Price ₹ 100/-per copy

A MONTHLY JOURNAL OF
THE CHAMBER OF TAX CONSULTANTS

THE CHAMBER'S JOURNAL

MARCH - 2014

VOL. II | NO. 6

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

LAWS FOR A CHANGING INDIA

NEW

Log on to the Chambers' revamped website
www.ctconline.org
for host of new features including web-based Chambers' Journal, Audio and Video Presentations.

Other Contents

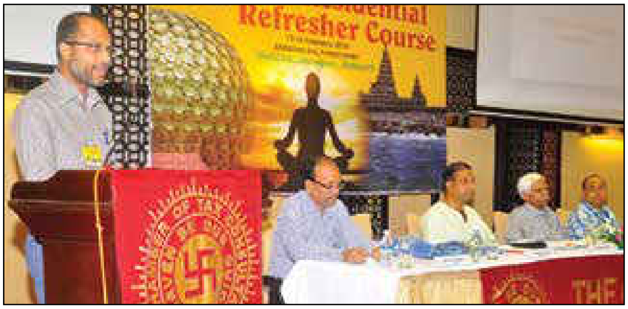
Direct Taxes | International Taxation | Indirect Taxes | Corporate Laws | Other Laws | Best of the Rest | Economy & Finance | Your Questions & Our Answers | The Chamber News | and more

TRANSFORMING INFORMATION INTO KNOWLEDGE

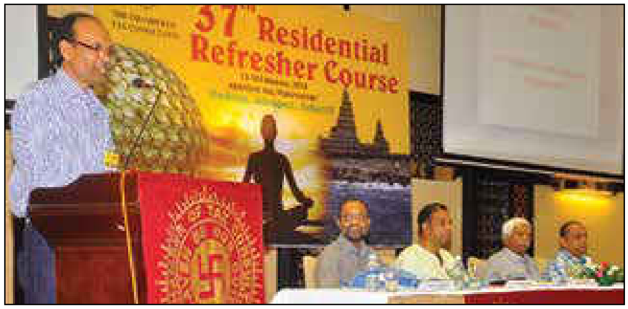
THE CHAMBER OF TAX CONSULTANTS

RESIDENTIAL REFRESHER COURSE & PUBLIC RELATIONS COMMITTEE

37th Residential Refresher Course held on 13th to 16th February, 2014 at Anandha Inn Convention Centre & Suites, Pondicherry.



CA Yatin K. Desai, President addressing the delegates. Seen from L to R : S/Shri CA Vijay Bhatt, Chairman; Dr. Alok Pandey, Chief Guest; Shri Kishor Vanjara, Advisor & Past President; CA Kishor Rajeshirke, Convenor.



CA Vijay Bhatt, Chairman welcoming the delegates. Seen from L to R : CA Yatin K. Desai, President; Dr. Alok Pandey, Chief Guest; Shri Kishor Vanjara, Advisor & Past President and CA Kishor Rajeshirke, Convenor.

Dr. Alok Pandey inaugurating the conference by lighting the lamp. Seen from L to R : S/Shri CA Charu Ved, Convenor; CA Vijay Bhatt, Chairman; CA Yatin K. Desai, President; Shri Kishor Vanjara, Advisor & Past President and CA Kishor Rajeshirke, Convenor.

Dr. Alok Pandey addressing the delegates on the subject "Importance of Meditation in today's stressful life". Seen from L to R : S/Shri CA Vijay Bhatt, Chairman, CA Yatin K. Desai, President, Shri Kishor Vanjara, Advisor and CA Kishor Rajeshirke, Convenor.

Chairmen of the Sessions

Shri Keshav Bhujle
Advocate

Shri S. N. Inamdar
Sr. Advocate

CONTENTS

Vol. II No. 6
March – 2014

THE CHAMBER OF TAX CONSULTANTS
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

MEMBERSHIP FEES & JOURNAL SUBSCRIPTION (REVISED FEES AND SUBSCRIPTION FROM 2014-15)

Sr. No.	Membership Type		Fees	Service Tax 12.36%	Total
1.	Life Membership Additional Optional subscription charges for Annual Journal	₹	11000 900	1359 0	12359 900 ₹ 13259
2.	Ordinary Members Entrance Fees Annual Membership Fee, including subscription for Journal	₹	200 1900	24 235	224 2135 ₹ 2359
3.	Associate Membership Entrance Fees Membership Fees including Subscription for Journal	₹	1000 2000	123 247	1123 2247 ₹ 3370
4.	Student Membership Entrance Fees Journal Subscription	₹	250 700	31 0	281 700 ₹ 981
5.	Non-members Journal Subscription	₹	1800	0	1800 ₹ 1800

Editorial

Friends we are into the last month of the current financial year. But it is interesting to note that the month of March was the first month of the earliest Roman calendar. It was named for Mars, the Roman god of war who was also regarded as a guardian of agriculture. As the Election Commission has announced the schedule of poll for the 16th Lok Sabha elections we can feel there is a lot of hope and expectation in the air. I don't remember any election which was so eagerly awaited like the general elections of 2014. I request you all to be vigilant and update your name and details in the electoral rolls.

This issue of The Chamber's Journal carries a special story on some legislations which were enacted in post liberalisation era. Right from the days when the securities scam broke out in 1991, we are known for reacting to a particular crisis whether it is financial, social or a natural calamity. In spite of a huge reservoir of talent, the State has not been able to demonstrate vision in disaster management. I hope the Special Story for this issue of The Chamber's Journal's shall help you all to know about these laws.

I am grateful to Mr. Janak Pandya and Mr. Pankaj Majithia for helping me in bringing out this Special Story. My special thanks to Mr. Akolkar, Editor of Sakal Daily, who gave us guidance in the title for this issue. I thank all the contributors of this issue for sparing their valuable time for the Chamber's Journal.

K. GOPAL
Editor

From the President

Dear Members,

When I was very young, my mother had mentioned about resignation by Shri Lal Bahadur Shastri as a Railway Minister owning moral responsibility for a train accident. At that age, I did not realise the purpose of the mention, probably, as mother; she wanted to inculcate some good characters in me. I listened to it as a story, but always remembered. In today's time, where we see moral and ethical life of political leaders reaching to a new low, it is heartening to know that our past had given us great leaders who stood the test of time with integrity, conviction and clarity.

The above incident came to my mind as very recently, newspapers and media, flashed news that in an unprecedented step, Navy Chief Admiral D. K. Joshi resigned, owning "moral responsibility" for warship and submarine accidents latest being mishap on submarine INS Sindhuratna off Mumbai coast. Unprecedented, because Admiral Joshi's immediate resignation taking moral responsibility for the accident stands out as a shining act of conscience at the time when our ministers and administrators cynically and shamelessly refuse to be held accountable for their deeds. Admiral Joshi, in his resignation letter, said though the Government had reposed faith in his capabilities, it had become untenable for him to continue as Navy chief in terms of accountability.

In last few days, yet another incident of resignation was flashed. This time it was by an activist turned politician, Shri Arvind Kejriwal, who resigned as a Chief Minister of Delhi in less than two months from taking oath. The news is important for all of us as a thumping win by the AAP Party had raised many hopes for the country in the hopeless situation created by the politicians and bureaucrats. People of India feel that the resignation came in wake of the reasons which is petty and not good enough for resignation. The resignation, on social media, became active news. Chetan Bhagat, famous author twitted, "feels like someone just quit at the ₹ 5,000/- question in KBC, without using any lifeline". The twit expresses the feeling of people of India and echoing noise of shattered hopes.

At Chamber, one of most awaited event, Residential Refresher Course (RRC) is over. The participants appreciated contents of the paper, technical sessions, entertainment programmes, hospitality and fellowship. The Committee with the leadership of Shri Vijay Bhatt and advisor Shri Kishor Vanjara, took due care of each and a very aspect of the RRC.

The other activities of the Chamber continue in the direction of spreading knowledge for professionals. The International Taxation Committee arranged its 5th Conference at Hotel Sahara Star. Since last couple of years, the Chamber felicitates senior members of the profession at this Conference. This year, the Chamber felicitated one of the most Senior Past Presidents of the Chamber, Member of Rajya Sabha and Senior Advocate, Shri Y. P. Trivedi, on completing more than 50 years in the profession. Shri Trivedi was honoured by his colleagues in the profession and our Past President Shri V. H. Patil. Shri Trivedi spoke about his journey in the profession. It was a rare opportunity and a treat to listen to him on a subject which was not academic.

As I mentioned in my last communication, the Chamber is envisaging changes in its 'Rules and Regulations'. As a procedure, after putting before in the meeting of Past Presidents Advisory Board for their suggestions, the same were discussed at the Managing Council meeting held recently. There was threadbare discussion on the subject and I am happy that all members actively participated in this Managing Council meeting which lasted for more than 4 hours.

As usual, the coming months the Chamber has full of activities. Apart from regular Study Circles and other meetings, many seminars and conferences are planned and till April end all Fridays and Saturdays are booked in the calendar of the Chamber. I sincerely apologise to the members for some of the overlapping programmes which were inevitable for some compelling reasons. I request members to take benefit from the activities of the Chamber.

The subject of the Chamber's Journal for this month is 'Laws for a changing India'. I appreciate efforts of CA Pankaj Majithia and CA Janak Pandya for designing and co-ordinating the issue.

Yatin Desai
President

The Chamber of Tax Consultants

Vision Statement

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

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

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

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

V. H. Patil, *Advocate*

An Introduction to – Ved and Vedanta

After Bhakti Yoga we turned to Sankhya Yoga.

SANKHYA YOGA

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

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

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

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

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

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

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

(5) Desire less actions, lead to self realisation (shlokas 45 to 53)

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

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

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

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

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

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

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

In the next ten shlokas (31 to 40) Lord tells Arjuna the importance of following one's swadharma. By his swadharma that is by his nature, he is a Kshatriya and therefore by nature he must fight a war for a right cause. Abandoning such an opportunity will only incur infamy and sin. In victory he enjoys kingdom and in case of death in such war he will, gain heaven. Therefore the Lord advises Arjuna to arise from the paralysis state and fight, without concern for the result of the battle, as in either case he is a gainer and not a loser.

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

(iv) Actions with desires

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

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

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

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

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

(Nirguna) Sankhya	+	(Saguna) Yoga	+	(Saakaar) Sthitaprajna
(Comprehension of The principles of life)		Art of applying them in life		Personification of those principles and master of the art

together constitute the whole science of Life

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

As up to Shlokas 53 the whole sermon of life is covered, Chapter II would have ended, but for the question put by Arjuna in shlokas 54, as to what is the description of one of study wisdom (sthitaprajna) merged in the super conscious state? How he speaks how does he sit, how does he work. As an answer to this question. The LORD narrates the qualities of a sthitaprajna, the realised soul. In short after attaining union with spirit a devotee's consciousness never descend. The devotee merged in God consciousness remains in samadhi union with God. His plane of activity changes instead of working in the world, while looking towards God, he feels himself in God, while in the world His discrimination is merged with the spirit, even whether sleeps, eats, works. He realises that God has become his nature, not his little self as well as all other selves. He beholds the entire material world as God saturated cosmos. Even in the wakeful state he enjoys nirvikalpa Samadhi or the state in which the devotee perceives both nature and God. He has given up all personal desires completely, all the desires of the mind and he is satisfied in the self by the self. It must be noted that giving up desires of the mind does not mean abandonment of the duties. He does his duties desirelessly and with even mind. He is not agitated by sorrows nor excited by joy, he is free from desires, fears and anger. He is everywhere without attachment, having met good or evil neither rejoices nor hates. Like a tortoise withdraws his senses from sense objects (shlokas 58). The sense objects (vishaya) turn away from an abstinent man but not the relish; even his relish turns away on seeing the supreme (shlokas 59). Senses are very strong and even a wise man is carried towards them. However a wise man controlling senses must focus on God (shloka 61). A self controlled person, a sthitaprajna, moving among sense objects with his sense under control and he is free of attraction or aversion. In his tranquillity all sorrows are destroyed and he becomes firm. (shl. 65). A Jnani's, all senses are fully under his control, keeping them away from all sense objects. A sthitaprajna keeps away all the sense objects, and also the I and my sense, as I and mine leads for craving. Such person (sthitaprajna) attains his real self and becomes one with Soul. That, is he becomes jeevana mukta, which is the final goal of every person. He gets away from the circle of birth and death and thereafter lives in eternal peace.

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

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

		Shlokas
I.	Yogi (active), sannyasi (ascetic) and jnani (enlightened)	1 – 7
II.	How they relate to action	8 – 12
III.	State of supreme Being	13 – 19
IV	Renunciation precedes meditation and realisation	20 – 29

I. Yogi, sannyasi and jnani

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

II. How they relate to action

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

III. State of supreme Being

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

IV. Renunciation precedes meditation and realisation

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

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

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

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

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

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

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

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

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

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

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

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

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

Manas Kumar Chaudhuri, Partner, Competition & Antitrust Law Team Khaitan & Co.

Evolution of the Competition Regime

Introduction

The Competition Commission of India was set up and became functional on 20th May, 2009. Enforcement activities pertaining to penalising cartels, bid riggings and abuse of dominance by enterprises started immediately thereafter. As regards regulating mergers and acquisition the same commenced only from 1st June, 2011 after several rounds of discussions and deliberations between the Commission and the Government of India when Industry Associations actively participated. During this short period of enforcement of Competition Act the Commission has made a mark in the regulatory space of India. Headline grabbing fines have been imposed against a few delinquent companies and majority merger filings have been approved without much concern to the industry. Barring a few smaller penalty amounts, being deposited by the parties, most of the penalties have not yet been credited to the Consolidated Fund of India since almost all big penalties are under challenge before the Competition Appellate Tribunal. The Commission has firmed up a few statutory regulations which are essential for smooth functioning of the Commission. However, there has been a persistent demand by stakeholders before the Commission towards issuance of some essential guidelines enabling the industry to assess a road-map to address Competition Law related concerns. However, it appears that the Commission though is aware that guidelines are issued by other Competition Authorities worldwide, yet seems not ready to issue such guidelines perhaps on the ground that in the absence of enabling provisions in the law the guidelines may either be misunderstood or challenged before higher courts. Absence of guidelines coupled with inconsistent speaking orders makes the problem even much larger.

Illustrations

In sugar cartel case the Commission held that even if price was discussed amongst the competitors in the trade association meetings, yet if such price-discussion was not implemented or given effect to, the cartel may not have the effect in the market much less adverse effect. On the contrary, in the absence of a direct evidence of price-discussion amongst competitors in the trade association meetings, cement companies were accused of forming cartel and a composite penalty to the tune of ₹ 6,700 crores was imposed upon 12 cement companies. Further, in the absence of a stable market share amongst competitors allegedly involved in a cartel was held to be not a conclusive proof of cartel and thereby the Commission exonerated tyre companies from the allegations of cartel. The concept of instable market share amongst competitors was ignored in another matter. While looking at the order against LPG cylinder manufacturers it appeared that the Commission as well as the COMPAT did not consider it appropriate to gather evidences from the PSU Oil Marketing Companies and concluded bid rigging on the basis of a DG's investigation report and penalised 48 LPG cylinder companies with a fine amounting to ₹ 165 crores. It was subsequently revealed from the information available in public domain that one of the PSU Oil Marketing Companies inserts a condition in the tender document of a *price band* and any bid below the lower band of the price band becomes ineligible to participate in the tender. This condition of price band in a tender document would continue to give wrong price signals in the market since all bidders would be forced to bid at the lowest price band which may appear to the Commission and COMPAT a collusive bidding but in fact such price bidding is due to defective design of the tender document. The aforesaid illustrations indicate inconsistencies in decision-making process, thereby creating confusion in the minds of the industry players and such confusion gets multiplied in the absence of appropriate guidelines. When we look at a few orders of abuse of dominance we find that a similar picture of inconsistency and confusion continues. A ₹ 630 crore penalty against DLF has not yet been decided by the Tribunal in First Appeal perhaps on the ground that the determination of relevant market by the Commission at the trial level may have gone contrary to the intent of the law and such a determination is fundamental while deciding allegations of abuse of dominance. The other matter which has also been pending for quite a number of years before the Tribunal is that of *NSC vs. MCX* appeal. The findings of the Commission against NSC's ability to provide service in the currency derivative market at zero cost by exercising its dominance in the stock market was held abusive and has been challenged by NSC before the Tribunal on the ground that at the relevant time of allegation the market share of MCX in the currency derivative market was consistently rising and came nearly equal to that of NSC; as such effect of dominance much less abuse by NSC against MCX in the currency derivative market was not only misleading but much less a breach of the Act. The order of the Tribunal is awaited.

Distinguishing penalties by Tribunal

The Tribunal recently upheld the substantive breach of bid rigging and cartelisation against Explosive Manufacturers and Aluminium Phosphorus Tablet manufacturers. However, in both these cases the Tribunal had distinguished the quantum of penalties being imposed by the Commission and reduced the penalties from ₹ 60 crores to ₹ 6 crores in the *Explosives* case and from ₹ 317 crores to ₹ 10 crores in the *Aluminium Phosphorus Tablet* case. If one looks at the substantive law and the Supreme Court Judgment arising out of Electricity Act, 2003, a Tribunal which is a creature of a statute cannot exercise the powers of judicial review to distinguish the same very statute. If one looks at this judgment of the Supreme Court then one wonders if the basic allegations of bid rigging and cartels having been upheld by the Tribunal, can the Tribunal distinguish the penalties in the absence of specific provisions in the principal legislation? It is noteworthy that section 64 of the Competition Act enables the Commission to frame statutory regulations and issuance of any guidelines including fining guidelines may not strictly come within the ambit and scope of section 64 of the Act. In such dichotomy it would be better for the Commission and Tribunal to pass consistent orders so that guidelines, if any, may emerge from such orders from time to time.

Investigation by the DG

We have also noticed that the office of the Director General, the investigating wing of the Commission, has been able to pass several reasonable investigation reports but in some cases the investigation reports appear to have some concerns and may come in the way of proper evolution of this complex legislation. The DG does not enjoy any discretion to suppress any material evidence in its report if such material information had been collected by the DG during his investigation. The copies of the depositions made on oath by the deponents before the DG are not handed over to the party making such depositions a fundamental right of deponent seems ignored. The office of the DG does not enjoy any *suo motu* powers and the same was confirmed by the Supreme Court in the *CCI vs. SAIL* judgment on 9th September 2010 yet we find that the DG at times exceeds the legal mandate and expands the scope of investigation causing substantial harm to the parties. However, there is always a scope of improvement and we are quite hopeful that the office of the DG would render appropriate service of assisting the Commission.

Merger control

The Merger Control under the Competition Law is a regulatory function unlike adjudicatory function of Commission in respect of anti-competitive agreements and abuse of dominance. The statutory regulation of combination has helped companies to file pre-merger notifications appropriately before the Commission and the Commission has been able to approve nearly 90 to 95 per cent of the merger filings within a period of 30 to 45 calendar days. The statistics appear at par with international practice and the CCI deserves commendation for the same. The CCI was initially lenient in respect belated filings, however, lately it has adopted a stricter position and belated filings have gradually been falling foul of the penal provisions. Penalties ranging from ₹ 5 lakhs to ₹ 1 crore have been imposed against companies for belated filings. An appeal against the order of approval of *Jet-Etihad* merger has been preferred by a third party and admitted by the COMPAT.

Amendments

With third party appeal having been admitted by the COMPAT, we may soon see an amendment to Regulation 29 of the Combination Regulations. The CCI is open to certain amendments in its regulations from time to time depending on the evolution of the law and public debates which emerge from time to time in conferences and seminars which further help fine-tuning the law in the formative years. The Government of India has also taken a note of certain issues and has decided to suggest a few amendments to the principal legislation and an amendment to this effect has been awaiting the final decision of the Parliamentary Standing Committee. The amendment bill may, if passed, enhance the power of the Chairperson of the Commission substantially thereby the Commission would be further strengthened to cause unannounced search and seizure within the premises of companies facing allegations of anti-competitive conducts.

Way forward

The Government has also been keen to have a comprehensive national competition policy this may pave the way for all the commercial activities of government as well as private companies come within the scope and ambit of such policy making the markets more competitive and ensuring better economic standards for doing business in India. The Competition Law and the Commission have come a long way in India and it is definitely a distinct departure from what India witnessed in the past when the Monopolies and Restrictive Trade Practices Commission was functional. The Commission and the Tribunal both appear to be very pro-active to change and that is a positive take away in Indian regulatory space which may enable overseas investments easier. Imposition of a penalty of ₹ 1773.5 crore against Coal India Limited is a positive development and the immunity enjoyed by government companies so far may change gradually. We look forward to a growth of competition culture in business space in India and companies soon rush to develop internal compliance manuals and defend their business strategies better.

Ananth Malathi, Nishith Desai Associates

The Competition Act – Overview

Introduction

The Competition Act, 2002 ('Competition Act') was enacted when India had integrated with the world economy and when Government of India was seeking to divest its shares in several State Owned Enterprises ('SOEs'). Although the Competition Commission of India, constituted under the Competition Act ('Competition Commission') has been in existence for less than five years, in its short duration the Competition Commission has played a crucial role in addressing issues relating to freedom of contract[1] and applying principles of the Competition Act even to State Owned Enterprises – in a marked and conscious departure from the earlier legislation, the Monopoly and Restrictive Trade Practices Act ('MRTP Act'). Under the Competition Act, an appeal against orders of the Competition Commission lie to the Competition Appellate Tribunal ('COMPAT'), however, there aren't many notable rulings of COMPAT. In spite of the fact that these are relatively early stages for the Competition Act, the orders of the Competition Commission demonstrate that the Competition Act in its application and the orders of the Competition Commission are of extreme relevance to business entities in India. Business entities must be aware of the significance of the Competition Act and the implications of the same, whether it relates to innocuous transactions such as franchisee agreements, dealer agreements or mergers and acquisitions.

Background

The foundation for independent India's economy was set in a planned economy which envisaged planned utilisation and consumption of resources. The MRTP Act was passed at a time of strict regulation and licensing of industries which was aimed at achieving the objectives of the MRTP Act, namely, to prevent (a) economic power concentration in a few hands and curbing monopolistic behaviour, (b) prohibition of monopolistic, unfair or restrictive traded practices. The intention behind this was both to protect consumers as well as to avoid concentration of wealth.[2]

1. The Competition Commission has generally accepted exclusive clauses in the context of dealers and franchisees – clearly recognising the right of a business entity to impose reasonable restrictions on its dealer. The Commission has also examined mergers and acquisitions across various industries and also addressed issues of cartelisation and applied the Competition Act to Public Sector Undertakings.

2. Subsequent to the 1991 amendment to the MRTP Act, there was a shift in emphasis towards prohibition of monopolistic, unfair or restriction trade practice rather than on concentration of wealth and control of monopolies. See Jaivir Singh, Monopolistic Trade Practices and Concentration of Wealth : Some conceptual problems in MRTP Act, Economic and Political Weekly, Vol. 35, No. 50 (Dec. 9-15, 2000), pp. 4437-4444.

MRTP Act to Competition Act

In contrast, the objectives of the Competition Act are to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. Therefore, while the emphasis in the MRTP Act was to prevent concentration of economic power and monopolistic behaviour, the Competition Act, in contrast focuses on positive acts of engendering competitive spirit and free enterprise.

While there are certain elements common to MRTP Act and the Competition Act, fundamental distinctions between the enactments are the objectives of the respective statutes and the intent of the legislature. The significance of these objectives are realised in the course of interpretation and enforcement of the relevant statutes when a court considers objects of a statute to interpret a particular provision of law and analyse transactions that have been brought before it.[3]

In spite of the laudable objectives of the MRTP Act, it was unable to achieve its objectives both in terms of enforcement of the law and enforcement of its rulings. From a jurisprudential perspective, the MRTP Commission took a fairly narrow view of private contractual rights. The Supreme Court of India ('Supreme Court') upheld restrictive clauses in agreements[4] and applied the test of rule of reason in respect of such clauses in agreements.[5] The MRTP Amendment Act, 1984, brought in response to the above judgments sought to re-establish restrictions set out in section 33(1) of the MRTP Act, such as resale price maintenance, were restrictions, exclusive dealing as being restrictive and in contravention of the MRTP Act. The Supreme Court in *Voltas Ltd vs. Union of India*[6] held that in view of the general definition of restrictive trade practices under section 2(o), practices other than those listed under Section 33 (1) could be examined under rule of reason analysis.

However, in spite of certain notable rulings of the Supreme Court under the MRTP Act, from a regulation and enforcement perspective, the MRTP Act failed to achieve its objectives. Against this background, the Finance Minister of India in its budget speech in February, 1999 made the following statement in regards to the then existing MRTP Act."

> *"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions."*

The Raghvan Committee[7] was constituted to recommend a suitable legislative framework

3. Burakar Coal Co Ltd. vs. Union of India, AIR 1961 SC 954.

4. TELCO vs. Registrar of RT Agreement 2 SCC 55 (1977) and M & M Limited v. Union of India 2 SCC 529 (1979).

5. The Supreme Court propounded the following ratio : "The definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be a restrictive trade practice, every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts an peculiar to the busmen to which the restraint is applied. Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual and probable effect."

6. AIR 1995 SCC 1881.

7. http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf

relating to competition law for the country. It was felt that although the MRTP seemingly had provisions regulating anti-competitive practices, in comparison with competition laws of many countries it was inadequate for promoting competition in the market and trade and for reducing, if not eliminating, anti-competitive practices in the country's domestic and international trade.

One of the biggest shortcomings of the MRTP Act was the inadequacy of MRTP Act to provide adequate remedy to complainants. Except for orders directing a respondent to 'cease and desist' from the alleged monopolistic, restrictive or unfair trade practices the Commission could not impose penalties for breach of law; no other penalty or fine could be imposed.[8] Secondly, it is a generally accepted principle that competition law has extraterritorial application in all the cases where the overseas conduct of defendant distorts the competition in the domestic market. However the Supreme Court repeatedly refused to acknowledge this principle and had held that the wording of MRTP Act did not provide for the extraterritorial jurisdiction.[9] Thirdly, the MRTP Act did not define certain key provisions[10] such as abuse of dominance, cartels, collusion, price fixing, bid rigging, boycotts, refusal to deal and predatory pricing. It is often argued that lack of definition was immaterial. Because the general nature of the MRTP Act could have covered all anti-competitive practices e.g. restrictive trade practices were defined in a fairly general terms to include all trade practices that prevents, distorts or restricts competition and therefore there was no need for a new law.[11] It is true that the generic nature of MRTP Act was very wide but this generic nature caused ambiguities in the interpretation and application of MRTP Act and ambiguities resulted into atmosphere of general business uncertainty on key issues.[12] Given the above, it was felt that drafting a new law would be more beneficial. This led to the enactment of the Competition Act.

The Competition Act

The Competition Act prohibits or regulates (i) Anticompetitive agreements (section 3 of the Competition Act) (ii) Abuse of dominant position (section 4 of the Competition Act) (iii) Combinations (under section 5 and section 6 of the Competition Act).

As a quasi-judicial body, the Competition Commission is bound by principles of rule of law in giving decisions[13] and the doctrine of precedents. As per the Competition Act the Competition Commission is duly empowered to receive documents and testimonial by way of evidence and therefore is well suited to adjudicate disputes before it on the basis of material adduced by parties and by application

8. See, Chakravarthy S MRTP Act metamorphoses into Competition Act. www. Cuts-international.org/doc01.doc;

9. See American *Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and Others (1998) 3 CompLJ 152 MRTPC. ANSAC,* a joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI complained, to the MRTPC to take action against ANSAC for forming a cartel to exports to India. SC did not go into the allegations of cartelisation, it held that the MRTP Act did not give the MRTPC any extraterritorial jurisdiction therefore MRTPC therefore could not take action against foreign cartels.

10. See Study of Cartel Cases in select Jurisdiction at http:// www.cuts-ccier.org/CARTEL/pdf/FinalReport.pdf

11. Ibid

12. Both Supreme Court and MRTP Commission had in various cases such as: *Haridas Exports vs. All India Float Glass Manufacturer Association (AIFGMA), 6 SCC 600 (2002), AIFGMA vs. PT Mulia Industries, 2000 CTJ 252 (MRTPC), Union of India vs. Hindustan Development Corporation 16 SCC 499 (1993), DG (I & R) vs. Modern Food Industries, 3 Comp LJ 154 (1996),* had not been able to give any guidance to the business community as to what will constitute predatory price under MRTP Act. In the Modern Food Case mentioned above, SC did mention Matsushita but missed matsushita's significance with respect to the market structure and the theory recoupment.

13. These are (a) predictability in the judicial reasoning (b) uniform and consistent application of law

of the principles of evidentiary proof under the Evidence Act. This is important since unlike the United States, a suit for anti-competitive practices cannot be brought in a civil court. Nor does intent in cartel like conduct take the case outside the jurisdiction of the Competition Commission. Further, the scope of investigation of the Federal Trade Commission and the Department of Justice are slightly different;[14] however in India all cases relating to anti-competitive practices can only be investigated by the Competition Commission.

