopening and reassessment

2.1 The general principle is that once an assessment is completed it becomes final. The Act empowers the Assessing Officer to reopen an assessment if the conditions prescribed therein are satisfied. The conditions for valid reopening and reassessment are to be found in sections 147, 148, 149 and 151 of the Act.

2.2 Income escaping assessment

The purpose of reopening is to assess the income escaping assessment. Reopening of an assessment is with an object of assessing the income which has escaped assessment. Section 147 provides the first condition for a valid reopening to be that the Assessing Officer must have reason to believe that any income chargeable to tax for the relevant assessment year has escaped assessment.

2.2.1 When income deemed to have escaped assessment: Explanation 2

Explanation 2 provides that in the following cases it would be deemed that the income chargeable to tax has escaped assessment.

- Where no return of income is filed though there is tax liability;
- Where a return of income has been furnished but no assessment has been made and it is found that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;
- Where the assessee has failed to furnish a report of international transaction which he was so required u/s. 92E;
- Where an assessment has been made, but
  - (i) Income chargeable to tax has been under assessed; or

(ii) Such income has been assessed at too low a rate; or

(iii) Such income has been made the subject of excessive relief; or

(iv) Excessive loss or depreciation allowance or any other allowance has been computed;

– Where a person is found to have any asset (including financial interest in any entity) located outside India.

2.2.2 Income escaping assessment relevant at two stages

Income escaping assessment is the basis for reopening and reassessment. If there is no escapement of income chargeable to tax from assessment, there can be no valid reopening and reassessment. Its relevance at the two stages is as under:

i) At the time of initiation; only reason to believe is sufficient.

ii) At the time of reassessment, actual escapement of income is necessary.

2.2.3 Reason to believe

Though the actual escapement of income from assessment is necessary for the purpose of reassessment, for the purpose of reopening by issuing notice u/s. 148, the existence of 'reason to believe' that the income chargeable to tax escaped assessment would be sufficient. However, mere 'reason to suspect' which is quite different from 'reason to believe' would not be sufficient. The words "has reason to believe" are stronger than the words "is satisfied". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The "reason to believe" must be based on the material on record and not merely a guess or a presumption. The material on the basis of which the belief is arrived at should be disclosed. There should be direct live-link between the material, the reasons and the formation of belief.

Assessment cannot be validly reopened for making rowing enquiries or to investigate, verify and test as to whether there is any income escaping assessment. Where it is a case of mere possibility of income escaping assessment or a mere suspicion requiring further verification, it would not satisfy the requirement of "reason to believe" as contemplated u/s. 147. In such circumstances, the Assessing Officer does not have power u/ss. 147 and 148 of the Act to reopen the assessment. He could only exercise his power u/s. 143(2) of the Act and proceed to make assessment u/s. 143(3) if it is otherwise permissible in law. The following judgments make this point more clear:

i) Chhugamal Rajpal vs. S. P. Chaliha; (1971) 79 ITR 603 (SC);

ii) Ganga Saran & Sons P. Ltd. vs. ITO; (1981) 130 ITR 1 (SC);

iii) CIT vs. Maniben Velji Shah; (2006) 283 ITR 453 (Bom.);

iv) CIT vs. Batra Bhatta Co.; (2010) 321 ITR 526 (Del.);

v) ITO vs. Bidbhanjan Investment & Trading & Co. (P) Ltd.; (2011) 132 ITD 51 (Mum);

vi) RRB Securities Ltd. vs. JCIT; (2004) 3 SOT 13 (Del.);

vii) ACIT vs. Heera Lal; (2007) 14 SOT 4 (JP) (URO); (2007) 106 TTJ 114 (JP):

2.2.3.1 Reason to believe must be that of the Assessing Officer and not any other authority including a superior authority.

For a valid reopening, the belief should be that of the learned Assessing Officer issuing notice u/s. 148 and not of any other authority. If the "reason to believe" is not that of the Assessing Officer issuing the notice then the notice u/s. 148 and the reopening would be illegal and invalid.

Judgments

i) Indian and Eastern Newspaper Society vs. CIT; 119 ITR 996 (SC);

ii) ICICI Home Finance Co. Ltd. vs. ACIT; (2012) 210 Taxman 67 (Bom);

iii) *Purity Techtextile Pvt. Ltd. vs. ACIT; 325 ITR 459 (Bom);*

iv) *Asian Cere Information Services (P) Ltd. vs. ITO; 293 ITR 271 (Bom.);*

v) *CIT vs. Aslam Ulla Khan; 321 ITR 150 (Kar.);*

vi) *Adani Exports vs. DCIT; 240 ITR 224 (Guj.);*

vii) *Hyoup Food and Oil Industries Ltd. vs. ACIT; 307 ITR 115 (Guj.);*

viii) *Raghubar Dayal Ram Kishan vs. CIT; 63 ITR 572 (All.);*

ix) *CIT vs. T. R. Rajkumari; 96 ITR 78 (Mad);*

x) *Sheo Narayan Jaiswal vs. ITO; 176 ITR 352 (Pat.);*

2.2.3.2 So long as assessment proceedings are pending, the Assessing Officer cannot have any reason to believe that income for that year has escaped Assessment.

Judgments

i) *51 ITR 557 (SC); Ghanshyamdas vs. Regional Asst. Commissioner.*

ii) *184 ITR 50 (Bom.); Sheila Brij Jaggi vs. ITO.*

iii) *266 ITR 664 (All.); Jhunjhunwala Vanaspati Ltd. vs. ACIT:*

Where assessment consequent upon remand order was pending, notice u/s. 148 was held to be invalid.

2.2.4 Reason to believe and change of opinion

A mere "change of opinion" does not constitute a valid "reason to believe" that income chargeable to tax has escaped assessment for the purpose of sections 147 and 148 of the Act.

Judgments

i) *CIT vs. Kelvinator of India Ltd; 320 ITR 561 (SC)*

ii) *ACIT vs. ICICI Securities Primary Dealership Ltd; 348 ITR 299 (SC)*

iii) *ICICI Home Finance Co. Ltd. vs. ACIT; 210 Taxman 67 (Bom.)*

iv) *CIT vs. Prima Paper and Engineering Indistry; 364 ITR 222 (Bom.)*

v) *Aroni Commercials Ltd. vs. Dy. CIT; 362 ITR 403 (Bom.)*

vi) *Mrs. Pravin P. Bharucha vs. Dy. CIT; 348 ITR 325 (Bom.)*

vii) *NYK Line (India) Ltd. vs. Dy. CIT; 346 ITR 361 (Bom.)*

viii) *Rabo India Finance Ltd. vs. Dy. CIT; 346 ITR 528 (Bom.)*

2.3 Proviso to section 147

Proviso to section 147 provides a restriction of period of limitation. The proviso provides that notice u/s. 148 shall not be issued after a period of 4 years from the end of the relevant assessment year where the assessment was earlier completed u/s. 143(3) or 147 of the Act. However this restriction for reopening would not be applicable if the income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee i) to make a return u/s. 139 or in response to a notice issued u/s. 142(1) or section 148 or ii) to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

2.3.1 Full and true disclosure: Explanation 1

Explanation 1 provides that the production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso.

2.4 Issue and service of notice: S. 148(1)

Assessment is reopened by issuing a notice u/s. 148. Section 148(1) provides that before assessment u/s. 147, the Assessing Officer shall serve a notice on the assessee. Such a notice should be a valid notice as prescribed therein. Service of notice u/s. 148 is mandatory. Service of a valid notice u/s. 148 is a precondition for a valid reassessment proceeding. The burden of proving that a valid notice u/s. 148 is served on the assessee, is on the Assessing Officer.

Judgments

CIT vs. Kurban Hussain Ibrahimji Mithiborwala; 82 ITR 281 (SC);

CIT vs. B. Sumangaladevi; 313 ITR 285 (Kar.);

CIT vs. B. Sumangaladevi; 314 ITR 127 (Kar.);

"The Income-tax Officer's jurisdiction to reopen an assessment u/s. 147 of the Income-tax Act, 1961, depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for want of jurisdiction".

CIT vs. Harish J. Punjabi; 297 ITR 424 (Del.):

Where no notice u/s. 148 was served on the assessee, assessment u/s. 147 was held to be invalid.

2.5 Recording of reasons: S. 148(2)

Section 148(2) provides that before issuing any notice u/s. 148, the Assessing Officer shall record his reasons for doing so. Thus, section 148(2) makes it mandatory for the Assessing Officer issuing the notice u/s. 148 to record the reasons for doing so before issuing the notice. The reasons must disclose *prima facie* facts which would justify issuance of the notice and to any person perusing the reasons it should be obvious as to how the mind of the Assessing Officer worked when he issued the notice. Where the reasons recorded do not justify suggesting that the income has escaped assessment but simply mentions that the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment, such reasons do not constitute compliance as required by section 147 and hence notice issued u/s. 148 will be invalid *(Travellers Choice vs. ITO; 326 ITR 153 (Kar.)).*

Letters written by the Assessing Officer are not substitute for the recorded reasons. In *Morarjee Goculdas Spinning. & Weaving Co. Ltd. vs. P. N. Bansal; 208 ITR 471 (Bom.);* in response to the request of the petitioner for reasons recorded before issuing notice u/s. 148, the Assessing Officer wrote a letter giving reasons for reopening. Copy of the recorded reasons was not furnished even before the Court. The Bombay High Court held that a letter written by the Assessing Officer is not a substitute for the recorded reasons. The Court rejected the contention of the Department that the reasons set out in the letter are sufficient compliance with the requirement u/s. 148 of the Act. The Court held that in the absence of the reasons recorded, the inescapable conclusion is that the exercise of power was without any jurisdiction.

The reasons so recorded will be the basis for determining the validity of the reopening. No supplementing subsequently by an affidavit etc. is permitted. Only the recorded reasons are to be seen.

Judgments

i) *Prashant S. Joshi vs. ITO: 324 ITR 154 (Bom.);*

ii) *3i Infotech Ltd. vs ACIT; 329 ITR 257 (Bom.):*

2.6 Sanction/approval for issue of notice: S. 151

A notice u/s. 148 for reopening of the assessment u/s. 147 has to be issued by the concerned Assessing Officer. However, in specified circumstances, the Assessing Officer issuing the notice is required to take a prior approval/sanction from the specified superior authority for issuing such a notice. Failure to comply with this condition would nullify the reopening and the consequent reassessment proceeding. Section 151 provides for such sanction/approval.

Where the assessment has been made for the relevant year u/s. 143(3) or u/s. 147, and the reopening is within a period of 4 years from the end of the relevant assessment year, no approval/sanction will be required if the assessment is reopened by the Assessing Officer of the rank of Assistant Commissioner or Deputy Commissioner and above. If the reopening is by an Assessing Officer below the rank of Assistant Commissioner or Deputy Commissioner then the prior approval/sanction of the Joint Commissioner would be required.

Where the reopening is beyond the period of 4 years from the end of the relevant assessment year, then prior approval/sanction of the Chief Commissioner or Commissioner would be required.

Where no assessment has been made u/s. 143(3) or u/s. 147 for the relevant year, and the reopening is within a period of 4 years from the end of the relevant assessment year, no approval/sanction will be required for reopening of the assessment by any Assessing Officer. Where the reopening is beyond the period of 4 years from the end of the relevant assessment year, then prior approval/sanction of the Joint Commissioner would be required if the reopening is by an Assessing Officer below the rank of the Joint Commissioner.

The approval/sanction shall be granted by the superior authority on satisfying themselves that it is a fit case for reopening on the basis of the reasons recorded by the Assessing Officer reopening the assessment.

2.7 Time limit for notice: S. 149

Section 149 of the Act provides time limit for initiation of the reassessment proceedings by issuing notice u/s. 148. The general time limit is 4 years from the end of the Assessment year (s. 149(1)(a)). However, where the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year; the assessment can be reopened within a period of 6 years from the end of the relevant assessment year (s. 149(1)(b)). Further, the assessment can be reopened within a period of 16 years from the end of the relevant assessment year, if the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax has escaped assessment (s.149(1)(c)). Also, section 149(3) provides that if the person on whom a notice u/s. 148 is to be served is a person treated as a agent of the non-resident u/s. 163 and the reassessment is to be made on him as the agent of such non-resident then the time limit for issuing the notice u/s. 148 is 6 years from the end of the relevant assessment year.

2.8 Where s. 149 not to apply: S. 150

Section 150(1) of the Act gives an exception to the period of limitation provided u/s. 149 and provides that the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

Further, section 150(2) gives an exception to section 150(1) and provides that the provisions of section 150(1) shall not apply in any case where any such reassessment relates to an assessment year in respect of which reassessment could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for reassessment may be taken.

Judgments

i) *123 ITR 494 (AP); CIT vs. Moduri Rajaiah Gari Kishtaiah*

Assessment/reassessment by virtue of an order has to be confined to items in respect of which such finding or direction is given. It is not open to the AO to deal with other items of escaped income.

ii) *288 ITR 459 (Bom.); Lotus Investments Ltd vs. ACIT:*

Remark that reassessment proceedings can be taken is not a finding or direction u/s. 150.

311 ITR 247 (Bom.); Rakesh N. Dutt vs. ACIT: Similar view.

iii) *249 ITR 19 (Ker.); CIT vs. Vaikundam Rubber Co. Ltd.*

When assessments are being reopened as a consequence of the decision of the Tribunal it is the order passed by CIT(A) which is to be construed as the order which was the subject matter of appeal for purposes of section 150(2).

2.9 Other relevant remedies

Where the Assessing Officer reopening the assessment had other alternative remedies u/s. 154 for rectification or revision u/s. 263 he would not be justified in reopening the assessment u/s. 147 by issuing notice u/s. 148.

Judgments

i) *J. C. Thakkar vs. CIT; 27 ITR 658 (Bom.):*

When one or more modes of assessment or remedies are available to the taxing authority, the authority must adopt the remedy which is a matter of the least prejudice to the assessee.

ii) *Hindustan Uniliver Ltd. vs. Dy. CIT; 325 ITR 102:*

When remedy u/s. 154 is open for rectification, reopening u/s. 147 is not warranted.

3. Objections for reopening and order on objection

3.1 Conditions for reopening mandatory

The abovementioned conditions for a valid reopening are mandatory and if any of the conditions is not satisfied, then the notice u/s. 148, reassessment proceedings and the reassessment order will be null and void being without authority of law and without jurisdiction. The conditions go to the root of the jurisdiction and accordingly cannot be waived with the consent of the assessee. The consent of the assessee cannot confer jurisdiction in such a case.

Judgments

i) 138 ITR 462 (All.); CIT vs. Hari Raj Swarup & Sons

ii) 113 ITR 22 (Guj.); P. V. Doshi vs. CIT;

iii) 110 ITR 535 (Mad.); R. Vijayaraghavan vs. Commissioner of Agr. Income-tax.

3.2 Procedure for order on objections

The question of jurisdiction for reopening can be raised by the assessee at any point of time including at the stage of appellate proceedings. However, it being a jurisdictional issue which goes to the root of the proceedings, it is also required to be decided even before the reassessment proceedings on merits commence. Accordingly, the Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd. vs. ITO; 259 ITR 19 (SC)* and other courts have laid down a procedure for such decision by the learned Assessing Officer on such jurisdiction for reopening of the assessment even before the commencement of the reassessment proceedings on merits.

Primarily, the onus to prove that the necessary conditions are satisfied is on the Assessing Officer it being completely within his knowledge and control. The validity of the reopening has to be judged on the basis of the reasons recorded as required u/s. 148(2) of the Act. In the case of *GKN Driveshafts (India) Ltd. vs. ITO; 259 ITR 19 (SC)* the Hon'ble Supreme Court has held that the recorded reasons must be furnished to the assessee after filing return of income pursuant to the notice u/s. 148. The Court held that on receipt of the reasons the assessee is entitled to file objections to issuance of the notice and the Assessing Officer is bound to dispose of the same by passing a speaking order before proceeding with the assessment for the relevant year.

Such an order passed by the Assessing Officer is not appealable. The remedy lies in filing a writ petition before the High Court challenging the order. In the alternative, after completing the assessment, it would be open to the assessee to challenge the validity of reopening on jurisdictional ground in the appeal filed against the assessment order before the appellate authorities.

In *Allana Cold Storage Ltd. vs. ITO; 287 ITR 1 (Bom.)*; and *HDFC Ltd. vs. Dy. CIT; 165 Taxman 8 (Bom); 206 CTR 268 (Bom.))* the Bombay High Court has held that in the event the objections are rejected, the Assessing Officer shall not proceed further in the matter of assessment for a period of four weeks from the date of service of the order on objections on the assessee, so that the assessee will have time for a remedy against order by way of a writ before the High Court if he so desires.

3.3 As noted above, escapement of income chargeable to tax from assessment is the basis for reopening and reassessment. Where the assessment is reopened on the basis that certain income chargeable to tax has escaped assessment and thereafter it is found or the assessee has shown that either such income has not escaped assessment or such income is not chargeable to tax then the reassessment proceedings will fail and such proceedings will have to be dropped. If the Assessing Officer finds that the income that he had reason to believe that it has escaped assessment is not chargeable to tax or has not escaped assessment then the reassessment proceedings would fail and the Assessing Officer will not have power to assess any other income. In such circumstances the Assessing Officer will have to drop the reassessment proceedings.

Judgments

a) *CIT vs. Jet Airways India Ltd.; (2011) 331 ITR 326 (Bom.)*

b) *CIT vs. ICICI Bank Ltd.; (2012) 349 ITR 482 (Bom.):*

c) *CIT vs. Double Dot Finance Ltd.; (2013) 214 Taxman 47 (Bom)(Mag); (2013) 31 taxman.com 352 (Bom.):*

d) *CIT vs. Mohmed Juned Dadani.; (2013) 258 CTR 168 (Guj); (2013) 214 Taxman 38 (Guj.):*

e) *Ranbaxy Laboratories Ltd. vs. CIT; (2011) 336 ITR 136 (Del.):*

f) *CIT vs. Cheil Communications India P. Ltd.; (2013) 354 ITR 549 (Del.);*

Thus in the course of the proceedings objecting the reopening, if the assessee could explain as to how the income in respect of which the Assessing Officer had 'reason to believe' that such income is chargeable to tax and has escaped assessment, in fact, is not chargeable to tax or has not escaped assessment, then the reassessment proceedings could not be continued and accordingly will have to be dropped.

3.4 When real income is not more than the total income proposed to be assessed: S. 152(2)

Where the assessee can show that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made, section 152(2) provides that the reassessment proceedings will be liable to be dropped. However, this option will be available to the assessee only if he has not impugned any part of the original assessment order for that year either u/ss. 246 to 248 or u/s. 264. However, in so doing he shall not be entitled to reopen matters concluded by an order u/s. 154, 155, 260, 262, or 263.

140 ITR 972 (Bom.); CIT vs. Dharamchand Jain:

Where the assessee has preferred an appeal, he would not be entitled to invoke the provisions of section 152(2) only with regard to the items agitated by him in the appeal and in regard to other items the benefit of section 152(2) would be available.

4. Scope of assessment u/s. 147

On reopening the assessment the Assessing Officer is empowered to assess such income which he had reason to believe that it has escaped assessment if he finds that such income is assessable to tax. In such circumstances he is also empowered to assess any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the reassessment proceedings. Further, the second proviso puts a bar in the scope of assessment u/s. 147. Income involving matters which are/were the subject matters of appeal, reference or revision will not be subjected to section 147.

5. Time limit for completion of reassessment: S. 153(2)

Section 153(2) of the Act provides that the time limit for passing an order of reassessment u/s. 147 is one year from the end of the financial year in which the notice u/s. 148 was served on the assessee.

6. Hawala Purchases

In the recent past, the Income-tax Department is reopening the assessments on the ground that the purchases by the assessees are bogus; that is to say that the purchases are bogus or the bills for purchases are not genuine. This is mostly based on the statements made by the sellers before the Income-tax Authorities in their respective cases or the information available with the Income-tax Department or on the basis of the information received from or published by the other Departments, like the Sales Tax Department. Such information by itself, without any further evidence, would not be sufficient for concluding that the purchases by the assessee are bogus or for making any addition. However, such information and material may constitute valid and sufficient information and material for formation of the "reason to believe" that the purchases by the assessee are not genuine or that there is any escapement of income from tax. This would depend on the other corroborating material that is available with the Assessing Officer while recording the reasons for reopening for issuing notice u/s. 148.

However, I am informed that in a number of cases the Assessing Officers are issuing notices u/s. 148 of the Act, merely on the information that a particular assessee is a beneficiary of the bogus bills issued by a particular seller who has been declared by the Sales Tax Department as a hawala dealer since he has not deposited the sales tax (VAT) which he was required to deposit in respect of the transactions of sales made by him. If the reopening is merely based on such information, without any further evidence, and such recording of reasons, in my view, the reopening will be bad in law. The Assessing Officer has to consider each case separately and independently and arrive at a conclusion as to the "reason to believe" that income chargeable to tax has escaped assessment or not. Such an exercise is very rarely done. I am informed that even in the cases where the purchases from such parties are as low as ₹ 5,000/- assessments are reopened. This shows the mechanical issuing of the notice u/s. 148 by the Assessing Officer without application of mind. Such a reopening cannot be valid in law.

The validity of reopening in such cases will have to be tested on case to case basis by taking into account the information and material on the basis of which the assessment is reopened. The question of addition will depend on the material available with the assessee as regards the genuineness of purchases, the representation made by the sellers in their income-tax assessments and the material produced by them. Before, making any such addition on the basis of the statement of the third party, the assessee should be given a fair opportunity of cross-examining the party on the basis of whose statement the addition is proposed to be made.

7. Conclusion

It is not possible to deal with every aspect of reassessment within the permitted space allotted to the article. An attempt is made to briefly deal with some important aspects which will be of assistance to the readers.

Udayan Choksi, *Advocate*

Place of Provision of Service Rules – Overview and Recent Amendments

Introduction

This article provides an overview of the service tax legislation in relation to the concept of place of supply of services, and discusses the impact of the recent amendments to the Place of Provision of Service Rules, 2012 (POP Rules – for all rule references in this article) in the Budget 2014 proposals.

The need for place of supply provisions arises out of the need for a linkage with taxable territory for the charge to tax to be triggered. Just as, in income tax, taxability hinges on whether income is received, or accrues or arises, in India (or is so deemed), and then the residential status of the person earning the income (subject to the provision of any applicable DTAA and the determination of taxability on the basis of income characterisation thereunder), for the levy of service tax, the charging section 66B (of the Finance Act, 1994 – for all section references in this article) provides that service tax shall be levied at 12% on the value of all services, other than those specified in the negative list, that are provided or agreed to be provided in the taxable territory. Section 65B(52) defines the term 'taxable territory' to mean "the territory to which the provisions of [the Act] apply", which takes us to the definition of 'India' in section 65B(27), which includes the territory of the Union of India, her territorial waters, continental shelf, EEZ or other maritime zone, the sea-bed and sub soil underlying her territorial waters, Indian air space, and installations, structures and vessels located in the continental shelf of India and EEZ (the State of Jammu and Kashmir being excluded, per section 64(1)). India having so been defined, section 66C, titled 'Determination of place of provision of service' provides for the Central Government to prescribe rules to determine the place where a service is provided or deemed to have been provided, having regard to the nature and description of the various services. There is an obvious parallel, therefore, with income tax, in terms of the aspect of territorial nexus and the importance of characterisation. Pursuant to this provision, the Central Government has *vide* Notification No. 28/2012-ST dated 20-6-2012 notified the POP Rules. Section 66C provides that any rule made thereunder shall not be invalid on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory – this provision is similar to Article 245 of the Constitution which provides that no law made by Parliament can be deemed to be invalid on the ground of extra-territorial operation.

Place of Provision of Service Rules, 2012

The guidance on the POP Rules in the Education Guide published by CBEC explains that per the essential notion of indirect taxation that services should be taxed in the jurisdiction of consumption, exports should not be suffer tax and services should be taxed upon importation into the taxable territory. There is also the well-established concept (arising largely out of practical considerations) that B2B services should be taxed based on the location of the customer, and B2C services based on the location of the provider. The POP Rules seek to apply both these principles through the adoption of different criteria on the basis of aspects such as location of parties, place of performance of service, location of immovable property to which service relates, location of event, and origin and destination of transport services. While there continues to be an element of perceived arbitrariness as to which of these criteria ought to apply for a given service, one has to accept that some of this arbitrariness is inevitable – by the very nature of services, they can be provided, performed and received all at different locations and even across a larger geographical territory falling in more than one taxable jurisdiction. Nonetheless, one finds that the issues that industry is facing (and the amendments that have been made last month – quite apparently, to address such issues) hinge on the fact of this arbitrariness, and from the inescapable application of location proxies in determining place of supply.

The POP Rules accord significant importance to the location of service provider and location of service recipient and defines these terms at length and in similar terms. Per the definitions, the location of the service provider/receiver is to be determined on the basis of the following tests: (A) where the service provider/receiver has obtained a single registration under the service tax provisions, whether centralised or otherwise, his location is the premises for which such registration has been obtained; (B) otherwise, his location is (i) the location of his business establishment, or (ii) where the services are provided/used at a place other than the business establishment i.e. a fixed establishment, the location of such fixed establishment, or (iii) where services are provided from/used at more than one establishment, whether a business establishment or fixed establishment, the location of the establishment most directly concerned with the provision/use of the service; and (iv) in the absence of such places, the usual place of residence of the service provider/receiver. The usual place of residence of a body corporate has been defined to mean the place of its incorporation of legal constitution, and the usual place of residence of the service recipient in respect of telecommunication services, has been defined to be the billing address. To apply the aforesaid definitions, it is necessary to appreciate the distinction between a 'business establishment' and 'fixed establishment'. The CBEC has clarified that a business establishment means "a place where the essential decisions concerning the general management of the business are adopted, and where the functions of its central administration are carried out [which] could be the head office, or a factory, or a workshop, or shop/retail outlet" and that there can be only one such establishment. A 'fixed establishment' has been clarified to mean "a place (other than the business establishment) which is characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to provide the services that are to be supplied by it, or to enable it to receive and use the services supplied to it for its own needs". It follows that the determination of the relevant 'establishment' will depend on the facts and supporting documentation of each case.