Section 27 of the Act lays down remedies for the violation of sections 3 and 4 of the Competition Act. The Competition Commission may issue a "cease and desist' order, or impose a penalty not exceeding '10 per cent of the average turnover during the preceding three years' from the date of order. In cartel cases Competition Commission could impose a penalty that could be higher of either up to 10 per cent of the turnover or three times the amount of profit derived from the cartel agreement. In the cases of 'contravention by companies', Competition Commission may under the provision of section 48 of the Competition Act proceed against and punish any person who, at the time of the violation, was in charge of the company, unless that person can show that the violation was committed 'without his knowledge' or that he had exercised 'all due diligence to prevent the violation'. Section 43A provides that in case of a failure to notify a combination, the Commission shall impose a penalty of 1% of the total assets or turnover of the combination. Section 42A of the Competition Act provides for the compensation in case of contravention of orders of the Competition Commission. This section provides that a person may make an application to the COMPAT for recovery of compensation from an enterprise for any loss or damage suffered by him for violating the directions of Competition Commission under sections 27, 28, 32, 33 and 41 of the Competition Act.

Restrictive covenants

Section 3 of the Competition Act defines anti-competitive agreements also provides that no enterprise, association of enterprises, person, association of persons shall enter into an agreement which causes or is likely to cause an appreciable adverse effect on competition.

The rulings of the Competition Commission in matters under section 3 and section 4 of the Competition Act show keen sense of understanding of current day business transactions.[15] The reasoning of the Competition Commission in Automobiles Dealers and Lamborghini is balanced and recognises changes in business models without placing dealers in a vulnerable or disadvantageous position. The Competition Commission in these rulings has relied on the criteria provided in section 19 of the Competition Act and has also recommended that all the factors mentioned therein be examined and has sought to ensure uniformity in outcomes and predictability in application of the Competition Act. The Competition Commission has stressed on the need to rely on all factors set out in section 19(3), namely, whether:

a. there was creation of barrier to entry;
b. competitors were driven out of the market;
c. competition was restricted by hindering entry into market;
d. there was accrual of benefits to customers;
e. there was improvement in production or distribution of goods or services;
f. there was promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

14. See for instance Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission, Remarks of J. Thomas Rosch, Commissioner, FTC at the George Mason Law Review's 14th Annual Symposium on Antitrust Law, February, 2011.

15. *Automobiles Dealers Association vs. Global Automobiles Limited & Anr.* Case No. 33 of 2011 ('Automobiles Dealers') and *Exclusive Motors Pvt. Ltd. vs. Automobili Lamborghini S.P.A.* ('Lamborghini') Case No. 52 of 2012.

By taking into consideration tangible factors rather than mere interpretive analysis of sections[16], the Competition Commission has ensured a fair and reasonable outcome to the application of the provisions of the Competition Act. The application of rules relating to burden of proof and onus of proof would also ensure that even at the preliminary stage, an informant who approaches the Competition Commission, does soon the basis of real and tangible evidence and not on conjectural or hypothetical circumstances. This would also help to put an end to frivolous complaints and abuse of the process of law.[17]

Abuse of dominant position and SOEs

A party is said to be in apposition to abuse its dominance if the party has the power to:

a. impose unfair /discriminatory conditions on sale or purchase of goods,

b. limits production and supply and development of goods,

c. denies market access to goods/services,

d. makes acceptance of contract conditional upon other obligations imposed on a party,

e. uses dominant position in one market to enter into another market.

The Competition Commission has had occasion to consider this aspect in several rulings, particularly cases where trade associations and similar bodies were involved. The Competition Commission is acutely cognisant of limitations of proving certain aspects such as agreements and intents. However, the general trend of the Competition Commission has been a more pragmatic approach by carefully weighing the attending circumstances. However, prior to ascertaining whether there is abuse of dominance, the Competition Commission is first required to make a conclusion on the relevant market. The Competition Act sets out the conditions for ascertaining the relevant market and once the same has been identified, the Competition Commission thereafter examines the behaviour of the party against whom the allegations have been made.

The Competition Commission has had occasion to examine this issue in several cases, apart from those relating to entities and trade associations exercising such power, but also allegations against SOEs[18] and in the context of mergers and acquisitions. The cases examined therein shows that while in some cases, trade associations actively agreed to exclude parties[19] or not transact with a particular party.[20] In one particular case, the Competition Commission has also had occasion to examine issues relating to obligations of a dominant party to compulsorily transaction with other parties in the market.[21] Although the Competition Commission has not emphatically ruled in any of the cases that a party will have to compulsorily transact with any party in the market, the Competition Commission has clearly recognised freedom of contracts and has ensured that no party is wrongfully excluded from a particular market.[22]

16. See Hindustan Lever Limited supra.

17. For a detailed analysis, see Competition Commission in India rules on restrictive clauses in dealership agreements CLR, Feb, 2013 Vol. 1, Part 2, page B-33 by M.S. Ananth.

18. For a detailed analysis, see Competition Law in India, Jurisprudential Trends and the way forward, Nishith Desai Associates, April 2013.

19. FICCI – Multiplex Association of India Federation House v. United Producers / Distributors & Ors. CCI Case No. 1 of 2009.

20. Uniglobe Mod Travels Pvt. Ltd vs. Travel Agents Federation of India, CCI Case No. 3 of 2009.

21. M/s. Kansan New Pvt. Ltd. vs. M/s. Fast Way Transmission Pvt. Ltd. & Ors. Case No. 36 of 2011.

22. Sajjan Khaitan vs. Eastern India Motion Pictures Association & Ors., Case No. 16 of 2011.

The rulings of the Competition Commission therefore clearly demonstrate that wrongful exclusion is an actionable claim and a party which is able to exercise influence in a manner as set out in section 4 of the Competition Act can be held guilty of abusing its dominant position. However, it must be noted that the Competition Commission has never ruled that merely because a party has a dominant position or exercises significant control in a relevant market that by itself is a violation of the Competition Act. This is indeed a salutary feature of the enforcement of the Competition Act.

SOEs

Although the Competition Commission has passed rulings against oil and gas distribution companies and Coal India Limited and its subsidiaries[23], these rulings have been appealed against before COMPAT. The Competition Commission in Coal India's case unequivocally and emphatically held that the Competition Act would apply to SOEs as well. Admittedly this is the position in law – however, the Competition Commission rejected contentions on the non-applicability of the Competition Act to SOEs. It remains to be seen how the appellate court reviews these orders.

What emerges from this analysis is that all entities will have to comply with the provisions of the Competition Act. Further, entities with significant influence in a relevant market will also have to ensure that terms and conditions in contracts are not seen to be oppressive or incorporated with an intention to take advantage of the weak bargaining power of the other party. Although this is a general aspect under the Competition Act, such clauses can change the nature of an allegation when a party exercises significant influence in a relevant market.

Mergers and Acquisitions

Section 5 of the Competition Act explains combination as:

> *'.....acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises......'*[24]

section 6 provides for regulation of combinations. As per section 6, any person or enterprise entering into a combination shall mandatorily give notice to the Commission of any such acquisition, merger or an amalgamation.[25] The objective behind regulating such combinations is to assess the appreciable adverse effect on competition in India while looking at the factors like level of competition, extent of barriers to entry into the market, market share, etc.[26] However, all amalgamations and mergers are not covered in the definition of section 5 of the Competition Act. Only those acquisitions and mergers which cross the specified assets and turnover criteria as set out in the Competition Act are regulated.

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011[27] ('Combination Regulations') provides for the procedure for compliance of such combinations. Any person or enterprise

23. See for instance http://www.financialexpress.com/news/price-fixing-hc-stays-cci-action-against-oil-cos/1198436. See also *M/s Maharashtra State Power Generation Company Ltd. vs. M/s Mahanadi Coalfields Ltd. & Ors.* 2. *M/s Maharashtra State Power Generation Company Ltd. vs. M/s Western Coalfields Ltd. & Ors, 3. M/s Gujarat State Electricity Corporation Limited vs. M/s South Eastern Coalfields Ltd. & Ors, Case No. 03/2012, 11/2012,* 59/2012.

24. Section 5, Competition Act, 2002

25. Section 6(2), Competition Act, 2002

26. Section 20(4), Competition Act, 2002

27. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, as amended up to 4th April, 2013

proposing a combination within the meaning of section 5 of the Act shall file a notice under section 6(2) of the Act read with Regulation 5[28] and 8[29] of the Combination Regulation.

Since all the Acts of acquisitions cannot be said to have an appreciable adverse effect on competition in India, certain acts of combinations are normally exempted from the reporting requirement by Regulation 4 of the Combination Regulations under Schedule I.[30]

Once a company makes a notification, the Competition Commission has the power to make enquiries with respect to the proposed combination and to examine if the same would cause or is likely to cause an appreciable adverse effect on competition. The Competition Act provides for the examination of these factors as set out in section 20(4) of the Competition Act to ascertain if there is likely to be an appreciable adverse effect on competition:

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of combination in the market;

(d) degree of countervailing power in the market;

(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or are likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(l) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Two such transactions are discussed below.

Jet-Etihad deal

Etihad Airways PJSC (a company incorporated in the United Arab Emirates and its national airline) was acquiring 24% equity interest in Jet Airways (India) Limited and other rights and benefits which the parties mutually agreed upon by the shareholders' agreement, commercial co-operation agreement and investor's agreement, valued at ₹ 2060 crores. Jet and Etihad jointly gave a notice under section 6(2) to the

28. Regulation 5, Combination Regulation, 2011 – Form of notice for the proposed combination

29. Regulation 8, Combination Regulation, 2011 – Failure to file notice

30. Annexure I, The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 – An acquisition which does not result in holding 25 per cent or more of total shares or voting rights of the company, whether directly or indirectly; an acquisition of not more than 5 per cent in any financial year where the acquirer is already holding 25 per cent or more of of total shares or voting rights of the company, but not exceeding 50 per cent; An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business; A combination referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India; etc.

Commission.[31] Interestingly, in the order of the Competition Commission, it has not been set out as to on what basis the Competition Commission exercised jurisdiction and examined the transaction. There is no discussion on either the assets of the entities or the financials arising from the proposed transaction.

Thereafter, in terms of Regulation 14, the parties were required to remove certain defects and provide necessary information and documents for which the parties sought extensions and furnished information in terms of Regulation 16. Further information was sought by the Competition Commission under Regulations 5 and 19 for which repeated extensions were given taken and information was furnished and in the due course substantial changes were also made to the governing documents like SHA (Shareholders' Agreement), CCA (Commercial Co-operation Agreement) and CGC (Corporate Governance Code). Further, Air India also furnished its views and comments on the proposed combination under regulation 19(3). After analysing the entire framework of this acquisition which was proposed for enhancing their airline business through joint initiative, the Competition Commission gave a clearance to this deal stating that *prima facie* there was no competition concern in the transaction.

It is pertinent to note that the Commission had also issued show cause notice to Etihad under Regulation 48[32] of the Competition Commission of India (General) Regulations, 2009 read with Section 43A[33] of the Competition Act stating that the parties consummated and implemented certain parts of the composite combination namely LHR Transaction (London Heathrow Airport transaction) and CCA; and Etihad, being the acquirer in the combination, failed to give notice in accordance with section 6(2) of the Act. In view of this, the Commission imposed a penalty of ₹ 1 crore on Etihad as the obligation to give notice to the Commission, as per Regulation 9[34] of the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations 2011, was on Etihad.

In this case, Competition Commission was examining a merger or arrangement in the context of airlines for the first time. Although Competition Commission did not quote any international pronouncements in the ruling, the approach of Competition Commission was similar to the approach followed by the European Commission in making a competition assessment in the context of mergers and operational arrangements between airlines in Europe. For instance, in the merger between British Airways and Iberia, the European Commission concluded that the merger would not affect competition and the merged entity would continue to face competition from other entities.[35] In the case of merger between Northwest Airlines and Delta Airlines, the European Commission allowed the merger and noted that both airlines had benefit of

31. Combination Registration No. C-2013/05/122 dated November 12, 2013.

32. Regulation 48, Competition Commission of India (General) Regulations, 2009 – Procedure for imposition of penalty under the Act

33. Section 43A, Competition Act, 2002 – Power to impose penalty for non-furnishing of information on combinations

34. Regulation 9, Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, Obligation to file the notice – (1) In case of an acquisition or acquiring of control of enterprise(s), the acquirer shall file the notice in Form I or Form II

35. European Commission – IP/10/938 14-7-2010, available at http://europa.eu/rapid/press-release_IP-10-938_en.htm.

complementarity in their resources.[36] In the case of acquisition of Martinair by KLM[37] the European Commission directed investigation and approved the same thereafter. Interestingly, in the case of the takeover of SN Brussels Airlines by Lufthansa[38] after the European Commission highlighted apprehensions, Lufthansa made several commitments and concessions. After examining these concessions and commitments, the European Commission approved the acquisition subject to Lufthansa complying with the conditions.[39]

This is a landmark ruling as Competition Commission has examined in far greater detail the impact of the proposed transaction on air passenger services for Etihad and Jet and its consequential impact on competition in India than it has in other cases. The approach of the Competition Commission provides clarity regarding the steps to be followed to analyse whether a combination is likely to cause appreciable adverse effect on competition and this analysis would help companies identify whether a proposed transaction would be permissible or not under the Competition Act. The reasoning and conclusions of this ruling were grounded in uncontroverted facts and this is an extremely important aspect as it clearly places the onus on parties to substantiate their claims before Competition Commission.

This pragmatic and balanced approach augurs well for companies that intend to enter into combinations either at the vertical or horizontal level and whether at the domestic or international level.

It is important to note that the issue of foreign investment in India is regulated primarily by the regulations under the foreign exchange laws. As a listed company, Jet is also required to comply with various regulations issued by SEBI apart from compliance with requirements under the Companies Act, 1956 and possibly the Income-tax Act, 1961. The ruling of Competition Commission only approves the proposed transaction from the perspective of competition in the market. Although the issue relating to conflicting jurisdictions by different regulators has not been addressed by the Supreme Court of India, the approval of one regulator is not binding and not an indication of compliance for the purpose of another regulator.

The Competition Commission's order holding that the proposed transaction did not have appreciable adverse effect in the relevant market has been challenged before COMPAT by the Former Air India Executive Director Jitender Bhargava. This appeal is pending adjudication.[40]

United Spirits Ltd. – Diageo Plc deal

Relay B.V., (an indirect wholly-owned subsidiary of Diageo Plc., hereinafter referred as Diageo) and United Spirits Limited (USL) jointly gave a notice under section 6(2) for the proposed

36. European Commission – IP/08/1245 6-8-2008, available at http://europa.eu/rapid/press-release_IP-08-1245_en.htm. The European Commission noted similar commercial principles in the case of merger between United Airlines and Continental Airlines, European Commission - IP/10/1010 27-7-2010, available at http://europa.eu/rapid/press-release_IP-10-1010_en.htm.

37. European Commission – IP/08/1995 17-12-2008, available at http://europa.eu/rapid/press-release_IP-08-1995_en.htm,

38. European Commission – IP/09/129 26-1-2009, available at http://europa.eu/rapid/press-release_IP-09-129_en.htm.

39. Case No. COMP/M.5335- LUFTHANSA/ SN AIRHOLDING, available at http://ec.europa.eu/competition/mergers/cases/decisions/M5335_20090622_20600_229007_EN.pdf.

40. See http://businesstoday.intoday.in/story/compat-to-hear-appeal-against-jet-etihad-deal/1/202198.html

acquisition of shares and control of USL. The notice was given pursuant to the execution of (i) Preferential Allotment Agreement (ii) Share Purchase Agreement and (iii) Shareholder's Agreement on 9th November, 2012 (PAA, SPA and SHA respectively). In terms of Regulation 14, the parties were required to remove certain defects and furnish the required information/ documents and additional information under Regulations 5(4) and 19(2) of the Combination Regulations, which were furnished.

As part of the deal, Diageo would acquire 27.4 per cent stake for ₹ 5,725.4 crore through a combination of share purchase from existing promoters and preferential allotment of shares. In addition, it had offered to acquire an additional 26 per cent stake for ₹ 5,441.07 crore through an open offer for public shareholders.

The execution of the SPA and the PAA triggered an obligation on the part of Relay B.V. to make a mandatory tender offer to the public shareholders of USL under the SEBI Takeover Regulations[41]. If the mandatory tender offer was fully subscribed, Relay B.V. would hold 53.4 per cent of the USL's enlarged equity share capital.

After doing a detailed assessment of the relevant product market and relevant geographic market, Competition Commission observed that post-combination, the market share of the combined entity will not change much. There are multiple brands of other players who are present and effectively competing with the brands of USL and Diageo in those segments, and the proposed combination may bring new products and more variants of the existing brands at different price points which would ultimately enable the consumer to expand his choice set.

On February 26th 2013, Competition Commission had given a green signal to Diageo Plc, the UK spirits company, for acquiring majority stake of 53.4% in United Spirits Ltd. of the UB Group for a total consideration of ₹ 11166.5 crores. Despite getting several clearances, the Karnataka High Court had struck down the transaction on the ground of undervaluation of shares and lack of *bona fides* on a plea by a host of creditors seeking to recover money from Kingfisher Airlines (of the UB Group). This order of the Karnataka HC has been recently challenged in the Supreme Court by Diageo Plc and the United Breweries.[42]

An analysis of the rulings relating to mergers and acquisitions would reveal that companies would need to demonstrate that even if they are covered within the threshold set out in section 5 of the Competition Act, it is important that companies are prepared to demonstrate to the satisfaction of the Competition Commission that the proposed transaction does not cause appreciable adverse effect on competition. The ruling of the Competition Commission in the Jet Etihad case serves as a good indicator of the factors that the Competition Commission would consider in the case of a proposed transaction.

41. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

42. 'Diageo moves Supreme Court against High Court order on United Spirits deal' The Economic Times, January 21, 2014, available at http://articles.economictimes.indiatimes.com/2014-01-21/news/46411322_1_united-spirits-diageo-ub-holdings

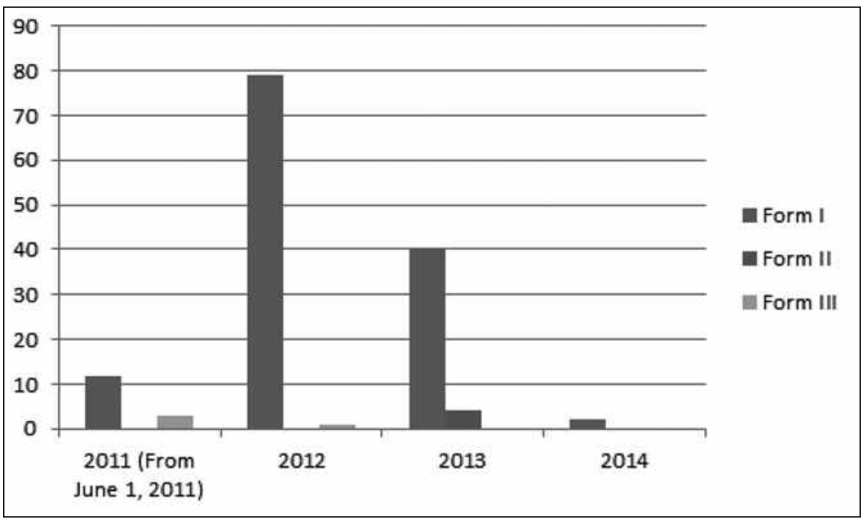
Aparna Mehra, AZB Partner

Merger Review by CCI – Trends

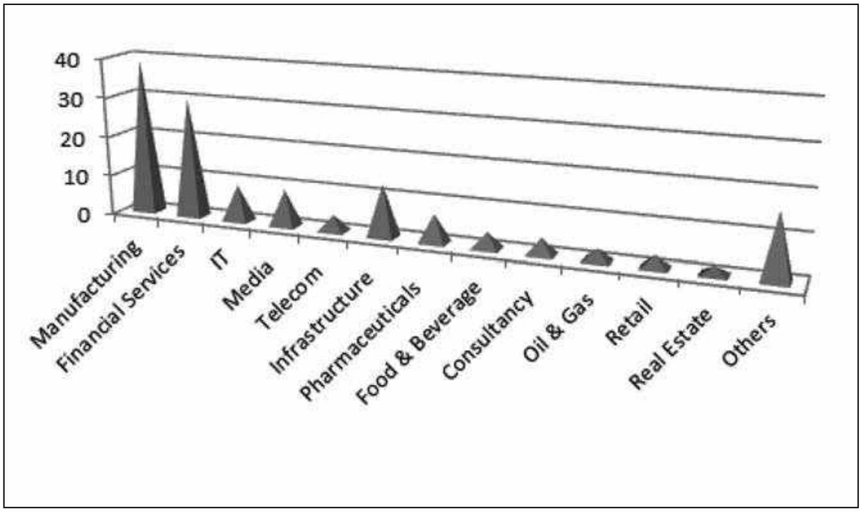
The journey and growth of Indian merger control regime, since its inception more than 2 years ago, has been a fairly exciting one. Based on the experience gained in the first nine months, the Competition Commission of India ("CCI") proactively amended the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 ('Combination Regulations') in February, 2012. The revised Combination Regulations evoked mixed reactions from the industry and law practitioners, which possibly led to a further set of amendments in April, 2013. This bears ample testimony to the CCI's responsiveness to the expectations and concerns of the various stakeholders.

So far, CCI has reviewed approximately one hundred and forty combinations. Much to the relief of the industry, which was initially sceptical about CCI's ability to clear transactions in a time bound manner, CCI has completed its initial reviews within 30 days (excluding the stoppage time on account of information requests) of receiving notifications and has cleared all transactions on the basis of a preliminary assessment. Commendably, CCI has even cleared the four detailed Form-II notifications that it has received so far, within the 30-45 day time period.

The chart below depicts the number of approvals granted by CCI since June 2011:



CCI has reviewed combinations across a variety of sectors such as manufacturing, financial services, telecom, retail, and real estate. The manufacturing sector accounts for the maximum number of transactions notified to CCI with a total of 39 notifications, followed closely by the financial sector with 30 notifications. The chart below provides a sector wise break up of transactions that have been notified to CCI[1].



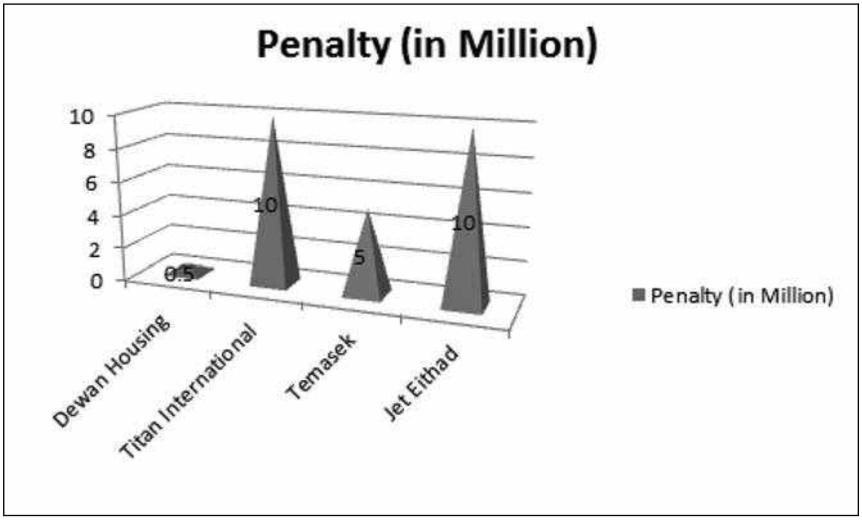
Initially, a majority of the transactions notified to CCI were in the nature of intra-group reorganisations. Such transactions do not generally result in any change in the competitive conditions in the market and have little or no potential to cause an appreciable adverse effect on competition in India. This prompted CCI to introduce a specific carve out from the notification requirement for intra-group mergers and acquisitions, as long as they do not result in change in control over the parties to the transaction.

In case of belated notices[2], CCI did not impose any penalty in its first year of the regime with an aim to give headroom to the stakeholders to get familiarised with the nascent merger control regime in India, particularly since this was the first year of implementation of the enforcement provisions relating to combinations[3] by the CCI. However, in the second year of its implementation, there was a clear departure from the soft approach and CCI imposed penalties in 4 instances:

1. The data captured above does not include notices which were deemed as 'not valid' or where the Commission found that the transaction was not a valid combination.

2. Failure to notify a combination to the Commission can result in a fine of up to 1% of the total turnover or the assets of the enterprises involved, whichever is higher. If any person fails to comply with the orders or directions of the Commission issued in relation to combinations, such person would be punishable with fine which may extend to INR 100,000 for each day during which such non-compliance occurs, subject to a maximum of INR 100 million. The failure to notify a combination does not mean that the Commission cannot investigate into such combinations. The Competition Act, 2002 empowers the Commission to investigate into such combinations as long as the period of one year from the date of coming into the effect of the combination has not lapsed.

3. In all such cases, separate proceedings regarding imposition of penalty under Section 43A were initiated.



INR 0.5 million on the parties for delayed filing (Dewan Housing and First Blue Home Finance Limited)[4]; INR 10 million for delayed filing on the acquirer (Titan International)[5]; INR 5 million on the acquirer for delayed filing despite the combination having no significant local nexus and the transaction having been abandoned by the parties (Temasek)[6]; and INR 10 million on the acquirer for consummating certain part of the transaction prior to approval and failure to give notice (Jet/Etihad).

On the procedural front, CCI's scrutiny on claims of confidentiality request by the parties in the filings has tightened. Of late, parties are being asked to verify whether the information being claimed confidential is in public domain at the time of filing. Accordingly, confidentiality over information readily available in the public domain (i.e. information available on parties' website, annual reports, press releases, media reports, information submitted to other regulators, as an example registrar of companies, which is also available online, etc.) will not be granted by the CCI.

Conclusion

Having witnessed the merger control regime, one can say that the CCI's effort to review and approve combinations in a time-bound manner has put to rest the fears of the business community. Although there are certain areas which need to be addressed, the CCI, being a fairly new regulator has been responsive and its approach has been very evolving and adaptive.

4. C 2012/11/92, order dated January 3, 2013.
5. C-2013/02/109, order dated April 2, 2013.
6. C-2013/06/124, order dated August 1, 2013.
7. C- 2013/05/122, order dated December 19, 2013.

Veena Gopalakrishnan & Vikram Shroff, Nishith Desai Associates

India's New Law on Prohibition of sexual harassment at the work place

Employer's Duties And Responsibilities

The year 2013 may go down in India's history as a landmark year for protection of women's rights. The country witnessed the introduction of two prominent legislations pertaining to sexual harassment. The first was the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 **("Sexual Harassment Act")** and the other was the Criminal Law (Amendment) Act, 2013 **("Criminal Law Amendment Act")**. Both the legislations were introduced as an immediate reaction to unfortunate and very serious incidents of sexual harassment that jolted the country in late 2012 and early 2013.

The Supreme Court of India **("Supreme Court")** was not to be left behind as it quickly introduced the Gender Sensitisation and Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013.

Background and Legislative Timeline

<u>The Vishaka Judgment:</u> The Sexual Harassment Act has been legislated almost 16 years after the Supreme Court, in its landmark judgment in *Vishaka and Others vs. State of Rajasthan* **("Vishaka Judgment")**[1], laid down guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right to gender equality of working women ("Guidelines").

The Vishaka Judgment for the first time in India's history, acknowledged sexual harassment at the workplace as a human rights violation. The Supreme Court relied on the Convention on the Elimination of All Forms Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979, which India has both signed and ratified. In its judgment, the Supreme Court outlined the Guidelines making it mandatory for employers to provide for sympathetic and non-retributive mechanisms to enforce the right to gender equality of working women. As per the Vishaka Judgment, the Guidelines, until such time a legislative frame work on the subject is drawn-up and enacted, shall have the effect of law and the Guidelines are to be mandatorily followed by organisations, both in the private and government sector.

1 AIR 1997 SC 3011

LEGISLATIVE TIMELINE	
2007	Draft Protection of Women against Sexual Harassment at Workplace Bill, 2007 approved by the Union Cabinet
2010	The bill was introduced in the Lok Sabha
2012	Bill was amended and re-introduced in the Lok Sabha
September 3, 2012	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was passed by the Lok Sabha
February 26, 2013	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was passed by the Upper House of the Parliament – Rajya Sabha
April 23, 2013	The Sexual Harassment Act received the President's assent and published in the Gazette of India as Act No. 14 of 2013
December 9, 2013	The Indian Ministry of Women and Child Development ("Ministry") notified: – December 9, 2013 as the effective date of the Sexual Harassment Act; and – The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013

The Sexual Harassment Act

Object: The Sexual Harassment Act has been enacted with the objective of providing women protection against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment. Sexual harassment is considered as a violation of the fundamental right of a woman to equality as guaranteed under Articles 14 and 15 of the Constitution of India (**"Constitution"**) and her right to life and to live with dignity as per Article 21 of the Constitution. It has also been considered as a violation of a right to practice or to carry out any occupation, trade or business under Article 19(1)(g) of the Constitution, which includes a right to a safe environment free from harassment.