In applying the POP Rules, there is a sequence-related override per which, where the place of provision of a service is *prima facie* determinable under more than one rule therein, the rule that occurs later among the rules that merit equal consideration shall be applicable. This is provided in tie-breaker Rule 14.

With this background, set out below is a short analysis the different rules, taken seriatim. Rules 1 and 2 set out the date of commencement of these rules (1-7-2012) and the relevant definitions. There is an important amendment to the definition of 'intermediary' – this is discussed later in the context of Rule 9.

Rule 3 – Place of provision generally

The general rule or the default rule is that a service shall be deemed to be provided where the service recipient is located. It follows that if the location of the service recipient is in the taxable territory, such service will be considered to be provided in the taxable territory and service tax will be payable (subject of course to the negative list and specific exemptions). It has to be separately examined whether the tax will be payable by the service provider or service recipient, depending upon whether the former is located in the taxable territory.

In applying Rule 3 in the context of global arrangements, it is relevant to discuss the difference between cases where one establishment of a multinational corporation /group enters into an arrangement that covers all the establishments/entities of the corporation/group (though actually served locally) – what the Education Guide refers to as 'global agreements' and cases where only one establishment enters into an enabling agreement as a precursor to individual arrangements entered into by the individual establishments/ entities of the corporation/group (again actually served locally) – what the CBEC refers to as 'framework agreements'. Then, whereas in both cases the service is to be provided locally, i.e. by the local entity of the service provider group to each individual entity of the service recipient group, in the former case the taxable supplies of service would be *inter se* between the entities of the service provider and service recipient groups (through the recharges), and in the latter case the taxable supplies would be between the service provider entity and service recipient entity in each jurisdiction. These examples taken by the CBEC highlight the importance of correctly determining the service recipient – this is the person legally entitled to receive the service and, obliged to make payment. Another example would be that of telecommunication services relating to a roaming facility provided to a subscriber of a foreign telecommunication company on his visit to India – the service recipient would be the foreign telecommunication company, and not the subscriber.

Per the proviso to rule 3, in situations where the location of the service recipient is in the ordinary course of business not available to the service provider, the place of provision will be the location of the service provider. The Education Guide suggests that this distinction will generally be a B2B vs. B2C differentiation, and that generally in a B2B context, the service provider will be aware of the location of the service recipient. A typical B2C situation would be one where in the normal course of trade a service is provided to an individual customer who comes to the premises of the service provider for availing the service, such as to a restaurant or salon. It is important to note that the trigger to apply the proviso is not whether or not it is possible to know the location of the customer, but whether the location is known in the ordinary course of business, and the service provider is not required to make any extraordinary efforts to trace the location of the service receiver.

Rule 4 – Place of provision of performance based services

Performance based services are enumerated in Rule 4 as being of 2 types, viz. (i) services in respect of goods, where the goods are required to be made physically available to the service provider for the provision of service (e.g. warehousing, testing services), and (ii) services provided to persons, which require the physical presence of the service recipient, or a person acting on his behalf for the provision of the service (e.g. healthcare services and education). The Education Guide has clarified that services where the supply of goods by the recipient of service is not material to the rendering of the service will not be covered under this rule – one of the examples cited is that of the provision of a market research service to a manufacturing firm for a consumer product where the market research firm is given samples to carry for door-to-door surveys.

By a proviso to Rule 4, the place of provision of services provided electronically from a remote location is the location where the goods are situated at the time of provision of service. There is a further proviso in respect of goods temporarily imported into India. This proviso earlier provided that for imports of goods for repairs /reconditioning /re-engineering "for re-export", the performance based criterion of Rule 4 will not apply, subject to specified conditions (which were never issued) – per this, services to overseas customers were sought to be kept out of the service tax net. To address the ambiguity over what temporary imports into India "for re-export" would include, the proviso has been reworded to apply to situations of goods temporarily imported for repairs, and exported without being put to use in India.

As stated, an important example of such services, in respect of goods, is the service of technical testing. If the services are performed in India, under the test of aforesaid Rule 4, the place of provision of such services will be in India, and these services will suffer service tax even when provided to service recipients located outside India, as the carve-out in the second proviso requires that the goods be re-exported, and is restricted to situations of repair services. Industry had asked for testing services such as clinical trials to be kept outside the application of section 4, but no relief has been granted in the Budget 2014 amendments.

Rule 5 – Place of provision of services relating to immovable property

The place of provision in respect of services covered by this rule is the place where the immovable property is located or intended to be located. Examples of such services include the services provided by estate agents, architects, interior designers etc., services of carrying out co-ordination of construction work or grant of right to use an immovable property or provision of hotel accommodation by a hotel, guest house, inn, club or camp site, etc.

For the application of Rule 5, there needs to be a close link or association between the service and the immovable property. The CBEC has clarified that criteria to determine the extent of linkage would include aspects such as (i) whether the services consist of lease, or a right of use, occupation, enjoyment or exploitation of an immovable property or (ii) whether the services are physically required to be performed on an immovable property or (iii) whether the direct object of the services is to enhance the value of the immovable property, and (iv) whether the services are for transfer or conveyance of the immovable property or determination of title of the immovable property.

An interesting issue arises in relation to the determination of the place of provision of real estate agent services (specifically referred to in Rule 5 and the Education Guide), in terms of whether Rule 5 should apply or Rule 9 *qua* intermediary services – this is discussed later in the discussion on Rule 9.

Rule 6 – Place of provision of services relating to events

The nature of events covered under this rule is extensive and pertains to cultural, artistic, sporting, scientific, educational or entertainment events, and occasions such as celebrations, conferences, fairs, exhibitions, and similar events. By definition, services in relation to such events would be provided either by way of admission to the event or in relation to organisation of an event. The place of provision in respect of such services shall be the place where the event is actually held.

Notwithstanding the broad coverage of rule 6, it may be borne in mind that admission to entertainment events (as defined) is not liable to service tax per the negative list entry under section 66D(j). However, any ancillary services to an event would be liable to tax and are covered within the ambit of this rule in relation to the determination of the place of provision.

Rule 7 – Place of provision of services provided at more than one location

Rule 7 provides that where any of the services stated in Rules 4, 5 or 6 above is provided at more than one location, including a location in the taxable territory, the place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided. In other words, as explained in the Education Guide, if any portion of the service is provided in the taxable territory, the entirety of the service becomes taxable in India (at the location in the taxable territory where the greatest proportion of the service is provided) – this would be the case even if the greatest proportion of service provision is outside the taxable territory. Following from our earlier example in the context of performance based services, a personal security service will be treated as provided in India if at any point in time the service was provided in India even if for a majority of the period the person receiving this service was travelling outside India.

The Education Guide clarifies that an insignificant portion of the service (such as mere invoicing or processing of an order – but not the actual rendition of service) would not trigger taxability under Rule 7. It also clarifies that as Rule 7 applies in respect of performance-based services and location-based services (whether qua relation to immovable property or event), and such services when provided outside the taxable territory would require the service recipient to have outside establishment(s) which would be deemed to be separate persons from the establishment(s) in the taxable territory per the explanation to section 65B(44), it would be legitimate to invoice the recipient's establishments inside and outside the taxable territory separately, and thereby not to charge to tax the portion of services provided to the establishment outside the taxable territory.

Rule 8 – Place of provision of services where provider and recipient are located in taxable territory

Like Rule 7, Rule 8 marks a departure from the criteria in Rule 4 (performance basis), and rules 5 and 6 (location basis) to provide that if the service provider and the service recipient are both located in the taxable territory, the place of provision of service shall be the location of service receiver – even if the place of provision of service is determined to be outside the taxable territory in terms of the application of one of these earlier rules. The reasoning put forward is that "the presence of both the service provider and the service receiver in the taxable territory indicates that the place of consumption of the service is in the taxable territory". An obvious question that arises is that having specifically set out specific criteria to determine the place of provision of service (other than on the basis of location of the service recipient), why should the location of the service recipient become relevant when the service provider is also located in the taxable territory. To take an example, why would the services of an architect to design a house situated in London, say, of an Indian resident be liable to tax in India if the architect is also an Indian resident but not if the architect is located in a foreign country. Or, why should the place of provision of the service provided by an event manager to a firm in relation to an event in Singapore be within the taxable territory if both these persons are located in taxable territory but not if the event manager is Singapore.

It may be noted that, on the other hand, the services provided and received by persons located in non-taxable territory, irrespective of the place of provision, has been exempted from service tax by virtue of Sr. No. 34(c) of the Mega Exemption Notification 25/2012-S.T. dated 20-6-2012. Arguably, this is by way of an administrative relaxation and does not in any way redefine the principles behind determining the place of provision of service.

Rule 9 – Place of provision of specified services

In respect of 4 specific types of services, Rule 9 provides that the place of provision shall be the location of the service provider. These services are discussed seriatim below.

(i) Services provided by a banking company / financial institution / non-banking financial company to an account holder

The term 'account' has been defined in rule 2(b) to mean an account bearing interest to the depositor and to include an NRE account and an NRO account. Accordingly, in so far as services relating to the operation of a bank account and transfers of money are concerned, the place of provision will be determined on the basis of the location of the bank/ financial company /NBFC. Conversely, insofar as financial services relating to financial leasing, merchant banking, foreign exchange broking, asset management, financial management and such other services are concerned, the place of provision will be determined on the basis of the location of the service recipient under the general rule (Rule 3) discussed earlier.

The intent behind this position appears to be the taxation of banking and financial services on the basis of the place of consumption by applying the basis that account related services are usually provided locally whereas other banking and financial services may be provided remotely.

(ii) Online information and database access or retrieval services

Rule 2(l) defines 'online information and database access or retrieval services' to mean "providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network". An important feature of these services is that they are usually completely automated, and require minimal human intervention. The CBEC has clarified that examples of such services include data services for online information which is generated automatically by software from specific data inputs, services of providing trade statistics, legal and financial data, digitized content of books and electronic publications, subscription to online news, journals and reports, and web-based services providing access or download of digital content etc. It has also clarified that the sale or purchase of goods over the internet, internet telecommunication services, internet access services, and repair services of software or hardware over the internet from a remote location etc. shall not be covered under this rule.

The rationale behind this specification could be the fact that the main element involved in the provision of these services relates to the data and information provided, and therefore that the place where this content is created ought to form the basis for determining the place of provision of service.

(iii) Intermediary services

Rule 2(f) earlier defined the term 'intermediary' as "a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account." In this connection, the Education Guide had clarified that, as defined, the services of an intermediary involved 2 supplies at one time, viz. "(i) the supply of service between the principal and the third party, and (ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged". Rule 2(f) has been substituted to now extend to the supply of goods, and thereby to bring the services of intermediaries *vis-à-vis* supplies of goods and services on par.

This amendment *vis-à-vis* goods supplies is important, and has far reaching implications for agency businesses in India. Whereas the origination and co-ordination services that such businesses provide were measured against Rule 3 (and counted as exports of services in most cases) earlier, they will now be liable to service tax in India. Conversely, agents of Indian exporters based in foreign countries will no longer trigger a reverse charge service tax liability in the hands of their principals in India. It must be pointed out that whereas there was a question mark over the reason for the distinction between the tax treatment of intermediary services *vis-à-vis* goods and services, the demand from businesses was more for intermediary services to apply Rule 3 for services as well, rather than the other way around as has been done – this would also have been keeping with the consumption principle, given that these services are nearly always supplied in a B2B context.

Vis-à-vis services, the rule distinguishes between the role of an intermediary who arranges or facilitates the provision of a service from the role of a person who provides the main service on his own account. The CBEC has taken the example of a freight forwarder, and explains that factors such as ability to alter the nature and value of the service, and separate identification of value from the value of the main service arranged by the intermediary are indicative factors to determine whether a person is an intermediary or not. This distinction effectively accepts the proposition that there can be trading in services on a principal-to-principal basis, over which the debate has raged for long!

As stated above, there is an interesting question in relation to determining the place of provision of services of real estate agents. These services, though specifically listed in the context of rule 5, also fall within the ambit of rule 9(iii) when in relation to the provision of services. Further, rule 8 could also be triggered, depending upon the location of service provider and the service recipient. In such cases, the correct view appears to be that notwithstanding the more specific linkage to nature of service in rule 5, per rule 14, the determination of the place of provision will have to be on the basis of the rule that occurs later in the sequence, i.e. rule 9(iii).

(iv) Service consisting of hiring of means of transport other than aircraft and vessels, up to a period of one month.

Rule 2(j) defines 'means of transport' to mean "any conveyance designed to transport goods or persons from one place to another". It is noteworthy here, that the place of provision of service under this rule is not dependent upon the location of means of transport but upon the location of service provider. Therefore, even if the means of transport is hired outside the taxable territory up to a period of one month and used outside India, service tax will be leviable if the service provider (owner of the means of transport) is situated in the taxable territory. The amendment to this rule in the Budget 2014 proposals makes a carve-out from the above tax treatment for aircraft and vessels (excluding yachts) whereby Indian companies hiring these means of transport would no longer be liable to service tax. This amendment appears to be in response to the request from the shipping industry that Indian service providers were at a competitive disadvantage *vis-à-vis* international players.

Rule 10 – Place of provision of goods transportation services

The POP Rules have special provisions in respect of transportation services. Rule 10 deals with the place of provision of transportation of goods by any mode (air, road, rail, sea etc.) other than by way of mail or courier, and provides that the place of provision will be the destination of the goods. There is an exception from this determination in the case of services provided by a goods transportation agency in respect of transportation of goods by road, by which case the place of provision is the location of the person liable to pay tax (as determined in terms of Rule 2(1)(d) of Service Tax Rules, 1994.

It should be kept in mind that services of transportation of goods by an aircraft or vessel from a place outside India to any custom station of clearance in India is covered under clause (p) of Section 66D in the negative list and therefore not liable to service tax.

Rule 11 – Place of provision of passenger transportation service

As opposed to the determinant of the place of provision in respect of transportation of goods, the place of provision of service in respect of passenger transportation service is the place where the passenger embarks on the conveyance for a continuous journey.

The reference to a 'continuous journey' and the definition of the term is presumably with the intent to differentiate between cases where a passenger is in transit from a situation where the passenger effectively undertakes multiple independent journeys by virtue of the interruption/subdivision of a larger journey into smaller journeys (for which a separate ticket/invoice would have been issued), per the reasoning that in the latter situation, the place of provision for each such smaller journey should be independently determined.

Rule 12 – Place of provision of service provided on board a conveyance

Following from the test in relation to the place of provision of passenger transportation service, the place of provision of services provided on board a conveyance (bus, train, aircraft, vessel etc.) during the course of a passenger transport operation is the first scheduled point of departure of that conveyance for the journey. Examples of such services are on-board facility of movies / music / video / software games on demand, beauty treatment or supply of food on flight, etc. when provided against a specific charge which are intended to be wholly or substantially consumed while on board. It is relevant to note where the price of such service to be provided on board is included in the fare for transportation of passenger, the service is considered as naturally bundled, and will be treated as a service of transportation.

Rule 13 – Powers to notify description of services or circumstances for certain purposes

By virtue of this rule, the Central Government has been empowered to notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service. The CBEC has explained that this rule "is an enabling power to correct any injustice being met due to the applicability of rules in a foreign territory in a manner which is inconsistent with these rules leading to double taxation". It has been further stated that this "rule is also meant as an anti-avoidance measure where the intent of the law is sought to be defeated through ingenious practices unknown to the ordinary ways of conducting business". Given this, Rule 13 will encourage industry to make representations to the Central Government to address situations of double taxation. Somewhat ironically, the provisions of Rules 7 and 8 discussed earlier, which override the scheme of Rules 3 to 6 and the special treatment of the specified services considered in rule 9 are themselves likely to cause situations of double taxation.

CA Kiran Nissar

Amendments to Finance (No. 2) Bill, 2014

The Finance (No. 2) Bill, 2014 (the Bill) was introduced in the Lok Sabha on 10th July 2014. Later, some of the provision of the Bill was amended. The key amendments, relating to the Direct Tax Laws, made to the Bill, before it enacted into Finance (No. 2) Act, 2014, are summarised below:

Holding period of unlisted securities and units of non-equity oriented mutual fund transferred between 1-4-2014 to 10-7-2014

The Bill had proposed to regard unlisted shares and units of non-equity oriented mutual fund as a short term capital assets if the same were held for not more than 36 months (as against existing period of 12 months).

Now, a new proviso is introduced to section 2(42A) to provide that unlisted shares and units of mutual funds shall continue to be deemed to be a long term capital assets if the same are transferred during the period 1st April 2014 to 10th July 2014 after holding for a period of more than 12 months.

Long term Capital Gains on mutual fund units transferred between 1-4-2014 to 10-7-2014

The bill had proposed to withdraw the option of paying tax at the concessional rate of 10% on long term capital gain (without indexation) on sale of unit of mutual funds (other than equity oriented mutual funds).

Now it is provided that the option of paying tax at the concessional rate of 10% will continue to apply for long term capital gains without indexation, arising from transfer of units of Mutual Funds, if such units are transferred between 01-04-2014 to 10-07-214.

Computation of Arm's Length Price (ALP)

Under the existing transfer pricing regulation, where more than one price is determined by most appropriate method, the arithmetic mean of such prices shall be taken as arm's length price (ALP) with a tolerance range of +- 3% or +- 1% as the case may be. Under the arithmetic mean concept, the average price and margin is distorted by extreme value and does not give true ALP. To address this, the Finance minister in his Budget speech has proposed to introduce the concept of price range for determination of ALP where there are adequate comparables. However the Finance Bill as presented did not include any clause to this effect.

Now, third proviso is introduced in section 92C to provide that, where more than one price is determined by most appropriate method, the ALP in relation to international transaction and specified domestic transaction, undertaken on or after 1st April 2014, shall be computed in such manner as may be prescribed. Consequently, the first and second proviso (arithmetic mean and tolerance range) shall not apply.

Scope of Settlement Commission

As per section 245C of the Act, an assessee can approach to Settlement Commission for settlement of cases, if any proceeding for assessment is pending before the Assessing Officer on the date on which application is made.

Finance Act, 2007 has restricted the scope by inserting a proviso to section 245A(b) to deny access to Settlement Commission during the pendency of reassessment proceedings or during the pendency of proceedings of making fresh assessment where original assessment was set aside. Effectively, the scope of the term 'case' for which an application could be made was curtailed by the Finance Act, 2007.

The Finance Minister during his budget speech has proposed to enlarge the scope of the Income-tax Settlement Commission so that taxpayers could approach the Commission for settlement of disputes. Accordingly, the Finance Bill, 2014 as passed by Lok Sabha has deleted the proviso which restricted the scope of the term 'case' to the pending assessment cases only. Such amendment would reinstate the erstwhile position wherein an assessee can apply for settlement of even those cases which are pending for re-assessment proceedings or pending for fresh assessment pursuant to order from Higher authorities. The changes in the provisions shall take effect from October 1, 2014.

Similar changes have been made in Wealth-tax Act as well for settlement of cases.

Resident Taxpayer can approach Authority for Advance ruling (AAR)

Currently an advance ruling can be obtained either by non-resident or by a Public Sector Undertakings. In the Budget speech, the Finance Minister has proposed to extend the scope of advance ruling to resident taxpayer also.

Accordingly, section 245N(a) is amended (from 1st October 2014) to provide that such class or category of resident taxpayer (as may be notified) can make an application to AAR to determine tax liability arising out of transaction undertaken or proposed to be undertaken.

Provisions to strengthen AAR

In the Budget speech, the Finance Minister has stated that additional Benches of AAR would be constituted. Accordingly following amendments have been made to the Finance Bill:

- Composition of AAR: The amendment provides for additional appointment of Vice-Chairman as member of AAR. Further, Central Government is empowered to appoint such number of Vice-Chairman, revenue member and law member, as it deems fit.
- Additional Benches of AAR: It is proposed that the office of AAR shall be located in Delhi and its Benches shall be located at such places as may be notified by the Central Government. Further, such Benches would consist of Chairman or the Vice-Chairman and one revenue member and one law member.

CBDT gets power to relax fees applicable for default in furnishing TDS/ TCS statement

Section 119, which empowers the Central Board of Direct Taxes (CBDT), to issue order for relaxation of any provision, now covers fees payable under section 234E for the default in furnishing statement of tax deducted at source (TDS) or statement of tax collected at source (TCS).

ML-702

Shashank Pant
Student from University of Petroleum & Energy Studies, Dehradun

Is Democratic Form of Government Best for India ?

ABSTRACT

On 15th August, 1947 a new democratic country India with diverse culture, language and religion was born. India has achieved a milestone by completing 66 years of Independence. In these years India has had many ups and down. In the essay the author will compare the dictatorship with democracy, which form of government is best of India. Then a comparative study between India's democracy and Chinese communist rule will be made to present a picture of Asia's two leading economics. In next phase author will address the achievements of Indian democracy and possible failures. India had various issues due to communal riots, political, economic and social issues on the other hand India made a tremendous growth in Industrial development, BPOs, Science and research etc. Author will address such topics and give possible solutions/ changes which can be adopted by India to make it a better democracy. In next episode the author will conclude the essay with the answer is democratic form of Government best for India?

IS STRONG DICTATORSHIP BETTER THAN A WEAK DEMOCRACY

Dictatorship is a form of government in which there is a centralisation of power while democracy offers freedom to the people for self-expression and liberty. The absolute power of a dictatorship as history has shown us will result in eventual abuse and socio-economic failures like that of Greeks and Romans in the past. Dictatorships are pretty unlikely to remain benevolent, so democracy is the tie on power that protects the people. Einstein, the famous scientist once said "Dictators of genius are succeeded by scoundrels" countries like China ruled by Hu Jintao and Saudi Arabia ruled by King Abdullah Bin Abdul-Aziz are considered to be one of the most evil dictators as there is a saying absolute powers corrupts absolutely. Democracy whether weak or strong will last longer because of its strong structure and basic fundamentals.

A weak democracy is way better than strong dictatorship. We often associate dictatorship will oppression, tyranny and reign of terror where as in democracy there is always equality, justice and freedom. A strong dictatorship will lead to more oppressive rule. A population has to choose whether living in fear with no freedom of any kind is relevant or living with absolute freedom is better. Citizens **strive for freedom** of speech, expression and to freedom to choose our leaders. Indian citizens would surely prefer freedom over absolute control. Democracy should be given time, let's face it democracy is a form of government which is never perfect but it is preferable to have people exercise some control over their own destiny even when the system is flawed. The absolute power of a dictatorship as the history has shown us will result to eventual abuse and socioe-conomic failure. We Indians lost our freedom for over 600 years due to Mughal empire rule and then for another 400 years under British rule. If in current scenario we replace Democracy with Dictatorship then it will simply be a failure of our veteran freedom fighters who sacrificed their lives for swaraj and freedom. Democracy is best form of government which Indian citizens can have. The J.P. movement[1] (Total Revolution Movement) 1973 and Ombudsmen movement has just shown the power of democracy and its people.

INDIAN DEMOCRACY vs. CHINESE COMMUNISM

The growth graph of China has put up India's democracy to a serious question. Do formal political institutions and practices constitute democracy or does it involves appropriate socio-economic conditions which enables citizens to exercise their political rights. China has asserted that it is engaged in creating better living condition for its people after overthrowing semi colonial and semi-feudal domination. China has been successful in doing so, the quality of life has gone up and poverty has been almost diminished. India on the other hand has scored poorly as 40% of the population still lives in poverty. Let's take another situation of equality and freedom. Western liberal's democratic theory asserts the priority of freedom over equality even though the radical stream in liberalism stresses that gross inequalities are detrimental to the exercise of freedom. India is placed a step higher in comparison to China. In India there were a number of reforms/measures takes in early decades following independence to curb monopoly in industry, abolish zamindari system and carrying out new land reforms. In china to the social inequalities were reduced by abolition of landlordism and formation of cooperatives. The wage system was directed towards promoting equality limiting income differences within the six point grade system.

It has been said that democracy is the best form of government until we find a better one. Granted that the form of democracy that has evolved in India is not a paragon of an ideal state or one of a democracy as envisioned by the founding fathers of India[2]. What is also granted is that China with its autocratic government has surpassed India in almost every each and every field of endeavour. Be it economic/military/sports power, but is that sufficient and just cause to denigrate democracy itself? Or rather a clarion calls for us to endeavor to improve our democracy by better value and more stringent laws against corruption and unhealthy practices? The growth and progress by China has raised some serious question upon the success of democracy, but one could not underestimate Indian progress under democratic rule. With a strong accountability, good governance and strong judiciary our democracy can work wonders on the other hand India has the largest youth population which make it distinct from other countries. Countries like Australia, USA and Japan became world leaders in terms of Economy, Military and Governance. Surely India could reach the same mark under democratic rule.

JUDICIAL ACTIVISM- A BOON TO INDIAN DEMOCRACY

Judicial activism is a pro-active judiciary which does no limit itself to the interpretation of law only but also sees if the law affects people adversely. The great contribution of judicial activism in India has been to provide a safety value and a hope that justice is not beyond reach. To understand the concept of judicial activism two theories have been expounded. The first theory

1 Quest for Participatory Democracy by Lok Raj Baral.

2 Shashi Tharoor, "Indian Democracy at 60", Khaleej Times. 15 August 2007.

"Power vacuum filling" theory says if in a system there is a vacuum because of the lack of any particular organ or the inaction of it then other organs extend their influence to the vacuum created. Nature does not allow the vacuum to remain as such. In the government in certain areas vacuum is created due to lack of interest in executive or legislature or simply due to the inaction and indifference in their part. *This vacuum is filled by a dynamic judiciary*[3] which is stated as judicial activism. The other theory is of social want; say that people want something which is neither provided by executive or the legislative. So judiciary took it upon itself to provide the wants of the people. So it became proactive and this lead to birth of judicial activism.