Sexual Harassment: The Sexual Harassment Act defines sexual harassment in line with the Supreme Court's definition in the Vishaka Judgment and includes, any unwelcome sexually determined acts or behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, sexually coloured remarks, showing pornography, or any other unwelcome physical verbal or non-verbal conduct of sexual nature.

The Sexual Harassment Act stipulates that no woman shall be subjected to sexual harassment at any workplace[2]. It is further provided that the presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety may amount to sexual harassment.

Scope: The Sexual Harassment Act, unlike the laws in other countries, is not gender neutral and provides protection only to women employees. As per the Sexual Harassment Act, an 'aggrieved woman' in relation to a workplace, is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment[3].

2 Section 3 of the Sexual Harassment Act
3 Section 2(a) of the Sexual Harassment Act

The ambit of the Sexual Harassment Act is very wide and is applicable to the organised sector as well as the unorganised sector. The statute, *inter alia*, applies to government bodies, private and public sector organisations, non-governmental organisations, organisations carrying on commercial, vocational, educational, entertainmental, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and a dwelling place or a house. It is interesting to note that the Sexual Harassment Act introduces the concept of an 'extended workplace' and provides that a workplace also covers within its scope places visited by employees during the course of employment or for reasons arising out of employment - including transportation provided by the employer for the purpose of commuting to and from the place of employment[4].

The definition of 'employee' under the Sexual Harassment Act is fairly wide and covers regular, temporary, *ad hoc* employees, individuals engaged on daily wage basis, either directly or through an agent, contract labour, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.

Grievance Redressal Mechanism

Internal Complaints Committee and Local Complaints Committee: The Sexual Harassment Act requires an employer to set up an 'Internal Complaints Committee' **("ICC")** at each office or branch, of an organisation employing at least 10 employees, to hear and redress grievances pertaining to sexual harassment. At the district level, the government is required to set up a 'Local Complaints Committees' **("LCC")** to investigate complaints regarding sexual harassment from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer.

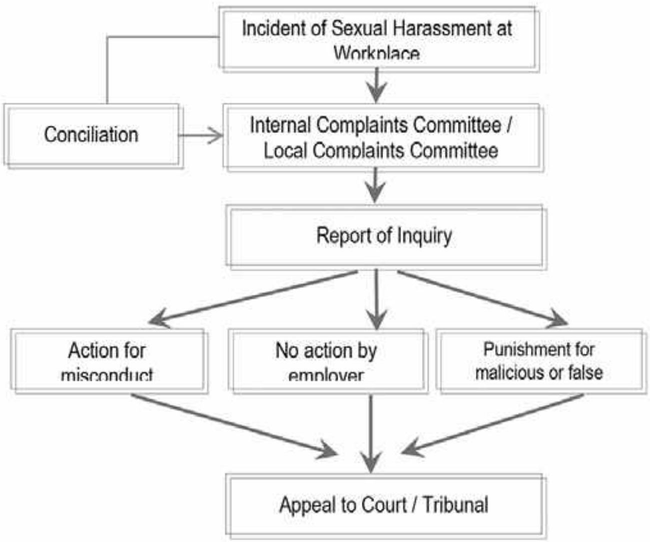
The Sexual Harassment Act prescribes the constitution of the committees, process to be followed for making a complaint and inquiring into the complaint in a time bound manner.

CONSTITUTION OF THE ICC	
Presiding Officer	Woman employed at a senior level at the workplace from amongst employees
Members	– Not less than 2 Members from amongst employees – Preferably committed to the cause of women or who have had experience in social work or have legal knowledge
External Member	From an NGO or association committed to the cause of women or person familiar with issues relating to sexual harassment
Not less than 50% of the total membership of the ICC shall be women	

Complaint: As per the statute, an aggrieved woman is required to submit six copies of the written complaint, along with supporting documents and names and addresses of the witnesses to the ICC or LCC, within 3 months from the date of the incident and in case of a series of incidents, within a period of 3 months from the date of the last incident. The law makes provisions for friends, relatives, co-workers, psychologist, psychiatrists, etc. to file the complaint in situations where the aggrieved employee is unable to make the complaint on account of physical incapacity, mental incapacity or death.

4 Section 2(o) of the Sexual Harassment Act

Process for Complaint and Inquiry: Please refer to the flowchart which provides, in brief, the process to be followed by the aggrieved employee to make the complaint and by the employer to inquire into the complaint. The law allows the aggrieved woman to request for conciliation in order to settle the matter although a monetary settlement should not be made as a basis of conciliation.



Timelines

A written complaint (6 copies) along with supporting documents and names and addresses of witnesses have to be filed by the aggrieved woman within 3 months of the date of the incident.

Upon receipt of the complaint, 1 copy of the complaint is to be sent to the respondent within 7 days.

Upon receipt of the copy of complaint, the respondent should file his reply to the complaint along with his list of documents, and names and addresses of witnesses within 10 working days.

The Inquiry has to be completed within a total of 90 days from the receipt of the complaint.
The Inquiry report has to be issued within 10 days from the date of completion of inquiry.

The employer is required to act on the recommendations of the committee within 60 days of receipt of the Inquiry report.
Appeal against the decision of the committee is allowed within 90 days of the date of recommendations.

Interim Reliefs: The Sexual Harassment Act empowers the ICC and the LCC to recommend to the employer, at the request of the aggrieved employee, interim measures such as

(i) Transfer of the aggrieved woman or the respondent to any other workplace;

(ii) Granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement; and

(iii) Restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report. Such duties may be transferred to other employees.

Punishment and Compensation: The statute prescribes the following punishments that may be imposed on an employee for indulging in an act of sexual harassment:

– Punishment prescribed under the service rules of the organisation;

– If the organisation does not have service rules, disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service; and

– Deduction of compensation payable to the aggrieved woman from the wages of the respondent.

The statute also envisages payment of compensation to the aggrieved woman. The compensation payable shall be determined based on:

– The mental trauma, pain, suffering and emotional distress caused to the aggrieved employee;

– The loss in the career opportunity due to the incident of sexual harassment;

– Medical expenses incurred by the victim for physical/psychiatric treatment;

– The income and status of the alleged perpetrator; and

– Feasibility of such payment in lump sum or in installments.

Action against Frivolous Complaints: So as to ensure that the protections contemplated under the Sexual Harassment Act do not get misused, provisions for action against "false or malicious" complainants have been made. The Sexual Harassment Act provides that if the ICC or the LCC concludes that the allegation made was false, malicious, the complaint was made knowing it to be untrue or forged or misleading information has been provided during the inquiry, disciplinary action in accordance with the service rules of the organisation may be taken against such complainant. Where the organisation does not have service rules, the statute provides that disciplinary action such as written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service may be taken.

Employer's Duties and Obligations

In addition to ensuring compliance with the other provisions including setting up the ICC, the Sexual Harassment Act also casts certain obligations upon the employer to, inter alia,

a. Provide a safe working environment

b. Formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace

c. Display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the ICC

d. Declare the names and contact details of all members of the ICC

e. Organise workshops and awareness programmes at regular intervals for sensitising employees on the issues and implications of workplace sexual harassment and organising orientation programmes for members of the ICC.

f. Provide necessary facilities to the ICC for dealing with the complaint and conducting an inquiry;

g. Cause to initiate action, under the Indian Penal Code, 1860 ("IPC") or any other law in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place

h. Provide assistance to the aggrieved woman if she so chooses to file a complaint in relation to the offence under the IPC or any other law for the time being in force

i. Treat sexual harassment as a misconduct under the service rules and initiate action for misconduct;

j. Prepare an annual report with details on the number of cases filed and their disposal and submit the same to the District Officer;

k. Monitor the timely submission of reports by the ICC.

Non-compliance with the Sexual Harassment Act: If an employer fails to constitute an ICC or does not comply with the requirements prescribed under the Sexual Harassment Act, a monetary penalty of up to INR 50,000 (approx. US$1,000) may be imposed. A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licences. It is however unclear as to which business licenses are being referred to in this case.

Amendments to the Indian Penal Code

The IPC was amended in April 2013 to include a new section pertaining to sexual harassment of women. The Criminal Law Amendment Act has introduced section 354A which enlists the acts which constitute the offence of sexual harassment and further prescribes penalty / punishment for such acts. Section 354A includes within the scope of sexual harassment:

– Physical contact and advances involving unwelcome and explicit sexual overtures;

– A demand or request for sexual favours;

– Showing pornography against the will of the woman; and

– Making sexually coloured remarks.

An offence of sexual harassment is punishable with imprisonment of up to 3 years and/or fine. Since the amendment criminalises all acts of sexual harassment, employers shall be required to report any offences of sexual harassment to the appropriate authorities.

Analysis

While the law on sexual harassment is a much awaited development in ensuring women a healthy work environment, it is being viewed as a hasty firefighting measure taken by the legislature which is ambiguous, with loopholes and susceptible to abuse. The Sexual Harassment Act only addresses the issue of protection of women employees and is not gender neutral. Male employees, if subjected to sexual harassment, cannot claim protection or relief under the law. The statute nowhere provides any protection against retaliation and victimisation, which is a very common consequence faced by individuals upon making a complaint of sexual harassment.

The law also casts an obligation upon the employer to address the grievances in respect of sexual harassment at workplace in a time bound manner, which in several cases may not be practically possible as the employees or witnesses involved may not easily or readily co-operate. Another interesting inclusion in the statute is the ability of the employer to punish the complainant in case of a false or malicious complaint. This provision, although meant to protect the employer's interests, is likely to deter victims from reporting such incidents and filing complaints, which may defeat the purpose for which the law has been enacted. Whether this law is successful in protecting women employees and reducing instances of sexual harassment at the workplace is yet to be tested.

Amit Bhasin, Sr. Partner, Bhasin & Bhasin Associates

Prevention of Sexual Harassment of women at the workplace : What does the law expect ?

The term "Sexual Harassment" has rapidly becoming one of the most mouthed phrases in our public discourse, with the label of sexual harassment being used, abused and mis-used in alarmingly equal proportions. At one level it can be argued that 'if everything is harassment, then nothing is'. Yet the increasing instances of workplace harassment do nudge us out of our inertia to implement the new law pro-actively. Employers can no longer permit their employees to drift un-moored lest they violate the law, crossing the line and sexually harass female employees at the workplace. That the general complexion of Indian society towards protection of women is changed, catalysts the stringent application of this enactment and rightly so.

Sexual harassment of women at the workplace is fast emerging as one of the most challenging and complicated areas of employment law. Despite widespread publicity about the perils of sexual harassment, many businesses operating in the country have yet to address the problem in its practical form. Companies have scrambled and have put together, cut and pasted their internal policy on the subject but that by itself does not permit the companies to wash their hands off the matter in a Pilates mind-set. What next is a question that companies do not usually wish to address. The ostrich buries its head deep in the mound of sand beguiled in its belief that no perils lurk on the horizon. And then the monster of sexual harassment strikes. Due to lack of infrastructure, training and communication blocks, the matter escalates to the legal department only when irreparable damage and harm has been done. It's perhaps already too late to switch on the emergency light and signal 'damage control'. Failure to adopt a pro-active and aggressive stance on this issue at the relevant and earliest possible stage, however, can result not only in costly lawsuits, but also in a loss of employee morale, decline in productivity, and an erosion of a company's public image.

Employers may harp on being proactive yet the evolution to stop and prevent sexual harassment at the workplace germinates way before any such complaints are contemplated. Every proactive employer must send out a loud and clear message that the company has a zero tolerance policy on the issue and such policy must not be relegated to the intranet or a bundle of papers in a folder. Communication of the policy in its correct form and spirit must be communicated by the company to employees, all and sundry. It is at this level that the Human Resources department must step in and train the employees about the concept of sexual harassment, how to deal with such cases as a 'first-aid' assistant and give flesh and blood to the intention of the employer to prohibit such acts at the workplace.

HR training for all employees must clearly define and explain as to what acts of omission and commission can be construed as sexual harassment at the workplace. Workplace ethics must be redefined and explained so that no employee can raise the plea of ignorance.

A complaint of sexual harassment is a serious one. Inevitably, the victims face a choice between their work and their self-esteem. Sometimes, the victims face a choice between their jobs and their own safety. And yet sometimes, mountains are made out of mole hills and the battle lines are drawn. And sometimes it is also possible that while the victim construed an act as sexual harassment, the purported aggressor may well have the best intention at heart. Hence HR trainings on such issues acquire paramount priority as every woman has a different level of tolerance. What may be harassment for one may not be for another.

But is it necessary for the employees to understand as to what constitutes sexual harassment at the workplace? When does friendly and mild bantering or horseplay between the sexes cross the line and become too much and unwelcome? What can be flattering or complimentary to one person can be offensive, objectionable, and frightening to another. One person may regard flirting as innocent fun, and it may not be viewed as objectionable at the time of the behaviour, but someone else may see it as aggressive, insulting, and demeaning, or down the road it may be regarded as part of a pattern of a hostile environment. Who decides what is appropriate, and what is not? Should employees be required to tolerate some minimal level of offensive sexual behaviour within the workplace? For good or for bad, all and none of the above, all interaction and inaction between the genders can constitute sexual harassment in the present legal scenario. And HR trainings highlighting these issues coupled with gender sensitization workshops can definitely ease the problems arising out of the above. It needs to be highlighted to all employees that all acts of non-consensual behaviour can be construed as sexual harassment at the workplace. Gender sensitisation is not only to make the male employees aware of instances of how their conduct can be labelled offensive but also to identify and report such cases to the senior management where the victim is cowed down and diffident, scared to report the matter.

Post the noted 'Vishaka' judgment and the passing of the new law, framing of a Sexual Harassment Prevention Policy, circulating and implementing the same, defining objectionable conduct, setting forth the grievance procedure, setting up an internal complaints committee, defining penalties etc. are now the employers responsibility. The internal complaints committee with its majority of female members and outside NGO participation is all to ensure that a female victim gets a fair opportunity to put forth her case however high placed or powerful the aggressor may be.

In today's commercial world where outsourcing is prevalent in most organisations, this law applies with equal gusto to the third party vendor employees as well. The employer is duty bound under the law to provide protection to all female employees working at its premises engaged through a contractor. And also to its own employees from third party vendor employees deputed at the company premises. Thus the lack of employer-employee relationship cannot free the employer of its obligations as stipulated under the Act.

Another screaming instance of sexual harassment complaints is when love affairs turn sour. The employer must be astute enough while investigating such complaints that navigate through love, lies and retaliation to ensure that justice is done not only to the female employee but also to the alleged aggressor.

A discrimination complaint can polarise a workplace. Workers will likely side with either the complaining employee or the accused employee, and the rumour mill will start working overtime. The accused aggressor suddenly becomes an object of intrigue and comes under the public microscopic eye. Presumption of guilty before being declared so? Doomed before doomsday? To prevent the above, it is imperative that the internal committee conducts the proceedings in utmost confidentiality and examination of witnesses does not lead to the alleged facts of the case leaking out to the masses. The complaints committee must realize that it is quite possible that at the end of it the charges of sexual harassment could be held incorrect, misconceived or false.

What if the charges are false and were framed by a disgruntled employee? Will exoneration clean the slate forever or will it just brush the dirt and the muck under the carpet only to be raked up again? Will a false complaint become the Achilles' Heel for the once-accused-now-exonerated employee? The service record is clean but there's a stain on the vest. And that stain shall never fade with time, threatening to act as a time bomb till another similar complaint is slapped on the charged employee. Law does provide protection to women at the workplace. But not at this cost for sure. Hence the companies must exercise vigilantism of the most sophisticated kind to ensure that their internal rules and complaints committee do not provide a lip sided view of justice and equality before the law.

While feminist activism has had a major impact on many areas of the law, including rape, domestic violence, and an emerging legal category as sexual harassment. However, the ideology of legal feminism is not intended to go far beyond the original and widely supported goal of equal treatment for both sexes. The agenda behind the new law is not to redistribute power from the men to the women or else in this redistribution we run the risk of inequalities. The company while adjudicating upon complaints of sexual harassment at the workplace must apply this thumb rule and make the workplace safe for all.

In responding to a complaint of sexual harassment, it is important to point out that knee-jerk reactions are not the way to handle such complaints. Thorough investigations must be conducted and no short cuts in terms of time, procedure or costs should be the underlying motive of the company.

To reiterate, any investigation for sexual harassment should bear in mind 'equality of genders' and natural justice should prevail. Where the company policy spells out the punishment for sexual harassment, the same policy should also spell out the consequences of making a false complaint. Gender sensitisation workshops can ensure that every communication between two colleagues should not be viewed from a lop sided angle where all interaction between the genders maybe construed as sexual harassment, where paranoia reigns supreme and fun, by any definition, is out the window.


Gautam Swarup[1] & Prasad Subramanyan[2]

Relevance of the Foreign Accounts Tax Compliance Act in India

Initially introduced under the Hiring Incentives to Restore Employment Act ("HIRE"), FATCA forms part of the US tax-regulatory framework that subjects virtually any entity, even if: (i) remotely invested in the US market; or (ii) dealing with US citizens / green-card holders living in India; or (iii) subsidiary of a US person, to strict due diligence and reporting compliances with the US Internal Revenue Services ("IRS"). These compliance burdens could include the requirement to engage with and enter into an agreement with the IRS, undertaking additional due diligence to identify US taxpayers invested/proposed to be invested in the entity, periodically reporting to the IRS and setting in place documentation and verification processes to undertake any or all of the above.

These developments have assumed importance not only due to the reach of these regulations, but also on account of the manner in which they seek to enforce compliance by imposition of penalty on US payments made to any non-compliant entity.

The Foreign Accounts Tax Compliance Act ("FATCA") is essentially a measure aimed at preventing the evasion of tax by US taxpayers through concealment of their assets either directly in foreign accounts or indirectly through offshore entities. In this respect, FATCA employs two-pronged approach for effective implementation: at a primary level FATCA imposes obligations on US taxpayers to report to the IRS regarding any assets located abroad either in financial institutions, or assets held by such taxpayers through indirect substantial ownership in foreign entities. However FATCA is significant for the method it employs at a secondary level to ensure the identification of such US sourced assets abroad. It does this through the imposition of strict monitoring and reporting obligations on foreign entities that may either be financial institutions (categorised as Foreign Financial Institutions "FFI") or non-financial entities that have substantial US ownership (categorised as Non-Financial Foreign Entities "NFFEs"). Given that FATCA reporting and due diligence obligations are imposed on the above entities irrespective of the US assets held, and are backed by penalties for non-compliance, there is significant cause for concern among institutions across the globe to set in place compliance mechanisms if they are to continue doing business in the United States.

1. Gautam Swarup is graduate of NALSAR University of law, Hyderabad and is a member of the international tax practice at Nishith Desai Associates.

2. Prasad Subramanyan is graduate of Christ College School of Law, Bengaluru and is a member of the international tax and funds practice at Nishith Desai Associates.

The provisions of FATCA and the accompanying withholding penalties leviable are scheduled to come into force come January, 2014, with IRS compliance mechanisms required to be set in place as early as October, 2013. Multi-national companies, banks and other entities which have not undertaken an assessment of the impact of FATCA and set in place plans to implement compliance, may require extensive changes to existing systems, and possibly even a complete overhaul of their due diligence and reporting procedures. Such measures are likely to be extremely cumbersome, both from a compliance and financial perspective.

This memorandum summarises the context and breadth of obligations imposed by the IRS through FATCA and provides an insight into the steps to be taken by institutions in order to ensure compliance and escape the withholding tax on US sourced payments made to them for non-compliance. Accordingly, it will address key issues outlined below:

1. Entities subject to FATCA obligations.
2. Scope of obligations and consequentially, penalties under FATCA.
3. Timeline and important dates under the FATCA regulations for compliance.
4. FATCA's impact on the global investment fund industry.
5. Specific impact of FATCA on India / India focused entities.

Bird's eye-view of how FATCA works

The intention behind the passage of FATCA was to ensure that income earned and assets held abroad in offshore accounts or indirectly through ownership in entities, are reported to the IRS. This legislation is based on a model that departs from the conventional practice of revenue authorities using intelligence and information exchange agreements with different countries to gather such details. Instead, its design is predicated on fulfilment on identification and reporting obligations imposed on a broad group of US and foreign persons to disclose information on specified US sourced assets of income held by them.

FATCA ensures compliance on such entities (FFIs and NFFEs) by imposing withholding tax obligations that not only offer a significant financial incentive to stakeholders, but also by penalising non-compliance by such entities by a similar withholding tax on any payments made to them. The standard rate of withholding tax for non-compliance by any individual, institution or entity under FATCA is 30%.

As an illustration, any institution categorised as an FFI would be obliged to undertake certain due diligence and reporting responsibilities directly to the IRS. As an incentive to ensure that these entities comply with the same, FATCA authorises them to withhold 30% on payments that fall within the definition of 'withholdable payments' when made to non-compliant payees. On the other end of the spectrum, non-compliance by the FFI will by itself attract a 30% withholding tax on any payments made to it that are sourced in the US.

Who does FATCA apply to?

The term 'Foreign Financial Institution' has been defined very broadly to include,

- Depository Institution: Any entity that accepts deposits in the ordinary course of banking activities,
- Custodial Institution: Any entity that holds financial assets for the accounts of others as its business, or
- Any entity that is engaged primarily in the business of investing, reinvesting, trading in securities, partnership interests and commodities.
- Specified Insurance Company: Any insurance company or a holding company with an insurance company in its expanded affiliated network whereby the

insurance company or holding company issues or is obligated to make payments with respect to cash value insurance or annuity contracts,

– Holding Company: Any entity primarily involved in directly or indirectly holding all or part of the outstanding stock of one or more members of its expanded affiliated group. To fall under the definition of an FFI, the holding company must either be part of an expanded affiliated group that includes a depository institution, custodial institution, insurance company or an investment entity (classified as such because it is a professionally managed entity primarily engaged in investing, reinvesting or trading in financial assets or because it functions or holds itself out to be an investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets); or be formed in connection with or availed by an investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets

Given the wide reach of the definition, entities considered as FFIs include Funds (such as mutual funds, hedge funds, private equity and venture capital funds) with various investment strategies dealing with financial assets; it would also include trusts managed by professional trust companies or by investment managers; trusts not professionally managed would be categorised as Non-Financial Foreign Entities ("NFFE").[3] Thus, it should be noted that all structures by which investments are made into India from the US such as investment funds, professional fund manager entities, banks, wealth planning trust/foundation structures etc, would typically constitute FFIs owing to the large scope of this definition.

An NFFE is a foreign entity that is not an FFI. FATCA is targets NFFEs to ensure that assets held abroad by US persons indirectly through an interest/shareholding in foreign entities do not escape disclosure to the IRS. Accordingly, NFFEs include all foreign entities that are not FFIs in which there is a US substantial ownership, the threshold for which is at least 10% under FATCA. Apart from corporations and trusts described above, NFFEs would include various types of family owned investment entities, including partnerships.[4]

The categorisation of entities as FFIs and NFFEs typically would determine the kind of obligations imposed on them by FATCA. For instance, trusts treated as FFIs would require a disclosure of its US settlors, determinate and discretionary beneficiaries while one classified as an NFFE would require disclosures of substantial owners and beneficiaries.

---

3. The new Regulations have revised the kinds of entities that would be excluded from the definition of FFIs:
    1. FFI holding companies, treasury centers and captive finance companies that are in a non-financial group, as defined in the Regulations.
    2. Non-financial startup companies or companies entering into a new line of business.
    3. Non-Financial entities that are in liquidation or bankruptcy
    4. Inter-affiliate companies created to transact a particular deal or for tax or regulatory purposes.
    5. Non-Profit Organisations
    6. Reserving activities of an insurance company
4. Excepted NFFEs in this regard include:
    1. Publicly traded corporations and affiliates
    2. Territory NFFEs that are directly or indirectly wholly owned by *bona fide* U.S. territory residents in the NFFE's country of organisation
    3. Active NFFEs – entities that conduct an actual business activity other than holding assets that produce investment income such as interest, dividends, rents, etc.

The obligations of FFIs and NFFEs under FATCA are summarised in the table below:

	OBLIGATION	FOREIGN FINANCIAL INSTITUTION	NON-FINANCIAL FOREIGN ENTITY
1.	Identification Obligations	– Must identify the status of each of its accounts to determine if it is a US account, a non-US account, or an account held by a recalcitrant holder of a non-participating FFI	– Must identify the ownership interest of each entity and determine if any such interest exceeds 10% (substantial ownership) under FATCA
2.	Documentation Obligations	– Documentation of the above-mentioned US accounts – Documentation of accounts of payees (other than account holders)	– No documentation obligations
3.	Withholding Obligations	– 30 per cent on any withholdable payment made to a recalcitrant account holder or non-participating FFI – Withholding must take place at the time of making payment	– No withholding obligations
4.	Reporting Obligations	– A participating FFI agrees to report on specified U.S. individuals, specified U.S. owners of accounts held by owner-documented FFIs, and substantial U.S. owners of accounts held by passive NFFEs – Reporting is also required with respect to aggregate payments made to non-participating FFIs in 2015 and 2016, and aggregate payment information on payments made to recalcitrant account holders	– Each NFFE has an obligation to provide its 'Withholding Agent' with details of substantial US owners, in any, and if none exist, a certificate to that effect.

These obligations are placed on all FFIs/NFFEs worldwide and not just on those that have US shareholding or US sourced payments.

FATCA has also imposed obligations on payers of US sourced fixed or determinable, annual or periodical ("FDAP") income – which will typically include all major multinational corporations, amongst others – towards setting in place due diligence procedures to identify and categorise non-US payees for FATCA purposes, report and potentially apply a 30% withholding tax to avoid being liable itself under FATCA. Even foreign entities that are not FFIs, to the extent that they receive US sourced payments, are required to establish their FATCA status with the IRS with appropriate documentation to avoid the withholding tax consequences.

What constitutes 'withholdable payments'?

FATCA gives a very expansive definition of the term 'withholdable payment' which, although typically includes gross amounts of US sources FDAP income, can include other types of US source income not otherwise subject to withholding under the Act. Payments of the following nature are examples of what may be included as withholdable payments under FATCA:

1. Interests and dividends;
2. Bank and custodial fees;
3. Advisory or broker fees associated with merger or acquisition activity;
4. Insurance or re-insurance premium paid for insuring US risk; and
5. Gross proceeds from derivatives, swaps, and other hedging arrangements, typically performed by the treasury function.

What is an FFI Agreement?

An FFI under FATCA would be required to enter into an agreement ("FFI Agreement") with the US Treasury Department consequent to which it becomes a 'Participating FFI' and can avoid FATCA withholding tax on payments it receives. The FII Agreement is essentially an undertaking to comply with all FATCA reporting/ due diligence obligations. Additionally, it entails several verification and due diligence procedures and annual reporting on these accounts to the IRS. Any further requests made by the IRS towards performance of the above obligations would also need to be complied with, thus illustrating the extra-territorial reach of the IRS.

Alternative compliance through Inter-Governmental Agreements

Alternatively, FATCA compliance may also be mandated through Inter Governmental Agreements ("IGAs") entered into between the Government of the US with other State parties. In fact, while FATCA has sought to enforce compliance on all FFIs even in the absence of an IGA, the IRS has been strongly lobbying for the utilisation of IGA. The existence of an IGA in place would replace FATCA obligations in the following ways:

1. First, there would no reporting requirements directly to the IRS. Each entity subject to FATCA would have obligations instead under domestic law pursuant to conclusion of the IGA.
2. An IGA would directly address legal impediments to implementation of FATCA such as data privacy laws, banking secrecy laws, etc.
3. In this route all entities are automatically deemed compliant and would not be subject to any withholding tax as long as they fulfil their obligations.
4. In case of NFFEs, for compliance under an IGA, the substantial owner test would be the "controlling" test, entailing that the ownership threshold would be 25%, as opposed to 10% under FATCA.

At present the US Treasury is in the process of finalising such IGAs with 50 countries. Amongst these, are countries such as Germany, Norway, Switzerland, the United Kingdom and France. It has been reported that India is in the process of finalising an IGA with the US so as to prevent the difficulties that come with individual compliance under FATCA.

FATCA impact on foreign funds

The definition of an investment entity under the regulations is fairly wide and includes any entity that is:

1. Professionally managed by a depository institution, custodial institution, any specified insurance company or another investment entity;
2. Functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets; or
3. Primarily engages in a business of trading financial products for customers, performing portfolio management, or investing, administering, or managing funds, money, or financial assets on behalf of customers.

Along with the fund itself, this definition includes within its fold, investment management companies, investment advisers and fund administrators. In most cases therefore, such non-US funds should be characterised as FFIs and would be required to enter in the FFI agreements with the IRS unless they are deemed complaint FFIs or should there be an IGA in place.