Has Indian judiciary by judicial activism protected the democracy? Yes the courts by their intervention have protected the rights of citizens. Let's not forget India is the best democracy but unfortunately we have worst politicians. In a landmark case of Keshavananda Bharti the judicial activism literally saved our democracy. Prior to the case the Indian Parliament could simply amend any part of constitution by 2/3 majority, but SC intervened and held by a 7:6 majority that constitution is supreme. Parliament is not empowered to amend the basic structure of constitution; it has to respect the basic feature of constitution. Many argue that judicial activism compromises the executive powers as a result of which it imbalances the separation of power due to which executive suffers. Is this compromise suitable? Yes we Indian citizens need to have such compromise because courts/ judges by judicial intervention have saved us from arbitrary laws like in Sunil Batra case, M.C Mehta vs. State of T.N case and many others.

THE CASE WHICH SAVED INDIAN DEMOCRACY

The judgment in Kesavananda Bharti vs. State of Kerala[4] was crucial in upholding the supremacy of the constitution and preventing authoritarian rule by a single party. The core question in the case was – the power of parliament to amend the constitution unlimited? In other words could parliament amend, abrogate any part of constitution even to the extent of taking away all fundamental rights?

A 703 pages judgment revealed a sharply divided court and, by a wafer-thin majority of 7:6 it was held that parliament could amend any part of constitution as long as it did not alter or amend "the basic structure or essential features of constitution". This was the inherent and implied limitation on the amending power of parliament. This basic structure doctrine as future event showed saved the Indian democracy and Kesavananda Bharti will always occupy a hallowed place in our constitutional history. If the majority of the Supreme Court had held that (as six judges indeed did) that parliament could alter any part of constitution, then India would have most certainly degenerated into a totalitarian state or had one party rule. At any rate, the constitution would have lost its supremacy. Many jurists have even admitted that the basic structure theory preserved Indian democracy. The 39th amendment prohibited any challenge to the election of president, vice-president, speaker and Prime minister irrespective of the electoral malpractice. This was a clear attempt to nullify the adverse Allahabad HC ruling against Indira Gandhi. The 41st amendment prohibited any case civil or criminal being filed against President, Vice-President, Prime Minister or the Governor. Not only during their term of office but forever. If parliament were indeed supreme, these shocking amendments would have become the part of constitution. It was due to the effort of Kesavananda Bharti, Palkhivala and the seven judges who were in majority; India still continues to be the world's largest democracy. It was only after this case that the great souls of Patel, Ambedkar and the founding fathers of our constitution could really rest in peace as democracy still works best for India.

3 http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece

4 http://www.gktimes.in/2013/11/keshavnand-bharti-case-facts-vs-state-of-kerala-judgement-1973.html

IS DEMOCRATIC GOVERNMENT BEST FOR INDIAN ECONOMY& GROWTH

The relation between democracy and economic growth has long been debated. Over time, views on the relationship between democracy and economic development have changed. Well the true story is democracy neither causes nor depends on economic growth. Democracy is a contextual thing which may be positively or negatively related to economic development at different situations. Democracy promotes economic development when it provides stable political conditions. It may retard economic development when the policies do not support the economic uplift which may be due to political pressure or vote-bank policies.

Democratic approach may not be as aggressive as other forms of government, but it fosters good governance. Democracy is an imperative that both liberal democracies and market economies rely for their long-term success on similar attributes of good governance like healthy competition, access to free and full information, Secure property rights, sanctity of contracts enforceable by an independent judiciary, a multi-skilled and well educated workforce, an effective and transparent legal system, prudential regulatory systems and most importantly the protection of fundamental rights of citizens by courts makes democracy the best among other forms of government. Market requires good governance[5] which is possible in presence of democracy and civil society and at the end democracy facilitates achievement of necessary social compromises between capital and labor, efficiency and equity and equality. Although other forms of government like Dictatorship, Communist rule have performed better in economic growth rate but the equality and mental security comes at a price which can only be offered by democratic nations like India, USA, Japan, Australia and many others.

DID INDIA HAVE A STEADY ECONOMY DUE TO DEMOCRACY?

It would be unfair if we don't give credit to India's democratic rule for 8% GDP growth. Democracy is favoured for economy because

- Only governments with some legitimacy will be able to implement and sustain policies that may bear high short-term costs.
- Various institutional characteristics of a democracy like an independent legal system is required for a successful liberalisation.
- Democratisation may limit rent seeking due to its system of checks and balances. Democratic institutions like political parties, elected representatives, free speech and the like can be viewed as the ultimate institutions of conflict management as they allow for differences among social groups to be resolved in a predictable, inclusive and participatory manner.

Since economic growth arises from good policies, people tend to think that politics (democracy) affects the policies. As a matter of fact good policies[6] have always been rooted in more complicated sources and institutional settings rather than just political processes. That's why economic growth takes place in both democratic and authoritarian states as long as they can produce good policies and institutions for capital. Long story short-democracy and economic development are the ends to be achieved in a sustainable way, and this cannot be guaranteed without the greasing and conditioning process of good governance.

5 Susanne Hoeber Rudolph and Lloyd I. Rudolf, 2002, "South Asia Faces the Future: New Dimensions of Indian Democracy", Journal of Democracy, vol. 13, no. 1, January, pp. 52-66.

6 Arvind Subramanian, 2007, "The Evolution of Institutions in India and its Relationship with Economic Growth", Oxford Review of Economic Policy, vol. 23, no. 2, pp. 196-220

POSSIBLE CHANGES AND REFORMS NEEDED BY INDIA SO AS TO IMPROVISE DEMOCRACY

Given the present situation, we the citizens find ourselves at the crucial juncture of Indian democracy. There is a need to protect the noble Indian constitution which is constantly being abused by unscrupulous politicians. No doubt, the *constitution has been a dark knight*[7] when it comes to the protection of rights to citizens. The judges have used the principle of natural justice and rule of law quite well when parliamentarians have misused their powers by passing arbitrary rules. The citizens have lost complete faith over the functioning of Government due to weak administrative structure. There is a need to reform most of the administrative structures in order to revive the faith of people in government.

To have a better administration system, the Government had previously introduced functions like delegated legislature, principle of natural justice and many others. Even after such reforms the administration has not been up to mark, reason? India follows the same old 18th century laws. The outdated laws have several loop holes which are exploited by parliamentarians, administrative authorities and the most by lawyers. A better administration can function if we have strong powerful laws which are updated with present requirements of system.. On the other hand there is a need for electoral and judicial reforms which can strengthen these institutions effectively. There is a need of executive reforms (police departments) so that local citizens can be served more in contrast to politicians. Accountability and responsibility among bureaucrats and government officials must be fixed by laws; we don't see any such laws for such classes. At the end if we want to be a well-managed democratic country like Japan, USA and Australia then we citizens need to be vigilant and proactive to defend our democratic rights as it has been said that "Eternal vigilance is the price of democracy". Finally, there is a need of youth participation in politics, on the other hand we badly need leaders like Anna Hazare to raise the conscience of nation and galvanize the people to fight for their rights and thus safeguard democracy.

INDIAN DEMOCRACY SUCCESS OR FAILURE

The idea of true democracy is realized within an educated/ informed society. From that standpoint India's emergence with a democratic dream was magnificent, even current statistics of literacy in India does not look conducive for any effective democracy to function. The forefathers of Indian nation dreamed big. Indians initial condition consists of huge population, a pluralist, multi-lingual and multi-ethnic groups. In spite of having such a diverse population India has done reasonably well to keep the country united and prosperous by holding to the democratic principles. Certainly it's not a failure, sometimes it becomes difficult for us living within India to appreciate the true value of our argumentative, dis-organized and chaotic ways, but there is a remarkable ingenuity in that. Perhaps Indian way of democracy is an alternative in itself. Let's compare some of the success and failure of Indian democracy for past 66 years of its democratic rule.

ACHIEVEMENTS

1. **Self-reliance and Industrial development**[8] - India had to rely on other countries during initial years of independence,

7 C. J. Anderson, 1998, "Parties, Party Systems, and Satisfaction with Democratic Performance in the New Europe", Political Studies, 46, pp. 572-588; A. Wagner and F. Schneider, 2006, "Satisfaction with Democracy and Environment in Western Europe–A Panel Analysis", CESIFO Working Paper No. 1660.

8 34Kanti Bajpai, "Diversity, Democracy and Devolution in India", in Michael E. Brown and Sumit Ganguly, eds., Government Policies and Ethnic Relations in Asia and the Pacific (Cambridge: MIT Press, 1997), pp.33-83.

but a major chunk of importance was given to agriculture. With the advent of green revolution we not only became self-reliant but also became export leaders in agricultural products, cash crop and cereals. Introduction of machinery, hybrid seeds contributed to the progress of this sector. India achieved an enormous progress in the sector of industrial development too; a transformation from Khadi and small scale village industries to heavy multibillion large scale industry is worth an achievement for a democratic nation. The development of these sectors is evident from the inflow of huge FDIs and FIIs. Industrial development was supported by the service sectors which contributed to the high GDP growth. India's service sector with reference to BPO industry has reached the stars, as a result of which even China has been left behind. The aggressive democratic economic policies have given India recognition in the global world.

2. **Bilateral relations with others[9] –** India has always been a supporter of peace and cooperation. During the initial years of independence there was a rise of cold war between USSR & USA. India cleared its side that her motive was not to be part of any super power; it wanted to have cordial and healthy relations with everyone. The result is the existence of Non alignment group formed by Nehru. India has been often mentioned as a soft nation, but the recent aggressive stands taken by India have proved the critics wrong. The aggressive diplomatic behavior forced Italy to send back its marines in India for trial. Another was that of Devyani Khobragade, even after having a diplomatic immunity she was subjected to arrest and strip search. This treatment to an Indian diplomat led to a major diplomatic standoff between India and United States. India reacted strongly regarding the issue; several perks offered to US diplomats in India were revoked. Delhi police removed the security barricades on the road outside the US embassy in New Delhi, citing need for improvement of traffic flow in that area. Apart from these issues, India has been aiding several countries in their development too. For instance India is aiding 53 Pan African countries in areas of education and health. India has also provided funds to several countries five year plans like Nepal. From being a support receiver India has now become a support provider to many countries, this clearly presents a powerful democratic image of India.

3. **Media and its Freedom** - It would be unfair to count out media's role in protecting India's democracy. Media has played an important role in India's democracy by concealing the true facts to citizens which influence our decision to choose our representative government or we can say personality by whom we want to be governed. Media through its various means of newspapers, television and cinema have made the citizens pro-active regarding their inherent rights. For instance the advertisement by TATA group 'Jaago Re' was used to promote the voting rights of citizens. Satyamev Jayate (soap opera) was another initiative taken up by actor Aamir Khan. The episodes main purpose was to influence our mind and change our attitude regarding some major social evils in our society. The media has helped to make our society more civilised and open by focusing on issues like child birth, homosexuality, child-care, domestic violence and sexual harassment. These matters were once

9 http://articles.economictimes.indiatimes.com/keyword/bilateral-relations

considered to be strictly private, but due to the freedom given to media these matters have now been openly and freely brought up. Thanks to the democratic feature of freedom, our society has seen a positive attitude change.

4. **Welfare State benefits** – One of the salient features of Indian constitution is to establish a welfare state. The preamble and directive principles of state policy make it amply clear that the main goal of India will be to serve its citizens through democratic means. Bills like RTI, MGNREGA[10], Food Security, Forest Right Act, Lokpal and many others have been introduced in parliament which has benefitted the citizens. The forests rights act seeks to empower various tribes and other communities which depend on forest for their livelihood and sustenance. Universal education is a goal of every society and government in the world, the failure to educate its people is one of India's greatest failures. Right to Education act has been introduced to set the things right and recently the program has seen a success. The food security act has been criticized and often it has been termed as a disaster, but the current circumstances made government to pass such a bill. The Human Index Figure has not been the best for India and still million Indian bellies goes to bed without proper food. The bill may be a success in future and promises to remove hunger and mal-nutrition among poor population. The critics criticize Indian democracy of not having accountability and strong laws against government officials, bureaucrats and others. The Lokpal bill may be a right reply to those critics, Lokpal and RTI acts are creating a strong accountability environment in India and thus strengthening the democratic behaviour. Even in this highly competitive globalized world the democracy looks after the welfare of people instead of satisfying the corporate leaders. A right balance between economic growth and citizen's welfare has been one of the best contributions of Indian democracy.

FAILURE OF DEMOCRACY

Democracy is a set of formal principles developed in Western Europe with the aim of facilitating the representation and articulation of the middle and working classes and designed to contain peacefully the conflicts between them and upper class. In India there is an absence of a balance of power between classes and a consensual unifying national identity, the automatic installation of formal democratic principles makes matters worse for India. Some of the present failures of Indian democracy are as follows-

1. **Nexus of crime and politics** – About 153 members of the Indian parliament have either been convicted and appealed or currently accused of various crimes. This nexus of crime and politics in India has developed at two stages, first stage-Indian politicians used criminal elements and gangsters to control and intimidate their rivals/ oppositions. The vote bank policy and the influence of such criminals have degraded the standard of politics In India. Most Indian politicians have used their election wins to significantly enrich themselves, according to their own pre-election declaration of assets. For example, the comparison of assets of candidates who won in 2004 and sought re-elections in 2009 showed that the wealth of these politicians grew by over 100%. The Karnataka politician's wealth grew by 693% between 2004-2009. This nexus came to a halt when *SC in its Judgment of Lily Thomas vs. Union of India*[11] 'ruled

10 http://www.firstpost.com/tag/mgnrega.

11 http://khagesh-gautam.blogspot.in/2013/07/understanding-lily-thomas-v-union-of_31.html.

that any MP/MLA who is convicted of a crime will be disqualified as elected representatives from the date of conviction according to representation of the people act. Rasheed Masood, Lalu Prasad Yadav, Jagdish Sharma are some of the MPs who were convicted of scams as a result of which they were disqualified. The judiciary has repeatedly protected the citizens by their rational judgments and interventions. Democracy needs fair and clean representatives to represent the citizens. The youth participation in politics must be encouraged and strong rigid laws should be introduced to break the nexus between criminals and politicians.

2. **Old Traditional Caste Traditions** – The entire culture and governance of India is heavily influenced by caste system that legitimizes abuse and exploitation of one group of people by another. It plays a significant role in voting patterns as well. Most of the Indian usually vote their caste rather than casting their votes. Other issues include the lack of democratic structures inside India' political parties and a culture of corruption fostered by a stifling level of bureaucracy. The question remains as to why cannot democracy bring a change in Indian culture where people are treated as equals when similar rights are given all citizens, having freedom of expression, rights to elect their representatives, freedom of religious practices and other rights as envisaged in a democratic state? Indian social system is the answer, social order in India is hate driven and low caste communities irrespective of their claims to be Indian by birth are despised as much as the outsiders are loathed and rejected. Such a democracy has practically led people to incapacitation and wheezing debilitation, as a matter of fact India shines only for the elite classes. The reservation system was introduced to minimise the difference between different communities and to uplift the status of the deprived communities. The reservations have not been a mega-success as a matter of fact we see only a few citizens getting a real fruitful benefit out of it. The solution of such differences can be minimised by education, proper awareness and a change in attitude. The differences between blacks and whites were minimized by an attitude change and a similar change can benefit Indian democracy and improvise it.

3. **High Poverty Rate and Black Money[12] –** The poverty and the difference between rich and poor has seen a rise in democratic India. No doubt the middle class has been doing their hard-labour work to lead a comfortable life, but what about the poor? We have failed to provide them with basic education, health care, Food diet and future security. The fundamental right of equality has been up to the mark/level in India. Dictatorship and the communist rule have brought down the poverty graph to a low level, but India has failed in this field. This is certainly not an end of a road; good governance can change everything. We lack political strength and good governance. The coalition form of government makes a majority government weak and helpless. A democracy needs a strong government in centre which can make a quick decision which is free from political pressure situations. Every government can make some economic reforms and make liberal policies, but this is not our present requirement. We need a government which can bring back our black money. The black money is eating away the vitals of our national economy. Unless it is ruthlessly combated and cut to a minimal size, it is likely

12 http://www.thehindubusinessline.com/economy/oecd-issues-new-standard-to-combat-black-money-india-to- follow/article5685008.ece .

to upset the whole economic planning. A government with a vision can only succeed in such mission. According to Swiss Banking Association Report 2006 India accounted for more than $1500 billon as black money. If sincere efforts are made to bring back the black money then the poverties definition can be permanently erased from India's dictionary. The infra issues, labor unemployment, illiteracy, mal-nutrition, high imports and many others can be addressed. High illiteracy, poverty, caste differences are some serious issues in democratic India, the solution lies within India but at what cost can we Indian redeem it?

4. **Maoist and Extremist Environment –** Maoist are active in around 240 districts, the Maoist originated from West Bengal in year 1967. The Maoist leader's motive is to seize political power and herald a New Democratic Revolution (NDR) under the leadership of agrarian class. The Maoist leaders are against imperialism, Feudalism and comprador bureaucratic capitalism. In order to succeed in their mission, the naxalites are reportedly working to build a base of popular support, tackling socio-economic problems such as the failure of governance, getting involved in anti-mining agitation and fighting land acquisition based on caste. Violence by Maoist and going against the basic human rights features have created a lot of controversies in past. The naxal attack in darbha valley caused the death of 27 political leaders in 2013; the killing of CRPF policemen has become a common practice for them. Laws regarding land acquisition and the role of NGOs in civil society can change the fate of Maoist. Tackling the problem in an efficient way requires a multilayered approach. If poverty is the context rather than the direct cause for the growing strength of the Naxalite movement, then the same must be said about India's industrialization regime which is threatening to displace large numbers of people without providing commensurate employment. A hyper solution won't benefit any parties in conflict. Rational and well thought negotiations can make this issue less aggressive as democracy's main objective is to create an environment for peace, prosperity and equality, but in case of Maoist the democracy has failed to support them.

CONCLUSION

Yes, democracy is best form of government for India. In these 66 years India has made its own mark in almost every field, be it Mars mission, economic growth, diplomatic relations etc. For a country with huge diversities in culture, language etc. is not easy to achieve this progress and the credit goes to hard working citizens and some dedicated politicians who have served India very well. Let us all hope that the dream of our former President Dr. A.P.J Abdul Kamal of a developed India by 2020 comes true. The pro-active citizens and good governance can make it happen. To conclude, the quotes of Dr. Manmohan Singh on completion of India's 66 years are perhaps the effective one. Dr. Singh said "while there is much to be proud of in our record of the past 66 years, the unfinished agenda should make us humble and energise us to work together". The emerging challenges at home and globally should make us firm in our resolve to be united and to be cooperative.

BIBLIOGRAPHY

- Quest for Participatory Democracy by Lok Raj Baral.
- Times of India and Hindu articles.
- In the name of democracy by Chandra Bipan
- "Impasse in India", The New York Review of Books, vol. 54
- Indian Constitution Bare act.
- Justice Verma Committee report.
- Economic times articles.

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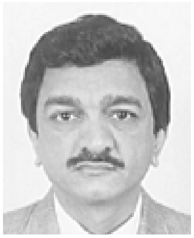

B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Valuation of immovable property under Rule 3 or under Rule 8 of Schedule III to the Wealth-tax Act, 1957.

Amrit Banaspati Co. Ltd. vs. Commissioner of Wealth-tax – [(2014) 105 DTR (SC) 337]

For A.Y. 1993-94 the assessee company had filed its return of taxable wealth wherein a residential flat at Worli, Mumbai, which was used as a guest house and acquired before 1st April, 1974, was valued as per Rules 3 to 7 of the Schedule III of the Wealth-tax Act, 1957 at ₹ 1,55,139/-. The A.O. referred the matter to DVO under Rule 20 of Schedule III who valued the flat at ₹ 2,60,73,000/-. The A.O. also relied upon the Agreement to Sale the said flat dated 15th September, 1995 entered into by the assessee company with the vendor for ₹ 10,26,00,000/-. The C.W.T.(A) and the Tribunal upheld the order of the A.O. The High Court also affirmed the view taken by the Revenue.

Dismissing the appeal of the assessee company their Lordships of the Supreme Court held as under:

"22. While R. 1BB was omitted by Wealth-tax (Second Amendment) Rules, 1989 w. e. f. 1st April, 1989 but simultaneously R. 8 was inserted *vide* Schedule III. Therefore, it cannot be said that after insertion of Schedule III of the Act the value on which the wealth-tax is payable has no relevance in determining the fair market value of the asset or the price which the asset would fetch if sold in the open market on the valuation date. In the case, A.O. is of the opinion that it is not practicable to apply the provisions of R. 3, and the said asset is referred to Valuation Officer under S. 16A for assessment, the value of such asset shall be estimated to be the price which, in the opinion of the Valuation Officer, would fetch if sold in the open market on the date of valuation."

"23. A conjoint reading of the various provisions reproduced above makes it clear that the legislature has not laid down a rigid directive on the A.O. that the valuation of an asset is mandatorily required to be made by applying R. 3; the A.O. has the discretionary power to determine whether R. 3 or R. 8 is applicable in a particular case. If the AO is of the opinion that it is not practicable to apply R. 3 the AO can apply R. 8 and value of the asset can be determined in the manner laid down in R. 20 or s. 16A."

"25. It is true that the invocation of r. 8(a) cannot be based on *ipse dipsi* of (dixit) of the A.O. The discretion vested in the A.O. to discard the value determined as per R. 3 has to be judicially exercised. It must be reasonable, based on subjective satisfaction; the power must be shown to be objectively exercised and is open to judicial scrutiny.

"26. In the present case, the AO refused to accept the self-assessment for the following reasons:

(i) There is a wide variation between the market value and the valuation done by the assessee as per municipal taxes.

(ii) The property is used as a guest house.

(iii) The value for levy of municipal tax is very low, as the total rateable value of the assessee is done by the municipal authorities @ ₹ 6,573 per annum.

(iv) The assessee was a tenant of the property @ ₹ 500 per month. After purchase of the property a lot of expenditure was incurred from time to time on improvement of the property which is very difficult to ascertain.

(v) The value of the building is grossly understated as the assessee himself entered into an agreement to sell the same in the year 1995 for a sum of ₹ 10,26,00,000/-.

Considering the above factors, the A.O. assessed the value of the property at ₹ 2,60,73,000/ as valued by the DVO.

27. The CWT(A) held that the reference made by the A.O. to DVO was justified. Tribunal also justified the action of the A.O. and on appeal, the same was affirmed by the High Court *vide* impugned judgment.

28. After careful consideration of the facts and circumstances of the case and the submission made by the learned counsel for the parties, we are of the opinion that the A.O. was justified in holding that it was not practicable to apply R. 3 in the instant case and rightly referred the matter to the Valuation Officer under S. 16A for determination of value of the asset. The A.O, thereafter, has rightly assessed the wealth-tax on the basis of such value determined by the Valuation Officer. We find no merit in this appeal and the same is, accordingly, dismissed."

The meditative state is the highest state of existence. So long as there is desire, no real happiness can come. It is only the contemplative, witness-like study of objects that brings to us real enjoyment and happiness.

— Swami Vivekananda



Ashok Patil, Mandar Vaidya & Priti Shukla
Advocates

DIRECT TAXES
High Court

Reported

1] Sec. 147; 80IA – Deduction allowed after scrutiny – Retrospective insertion of explanation – Reopening held to be invalid – Held to be change of opinion – A.Y. 2005-06

Sadbhav Engineering Ltd. vs. DCIT (2014) 105 DTR (Guj) 33

In the instant case the AO on a detailed scrutiny of the assessment had allowed partly allowed the claim of the assessee u/s. 80IA(4) of the Income-tax Act, 1961. The part disallowance was challenged before the CIT(A) and ITAT. In 2009 a explanation was inserted with retrospective effect from 2000. The AO initiated reassessment proceedings solely on the basis of such insertion of the Explanation. On a writ petition, the High Court held that the AO having initiated reassessment proceedings solely on the ground of insertion of Explanation which was clarificatory in nature amounted to change of opinion, and therefore held that reopening was held to be not sustainable.

2] Sec. 32 – Nursing home building – Depreciation allowable at a higher rate treating it as a plant – A.Y. 1995-96

CIT vs. Shashi Nursing Home Ltd. (2014) 105 DTR (All) 25

The assessee a public limited company and for the relevant year had claimed depreciation at the rate of 25% treating the hospital building as plant and machinery. The AO disallowed the claim of the assessee and allowed the claim of depreciation at normal rates applicable to buildings. On appeal, the CIT(A) and ITAT held in favour of the assessee. On appeal, the High Court, held that if a building or a structure constituted an apparatus or a tool of the assessee, by means of which business activity is carried out and in the instant case the nursing home was equipped with operation theatre, laboratory, x-ray plant, sterilisation unit, etc amounted to a plant and hence the Tribunal was right in holding that the assessee was eligible for deduction at the rate applicable to plant and machinery which is 25%.

3] Sec 251; 254 – power of the Tribunal – to allow claim not made in the return of income

CIT vs. Sam Global Securities Ltd. (2014) 105 DTR (Del.) 41

The assessee had not claimed business loss and had not claimed income from dividend from Mutual Fund Units exempt u/s.10(35). During the assessment proceedings the assessee filed a revised computation of income claiming such benefits. The AO disallowed the claim of the assessee on the grounds that the assessee did not file a revised return of income. CIT(A) confirmed the order the AO, and the ITAT allowed the claim of the assessee. On Appeal, the High Court held that CIT(A) could not reject a claim on the grounds that a revised return was not filed, and also that the ITAT has powers to allow claim which was not made in the return of income.