FATCA compliance timeline

The important dates for FATCA compliance are:

- *April 25, 2014:* Registration deadline for all entities to first determine if they are in fact FFIs and consequently if they are, register with the IRS;
- *June 30, 2014:* FFIs begin withholding on US FDAP payments to recalcitrant high-value account holders;
- *July 1, 2014:* Timeline for implementing new account opening procedures.
- *December 31, 2014:* Complete due diligence to be carried on for all accounts by FFIs; and

An India specific brief on issues

Although spoken about sometimes, FATCA being US domestic anti-avoidance law, has failed to receive the necessary attention of the Indian financial industry. However, it is relevant that FATCA being understood thoroughly by an person looking to engage in business with a US based entity, either directly or indirectly. As explained above, irrespective of determinable US interests, all FFIs need to necessarily perform obligations under FATCA.

The IRS has documented that the Indian Government is in the process of negotiating an IGA with the US and there with reports of an IGA on the horizon. However, in absence of an IGA coming into force, each individual institution that qualifies as an FFI needs to prepare itself.

1. *NRI's investment in India:* Primarily, Non-Resident Indians ("NRIs") based out of the US who are involved in India owing to investments or assets need to be wary of payments made out of the US for such investments. Several high net worth NRIs have planned their wealth through several investments involving in India and unless financial institutions or funds or trusts used for such purpose are compliant, all payments would be subject to the heavy withholding tax owing to the income being US sourced. Moreover, banks in India are looking to alienate American residents in order to avoid involvement of US sourced payments. Thus, NRIs will face difficulty in maintaining their accounts in India through which payments are routed. Furthermore, several NRIs have Indian roots in the form of Hindu Undivided Families ("HUFs"). If an NRI becomes the Karta of an HUF owing to succession, such HUF may very well be classified as an FFI based on its investments. In such a scenario, income received by the Karta from HUF could be subject to the 30% withholding tax.
2. *Tax Treaty – FATCA dichotomy:* FATCA would also affect India in terms of the India-US DTAA owing to the varying withholding rates and credit mechanisms available with respect to FDAP income in the tax treaty. In general, no credit or refund is prescribed under FATCA for non-participating FFIs. While the treaty prescribes lower withholding rates and creditability, the regulations provide that the outcome of such clash is that credit would be applicable only to the extent of reduced withholding rate provided by such treaty. In such a case, the non-availability of tax credit would become a serious hurdle for deals involving India and the US if an intermediary entity in the structure is characterised as an FFI.
3. *Impact on banks:* On an industry wise approach, the banking industry in India will face a real challenge in ensuring FATCA compliance. As of today, Indian banks have a Know-Your-Customer system established for maintaining the identities of its customers. It has been opined that all processes related to opening of accounts and transactions as is at present will have to be completely revamped by Indian banks to ensure compliance. The banks also need to ensure a continual system of monitoring US source payments and reporting of the same to ensure compliance. Apart from all this, it is also important that all banks have a system in place to determine whether several accounts can be treated as one while calculating balance. In a situation involving several accounts, including joint accounts, as

is seen in the case of several Non-Resident Indians, this would be extremely difficult to implement. Prior to the first registration deadline of October 2013, all banks need to prove that their systems are in place so as to comply with the FATCA and at this point, this seems to be a major challenge for many Indian banks.

4. ***Impact on the investment funds industry:*** The private equity and venture capital funds industry will also face a major brunt of the compliance burden imposed by FATCA. The final regulations have broadened the scope of 'investment entity' in such a way that fund managers, investment advisors and general partners in a Limited partnership structure are bound to be affected. As per the definition of FFI, any entity that acts primarily for investment or that holds financial assets for another qualify under the Act. Therefore, all fund managers need to carry out preparatory work on their existing client base, client take-on procedures and on due diligence requirements under the FATCA. Since a lot of US sourced investments into India come through offshore funds managed by Indian or Indian affiliated fund managers, such entities need to ensure compliance to avoid the withholding tax. From 2017, such funds will also be affected by withholding obligations on pass-through payments although the exact scope of the same has not been laid down in the final FATCA regulations as yet.

5. ***Other considerations:*** Likewise, the definition of 'holding company' is also of relevance as all private equity structures or similar investment vehicle structures will fall under the purview of the FATCA. In addition, several Indian companies with substantial US interests, although not classified as an FFI, might be classified as an NFFE that needs to comply with FATCA requirements. Owing to the same, US based NRIs who have investments in India through mutual funds or hedge funds need to be wary as to whether such funds have subscribed to this regime.

At this point, it is also important to point out that in order to prove compliance, all Indian FFIs or entities that qualify as FFIs that have major Indian interests or investments will have to establish systems to show that they are participating FFIs. FATCA has a mandatory information compliance system that results in classification as non-compliant even in a case where an FFI has no US shareholders, assets or US sourced investments. Therefore, contrary to popular belief, the alienation of US based shareholding, investments and assets will not take an FFI out of the purview of FATCA. Thus, all Indian entities that qualify as FFIs need to ensure that compliance systems are set up prior to the deadline of October 25, 2013 in order to avoid the withholding requirements.

Conclusion

With US and European players shifting gear to bring themselves within the purview of FATCA, developing jurisdiction such as India need to fast start up on meeting FATCA compliance burdens. The purpose of the memorandum is to bring out the need for entities impacted by FATCA to firstly identify if and to what extent they stand to be impacted by FATCA and what obligations would be imposed on them thereunder. Consequently, it is important for each entity to evaluate the requirements of the regulations such as the enhanced due diligence procedures, tax reporting, tax withholding and FFI agreements. Furthermore, while most organisations are focusing on the above-mentioned core requirements, few are taking steps to address the challenges presented by FATCA in terms of addressing the governance, compliance and controls framework of the IRS. Since the level of complexity to implement such controls will be significant, it is of vital importance that concurrent with identifying the core implications of FATCA, all entities, especially multi-national companies and institutions, focus on designing a compliance and controls framework as well. As the deadlines for implementation of FATCA are fast approaching the same will have to be done at the earliest.


Rabindra Jhunjhunwala, Partner & Stuti Galiya, Senior Associate
Corporate Law Practice Group

Directors' Liabilities for "Cheque Bouncing" under Negotiable Instruments Act

Are you a director/chairman of a company? Have you been shocked to receive summons for dishonour of cheque not even signed by you and for a transaction, you were not in any way involved in. This article deals with these questions and analyses the liabilities of directors for "cheque bouncing" under Negotiable Instruments Act, 1881 ("NI Act"), in light of certain important judgments delivered by the Courts in India.

Offence of "cheque bouncing" under the NI Act

"Cheque bouncing" is not an uncommon occurrence in commercial transactions in India. In order to present this the legislature inserted Section 138 in the NI Act. This section makes a dishonour of cheques due to insufficiency of funds or for the reason that it exceeds the arrangements made by the drawer a criminal offence and the drawer is liable to be prosecuted and penalised for it. In order to attract the penal provisions under Section 138, it's necessary that the cheque must be issued in discharge, wholly or in part, of any debt or other liability of the drawer to the payee. This is in addition to satisfaction of certain other conditions, such as:

(i) The cheque should be presented to the bank within a period of 6 months from the date on which it is drawn or within the period of validity, whichever is earlier;

(ii) The payee or the holder in due course of the cheque, must make a demand in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(iii) The drawer of such cheque fails to make the payment of the said amount of money to the payee or the holder of the cheque (as the case may be), within 15 days of receipt of the said notice.

The Act prescribes imprisonment for a term which may extend to 2 years or with fine which may extend to twice the amount of the cheque or with both, for the offence. This offence however, is bailable, compoundable and non-cognisable. Apart from the aforesaid, the aggrieved person also has the right to pursue civil remedies.

Offences by companies

Section 141 of the NI Act (reproduced below) specifically deals with offences by companies. Section 141 is herein reproduced for reference:

"Section 141 – (1) If the person committing an offence under Section 138 is a company, every person

who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. – For the purposes of this section,-

(a) 'Company' means any body corporate and includes a firm or other association of individuals; and

(b) 'Director' in relation to a firm, means a partner in the firm."

Persons who are covered under Section 141

The three categories of persons covered by Section 141 of the NI Act are:

(a) The company which committed the offence;

(b) Every person who was in charge of and was responsible for the business of the company;

(c) Any other person who is a director or a manager or a secretary or officer of the company with whose connivance or due to whose neglect, the company committed the offence.

As will be seen from the above, dishonour of cheques could have serious consequences for the directors of the company.

Concept of vicarious liability under NI Act

A company being an artificial person created by law, acts through its directors and officers who are responsible for the conduct of the business of the company. A criminal liability on account of dishonour of cheque primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the NI Act regulates offences by companies and makes the directors, manager, secretary and other officer of the company liable if the offence is attributable to any neglect on their part. Immunity from Section 138 has however been given to directors nominated by the Central Government or State Government or their financial corporations.

The legal position concerning the vicarious liability of a director in a company which is being prosecuted for the offence under Section 138 came up for consideration before the Supreme Court on more than one occasion. In a recent decision in the case of *National Small Industries Corporation Limited versus Harmeet Singh Paintal*[1], the Supreme Court has laid down the following principles:

1. (2010) 3 SCC 330

(a) The primary responsibility is on the complainant to make specific averments as are required under law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that the director knows about the transaction.

(b) Section 141 does not make all the directors liable for the offence. The criminal liability can be fastened only on those who, at the time of commission of the offence, were in charge of and were responsible for the conduct of business of the company.

(c) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(d) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(e) If the accused is a managing director or a joint managing director, then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(f) If the accused is a director or an officer of the company who signed the cheques on behalf of the company, then also it is not necessary to make specific averment in the complaint.

(g) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

The Court has reiterated the position taken by it in its earlier decisions including the landmark judgment delivered by it in the case of *SMS Pharmaceuticals Ltd. vs. Neeta Bhalla*[2].

The Apex Court has provided some relief to the corporate world by holding that since the provision of Section 138 creates criminal liability, the conditions contained in Section 141 have to be strictly complied with. For launching prosecution against the directors of the company under Section 138 read along with Section 141 of the NI Act, there has to be a specific allegation in the complaint with regard to the role played by them in the transaction in question. In the case of *Central Bank of India vs. Asian Global Limited*[3], the Supreme Court has laid down that the allegations have to be clear and unambiguous showing that the directors were in charge of and responsible for the business of the company.

To summarise, it is clear and consistent from a series of judgments delivered by the courts that it is imperative to specifically aver in the complaint that the accused was in charge of and was responsible for the conduct of business of the company. Unless clear averments are specifically incorporated in the complaint, the respondent cannot be compelled to face the ignominy of a criminal trial. The liability under Section 141 of the NI Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. Accordingly, it is necessary that a clear case be spelt out in the complaint against the person sought to be made liable. Merely being described as director in a company is not sufficient to satisfy the requirements under Section 141.

2. 2005 (8) SCC 89
3. AIR 2010 SC 2835

Quashing of prosecution

In spite of the aforesaid, several criminal complaints are lodged making directors party, without application of mind and flooding the courts with such cases, resulting in vexatious litigation.

In such cases, directors may seek remedy by approaching the High Court for quashing of criminal proceedings under Section 482 of the Criminal Procedure Code (for exercise by the High Court of inherent powers).

However, practically once a director is served with the notice under Section 138, he will have to go through the rigours of criminal procedural law. This is because the question whether the director is involved in the day-to-day affairs of the company is a question of fact and cannot be decided in petition under Section 482 of the Criminal Procedure Code. The Supreme Court has in the case of *State of Madhya Pradesh vs. Awadh Kishore Gupta*[4] observed that:

"It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter of trial. While exercising jurisdiction under Section 482, it is not permissible for the Court to act as if it was a trial judge.."

Here, it may be relevant to mention another observation made by the High Court of Andhra Pradesh in the case of *Rohinton Noria vs. NCC Finance Limited*[5], which is reproduced below:

"It is being observed that in complaints filed for offence under Section 138 of the Negotiable Instruments Act, all the Directors of the Company are routinely being proceeded against by invoking the provision under Section 141 of the Negotiable Instruments Act by glibly repeating the words in the section that certain director 'was in charge of and responsible to the company for the conduct of business of the company'. It is necessary to emphasise that Section 141 of the Negotiable Instruments Act where an offence under Section 138 of the Negotiable Instruments Act has been committed by a company, the complainant is required to give a serious thought and make enquiries and ascertain the fact as to whether a particular director was in charge of and responsible to the affairs and conduct of the business of the company. Routinely roping in all the Directors by merely repeating the words used in Section 141 of Negotiable Instruments Act without ascertaining the facts is a serious matter which has to be deprecated. However, it is a question of fact which necessarily has to be decided during the trial."

It is fairly settled now that while exercising inherent jurisdiction under Section 482 of the Criminal Procedure Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents, which are beyond suspicion or doubt placed by the accused, the accusations against him cannot stand, it would be a travesty of justice if accused is relegated to a trial and he is asked to prove his defence before the trial court.

In another important judgment, the Supreme Court has held in the case of *Harshendra Kumar D vs. Rebatilata Koley*[6] that in such matters, for the promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage. In the case of *Anita Malhotra vs. Apparel Export Promotion Council*[7], the Supreme Court has held that where e-Form 32 produced revealed that the person prosecuted was not a director who was in charge of and responsible for the affairs of the company

4. AIR 2004 SC 517
5. 2000 Cri LJ 4117 (AP)
6. 2011 Cri LJ 1626 (SC)
7. 2012 Cri LJ 625 (SC)

during the relevant period, the proceedings against him are liable to be quashed.

Accordingly, it would be important for companies to ensure that all the filings with the Registrar of Companies (regarding appointment and resignation of directors, annual return etc.) are up-to-date, which will enable the accused to provide relevant evidence to the High Court for purposes of considering application for quashing under Section 482 of the Criminal Procedure Code. The person who is not a director on the date of commission of offence cannot be held responsible.

Frivolous litigation and duty of courts

Even though, it has been consistently held by the courts that a director who is not in-charge of or responsible for the conduct of the business cannot be proceeded against under Sections 138, complainants usually join all the directors to put extra pressure on the company. Provisions of Section 138 and 141 of the NI Act are often used as arm twisting tactics for recovery of amounts due. Once a complaint is filed against the company and its directors and a notice is served, the burden is on the directors to show that they are not liable to be convicted and to show that they were not in charge of the affairs of the company at the time the offence was committed. This may cause undue hardship to directors who are not in charge of the day-to-day affairs of the company, as they will have to argue their case before the trial court to prove innocence.

It is therefore necessary that at the initial stage itself, appropriate scrutiny be made to curb multiplicity of litigation. The trial court Magistrate needs to ensure that averments contained in the complaint together with preliminary evidence gathered justify an action under Section 138. This is necessary to discourage filing of vexatious complaint against an innocent person who does not deserve to endure unnecessary trauma.

Further, where application for quashing of proceedings is made before the High Court, though it is not proper for the High Court to consider defence of the accused which is subject matter of adjudication during trial, it is incumbent on the High Court to look into those documents which have a bearing on the matter at the initial stage itself and grant relief to the person concerned. This is necessary to prevent misuse of provisions of law and consequential harassment as well as hardships to directors who are not in charge of the day-to-day affairs of the company.

Give a man health and a course to steer, and he'll never stop to trouble about whether he's happy or not.

– George Bernard Shaw

Happiness is nothing more than good health and a bad memory.

– Albert Schweitzer

Income Tax Review/The Chamber's Journal Special Story during last decade

Months	2001	2002	2003	2004	2005	2006
January	Taxation of Shares & Securities	Cash Credits & unexplained Investments	Assessment	Service Tax	TDS & TCS under Income Tax Law	Taxation of Securities)
February	March of Law	March of Law	Speculation	FAQs – Tax Recovery & Stay	Penalties under the Income-tax Act, 1961	Taxation of IT Industry
March	Finance Bill, 2001	Union Budget, 2002	The Finance Bill, 2003	Taxation of Salary	The Finance Bill, 2005	Chapter VI-A Deductions Part I – General Provisions and Expenditure based deduction
April	Basic of Central Excise	Important Supreme Court Judgments of 2001	Not Ordinarily Resident	Interest payable/ receivable – IT Act, 1961	Model Applications & Petitions	Chapter VI-A Deductions (Part II Income based Deductions)
May	March of Law	Derivatives	Appeals – CIT(A) and Tribunal	Clubbing of income/wealth	Model Deeds	The Finance Act, 2006
June	Accounting Stds. & Taxation	Block Assessment	Filing of returns for A.Y. 2003 - 04	Filing of Returns – A.Y. 2004-05	Filing of Returns for A.Y. 2005-06	Family Partition & Family Arrangement
July	Interpretation of Taxing Statutes – Part–I	Penalty u/s 271(10C) – Recent Developments	Assessment pursuant to search	The Finance (No. 2) Bill, 2004	F.B.T. & BCTT	International Taxation – Part–I Recent Developments & Advance Issues)
August	March of Law	Sec. 50C-A Critical Analysis	Construction Business – Accounting & Taxation	Losses- Set Off- Carry Forward	Accounts, Audit & Certification under Income-tax Act, 1961	International Taxation – Part–II
September	Interpretation of Taxing Statutes – Part–II	Charitable Trust & Associations – Recent Developments	Charitable Trusts	Accounting Standards & Taxation	Foreign Exchange Management Act	Business Entities
October	Transfer Pricing	Dissolutions/ Reconstitution of Partnership Firms	NRI – FEMA and Taxation	Transfer Pricing – Regulations in India	Assessment	Business Expenditure
November	March of Law	Bad Debts and Business Loss	Income from house property	The Finance (No. 2) Act, 2004	Presumptive Taxation	MCA-21. E-TDS & e-Returns
December	FAQ – Co-op. Hsg. Soc.	Tribute to a Legend – N.A. Palkhivala	Survey under Income-tax Act	Service Tax	Depreciation	Codified Hindu Laws

Income Tax Review/The Chamber's Journal Special Story during last decade							
2007	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
Tax Recovery	Important Supreme Court Judgements : 2006-07	Public Charitable Trust	Information Technology Industry	Intellectual Property Rights	First Appeal and Stay of Demand	NBFC	Capital Gain
Capital Gains	AOP and BOI	Section 14A	Important Supreme Court Decisions	Real Estates Projects & Redevelopment – Part-I	Revised Schedule VI to the Companies Act, 1956	Companies Bill, 2012	Interna-tional Taxation
Finance Bill, 2007	Finance Bill, 2008	Sepecial Economic Zone	Finance Bill, 2010	Finance Bill, 2011	Appeal before Tribunal, High Court & Supreme Court	Finance Bill, 2013	Laws for a changing India
Central Excise Law	Set Off and Carry Forward Losses	Search & Seizure	Taxation Salaries	Real Estates Projects & Re-Development-Part-II	Finance Bill-2012	Maharashtra Co-op. Housing Society Part–I	
Survey under Direct Taxes	Depreciation	Works Contract – MVAT & CST	Filing of Income Tax Returns	Refund under Direct & Indirect Taxes	Entertainment Industry Part–I	Maharashtra Co-op. Housing Society Part–II	
Filing of Returns and Recent Amendments	Amendments Relevant for Returns – A.Y. 2008-09	Interest & Penalties-I	FDI Policy – DIPP Guidelines & FEMA provisions	Filing of Return A. Y. 2011-12	Entertainment Industry Part–II	Recent Controversies in Income Tax Assessments	
Recent Developments under Service Tax	Appeal – Before Appellate Tribunal & High Court	Finance Bill, 2009	Gifts	Embracing Change	Wealth Management	Business Valuation	
Accounting Standards and Taxation	Income from Other Sources	Interest & Penalties – II	Service Tax – Recent Developments	Supreme Court Decisions of 2010	Audit & Certification under Income Tax, 1961	Service Tax Voluntary Compliance Encouragement Scheme, 2013 and LBT	
Audit and Certification under Direct and Indirect Taxes	Cash Credits	Limited Liability Partnership	Business Restructuring-I	e- Compliance	Internal Audits	Valuation under Indirect Tax Laws	
Partnership General Law and Taxation: Part-I : General Law (102)	Hindu Law-Part–I	Assessment	Business Restructuring–II	Shares & Securities – Taxation & Other Aspects - Part–I	Important Supreme Court Decisions 2011-12	Domestic Transfer Pricing	
"Partnership General Law and Taxation" Part II: Taxation Aspects (98)	Hindu Law-Part–II	Int & Penalties under Indirect Tax Laws	MVAT Audit – 2010	Shares & Securities – Taxation & Other Aspects – Part–II	March of the Law	Estate and Succession Planning	
First Appeal and Revision (86)	Service Tax	TDS	Business Expenditure	Recent Development in Service Tax & MVAT	Negative List based – Taxation of Service	Private Trust	



Ashok Patil, Mandar Vaidya & Priti Shukla
Advocates

DIRECT TAXES
High Court

1. Sections 10A / 10B – interest on EEFC account and interest income earned on inter-corporate deposit – Entitled to exemption – A.Ys. 1998-99 & 2001-02

CIT vs. Motorola India Electronics (P) Ltd. (2014) 98 DTR (Kar.) 81

In the instant case the assessee had borrowing by way of external commercial borrowing [ECB]. During the said period there was a restriction on the prepayment of such borrowing. The assessee had to park such surplus funds until the date of repayment of the ECB and also pay interest on such ECB. The assessee took a business decision to park these funds in inter-corporate deposits. The assessee claimed this interest income from EEFC and inter-corporate discounts as business income and claimed the same being exempt u/s 10A. The issue came up before the High Court, and the High Court while deciding the issue in favour, held that such interest derived from EEFC and inter-corporate deposits have a clear nexus with the business of the undertaking, thought it does not partake the character of a profit from the sale of article, it is the income which is derived from the consideration realised by the export of articles, and in view of the definition of income from profits and gains incorporated in sub-section (4), the assessee is entitled to the benefit of exemption.

2. Section 11(15); 10(23AAA) – Employee welfare fund – Violation of section 11(5) – Contributions received from the member cannot be taxed – A.Y. 2000-01

The assessee is welfare fund which was approved the CIT, and the same is notified by the board in the Official Gazette for the welfare of its employees and their dependents. Admittedly, for the relevant year the investment and deposit were not invested as per the norms of section 11(5) of the Act, and therefore the AO held that any income and contributions received would not be exempt. In appeal it was held that only the income from the investments not made as per the provisions of section 11(5) should be denied exemption, but all the other income of the assessee could not be denied exemption. The High Court held that once the fund is approved by the CIT under section 10(23AAA), the contributions made by the employees could not be held to be taxable even if there is violation of section 11(5).

3. Section 4 and 2(24) – Capital or revenue – Subvention assistance from holding company to recoup anticipated losses – Capital receipt

CIT vs. Deutsche Post Bank Home Finance Ltd. (2014) 98 DTR (Del.) 144

The assessee is a 100 per cent subsidiary of a company based in Germany, and was engaged in the business of housing finance. During the year the assessee anticipated a heavy loss, and therefore the holding company granted subvention assistance to the assessee, the assessee held the same to be a capital receipt. The AO held that it is casual receipt received by the assessee as assistance for running its business in India, and held the same to be taxable. The CIT(A) held the same to be a gift by the holding company, and the same cannot be taxed. The ITAT held that it is capital receipt. The High Court held subvention assistance from holding company to recoup anticipated losses of the assessee constituted capital receipt not chargeable to tax.

4. Section 54F – meaning of construction – demolition of old house and rebuilding a new one in its place – Exemption allowable

CIT vs. Ashok Kumar Ralhan [2014] 360 ITR 575 (Delhi)

The assessee had sold a property, with which he bought a fully built property and demolished the structure and rebuilt it. The assessee claimed the money used to construct the house exempt u/s 54F. The AO denied the exemption as there was no need to reconstruct a already fully constructed house. The CIT(A) and Tribunal held in favour of the assessee. On Appeal to the High Court, the High Court held that there was a factual finding that construction was carried out with in the outer limit of 3 years, makes not difference if the same is constructed after demolishing a existing house and reconstructing the same.

5. Section 43(5) – Sale purchase of shares by stock broker on behalf of himself being 'jobbing' – Loss not speculative loss

CIT vs. Ram Kishan Gupta [2014] 41 taxmann.com 363 (Allahabad)

Assessee being stock broker incurred loss in respect of transactions done by him on floor of stock exchange with the broker. He set off same against other income. The Assessing Officer treated same as speculation loss being on account of transactions for which there was no physical delivery. He held that same could not be set off against other income and had to be carried forward whereas assessee submitted that since delivery had been effected at net basis as per stock exchange guidelines and no forward trading was allowed and further as per direction of SEBI, he had deposited turnover fee of jobbing, no question of speculation loss arose. On appeal the CIT(A) confirmed the order made by the Assessing Officer. The CIT(A) held that transaction which have been settled otherwise than actual delivery of shares in question will have to be treated as speculative transaction as provided under section 43(5). On further appeal in Tribunal, the Tribunal allowed the assessee's appeal and held that the allegation that transactions were settled without actual delivery was not fully established by the revenue. Further, it was held that if the system provides settlement at net basis in respect of jobbing and assessee had been found paying turnover fee on such transaction ever since 1991-92, assessee's entire business was of non-speculative nature. On an appeal in High Court, High Court dismissed the appeal of the revenue and held that the share trading business on behalf of oneself is known as jobbing. Further the transaction carried on by assessee for sale and purchase of shares was fully covered by term 'jobbing' and assessee was entitled for extension of benefit of proviso (c) to section 43(5) and thus, losses suffered by assessee could not be termed to be speculative loss.

6. Section 54EC – Deeming fiction – Cannot restrict application of section 54EC

CIT vs. Aditya Medisales Ltd (2014) 99 DTR (Guj.) 92

Assessee filed its Return of Income for the A.Y: 2007-08. During the year, the assesse sold "Automatic Electric Loard Monitoring System" for a sum of ₹ 240 lakhs and the assessee invested the gain amount in Rural Electrification Bonds and claimed exemption u/s 54EC of the IT Act. The AO passed an order u/s 143(3) wherein he disallowed such exemption on the ground that the same was available on short-term capital and invocation of section 54 EC was permissible only on long-term capital gain. On an appeal before CIT(A), CIT(A) deleted said addition and allowed partly relying on the decision of *CIT vs. Ace Builders (P) Ltd.*

(2006) 281 ITR 210 (Bom.). On Revenue's appeal in Tribunal, the Tribunal dismissed the appeal of revenue & allowed in favour of assessee. On further appeal in High Court, wherein the question of law was whether the exemption u/s 54E cannot be denied to the assessee only on account of the fact that deeming fiction is created u/s 50 of the IT Act. The court held that legal fiction created u/s 50 though restricted to computation of capital gains; such deeming fiction cannot restrict application of 54EC of the Act which allows exemption of capital gains, if assessee makes investment in the specified assets. Thus the assessee cannot be charged to capital gains when Short Term Capital Gain of Long Term Capital assets get invested in the areas specified under the law.

7. Section 147; 148 – Reassessment –on basis of audit party – Not maintainable

CIT vs. Shilp Gravures Ltd. 220 Taxman 382 (Guj.)

Assessee company was engaged in the business of manufacturing job work in electronically engraved copper rollers. It claimed expenses on in-house research being in the nature of consumption of raw material on test production and salary/ wages of personal deployed for R&D expenses in previous year & balance amount in two succeeding previous years. AO at an instance of audit party applied 35AB and issued notice u/s 148. CIT(A) quashed the reassessment proceedings. On revenue's appeal, Tribunal confirmed the order of CIT(A). On further appeal in Tribunal, Tribunal confirmed the order of CIT(A). On appeal in High Court, High Court dismissed revenue's appeal and held that since AO had by recording reasons for which he had no conviction, same was a colorable exercise of jurisdiction by AO and could not be sustained. Subjective satisfaction of AO was lacking in this case. AO had no belief while issuing notice and therefore as per *Adani Exports vs. DCIT 240 ITR 224 (Guj.)* it was a colourable exercise of jurisdiction by AO by recording the reasons for which he obviously had no conviction and had initiated the reassessment proceedings solely at the instance of the audit party which cannot be sustained.

8. Business Income vis-a-vis Income from House property

CIT vs. Velankani Information systems (P) Ltd (2014) 265 CTR (Kar.) 250.

Assessee was real estate developer in the business of providing comprehensive facilities to IT Industry. Such facilities included provision for specifically furnished buildings, special electrical connections & special furniture. Provisions for such facilities also included letting out specialized buildings & office premises that were built to cater to the special requirements of IT industry. The assesse company filed ROI for A.Y. : 2005-06 declaring total income of Rs NIL & paid taxes u/s 115 JB of the IT Act. The assesse claimed such facilities provided as income from business on profession. The AO treated it as Income from House property since the assesse has let out the buildings and also provided several amenities. He treated the income arising from the letting out of space as independent of the other. The lessee may or may not opt for these benefits . Therefore income arising from letting out of building or lands appurtenant thereto clearly constituted as "income from House Property" and services provided as Income from other sources. On an appeal in CIT(A), the CIT(A) allowed the appeal of the assesse. On further appeal by revenue in Tribunal, Tribunal dismissed revenues's appeal & treated it as "income from business". On further appeal in High Court, High Court dismissed revenues' s appeal and held that several agreements are entered into contemporaneously and the object is to enjoy the entire property building, furniture the accessories as a whole which is necessary for carrying on the business, the income derives therefrom cannot be separated based on separate agreement between the parties . What is to be seen is the intention behind the lease & the facilities provided along with the building and the document executed in respect of each of them. Further, it is to be seen if there is commercial property along with certain facilities and they are inseparable than the rental income falls under the head "Profits and gains of business or profession. Therefore the rental income of the assesse was assessable as business income and not as income from house property or as income from other sources.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Notifications

Section 35(1)(ii) of the Income-tax Act, 1961 – Scientific research expenditure – Approved scientific research associations/institutions

The organisation(s) Institute of Liver & Biliary Sciences, New Delhi, (PAN – AAALI0055R) and Amrita Vishwa Vidhyapeetham University Kochi, (PAN – AAATM2403M) have been approved by the Central Government for the purpose of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 from assessment year 2012-13 and 2013-14 and onwards respectively in the category of "University College and other Institution", engaged in research activities subject to the conditions mentioned in the respective notification(s).