4] Sec 22; 28 – Rental Income – Business Income or House Property – Interest Free advances to sisters concern – Allowable expenditure

CIT v. Prakash Agnihotri [2014] 46 taxmann.com 145 (Allahabad)

(a) Assessee owned an immovable property i.e. a shopping mall. During relevant year, assessee let out a portion of said mall. Assessee claimed that rental income derived from mall was taxable as income from business. AO held that rental income in question was to be taxed as income from house property. CIT(A) allowed assessee's claim. On further appeal in Tribunal, Tribunal allowed assesse's appeal. On appeal in High Court, the Court held that there was a categorical findings of fact by the Appellate Authority as well as the Tribunal that letting out was for the purposes of business after considering all relevant facts and the fact that the premises City Centre, the Mall, was taken back by the assessee and further in major portion of the premises assessee was already carrying out his own business, it is opined that assessee has rightly shown his rental income as business income.

(b) During relevant year, assessee claimed deduction of interest paid on loan. AO opined that loan had been taken by assessee to purchase shares of its sister concern in order to acquire controlling interest in said company. He thus rejected assessee's claim taking a view that loan was not taken for but there being categorical findings of fact by the Appellate Authority as well as the Tribunal that letting out was for the purposes of business after considering all relevant facts and the fact that the premises City Centre, the Mall, has been taken back by the assessee and further in major portion of the premises assessee was already carrying out his own business, it is opined that assessee has rightly shown his rental income as business incomes for business purpose. CIT(A) confirmed AO's order. Tribunal, however, allowed assessee's claim. On further appeal in High Court, High Court allowed the claim and held that since interest free advance available with assessee was far in excess of investment made in purchasing shares of sister concern, it could be concluded that borrowed funds had been utilised for business purpose and, therefore, assese's claim for deduction was rightly allowed.

5] Sec 263 – Lack of enquiry – Revision possible

P.V. Sreenijin v. CIT [2014] 47 taxmann.com 61 (Kerala)

Commissioner sought to revise assessment order on ground that excess deduction on account of expenditure had been allowed by AO. Assessee filed writ challenging legality of show-cause notice issued by Commissioner. It was found that on basis of information available with department, Commissioner concluded that many transactions had been omitted to be considered by AO and some expenditure had been allowed far in excess of that permissible and even beyond income declared. On filing Writ Petition in High Court, the Court dismissed writ Petition and held that since entire material available with department was not considered by AO, it was an erroneous approach on part of AO resulting in prejudice to revenue. Further Commissioner vide impugned order had not attempted a substitution of opinion of AO, but had taken cognizance of 'lack of enquiry' with respect to certain transactions.

6] Sec 153 – period of limitation for assessment

CIT vs. Chandra Bhan Bansal [2014] 46 taxmann.com 108 (Allahabad)

A search and seizure operation was conducted on 19-1-1989 at the business premises of assessee firm and residential premises of partners. The assessee was not assessed to tax earlier. Notices under sections 147(a)/148 were issued to the assessee for the assessment years 1986-87, 1987-88 and 1989-90 requiring the assessee to file return. In response to the notices issued to the assessee, return was filed only for the assessment year 1989-90. For remaining assessment years, assessee filed writ petition challenging validity of reassessment proceedings. The High Court passed an order staying the reassessment proceedings. Subsequently, the writ petition was dismissed on 1-8-1995. After dismissal of the writ petition, the proceedings for assessment were completed on 4-1-1996 by the AO. In appellate proceedings, one of the objections taken by assessee was that the interim order granted by the High Court was vacated on 1-8-1995, hence the original assessment was to be completed within 60 days i.e. up to 30-9-1995 in view of Explanation 1(ii) to section 153 (3), whereas the assessment having been made on 4-1-1996 was barred by time. On revenue's appeal in High Court, High Court allowed writ petition and held that in terms of provisions of Explanation 1(ii) to section 153(3), period of limitation for assessment can be stayed only by an order or injunction of any Court and as soon as said order or injunction of Court is vacated, period of limitation shall re-start even though order vacating injunction is not communicated to department.

7. Sec 68 – Failure to provide confirmation and identity – Cash credits justified u/s. 68 of IT Act

Sudhir Kumar Sharma (HUF) vs. CIT [2014] 46 taxmann.com 340 (P&H)

During assessment proceedings, AO noticed that assessee had deposited huge amount of cash in his bank account. In view of failure of assessee to explain source of said deposits, AO added amount so deposited to assessee's taxable income by invoking provisions of section 68 CIT(A) confirmed part of said addition on basis of peak deposits and Tribunal confirmed said addition. On further appeal in High Court, the Court dismissed the appeal of the assessee and held that since various amounts in cash were deposited in bank account of assessee, onus was upon assessee to explain nature and source of said cash deposits. Since assessee failed to give list of persons who advanced cash to him along with their confirmation in respect of said cash credits, impugned addition was to be confirmed. Further the Court held that Tribunal had rightly held that there were cash deposits in the bank account and thereafter cheques were issued to different parties and in such circumstances, the theory of peak credit could not be accepted. Moreover, the assessee had not been able to show that there existed any nexus whereby the amount deposited in cash had been withdrawn in cash and thereafter re-deposited to take benefit under peak credit theory.

"All differences in this world are of degree, and not of kind, because oneness is the secret of everything."

— Swami Vivekananda


Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

REPORTED DECISIONS

1. Business Expenditure – Section 14A of the Income-tax Act, 1961 – Disallowance of expenditure under section 14A of the Act cannot exceed the Income earned. A.Y. 2009-10

Sahara India Financial Corporation Ltd. vs. Dy. CIT – (2014) 105 DTR 1 (Del.) (Trib.)

The assessee during the year earned exempted dividend income of ₹ 68.37 lakhs. The Assessing Officer during the course of assessment proceedings applying the provisions of Rule 8D of the Income tax Rules, 1962 worked out disallowance of ₹ 2.16 crores which was enhanced by the CIT(A) to ₹ 2.19 crores.

On appeal the Tribunal restricting the disallowance to fifty per cent (50%) of the dividend income earned by the assessee held that, if mechanical method of Rule 8D of the Rules is applied, it may lead to manifestly absurd result in as much as, the disallowance under Rule 8D of the rules may be many times more than the exempted income earned by the assessee, such unanticipated absurdities cannot be the intention of the legislature. Thus, disallowance under section 14A of the Act of expenditure in any case should not exceed the income earned by the assessee.

2. Additional Grounds of Appeal before the Appellate Tribunal – Section 254(1) of the Income tax Act, 1961 – claim not made in the return – Appellate authorities can exercise jurisdiction to consider the claim of the assessee not made in the return. A.Y.: 2008-09

Mando India Steering Systems (P) Ltd. vs. Asst. CIT – (2014) 105 DTR (Chennai) (Trib) 317

The Assessee while filing the return of income for the year under consideration failed to make deduction on account of foreign exchange gain. The gain was already reduced from the cost of the fixed asset while computing the depreciation under the Act however the same was not claimed as deduction while making the computation. The assessee made the claim for the first time during the course of the assessment proceedings vide letter dated 15th December, 2011. The A.O. rejected the claim of the assessee for the reason that the claim has not been made by filing revised return of income and as per the Act, any claim made during the course of assessment by filing an application is not permissible. On appeal the first Appellate Authority upheld the action of the A.O. Being aggrieved the assessee carried the matter further before the Hon'ble Chennai Appellate Tribunal. The Tribunal quashed the order of the lower authorities and allowed the appeal of the assessee by observing that the appellate authorities can exercise their jurisdiction to consider the claim of the assessee not raised in return.

3. Income – Section 5 of the Income-tax Act, 1961 – Service charges received in advance – Advances are offered for tax in the year in which services are rendered – Books of account maintained on accrual basis – Addition made in the year of receipt of advance not justified. A.Y.: 2009-10

Dy. CIT vs. Velti India (P) Ltd. – (2014) 105 DTR (Chennai) (Trib) 213

The A.O. while finalising the assessment treated the advances received from the customers as income on the ground that there is no liability attached to the assessee in the event of failure to render contracted services. The assessee being aggrieved by the assessment order preferred an appeal before the Ld. CIT(A). The first Appellate Authority after considering the submissions of the assessee deleted the addition made by the A.O. The department being aggrieved by the order passed by the Ld. CIT(A) carried the matter before the Hon'ble Chennai Appellate Tribunal. Hon'ble Appellate Tribunal upheld the order passed by Ld. CIT(A) by observing that Assessee having maintained its books of account on accrual basis, service charges received in advance for the services to be rendered in future years are not liable to be taxed in the year of receipt.

UNREPORTED DECISIONS

1. Income from Other Sources – Expenditure – Section 57(iii) of the Income-tax Act, 1961 – Expenditure laid out wholly and exclusively for the purpose of earning such income – Assessee raises a loan against the fixed deposits to keep her source of earning intact and to meet her financial needs – Interest expenditure so incurred would be wholly and exclusively to earn fixed deposit interest income – Therefore, interest expenditure incurred is allowable as deduction. A.Y. 2008-09

Raj Kumari Agarwal vs. Dy. CIT – [I.T.A. No.: 176 / Agra / 2013; Order dated: 18.07.2014; ITAT Agra Bench]

The assessee had fixed deposits in a bank and earned interest on these deposits. While computing the income from other sources, the assessee claimed a deduction on account of interest paid on loan which was taken, on the security of the fixed deposits. The assessee substantiating the claim of deduction before the Assessing Officer submitted that she needed funds and with a view to avoid premature encashment of the fixed deposits, for that purpose, which would have resulted in net loss to her, she took a loan against fixed deposit so as to keep the fixed deposit intact and earn the interest income thereon. Thus, it was contended that the interest paid on the borrowings from bank, against security of fixed deposit, was made for the purpose of earning interest income on fixed deposits. The Assessing Officer rejected the claim of deduction holding that, as expenditure was not laid out or expended wholly and exclusively for the purpose of earning income from fixed deposits, the claim of the assessee was not admissible according to the provisions of Section 57 (iii) of the Act.

On appeal the Tribunal allowing the assessee's claim of interest expenditure held that, in order to protect the interest earnings from fixed deposits and to meet her financial needs, when an assessee raises a loan against the fixed deposits, so as to keep the source of earning intact, the expenditure so incurred is wholly and exclusively to earn the fixed deposit interest income and thus, allowable under section 57 (iii) of the Act.

2. Penalty – Explanation 5 to section 271(1)(c) of the Income tax Act, 1961 – Where no material is found with regard to assessee's ownership of asset during the search proceedings – Deeming provision contained in Explanation 5 to section 271(1)(c) could not be applied to levy

penalty under section 271(1)(c) of the Act. A.Y. 2005-06 & 2006-07

ITO vs. V.R. Rathish – [I.T.A. Nos. 797 & 798 / Coch / 2013; Order dated: 25-4-2014; Cochin Bench]

A search action was conducted in case of the father of the assessee in August 2005. Thereafter, the assessee for first time filed returns of income for both relevant assessment years in response to notice issued under sections 153A read with section 153C and 142(1) of the Act. During course of assessment proceedings, assessee filed a statement of assets and liabilities of him and his wife and offered shortfall as undisclosed investment under section 69B of the Act. The Assessing Officer held that assessee had not disclosed increase in wealth before date of search and, therefore, there was a deemed concealment in view of Explanation 5 to section 271(1)(c), accordingly, he levied penalty.

On appeal before the Tribunal deleting the penalty held that, during course of search proceedings no material was found with regard to ownership of any asset by assessee, therefore, the deeming provision as provided in Explanation 5 to section 271(1)(c) of the Act would not apply.

3. Charge of tax where share of beneficiaries of a trust is unknown – Section 164 of the Income tax Act, 1961 – Assessee received her beneficial share out of dividend income from a private trust – Claimed it as exempt having been already taxed in hands of trustees under section 164 of the Act – Assessing Officer added and taxed beneficial share in hands of assessee – Held the Assessing Officer was not justified in assessing amount of beneficial share in hands of assessee once again when the income is already taxed in the hands of trustees at maximum marginal rate under section 164 of the Act. A.Y.: 2009-10

Smt. Alpana Kirloskar vs. Asstt. CIT - [I.T.A. No. 2670 / Del / 2013; Order dated 28-4-2014; Delhi Bench]

The assessee was one of the beneficiaries of a private discretionary trust. The trust's income was from dividends, which was exempt during the year under section 10(34) of the Act. The trust filed its return of income, offering the exempt dividend income. The trust income was assessed at maximum marginal rate under section 164 of the Act in the hands of the trustees as per section 164 of the Act and assessment was framed accordingly for the year. The assessee received her beneficial share out of said dividend income of the trust and claimed it as exempt under section 10(34) of the Act having been already taxed in the hands of the trustees under section 164 of the Act. The Assessing Officer, however, was of the view that section 164 provided that it was only when no income was distributed amongst the beneficiaries by a private discretionary trust then the trust income was taxable in the hands of the trust as a separate taxable entity. However, when the surplus was distributed by the trust, the receipt in the hands of beneficiary would be taxable as 'income from other sources', accordingly, he taxed the receipt in the hands of assessee as, 'income from other sources' under section 56(2)(vi) of the Act.

On appeal the Tribunal held that, it is not disputed that entire trust income is from dividends exempt under section 10(34) of the Act, therefore, what comes in the hands as beneficial share retains the same colour and is also exempt under section 10(34) of the Act. Thus, the beneficial share being part of exempt dividend income, same is exempt from tax and is to be excluded while computing the income of the assessee.

4. Business Expenditure – Section 14 A of the Income-tax Act, 1961 –Disallowance under section 14 A is legally tenable only when the assessee has claimed some deduction in respect of the expenses incurred by him for earning the other income which may include the expenditure for earning the exempt income. A.Y. 2009-10

Smt. Gauri Shriya vs. ITO - [I.T.A. No.: 3161 / Mum / 2013; Order dated: 30-7-2014; ITAT Mumbai Bench]

The assessee earned dividend income on shares amounting to ₹ 6.48 lakhs and from units at ₹ 6.99 lakhs which were claimed as exempt Apart from the above, assessee earned income under the heads salary, capital gain and income from other sources which were offered for tax on gross basis without claiming any deduction of expenses incurred for earning any of the said income. The Assessing Officer invoked section 14A read with Rule 8D of the Income tax Rules, 1962 made disallowance of ₹ 3.04 lakhs.

On appeal the Tribunal deleted the disallowance, holding that section 14A of the Act reads as, 'for the purpose of computing the total income under this chapter no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act'. Thus, when an assessee has not claimed any deduction of expenditure in respect of earning any income under the other heads of income, the Assessing Officer was not justified in making the disallowance by invoking section 14A of the Act read with Rule 8 D of the Rules.

5. Penalty – Section 271(1)(c) – All the material particulars relevant to the claim made by the assessee fully and truly furnished by the assessee while making the claim on account of deduction of legal expenses – Further, claim of legal expenses allowed by the CIT(A) however, reversed by the Tribunal in appeal – Clearly demonstrates that claim made by the assessee was based on a possible view and the claim made by him for deduction on account of legal expenses was a *bona fide* claim – Thus, penalty under section 271(1)(c) of the Act not leviable. A.Y.'s 2003-04 and 2004-05.

Salman Khan vs. ACIT - [I.T.A. Nos.: 2559 & 2560 / Mum / 2013; Order dated 30-7-2014; ITAT Mumbai Bench]

During the years under consideration assessee incurred expenses for defending himself in various criminal proceedings pending in the Court. The expenses were claimed as business expenditure by the assessee. According to the Assessing Officer, the expenses incurred by the assessee to defend himself in criminal proceedings were personal expenses and the same therefore not allowable as business expenditure. Accordingly, he disallowed the legal expenses claimed by the assessee in both the years under consideration. On appeal, the CIT(A) deleted the disallowance made by the AO on account of legal expenses for both the years under consideration observing that the said expenses were incurred by the assessee for the preservation and protection of his profession from any legal process or proceedings which might have resulted in reduction of his income. On further appeal by the Revenue before the Tribunal, the Tribunal reversed the decision of the CIT(A) on the issue and confirmed the disallowance made by the Assessing Officer for both the years under consideration. As a result of sustenance of disallowance by the Tribunal of additions made to the total income of the assessee on account of disallowance of legal expenses in both the years under consideration, the Assessing Officer levied penalty under section 271(1)(c) of the Act.

On appeal the Tribunal deleting the penalty for both the years held that it is not in dispute that the legal expenses claimed by the assessee were actually incurred by him and it is not the case of the Revenue that the expenses so claimed by the assessee were bogus or non-genuine. Further, the Tribunal noted that although the Tribunal had reversed the decision of the CIT(A) on issue of allow ability of legal expenses, the fact that the claim of the assessee was accepted by the CIT(A) on merit clearly showed that the claim made by the assessee was based on a possible view of the matter. Thus, the claim made by the assessee for deduction on account of legal expenses was a *bona fide* claim and no penalty under section 271 (1) (c) of the Act was leviable.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

NOTIFICATIONS

Senior Citizen Savings Scheme (Amendment) Rules, 2014

The Central Government made the rules to amend the Senior Citizens Savings Scheme Rules, 2004 as the Senior Citizen Savings Scheme (Amendment) Rules, 2014 which shall come into force on the 1st day of April, 2014. Accordingly in the Senior Citizen Savings Scheme Rules, in the case of a deposit made under these rules on or after the 1st day of April, 2014, it shall bear interest at the rate of 9.2 per cent per annum from the date of deposit."

(Notification No. GSR 492(E) [F.NO.6-1/2011-NS-II], dated 11-7-2014)

Income-tax (Seventh Amendment) Rules, 2014 – Substitution of Form Nos. 3CA, 3CB and 3CD

In exercise of the powers of section 44AB of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes made the rules further to amend the Income-tax Rules, 1962, which may be called the Income-tax (7th Amendment) Rules, 2014 and shall come into force on the date of their publication in the Official Gazette. In the Income-tax Rules, 1962, in Appendix-II, for Form No. 3CA, Form No. 3CB and Form No. 3CD, the following forms shall be substituted, namely:-

Form No. 3CA [See Rule 6G (1) (a)] Audit report under section 44AB of the Income-tax Act, 1961, in a case where the accounts of the business or profession of a person have been audited under any other law.

Form No. 3CB [See Rule 6G(1)(b)] Audit report under section 44AB of the Income-tax Act 1961, in the case of a person referred to in clause (b) of sub-rule (1) of Rule 6G.

Form No. 3CD [See Rule 6 G (2)] Statement of particulars required to be furnished under section 44AB of the Income-tax Act, 1961.

(Notification No. 33/2014 - dated 25-7-2014)

CIRCULARS

Section 80G of the Income-tax Act, 1961 – Deductions – Donations to certain funds, charitable institutions, etc. – Contribution made towards disaster relief for the affected people of Uttarakhand eligible for 100% deduction under section 80G

It was brought to the notice that 100% deduction under section 80G of the Income-tax Act is available on contributions made for Uttarakhand disaster relief. In this regard, it has been informed that this 100% deduction is available as per section 80G (2) (iiihf) of the Income-tax Act and PAN of CM Relief Fund Uttarakhand, for claim of the deduction, is AAAGM0036M.

(Letter [F.No.IRSA (AIB)/EC/RES./UK-DR/5], dated 15-7-2014)

Constitution of a committee to study the Appellate Orders to examine filing of Appeals by Department before various forums

It has been decided to constitute a Committee to appraise the efficacy of existing dispute resolution forums of CsIT(A) & ITAT and to suggest steps to reduce litigation before these forums. The terms of reference of the committee to be:

To carry out detailed analysis of appellate orders and assessment orders, on various aspects as suggested in Para 7 and recommend steps to reduce litigation before the CIT(A). (ii) To study the efficacy of existing system of filing appeals to the ITAT by the Department and suggest steps to reduce litigation before the ITAT after analysing various aspects as mentioned in 7. The Committee would examine the assessment orders, appellate orders and scrutiny report for the appeal to the ITAT related to orders selected as per guidelines mentioned in para below and give its recommendations for different income groups as defined in para separately for corporate and non-corporate assessees.

Guidelines to select orders

As far as possible, orders in cases of corporate and non-corporate assessees should be selected in equal numbers, particularly in metro charges whereas in non-metro, sample of non-corporate assessees may be larger. It must also be ensured that some orders in search cases are in select basket. As number of appeals filed by the Department before ITAT is much larger than appeals filed by the assessee, the order in appeals filed by the Department and by the assessee may be selected in the ratio of 2:1.

Analysis would be done and conclusions are drawn separately by categorising assessment orders in various income groups (returned income) as under:

< 25 lakh; 25 lakh to 1 crore; 1 crore to 10 crore; 10 crore and above

Within the overall terms of reference, an analysis on the following aspects should be conducted, along with any other that the Committee deems fit:

(i) Assessment Orders: Nature of additions made in general, guidance of supervisory authorities, sustainability of additions in appeal, quality of addition made and average tax effect of additions made in each category at above. (ii) Orders of CIT(A): Whether relief allowed is based on proper marshalling of facts and legal position. The decisions are also to be analysed in the light of the order of the ITAT. (iii) (a) Authorisation by CIT: The filing of second appeal is to be examined as to whether the same is filed mechanically by applying the monetary limits or on sound grounds after examining the merits of each order. (iii) (b) The Committee should ascertain from the orders of each CIT(A) received during the F.Y. 2013-14 by each administrative CIT under the jurisdiction of CCIT-I & CCIT-VIII Delhi, CCIT-I Ahmedabad, CCIT-II Hyderabad the percentage of appeals filed by the Department in ITAT where the tax effect exceeds monetary limits. (iv) The success rate of appeals filed by the Department/Assessee before the ITAT to be analysed. (v) The Committee must also take inputs on relevant issues from DRs in the stations mentioned in para above.

The Headquarters of the Committee will be in Delhi.

(Office Memorandum [F.No.279/Misc./M-84/2014-(ITJ)], dated 17-7-2014)

Section 10A, read with section 10AA of the Income-tax Act, 1961 – Free Trade Zone – Clarification on allowability of deduction under sections 10A/10AA on transfer of technical manpower in case of software industry

Section 10AA of the Income-tax Act, 1961, *inter alia*, provides for deduction in respect of the profits derived by a unit set up in SEZ from export of computer software or from providing any ITES services. The said deduction available to a new SEZ unit is subject to certain conditions including:

(i) It is not formed by the splitting up, or the reconstruction of a business already in existence;

(ii) It is not formed by the transfer to a new business, of machinery or plant previously used for any purpose.

2. In this regard, attention of the Board has been drawn to the issue of transfer/ redeployment of technical manpower from the existing units of an assessee engaged in computer software development to its new SEZ unit. This, at times, is considered as splitting up or reconstruction of the existing business by some of the Assessing Officers resulting in denial of benefit u/s. 10AA of the Income-tax Act, 1961 to the assessee.

3. It has been represented by the software industry that there is only a limited pool available with a software developer of skilled, talented and experienced manpower with domain knowledge. Given the highly technical and competitive nature of software development, some technical persons having prior experience are required to manage the critical functions of software development in a new unit. It has thus been submitted that movement of technical manpower from an existing unit to a new SEZ unit should not be a constraint in availing deduction u/s 10AA of the Income-tax Act. Attention has also been drawn to Instruction No. 70 dated 9-11-2010 issued by the Ministry of Commerce which states that there is no bar on transfer of manpower to SEZ units. It has also been submitted that while there is a specific prohibition on transfer of plant or machinery from an existing unit to a new SEZ unit [sec.10AA(4)(iii)], subject to a ceiling of 20 per cent, no such bar on transfer or redeployment of manpower has been explicitly laid down in the section.

4. The matter has been examined in the Board. It is clarified that mere transfer or re-deployment of existing technical manpower from an existing unit to a new SEZ unit in the first year of commencement of business will not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred does not exceed 20 per cent of the total technical manpower actually engaged in developing software at any point of time in the given year in the new unit.

5. This circular shall be applicable only in the case of assessees engaged in the development of software or in providing IT Enabled Services in SEZ units eligible for deduction u/s. 10A or u/s. 10AA of the Act.

(Circular No. 12/2014 [F.No. 178/84/2012-ITA.I], dated 18-7-2014)

Section 164 of the Income-tax Act, 1961 – Charge of tax where share of beneficiaries unknown – Clarification on taxation of alternative investment funds having status of non-charitable trusts under Income-tax Act, 1961

The SEBI (Alternative Investment Funds) Regulations, 2012 ('AIF Regulations') *vide* Regulation No. 4 issued in May 2012 aims at regulating all forms of private pool of funds in India. The said Regulations divide the Alternative Investment Funds ('AIFs') into three broad categories – Category-I, Category-II and Category-III Alternative Investment Funds, depending upon the operational strategies, objectives and fund structure. A large number of AIFs registered with SEBI have been set up in the form of non-charitable trusts.

2. While the AIFs, being Venture Capital Funds, making investment in the Venture Capital Undertakings have been accorded 'tax pass through' status under section 10(23FB) read with section 115U of the Income-tax Act, 1961 ('Act') (whereby income arising in the hands of such Fund would be treated as tax exempt, while investors of such funds would become liable to tax liability on as if the investors have made the investments directly in the Venture Capital Undertaking), clarification has been sought about tax-treatment in cases of AIFs being non-charitable trusts where the investors name and beneficial interest are not explicitly known on the date of its creation – such information becoming available only when the funds starts accepting contributions from the investors.

3. Board was requested to clarify whether the income of such funds would be taxable in the hands of the Trustees of the AIF in the capacity of a 'Representative Assessee' (as defined u/s. 160(i) (iv) of the Act) or in the hands of investors (i.e. contributors of funds)

4. The board clarified that in the situation where the trust deed either does not name the investors or does not specify their beneficial interests, provisions of sub-section (1) of section 164 would come into play and the entire income of the Fund shall become liable to be taxed at the Maximum Marginal Rate of income-tax in the hands of the trustees of such AIFs in their capacity as 'Representative Assessee'. It also clarified that in such cases, provisions of section 166 of the Act need not be invoked in the hands of the investor, as corresponding income has already been taxed in the hands of the 'Representative Assessee' in accordance with sub-section (1) of section 164 of the Act.