(Notification No. 7/2014 and 8/2014 both dated 22-1-2014)

Section 115AD, Explanation (A) of the Income-tax Act, 1961 – Income of Foreign Institutional Investors from Securities or Capital Gains arising from their transfer – Taxability of – Notified Foreign Institutional Investors

The Central Government specified Foreign Portfolio Investors registered under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, as Foreign Institutional Investor for the purposes of the said section 115AD.

(Notification No. 9/2014 - dated 22-1-2014)

Section 90 – Agreement for Avoidance of Double Taxation and prevention of fiscal evasion with foreign countries – United Kingdom & Northern Ireland

The protocol amending the convention between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital was signed in October, 2012 according to which the date of entry into force of the said protocol amending the Convention is the 27th day of December, 2013. Now the Central Government directed that all the provisions of said Protocol as set out in the Annexure thereto, shall be given effect to in the Union of India with effect from the said date.

(Notification No. 10/2014 – dated 10-2-2014)

Circulars

Finance Act, 2013 – Explanatory Notes to the provisions of Finance Act, 2013

The Finance Act, 2013 as passed by the Parliament which received the assent of the President on the 10th day of May, 2013 has been enacted as Act No. 17 of 2013. This circular explains the substance of the provisions of the Act relating to direct taxes.

2. Changes made by the Act

2.1 The Act has-

(*i*) Specified the rates of income-tax for the assessment year 2013-14 and the rates of income-tax on the basis of which tax has to be deducted at source and advance tax has to be paid during financial year 2013-14.

(*ii*) Amended sections 2, 10, 36,40, 43, 56, 80C, 80CCG, 80D, 80G, 80GGB, 80GGC, 80-IA, 80JJAA, 87, 90, 90A, 115A, 115AD, 115BBD, 115-O, 115R, 132B, 138, 139, 142, 144C, 153, 153B, 153D, 167C, 179, 195, 196D, 204, 206AA, 206C, 245N, 245R, 246A, 252, 253, 271FA, 295 in the Income-tax Act, 1961;

(*iii*) Omitted Chapter X-A and Section 144BA of the Income-tax Act, 1961;

(*iv*) Inserted new sections 32AC, 43CA, 80EE, 87A, 194-IA and 194LD in the Income-tax Act, 1961;

(*v*) Inserted Chapter X-A consisting of sections 95 – 102, Chapter XII-DA consisting of sections 115QA - 115QC and Chapter XII-EA consisting of sections 115TA – 115TC, section-144BA and section-194LD in the Income-tax Act, 1961;

(*vi*) Amended rule 3 of Part A of the Fourth Schedule to the Income-tax Act, 1961;

(*vii*) Amended sections 2 and 46 of the Wealth-tax Act, 1957;

(*viii*) Inserted sections 14A and 14B in the Wealth-tax Act, 1957

(*ix*) Amended section 98 of the Finance (No.2) Act, 2004;

(*x*) Introduced Commodity Transaction Tax through Chapter VII.

AMENDMENTS AT A GLANCE

Section/Schedule	*Particulars/Paragraph number*
	Finance Act, 2013
First Schedule	Rate Structure, 3.1 - 3.4
	Income-tax Act, 1961
2	Change in the definition of capital asset, 4.1 – 4.5

Section/Schedule	*Particulars/Paragraph number*
10	Change in the definition of Keyman insurance policy, 5.1–5.5; exemption to income of investor Protection Fund of depositors, 6.1–6.3 ; pass through status to certain Alternative Investment Funds, 7.1–7.4; exemption of income received in India in Indian currency by a foreign company, 8.1–8.4; exemption to National Financial Holdings Company Limited, 9.1–9.3.
Insertion of new section 32AC	Incentive for acquisition and installation of new plant or machinery by manufacturing company, 10.1–10.4.
36	Clarification for amount to be eligible for deduction as bad debts in case of banks, 11.1–11.8.
40	Disallowance of certain fee, charge, etc. in case of State Government Undertakings, 12.1–12.3.
Insertion of new section 43CA	Computation of income under the head "profits and gains of business or profession" for transfer of immovable property in certain cases, 13.1–13.4.
56	Taxability of immovable property received for inadequate consideration, 14.1–14.4.
80C	Raising of limit of percentage of eligible premium for life insurance policies of persons with disability or disease, 15.1–15.6.
80CCG	Expanding the scope and deduction and its eligibility under the section, 16.1–16.5.
80D	Deduction for contribution to Health Schemes similar to Central Government Health Scheme (CGHS), 17.1–17.3.
Insertion of new section 80EE	Deduction in respect of interest on loan sanctioned during financial year 2013-14 for acquiring residential house property, 18.1–18.4.
80G	One hundred per cent deduction for donation to National Children's Fund, 19.1–19.4.
80GGB & 80GGC	Contribution not to be in cash for deduction under section 80GGB & 80GGC, 20.1–20.3.
80-IA	Extension of the sunset date under the section for the power sector, 21.1–21.3.
80JJAA	Deduction for additional wages in certain cases, 22.1–22.6.
87 and Insertion of new section 87A	Rebate of 2000 for individuals having total income up to ₹ 5 lakh, 23.1–23.4.
90 and 90A	Tax Residency Certificate, 24.1–24.5.
Omission of Chapter X-A relating to General Anti-Avoidance Rule and Insertion of new Chapter X-A, omission of section 144BA and insertion of new section 144BA, amendment of sections 144C, 153D, 245N, 245R, 246A, 253 and 295	General Anti Avoidance Rule (GAAR), 25.1–25.5.

Section/Schedule	*Particulars/Paragraph number*
115A	Taxation of income by way of Royalty or fees for technical services, 26.1–26.4.
115BBD	Lower rate of tax on dividends received from foreign companies, 27.1–27.3.
115-O	Removal of the cascading effect of Dividend Distribution Tax (DDT), 28.1–28.5.
Insertion of new Chapter XII-DA	Additional income-tax on distributed income by company for buy-back of unlisted shares, 29.1–29.4.
115R	Rationalisation of tax on distributed income by the Mutual Funds, 30.1–30.5.
Insertion of new Chapter XII-EA	Taxation of securitisation trusts, 31.1–31.4.
132B	Application of seized assets, 32.1–32.3.
138	Replacement of terms "Foreign Exchange Regulation Act, 1947" and Foreign Exchange Regulation Act, 1973" with "Foreign Exchange Management Act, 1999", 33.1–33.4.
139	Return of income filed without payment of self-assessment tax to be treated as defective return, 34.1–34.3.
142	Direction of special audit under sub-section (2A) of the section, 35.1–35.3.
153 and 153B	Exclusion of time for computing the period of limitation for completion of assessments and reassessments, 36.1–36.6; time limit for completion of assessment or reassessment where reference is made to the transfer pricing officer, 37.1–37.6
167C and 179	Clarification of the phrase "tax due" for the purposes of recovery in certain cases, 38.1–38.3.
Insertion of new section 194-IA	Tax Deduction at Source (TDS) on transfer of certain immovable properties (other than agricultural land), 39.1–39.6.
Insertion of new section 194LD, amendment of sections 115AD, 195 and 196D	Income by way of interest on certain bonds and Government securities, 40.1 - 40.2.
204	Meaning of person "responsible for paying" under Chapter XVII, 41.1–41.4.
206AA	Exemption from requirement of furnishing PAN under section 206AA to certain non-resident bond holder, 42.1–42.3.
206C	Removal of exemption from levy of Tax Collection at Source (TCS) to cash sale of any coin or any other article weighing 10 grams or less, 43.1–43.2.
252	Appointment of President of the Appellate Tribunal, 44.1–44.4.
Substitution of new section for section 271FA	Penalty under section 271FA for non-filing of Annual Information Return, 45.1–45.5.

Section/Schedule	*Particulars/Paragraph number*
Fourth Schedule	Extension of time for approval, 46.1–46.5.
	Wealth-tax Act, 1957
2	Change in the definition of capital asset; exemption from wealth tax to agricultural land situated in urban area, 47.1–47.3.
Insertion of new sections 14A and 14B and amendment of section 46	Enabling provisions for facilitating electronic filing of annexure-less return of net wealth, 48.1–48.4.
	Finance (No.2) Act, 2004
Section 98 of the Finance (No.2) Act, 2004	Rationalisation of securities transaction tax rates, 49.1–49.3.
	Chapter VII, Finance Act, 2013
Chapter VII of the Finance Act, 2013 and amendment in sections 36 and 43 of the Income-tax Act, 1961	Commodities Transaction Tax, 50.1–50.6.2.

(Circular No.3/2014 - dated 24-1-2014)

Section 10(17A) of the Income-tax Act, 1961 – Awards – Awards instituted/ Approved by the Central/State Government under Clause (17A) for the purpose of exemption of payment made in pursuance thereof

In pursuance of the powers conferred by sub-clause (ii) of clause (17A) of section 10, the Central Government approved any payment made, whether in cash or in kind, as a reward by the Central Government or a State Government to the medal winners of the Olympic Games or Common Wealth Games or Asian Games with effect from the date of this order.

(Order [F. No.199/03/2013-ITA.1], dated 28-1-2014)

Section 143 of the Income-tax Act, 1961 – Assessment – Non-filing of ITR-V in returns with refund claims – Relaxation of time-limit for filing ITR-V and processing of such returns

Several instances of grievances have come to the notice of the Board stating that a large number of returns-of-income for Assessment Year ('AY') 2009-2010, which were electronically filed without a digital signature in accordance with procedure laid down were not processed as such returns became *non-est* in law in view of Circular No. 3 of 2009 of CBDT dated 21-5-2009. Paragraphs 9 and 10 of the said Circular laid down that ITR-V had to be furnished to the (Centralised Processing Centre ('CPC'), Bengaluru by post within 30 days from the date of transmitting the data electronically and in case, ITR-V was furnished after the stipulated period or not furnished, it was deemed that such a return was never furnished. It was claimed by some of the taxpayers that despite sending ITR-V through post to CPC within prescribed time-frame, the same probably could not reach CPC and thus such returns became *non-est*. Since ITR-V was required to be sent through (ordinary) post at a 'post box' address, there were no despatch receipts with the concerned senders in support of their claim of having furnished ITR-V to CPC within prescribed time limit.

2. Subsequently CBDT extended the time-limit for filing ITR-V (relating to Income-tax returns filed electronically without digital signature for AY 2009-2010) upto 31-12-2010

or 120 days from the date of filing, whichever was later. It also permitted sending of ITR-V either by ordinary or speed post to the CPC. However, for the AY 2009-10, some cases were still reported where return was declared *non-est* due to non- receipt of ITR-V by CPC even within such extended time-frame and consequently the refunds so arising continue to remain held up.

3. Likewise, for AY's 2010-11 and 2011-12, though relaxation of time for furnishing ITR-V was granted by Director General of Income Tax (Systems), it has been noticed that a large number of such electronically filed returns still remain pending with Income-tax Department for want of receipt of valid ITR-V Certificate at CPC.

4. In order to mitigate the grievances of the taxpayers pertaining to non- receipt of tax refunds, Central Board of Direct Taxes, relaxed and extended the date for filing ITR-V Form for Assessment Years 2009-10, 2010-11 and 2011-12 till 31-3-2014 for returns e-filed with refund claims within the time allowed under section 139 of the Act. The taxpayer concerned may send a duly signed copy of ITR-V to the CPC by this date by speed post in such cases. Central Board of Direct Taxes also relaxed the time-frame of issuing the intimation and directed that such returns shall be processed within a period of six months from end of the month in which ITR-V is received and the intimation of processing of such returns shall be sent to the assessee concerned as per laid down procedure.

5. Provision of sub-section (2) of section 244A of the Act would apply while determining the interest on such refunds.

6. The taxpayer may ascertain whether ITR-V has been received in the CPC, Bengaluru or not by logging on the website of income-tax Department – http:/incometaxefiling.gov.in/e-Filing/Services/ITR-V Receipt Status.html by entering PAN No. and Assessment Year or e-filing acknowledgement number. Alternatively, status of ITR-V could also be ascertained at the above website under 'Click to view Returns/Forms' after logging in with registered e-filing account. In case ITR-V has not been received within the prescribed time, status will not be displayed and further steps would be required to be taken as mentioned above.

(Circular No. 4/2014 [F.No.225/198/2013-ITA.II], dated 10-2-2014)

Expenditure incurred in relation to income not includible in total income – Clarification on disallowance of expenses under section 14A in cases where corresponding exempt income has not been earned during the financial year

Section 14A of the Income-tax Act, 1961 provides for disallowance of expenditure in relation to income not "includible" in total income. A controversy arose in certain cases as to whether disallowance can be made by invoking section 14A of the Act even in those cases where no income has been earned by an assessee which has been claimed as exempt during the financial year. The matter has been examined by the Board. It is pertinent to mention that section 14A of the Act was introduced by the Finance Act, 2001 with retrospective effect from 1-4-1962. The purpose for introduction of section 14A with retrospective effect since inception of the Act was clarified *vide* Circular No. 14 of 2001.

According to this the legislative intent was to allow only that expenditure which is relatable to earning of income and it therefore follows that the expenses which are relatable to earning of exempt income have to be considered for disallowance, irrespective of the fact whether any such income has been earned during the financial year or not.

The above position was further clarified by the usage of term 'includible' in the Heading to section 14A of the Act and also the Heading to Rule-8D of I.T. Rules, 1962 which indicate that it is not necessary that exempt income should necessarily be included in a particular year's income, for disallowance to be triggered. Also, section 14A of the Act does not use the words "income of the year" but "income under the Act". This also indicates that for invoking disallowance under section 14A, it is not material that assessee should have earned such exempt income during the financial year under consideration.

The above position is further substantiated by a language used in Rule 8D (2)(ii) & 8D (2)(iii) of I.T. Rules. Thus as per this circular the Central Board of Direct Taxes clarified that Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where taxpayer in a particular year has not earned any exempt income.

(Circular No.5/2014 - dated 11-2-2014)

Press Releases

Procedure for pan allotment – Decision to change procedure for pan allotment has been kept in abeyance and old procedure thereof to continue till further orders

The CBDT decided to keep in abeyance the decision to change the procedure for PAN allotment till further orders. Accordingly the operation of circular No. 11 dated 16-1-2014 issued to PAN service providers has been directed to be put on hold till further orders. In the meantime the old procedure of PAN application and allotment shall continue.

(CBDT Press Release, dated 30-1-2014)

Section 90 – Agreement for Avoidance of Double Taxation and prevention of fiscal evasion with foreign countries – Fiji

The Government of the Republic of India signed a Double Taxation Avoidance Agreement (DTAA) with the Government of Republic of Fiji for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income.

The said DTAA provides that business profits will be taxable in the source state if the activities of an enterprise constitute a permanent establishment in the source state. Profits derived by an enterprise from the operation of aircraft in international traffic shall be taxable in the country of place of effective management of the enterprise. Dividends, interest, royalty income and fees for technical or professional services will be taxed both in the country of residence and in the country of source. However, the maximum rate of tax to be charged in the country of source will not exceed the prescribed limit for such dividends, interest, royalties and fees for technical services. Capital gains from the sale of shares will be taxable in the country of source.

This agreement incorporates provisions for effective exchange of information and assistance in collection of taxes between tax authorities of the two countries including exchange of banking information and also incorporates anti-abuse provisions to ensure that the benefits of the Agreement are availed of only by the residents of the two countries and to prevent treaty abuse. The Agreement would provide tax stability to the residents of India and Fiji and facilitate mutual economic cooperation as well as stimulate the flow of investment, technology and services between India and Fiji.

(CBDT Press Release, dated 30-1-2014)


CA Tarunkumar Singhal & CA Sunil Moti Lala

INTERNATIONAL TAXATION
Case Law Update

A] SUPREME COURT

I. Section 245R(2) – Delhi High Court judgment in Sin Oceanic and NetApp BV, wherein it held that AAR applications inadmissible once tax return filed set aside and restored to the file of AAR, in the light of recent AAR ruling in Mitsubishi Corporation wherein AAR held that mere return filing not a bar under Section 245R(2)

Sin Oceanic Shipping ASA Norway vs. Authority for Advance Rulings [2014] 41 taxmann.com 444 (SC)

Facts

1. The assessee, Sin Oceanic Shipping ASA Norway, had filed a Special Leave Petition ("SLP") before the Hon'ble Supreme Court on the issue of maintainability of the application under Section 245R(2) of the Income-tax Act, 1961 ("the Act") before the Hon'ble AAR when a return of income is filed prior to the date of filing the application.

2. The Hon'ble AAR had declined to entertain the application as the assessee had already filed its return of income for the relevant A.Y. 2009-10 before filing of the application before the Hon'ble AAR.

3. The Hon'ble Delhi High Court had confirmed the AAR order in cases involving *Sin Oceanic Shipping ASA and NetApp BV & Ors. [2013]* wherein it was held that filing of a return of income fell within the sweep of "pending proceedings", attracting the bar of Section 245R(2) for admitting the application and rejected the assessee's petitions.

4. Aggrieved, the assessee preferred an SLP before the Hon'ble Supreme Court.

Judgment

1. The Hon'ble Supreme Court observed that in light of the order of the Hon'ble AAR in *Mitsuibishi Corporation, Japan, In re [2014] 264 CTR 113 (AAR),* the learned counsel for the common appellant in both the appeals and learned senior counsel for the respondents agreed that the impugned order may be set aside and the matter may be restored to the file of the Authority.

2. Accordingly, the Hon'ble Supreme Court set aside the impugned order dated 14-8-2012 passed by the Hon'ble Delhi High Court and restored the matter to the file of the Authority for fresh ruling in accordance with law.

B] AUTHORITY FOR ADVANCE RULINGS

II. Section 245N – 'Transaction' or 'proposed transaction' should not be mere 'intention' – Applicant intends to set-up 100% subsidiary in India which further intends to set-up a partnership consortium with another Indian company, who shall take up infrastructure project – Applicant sought ruling on allowability of deduction under Section 80IA(4) to partnership consortium – Held, 100% subsidiary has to exist in reality and partnership consortium has to be set up in order to constitute a 'transaction' or 'proposed transaction' u/s 245N

Trade Circle Enterprise LLC, In re [2014] 42 taxmann.com 287 (AAR)

Facts

1. The applicant, a company registered in UAE, engaged in the business of developing and investing in infrastructure and real estate sector intends to invest in a 100% subsidiary company in India.

2. The Indian subsidiary company intends to set up a consortium by way of partnership firm under the Partnership Act, 1932 with another Indian Company namely, MEP Infra Private Limited (MEPPL).

3. The consortium proposes to acquire the undertaking of MEPPL which is engaged in the business of operating and maintaining 20 road bridges in Mumbai and in consideration collects toll at five Mumbai entry points pursuant to a contract dated 19th November, 2010 entered into with the Maharashtra State Road Development Corporation, a Corporation (MSRDC) owned by the Government of Maharashtra ('Undertaking') for a period of 16 years.

4. The present Undertaking is eligible for tax deduction of 100% of its profits and gains from such undertaking for a period of 10 consecutive assessment years out of the 20 assessment years as per provisions of Section 80IA(4)(i) of Income tax Act, 1961 ('Act'). MSRDC and MEPPL have not claimed any income tax benefit under the said section.

5. The above transaction is expected to be completed by the month of December, 2011, subject to necessary approvals.

6. The applicant sought an advance ruling on the eligibility of claim of benefits of Section 80IA(4)(i) deduction in the hands of partnership firm and the period thereof.

7. The Revenue objected to admission of the application u/s. 245R(2) stating that the questions posed before the AAR do not fall under any of the clauses of section 254N of the Act.

Ruling

1. The Hon'ble AAR held that in order to bring in the question within the scope of Section 245N of the Act, there has to be either a transaction undertaken or proposed transaction to be undertaken by the non-resident applicant. This is not the case in the present application. "Transaction" or "proposed transaction" are not the same as mere intention.

2. It observed that in present application, the applicant intends to invest in a 100 per cent subsidiary company in India which in turn intends to set up a consortium by way of partnership firm with the Indian company and the partnership firm propose to acquire the undertaking of the Indian company which is stated to be eligible for deduction under Section 80IA of the Act. It held that the 100 per cent subsidiary company has to exist in reality and the partnership firm has to be set up in order to make transaction or proposed transaction of the applicant with the Indian company/ subsidiary.

3. It further held that the question relates to proposed setting up of the subsidiary and the partnership firm with the Indian company and as to whether the subsidiary or the partnership firm will be eligible to 100 per cent deduction under Section 80IA of the Act. It observed that the ruling in the case of *Umicore Finance vs. CIT (318 ITR 78)* was also not applicable.

4. Accordingly, the Hon'ble AAR agreed with the stand of Revenue that the questions posed do not fall under the purview of the Authority.

III. A taxpayer who is obliged to perform independent personal services without having a PE of his own, is deemed to have a PE where he performs his services – On the issue of Agency PE the relevant question is "business connection"

Booz & Company (Australia) (P.) Ltd. & Others, In re [2014] 42 taxmann.com 288 (AAR)

Facts

1. The applicants, Booz & Company entities, filed 10 applications before the Hon'ble AAR involving identical disputes concerning Double Taxation Avoidance Agreements ('DTAA') of different countries in which these entities were resident viz. Australia, USA, UK, Germany, Italy, Japan, Netherlands, China and France ("the DTAA") except Cayman Islands wherein the questions placed were in respect of taxability under the Act.

2. It sought an advance ruling on the taxability of the payments received / receivable in connection with the provision of services of technical / professional personnel to Booz India in India as Fees for Technical Services ("FTS") under Article 12 of the respective DTAA's in the absence of Permanent Establishment ("PE") in India.

3. The Revenue contended that the various terms and conditions governing the relationship between the applicants and Booz India, the global character and profile of the Booz Group, the interdependence amongst the various companies of the Booz Group, the nature of the services rendered and exchanged between the companies of the Booz Group and the location of Booz India's office in India combined to give rise to a case for Booz India being a PE in India for the applicants from multiple angles.

4. The Revenue relied on various terms and conditions governing the relationship between the applicants and Booz India as under to contend that Booz India can be simultaneously/ alternatively a service PE, an agency PE and also a fixed place PE:

- Booz Group is a global network of group companies and in order to optimise the benefits of Booz Group's global business network and expertise, affiliates of Booz Group provide/avail services from each other.
- The entire Booz Group is being catered by a basket of approximately 2,200 technically/professionally qualified personnel which is utilized for executing any project won by the group/its affiliates.
- Booz India would execute the client's project using its own employees and to the extent required, procure services of technical/professional/personnel from the applicant/and other affiliates of the group. This combine of professionals would work together as one team to execute the projects.
- The applicants will have the power to recall its technical/professional/personnel and replace them with other technical/ professional/personnel.
- The technical/professional/personnel of the applicants will work under the supervision of Booz India with respect

to the concerned project. However, the overall control over the technical/ professional/personnel shall be with the applicants.

- The technical/professional/personnel will abide by the employment agreement entered into with the applicants.

- Any financial and/or other responsibility in respect of any claim made by the third party on Booz India for an actual or alleged infringement of any industrial or other rights of third parties *vice versa* usage by Booz India of Technical information, data, etc made available by the applicant to Booz India will be borne by the applicants.

- The applicants will also impart on the job training to the employees of India. This can be treated as one primary contention.

5 The Revenue contended the existence of PE on following arguments:

- Agency PE: Since all entities of the applicants were interdependent, they could not attain optimal efficiency without receiving services from each other. Therefore, these inherent and specific dependencies made it very clear that Booz India was a dependent agent of the applicants.

- Service PE: The number and high level of qualified personnel deployed by the applicant to Booz India clearly established that Booz India was a service PE.

- Fixed PE: The access given by Booz India to the technical and professional personnel deployed to work in a given space also rendered that place as a fixed place PE.

6. The Hon'ble AAR has not produced / dealt with the submissions of the applicant.

Ruling

1. The Hon'ble AAR observed that one of the *sine qua non* of a fixed place PE is that the fixed place of business through which the business is carried on should be 'at the disposal' of the taxpayer which is called the "disposal test". OECD does not expressly define what constitutes the place to be 'at the disposal' of the taxpayer and instead gives examples wherein it may or may not tantamount to 'right of disposal'. Conducting trading operations generally require a fixed place which the taxpayer uses on a continuous basis. However, taxpayers rendering service usually do not require a place to be at their constant disposal and therefore application of 'disposal test' is generally more complex in such cases. In some jurisdictions the 'disposal test' is satisfied by the mere fact of using a place. In some other jurisdictions it is stressed that something more is required than a mere fact of use of place. The Hon'ble AAR quoted the judgment of *Rolls Royce Plc vs. DIT [2011] 339 ITR 147* and *Seagate Singapore International Headquarters (P.) Ltd., in re. [2010] 322 ITR 650 (AAR)* rendered in the context of fixed place PE.

2. The Hon'ble AAR held that a taxpayer who is obliged to perform independent personal services without having a PE of his own, is deemed to have a PE where he performs his services. It further highlighted how a factual distinction can bring about a different approach by citing the judgment of *Motorola Inc. vs. DCIT [2005] 147 Taxman 39 (Del.) (SB).*

3. The Hon'ble AAR observed that various factors have to be taken into account to decide a fixed place PE which *inter alia* includes a right of disposal over the premises. No strait jacket formula applicable to all cases can be laid down. Generally the establishment must belong to the Employer and involve an element of ownership, management and authority over the establishment. In other words the taxpayer must have the element of ownership, management and authority over the establishment. It further quoted the judgment of *Western Union Financial*

Services vs. ADIT [2007] 104 ITD 34 (Del), DIT vs. Morgan Stanley and Co. Inc. [2007] 292 ITR 416 (SC) and Aramex International Logistics (P.) Ltd., 248 ITR 159 (AAR).

4. The Hon'ble AAR further held that on the issue of Agency PE the relevant question is "business connection". Relying on the judgment of *CIT vs. R. D. Aggarwal & Co. [1965] 56 ITR 20 (SC)* it observed that the essential features of "business connection" may be summed up as follows:

- A real and intimate relation must exist between the trading activities carried on outside India by a non-resident and the activities within India
- Such relation shall contribute, directly or indirectly, to the earning of income by the non-resident in his business
- A course of dealing or continuity of relationship and not a mere isolated or stray nexus between the business of the non-resident outside India and the activity in India, would furnish a strong indication of 'business connection' in India.

5. The Hon'ble AAR held that the facts of the instant case would also fulfil the essential features of business connection. The factual position as highlighted by the Revenue clearly support the stand taken by it that a PE does exist.

6. It thus concluded that the incomes received by them from the Indian Company were taxable as business profit under Article 7 of the respective DTAA's except M/s. Booz & Co. (ME) Ltd. Cayman Islands (AAR/1026) with which there is no DTAA by India.

[Editor's Note: As evident from above it is respectfully submitted that:

1. The Hon'ble AAR has not produced/dealt with the submissions of the applicant.
2. The Hon'ble AAR has not concluded which PE [i.e. fixed place PE, Dependent Agency PE or Service PE] exists.
3. The reasoning of the Hon'ble AAR in the context of Fixed Place PE that "a taxpayer who is obliged to perform independent personal services without having a PE of his own, is deemed to have a PE where he performs his services" seems incorrect and contrary to the decision of *DIT vs. E Funds IT Solutions Group Inc. [2014] 42 taxmann.com 50 (Delhi)* that Article 5(1) cannot be invoked and applied if the premises are not at the disposal, legally or otherwise of the assessee.
4. The reasoning of the Hon'ble AAR that for determining Agency PE under the DTAA the relevant question is business connection under the Act seems incorrect and contrary to the decision of *DIT vs. E Funds IT Solutions Group Inc. [2014] 42 taxmann.com 50 (Delhi)* wherein despite concluding that the assessee had a business connection it held that the assessee did not have an Agency PE since the conditions mentioned in Article 5(4) of the DTAA was not satisfied.
5. The Hon'ble AAR failed to appreciate that a service recipient (i.e. Booz India) can never be considered to be an Agent, much less a DAPE of the applicants.
6. It seems that the Hon'ble AAR got influenced by the interdependence amongst the various entities of the Booz Group global having regard to the character and profile of the Booz Group. However, in case of *DIT vs. E Funds IT Solutions Group Inc. [2014] 42 taxmann.com 50 (Delhi)* it was held that for determining PE under the DTAA following factors such as – close association between two entities, providing various services to the other entity and being dependent on them for its earning, assignment of a contract or sub-contract – are not relevant.]