5. However, in cases of funds where names of the beneficiaries and their interests in the Fund are determined i.e. stated in the trust deed, the tax on whole of the income of the Fund – consisting of or including profits and gains of business, would be leviable upon the Trustees of such AIF, being 'Representative Assessee' at the Maximum Marginal Rate in accordance with sub-section (1A) of section 161 of the Act.

6. The clarification above shall not be operative in the area falling in the jurisdiction of a High Court which has taken or takes a contrary decision on the issue.

(Circular No. 13/2014 [F.NO.225/78/2014-ITA. II], dated 28-7-2014)

INSTRUCTIONS

Section 268a of the Income-tax Act, 1961 – Appeals and revision – Filing of appeal or application for reference by Income-tax Authority – Revision of monetary limits for filing of appeals by the Department before Income tax Appellate Tribunal, High Courts and Supreme Court – Measures for reducing litigation

Reference is invited to Board's Instruction No. 3/2011, dated 9-2-2011 wherein monetary limits and other conditions for filing departmental appeals (in Income-tax matters) before Appellate Tribunal, High Courts and Supreme Court were specified.

2. In supersession of the above instruction, it has been decided by the Board that departmental appeals may be filed on merits before Appellate Tribunal, High Courts and Supreme Court keeping in view the monetary limits and conditions specified below.

3. Henceforth appeals shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:–

S. No.	Appeals in Income-tax matters	Monetary Limit (in ₹)
1.	Before Appellate Tribunal	4,00,000/-
2.	U/s. 260A before High Court	10,00,000/-
3.	Before Supreme Court	25,00,000/-

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

4. For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as "disputed issues"). However the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or Appellate Authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order/judgment involves more than one assessee, each assessee shall be dealt with separately.

6. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

7. In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit and, therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value. As the evidence of not filing appeal due to this instruction may have to be produced in courts, the judicial folders in the office of CsIT must be maintained in a systemic manner for easy retrieval.

8. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect.

(a) Where the Constitutional validity of the provisions of an Act or Rule are under challenge, or

(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or *ultra vires*, or

(c) Where Revenue Audit objection in the case has been accepted by the Department.

9. The proposal for filing Special Leave Petition under Article 136 of the Constitution before the Supreme Court should, in all cases, be sent to the Directorate of Income-tax (Legal & Research), New Delhi and the decision to file Special Leave Petition shall be in consultation with the Ministry of Law and Justice.

10. The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by relevant provisions of statute & rules. Further, filing of appeal in cases of Income-tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A of the IT Act, 1961, shall not be governed by the limits specified in para 3 above and decision to file-appeal in such cases may be taken on merits of a particular case.

11. This instruction will apply to appeals filed on or after 10th July, 2014. However, the cases where appeals have been filed before 10th July, 2014 will be governed by the instructions on this subject, operative at the time when such appeal was filed.

12. This issues fall under section 268A(1) of the Income-tax Act 1961.

(Instruction No. 5/2014 - dated 10-7-2014)

CA Tarunkumar Singhal & CA Sunil Moti Lala

INTERNATIONAL TAXATION
Case Law Update

A] HIGH COURT JUDGMENTS

I. While rendering technical services, whether technical knowledge with which the services were rendered was also 'made available' to the assessee/customers is purely a question of fact

DIT vs. Sun Microsystems India Private Limited (ITA No. 35/ 2010) (Karnataka High Court)

Facts

1. The assessee entered into a logistics services agreement with its associated enterprise, namely, Sun Singapore. In terms of agreement, Sun Singapore was required to provide distribution management and logistics services to the assessee company which included providing spare management services, provision of buffer stock, defective repair services, managing local repair centres, business planning to address service levels, etc.

2. The Assessing Officer ('AO') held that payment in respect of aforesaid services was in nature of Fees for Technical Services ('FTS') under Article 12(4) of the Double Taxation Avoidance Agreement between India and Singapore ("the DTAA") and thus the assessee was required to deduct tax at source.

3. On appeal, the Hon'ble ITAT held that the technology, experience or skill had not been made available to the assessee by Sun Singapore and as Sun Singapore was not having any permanent establishment in India, the payments were not required to be taxed under the head 'business' in view of Article 7 of the DTAA.

4. Aggrieved, the Revenue filed an appeal before the Hon'ble Karnataka High Court. It contended that the terms of the agreement provided for making available inventory physical movement and self-control process, assistance to enable inventory transaction and management and business planning to address service level relating to the local business and customer needs. However, the assessee was not utilising the said services in order to avoid deduction of tax at source.

Judgment

1. The Hon'ble Karnataka High Court ('HC') dismissed the appeal relying on the decision of the co-ordinate Bench in the case of *CIT vs. De Beers India Minerals (P) Limited (346 ITR 467)*. wherein it was held that the question, whether along with rendering technical services, whether the technical knowledge with which the services were rendered was also made available to the assessee/customers was purely a question of fact which was to be gathered

from the terms of the contract, the nature of services undertaken and what had transmitted in the end after rendering technical services.

2. It further held that from the facts of the case, it was clear that Sun Singapore has not made available to the assessee the technology or the technological services which is required to provide the distribution, management and logistic services. Such a finding of fact was recorded by the Hon'ble ITAT on appreciation of the entire material on record. When once factually it was held the technical services has not been made available, then in view of the law declared in the De Beers (supra), there was no liability to deduct tax at source and therefore, there was no fault in the finding recorded by the Appellate Authority.

II. Transfer Pricing – Higher commission rate justified in view of fact that Associated Enterprises were performing customisation work which was not being done by independent distributors

CIT vs. I-Flex Solutions Ltd. (IT Appeal No. 2352 of 2011) (Bombay High Court)

Facts

1.. During the relevant year, the assessee had paid commission to its subsidiaries located abroad for customisation work. The subsidiaries acted as sales and marketing offices of the assessee. The nature of the transaction between the assessee and its subsidiaries were essentially of resale. The ultimate sale prices were negotiated by the subsidiaries directly with the end-customers and assessee offered a margin of 10 per cent.

2.. The Transfer Pricing Officer / Assessing Officer were of the view that commission paid to subsidiaries were higher than those paid to local distribution agents and accordingly, made certain adjustments to assessee's ALP in respect of payments made to subsidiaries. The assessee challenged the addition before the Commissioner of Income Tax (Appeals) who deleted the same.

3. On appeal, the Hon'ble ITAT, upheld the deletion of the said addition. It held that in view of fact that the said subsidiaries were performing customisation work which was not being done by independent distributors, consequently payment of commission at higher rate was justified.

4. Aggrieved, the Revenue preferred an appeal before the Hon'ble Bombay High Court.

Judgment

Based on the nature of the dealings, the Hon'ble Bombay High Court held that once the subsidiaries were found to be customising the work and such work was not being done by independent distributors, then the justification was rightly accepted by the Hon'ble ITAT. Accordingly, the appeal of the Revenue was dismissed.

III. Inland Haulage Charges earned by the assessee forms part of the income derived from shipping operations and therefore, covered under Article 8 of the Indo-Belgium DTAA

DIT(IT) vs. Safmarine Container Lines NV. [Income Tax Appeal No. 410 of 2012. Order dated 17th July, 2014, Bombay High Court]

Facts

1. The assessee, a company incorporated in and tax resident of Belgium, was engaged in business of operation of ships in international traffic. The assessee collected Inland Haulage Charges from its customers in respect of transportation of goods from Inland Container Depots (IDCs) to the port from where the goods were to be loaded in the ships for international traffic.

2. The AO held that the Inland Haulage Charges collected by the assessee did not come within the purview of Section 44B of the Income- tax Act, 1961 ('the Act') and was accordingly taxable as normal business profits under the provisions of the Act.

3. On appeal, the CIT(A), reversing the order of the AO, held that amount collected towards Inland Haulage Charges was connected with the cargo which was to be carried forward for onward international traffic and, therefore it was nothing but part of income derived from shipping operations. Consequently, Article 8 of the Indo-Belgium Double Taxation Avoidance Agreement ('the DTAA') was applicable and the same was held to be non-taxable in India.

4. On appeal by the Revenue, the Hon'ble ITAT, relying on the decision in assessee's own case for earlier assessment years, upheld the order of the CIT(A).

5. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court noticed that in assessee's own case for the earlier assessment year (ITA No. 952 of 2011 with ITA No. 147 of 2009 Order dated 17 January 2013), Hon'ble Bombay High Court had decided the very same issue in favour of the assessee. In the said case, Court relied upon another Judgment of Hon'ble bombay High Court in case of *DIT vs. Balaji Shipping UK Ltd. (253 CTR 460).*

2. The Hon'ble High Court, thus, held that the issue was fully covered in favour of the assessee by the above referred judgments.

IV. Supply of designs, flow charts and information for the purposes of installation and use of convertors at the site of Indian resident, where such convertors were also supplied by the assessee, did not constitute royalty within the definition as enumerated in Explanation 2 to section 9(1)(vi) of the Act. – Fees received on granting of all rights including licence by the assessee along with the supply of equipment did not fall within the purview of the term 'royalty' as defined in Article 30 of the Indo-Danish DTAA

DIT(IT) vs. M/s Haldor Topsoe. [Income Tax Appeal Nos. 23 and 41 of 2012. Order dated 16th June, 2014. Bombay High Court]

Facts

1. The assessee, a company incorporated in Denmark, had sold certain equipment called S-200 Convertors to an Indian company. The assessee also supplied designs, flow charts and information for the successful installation of the said equipment.

2. The AO held that supply of designs, flow charts and information for the successful installation of the equipment constituted 'royalty' within the meaning as given in Explanation 2 to section 9(1)(vi) and was accordingly taxed.

3. The Hon'ble ITAT, relying on the decision in assessee's own case for earlier assessment years, held that the supply of designs, flow charts and information for the installation of the equipment, where the equipment was supplied by the assessee itself, did not constitute 'royalty' even within the meaning as given in Explanation 2 to section 9(1)(vi). In respect of fees received on granting of all rights including licence by the assessee along with the supply of equipment, ITAT held that it did not fall within the purview of the term 'royalty' as defined in Article 30 of the Indo-Danish Double Taxation Avoidance Agreement ('the DTAA').

4. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court held that supply of designs, flow charts and information for the installation of the equipment, where such equipment was supplied by the assessee itself, did not constitute 'royalty' within the widest possible meaning as given in Explanation 2 to section 9(1)(vi) of the Act.

2. Further, the Hon'ble High Court held that the finding of fact as arrived at upon by the Hon'ble ITAT, based upon the case and contract of the assessee, was a possible one and did not require any interference.

3. In so far as fees received on granting of all rights including licence by the assessee along with the supply of equipment was concerned, the Hon'ble High Court held that the finding of ITAT that it did not fall within the purview of the term 'royalty' as defined in Article 30 of the DTAA was a possible view and cannot be termed as perverse.

V. Interest on income tax refund received by foreign entity having Indian PE, taxable at lower rate of 10% under Article 11 of India – Netherlands DTAA.

DIT vs. DHL Operations BV (ITA No. 431 of 2012) (Bom.)

Facts

1. The assessee filed its return of income for A.Y. 2003-04 and was assessed to total tax of ₹ 1323.17 lakhs. The AO held that provisions of Articles 5(1) and 5(2) of the India Netherlands Double Taxation Avoidance Agreement ('the DTAA') were applicable and hence the assessee was deemed to have a PE in India. Based thereon, business income was offered to tax @ 41%, while the interest on income tax refund was offered to tax @ 10% in view of Article 11 of the DTAA.

2. The AO rejected this stand and taxed the income from interest on income tax refund @ 41% as applicable to business income along with surcharge @ 5%. In appeal, CIT(A) upheld the order of the AO.

Aggrieved, assessee filed an appeal before Hon'ble ITAT. It held that the assessee's case was covered by the Special Bench decision of Hon'ble Delhi ITAT in *ACIT vs. Clough Engineering Ltd. (130 ITD 137)* wherein it was held that the interest on income tax refund was not effectively connected with PE. Accordingly, it held that the interest on income-tax refund is not effectively connected with permanent establishment either on the basis of asset-test or activity-test and thus taxable under Para 2 of Article 11 of the DTAA.

3. Aggrieved, the Revenue preferred an appeal before Hon'ble Bombay High Court.

Judgment

1. The Hon'ble Bombay High Court held that the order passed by the Hon'ble ITAT did give rise to any substantial question of law. It also held that the view of the Hon'ble ITAT cannot be said to be perverse and was based on the facts and the DTAA. Also, the ITAT had followed its own Special Bench ruling. The Hon'ble Court, therefore, dismissed the appeal of the Revenue.

VI. Prior to Finance Act, 2010, if conditions stated in section 44DA were satisfied, income in connection with prospecting for, or extraction or production of mineral oils would be computed under section 44BB(1), and if not then income would be computed under section 115A(1)(b) of the Act

PGS Geophysical AS vs. ADIT (ITA 612/2012) (Delhi High Court)

1. The assessee, PGS Geophysical AS, a company incorporated under the laws of

Norway, was principally engaged in the business of providing geophysical services worldwide which include services of acquiring and processing 2D and 3D seismic data (both on-land and offshore).

2. B.G. Exploration and Production India Limited ('BG') and Reliance Industries Limited ('RIL'), who had been granted exploration licences, engaged the services of assessee for acquiring and processing 3D marine seismic data with respect to offshore block awarded to them.

3. The assessee opted to be taxed on presumptive basis under section 44BB(1) of the Income-tax Act, 1961 ('Act') at the rate of 10% of the gross revenue. Accordingly, it made an application under section 197 of the Act. The AO authorised deduction of income tax at source at the rate of 4.223% of the gross amounts payable by the contracting oil companies (BG & RIL) to assessee for F.Y. 2007-2008. The assessee filed its return of income for A.Y. 2008-09 declaring a total income of ₹ 26.87 crores.

4. On scrutiny, AO observed that the services provided by assessee were technical in nature and its income from providing services fell within the definition of "fees for technical services" ('FTS') under section 9(1)(vii) and was liable to be taxed under section 115A and not under section 44BB(1), in view of the proviso to section 44BB(1). Accordingly, AO passed a draft assessment order to the aforesaid effect.

5. The Dispute Resolution Panel ('DRP'), on observing assessee's objections, rejected them and directed AO to complete the assessment as per the draft order. Accordingly, a final assessment order was made computing assessee's income at ₹ 268 crores.

6. The Hon'ble ITAT on appeal, remitted the matter to the AO directing him to first determine whether assessee had a Permanent Establishment ('PE') in India and, thereafter determine the taxability of its income in accordance with law and taking into consideration its ruling in CGG Veritas Services SA (ITA No. 4653/Del/2010).

7. Aggrieved, the assessee preferred an appeal before the Hon'ble Delhi High Court.

Judgment

1. The Hon'ble Delhi High Court ('HC') after having perused the provisions of section 9(1)(vii), 44BB(1) (prior to the Finance Act 2010 amendment), 44DA (prior to the Finance Act 2010 amendment) and 115A of the Act held that provisions of section 44BB would not apply in a case where provisions of section 115A of the Act were applicable for computing profits and gains or other income referred to in that section. It was, thus, necessary to refer to section 115A of the Act for ascertaining the nature of income that was taxable therein and consequently, expressly excluded from the ambit of section 44BB(1) of the Act by virtue of the proviso thereto.

2. Further, the income which was in the nature of 'fees for technical services' of the assessee would be taxable under section 115A(1)(b) of the Act unless it fell within the exclusion provided therein i.e. that such income was referred to in section 44DA(1) of the Act.

3. In view of the Hon'ble HC, section 44DA(1) of the Act would be applicable, *inter alia,* in respect of income by way of fees for technical services by a foreign company only in cases where such foreign company carries on business through a PE in India and the contract in respect of which income by way of fees for technical services was received was effectively connected with that PE.

4. On a combined reading of the above provisions, the Hon'ble HC thus held that, during the period 1-4-2004 to 1-4-2011, in the event the conditions of section 44DA(1)

of the Act were satisfied, the tax on income of the appellant for the relevant year would be liable to be computed in accordance with section 44BB(1) of the Act and not under section 115A of the Act. This interpretation was in accordance with the views expressed in *DIT v. OHM Limited (28 Taxman 120) (Del) & Geofizyka Torunsp Z.O.O.,* In re: (320 ITR 268) (AAR), wherein it was held that section 44BB of the Act, being industry specific was a special provision and would override the provisions of section 44DA(1) of the Act in respect of income which fell within the ambit of section 44DA(1) of the Act but had arisen in respect of business carried on in connection with prospecting for, or extraction or production of mineral oils.

5. The Hon'ble Court further clarified that after 1-4-2011, the conflict between 44BB & 44DA was resolved by the Finance Act, 2010 by introduction of a reference to section 44DA in the proviso to section 44BB of the Act and simultaneously introducing a second proviso to section 44DA which stated that section 44BB would not apply in respect of the income referred to in section 44DA of the Act.

6. The Hon'ble Court accordingly directed the AO to specifically determine whether assessee had a PE in India during the relevant period and if so, whether the contracts entered into between assessee and BG & RIL were effectively connected with assessee's PE in India. It held that only if the said two conditions were satisfied, assessee's income would be computed under section 44BB(1), and if not then assessee's income shall be computed under section 115A(1)(b) of the Act.

B) Tribunal Decisions

I. India – Germany DTAA- Permanent Establishment – Supervisory services through its technicians not a PE in India, however it is taxed as FTS

GFA Anlagenbau Gmbh vs. ADIT – Assessment Years: 2005-06 to 2009-10 – 2014-TII-95-ITAT-HYD-INTL

Facts

1. The assessee is a German company engaged in the activity of supervision, erection, commissioning of plant and machinery for steel and allied plants in India. It entered into an agreement with four Indian Companies Tata Steel Ltd., SMS Demag P. Ltd., SAIL, Jindal Steel and Power Ltd. for the supervision, erection, ramp up, commissioning, demonstration of performance, performance guarantee test, etc., of various 'plant and machinery' for their steel and allied plants. During the years under consideration, the assessee had received receipts from the Indian Companies for rendering technical and supervision services.

2. The Assessing Officer (AO) held that since the activities carried on by the assessee through its employees exceeded six months, it was liable to be assessed under Section 44D or Section 44DA of the Act. The AO also held that since the assessee was having PE in India under Article 5 of the tax treaty, its income was liable to be taxed under the head 'business profits' under Article 7 of the tax treaty.

3. The Disputes Resolution Panel (DRP) held that the clauses of the contract agreement as well as the provisions of the tax treaty establish that the assessee was having a PE in India. Further, with regard to the deduction of expenditure, it was held that the assessee was entitled to a deduction of 50% of gross receipts from all projects towards expenditure. Accordingly, the DRP directed the AO to impose tax, applying a rate of 40 per cent in addition to surcharge and education cess, as per Section 44DA of the Act.

Decision

On appeal, the Tribunal held in assessee' favour as follows:

1. Relying on the decision of the Andhra Pradesh High Court in the case of *Clouth Gummiwerke Akrineqesellschaft vs. CIT [1999] 103 Taxman 280 (AP)* (the Tribunal observed that supervisory activities are to be considered as FTS under Section 9(1)(vii) of the Act). The Tribunal held that this rationale would also apply to the present case and therefore, the assessee's supervisory activities have been correctly offered to tax under Section 9(1)(vii) read with Section 44D/Section115A of the Act.

2. The Andhra Pradesh High Court in the case of *CIT vs. Visakhapatnam Port Trust [1983] 144 ITR 146 (AP)* had observed that the expression PE used in the tax treaty postulates the existence of substantial element of enduring or permanent nature of a foreign enterprise in another country, which can be attributed to fixed place of business of that country. The High Court had observed that the mere supervisory activities would not form a PE. In the instant case, the Tribunal observed that though the rationale of the Andhra Pradesh High Court's ruling can be adopted, the India-German tax treaty at that point in time was different from the current tax treaty.

3. Relying on the decision of *Motorola Inc vs. DCIT [2005] 95 ITD 269 (Del) (SB)* it was, observed that the concept of 'fixed place of business' in the Act is not different from the general provision of Article 5(1) found in the Model Conventions and the other Indian tax treaties.

4. In the present case, the assessee was supervising the project of an Indian company and had no fixed place of business. Only its technicians deputed to India, in the case of one project, stayed for more than 180 days. Nothing was brought on record to show that the technicians were operating from a fixed place in the custody of the assessee.

5. The Tribunal observed that a literal reading of Article 5(2)(i) of the tax treaty indicates that supervisory activities by themselves cannot constitute a PE since the activities are required to be in connection with a building, construction or assembly activity of the non-resident, which is not the case here as the assessee provides only supervisory activities.

II. India-UK DTAA – Taxation of the Concept of "Make Available" – Services as viability assessment do not 'make available' technical knowledge, skills, etc. Hence not FTS under the India-UK tax treaty

ITO vs. Dholera Port Ltd. and Adani Port-Infrastructure Pvt. Ltd. 2014-TII-64-ITAT-AHM-INTL – Assessment Year: 2008-09

Facts

1. The assessee was contemplating to develop the Dholera Port, for which it had undertaken certain basic studies for evaluating the feasibility of the port.

2. The assessee availed services of the UK based company to undertake morphological, sedimentation and navigation & mooring studies. In terms of the said services, the assessee made payment to the UK based company without deduction of tax.

3. The Assessing Officer (AO) noted that no tax was deducted as required under Section 195 of the Act while making the payment. According to the AO, the services provided by the UK based company were fees for sedimentation studies and were in the nature of FTS under Explanation 2 to Section 9(1)(vii) of the Act. The AO concluded that the services provided by the UK based company were in the nature of consultancy services, which were made available to the assessee.

4. On an appeal to the Commissioner of Income-tax (Appeals) [CIT(A)] observed that since no technical knowledge, skill experience or process was made available to the assessee,

and since the assessee was also not in a position to render such services on its own to others, the fees paid to the UK based company were not FTS under Article 13(4)(c) of the tax treaty. It constitutes business income in the hands of a non-resident. Consequently, the assessee was not liable for withholding of tax.

Decision

On Revenue's appeal, the Tribunal held in favour of assessee as under:

1. The Appellate Tribunal observed that there is a significant distinction between the definition of FTS provided under Section 9 of the Act as compared with the definition of FTS provided in Article 13 of the tax treaty.

2. The Tribunal made a reference to the decision of the Supreme Court in the case of *Union of India vs. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)* Further, in the case *GE India Technology vs. CIT [2010] 327 ITR 456 (SC)* the Supreme Court held that there was no obligation for withholding of tax on any person, if the payment made to a non-resident was not chargeable to tax.

3. Accordingly, it was held that services rendered by the UK based company do not make available the technical knowledge, experience and know-how to the assessee. Therefore, the payment made by the assessee was outside the ambit of Section 195 of the Act.

III. Disallowance u/s. 40(a)(ia) – Retrospective amendment, and short deduction of TDS should not attract disallowance under Section 40(a)(ia) with respect to payment of placement fees – in assessee favour

ACIT vs. NGC Networks (I) Pvt. Ltd. 2014-TII-99-ITAT-MUM-INTL – Assessment Year: 2009-10

Facts

1. The assessee paid placement charges to cable operators for placing their channel on a particular frequency or bandwidth so as to maximise viewership and increase quality of the channel being aired. On such payments, the assessee deducted taxes at 2% under Section 194C of the Act.

2. The tax officer was of the view that placing a particular channel on a particular frequency is an integral part of the transmission and broadcasting process. Accordingly, the said payment constitutes royalty, and taxes ought to have been deducted at 10% under Section 194J of the Act. Since the assessee has deducted taxes at 2% under Section 194C of the Act, the provisions of Section 40(a)(ia) of the Act are attracted for disallowance.

3. The Dispute Resolutions Panel (DRP), after considering the definition of 'process', inserted with retrospective effect by the Finance Act, 2012, by way of Explanation 6 to Section 9(1)(vi) of the Act, held that the payment of placement fees does not tantamount to payment of fees for transmission purpose and does not constitute royalty under the Act.

4. Accordingly, the DRP held that disallowance under Section 40(a)(ia) is not warranted.

Decision

The Tribunal held as under:-

1. The Tribunal held that channel placement fee paid to cable operators/DTH providers cannot be regarded as royalty as it does not fall under the definition of 'royalty' under Explanation 2 to Section 9(1)(vi) of the Act.

2. Further, with respect to the Explanation 6 inserted by the Finance Act, 2012, with effect from 1 July 1976, the Tribunal held that the same cannot be pressed into service for the purpose of disallowance under Section 40(a)(ia) of the Act because at the time when the assessee deducted the tax at source, the said explanation was not on statute. In this regard, the Tribunal

considered the decisions in the case of *Channel Guide India Limited vs. ACIT [2012] 139 ITD 49 (Mum.)* and *Sterling Abraive Ltd vs. ACIT [2011] 140 TTJ 68 (Ahd.)* wherein it has been held that law compels as assessee to do something which is impossible to perform.

3. Accordingly, the Tribunal held that when the assessee has deducted tax under Section 194C of the Act, which is a *bona fide* decision, keeping in view the nature of payments and facts of the case, it is not supposed to forsee the subsequent retrospective amendment in the statute to deduct tax at source under Section 194J of the Act.

4. Further, the Tribunal also referred to the decision of the Calcutta High Court in the case of *CIT vs. S.K. Tekriwal (ITA No. 183 of 2012)* wherein it is held that if there is any shortfall due to difference of opinion, no disallowance under Section 40(a)(ia) can be made on account of shortfall in the deduction of taxes at source.

5. The Tribunal also relied on the decision in case of *SKOL Breweries vs. ACIT (2013) 153 TTJ-257 (Mum.)* [which in-turn relies on the decision of *Sonata Information Technology Limited vs. DCIT (2012) 54 SOT 233 (Mumbai)]* and held that Explanation 6 cannot be pressed into service, as the definition of 'royalty' for the purpose of Section 40 refers to 'royalty' as per Explanation 2 to Section 9(1)(vi) of the Act [and does not refer to Explanation 6 to Section 9(1)(vi)].

6. Accordingly, the Tribunal upheld the order of the DRP and held that no disallowance should be made under Section 40(a)(ia) of the Act on account of placement charges paid by assessee to cable operators.