IV. Section 245R(2) – Question cannot be said to be already pending for adjudication before the Income-tax authority unless notice under section 143(2) is issued before the application is filed – Pending proceeding in general and question already pending for adjudication are not the same

LS Cable & System Limited, Korea Hyderabad Project [2014] 42 taxmann.com 289 (AAR)

Facts

1. The applicant, LS Cable & System Limited ('LSCSL"), a Korean Company had received offshore supplies contracts from M/s. Indu Projects Limited ('Indu') for offshore supply order for design, manufacture, supply of UG Cable and Accessories.

2. The title of the plant and equipment supply under the offshore supply contract shall be transferred in favour of Indu outside India. The applicant will receive payment in consideration for the scope of work from Indu outside India through irrevocable Letter of Credit.

3. The applicant sought advance ruling on whether the amounts received by it from Indu Project Limited for Offshore supply of Equipments & Materials, etc., would be liable to tax in India.

4. The Revenue objected to admission of application on the ground that question was already pending before Income-tax authority as return of income for A.Y. 2011-12 in respect of the said contract, was already filed by applicant before filing of application for advance ruling. It further contended that the notice under Section 143(2) was issued within the limited time permitted under the Act though the same was issued after filing of the application. Therefore, the question was pending before the Assessing Officer ("AO") till the time available to him under the proviso to Section 143(2) of the Act.

Ruling

1. The Hon'ble AAR observed that the AO assumes jurisdiction to adjudicate all the questions arising out of the return by issue of notice under section 143(2) only. It relied on the ruling of Hyosung Corporation, Korea, In re [2013] 36 taxmann.com 150 (AAR - New Delhi) wherein it was held that mere filing of return does not attract bar on the admission of the application as provided in section 245R(2).

2. It further observed that the question raised in the application would be considered as pending for adjudication before Income-tax authority only when the issues are shown in the return and notice under section 143(2) was issued.

3. The Hon'ble AAR held that the revenue's contention, that notice under 143(2) was issued within the stipulated time, would not affect the stated position because without issuance of the notice, the AO does not have jurisdiction to examine and adjudicate the issues raised.

4. It further held that pending proceeding in general and question already pending for adjudication are not the same. For example, when a return of income is filed, it can be said that proceeding is pending till it is processed or deemed to have been processed under section 143(1). However, that does not mean the issues raised before this Authority are already pending for adjudication by the Income-tax Authorities.

5. It thus concluded that the question cannot be said to be already pending for adjudication before the Income-tax authority unless notice under section 143(2) is issued before the application is filed. In the instant case, though return of income was filed before filing of the application before this Authority, since notice under 143(2) was issued after the application was filed the question could not be said to be already pending before the Income-tax authority.

[Note: One more application was filed by the same applicant LS Cable & System Limited, Korea Ukai

Project (AAR No 1320 of 2011) . The Hon'ble AAR admitted the application based on the same ruling given for above case.]

V. Section 6(1) – Explanation (a) to Section 6(1) for person leaving India for employment, applicable only in year in which person leaves India – Explanation (b) to section 6(1)(c) is applicable only when a person comes to India on a visit while retaining his/her employment in foreign country

Mrs. Smita Anand [2014] 42 taxmann.com 366 (AAR)

Facts

1. The applicant, Mrs. Smita Anand, an Indian citizen and a person of Indian origin was working with Hewitt Associates (India) Private Limited from April, 2002 till September, 2007. On September 22, 2007, the applicant left India for the purpose of employment with Hewitt Consulting (Shanghai) Company Ltd. ("Hewitt, China"), a company incorporated in China.

2. During her employment in China, she visited India and her stay in India in a particular year never exceeded 182 days. She returned to India on February 12, 2011 after resigning from her employment in China with effect from January 31, 2011. For A.Y. 2011-12, which is the relevant year in this application, her total stay in India was 119 days.

3. The applicant was awarded following stock options by her employer in China and which were vested as well as exercised by her during the tenure of her employment with Hewitt, China:

- Historic Restricted Stock Units ("RSUs") awarded under an Employees Stock Incentive Scheme by her employer Hewitt, China.
- Converted stock options of AON Corporation awarded in lieu of historic stock options of Hewitt (" ESOP"), as a result of global merger of Hewitt with AON Corporation.

4. During A.Y. 2011-12, the applicant realised proceeds from exercise of ESOPs and RSUs which were credited in applicant's name to her individual account with Morgan Stanley Smith Berne US from where the money was remitted to her Indian savings account after conversion into Indian rupees before returning to India on 12th February, 2011.

5. The applicant sought an advance ruling on the taxability in India of the proceeds received from exercise of ESOP and RSUs.

6. While admitting the application under Section 245R(2), the Authority left the question as to whether the applicant is a resident or a non-resident, to be considered while deciding the application under Section 245R(4).

Ruling

1. The Hon'ble AAR observed that there are two conditions in Section 6(1) of the Act, when an individual is said to be resident in India in any previous year namely sub-section (a) and sub-section (c). The requirement of sub–section (a) was not met by the applicant as her stay during any of the previous year after going abroad for employment was less than 182 days.

2. It observed that as regards the requirement of subsection (c), it observed that following two conditions should be satisfied:

- Stay in India during preceding four years to the relevant year should be 365 days or more, and
- Stay in India in relevant year to be 60 days or more.

3. The Hon'ble AAR further observed that Explanation (a) to Section 6(1) providing for extension of period for Indian Stay of 182 days in

place of 60 days in sub-section (c) to Section 6(1) of the Act was applicable only in a particular year when a person leaves India. The words "In relation to that year" relates to the previous year in which a person leaves India. Since the applicant left India on 22nd September, 2007 for the purpose of employment with Hewitt, China, the relevant F.Y. was 2007-08 which was not the subject matter of the application. Besides, the applicant left India in September, 2007 and came back to India on 12th February, 2011 after resigning from her employment in China effective on 31st January, 2011. Relying on the decision of Hon'ble ITAT in the case of *Manoj Kumar Reddy Nare vs. ITO [2009] 132 TTJ 328 (Bang.)* wherein it was held that if the assessee had come to India after leaving his employment outside India, the Explanation (a) to section 6(1)(c) will not be applicable.

4. It thus held that since the total stay in India of the applicant for the preceding four years was for a period amounting to more than 365 days and also total stay in India for the F.Y. 2010-11 was for a period amounting in all to 119 days which is more than 60 days, requirements of sub-section (c) of section 6(1) was met by the applicant to become a resident in India.

5. The Hon'ble AAR also held that as regards Explanation (b) to section 6(1)(c) of the Act, the test was whether the applicant had come on a visit to India in the previous year 2010-11 as a non-resident. It cannot be said that the applicant is a non-resident in that particular year as this is the point in dispute now. If she is not a non resident, one limb of the Explanation falls. The other issue is whether she came to India only for a visit.

6. As regards the second limb, it held that having regard to the facts and circumstances, it can be concluded that the applicant did not come to India only for a visit. It observed that the applicant's argument that the applicant's employer card was valid upto 31-3-2012, the applicant was considerably exploring possibility of job outside India, the residential house property owned by the applicant jointly with her husband had been let out till June, 2011, the applicant visited her friends and relatives in different parts of India and also travelled different locations on holidays, the children of the applicant were staying abroad at the time when applicant came to India etc., were not sufficient to conclude that the applicant came to India on a visit only. The applicant could very well resign even during the validity period of the employer's card and that was what she had done. The activities mentioned by the applicant need not be necessarily proof of a visit, even a person staying permanently in India also does those activities. When the applicant resigns from her employment in China, the reason for return to India does not seem to be only for a visit. Further the applicant failed to give any information as to whether the applicant left India thereafter for any employment.

7. Accordingly, it held that the applicant was a resident in India and thus the amount of proceeds received in India on conversion of ESOPs and RSUs awarded to her by her employer in China will be taxable in India.

C] HIGH COURT JUDGMENTS

VI. Indian subsidiary of a foreign company providing back office support operations does not constitute a PE in India if the conditions mentioned in Articles 5(1), 5(4) and 5(5) are not satisfied – Employees of e-Fund India did not become other personnel of the assessee's, once and if the said persons were de facto and de jure employed by the Indian entity/enterprise – MAP cannot be determinative or primary basis to decide whether the assessee had PE in India

DIT vs. E Funds IT Solutions Group Inc. [2014] 42 taxmann.com 50 (Delhi)

Facts

1. The assessees, E Funds Corporation ("e-funds Corp") and E Funds IT Solutions Group Inc. ("e-funds Inc"), are companies incorporated and resident in USA. E Funds International India Private Ltd. ("e-funds India"), a company incorporated and resident of India. E-funds Corp was the ultimate holding of e-funds India and also e-funds Inc.

2. The assessee's had four main business lines, namely electronic payments, ATM management service, decision support & risk management and professional services. E-funds India had performed back office operations in respect of the first three. This included data entry operations etc. in respect of decision support and risk management.

3. The pertinent issue involved in the case was whether e-funds India would be deemed as PE of assessee in India and how much income could be attributed and taxed in the hands of the assessee in India.

Judgment

Business connection

1. The Hon'ble High Court held that there was a business connection of the taxpayers in India, because the e-funds India was providing information and details to the taxpayers in USA for the purpose of entering into contracts with third parties and subsequently the said contracts were performed fully or partly by e-funds India as an assignee or sub-contractee.

Mutual Agreement procedure

2. The Hon'ble High Court observed that Mutual Agreement Procedure (MAP) procedure as envisaged under Article 27 of the tax treaty was resorted to for the earlier years. As per the communication by US treasury department, they did not agree that taxpayers had a PE in India but they had agreed to mutual agreement to divide income to avoid double taxation. The tax department contended that taxpayer has a PE as India and USA had resorted to MAP as envisaged under Article 27 of the tax treaty.

3. It held that the MAP procedure and agreement is relevant but cannot be the primary basis to decide whether the taxpayer had PE in India. Whether or not PE exists is a matter of law and fact, and there has to be determination of the said issue on merits.

Fixed Place and Subsidiary PE

4. The Hon'ble High Court held that a perusal of Article 5(6) indicates that even carrying on business in the other country by either the "controlled company" or the "controlling company", would not make them, i.e. the two companies, a PE of each other. However, a subsidiary can become a PE of the holding/controlling company or the related company, if it satisfies the postulates and requirements of other paragraphs of Article 5, notwithstanding and negating the protection provided under paragraph 6 of Article 5, which recognises legal independence of the two entities for tax purposes.

5. The Hon'ble High Court observed that none of the authorities including the tribunal held that the two assessees had right to use any of the premises belonging to e-fund India. It was not adverted to or stated that premises of e-fund India were at the disposal, legally or otherwise, of the two assessees. In the absence of any such finding Article 5(1) cannot be invoked and applied. Also, even if the foreign entities have saved and reduced their expenditure by transferring business or back office operations to the Indian subsidiary, it would not by itself create a fixed place or location PE.

6. It also held that the fact that the subsidiary company was carrying on core activities as performed by the foreign assessee does not create a fixed place PE. Paragraph 3 is not a positive provision but a negative list. The said paragraph does not create a PE but has a negative connotation and activities specified when carried on do not create a PE.

7. It further held that following factors relied upon by the lower authorities were not relevant to determine and decide PE under Articles 5(1), 5(4), or 5(5):

- Close association between e-fund India and the assessee's
- E-fund India provides various services to the taxpayers and was dependent on them for its earning
- E-Fund India did not bear sufficient risk
- E-Fund India was reimbursed the cost of the call centre operations plus 16 per cent basis or that the basis of margin fixation was not known
- Direct or indirect costs, and corporate allocations in software development centre or BPO
- Assignment or sub-contract to e-fund India
- Whether or not any provisions for intangible software was made or had been supplied free of cost
- Details of or number of employees of e-fund India which are part of the e-fund group

Agency PE

8. The Hon'ble High Court observed that subsidiary by itself cannot be considered to be a dependent agent PE of the Principal. However, a subsidiary may become dependent or an independent PE agent provided the tests as specified Articles 5(4) and (5) are satisfied.

9. The Hon'ble High Court held that conditions of Article 5(4) were not satisfied in the present case. It observed that it was not the case of the Revenue that e-fund India was authorised and habitually exercised authority to conclude contract or was maintaining stock or merchandise from which it delivered goods or merchandise on behalf of the assessee or secured orders on behalf of the assessee. The fact that e-fund India had provided necessary inputs to e-fund Corp or e-Fund Inc. to enable them to enter into contracts which were assigned to e-fund India will not make e-fund India a PE of the assessee.

10. As per Article 5(5), an agent is not considered to be an independent agent if his activities are wholly or mostly wholly on behalf of foreign enterprise and the transactions between the two are not made under arm's length conditions. The twin conditions have to be satisfied to deny an agent, the character of an independent agent. It held that the transactions between the taxpayers and e-fund India were at arm's length and were taxed on arm's length principle and therefore, requirements of Article 5(5) were not satisfied.

Service PE

11. The Hon'ble High Court held that the employees of e-fund India were their employees, i.e. employees of an Indian entity and not employees of the taxpayers. The employees of e-fund India did not become other personnel of the assessee's, once and if the said persons were *de facto* and *de jure* employed by the Indian entity/enterprise. The words 'employees and other personnel' under the Article 5 of the tax treaty have to be read along with the words 'through' and 'furnishing of services' by the foreign enterprise within India. Thus, the employees and other personnel must be of non-resident to create a Service PE.

12. It further observed that assessment order also does not record any other relevant finding for creation of service PE under Article 5(2)(l), other than payment received by e-fund India for providing management and support service by the President and Sales Team to overseas group entities. Such a fact was relevant with reference to Article 5(2)(a) but the said provision was not invoked by the lower authorities. It held that extent and timing of applicability of the 'Place of Management' principle in such cases, require

findings of facts at the first instance and cannot be made matters to be decided for the first time in an appeal before the High Court under section 260A of the Act.

13. The Hon'ble High Court relied on the Supreme Court decision in the case of *DIT vs. Morgan Stanley and Co. Inc. [2007] 292 ITR 416 (SC)* and held that merely because the non-resident taxpayer to protect their interest, for ensuring quality and confidentiality has sent its employees to provide stewardship services, will not make the Indian subsidiary or another entity, a PE of the non-resident company even if the employees of the non-resident taxpayer were taken on deputation.

VII. Section 195 – Explanation 2 to Section 195 by Finance Act, 2012 w.r.e.f. 1-4-1962 providing that tax has to be deducted whether or not the non-resident has PE or not would not impact the provisions of DTAA – Judicial discipline requires that orders of higher appellate authorities should be followed by the subordinate authorities

M/s. Anand Transport (Private) Ltd. vs. Assistant Commissioner of Tax (WA 952/2013 & WP 11360/2013, Madras HC)

Facts

1. The assessee, engaged in the business of transportation of coal through ships between Indian ports, entered into agreement with M/s. Jaldhi Overseas Private Limited ("JOPL"), a tax resident of Singapore, wherein JOPL agreed to provide suitable ships to the assessee for transportation of coal between the Indian ports. The payment was to be made in foreign currency. JOPL did not have any Permanent Establishment ("PE") in India.

2. For A.Y. 2010-11, assessee filed an application for nil deduction of tax at source for quarter ended June 2009. The AO however observed that the contract between the assessee and JOPL was for 5 years and if the activities continue for a period of 90 days in aggregate for a fiscal year, JOPL would be deemed to have a PE in India. Accordingly, it directed the assessee to deduct tax at the rate of 3.167%.

3. Aggrieved, the assessee preferred revision under Section 264 before DIT (Int'nl Tax). The revisional authority held that JOPL was not having a PE in India and the income of JOPL was liable to be taxed in Singapore and not in India by virtue of the Double Taxation Avoidance Agreement between India and Singapore ("the DTAA"). The Revenue did not challenge the revisional authority's order and thus it became final.

4. Further in assessee's own case for A.Y. 2009-10, the AO had disallowed the payments made to JOPL for non deduction of TDS. On appeal to CIT(A), the appellate authority took into consideration the order passed by the revisional authority above and held that no evidence was brought to show that JOPL was not a resident of Singapore and thus the income from Indian operations were not taxable in India by virtue of Articles 7 & 8 of the DTAA and directed the deletion of disallowance.

5. For A.Y. 2010-11, the AO held that as per Explanation 2 to Amendment of Section 195, the said Section was amended with retrospective effect from 1-4-1962, and in accordance with the amendment, tax had to be deducted for the payments made to JOPL, hence disallowed payments made u/s. 40(a)(i) of the Act. The AO issued a notice of demand and further issued a show cause notice as to why an order imposing penalty should not be made.

6. Aggrieved, the assessee filed a Writ Petition against the order and also moved a Miscellanous Petition praying stay of operation of the said order pending disposal of the main Writ Petition.

7. The court granted conditional order of stay. Challenging legality and *vires* of the said order the assessee filed the instant writ appeal.

Judgment

1. The Hon'ble High Court rejected the Revenue's contention that in view of the amendment to Section 195 by Finance Act, 2012 w.r.e.f 1-4-1962 tax has to be deducted whether or not the non-resident has PE or not, since in terms of the DTAA the remittances to JOPL were not chargeable to tax. The said issue was precisely considered by the revisional authority as well as the appellate authority in respect of A.Y. 2009-10, wherein findings were given that the income arising out of the transaction was not chargeable to tax in India under the DTAA. Relying on the judgment of GE India Technology Centre P. Ltd. it held that the assessee was not liable for payment of tax under Section 195.

2. The Hon'ble High Court further relying on the judgment *1991 (55) ELT 433 (SC) (Union of India vs. Kamalakshi Finance Corporation Ltd.),* held that the principles of judicial discipline require that the orders of the higher appellate authorities should be followed by the subordinate authorities and the stand taken by the AO, on the face of it was unsustainable both in law and on facts.

3. As regards the Revenue contention that in view of the availability of alternate appeal remedy, it observed that in light of the orders passed by revisional authorities, the stand taken by the AO that tax should be deducted at source, on the face of it was unsustainable and therefore for the said reason, the non-availment of the appeal remedy cannot be put against the appellant / writ petitioner / assessee.

4. Accordingly, the said writ petition was allowed. Consequently the writ appeal and connected miscellaneous petition were closed.

D) Tribunal Decisions

VIII. Whether salary received in an Indian bank account by a non-resident, employed outside India, is taxable in India – Held : No; in favour of the assessee

Arvind Singh Chauhan vs. ITO [2014] 42 Taxmann. com 285 (Agra) Assessment Years : 2008-09 and 2009-10

Facts

1. The assessee, an employee of Executive Ship Management Pte Ltd., Singapore (ESM), worked as a crew member on merchant vessels plying on international routes. The assessee qualified as a Non-Resident in the financial year and offered to tax in India his interest income from the Indian bank account and pension income from the Indian Army (previous employer).

2. Salary income from ESM was credited at the request of the assessee to his NRE bank account in Mumbai from the employer's bank account in Singapore. He did not offer his ESM salary on the understanding that the same is not liable to tax in India.

3. The Assessing Officer (AO) made an addition on account of the salary, considering it taxable in India owing to its accrual and receipt in India. Aggrieved by the decision of the AO and subsequent decision of the Commissioner of Income Tax (Appeals) [CIT(A)], the assessee appealed before the Tribunal.

Decision

1. The Tribunal observed that an employee has to render the services to get a right to receive a salary. Accordingly, the Tribunal opined that situs of accrual of salary income is the place where the services are rendered. Reliance was

placed on the Bombay High Court ruling in the case of *CIT vs. Avtar Singh Wadhwan [2001] 247 ITR 260 (Bom)* in this regard. Thus, the Tribunal held that the salary was accrued outside India where the services were performed.

2. The Tribunal observed that the assessee received USD denominated salary. Further, the assessee had the right to receive such salary at the place of employment (Singapore) i.e. the assessee had the right to disposal of such salary. It was thus noted that in lieu of such right to disposal of the salary, the assessee exercised his discretion to receive it in his Indian bank account.

3. The Tribunal opined that for the purpose of section 5(2) of the Income-tax Act, 1961, receipt of income refers to the first occasion when the assessee gets the money in his own control – whether real or constructive. What is material is the receipt of income in its character as income, and not what happens subsequently once the income, in its character as such, is received by the assessee or his agent. The Tribunal thus distinguished between 'receipt of income' and 'receipt of amount pertaining to the income'. Reliance was placed on the Madras High Court ruling in the case of *CIT vs. AP Kalyankrishnan [1992] 195 ITR 534 (Mad)* in this regard.

4. Thus, the Tribunal held that salary income was accrued outside India and was also received outside India. Accordingly, the same is not taxable in India.

Note: Other Favourable Decisions are as follows:

(ADIT vs. Nandan Singh Chauhan [ITA No. 1171/Del/2009])

(Ranjit Kumar Bose vs. ITO [1986] 18 ITD 230 (Cal))

IX. Taxability of Liaison Office – Sales promotion activity of Liaison Office is taxable in India

Browne & Sharpe Inc vs. ACIT (2014) 41 taxman.com 345 (Del) Assessment Years : 2003-04 to 2005-06

Facts

1. The assessee a US company, set up a Liaison Office in India with the RBI approval. The RBI approval was granted on the condition that the LO will not render any services, directly or indirectly, in India.

2. The LO was established only as a communication channel between the assessee and its customers or prospective customers in India. The LO did not render any service for the procurement of order or sale of the product in India. Hence there was no income earned in India. The assessee contended that the RBI had never alleged that it has violated the conditions put forth.

3. In this regard, the assessee referred to various decisions like Angel Garment Ltd. [2], U.A.E. Exchange Centre Ltd. [3], K.T. Corporation [4] etc. Furthermore, the payments made to the LO were merely reimbursement of expenses incurred by the LO on behalf of the assessee. Hence, it cannot be liable to tax in India.

4. The Tax Department contended that the LO was not merely a communication channel but it was also promoting the assessee's product brands in India, which was evident from the fact that the performance incentive of LO's employees was calculated on the basis of number of orders received by the assessee.

5. The Tax Department contended that the assessee was also registered with the Registrar of Companies in India and had filed a return of income claiming loss under the head "Profits and gains of business or profession", which shows that the assessee itself believes that it derives income from business in India. Thus, income attributable to the LO in India should be taxable in India.

Decision

The Tribunal held in favour of the Tax Department are as follows:

1. The LO was engaged in promoting the assessee's product brands in India. Other than the Chief Representative Officer, the LO had also appointed a Technical Support Manager. The employees of the LO were offered sales incentive plan as per which they were to be provided with remuneration, based on the achievement of the sales target of the assessee in India.

2. The assessee was registered with the Registrar of companies for carrying on business in India. It had also, on its own volition, filed a return of income declaring loss under the head "Profits and gains of business or profession". Thus, the assessee itself has taken a stand that it derives income from business in India.

3. In the decisions relied on by the assessee, the activities carried which were held to be of preparatory and auxiliary nature. However, the assesee's employees were promoting the sale of the Assessee's goods in India. Thus, income attributable to LO is taxable in India.

4. There is no doubt that the reimbursement of expenses can, under no circumstances, be treated as income. The LO, however, has received, on year-on-year basis, an amount exceeding the expenses actually incurred by it on behalf of the assessee. Thus, the amount over and above the expenses has to be treated as income.

Other favourable decisions are as under:

1. *Metal One Corporation vs. DDIT (ITA No. 5377/Del/2011)*

2. *St. Jude Medical (Hong Kong) Ltd. vs. DDIT (ITA Nos. 4626 and 4627/Mum/2005) - Taxsutra.com*

X. Transfer pricing – Justification for the payment of Management fees – Furnishing of evidence /Documentary proof in respect of services provided

TNS India Pvt. Ltd. vs. ACIT [TS-21-ITAT-2014(HYD)-TP] – Assessment Years: 2003-04, 2004-05 &2005-06

Facts

1. The assesee was engaged in conducting quantitative and qualitative market research. It had entered into several international transactions with its associated enterprises (AEs), of which the disputed transaction was that of payment of management fees. The other international transactions were accepted as having arm's length pricing, after being aggregated and benchmarked using Transaction Net Margin Method (TNMM). The Transfer Pricing Officer (TPO) challenged the management fee transaction and determined its arm's length price (ALP) to be NIL.

2. As a part of its business strategy, the Group had centralised key management functions in AEs which were set up exclusively for this purpose. These AEs provided management services, and were non-profit entities. The services/process/know-how/systems/ knowledge were available to the assessee on a real-time and continuous basis through the Group intranet. The assessee received the advantage of specialisation, skills and expertise, know-how and technology, which was developed in-house by the Group in all core areas of its business of market research. Other benefits were in the form of global consistency in business practices, economies of scale, and improvements in efficiency.

3. The assessee submitted the following documentary evidence:

a. documentation including a detailed description of services received from AEs;

b. inter-company service agreement;

c. financial statements and tax return of AEs;

d. confirmation that such payments had been made by other group companies too (average management fee as a percentage of sales paid by other group companies was 6.07%, which was higher than 4.5% paid by the assessee);

e. basis of allocation of costs by the global headquarters and regional headquarters; and

f. details of withholding tax on management fee payments.

Decision

The Tribunal held in favour of the assessee as follows:

1. Providing concrete evidence with reference to services provided in the nature of specific activities in day-to-day business was difficult as they were not tangible in nature. However, by the way business is conducted, one could perceive the same. Unless the TPO observed the role of AEs in the assessee's business, it would be difficult to place on record the sort of advice given in day-to-day operations. Accordingly, the TPO's contention that services were not rendered, was not acceptable.

2. Assessee had placed a lot of evidence in support of its claim. The detailed write-up of services provided and benefit received, as provided by the assessee, had neither been contradicted by the Revenue authorities, nor had they specified any other evidence that would satisfy them.

3. The role of a TPO was to determine the ALP of a transaction. By rejecting outright the entire payment of management fee, the TPO went beyond his jurisdiction. In the guise of determination of ALP, the TPO could not question the business decision of payment and determine that no services were rendered. [The Tribunal placed reliance on Delhi High Court ruling in case of *EKL Appliances Ltd. (ITA Nos. 1608 & 1070/2011)]*.

4. While determining the profit level indicator (PLI) for the assessee under TNMM, the management fee transaction had been considered. After paying management fee, the assessee's PLI under TNMM was higher than that of comparables. Considering this, adjustment on account of management fee was not proper.

5. Inter-company service agreement was entered into in an earlier year and the assessee had been paying and claiming management fee in earlier and later years.

6. The management fee amount was within the norms prescribed for payment of fees to various group companies of similar nature.

In view of the above, the Tribunal, in principle, allowed the claim of management fees. However, it observed that since the TPO had not examined whether or not the payment of management fee was in accordance with the pricing methodology laid out in the inter-company service agreement, the matter relating to quantification of the claim was restored back to the TPO.

"Health is a relationship between you and your body"

— *Terri Guillemets*

CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

Amendment to Rule 7 of the Cenvat Credit Rules 2004

Rule 7 of the CENVAT Credit Rules 2004, providing for manner of distribution of credit by input service distributor has been amended *vide* Notification No. 05/2014- CE (N.T.) dated 24 February 2014. The amendment, which comes into force from 1st day of April 2014, is discussed in the following paragraphs.

Rule 7 of the CCR 2014 at present reads as follows –

The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units, or units providing output service, subject to the following conditions, namely:

(a) The credit distributed against a document referred to in Rule 9 shall not exceed the amount of service tax paid thereon.

(b) Credit of service tax attributable to service used in a unit exclusively engaged in the manufacture of exempted goods or providing of exempted service shall not be distributed.

(c) Credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit, and

(d) Credit of service tax attributable to service used in more than one unit shall be distributed pro rata on the basis of turnover during the relevant period of the concerned unit to the sum total of all units to which the service relates during the same period.

Vide above Notification, conditions (b), (c) and (d) has been amended in the following manner:

(i) In clause (b) for words "used in a unit", the words "used by one or more units" are substituted.

The effect of this amendment is that the scope of restriction on distribution of service tax is expanded. Prior to amendment restriction was applicable in respect of service tax paid on services used in any unit exclusively engaged in the manufacturer of exempted goods or providing of exempted service. After the amendment, restriction is applicable to service tax paid on all services used by such unit whether in the unit or outside the unit. By using the words 'one or more units' even service tax paid on input services used by such exempted unit cannot be distributed.

(ii) In clause (c) for the words "used wholly in a unit", the words "used wholly by a unit" are substituted.

The effect of this amendment is that w.e.f. 1-4-2014 input service distributor can distribute the service tax paid on services used wholly or exclusively by a unit to that unit. Prior to amendment service tax paid on services used wholly in the unit only was allowed to be distributed. Thus now even if service is provided outside the unit but is used wholly by that unit, service tax paid on such service can be distributed to that unit only.

(iii) Clause (d) has been substituted for a new clause (d) which reads as follows –

Credit of service tax attributable to service used by more than one unit shall be distributed on a pro rata on the basis of the turnover of such units during the relevant period to the total turnover of all its units, which are operational in the current year, during the said relevant period.

The effect of the amendment is that while calculating service tax paid on input services used by more than one unit which is to be distributed on pro rata basis the turnover of all such units is to be divided by turnover of all units which are operational during the relevant period. Prior to amendment, turnover of only unit to which service tax was to be divided by turnover of only such units to which the service was related. Now the turnover of units to which service is related is to be divided by turnover of all the units which are operational units.

(iv) Explanation 3 to Rule 7 at present reads as follows:

(a) The relevant period shall be the month previous to the month during which the CENVAT credit is distributed.

(b) In case if any of its unit pays tax on quarterly basis as provided in Rule 6 of the Service Tax Rules, 1994, or Rule 8 of Central Excise Rules, 2002, then the relevant period shall be the quarter previous to the quarter during which the CENVAT credit is distributed.

(c) In case of an assessee who does not have any total turnover in the said period, the input service distributor shall distribute any credit only after the end of such relevant period wherein the total turnover of its unit is available.

The above Explanation 3 is substituted by new Explanation 3 as follows –

Explanation 3 – For the purpose of this Rule, the 'relevant period' shall be-

(a) If the assessee has turnover in the "financial year" preceding to the year during which credit is to be distributed for month or quarter as the case may be, the said financial year; or

(b) If the assessee does not have turnover for some or all units in the preceding financial year, the last quarter for which details of turnover of all the units are available, previous to the month or quarter for which credit is to be distributed.

The effect of the amendment is that now instead of calculating the turnover of previous month or previous quarter for pro rata calculation, the turnover of previous financial year is to be considered and pro rata calculation is to be done on the same basis throughout the current financial year.

However if new units are added or any unit is closed during the current year then turnover of last month or quarter as the case may be, for which turnover of all the current units is available, is to be considered for pro rata calculation.

CA Janak Vaghani & Nikita Badheka, *Advocate & Notary*

INDIRECT TAXES
VAT Update

1. Builders/Developers – Revised Returns- Extension

Trade Circular No. 7T of 2014, dated 21-2-2014

The Commissioner of Sales Tax has issued above-mentioned trade circular to permit the builders/ developers to file revised returns for the period from 20-6-2006 to 31-12-2013 by 30-4-2014 to give effect to amendment made to Rule 58 by Government Notification dated 29-1-2014. In para 4 of the said trade circular it is clarified as under:

i) In case of completed assessment such dealer may make claim before the Appellate Authority.

ii) In case where assessment is cancelled they can make claim at the time of fresh assessment.

iii) Even revised returns can be filed where notice for assessment is issued

In para 5 of the said circular it is further clarified that the developer has to discharge his tax liability by selecting any one option among four options available under the Act. No other option such as cost plus gross profit method apart from statutorily prescribed under the Act would be permissible.

2. Website Update

i) List of Dealers eligible for waiver of late fees.

The department has published list of dealers eligible for waiver of late fees in case late filing of first returns.

ii) List of non-filers of VAT Audit Report.

The department has published list of dealers who have not filed VAT audit report for the periods from 2009-10 to 2012-13.

3. The Ordinance extending Date of assessment for Developers _--

The State of Maharashtra has by ordinance no. VII of 2014, dt. 3-3-2014 inserted new subsection 23(13) to MVAT Act. By this amendment the period of limitation in respect of dealers who undertakes the construction of flats ,dwellings or buildings or premises and transfers them in pursuance of an agreement along with land or interest underlying the land and in whose case the limitation for passing the assessment ,for any periods expires on 31st march 2014, is extended to 30th September, 2015

Easy Exit Scheme – Industrial Policy 2013

The State of Maharashtra, Directorate of Industries has announced **a Special Amnesty Scheme for unviable and closed Units** *vide* GR No. SIC 2013/C No 51/13/ Udyog-10 dated 2-5-2013.

To give boost to new industries for balanced industrial growth and to provide employment through such industry, the State has come out with a Scheme called Special Amnesty Scheme for the units which are not possible to be revived and to provide easy exit to such units.

The immovable property owned by such units is required to be used for industrial purposes and therefore the units which fulfil the criteria as per this GR is provided easy exit option.

Eligibility

Eligibility No. 1: The unit should be closed for more than a year/declared insolvent by a competent Court.

No. 2: The unit should be non viable in terms of the RBI Guidelines.

No. 3: There should be a change in Management and the unit should be further run successfully and productively (it is not necessary that the same product should be manufactured but the use should be industrial and for manufacturing purpose only. This does not apply to IT/BT park any service/business unit).

Conditions and procedures

A. To get the benefits of the Scheme, the eligible units will have to pay the entire principal liability of the State Government in one installment. On such payment (subject to other conditions), the interest and penalty would be fully waived.

B. The dues outstanding includes the liabilities of all the laws governed by Sales tax department, MSEB, interest and penalty thereon would be treated as the outstanding liability.

C. The Scheme will apply to the Government, non-government organisations as also corporations.

D. The eligible unit will have to get the eligibility certificate from the Directorate of Industries, the Scheme will remain in operation up to 31st March, 2014.

E. The benefits of the Scheme would be available to all the laws administered by the Sales tax Department i.e. MVAT, BST, CST, Lease Act, Luxury Tax Act, Entry Tax on motor vehicle, Tax on entry of goods and SGPT.

F. The eligible units will have to give application to the JC of Sales tax VAT Adm. in the format provided in Circular 3T of 2014 dated 24-1-2014.

G. The necessary documents to be attached with the applications are stated in the said application. It mainly includes certificate by the implementing agencies about the unit being eligible under the Scheme, one time payment challan, proof of withdrawal of appeal if any filed, affidavit by the new management about the Balance Outstanding.

H. The new unit i.e., the transferee will have to file affidavit and take the responsibility of future liability arising from the past transactions, if any.

I. **In any case the amount will have to be paid before 31-3-2014**

J. The new unit will have to commence production within three years and will have to give "No dues" certificate.

K. The orders which created the liability will have to be attached with the application.

L. The draft of affidavit to be filed by the transferee and transferor are provided in the circular.

M. Along with the detailed application some attachments are required to be filed which includes Certificate by financial institutions in respect of the transferor, auditors certificate in respect to the transferor.

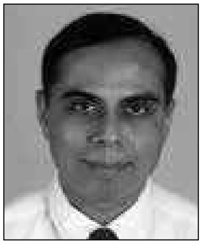
N. A resolution to be passed by management and transferor and transferee separately for executing tripartite agreement with Governor of Maharashtra for availing benefits under the Special Amnesty Scheme and authorising a person to complete the procedures.

O. A draft tripartite agreement provided by the Industry Department, is to be prepared on ₹ 100/- stamp paper.

P. Finally the approval under Special Amnesty Scheme must come under a letter of approval by Implementing Agency.

Q. The transferee will have to be ultimately intimated about the payment of principal amount by the transferor.

Thus, it must be appreciated that this is not a general amnesty scheme, but a scheme for the purpose of using the land of unviable units for fruitful purpose.




CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

1. Service provided by an authorised person or sub-broker to the member of recognised association or registered association in respect of forward contract

The Central Government directed that where no service tax was levied in respect of the services provided by an authorised person or sub broker to the member of a recognised association or a registered association, in relation to forward contract during the period September 2004 to 30th June, 2012, such authorised person or sub-broker is not required to pay service tax.

(Notification No. 3/2014 – ST dated 3-2-2014)

2. Amendment in Mega Exemption Notification No. 25/2012 – ST dated 20-6-2012

The mega exemption notification no. 25/2012 – ST dated 20-6-2012 has been amended by inserting following exemption entries:

"2A. Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation."

The Services provided by cord blood banks, such as collection of umbilical cord blood, processing the same for segregation of stem cells, testing and cryo – preservation of stem cells, etc. are exempt w.e.f. 17-2-2014.

"40. Services by way of loading, unloading, packing, storage or warehousing of rice."

Services of loading, unloading, packing, storage or warehousing of rice are exempt w.e.f. 17-2-2014.

(Notification No. 4/2014 – ST dated 17-2-2014)

3. Clarification on transportation of rice and milling of the paddy into rice

It is clarified that "foodstuff" includes the rice. Consequently, service tax on transportation of rice by rail or a vessel or by a goods transportation agency is exempt under Serial Nos. 20(i) and 21(d) of Notification No.25/2012 – ST dated 20-6-2012.

It is further clarified that milling of paddy into rice is an intermediate production process in relation to agriculture and hence, same is exempt under serial no. 30(a) of notification No. 25/2012 – ST dated 20-6-2012.

(Circular No. 177/03/2014 – ST dated 17-2-2014)

CA. Bharat Shemlani

INDIRECT TAXES

Service Tax – Case Law Update

1. Services

Works Contract Service

1.1 CST vs. Ratan Singh Builders Pvt. Ltd. 2014 (33) STR 242 (Del.)

In this case service was rendered prior to 1-3-2008 when rate of service tax was 2% but payment received after 1-3-2008, when rate of service tax was 4%. The High Court held that, rate of service tax applicable would be that which was in force at the time of rendition of service and not which was in force at the time of receipt of payment. Taxable event being the rendition of service and such rendition having been completed prior to 1-3-2008, the applicable rate of tax would be 2% i.e. rate of tax prevalent prior to 1-3-2008.

Outdoor Catering Service

1.2 Indian Coffee Workers Co-op. Society Ltd. vs. CCE, Allahabad 2014 (33) STR 266 (Tri.-Del.)

The appellant in this case provided canteen service in service recipient's premises under contract with NTPC and Lanco and received consideration from them. The Tribunal held that, the appellant has provided Outdoor Catering Service and adjudication order is impeccable and warrants no interference.

Event Management Service

1.3 CCE, Aurangabad vs. Lokmat Media Ltd. 2014 (33) STR 272 (Tri.-Mum.)

The assessee in this case advertised products by way of putting hoardings during Cricket Tournament. The department sought to tax the said activity under Event Management Service. The Tribunal held that, assessee has not organised tournament at the request of any franchisee or co-sponsors therefore no Event Management Service has been provided by the assessee.

Erection, Commissioning or Installation Service

1.4 Noida Power Co. Ltd. vs. CCE, Noida 2014 (33) STR 383 (Tri.-Del.)

The appellant in this case established power distribution network for providing connections to consumers and claimed immunity from tax on the basis of Exemption Notification No. 45/2010-ST. The Tribunal held that, in view of Exemption Notification No. 32/2010-ST and immunity Notification No. 45/2010-ST, all taxable services provided in relation to distribution of electricity energy are exempt from service tax liability. The expression "in relation to" is of wide import indicating all activities having direct and proximate nexus with distribution of electrical energy and distribution of energy cannot be effectively accomplished without installation of sub-stations, transmission towers and installation of meters.

Management, Maintenance or Repair Service

1.5 Financial Software Systems Pvt. Ltd. vs. CST, Chennai 2014 (33) STR 393 (Tri.-Chennai)

The Tribunal in this case after relying on Madras High Court judgment in *Kasturi & Sons Ltd. 2011 (22) STR 129 (Mad.)* held that, maintenance of computer software is not liable to service tax under Maintenance or Repair Service prior to 1-5-2006. It is also relied on apex court decision in *Martin Lottery Agencies Ltd. 2009 (14) STR 593 (SC)* holding that, explanation added to section 65(64) of FA, 1994 causing adverse consequences to taxpayers to have prospective effect.

It is further held that, certification of ATM is squarely covered by the definition of Technical Inspection and Certification Service and introduction of new service relating to ATM not to be interpreted that prior to date of notification of such service, certification of ATM was not liable to tax. Further, the appellants plea of *bona fide* belief of non-taxability was not based on legal position, hence no merit in prayer for non-invocation of extended period of time.

Tour Operator's Service

1.6 A. Manimegalai vs. CCE(ST), Salem 2014 (33) STR 412 (Tri.-Chennai)

The Tribunal in this case held that, Government has granted retrospective exemption from Service Tax to tour operators plying buses, inter-State and intra-State, from point to point and therefore the appeal is allowed.

Mandap Keeper Service

1.7 CST, Del.05 vs. Safdarjung Club 2014 (33) STR 415 (Tri.-Del.)

The Tribunal in this case held that, in case where services have been provided by club to members the relationship of client and employer is absent and therefore activities carried out by Club do not appear to be taxable service.

Commercial or Industrial Construction Service

1.8 Radius Corporation Ltd. vs. CCE, Raipur 2014 (33) STR 416 (Tri-Del)

The Tribunal in this case held that, excavation of land (digging, extraction of core), preparation of earthen floor, soil stabilisation, raising/widening of bunds, plantation and increasing height of reservoir which supply water to Industrial Units is liable to service tax under Commercial or Industrial Construction Service.

Rent-a-Cab Service

1.9 Harjinder Singh vs. CCE, Chandigarh 2014 (33) STR 437 (Tri.-Del.)

The appellant was having contract with PEPSU Road Transport Corporation for providing buses for operation on various routes for which they have received payment on per day basis. The Tribunal held that, ratio of *Deepak Transport Bus Service 2013 (27) STR 357 (T)* is to be followed as factually the present case is identical and therefore, services are liable to tax under Rent-a-Cab Service.

Business Auxiliary Service

1.10 Prakash Pulversing Mills vs. CCE, Jaipur 2014 (33) STR 454 (Tri.-Del.)

The appellant was undertaking grinding of herbs on job work basis during the period 10-9-2004 to 15-6-2005. The Commissioner (A) passed order taking grinding as processing holding no production can take place without processing. The Tribunal observed that, 'Processing' has been included in BAS definition w.e.f. 16-6-2005 and therefore demand of service tax on activity of grinding prior to 16-6-2005 is illegal.

2. Interest/Penalties/Others

2.1 Divya Tourism Pvt. Ltd. vs. CST, Ahmedabad 2014 (33) STR 249 (Tri.-Ahmd.)

The appellant in this case claimed that, they have not received the Order-in-Original dated 29-12-2008 till 30-12-2010. In support they have filed an application made by them for providing the documents under RTI wherein the dispatch register extract showed no mention of appellant's name in serial numbers entered for communication of Order-in Original. The appeal to First Appellate Authority held to be filed within time as per statute and no delay on part of the appellant.

2.2 *CST Ahmedabad vs. Gujarat State Road Transport Corporation 2014 (33) STR 283 (Tri.-Ahmd.)*

In this case the assessee claimed refund tax paid under Courier Service though as per clarification issued by CBEC was not liable to pay service tax. They have filed refund claim on 1-7-2011 after three years from the date of payment i.e. 7-6-2008. The adjudicating authorities rejected the refund claim on the ground that refund was filed beyond the period of limitation provided under section 11B of CEA, 1944. However, the First Appellate Authority allowed the refund claim. The Tribunal held that, any refund claim has to be filed under section 11B within the prescribed time. Even if the service tax paid by the assessee is considered unconstitutional or non-leviable, recourse to assessee is to file a suit for recovery or file a writ petition as has been held by the Constitutional Bench of Apex Court in the case of *Mafatlal Industries Ltd. 1997 (89) ELT 247 (SC)*. In view thereof, the refund claim is liable to be rejected.

2.3 *Aadishwar Motors (P) Ltd. vs. CST, Ahmedabad 2014 (33) STR 329 (Tri.-Ahmd.)*

The appellant claimed refund of amount deposited on directions of Investigative Authorities as the issue contested before higher judicial forums. The Tribunal held that, it is settled law that, dispute is said to be raised when assessee files appeal against amount deposited or confirmed against him and the judgments in *Jayant Glass Inds. Pvt. Ltd. 2003 (155) ELT 188 (Tri.-LB)* and *Parle International Ltd. 2001 (127) ELT 329 (Guj.)* are squarely applicable.

2.4 *Soccer International Pvt. Ltd. vs. CCE, Ludhiana 2014 (33) STR 334 (Tri.-Del.)*

The appellant in this case paid service tax on overseas commission agent service in March, 2009 and export of goods taken place in October, 2008 to December, 2008. They have filed refund claim on 31-8-2009. The Tribunal held that, Notification No. 17/2009-ST issued in supersession of Notification No. 41/2007-ST providing for limitation period of one year from the date of let export order and as per CBEC instructions F. No. 354/25/2009-TRU dated 1-1-2010, new notification applicable to exports undertaken prior to its issuance. Therefore, impugned order disallowing refund is unsustainable and liable to be set aside.

2.5 *CCE & ST (LTU) Bengaluru vs. Dell Intl. Services India P. Ltd. 2014 (33) STR 362 (Kar.)*

In this case, Committee of Commissioners first accepted the Order in Appeal but on second review on direction of Chief Commissioner, difference of opinion emerging amongst Committee, whereupon Chief Commissioner decided to file appeal. The High Court held that, decision of Committee was binding on Chief Commissioner, and there was no express provision for its review and since power of review has not been specifically provided, the Chief Commissioner is not empowered to exercise the same.

2.6 *Syndicate Bottles vs. CST, Chennai 2014 (33) STR 389 (Tri.-Chennai)*

The appellant in this case made short payment of tax and also in certain cases late payment of tax however, they have paid tax before issue of SCN and interest and 25% penalty within 30 days of issue of notice and asked for benefit of sections 73(1) and 73(3). The Tribunal observed that, the contravention is detected in two-folds, (i) short payment due to certain extent and (ii) delayed payment after realisation of consideration. It is held that, contravention visible through audit books and not through disclosure and therefore element of suppression present and therefore not entitled to the benefit of section 73(3).

3. CENVAT Credit

3.1 CCE, Ahmedabad vs. Ahmedabad Strips Pvt. Ltd. 2014 (33) STR 291 (Tri.-Ahmd.)

The Tribunal in this case held that, CENVAT credit of service tax paid on services for obtaining export incentives is related to manufacturing activity and therefore credit is admissible.

3.2 Seksaria Biswan Sugar Factory Ltd. vs. CCE, Lucknow 2014 (33) STR 292 (Tri.-Del.)

The department in this case disallowed CENVAT credit of service tax paid on commission agent service. The Tribunal held that, in catena of judgment it is held that, service tax paid on such services is available as credit, further as per CBEC Circular No. 943/4/2011-CX, dated 29-4-2011 even after deletion of expression 'activities relating to business' from definition of Input service, Service Tax paid on commission agent service is available.

3.3 Bajaj Hindustan Ltd. vs. CCE, Meerut-I 2014 (33) STR 305 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on services such as setting up of labour hutments, kisan sheds for providing temporary residential facility to workers and cane growers as the appellant was under statutory obligation to provide these facilities and the facilities were in relation to business activity. It is further held that, raising new structure after dismantling of old structure for setting up of a factory is in relation to business activity. It is also held that, appellant has filed proper returns under rule 9(7) of CCR, 2004 and therefore limitation period cannot be invoked.

3.4 Chintamani Lamination vs. CST, Ahmedabad 2014 (33) STR 327 (Tri.-Ahmd.)

The appellant in this case having two factories with separate registration and the department denied credit of the ground that, services received by Unit-2, whereas credit was utilised by Unit-1. The Tribunal held that, as per definition of Input Service credit is available for setting up of factory also and credit can be taken in Unit-2 as the same to be used in or in relation to manufacture.

3.5 United Telecoms Ltd. vs. CCE, Bengaluru-I 2014 (33) STR 357 (Kar.)

The appellant in this case, manufacturer of telecom equipments and other related products, claimed CENVAT credit of service tax paid on Stock Broking Service for sale of shares, acquired as investment. The department sought to disallow the same. The High Court held that, incidental object of investing and dealing in shares did not relate to and form part of main business of the appellant and the plea by department that it was not carried on regular business scale and did not partake in business activity has been upheld. Hence, it is held that, it was not input service on which company could have taken credit of service tax paid.

3.6 CCE, Lucknow vs. DSCL Sugar 2014 (33) STR 480 (Tri.-Del.)

The department in this case denied CENVAT credit of service tax paid on GTA service on the basis of Challan indicating payment of service tax. The Tribunal held that, when tax has gone into treasury, credit cannot be denied unless assessee is otherwise disentitled.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2014] 182 Comp Cas 243(Cal.)

[In the Calcutta High Court]

Simplex Infrastructures Ltd. and Banwarilal Bajoria and others vs. Registrar of Companies, West Bengal

Court can grant relief to directors for any proceedings initiated for negligence, default or breach of duty, if there is no specific allegation of dishonest intent and that same is a technical default and does not affect any person or is not opposed to public policy

Brief Facts

The Petitioners are the directors of the Company. The Registrar of Companies, West Bengal ("RoC") had issued several show cause notices to the Petitioners for various non-compliances and non-disclosures in the audited accounts as required under Section 211 of the Companies Act, 1956 ("Act"). The show cause notices indicated the following non-compliances and non-disclosures:

a. The loss on account of exchange fluctuation not being provided in the Company's accounts.

b. Advance received on account of work in progress not being shown separately.

c. Not disclosing the cancellable and non-cancellable lease separately.

Company had duly replied to all the show cause notices and had given proper explanation and justification as to all non–contraventions.

In anticipation of any action which may be taken against the Company and its directors, the Petitioners filed this application under Section 633 of the Act. Section 633 refers to powers of a court to grant relief in case of any proceedings for negligence, default, breach of duty, misfeasance or breach of trust against an officer of the company.

The argument from the Respondent is that although, the powers exercised by the Court under Section 633(2) is discretionary, the same should be exercised with great caution.

Judgment and Reasoning

The Hon'ble Court allowed the petition. While allowing the petition, the Court noted that for relief to be granted under Section 633, the Petitioners should have shown to have acted in a manner in which any man of affairs with reasonable care could be expected to act in the case and circumstances of the facts. The court also noted the replies given to the said show cause notices of the RoC. The Court also relied on the judgment in the case of *Bhagwati Foods P. Ltd vs. Registrar of Companies, West Bengal [2008] 143 Comp Cas 531 (Cal.),* in which it was held that the show cause notice should not only contain an exact offence but also a specific allegation of dishonest intent. The Court noted that a technical default, if it does not affect any person or is not opposed to public policy, can be excused under Section 633(2) of the Act.

Case Law No. 2

[2014] 182 Comp Cas 467 (Delhi)

[In the Delhi High Court]

Sunita Bhagat vs. Securities and Exchange Board of India.

Unless directors prove that an offence committed by the Company is without his knowledge or

he has exercised all due diligence to prevent the commission of the offence, he is liable for punishment

Brief Facts

The Accord Plantation Ltd. ("Company") had collected monies from various investors under Collective Investment Scheme ("CIS"). As per Section 12(1B) of the SEBI Act, 1992, which came into force on January 25, 1995, no person shall sponsor or caused to be sponsored or carry on any venture capital fund or CIS, unless it obtains a certificate of registration from the SEBI. Any person carrying out CIS prior to the above-stated period, must provide certain information to the SEBI as well as obtain registration. The Government of India asked the SEBI to form a CIS regulation and conveyed that instruments like agro bonds, plantation bonds, etc. shall be treated as CIS.

One of the objects of the Company is to carry business of agricultural, horticultural, floricultural and forestry related activities. The standard application form and brochure issued to prospective investors contain names of four persons as directors.

Based on SEBI's request, the Company provided the information on monies collected under the CIS. While communicating to SEBI, the Company conveyed that it had not floated any CIS and that they were not collecting any additional money under the current scheme. Subsequently, when the Company provided the information, it was observed that the Company had collected additional funds during these periods.

The SEBI notified the CIS regulation in October 1999 and the same was informed to the Company. In its reply, the Company disclosed that they are not interested in CIS registration and will return the monies to the investors upon maturity. The reply shows that during the period 2001-2004, the Company intended to raise additional funds and pay part of it. As the Company has not registered under the CIS, SEBI had sent the show cause notice. Upon several communications from the SEBI that the Company was not complying with the CIS regulation and after giving personal hearing to the Company, the SEBI Chairman passed an order directing the Company to pay amount to investors within one month from the date of the order. During these periods, letters sent to the Company were returned undelivered. After due process of law, SEBI filed compliant before the ACMM, Delhi. ACMM passed an order against the Appellants. As per the said order, Appellants were sentenced for rigorous imprisonment for six months and pay a fine of Rs. 10 lakhs each. If the fine was not paid, then an additional imprisonment of 3 months for punishment as stated above would be applicable.

The appeal is filed by the Appellants against the order of ACMM, Delhi. The main contention of the application is that whether they are liable at the time the provisions of Section 12(1B) and / or CIS regulations were contravened by the Company and were they responsible for the Company's business? Further, the SEBI had to also prove that the offence by the Company was committed with the consent or connivance of any of the Appellants or attribute to their negligence.

Judgment and Reasoning:

The Court rejected the application of the Appellants. The Court perused the report of Dave Committee and the judgment in *Paramount Bio-Tech Industries Ltd. vs. Union of India [2003] Law Suit (All) 1206; [2004] 120 Comp Case 18 (All)* as to activities falling under CIS. The Court has also observed that the Company had not complied with various requirements of CIS regulations. The Court also noted that no receipt of refund of monies to the investors or books of accounts to that effect were produced. The Court also noted from the witness of one of the directors that some of the investors had filed winding up petition against the Company for not refunding their money. The Court also reviewed its judgment in *Vishnu Prakash Bajpai vs. Securities and Exchange Board of India [2010] 154 Comp Cas 147 (Delhi) [2010] 2 Crimes 394 (Delhi),* that offence is continuous offence under Section 24 of the SEBI Act till the time the Company complies with the CIS regulations. The Court also looked into events date wise and the position of the directors at that point of time. The Court also observed that till the Company complied with the requirements as to refund of monies to the investors, the offence would continue and thus all the directors during such periods, even though resigned or appointed in between, are liable.



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

OTHER LAWS
FEMA Update

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

1. Third party payments for export/ import transactions

Presently third party payments for export of goods & software / import of goods are allowed subject to the conditions specified in A. P. (DIR Series) Circular No. 70 dated November 8, 2013.

It has now been decided that this requirement may not be insisted upon in case where documentary evidence for circumstances leading to third party payments/name of the third party being mentioned in the irrevocable order/ invoice has been produced. This shall be subject to conditions as under:

(i) AD bank should be satisfied with the *bona fides* of the transaction and export documents, such as, invoice/FIRC.

(ii) AD bank should consider the FATF statements while handling such transaction.

Further, with a view to liberalise the procedure, the limit of USD 100,000 eligible for third party payment for import of goods, stands withdrawn.

(A.P. (DIR Series) Circular No. 100 dated 4th February, 2014)

(This move will provide relief to exporters as this has been a long standing request by Federation of Indian Export Organisation (FIEO). Secondly there was a need to waive tripartite agreements for exports as most exports are being done on open terms and the dynamics for the same are dictated/settled by the buyers market rather than a sellers market.)

2. Export of Goods and Services: Export Data Processing and Monitoring System (EDPMS)

As of now, AD banks are submitting the various returns like XOS (export outstanding statements), ENC (Export Bills Negotiated/ sent for collection) for acknowledgement of receipt of Export documents, Schedules 3 to 6 (realization of export proceeds), EBW (write-off of export bills), ETX (extension of realisation of export bills) relating to export transaction under FEMA to RBI. These various returns are being managed on a different solo application or manually.

With a view to simplify the procedure for filling various returns and for better monitoring, a comprehensive IT-based system called EDPMS has been developed which will facilitate the banks to report all the above-mentioned returns through a single platform. In the new system, the primary data on exports transactions including offsite software exports from all the sources viz. Customs/SEZ/STPI will flow to RBI secured server and then the same will be shared with the respective banks for follow up with the exporters. Subsequently, the document submission and realisation data will be reported back by the AD banks to RBI through the same secured RBI server so as to update the RBI database on real time basis to facilitate quicker follow up/data generation. The AD banks are required to download and upload the data on daily basis.

The system will also facilitate the Authorised Dealer to raise the Authorised Dealer (AD) transfer request in case of export document submitted to the Authorised Dealers other than declared in the export document which will discontinue the paper based NOC issued by the AD banks. AD banks have to approve/disapprove the AD transfer request within 7 days from date of request.

The date of inception of the system along with user credentials and web link for accessing the system would be communicated to the AD banks shortly through e-mail. For user name and password, AD banks are advised to submit a fill-in form through E-mail on or before February 10, 2014. Clarification required, if any, may also be sent to the aforesaid email-id of Reserve Bank of India.

A cut-off date for shipping documents to be reported in the new system will be notified shortly which will be the commencement date of the new system. The entire shipping document should be reported in the new system after cut-off date and old shipping documents would continue to be reported in the old system till completion of the cycle. Both the old and new systems will run parallel to each other for some time before the old system is discontinued.