IV. Transfer Pricing – Application of Resale Price Method (RPM) – Determination of Selling Price and Gross Profit Margin – Tribunal rejects the TPO's approach of reducing cash discount, outward freight, and storage charges from selling price, with regard to computation of Gross Profit Margin-in assessees favour

Panasonic Sales & Services (I) Company Limited vs. ACIT 2014-TII-138-ITAT-MAD-TP – Assessment Year: 2008-09

Facts

1. The assessee is a subsidiary of Panasonic Holdings (Netherlands BV) which is ultimately held by Matsushita Electronic Co. Ltd., Japan. The assessee is engaged in the import of consumer electronic products from its Associated Enterprises (AE) for sale in the domestic market, and also provides market support services.

2. During the relevant year (A.Y. 2008-09), the assessee purchased goods from its AE for re-sale in India. It adopted RPM to determine the Arm's Length Price (ALP) of the goods purchased from the AE with GPM as the Profit Level Indicator (PLI). The assessee's margin was 14.69 per cent in respect of its international transactions, as against 16.47 per cent for comparables on the basis of multiple years' data, which was within the permissible limit of +/-5 per cent as envisaged by proviso to Section 92C(2) of the Income-tax Act, 1961 (the Act). For the transaction relating to marketing support services, Transactional Net Margin Method (TNMM) was adopted to determine the ALP.

3. There was no dispute with regard to the value of international transactions and the method adopted by the assessee. However, the dispute was with regard to determination of selling price and the calculation of GPM of the assessee and the comparable companies. In relation to the same, the Transfer Pricing Officer (TPO)/Assessing Officer (AO), made downward adjustment of purchase cost from the AE amounting to INR 145.53 million,

and upward adjustment of development and business promotion expenses amounting to INR 60.63 million.

4. The TPO while calculating the GPM reduced the cash discount offered by the assessee for early realisation of outstanding dues on account of sales. The TPO also added the freight and storage charges by treating them as direct expenses incurred in relation to purchase of goods. Further, the TPO did not distinguish between brand promotion and marketing expense, and made an upward adjustment towards development and business promotion expenses.

5. The assessee contended that the TPO had erred in equating cash discounts with trade discounts, and further contended that these discounts were given by the assessee to its debtors, post sales. The assessee, referring to Rule 10B(1)(b) of the Income-tax Rules, 1962 (the Rules) contended that the TPO erred in adding freight and storage charges to the cost of goods sold, while the Rule clearly explains that only expenses incurred in connection with the purchases are required to be reduced from sales. The freight and storage expenses are not towards inward but outward sales, and are thus in the nature of selling expenses. On the issue of brand promotion and marketing expense, the assessee relied on its own case *[Panasonic Sales & Services (India) Pvt. Ltd. vs. ACIT (2013]) 143 ITD 733 (Chen.)*

Decision:

On Appeal, the Tribunal held as follows:

1. On the issue relating to cash discount given by the assessee, the Tribunal stressed that cash discounts were offered by the assessee to its debtors for early realisation of payments, and were thus in the nature of financial charges. Further, the Tribunal held that the cash discounts were in the nature of incentives for early payments for the sales made by the assessee.

2. On the issue relating to reducing freight and storage expenses from selling price, the Tribunal observed that these expenditures were towards cost of packing and transportation of goods from the warehouse of the assessee to the customers, and that the expenditure on outward freight is in the nature of selling and distribution expenses.

3. The Tribunal held that the TPO erred in equating cash discounts with trade discount and that the cash discounts in the present case were offered after the completion of sales, and hence is entirely different in nature from trade discounts, and therefore held that the contention of the TPO to reduce it from the selling price was mis-conceived.

4. The Tribunal held that by no stretch of imagination, can the freight and storage expenses be reduced from selling price to determine the cost of goods sold.

5. With regard to marketing expenditure, the Tribunal followed the co-ordinate bench decision in the assessee's own case *Panasonic Sales & Services (India) Pvt. Ltd. vs. ACIT [2013] 143 ITD 733 (Chen.)* for the year wherein the Tribunal relied on the decision of the Special Bench (SB Ruling) in the case of *LG Electronics vs. ACIT [2013] 22 ITR (Trib.) 1 (Del.)(SB)*

Thus the Tribunal dismissed the TPO's contentions and directed the AO to treat the cash discount, outward freight, and storage charges towards selling and distribution expenses instead of reducing the same from selling price. This decision brings more clarity in the determination of selling price for the application of RPM.

CA. Bharat Shemlani

INDIRECT TAXES

Service Tax – Case Law Update

1. Services

Works Contract Service

1.1 YFC Projects P. Ltd. vs. UOI 2014 (35) STR 8 (Del.)

The High Court in this case held that the appellant has used Ready Mix Concrete (RMC) captively and supplied to third parties and only service element of use of RMC was amenable to service tax and not the entire RMC.

AC Restaurant Service:*1.2 Valley Hotels & Resorts vs. CCT, Dehradun 2014 (35) STR 28 (Uttarakhand)*

The High Court in this case held that, where element of service has been declared and brought under Service Tax *vide* Notification No. 24/2012-ST dated 6-6-2012, no VAT can be imposed on value of such service element.

Goods Transport Agency Service:

1.3 CCE, Salem vs. KMB Granites Pvt. Ltd. 2014 (35) STR 63 (Mad.)

The assessee, manufacturer of polished granites monuments/slabs/tiles availed service of GTA for transporting of its goods, both inward and outward. The demand of service tax thereon has been set aside by the Tribunal holding the assessee had engaged only individual lorry or truck operators who could not be considered as 'commercial concern'. The High Court set aside the Tribunal order and held that individual operator would also be covered within the expression 'commercial concern' and therefore assessee is liable to pay service tax.

Interior Decorator Service

1.4 Shobha P. Bhopatkar vs. CCE, Pune-III 2014 (35) STR 78 (Tri.-Mumbai)

The appellant in this case engaged in works contract for levelling of area and preparing of courtyards, plantation of trees/shrubs and laying pebbles and waterfall and maintenance of lawn. The Tribunal held that work orders are for execution of work and cannot be considered as advisory or consultancy or technical assistance.

Construction Service

1.5 ATR Constructions Pvt. Ltd vs. CCE, Ghaziabad 2014 (35) STR 92 (Tri.-Del.)

The Department sought to deny the benefit of abatement under Notification No. 1/2006-ST for failure to declare gross consideration received from service recipient, including value of goods freely supplied for taxable service. The Tribunal held, the Larger Bench of Tribunal in *Bhayana Builder (P) Ltd. 2013 (32) STR 49 (Tri.-LB)* interpreted scope of Notification No. 1/2006-ST to mean value of free supplies not comprehended within the scope of 'gross consideration received'.

Manpower Recruitment or Supply Agency Service

1.6 Computer Sciences Corpn. India Pvt. Ltd. vs. CST, Noida 2014 (35) STR 94 (Tri.-Del.)

The appellant company in this case employed overseas employees or transferred from other group companies. Further in addition to deductions from salaries towards provident fund and income tax, remittance made to group companies include certain social security and other benefits payable under law of foreign jurisdiction. However, no amount over and above the remittances to seconded employees were paid to overseas companies. The Tribunal held that, issue is squarely covered by *Volkswagen India Pvt. Ltd. 2014 (34) STR 135 (Tri.)* wherein it is held that global employees working as employees and employee-employer relation is present.

Cargo Handling Service

1.7 CCE, Meerut vs. Prempal Singh 2014 (35) STR 136 (Tri.-Del.)

The assessee in this case involved in handling of goods in factory or godown, removing of garbage etc. The Tribunal observed that assessee is not involved in packing and loading of sugar onto vehicles/railway wagons for transport and hence, activity cannot be said to be adjunct to transportation of goods and therefore impugned activity not covered by Cargo Handling Service.

2. Interest/Penalties/Others

2.1 CCE vs. Glyph International Ltd. 2014 (35) STR 30 (All.)

The High Court in the present case held that, section 86(6) of FA, 1994 which refers to fees which has to accompany an appeal does not speak of refund/rebate. Prior to 1-11-2004 there was provision for payment of fees in case of every appeal and the present provision does not contain an analogous arrangement.

2.2 Barnala Builders & Property Consultants vs. Dy. CCE&ST, Dera Bassi 2014 (35) STR 65 (P&H)

The High Court in this case held that, order passed by the Deputy Commissioner of Central Excise and Service Tax under Service Tax Voluntary Compliance Encouragement Scheme is appealable under section 86 of FA, 1994.

2.3 Spanco Telesystems & Solutions Ltd. vs. CST, Mumbai 2014 (35) STR 76 (Tri.-Mumbai)

The Tribunal in this case held that it has no jurisdiction to hear appeal filed against order passed by Commissioner (Appeals) in respect of rebate claim and therefore it is not maintainable. The Registry is directed to transfer the appeal to Joint Secretary to Government of India.

2.4 Jyotsana D. Patel vs. CCE, Nagpur 2014 (35) STR 77 (Tri.-Mumbai)

The Tribunal in this case held that appellant is not liable to pay service tax for purchase of residential unit and the refund claimed is not an amount of service tax and therefore, provisions of section 11B are not applicable.

2.5 B4U Television Network (I) P. Ltd. vs. CST, Mumbai 2014 (35) STR 88 (Tri-Mumbai)

The appellant in this case adjusted excess payment of service for the period 2001 to 2002 against the period October, 2002 to March, 2003. The Tribunal held that, excess payment is not disputed and adjusted against future liability and the revenue's contention that assessee ought to have filed refund claim not acceptable in light of decision in Nirma Architects (2006 (1) STR 305 (Tribunal)).

3. CENVAT Credit

3.1 CCE, Nagpur vs. Indorama Synthetics (I) Ltd. 2014 (35) STR 96 (Tri.-Mumbai)

The Tribunal in this case considering precedent decisions held that assessee is entitled to claim CENVAT credit of service tax paid on brokerage, air travel bookings, transportation of employees etc.

3.2 Aquapharm Chemicals Pvt. Ltd. vs. CCE, Raigad 2014 (35) STR 113 (Tri.-Mumbai)

The appellant in this case availed credit at manufacturing unit at Mahad of service tax paid on CHA service by its registered office, Pune. The department sought to deny the same. The Tribunal held that there is no provision in law prohibiting Mahad unit where goods manufactured and cleared for export and CHA services availed thereof, from availing credit of service tax paid on said services, merely because exporter having registered office at Pune.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Harshadbhai B. Patel vs. Bhagirath Construction Co. P. Ltd. and Others. [2014] 185 Comp Cas 58 (CLB) – [Before the Company Law Board-Mumbai Bench]

Even though MoU which is not part of Articles of Association and being a private arrangement not binding on the company and same is to agitated in Civil Court. However, if company has taken the benefit or acted in terms of such private arrangement, then same is binding on the company.

Brief Facts

The company petition has been filed by the petitioner alleging that three respondent have oppressed him and also mismanaged the respondent company.

There was a Memorandum of Association ("MoU") entered by the petitioner and three respondents. These three respondents were the directors and promoters of the respondent company.

Based on MoU, petitioner has acquired the shares of the respondent company by making payments to respondents. The petitioner has also made unsecured loan to respondent company. Based on MoU, the three directors from the petitioner were to be appointed on the board and two respondents were to resign. The allegations are as follows:

1. Balance sheet and annual returns since 2004 were not filed.
2. Form 32 for the appointment of three directors of petitioner not filed.
3. Further allotment of shares to dilute the shareholding of petitioner during the pendency of the petition.
4. Providing wrong registered office address and making this address on all filings on the address which was not occupied. The same address was used by respondents for all their filings with CLB.
5. Some of the minutes were destroyed.
6. Due to MCA systems, only existing directors can file new form and thus petitioner forms could not be uploaded.
7. Even after resignation as per the Companies Act, respondents have taken the management and property of the company in their hands which leads to oppression and mis-management.
8. To avoid the company's being NPA, petitioner has paid the loan amount and thus respondent company was saved from become NPA and taking over of its assets by banks.

For the effect and acceptance of resignation, the judgment in the *State of Bihar vs. Sitaram Jhunjhunwala, AIR 1967 Patna 433* was quoted, which states that acceptance of resignation, is not necessary. The other cases referred are *Glossop vs. Glossop [1907] 2 Ch D 370* and *Latchford Premier Cinema Ltd. vs. Ennion [1931] 2 Ch D 409.*

From respondents' side, they have contested the above with the following arguments.

1. The petition is based on MoU.
2. They pray that form 32 for the appointment of petitioner's directors be made and that form for resignation of directors also made. As this is dispute between parties and same can be treated as oppression and mis-management?
3. As per MoU, respondent no 2 & 3 were not to resign.
4. Petitioner was not able to comply with terms of MoU and his funds were refunded by the respondent nos. 2 & 3.
5. Petitioner has not paid the amount as per terms of MoU and hence the same was terminated on particular date as per section 55 of the Indian Contracts Act.
6. Filing of forms is the procedural lapse and the same can be ratified.
7. The petition is not maintainable as no case of winding up is pleaded or tenable.

Judgments and Reasoning

The petition was allowed. The CLB has observed that respondent could not counter any case laws presented by the petitioner that same are not applicable to present case. It was also admitted that 50.57% shares were transferred to the petitioner. Also, respondent no 2 & 3 had resigned but they resigned as Managing Director and Chairman and not as a director. The CLB has also noted that, even though the non-filing of forms can be filed with late fine and penalties *per se* not oppression but if same is result in to denial of rights of the shareholders, then is oppressive and also reveals as mis-management of the company.

It was also noted that even though MoU which is not part of Articles of Association and being a private arrangements not binding on the company and same is to agitated in Civil Court. However, even though company is not a party to such agreements, but has taken the benefit or acted in terms of such private arrangement, then same is binding on the company. On winding up, CLB has observed that where there is justification for winding up the company on just and equitable grounds under section 397 could be considered by the CLB.

Ganesh Bindal v. Harmandeep Singh and Others. [2014] 185 comp Cas 1 (CLB) [Before the Company Law Board- Northern Region Bench]

In the petition under sections 397 and 398 of the Companies Act, 1956, sending documents to the Forensic Science department is also a part of enquiry to ascertain whether documents are forged or not

Brief Case:

The petitioner has filed the petition under section 397, 398 402 and 403 of the Companies Act, 1956 ("Act').

The current application from the petitioner is to take cognizance of the offence committed by the respondent. The application is for giving direction for appropriate inquiry under section 340 of the Code of Criminal Procedure, 1973 (Cr CP).

In his application, the petitioner has stated that it has strong suspicion on the followings.

1. That respondent no. 1 has fabricated the false signature of respondent no. 2 on the pages of the reply.

2. That resignation letter of the petitioner and another director of the company have also been fabricated and misused and submitted to the RoC.

3. The respondent has misused and misutilised the signature of petitioner given on blank paper in good faith for drafting a board resolution.

4. The respondent has misused the blank signed documents for preparation of an affidavit, which is used for company's purposes whereas same was given in individual capacity.

5. The adhesive stamps affixed on the pre-signed blank papers have been manipulated and that ante-dated stamps have been procured.

In its support, the applicant has relied on the section 191 of the Indian Penal Code, 1860 which deals with giving false evidence which is an offence under section 193. It also provided the provisions of section 340 of the Cr CP as how to conduct an inquiry on such allegations. The judgment in Dr. Smt. Shipra v. Shanti Lal, AIR, 1995 Raj 50 was referred. In the said judgment it was observed that object of verification is to test the genuineness and authenticity of the averments made. The Supreme Court *suo motu* proceedings against R.R. Kamppan was also cited. Further the reference in the case of Pritish v. State of Maharashtra [2002] 1 SCC 253 was also made. In which it is stated that "in order to form an opinion the court is empowered to hold a preliminary inquiry." The judgment of Hon. Company Law Board, Additional principal Bench, Chennai in the case of *S.N. Harish vs. Pods Biotech P. Ltd [2009] 148 Comp Cas 804 (CLB)* was also quoted. In the said judgment, CLB has mentioned that, sending documents to the Forensic Sciences Department is also a part of enquiry.

In its counter argument, the respondent's advocate has argued that section 340 of the Cr CPC makes it clear that it is only in those cases the inquiry is being ordered where the court is of the opinion that an offence has been committed under section 195 of the IPC and it is expedient in the interest of justice to have inquiry.

The judgment of the Hon. Supreme Court in the case of *Iqbal Singh Marwah vs. Meenakshi Marwah [2005] 4 SCC 370* was quoted. In the said judgment, it was observed that "the maintainability of the complaint under section 195 of the IPC read with section 340 of the Cr CPC, the Court is not bound to make such complaint as and when every application is made before it". The Court has to look in to the gravity of injury suffered by the person so affected.... "

Judgment and Reasoning:

The CLB has accepted the application. CLB has directed the Bench Officer to send original documents related to resignation letter of the petitioner, and another director of the company, affidavit signed on October 14, 2010 and resolution signed to the Central Forensic Science Laboratory.

The CLB has relied on the judgment in *S.N. Harish vs. Pods Biotech P. Ltd.*, supra, where in it was observed that sending documents to the forensic sciences department is also a part of enquiry, while dealing with the matter under section 397/398 of the Act".



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/ Notifications issued by RBI:

1. Financial Commitment (FC) by Indian Party under Overseas Direct Investments (ODI) – Restoration of Limit

In terms of the extant provisions under the Foreign Exchange Management Act, 1999 (FEMA, 1999) on overseas direct investments, as amended by AP (Dir. Series) Circular No. 23 dated August 14, 2013, the total overseas direct investment (ODI) of an Indian Party in all its Joint Ventures (JVs) and / or Wholly Owned Subsidiaries (WOSs) abroad engaged in any *bonafide* business activity was reduced to 100 per cent of the net worth of the Indian Party from 400 percent of the net worth as on the date of the last audited balance sheet under the Automatic Route.

On a review, RBI has restored the limit of Overseas Direct Investments (ODI)/ Financial Commitment (FC) to be undertaken by an Indian Party under the automatic route to the limit prevailing, as per the extant FEMA provisions, prior to August 14, 2013. It has, however, been decided that any financial commitment exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route (i.e., within 400% of the net worth as per the last audited balance sheet).

(A.P. (DIR Series) Circular No. 1 dated 3rd July, 2014)

(This is a welcome step in light of the increasing forex reserves & the appreciating rupee. With rupee being seen stabilising against Dollar with the help of recent upsurge of foreign investment in India, RBI's step of restoring the limit of ODI investment up to 400 per cent would be a welcome and a right step for the Indian companies looking to expand their business worldwide Large corporates requiring forex exceeding US$ 1 billion, however, will require prior RBI approval, which was not applicable earlier even when the financial commitment ceiling was restricted up to 100 percent of the net worth)

2. Foreign Exchange Management Act, 1999 – Import of Rough, Cut and Polished Diamonds

In terms of A.P.(DIR Series) Circular No.59 dated May 6, 2011, AD Category – I banks were permitted to approve Suppliers' and Buyers'

Credit (Trade Credit), including the usance period of Letters of Credit for import of Rough, Cut and Polished Diamonds for a period not exceeding 90 days from the date of shipment.

Taking into consideration the representations received from the diamond importers and the GJEPC, RBI, in consultation with the Government of India has decided that the Clean Credit i.e. credit given by a foreign supplier to its Indian customer/ buyer, without any Letter of Credit (Suppliers' Credit) / Letter of Undertaking (Buyers' Credit) / Fixed Deposits from any Indian financial institution for import of Rough, Cut and Polished Diamonds, may be permitted for a period not exceeding 180 days from the date of shipment.

AD Category – I banks are advised to ensure that due diligence is undertaken and Know-Your-Customer (KYC) Norms and Anti-Money Laundering (AML) Standards, issued by the Reserve Bank are adhered to while undertaking the import transactions. Further, any large or abnormal increase in the volume of business should be closely examined to ensure that the transactions are bonafide. All other instructions relating to imports of Rough, Cut and Polished Diamonds shall continue.

(A.P. (DIR Series) Circular No. 2 dated 7th July, 2014)

(In order to address the representations received from Diamond Importers along with the GJEPC and to facilitate the Import of Diamonds in India, RBI has increased the limit of credit period. This relaxation will help those importers who are able to obtain clean credit for a period between 90 to 180 days)

3. Issue of Partly Paid Shares and Warrants by Indian Company to Foreign Investors

Currently, In terms of Notification No.FEMA.20/2000-RB dated 3rd May 2000- Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 only equity shares and compulsorily and mandatorily convertible preference shares/debentures are recognised as Foreign Direct Investment (FDI) compliant instruments. Further, equity shares or compulsorily and mandatorily convertible preference shares/debentures containing an optionality clause but without any option/ right to exit at an assured price were also recognised as FDI compliant instruments. However, issue of partly paid up shares and warrants was not permitted.

RBI has now reviewed the policy as regards partly paid shares and warrants and has decided as under:

(i) Eligible instruments and investors

Partly paid equity shares and warrants issued by an Indian company in accordance with the provision of the Companies Act, 2013 and the SEBI guidelines, as applicable, shall be eligible instruments for the purpose of FDI and FIIs Investors subject to compliance with FDI and FPI schemes.

(ii) Pricing and receipt of balance consideration

(a) Partly paid equity shares

The pricing of the partly paid equity shares shall be determined upfront and 25% of the total consideration amount (including share premium, if any), shall also be received upfront and the balance consideration shall be received within a period of 12 months.

The time period for receipt of the balance consideration within 12 months shall not be insisted upon where the issue size exceeds rupees five hundred crore and the issuer complies with Regulation 17 of the SEBI (ICDR)) Regulations regarding monitoring agency. Similarly, in case of an unlisted Indian company, the balance consideration amount can be received after 12 months where the issue size exceeds rupees five hundred crores. However, the investee company shall appoint a monitoring agency on the same lines as required in case of a listed Indian company under the SEBI (ICDR) Regulations. Such monitoring agency (AD Category -1 bank) shall report to the investee company as prescribed by the SEBI regulations, ibid, for the listed companies.

(b) Warrants

The pricing of the warrants and price/ conversion formula shall be determined upfront and 25% of the consideration amount shall also be received upfront. The balance consideration towards fully paid up equity shares shall be received within a period of 18 months;

The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such warrants, in accordance with the extant FEMA Regulations and pricing guidelines stipulated by RBI from time to time. Thus, Investee company shall be free to receive consideration more than the pre-agreed price.

(iii) Reporting

(a) Partly paid equity shares

The reporting of receipt of foreign inward remittance towards each upfront /call payment for FDI transaction shall be made in Advance Reporting Form along with copies of FIRC, KYC report and details of the Government approval, if any. The reporting of issue or transfer of partly paid shares shall be made in form FC-GPR and form FC-TRS respectively, to the extent the equity shares are called up.

(b) Warrants

The identity of non-resident investor shall be disclosed for the purpose of compliance with KYC norms at the time of issuance of warrants.

The reporting of receipt of foreign inward remittance towards each upfront /call payment for FDI transaction shall be made in Advance Reporting form along with a copies of FIRC, KYC report and details of the Government approval, if any. The reporting of issue or transfer of warrants in form FC-GPR and form FC-TRS respectively, under the head 'others', shall reflect the extent up to which the amount in respect of equity shares has been called up by the company.

(iv) Compliance

The onus of compliance of all the conditions under FEMA as regards entry route, sectoral caps and all other conditions under FDI guidelines shall be on the Investee company in case of issue of partly paid shares /warrants as well as upon resident transferor or transferee in accordance with extant guidelines in case of transfer of partly-paid shares/warrants. The onus of giving notice required under the provisions of the Companies Act, 2013 for transfer of partly-paid shares shall also be on the Investee company. The onus of compliance with individual limit below 10% (ten per cent) of the total paid-up equity capital shall be on each FII/RFPI. Further, the aggregate investments of all FIIs/RFPIs put together shall not exceed the applicable aggregate limit for each issue of partly paid shares.

Other conditions

The following other conditions shall also be adhered to:

(a) The Indian company whose activity/ sector falls under government route would require prior approval of the FIPB for issue of partly-paid shares/ warrants.

(b) The forfeiture of the amount paid upfront on non-payment of call money shall be in accordance with the provisions of the Companies Act, 2013 and Income tax provisions, as applicable;

(c) The company while issuing partly paid shares or warrants shall ensure that the sectoral caps are not breached even after the shares get fully paid-up or warrants get converted into fully paid equity shares. Similarly, the Non-resident investors acquiring partly paid shares or convertible debentures or warrants shall ensure that the sectoral caps are not breached even after the shares get fully paid-up or warrants get converted into fully paid equity shares.

(d) The deferment of payment of consideration amount or shortfall in receipt of consideration amount as per applicable pricing guidelines by the foreign investors will not be covered under these guidelines so as to be treated as subscription to partly paid shares and warrants. Thus, the Investee company under these guidelines for issue/transfer of partly-paid shares/ warrants, shall require to comply with the requirements under the Companies Act, 2013 for issuance of partly paid shares and warrants;

Non-Resident Indians (NRIs) shall also be eligible to invest on non-repatriation basis in partly-paid shares and warrants issued by Indian companies in accordance with the provisions of the Companies Act/ SEBI guidelines / Income tax provisions, as applicable. Investments by NRIs in partly-paid shares and warrants on non-repatriation basis shall also be subject to terms and conditions stipulated in Schedule 4 to Notification No. FEMA. 20/2000-RB dated 3rd May 2000, as amended from time to time

(A.P. (DIR Series) Circular No. 3 dated 14th July, 2014/ Notification No. 308/2014- RB dated 30th June, 2014)

(At the time of issue of Consolidated FDI Policy, Review of FDI policy to include warrants and partly-paid shares was under consideration of the Government. This move, with proper checks, satisfies long standing demand from the industry and brings FDI in parity with domestic investments)

4. Foreign Direct Investment (FDI) in India – Issue/Transfer of Shares or Convertible Debentures

- Revised pricing guidelines

The extant pricing guidelines in respect of transfer/issue of shares and for exit from investment in equity shares with or without optionality clauses of listed/unlisted Indian companies have been reviewed by RBI so as to provide greater freedom and flexibility to the parties concerned under the FDI framework.

The new existing & the new pricing guidelines are as under:

Annex 1

(Refer A.P. (DIR Series) Circular No.4 dated 15.07.2014)

Sr. No.	Issue/ Transfer of Shares	Existing Provisions	Revised Provisions
1.	**Issue of Shares**	**Issue of Shares to non-residents** Price of shares issued to persons resident outside India under this Schedule, shall not be less than (a) the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company is listed on any recognised stock exchange in India;	**Issue of Shares to non-residents** Price of shares issued to persons resident outside India under this Schedule, shall not be less than **No Change in existing clause (a)**

		(b) the fair valuation of shares done by a SEBI registered Category - I Merchant Banker or a Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognised stock exchange in India; and	(b) the fair valuation of shares done as per any internationally accepted pricing methodology for valuation of shares on arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker where the shares of the company are not listed on any recognised stock exchange in India
		(c) the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.	This provision is omitted
2.	**Transfer of Shares**	**Transfer by Resident to Non-resident** (i.e. to foreign national, NRI, FII and incorporated non-resident entity other than erstwhile OCB)	**Transfer by Resident to Non-resident** (i.e. to foreign national, NRI, FII, QFI, RFPI and incorporated non-resident entity other than erstwhile OCB)
		(a) where shares of an Indian company are listed on a recognized stock exchange in India, the price of shares transferred by way of sale shall not be less than the price at which a preferential allotment of shares can be made under the SEBI Guidelines, as applicable, provided that the same is determined for such duration as specified therein, preceding the relevant date, which shall be the date of purchase or sale of shares.	**No Change in the existing clause (a)**
		(b) where the shares of an Indian company are not listed on a recognized stock exchange in India, the transfer of shares shall be at a price not less than the fair value to be determined by a SEBI registered Category – I - Merchant Banker or a Chartered Accountant as per the discounted free cash flow method. The price per share arrived at should be certified by a SEBI registered Category-I-Merchant Banker / Chartered Accountant.	(b) where the shares of an Indian company are not listed on a recognized stock exchange in India, the transfer of shares shall be at a price not less than the fair value worked out as per any internationally accepted pricing methodology for valuation of shares on arm's length basis which should be duly certified by a Chartered Accountant or a SEBI registered Merchant Banker.

3.	**Transfer of Shares**	**Transfer by Non-resident** (i.e. by incorporated non-resident entity, erstwhile OCB, foreign national, NRI and FII) **to Resident** Price of shares transferred by way of sale, by non-resident to resident shall not be more than the minimum price at which the transfer of shares can be made from a resident to a non-resident as given in para 2 above.	**Transfer by Non-resident** (i.e. by incorporated non-resident entity, erstwhile OCB, foreign national, NRI, FII, QFI and RFPI) to Resident **No Change in the existing clause**

Annex 2

(Refer A.P. (DIR Series) Circular No.4 dated 15.07.2014)

c.f. Annex to A.P.(DIR Series) Circular No. 86 dated January 9, 2014	**Earlier condition for instruments with optionality clause**	**Revised condition for instruments with optionality clause**
Para 2(b)	(ii) In case of unlisted company, the non-resident investor shall be eligible to exit from the investment in equity shares of the investee company at a price not exceeding that arrived at on the basis of Return on Equity (RoE) as per the latest audited balance sheet. Any agreement permitting return linked to equity as above shall not be treated as violation of FDI policy/FEMA Regulations. Note: For the above purpose, RoE shall mean Profit After Tax / Net Worth; Net Worth would include all free reserves and paid up capital. (iii) Investments in Compulsorily Convertible Debentures (CCDs) and Compulsorily Convertible Preference Shares (CCPS) of an investee company may be transferred at a price worked out as per any internationally accepted pricing methodology at the time of exit duly certified by a Chartered Accountant or a SEBI registered Merchant Banker. The guiding principle would be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement and shall exit at the price prevailing at the time of exit, subject to lock-in period requirement, as applicable.	(ii) In case of an unlisted company, the non-resident investor shall be eligible to exit from the investment in equity shares, Compulsorily Convertible Debentures (CCDs) and Compulsorily Convertible Preference Shares (CCPS) of the investee company at a price not exceeding that arrived at as per any internationally accepted pricing methodology on arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker. The guiding principle would be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreements and shall exit at the fair price computed as above at the time of exit, subject to lock-in period requirement, as a

An Indian company taking on record in its books transfer of its shares or convertible debenture by way of sale from a resident to a non-resident and a non-resident to a resident is now required to disclose in its balance sheet for the financial year, in which the transaction took place, the details of valuation of share or convertible debentures, the pricing methodology adopted for the same as well as the agency that has given/certified the valuation.

(A.P. (DIR Series) Circular No. 4 dated 15th July, 2014/ Notification No. 306/2014- RB dated 23rd May, 2014)

(This is a welcome move by RBI as valuation under DCF considered cash as king in complete disregard to other factors such as asset base, good will, etc. which a prudent foreign investor may consider relevant. This step by RBI will provide greater freedom and flexibility to negotiate deals based on international valuation methods, to the parties concerned under the FDI framework.)

5. Liberalised Remittance Scheme (LRS) for resident individuals-Increase in the limit from USD 75,000 to USD 125,000

In terms of A.P. (DIR Series) Circular No. 138 dated 3rd June, 2014, the limit for Liberalised Remittance Scheme (LRS) for Resident Individuals was increased to USD 125,000 per financial year (April-March) from USD 75,000 for any permitted current or capital account transaction or a combination of both.

However, restrictions imposed on acquisition of immovable properties abroad vide A.P. (DIR Series) Circular No 24 dated August 14, 2013 and the subsequent clarifications issued vide A.P. (DIR Series) Circular No 32 dated September 04, 2013, were not withdrawn while raising limit to USD 125,000.

It has been clarified in this circular that the Scheme can now be used for acquisition of immovable property outside India.

(A.P. (DIR Series) Circular No. 5 dated 17th July, 2014/ Notification No. 311/2014- RB dated 24th June, 2014)

(This is a welcome relaxation by RBI permitting once again acquisition of immovable property under the LRS Scheme)

6. Foreign Direct Investment-Reporting under FDI Scheme

The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India has, vide Press Note 4 (2014 Series) dated June 26, 2014 decided to switch over to the National Industrial Classification 2008 (NIC 2008) from the NIC 1987 version, for the purpose of classification of activities under the industrial classification system.

Indian companies are now required to report the NIC Codes in the FCGPR and FCTRS forms as per the NIC 2008 version.

RBI has also decided to introduce a uniform State and District code list for reporting of details of foreign direct investment by Indian companies in Form FCGPR. The list can be accessed on the RBI website (www.rbi.org.in □ FEMA – State and District Code List).

(A.P. (DIR Series) Circular No. 6 dated 18th July, 2014)

(This is a practical step taken by RBI to bring in parity with the reporting under FDI guidelines)

7. Rupee Drawing Arrangement – Delegation of work to Regional Offices

Currently, application for obtaining first time approval to enter into Rupee / Foreign Currency Drawing Arrangements with Exchange Houses needs to be submitted by the AD Cat-I Bank to the Chief General Manager-in-Charge, Foreign Exchange Department, Forex Markets Division, Reserve Bank of India, Central Office, Mumbai - 400001.

RBI has now delegated the work of granting first time permission to AD Cat-I Banks for entering into Rupee Drawing Arrangement (RDA) with non-resident exchange house to the Regional Offices of the Reserve Bank.

Henceforth, AD Category - I Banks should submit the duly approved Annual Review note by 30th June every year, also to the respective Regional Office of the Foreign Exchange Department of the Reserve Bank under whose jurisdiction the registered office of the applicant falls.

(A.P. (DIR Series) Circular No. 7 dated 18th July, 2014)

8. Money Transfer Service Scheme – Delegation of work to Regional Offices

Currently, the application for necessary permission to act as an Indian Agent under MTSS is required to be made to the Chief General Manager-in-Charge, Forex Markets Division, Foreign Exchange Department, Reserve Bank of India, Central Office, Fort, Mumbai-400 001.

It has now been decided to delegate the work related to authorization of Indian Agents to the Regional Offices of the Reserve Bank. Therefore, the application for necessary permission to act as an Indian Agent under MTSS should henceforth be made to the respective Regional Office of the Foreign Exchange Department of the Reserve Bank under whose jurisdiction the registered office of the applicant falls.

(A.P. (DIR Series) Circular No. 8 dated 18th July, 2014)

9. Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Standards/ Combating of Financing of Terrorism (CFT)/ Obligation of Authorised Persons under Prevention of Money Laundering Act (PMLA), 2002 – Money Changing Activities – Recognising E-Aadhaar as an 'Officially Valid Document' under PML Rules

RBI has advised that Authorised Persons/ Authorised persons who are Indian Agents under MTSS (Indian Agents) may accept physical Aadhaar card/ letter issued by the Unique Identification Authority of India (UIDAI) containing details of name, address and Aadhaar number as an 'Officially Valid Document'. If the address provided by the customer is same as that on the Aadhaar letter, it may be accepted as a proof of both identity and address.

In order to reduce the risk of identity fraud, document forgery and have paperless KYC verification, UIDAI has launched its e-KYC service. RBI has decided to accept e-KYC service as a valid process for KYC verification under PML (Maintenance of Records) Rules, 2005. Further, the information containing demographic details and photographs made available from UIDAI as a result of e-KYC process ("which is in an electronic form and accessible so as to be usable for a subsequent reference") may be treated as an 'Officially Valid Document' under PML Rules. In this connection, it is advised that while using e-KYC service of UIDAI, the individual user has to authorize the UIDAI, by explicit consent, to release her or his identity/ address through biometric authentication to the Authorised Persons. The UIDAI then transfers the data of the individual comprising name, age, gender, and photograph of the individual, electronically, to the Authorised Person, which may be accepted as a valid process for KYC verification. The broad operational instructions to Authorised Persons on Aadhaar e-KYC service are provided in the Annex provided in the circular.

Further, it is clarified that, Authorised Persons may accept e-Aadhaar downloaded from UIDAI website as an officially valid document subject to the following:

If the prospective customer knows only his/her Aadhaar number, the Authorised Person may print the prospective customer's e-Aadhaar letter directly from the UIDAI portal; or adopt e-KYC procedure as mentioned in the para 3 above.

If the prospective customer carries a copy of the e-Aadhaar downloaded elsewhere, the Authorised Person may print the prospective customer's e-Aadhaar letter directly from the UIDAI portal; or adopt e-KYC procedure as mentioned in the para 3 above; or confirm identity and address of the resident through simple authentication service of UIDAI.

(A.P. (DIR Series) Circular No. 9 & 10 dated 21st July, 2014)

10. Export of Goods and Services – Project Exports

Currently, in terms of Regulation 18 of Notification No. FEMA 23 - Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 export of goods or services on deferred payment terms or in execution of a turnkey project or a civil construction contract requires prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank from time to time.

To further liberalise and simplify the procedure, it has been decided as under:

i) The structure of Working Group (consisting of representatives from Exim bank, ECGC

& RBI), which has hitherto been permitted to consider project exports and deferred service exports proposals for contracts exceeding USD 100 Million in value will now be dispensed with. The AD banks / Exim Bank can now consider awarding post-award approvals without any monetary limit and permit subsequent changes in the terms of post award approval within the relevant FEMA guidelines / regulations. Project and service exporters may accordingly approach AD banks / Exim Bank based on their commercial judgement. The respective AD bank / Exim Bank should monitor the projects for which post-award approval has been granted by them; and

ii) The stipulation of time limit of 30 days for the exporter undertaking Project Exports and Service contracts abroad to submit form DPX1/ PEX-1 /TCS-1 to the Approving Authority (AA) for seeking post award approval will not apply henceforth.

(A.P. (DIR Series) Circular No. 11 dated 22nd July, 2014/ Notification No. 310 dt. 12th June, 2014)

11. Exim Bank's Line of Credit of USD 41.96 million to the Government of the Republic of Senegal

Export-Import Bank of India (Exim Bank) has entered into an Agreement dated December 06, 2013 with the Government of the Republic of Senegal for making available to the latter, a Line of Credit (LOC) of USD 41.96 million (USD Forty one million and nine hundred and sixty thousand) for financing eligible goods, machinery, equipment and services including consultancy services from India for the purpose of financing purchase of setting up of Modern Abattoir, Meat processing, Cold Storage, Rendering and Tannery Plant and Market Place in Senegal

(A.P. (DIR Series) Circular No. 12 dated 23rd July, 2014)

12. Foreign investment in India by SEBI registered Long term investors in Government dated Securities

Currently, In terms of Schedule 5 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 notified vide Notification No. FEMA.20/2000-RB dated May 3, 2000, SEBI registered FIIs, QFIs and long term investors are allowed to purchase, on repatriation basis Government securities and non-convertible debentures (NCDs) / bonds issued by an Indian company subject to such terms and conditions as mentioned therein and limits as prescribed for the same by RBI and SEBI from time to time.

The present limit, in terms of A.P. (DIR Series) Circular No.99 dated January 29, 2014 for investment stands at USD 30 billion, out of which a sub-limit of USD 10 billion is available for investment by long term investors in Government dated securities.

On a review, the investment limit in government securities available to FIIs/QFIs/FPIs is enhanced by USD 5 billion by correspondingly reducing the amount available to long term investor from USD 10 billion to USD 5 billion within the overall limit of USD 30 billion. The incremental investment limit of USD 5 billion shall be required to be invested in government bonds with a minimum residual maturity of three years. Further, all future investment against the limit vacated when the current investment by an FII/QFI/FPI runs off either through sale or redemption shall also be required to be made in government bonds with a minimum residual maturity of three years. It is, however, clarified that there will be no lock-in period and FIIs/QFIs/FPIs shall be free to sell the securities (including that are presently held with less than three years of residual maturity) to the domestic investors.

(A.P. (DIR Series) Circular No. 13 dated 23rd July, 2014)

13. Issue of Prepaid Forex Cards- Due Diligence and Adherence to KYC norms

Attention of all the Authorised Persons in foreign exchange is invited to Para 2 of the A. P. (DIR Series) Circular No. 104 dated April 04, 2012.

It has been brought to the notice of RBI that some authorised dealers / full-fledged money changers may neither be exercising due diligence nor adhering to KYC norms while selling prepaid foreign currency cards (issued by a few select banks) to their customers.

In this connection, RBI has clarified that prepaid foreign currency cards are a form of foreign currency, similar to foreign currency notes or travellers cheques. As such, the authorised dealers/ FFMCs selling pre-paid foreign currency cards for travel purposes are required to comply with the same rigorous standards of due diligence and KYC as they would in case they were selling foreign currency notes/ travellers cheques to their customers.

(A.P. (DIR Series) Circular No. 14 dated 25th July, 2014)

14. Compilation of R-return: Reporting under FETERS – Discontinuation of ENC and Sch 3 to 6 file

RBI, vide A. P. (DIR Series) Circular No. 101 dated February 04, 2014 read with A.P. (DIR Series) Circular No.109 dated February 28, 2014 had operationalised a comprehensive IT- based system called Export Data Processing and Monitoring System (EDPMS) with effect from March 01, 2014 for facilitating AD banks to report various returns through a single platform.

It is advised that ENC and Sch. 3 to 6 file submitted under FETERS will be discontinued with effect from first fortnight of September 2014 as the information contained in these returns are available through EDPMS. AD banks should ensure to report all the ENC and Sch.3 to 6 transaction data for which export shipping bills/invoices are generated prior to march 01, 2014 by August 31, 2014. In exceptional cases after August 31, 2014, the same data may be submitted after seeking technical support from RBI at email.

With effect from first fortnight of September 2014, only two files (Viz. BOP6 file and QE file) need to be submitted under FETERS and other guidelines relating to FETERS data submission laid in A.P. (DIR Series) Circular No. 84 dated February 29, 2012 will remain unchanged.

(A.P. (DIR Series) Circular No. 15 dated 28th July, 2014)

15. Trade Credits for Imports into India — Review of all-in-cost ceiling

On a review, RBI has decided that the all-in-cost ceiling as specified under paragraph 4 of A.P. (DIR Series) Circular No.28 dated September 11, 2012 will continue to be applicable till December 31, 2014 and is subject to review thereafter.

(A.P. (DIR Series) Circular No. 16 dated 28th July, 2014)

16. External Commercial Borrowing (ECB) Policy — Review of all-in-cost ceiling

On a review, RBI has decided that the all-in-cost ceiling as specified under paragraph 2 of A.P. (DIR Series) Circular No. 99 dated March 30, 2012 will continue to be applicable till December 31, 2014 and is subject to review thereafter. All other aspects of ECB policy remain unchanged.

(A.P. (DIR Series) Circular No. 17 dated 28th July, 2014)

17. Constitution of Special Investigating Team – sharing of information

In pursuance of the Hon'ble Supreme Court Judgment dated July 4, 2011, Government of India has constituted a Special Investigation Team (SIT) under the Chairmanship of Hon'ble Justice M.B. Shah. In this regard, the Hon'ble Supreme Court has directed that:

"All organs agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies extend all the cooperation necessary for the functioning of the Special Investigation Team.

The Union of India and where needed the State Government will facilitate the conduct of the investigations, in their fullest measures, by the Special Investigation Team and functioning, by extending all necessary financial, material, legal, diplomatic and intelligence resources, whether such investigations or portions of such investigations occur inside the country or abroad."

In view of the above, RBI has advised all Authorised Persons to ensure that information/ documents required by the SIT are made available, as and when required.

(A.P. (DIR Series) Circular No. 18 dated 30th July, 2014)

Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Foreign Judgment – Execution – Notice to be issued by the jurisdictional court: Civil Procedure Code, 1908 sec. 44A, Order 21, Rule 22

On bare reading of Order 21, Rule 22, it is clear that where an application is made for execution of a decree filed under the provisions of sec. 44-A, the Court executing the decree has to issue a notice to the person against whom execution is applied for requiring him to show cause as to why the decree should not be executed against him. On conjoint reading of sec. 44A with order 21, Rule 22, it is clear that unless execution application for enforcement of cost certificates issued by foreign Court was filed in the Court having jurisdiction and unless notice under Order 21, Rule 22 of Code of Civil Procedure 1908 is filed by the decree holder for enforcement of such decree and/or order passed by foreign Court and unless show cause notice is issued by Court having jurisdiction, such foreign decree and/or order cannot be executed. Filing notice under Order 21, Rule 22 and issuance of show cause notice by Court is mandatory and till such notice is allowed, such decree and/or order passed by foreign Court cannot be enforced.

Cost imposed by English Court and Execution in India. The relevant date for determining rate of conversion of Sterling Pounds into Indian Rupees would be date on which decree became executable and not the date of issuance of cost certificate by foreign court.

Janardhan Mohandas Rajan Pillai vs. Madhubhai Z. Patel & Ors. AIR 2014 (NOC) 374 (Bom.)

2. Implied Overruling – Earlier ruling of Smaller Bench, stands overruled, if a subsequent Larger Bench lays down law to the contrary: Constitution of India Article 142:

Earlier ruling of Smaller Bench, held, stands overruled, if a subsequent Larger Bench lays down law to the contrary.

The Court further observed that the view taken by the High Court that the circulars issued by the Central Board of Excise and Customs are binding on the Dept. and the Dept. cannot be permitted to urge that the circulars issued by the Board are not binding on it, was correct inview of number of decisions and especially the Constitution Bench decision in the case of Dhiren Chemical Industries (2002) 2 SCC 127.

UOI & Ors vs. Arriva Industries India Ltd & Ors. (2014) 3 SCC 159

3. Registration – Presentation of document for registration – 4 months limitation period – Attachment order in respect of suit property – Period of attachment to be excluded : Registration Act 1908, sec. 23 and 25

The Petitioner a private limited company had entered into an agreement with Smt. Ramla and others on 15-12-2010 for the purchase of 16.97 ares of land. On the very same day the petitioner had entered into an agreement with Smt. Vaheeda for the purchase of her undivided share in 15.78 areas of land. On the basis of the aforesaid agreements Smt. Ramla and others executed the original sale deed dated 5-1-2011 on stamp papers of the aggregate value of ₹ 10,78,000/-. Smt. Vaheeda had likewise executed the original sale deed dated 7-1-2011 on stamp papers of the aggregate value of ₹ 1,64,500/-. The aforesaid documents were presented for registration before the Sub-Registrar, Kottappady on 14-1-2011 but they were returned without being registered in view of letter dated 7-1-2011 sent by the Detective Inspector, Crime Branch, CID EOW-III, Sub Unit, Kannur to the Sub-Registrar, Kottappady whereby the Sub Registrar was requested not to register instruments in relation to the lands described therein which include the lands covered by sale deeds, without first obtaining his clearance. The petitioner thereupon made enquiries and came to know that criminal cases had been registered against the predecessors-in-interest of his vendors and it was in view of the aforesaid fact that letter was sent to the Sub-Registrar concerned and report dated 5-2-2011 submitted in the Court of the Judicial Magistrate of First Class, Ponnani. When the Sub-Registrar declined to register the originals of sale deeds, the vendors moved the Court. A learned single Judge of this Court held that the investigating officer or the learned Magistrate had no jurisdiction to attach the properties in exercise of the powers under S. 102 of the Code of Criminal Procedure and quashed the order of attachment. The petitioner thereafter presented the originals sale deeds for registration on 4-2-2014, the Sub-Registrar declined to register the sale deeds on the ground that they were not presented for registration within the period of four months from the date of execution or within the period of eight months from the date of execution after paying the prescribed fine.

The Hon'ble Court observed that it is evident from the pleadings and the materials on record that during the period from 7-1-2011 to 5-11-2013, an order of attachment passed by the investigating officer and the Court of the Judicial Magistrate of First Class, Ponnani was in force. As a result thereof, the vendors were disabled from getting the sale deeds registered. The fact that the documents were originally presented for registration in time and were not registered on account of the order of attachment is not in dispute. If the period during which the order of attachment was in force namely the period from 7-1-2011 to 5-11-2013 is excluded while computing the period of four months stipulated in S. 23 of the Act, it cannot be said that the documents were not presented for registration within the period of four months from the date of their execution. If the aforesaid period is excluded, the period of four months computed from 5-1-2011 when sale deed was executed will expire only on 5-3-2014 and in respect of sale deed dated 7-1-2011 will expire only on 7-3-2014.

The Hon'ble Court referred two maxims of equity which are well settled, namely, *"Actus Curiae Neminem Gravabit"* an act of the Court shall prejudice no man. In Broom's Legal Maxims, 10th edition, 1939 at page 73 this maxim is explained that this maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is *"Lex Non Cogit Ad Impossibilia"* (Broom's Legal Maxims P. 162) The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir. W. Scott, with reference to an alleged in fraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.

By reason of an order of attachment passed by the investigating officer/criminal court under sec. 102 of the Code of Criminal procedure, which attachment was later found to be without jurisdiction, the vendors were prevented from getting the sale deeds registered.

The maxim *"Lex Non Cogit Ad Impossibilia"* applies to the facts of the case and therefore, the stipulations in sections 23 and 25 of the Registration Act, 1908 cannot operate with full

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force. The sub-registrar should have in such circumstances registered the documents if they were otherwise in order. It is evident from objections that except the fact that they were not presented for registration within four months as stipulated in sec. 23 of the Registration Act or within a further period of four months as stipulated in sec. 25 of the Registration Act, no other objection had been raised to the registration of the documents. The petitioner is therefore entitled to have the documents registered without payment of fine.

Sree Gokulam Chits & Finance Co. P. Ltd vs. State of Kerala & Ors. AIR 2014 Kerala 103

4. Consumer Complaint – Developer – Not handing over the possession of plot – Deceptive Practice – Unfair trade practice: Consumer Protection Act

The representative of the appellants induced the Respondents/Complainants to purchase a plot in its Project "Mohali Plots at Mohali Hills", who assured the respondents that development activity at the site was in full swing and if they booked the plot, the possession thereof complete in all respects would be handed over to them, within a period of 18 months, from the date of execution of the Plot Buyer's Agreement.

On such assurances, respondents applied to the appellants for allotment of a residential plot and paid a sum of ₹ 5 lakhs, as booking amount. The respondents were allotted plot measuring 250 square yards, in "Mohali Plots" at Mohali Hills @ ₹ 22,000/- per square yard. Thus, after discount of ₹ 1,10,000/-, the total sale consideration, in the sum of ₹ 65,30,250/-, was required to be paid by the respondents, towards the said plot.

A provisional allotment letter dated 25-2-2011, was issued in favour of respondent No. 1. Further, amount of ₹ 5,78,000/-, towards the part payment was deposited by the respondents. Despite getting part payment till the month of May, 2011, the appellants failed to ensure the execution of the Plot Buyer's Agreement. In the absence whereof, the Bank concerned refused to sanction the loan which was required by the respondents, to make payment of the remaining sale consideration. It was further stated that, on the other hand appellants, started levying interest, on delayed payments.

Thus, due to the delay aforesaid in execution of the Plot Buyer's Agreement, respondents could not avail the housing loan, in time from the concerned Bank. As a result whereof, they could not pay the amount of 3rd, 4th and 5th installments, which were due to be paid by them by August, 2011, November 2011 and February, 2012, respectively. Therefore, respondents sent an e-mail dated 20-12-2011, explaining their inability to pay the aforesaid due installments in time and requested the appellants for extension of time, but they refused to do so. On the other hand, appellants served cancellation notice dated 24-2-2012. By month of March, 2012, respondents succeeded in availing of loan from the HDFC Bank and by 20-8-2012, paid the part sale consideration of the said plot, to the tune of ₹ 62,60,750/- i.e. about 95% of the sale consideration. The remaining 5% of the sale consideration was required to be paid at the time of delivery of physical possession of the plot.

When physical possession of the plot in question complete in all respects, was not delivered to the respondents by the stipulated date i.e. 21-5-2013, they visited the site and found that there was no development in the area, in which the plot was allotted since the appellants had not delivered the possession of the plot, the respondents were not able to construct house thereon and reside therein. As a result whereof, for the last three years they had been staying in a rented accommodation for which they paid monthly rent to the tune of ₹ 14,520/- per month for the year 2012 and ₹ 15,000/- per month, for the year 2013, thereby causing unnecessary financial burden.

A complaint under Section 17 of the Consumer Protection Act, 1986 was filed praying for the following directions;

a. Refund the whole amount along with interest pay damages.

b. Pay compensation on account of monthly rent along with interest.

c. Pay litigation charges along with interest @ 24% p.a. etc.

The State Commission *vide* its order, partly allowed the complaint and passed the following directions:

(i) The opposite party is directed to refund the amount of ₹ 62,60,750/-, to the complainants, along with interest @12% per annum, from the respective dates of deposits,

(ii) The opposite party is further directed to pay compensation, in the sum of ₹ 2,00,000/- (two lakhs), for causing mental agony and physical harassment, to the complainants, as also escalation in prices of the real estate,

(iii) The opposite party is further directed to pay cost of litigation, to the tune of ₹ 20,000/-, to the complainants.

On appeal filed by the Developer before National Commission the Bench observed that it is an admitted fact that possession of the plot in question, had not been handed over to the respondents, either within the period of 12 months or 18 months from the date of execution of the 'Buyer's Agreement'. Further, appellants in their written statement have not given any explanation with regard to not handing over the possession of the plot to the respondents when admittedly appellants had already received more than 95% of the cost of the plot long ago. Thus, as on date the appellants themselves are not sure as to by which date they will be able to hand over the possession of the plot to the respondents. The appellants after grabbing 95% of cost of plot are sitting over it, whereas respondents are running from pillar to post to get their hard earned money back.

This act of the appellants in asking the respondents to pay a sum of ₹ 5 lakh as booking amount and ₹ 5.78 lakh as part payment towards the provisional allotment in the year 2011, without giving them any firm date of handing over of the possession of the plot is a "Deceptive Practice" which falls within the meaning of "unfair trade practice" as defined under the Consumer Protection Act, 1986. The appellants should have given firm date of handing over the possession at the time of taking the booking amount itself. By not indicating the true picture with regard to their project to the respondents, the appellants induced them to part with their hard earned money, which also amounts to unfair trade practice.

Moreover, the appellants by not delivering the legal physical possession of the fully developed plot to the respondents till date, even after having received more than 95% of the price thereof, are not only deficient in rendering service but are also guilty of indulging into unfair trade practice. Thus appellants being the builder, are enjoying the possession of the plot as well as substantial amount of consideration paid by the respondents. On the other hand, respondents after having paid substantial amount of consideration of the plot, are still empty handed.

The Bench observed that such type of unscrupulous act on the part of appellants/ builders should be dealt with heavy hands, who after grabbing the money from the purchasers, enjoy and utilise their money but do not hand over the plot, on one pretext or the other. Appellant wants the respondents to run from one to other, so that appellants can go on enjoying respondents' money without any hindrance.

The Bench imposed costs upon the petitioners (developer) for dragging the respondent up to National Commission when petitioners had no case at all.

Thus, present appeal is nothing but gross abuse of process of law and same is required to be dismissed with punitive damages. Accordingly, the appeal was dismissed with punitive damages of ₹ 5,00,000/- (Rupees Five lakhs only).

Emaar MFG Land Ltd vs. Karnail Singh & Anr. First Appeal No. 342 of 2014, Dated 25-7-2014 (NCDRC, New Delhi)

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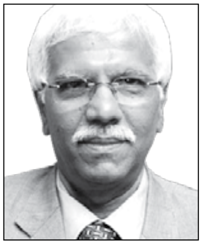

Kishor Vanjara, *Tax Consultant*

TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxmann, Current Tax Report (CTR), The Tax Referencer (TTR), Income Tax Review (I. T. Review), 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 April to May 2014 has been arranged and indexed topic-wise.

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Tribunal cannot Grant Stay Beyond Period Prescribed in Third Proviso to Section 254(2A)	Manoj Gupta	TTR	136	718
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No Liability to Deduct Tax on Commission Paid to Credit Card Companies	Siddharth Kumar	TTR	136	656
Whether TDS on service tax portion to be deducted in the absence of agreement?	Hiten Kishore Chande	ITR	362	65
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C & AG reports inconsistencies in the income-tax provisions conferring exemptions to charitable trusts and institutions	T. N. Pandey	ITR	362	5
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'W'				
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Gifts				
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CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

RE-EMERGENCE OF UNCERTAINTY

The month of July proved to be good for the Indian Economy. As per the survey of HSBC, the manufacturing activity rebounded to a 17 month high in the month on the back of surge in production, backed by new orders and improved business and consumer sentiments. The manufacturing Purchasing Manager's Index (PMI) rose to 53 in July from 51.5 in June. The index denotes increase in order from domestic and external sources that have led to a surge in the activities. Inflation started tapering down in the month of July and hopes of interest rate cut in the near future emerged therefrom. The overall sentiment in the Indian economy has started improving since the result of the general elections and it is expected to strengthen further. The sales figures of automobiles, which are an indicator of the economic activity, have surged suggesting that consumers are taking new initiatives in consumption. This forward indicator has a very positive sentimental effect on the Indian economy. During the month, exports surged and foreign exchange reserves climbed to near records. Though the agricultural production for the season was threatened due to a major dry spell in the month of June, respite came by the middle of July. There were widespread rains in the second fortnight of the month substantially wiping out the rainfall deficit for the season. El-Nino was a major concern for India for this year. Its effect on the global weather systems can be a cause of concern, as it generally affects the monsoon rainfall in India. Though there was a threat of low rainfall due to El-Nino this year, its impact seems to have been mitigated at least as of now. Though due to delay of onset of monsoon, the overall agricultural production in the country may suffer a bit, based on the current trend, it is likely that the negative impact may not be felt as severely as it was anticipated. On the domestic political front, there are signs of stability due to the massive electoral mandate secured by the current ruling party. The Budget did not give great surprises though it had some negatives for capital markets such as increase in dividend distribution tax and change of definition of long term capital asset in respect of investment in certain units of mutual fund schemes. Though no major reforms were evident in the Budget and it did not take a paradigm shift from the philosophy of the earlier finance minister, the changes were positive and maybe baby steps towards the long term objective of achieving double digit growth in the Indian economy. The announcement of liberalisation of FDI in the insurance sector added to the hope of further reforms to come soon. It was a sentiment booster to foreign investors and gave an indication of the kind of reforms to come. Minor political issues developed but they were not taken seriously by the Indian investors. The larger picture of better days ahead kept the sentiments high. Stock markets jumped in spite of the fear of inadequate rainfall, especially in the first half of the month. There was a clear case for sustainability of the economic growth in the near future and after a long time even the retail investors started returning to the stock markets.

The month was not without any negatives. On the international front, the image of India took a beating due to the hard stand it took with regards to the food security issue in the World Trade Organisation (WTO). India believes that the passing of the bill in its current format would harm the Indian interests and especially the interests of farmers as well as poor people in India, who constitute a major chunk of the Indian population. The bill, which was originally conceived in the WTO meeting in Bali last year, was to get formalised by 31-7-2014. However, due to non-agreement of India on the bill, it jeopardised the passing of the bill and the world missed the deadline set for it. The bill was apparently in the larger interests of the developed countries and it was expected to boost world trade and create wealth. However, there were inherent risks of suffering by developing countries, which were more of agro based economies, as the bill was against subsidising the farmers and farm output. This opposition to the global initiative put India in a bad light risking its position and economic interests with the developed countries. This time, it appears that India has taken a firm stand at the cost of even antagonising the leading economies across the world. India will have to make efforts to undo the risks of economic damage, which can be caused due to this impasse.

The US economy displayed better than expected growth for the second quarter of the calendar year 2014. It grew at the rate of 4% as against expectations of about 3% improving the global sentiments. The European region still remains laggard though there are expectations of better days in the near future. China has displayed better than anticipated growth rate but it has the risks of overheating. The Chinese economy has become the second largest in the world and any untoward incidence therein can disrupt the positive trends in the global economy which is expected to sustain its growth rate, in the near future. The Chinese Government and economy are not considered to be as transparent as the western developed economies and that increases the perceived risk in respect of the developments in China. It is only hoped that China will be careful about its policies and will not risk the global recovery by any burst.

The global risks seem to have increased in the month of July due to the developments in countries like Argentina and Portugal. Argentina seems to be heading towards an economic crisis emerging out of a debt default. The largest bank in Portugal is has developed a serious risk of default, which can disturb the strengthening of the EuroZone. The condition in Iraq is still not stable and the conflict is expected to continue for a while, causing disruption in the region. The situation in Gaza strip has again become uncertain due to renewed attacks by Israel. Any flaring up beyond a point can have an impact on global oil prices and further automatically on energy prices, which can affect growth in the months to come. These negative events have not affected much the sentiments in the Indian economy as of now. But any serious negative turn in the global scenario can start hurting India. The sentiments, which were at their peak in the world markets in the first half of July, have surely suffered. The stock markets across the world were on a high and suddenly many investors have realised that risks have increased which need a corresponding correction in the asset valuation. There was a sudden sell off at the end of July, which wiped out the gains made by most of the stock markets in that month and the sentiments turned south. Various negative developments had not affected the global markets significantly as the markets were hopeful, but by the middle of July, the sentiments changed and the global stock markets dropped. The major US stock indices have eased about 3% from their peak. The fall may be in the nature of correction as it was considered to be overdue but now the markets have become vulnerable to any global negative events. Only time will tell whether the current fall is a correction, which will make the global markets healthier or whether there is a re-emergence of negativity. The global investors need to be cautious about their decisions as the markets are not necessarily cheap and the risks have definitely increased with a possibility of multiple triggers.

Indian stock markets have not been affected much by the increased risks in the world as of now. India has some resilience towards global risks due to the structure of its economy, which is more dependent on domestic consumption than on export. Indian stock markets reached their all time high on 25th July, 2014 and thereafter within a week they have dropped by about 3%. The mood has become cautious. Though the sentiment on the domestic front is supportive, the investors have become concerned about the global developments. Indian stock markets are less resilient to global developments than the Indian economy. Over the last few months, the majority of money pumped in Indian stocks belonged to foreign investors, who may change their allocation to India based on the global developments. There is a risk of withdrawal of some money from the Indian stock markets by Foreign Institutional Investors (FIIs) and that is one of the major risks in the near future. The sentiments in the Indian stock markets have suddenly shaken for a while and a correction of about 3% has taken place, which can get deeper in the days to come. Though the markets have bounced back on the 4th of August, there is a lurking fear that the correction can erode the markets to the tune of 5% from the current levels. Whether the correction will immediately happen or happen later and how deep will it be is a million dollar question. It is possible that the buyers can get an opportunity to buy stocks at a lower level in the current month. There are a lot of expectations and the trend is positive in the Indian economy as well as the stock markets. Almost everybody is bullish over a medium term. The volatility remains high and global events may increase the same. Still it is advisable for the investors to increase their equity exposure. The safest way of increasing the same is contributing to SIP schemes of Mutual Funds, which can even out the market risk to an extent. The Indian stock markets are not cheap but not all the stocks are fully priced and there are a number of investment opportunities. Investors are advised to remain invested and even increase their investments in stocks after making appropriate study or seeking advice from experts. India is likely to encounter increased growth rate over the next three years and Indian stock markets are expected to appreciate at an average rate of 12-15%. Long term capital gains on disinvestment of listed stocks being tax exempt, this asset class will give one of the best returns over the next 3 years. Early birds will reap larger benefits. It is advisable for investors to reduce their risk aversion to an extent and start increasing their patronisation to stock markets.

As per the amendment in the Budget, the period of holding of units other than units of equity oriented mutual fund schemes, to qualify as long term capital assets, should exceed 36 months instead of the earlier applicable 12 months period. This has caused a flutter in the mutual fund industry as the amendment has suddenly come as a severe blow to it. The amendment can substantially reduce the assets under their management, held under various liquid and debt oriented schemes including Fixed Maturity Plans (FMPs). The amendment is certainly not in the interest of savvy investors, who are patronizing mutual fund schemes for parking their temporary surplus. However, the proposed amendment will soon become the law of the land and investors will have to deal with the situation. Investments in FMPs made a few months or a year back can get affected as the tax liability on the maturity of the schemes may increase unless the fund houses amend the plans and their respective maturities. The amendment, though not retrospective, can give a retrospective blow of taxation to many investors, who have no opportunity to exit before the amendment was declared, as no post declaration exit window was given. Investors will have to re-align their debt and liquid mutual fund scheme portfolios taking into consideration the effects of the amendment in the law ultimately passed by the legislature.

Though the liquid schemes of mutual funds have lost their charm to an extent due to the holding period of long term assets being extended to 36 months, they still remain a better asset class then fixed deposits especially for parking short term funds. Whilst providing very good liquidity they can give better returns than short term fixed deposits of banks with whom they generally compete. Arbitrage funds as an asset category can provide good tax free returns, while providing reasonable liquidity. Such funds generally do take 3 working days for redemption, which is still longer than liquid funds but they are equated with equity based mutual funds for income tax purposes. It may be noted that such schemes also have an exit load, if redeemed within 1-6 months depending upon the terms of the respective scheme.

Though the markets have improved in the month of July, uncertainty has increased. Investors need to be cautious in their approach and should not be carried away with, tips and hunches.

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CA Hinesh R. Doshi, Ajay Singh, *Advocate*
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th July, 2014 to 8th August, 2014 are being reported as under.

I. PAST PROGRAMMES

Sr. No.	Programme Name / Committee/Venue	Date / Subjects	Chairman / Speakers
1.	**Corporate Members Committee**		
A.	**Lecture Meeting on Post Budget Impact** Venue : Walchand Hirachand Hall, IMC	1st August, 2014 / Capital Markets and Road Ahead	CA S. P. Tulsian, Eminent Investment and Equity Analyst
2.	**Direct Taxes Committee**		
A.	**Half Day Seminar on Direct Tax Provisions of Finance (No. 2) Bill- 2014** **(Jointly with BCAS)** Venue : M. C. Ghia Hall, Fort, Mumbai.	19th July, 2014 / Direct Tax Provisions of Finance Bill – 2014 (No. 2)	Chairman: Mr. Keshav Bhujle, Advocate Speakers: CA Chetan Karia CA Gautam Nayak
B.	**Intensive Study Group on (ISG) Direct Taxes Meeting** Venue : CTC Conference Room	7th August, 2014 / Recent Important Decisions under Direct Tax	CA Hitesh R. Shah
C.	**Direct Tax Update Series Lecture** Venue : 4th Floor, Walchand Hirachand Hall, IMC.	8th August, 2014 / Purchases from Suspicious Dealers – in Income Tax (Including Reassessment)	Dr. K. Shivaram, Senior Advocate
3.	**Indirect Taxes Committee**		
A.	**Study Circle Meeting** Venue: 2nd Floor, Babubhai Chinai Committee Room, IMC	8th July, 2014 / Maharashtra State Budget Proposals Under MVAT Act and Profession Tax Act.	CA Mayur Parekh

Sr. No.	Programme Name / Committee/Venue	Date / Subjects	Chairman / Speakers
B.	**Workshop on Finance Bill, 2014** (Jointly with WIRC of ICAI) Venue: M.C. Ghia Hall, Rampart Row, Fort, Mumbai- 400 001	19th July, 2014 / Finance Bill, 2014 (Indirect Tax Provisions)	Mr. Vipin Jain, Advocate CA A. R. Krishnan
4.	**Information Technology Committee**		
	Info Tech Update Series Workshop Venue: M.C. Ghia Hall, Rampart Row, Fort, Mumbai- 400 001	5th August,2014 / Audit Features in Tally	CA Ashwin Dedhia
5.	**International Taxation Committee**		
	Intensive Study Group on International Taxation Venue : CTC Conference Room	5th August, 2014 / Finance Bill 2014 – Specific reference to provisions impacting cross border transactions and non residents.	Group Discussion
6.	**Study Circle & Study Group Committee**		
A.	**Study Circle Meeting** Venue : 2nd Floor, Babubhai Chinai Committee Room, IMC	4th August, 2014 / Finance Bill, 2014 – Direct Taxes Provisions	CA Praful Poladia
B.	**Study Group Meeting** Venue : 2nd Floor, Babubhai Chinai Committee Room, IMC	6th August, 2014 / Recent Judgments under Direct Taxes	CA Pradip Kapasi

III. FUTURE PROGRAMMES

Future programmes of the Chamber's are as follows:

Sr. No.	Programme Name / Committee / Venue	Day / Subjects	Speakers / Chairman
1.	**Allied Laws Committee**		
	Study Circle Meeting Venue : Kilachand Hall, 2nd Floor, IMC	19th August, 2014 / Provisions relating to The Indian Partnership Act, 1932 – An overview	Chairman : Mr. Pravin Veera, Solicitor Speaker : Mr. Ankush Mehta, Advocate
2.	**Indirect Taxes Committee**		
	Study Circle Meeting Venue : Babubhai Chinai Committee Room, 2nd Floor, IMC	20th August, 2014 / Issues in Declaration Forms under the CST Act.	Chairperson : Ms. Nikita Badheka, Advocate Group Leader : CA Amar Shukla

Sr. No.	Programme Name / Committee / Venue	Day / Subjects	Speakers / Chairman
3.	**Direct Taxes Committee**		
A.	**Direct Taxes Update Series Lecture** Venue : 4th Floor, Walchand Hirachand Hall, IMC	21st August, 2014 / Revised Tax Audit Report Formats	CA Ameet Patel
B.	**Intensive Study Group on (IST) – Direct Taxes Meeting** Venue : CTC Conference Room	27th August, 2014 / Recent Important Decisions under Direct Tax	CA Ashok Mehta
4.	**International Taxation Committee**		
A.	**Advance FEMA Conference** Venue : Terrace Hall, West End Hotel, New Marine Lines, Mumbai	6th September, 2014 a) Future of FEMA and the way forward b) FEMA issues from RBI perspective c) Question & Answer Session with RBI officials d) Overseas Direct Investment e) ECBs, Loan from non-residents f) FDI under approval route – FIPB, DIPP – Practical Issues	a) Mr. G. Padmanabhan, Executive Director, Reserve Bank of India b) Mr. B. P. Kanungo, Principal Chief General Manager Mr. C. D. Srinivasan, Chief General Manager, Foreign Exchange Dept. RBI c) Officials from RBI – Moderator : Shri Dilip J. Thakkar d) CA Hitesh Gajaria e) CA N. C. Hegde f) CA Vijay Gupta
B.	**FEMA Study Circle** Venue : CTC Conference Room	August, 2014 to May 2015	Study Circle is expected to discuss various issues, the members are expected to : a) Have basic understanding of the FMEA b) Take active part in the Study, and c) Give presentation on the topics allotted to them either on their own or in group with other members of the Study Circle.

Sr. No.	Programme Name / Committee / Venue	Day / Subjects	Speakers / Chairman
C.	Publication **Transfer Pricing An Industry & Technical Perspective**	The salient features of the publication include : • Technical issues on laws and interpretation • Transfer Pricing of Specified Domestic Transactions • Domestic and International Jurisprudence • APA Regime and MAR including its comparison • Industry specific issues (more than 20 important industries covered)	Special price for Members only Pre order pricing (Upto 31st August, 2014) – ₹ 1,100/- Order Post 1st September, 2014 – ₹ 1250/- (Courier charges extra ₹ 150/-)
D.	**Course Material:** 8th Residential Conference on International Taxation – 2014	Held on 19th June, 2014 to 22nd June, 2014	Sale Price ₹ 450 /- + Courier Charges ₹ 56/- (Inclusive of Service Tax) ₹ 456/-
5.	**Membership & EOP Committee Jointly with Student's Committee**		
A.	**'1st Football CUP'** Venue : Indian Football School, Cooperage Football Ground – Mini Ground (Soft & Spongy), Colaba, Churchgate.	9th August, 2014 / Football – The way to Professional Excellence	
B.	**Self Awareness Series** Venue : CTC Conference Room	20th August, 2014 / Health Management through Yoga (A session on carrying physical ailments by Practical Yoga & Techniques)	Shri Sridhar Parab & Shri Sunil Bhujbal
6.	**Student's Committee**		
A.	Lecture Meeting on Tax Audit for Students Venue : Maheshwari Bhawan, 1st Floor, 603, J. S. S. Road, Girgaon, Mumbai – 400 004.	13th August, 2014 a) Basics of Form 3CD, uploading and filing of Tax Audit Report b) Documentation in respect of Tax Audit c) Issues in Tax Audit and documentation	a) CA Dinesh Poddar b) CA Abhay Arolkar c) CA Ketan Vajani
B.	**Student Study Circle Meetings** Venue : CTC Conference Room	a. 4th September, 2014 E-Filing of Income Tax And Wealth Tax Return b. 7th October, 2014 E-Filing of Service Tax Return c. 4th December, 2014 MVAT Audit	a. CA Avinash Rawani b. CA Sumit Jhunjhunwala c. CA Prashant Vora

Sr. No.	Programme Name / Committee / Venue	Day / Subjects	Speakers / Chairman
7.	**Study Circle & Study Group Committee**		
	Study Circle Meeting on International Taxation Venue : Kilachand Hall, 2nd Floor, IMC	25th August, 2014 / Taxation of Software Payments	CA Vishal Palve

VI. Renewal of Membership and Subscription – 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 was due for payment on 1st April, 2014. **Pl renew your membership to avoid uninterrupted service of the Chamber's Journal.**

The details of the Fees are as under:

		Fees	Service Tax & Cess *	Total
1.	Membership Renewal Fees (for 1 year)	₹ 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 September, 2014 will cover topic on "Service Tax, Excise & Custom Duty".

INDIRECT TAXES COMMITTEE

Workshop on Finance Bill, 2014 (Indirect Taxes Provisions) held on 19th July, 2014 jointly with WIRC of ICAI at M. C. Ghia Hall, Mumbai

CA Paras K. Savla, President welcoming the Speaker & participants. Seen from L to R: CA Pranav Kapadia, Chairman, Indirect Taxes Committee, CTC, Mangesh Kinare, Member, WIRC of ICAI, Shri Vipin Jain, Advocate, Faculty, CA Aalok Mehta, Vice Chairman, Indirect Taxes Committee, CTC

CA Pranav Kapadia, Chairman, Indirect Taxes Committee addressing the participants. Seen from L to R: CA Mangesh Kinare, Member, WIRC of ICAI, Shri Vipin Jain, Advocate, Faculty, CA Paras K. Savla, President, CTC, CA Aalok Mehta, Vice Chairman, Indirect Taxes Committee, CTC

CA A.R. Krishnan, addressing the delegates. Seen from L to R: CA Ankit Kedia, Convenor, CA Pranav Kapadia, Chairman, CA Paras K Savla, President,

Shri Vipin Jain, Advocate addressing the delegates

INFORMATION TECHNOLOGY COMMITTEE

Workshop on Info Tech Update Series held on 5th August, 2014 at M. C. Ghia Hall, Fort, Mumbai

CA Paras K. Savla, President welcoming the delegates. Seen from L to R : S/Shri CA Mitesh Katira, Convenor, CA Ashwin Dedhia, Faculty and CA Manoj Shah, Chairman

CA Manoj Shah, Chairman addressing the delegates. Seen from L to R : S/Shri CA Mitesh Katira, Convenor, CA Ashwin Dedhia, Faculty and CA Paras K. Savla, President

CA Ashwin Dedhia addressing the delegates

Section of delegates

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting held on 4th August, 2014 on the subject "Finance Bill, 2014 – Direct Taxes Provisions"

Shri Praful Poladia addressing the members. Seen from L to R: CA Avinash Lalwani, Vice President, CA Dinesh Shah, Convenor, CA Paras K. Savla, President, CA Ashok Sharma, Chairman and CA Dilip Sanghvi, Vice Chairman

INDIRECT TAXES COMMITTEE

Study Circle Meeting held on 8th July, 2014 on the subject "Maharashtra State Budget Proposals under MVAT Act and Profession Tax Act"

CA Mayur Parekh addressing the members

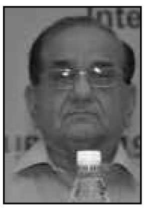
DELHI CHAPTER

Seminar on The Union Budget 2014 jointly with The Northern Region Chapter of International Fiscal Association – India Branch held on 19th July, 2014 at Multipurpose Hall, New Delhi

Shri C. S. Mathur, Chairman, Delhi Chapter, welcoming the speakers and delegates. Seen from L to R : S/Shri Aseem Chawla, Member, S. R. Wadhwa, Ajay Vohra and Abhishek Jain, Faculties.

Faculties

Shri Ajay Vohra, Managing Partner, Vaish Associates

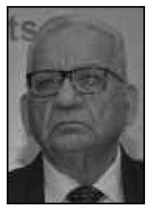


Shri S. R. Wadhwa, Advocate & Former Chairman Settlement Commission

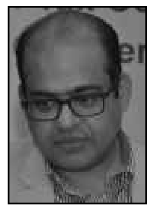
Shri Abhishek Jain, Partner – Indirect Tax Practice, EY

Shri Sunil Jain, Partner Direct Taxes, J. Sagar Associates

Shri Rahul Garg, Executive Director, Price Waterhouse

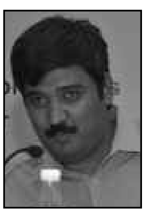


CA S. C. Vasudeva, Partner, S. C. Vasudeva & Co.



CA Aseem Chawla, Partner, MPC Legal

Panellist



Mr. Arun Giri, Tax Journalist, Taxsutra

Shri G. C. Srivastava, Advocate, Former DGIT (Intl. Tax), and Former Competent Authority of India

Shri Kamlesh Varshney, CIT – APA

Shri V. S. Wahi

Section of Delegates

THE CHAMBER'S JOURNAL

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