(A.P. (DIR Series) Circular No. 101 dated 4th February, 2014)

3. Foreign Direct Investment – Reporting under FDI Scheme: Amendments in form FC-GPR

In terms of para 9(1)A of Schedule I to the FEMA Notification No. 20 dated May 3, 2000, Indian companies are required to report the details of the amount of consideration received for issuing shares and convertible debentures under the Foreign Direct Investment (FDI) scheme to the Regional Office of the Reserve Bank in whose jurisdiction the Registered Office of the company operates, within 30 days of receipt of the amount of consideration. Further, in terms of Para 9(1)B of Schedule *ibid*, the companies are required to report the details of the issue of shares/convertible debentures in Form FC-GPR, to the Regional Office concerned, within 30 days of issue of shares/convertible debentures.

In order to further capture the granular details of FDI as regards Brownfield/Greenfield investments and the date of incorporation of investee company, Form FC-GPR has been revised. Accordingly, the details of FDI should, henceforth, be reported in the revised Form FC-GPR.

(A.P. (DIR Series) Circular No. 102 dated 11th February, 2014)

4. Import of Gold / Gold Dore by Nominated Banks /Agencies/Entities – Clarifications

It has now been clarified that in case of Advance Authorisation (AA)/Duty Free Import Authorisation (DFIA) issued before August 14, 2013, the condition of sequencing imports prior to exports shall not be insisted upon even in case of entities/units in the SEZ and EoUs, Premier and Star Trading Houses.

The imports made as part of the AA/DFIA scheme will be outside the purview of the 20:80 scheme. Such imports will be accounted for separately and will not entitle the Nominated Agency/ Banks/Entities for any further import.

The Nominated Banks/Agencies/Entities may make available gold to the exporters (other than AA/DFIA holders) operating under the Replenishment Scheme. They can resort to import of gold for the purpose, if considered necessary. However, such import will be accounted for separately and will not entitle them for any further import.

Import of gold in the third lot onwards will be lesser of the two:

i) Five times the export for which proof has been submitted; or

ii) Quantity of gold permitted to a Nominated Agency in the first or second lot.

Further with reference to A.P. (DIR Series) Circular No. 82 dated December 31, 2013 on import of Gold Dore, it is clarified that:

i) The refiners are allowed to import Gold Dore of 15% of their licence for each of the first two months.

ii) In case, the quantity has already been identified by DGFT for first two lots, import of such quantity will be in compliance with the guidelines issued *vide* A.P. (DIR Series) Circular No. 82 dated December 31, 2013.

iii) DGFT, through a notification, may include new refiners, and fix licence quantity for them.

(A.P. (DIR Series) Circular No. 103 dated 14th February, 2014)

(This clarification by RBI will benefit the country's jewellery industry. It may also help to bring down huge premiums on gold in domestic market.)

5. Foreign investment in India by SEBI registered FII, QFI and long-term investors in Corporate Debt

The present limit for investment by SEBI registered FIIs, QFIs and long-term investors in Corporate debt stands at USD 51 billion. Out of the above limit of USD 51 billion, a sub-limit of USD 3.5 billion is available for investment by eligible investors in Commercial Paper (CP). This sub-limit is being presently utilised only to the extent of around 58% of the limit put in place by SEBI.

To encourage long-term investors, it has now been decided, to reduce, with immediate effect, the existing Commercial Paper sub-limit of USD 3.5 billion by USD 1.5 billion to USD 2 billion. The balance USD 1.5 billion shall, however, continue to be part of the total Corporate debt limit of USD 51 billion and will be available to eligible foreign investors for investment in Corporate debt. The operational guidelines in this regard will be issued by SEBI.

The revised position is given below:

Instruments	Limit	Eligible Investors	Remarks
Corporate Debt including Commercial Papers	USD 51 billion	FIIs, QFIs and long terms investors registered with SEBI – Sovereign Wealth Funds (SWFs), Multilateral Agencies, Pension/ Insurance/ Endowment Funds, Foreign Central Banks.	Eligible Investors may invest in Commercial Papers only up to USD 2 billion within the limit of USD 51 billion

(A.P. (DIR Series) Circular No. 104 dated 14th February, 2014)

(This will provide more leeway for foreign investors to utilise funds under corporate debt categories and on long-term basis)

6. External Commercial Borrowings (ECB) – Reporting arrangements

It has now been decided that in order to capture details of the financial hedges contracted by corporates, of their foreign currency exposure relating to ECB and their foreign currency earnings and expenditure, the format of ECB-

2 Return has been modified (Part-E). The reporting in the modified ECB-2 Return will be applicable from the return of the month April 2014 onwards.

There is no change in the reporting procedure and corporates raising ECB continue to submit ECB-2 Return on a monthly basis duly certified by the designated AD Category-I bank so as to reach Department of Statistics and Information Management (DSIM) of Reserve Bank of India within seven working days from the close of month to which it relates.

(A.P. (DIR Series) Circular No. 105 dated 17th February, 2014)

7. Facilities to NRIs/PIOs and Foreign Nationals – Liberalisation - Reporting requirement

In terms of A.P. (DIR Series) Circular No. 12 dated November 16, 2006, AD – Category I banks were required to furnish on a quarterly basis, a statement on the number of applicants and total amount remitted in the format as prescribed therein relating to remittances (up to permissible limit of USD one million per financial year (April-March)) out of balances in NRO accounts, to the Chief General Manager-in-Charge, Foreign Exchange Department, Foreign Investments Division (NRFAD), Reserve Bank of India, Central Office, Mumbai – 400 001 within 10 days of the reporting quarter.

With a view to having access to more real time data, RBI has now decided to collect this information on a monthly basis within 7 days of the end of the reporting month. This data could also be sent by e-mail as per the proforma.

Further, the proforma has been revised to also include "Transfers from NRO to NRE account".

(A.P. (DIR Series) Circular No. 106 dated 18th February, 2014)

8. Foreign Direct Investment (FDI) into a Small Scale Industrial Undertakings (SSI)/Micro & Small Enterprises (MSE) and in Industrial Undertaking manufacturing items reserved for SSI/MSE

RBI has issued this circular to give effect to Press Note No. 6(2009) dated September 4, 2009 issued by Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India.

(A.P. (DIR Series) Circular No. 107 dated 20th February, 2014)

9. Exim Banks line of credit of USD 10 million to the Govt. of the Republic of Nicaragua

The Credit Agreement under the LOC is effective from January 31, 2014 and the date of execution of Agreement is June 14, 2013.

(A.P. (DIR Series) Circular No. 108 dated 24th February, 2014)

10. Export of Goods and Services: Export Data Processing and Monitoring System (EDPMS)

With further reference to A.P. (DIR Series) Circular No. 101 dated 4th February, 2014 (as enumerated above), RBI has informed that EDPMS has been operationalised with effect from February 28th, 2014 and would be available to AD Banks with effect from March 1, 2014.

(A.P. (DIR Series) Circular No. 109 dated 28th February, 2014)

Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Appeal to Commissioner (Appeals) – Unsigned appeal – A rectifiable defect – Rejecting appeal on ground which is rectifiable, liable to be set aside – Matter remanded for disposal of appeal – Section 35B of Central Excise Act, 1944

The First Appellate Authority i.e. the Commissioner of Appeal had rejected the appeal as not maintainable only for the reason that the said appeal was not signed by the Appellant. The appellant submitted that this is rectifiable error, otherwise the appeal was in time.

The CESTAT, after examining the records and after hearing both the sides, held that though the appellant should have been careful in filing the appeal properly, unsigning of the appeal is a rectifiable error which could have been rectified by issuing a defect notice by the First Appellant authority. The appellant should not be deprived of his right to make appeal before the higher authorities. The CESTAT set aside the order of the First Appellate Authority's order by stating that the First Appellate Authority, will restore the appeal to its original number after directing the appellant to rectify the error and on such rectification of the error, the First Appellate Authority will take up the appeal for disposal after following the principles of natural justice.

Amit Traders vs. Commissioner of Customs, Kandla 2014 (299) E.L.T. 351 (Tri. – Ahmd.)

2. Negotiable Instruments Act, 1881, S. 141 – Dishonour of cheque – Offence by Company – Prosecution of Directors – Complainant need not allege that director was incharge and was responsible for particular business for which cheque in question was issued

In this case several complaints were filed against the Company, its Chairman, Managing Directors and other Directors alleging commission of an offence under Section 138 of the Negotiable Instruments Act. Taking into account the allegations made in the complaints, the Magistrate issued process to the accused as well as the directing accused to face trial for commission of the offence under Section 138 of the Act. Aggrieved by the order issuing summons to face trial under section 138 the accused filed applications under Section 482 of the Criminal Procedure Code for quashing the order taking cognizance and issuing process. The High Court allowed the applications and quashed the prosecution. The said order was challenged before the Supreme Court.

The Supreme Court held that in case of offence by Company, to bring its Directors within the mischief of Section 138 of the Act, it shall be necessary to allege that they were incharge of and responsible to the conduct of the business of the Company. It is a necessary ingredient which would be sufficient to proceed against such Directors. As no particular form is prescribed, it may not be necessary to reproduce the words of the section. If reading of the complaint shows and substance of accusation discloses necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary. However, it may not be necessary to allege and prove that, in fact, such of the Directors have any specific role in respect of the transaction leading to issuance of cheque. Section 141 of the Act makes the Directors incharge and responsible to Company "for the conduct of the business of the Company" within the mischief of Section 138 of the Act and not particular business for which the cheque was issued.

In case of offence by company for dishonor of cheque, the culpability of the Directors has to be decided with reference to Section 141 of the Act. Every person who at the time the offence was committed is in charge of and responsible to the Company shall be deemed to be guilty of the offence under Section 138 of the Act.

A. K. Singhania vs. Gujarat State Fertilizer Co. Ltd. & Anr. Air 2014 Supreme Court 71

3. Right to Information – Annual Property Return (APR) of Government employees – Held – It is not personal information which cannot be supplied – It is not exempted under Section 8(e)(j) of Right to Information Act, 2005

The Information was sought by the Private Respondent relating to the expenditure, movable and immovable properties of the petitioner, *vide* application under the Right to Information Act, 2005 along with the copies of the permissions obtained by the Petitioner to purchase/sell the property. The same was not supplied by the State Public Information Officer (SPIO) hence the private respondent filed the first appeal, but the information was not supplied to him as well by the First Appellate Authority (FAA) stating that the information cannot be furnished as the same is covered under Section 8(e)(j) of the Act. Aggrieved by the action of the SPIO and the FAA, the Private Respondent filed the second appeal before the State Information Commissioner (SIC). The SIC directed SPIO and FAA to supply the information.

But the Petitioner was not satisfied and filed the Writ Petition invoking the provisions of Articles 226/227 of the Constitution of India.

The High Court held that the word "Information" has been defined under Section 2(f) of the Act to mean any material in any form, including records, documents, memos, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force and word "record" includes – (i) any document, manuscript and file; (ii) any microfilm, microfiche and facsimile copy of a document; (iii) any reproduction of image or images embodied in such microfilm (whether enlarged or not) and (iv) any other material produced by a computer or any other device.

Section 2(j) of the Act defines, "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to – (i) inspection of work, documents, records; (ii) taking notes, extracts or certified copies of documents or records; (iii) taking certified samples of material and (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

Section 3 of the Act postulates that subject to the provisions of this Act, all citizens shall have the right to information and obligations of public authorities to maintain all its record as listed in Section 4 of the Act. Every person is entitled to information, as per procedure prescribed under Section 6 of the Act, which will be disposed of by the competent authorities under Section 7 of the Act.

Proviso to section 8 of the Act envisaged that the information, which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person.

A co-joint reading of the aforesaid provisions would reveal, only that information is exempted, the disclosure of which, has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless the authorities are satisfied that the larger public interest justifies the disclosure of such information. Meaning thereby, as all the essential ingredients of exemption clause are totally lacking, therefore, the petitioner cannot claim its exemption. The information contained in the property statement has direct relationship with the public employment of the petitioner and cannot possibly be termed as unwarranted invasion of his privacy. Therefore, the information sought by the private respondent with regard to the sanctions, expenditure, movable and immovable properties of the petitioner, cannot possibly be termed to be exempted information, as escalated under Section 8(e)(j) of the Act, particularly when, what is not disputed is that the petitioner being a public servant was required and submitted his detailed properties statement, as per conduct rules and the authorities under the Act, are (legally) duty bound to supply such information to private respondent in this relevant behalf.

D. P. Jangra vs. State Information Commission, Haryana 2014 (299) E.L.T. 133 (P&H)

4. Appellate Tribunal – Appeals filed improper maintenance of the second folder of appeal – Not containing copies of order sheets and relevant papers – Registry directed to submit report – Advocates to appear only after filing of proper Vakalatnama – Section 35B of the Central Excise Act, 1944 – Rules 13, 14 and 28B of CESTAT (Procedure) Rules, 1982

The Hon'ble Tribunal observed that the second folder does not contain copies of order sheets available in first file. That keeps other Member of the Bench in dark to know the status of the proceeding. In the present case record of the case and bundle of papers were kept inside second folders instead of in different folders for easy handling of files.

The CESTAT observed that despite writ of mandamus issue by Hon'ble High Court of Delhi in the case of *Deepak Khosla vs. UOI, 2010 (251) E.L.T. 524 (Del.)* for filing proper Vakalatnama and all Tribunals in Delhi are required to carry out that order, Registry has no regard to the same and that amounts to contempt.

It is also the case that names of certain advocates appear in Cause List whose Vakalatnama is not available on record and name of the Advocate does not appear in the Cause List in spite of filing Vakalatnama. This sends bad message to the Society that records of the Tribunal are not maintained properly and some Advocates control Registry causing detriment to the interest of justice.

The CESTAT directed the Registrar to place his report within one month showing the reason why appropriate order shall not be passed against erring officials.

Davinder Singh Dawar vs. C.C. (Import & General), New Delhi 2014 (299) E.L.T. 205 (Tri. Del.)

5. Contract Act, 1872, S. 56 – Doctrine of frustration of contract – Applicability – Statutory contract specifying consequences of non-performance – Party cannot take shelter behind doctrine of frustration

The appellant was a successful bidder for sale of privilege to vend arrack which was governed by the Kerala Abkari Shops (Disposal in Auction) Rules, 1974. The appellant deposited 30% of the bid amount and executed a temporary agreement in terms of Rule 5(10) and made security deposit as per Rule 5(9). Before the other formalities for completion of contract, the Appellant through letter stated that her contract should be treated as rescinded. The appellant was asked to accept the confirmation notice and enter into permanent contract for which she replied and then challenged the said notices before the High Court. The High Court quashed the notices and all the proceedings initiated against the appellant and directed to refund the amount paid, but did not strike down Rules 5(15) and 5(16). Therefore, the appellant filed SLP before the Supreme Court.

The Supreme Court held that the doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the even to performance becoming literally impossible. However, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act.

The doctrine of fairness is nothing but a duty to act fairly and reasonably. It is a doctrine developed in the administrative law field to ensure rule of law and to prevent failure of justice where an action is administrative in nature. Where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action. But, it certainly cannot be invoked to amend, alter or vary an express term of the contract between the parties. This is so even if the contract is governed by a statutory provision i.e. where it is a statutory contract. It is one thing to say that a statutory contract or for that matter, every contract must be construed reasonably, having regard to its language. But to strike down the terms of a statutory contract on the ground of unfairness is entirely different.

In a contract under the Akbari Act and Rules made thereunder, the licensee undertakes to abide by the terms and conditions of the Act and the Rules made thereunder which are statutory and in such a situation, the licensee cannot invoke the doctrine of fairness or reasonableness. Rule 5(15) which provided for forfeiture of bid amount in case of breach of terms as such cannot be struck down on grounds of being unreasonable.

Mary vs. State of Kerala & Ors. AIR 2014 Supreme Court 1

STATEMENT AS PER PRESS AND REGISTRATION OF BOOKS ACT

FORM IV *[See Rule 8]*

THE CHAMBER'S JOURNAL

1.	Place of Publication	:	The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai 400 020.
2.	Periodicity of its Publication	:	Monthly
3.	Printer's Name & Nationality	:	Shri Kishor D. Vanjara, Indian,
	Address	:	3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020.
4.	Publisher's Name & Nationality	:	Shri Kishor D. Vanjara, Indian,
	Address	:	3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020.
5.	Editor's Name & Nationality	:	Shri Kishor D. Vanjara, Indian,
	Address	:	3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020.
6.	Names and Addresses of individuals who own the newspaper and partners or shareholders holding more than one per cent of the capital	:	The Chamber of Tax Consultants 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.

I, Kishor D. Vanjara hereby, declare that the particulars given above are true to the best of my knowledge and belief.

KISHOR D. VANJARA

Date : 9-3-2014

Signature of the Publisher

CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

Sudden Improvement

The volatility in the stock markets across the world continued unabated in the month of February. The worries from the month of January died down and the concerns were replaced by exuberance. Currencies stabilised, uncertainty receded and bullishness took the grip of the markets. Stock markets, especially of the developed countries, improved substantially over a short period of time, leaving behind the concerns of quantitative easing and slowing down of the Chinese economy. The economic data published by the US as well as by the Euro zone was encouraging and gave a push to the stock markets of the developed countries. The upward traction created by the positive movement in the developed economies pushed up stock markets of developing nations and helped to improve the overall sentiments across the world. The current thinking is that the fear of quantitative easing is overdone and the US can make the world digest the impact of the quantitative easing without much trouble. Time only will tell how far this will turn out to be correct.

The economic indicators are flashing positive signals about economic growth of the US as well as European economies. However, such positive signals are not visible in the developing markets, which are much larger in number, harbour disproportionately large population, but earn and consume only a small part of the global gross domestic product. The per capita income in these countries is quite low and many of them are ridden by poverty and misery. Such countries do not make economic difference to the world but they can make political difference. Unemployment, low per capita income, under nourishment of people and lack of resources can make the people in these economies aggressive. The age old tussle between the haves and have nots continues and such a situation may give birth to terrorism and even war. The recent recession which was much more pronounced in the developed countries, reduced the gap between the per capita income of the developed and some developing countries. Once again, the gap may start increasing, which can be dangerous to the political stability of the world. If this state of affairs continues for long, there can be an increase in militancy, fanaticism and aggressiveness. In the recent months, the developed world is being warned by some of the developing countries that the rollback of stimulus and anti recessionary measures in their countries can cause an exodus of capital for many developing and under developed countries. This capital had earlier landed in those countries from the developed countries for earning higher return. Such exit of capital can cause substantial damage to the weak economies of those countries and may cause widespread economic debacles in them. It was pleaded that the US should not abruptly unwind the quantitative easing and Europe should go slow in withdrawing the measures taken, for stabilising their respective economies. Otherwise, this will have serious repercussion, not only on the world economics but also on politics and stability. It seems that the advice is well taken as it is certain that developed economies cannot sustain their tempo without the support of many healthier developing economies. It is expected that the developed economies will implement a gradual roll back. The picture will be clearer over the next few months.

In spite of great expectations and promises of the Government, the Indian economy continues to struggle. Though there are certain positive developments, the turnaround does not seem to be easy or as quick as has been portrayed or expected by the Government. For the turnaround from the current level, India will need to address a number of issues, which she ignored or missed. The approach towards development and capitalism needs to be changed. Governance needs to change its approach and political interference must reduce. For India, change has become a necessity, as without that returning to high growth rate will be difficult, if not impossible. For alleviating her population to a better standard of living and give a fillip to progress, India needs to encourage reform, attract capital and increase the tempo of investment. To achieve this object, the domestic savings and investments will not turn out to be adequate and it needs to be heavily supplemented by foreign investment. The foreign investment, by character, seeks high returns with limited and predictable risks. If the country risk increases, quality capital cannot be attracted easily. If conditions become uncertain, the capital can flow out and not only cause damage to the economy directly, but can also weaken the currency, which has a lot of unwanted effects. Investment in India is generally an attractive proposal for a multinational on a long-term basis as the economy has a huge consumer base. However, supportive policies and certainty of rules and regulations is a key for attracting and sustaining the foreign investment and the Indian Government needs to take cognisance of the same. India seems to be well placed and well poised for growth. However, the current policies and politics in the country do not make the country compelling or attractive destination. The bureaucrats as well as the politicians need to take notice of this phenomenon and there has to be positive policy developments over the next few months. Sans that, India will struggle to achieve the projected growth rate, which the Government has been aggressively estimating. Growth above 5% needs active support by the Government as well as various other agencies. In India, it had emerged a few years back and that made the economy achieve near double digit growth in the first decade of the current century. Unfortunately, the phenomenon has changed without being adequately noticed by the Government, which is causing the current stress on the economic growth. We must act fast and in the right direction.

The Indian stock markets stabilised in the month of February and started improving like most others in the world. Now they are inching towards all time high levels and if pre-election rally ushers, the indexes can cross the all time high levels. The current indications of the political equations are suggesting that the markets may perk-up to a higher level before the general election results. Short-term investors can make some money, if they ride on the likely upsurge. The direction of the stock markets thereafter will be heavily dependent on the result of the general elections and the constitution of the ruling alliance. Increase in the growth rate in India can be achieved mainly by policy initiatives and they are dependent on the outcome of the elections. The investors will have to wait and watch. However, those investors who are comparatively equity light can take some risks and start accumulating good stocks of high growth companies, though they may appear expensive. When the economy starts improving, these stocks will appreciate faster and give more returns than most of the others. If tightening of the economy continues, it will be difficult to achieve growth rate of 5% even for the financial year 2014-15, as the economy still has a slight negative traction. In such a case, the stock prices will stagnate and the return on stocks will be below expectations. Unless there is a positive Government in power at the Centre, the investors need not take aggressive investment decisions and should stick to their asset allocation methodology. The next six months are likely to be volatile and interesting. There are chances of making good money for investors, but chances of incurring losses cannot be ignored. The stocks of export oriented sectors are likely to do better than many other sectors. Therefore, the companies engaged in the business of export of software, engineering products, textiles and even commodities are likely to do better than many others.

The Reserve Bank of India (RBI) continues its dear money policy though there are a few positive indicators. This policy is harming the economic growth but it is trying to tame inflation. The election results will decide how the thinking process of RBI will shape up in future. If the start of monsoon in the coming season is good, RBI may start reducing the interest rate, which is long awaited by the businesses in the country. When the interest rates will start their reverse journey still remains a million dollar question. Therefore, investors need to take a cautious approach and also keep their allocation to fixed income yielding deposits intact. More adventurous investors can invest in medium term bonds to get benefit of the reversal of interest cycle as and when it starts. Aggressive investors with high risk appetite can make some allocation to bonds issued by property companies, which are giving IRR of about 18%. However, while taking these risks, pedigree of the issuer and its cash flows becomes a critical factor for this decision making.

There is hardly any improvement in the property market. The commercial property market remains laden with slow sales and low rents on the back of slow growing economy and it may continue to remain so for some more time. Residential properties are improving gradually in selective pockets. The places at which there is high supply, the sales may remain sluggish and more so till the interest rates start coming down. It is likely that the stagnation will continue for some more time in the property market and so the investors should continue their cautious approach on this asset class.

Indian currency appears to be stabilising. If a decisive government comes into power at the Centre, the Rupee can strengthen even below ₹ 60 per US dollar. The possibility of making good returns on foreign stock markets is quite fair and investors can make investments under Liberalised Remittance Scheme of RBI to take advantage of the economic growth in the developed markets. The current limit of the investments under the scheme per year is 75,000 USD. As the year for this purpose is the financial year, investors can invest up to 75,000 USD before 31st March, if they have not done any such investment in the current year and they will be again entitled for investments of 75,000 USD from April onwards.

The investment sentiment has improved in the month of February and is likely to remain positive. Investors should take informed decisions and should avoid unnecessary risks. After the result of the elections, a better long term strategy can be worked out.

V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

FACTS & QUERY

Q.1 Slump sale

Company A Ltd., has 2 business undertakings – Division X and Division Y. The Management of A Ltd. is contemplating transfer of Division X at book value of ₹ 115 crores as on March 31, 2013. The break up of book value of Division X is as follows:

(₹ in crores)

Particulars	Amount
Fixed Assets (Net)	*100*
Investments	*25*
Net Current Assets	*40*
Loans	*(50)*
Total Net Worth	***115***

Whether transfer of business undertaking at book value will qualify as slump sale u/s. 50B of IT Act? (AD)

Ans. Now for the purpose of S. 50B, if an assessee holds more than one business undertaking, each of these undertaking will be a business undertaking for the purpose of provisions of S. 50B. Now in the case of the querist the division which the querist is transferring is itself an undertaking and as such transfer of such division will be a slum sale for the purposes of S. 50B of the Act.

As such the querist is right in claiming that transfer of the said division will be a slum sale for the provision of S. 50B.

Q.2 Condition for C/F Business Loss/Unabsorbed Depreciation

As per Sec. 72A(2)(a)(ii), for carry forward of Business Loss and Unabsorbed Depreciation under a scheme of amalgamation "the amalgamating company must have held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation."

a) Does the term "three-fourths of the book value of fixed assets" pertain to the value of assets or to the identity of assets?

For example:

Net Block as on April 1, 2010	*₹ 2 lakhs comprising 10 old machines*
October 1, 2011	*Purchase of 5 machines at ₹ 2 lakhs*
April 1, 2012	*Sells off old lot of 10 machines at ₹ 1 lakh.*
Date of amalgamation	*April 1, 2013*

In such a situation is the condition as described above satisfied? (SR)

Ans. The reference under S. 72A(2)(a)(iii), is to the value of whole block of assets and not to each and every asset forming part of block of assets. As such one has to take the value of the whole block of assets and not the value of each and every asset forming part of the block of assets.

Q.3 Business expenses

Depreciation on vehicles registered in the name of director/partner –

It is not uncommon to see that vehicles owned by the company/firm are registered in the name of director/partner though they appear in the balance sheet of company/firm. All expenses are debited in the books of the company/firm.

Recently ITAT "D" Bench, Mumbai, has distinguished Mysore Mineral (239, ITR 775) in Edwise Consultants Pvt. Ltd., vs. ACIT (ITA No. 391/Mum/2011 dated 19-4-2013) and held that no depreciation could be allowed to company/firm as it is not owner.

Queries

i. *Whether the said ITAT decision lays down the correct law?*

ii. *Does not this decision violate judicial propriety when there are several ITAT/ HC (apart from SC in Mysore Mineral) contrary decisions in favour of the assessee?*

   Ref:

   – *CIT vs. Podar Cement Co. Ltd. 226, ITR 625*

   – *CIT vs. Mirza Ataullash Bag, 202, ITR, 291*

   – *Swagat Infrastructure Pvt. Ltd. ITA No. 2004/Ahd/2012)*

   – *ITO vs. Shree Pachganga Agro Impex (P) Ltd., ITA No. 9556/ PN/09*

   – *ACIT vs. Suma Shlp Ltd., ITA No. 767/PN/2010*

   – *Rohan Builder & Developer Pvt. Ltd. vs. ACIT, ITA No. 942/ PN/2006*

iii. *Suppose if such vehicle is sold at a later date and some profit is earned, in whose hands such profit would be taxed and if taxed in the hands of Director/Partner, under which head it could be taxed? (SR)*

Ans. Under the provisions of S. 32 of the I.T. Act Depreciation Allowance is allowed to a person who has purchased an asset for the purpose of his business. Here the person means a person who is the real owner of the property, and as such on whose name the asset is purchased, is immaterial and as such the company in the case of the querist is a real owner, as the assets were purchased from its own funds and only because they were purchased the name of a director or any other person, is immaterial and as such in querist case it can claim depreciation allowance in respect of these assets.

Q.4 Income from House Property

A (assessee) & his son B – bought 2 adjacent flats viz. Flat No. 1 & Flat No. 2 respectively on 1-4-2007. As per the agreements, the owners are A & B for flat No. 1 and B & A for Flat No. 2.

During the FY 2008-09, the flats were merged into one single flat. On 1-4-2012, A bought another flat in another building Flat No. 3 and immediately he moved to Flat No. 3, leaving the combined flat for the use of his son.

The ITO wants to tax Income from deemed let out House Property in respect of Flat No. 1, as flat No. 3 being SOP.

A states that the Flat No. 1 is a part of the single combined flat used by B and as A himself is residing in Flat No. 3, the question of 'Income from Deemed Let out House Property does not arise. Is A justified? (AD)

Ans. For the purposes of computing income from House Property under the provisions of S.22 and 23 a residential house does not refer to only one flat, it may include two or more flats as long as they are used as one residential house. If the family of an assessee has more members in the whole family, it may require more than one flat for their residence. In fact in Bombay Tribunal decision reported in *16 ITD 195 K. G. Vyas vs. ITO* the family members were occupying four flats in a building, in fact the flats were on difference floors of the building. The Hon'ble Tribunal held that it is one house property and not many houses property.

As such the querist is right in his claim that he is residing in one house property only.

Q.5 Charitable Trust

A] Charitable Trust claims deduction of capital assets purchased and also claims depreciation thereon. Argument is purchase of capital asset is application of income and as income is to be computed on commercial basis, depreciation can also be claimed. There are many judgments including that of Bombay High Court in the case of Institute of Banking 264 ITR 110. However Kerala High Court following judgment of Supreme Court in the case of Escorts have taken contrary view holding that double deduction is not possible. What is your views in the matter. Can it be argued that as judgment of Escorts was under different provisions, the same is not applicable and that in view of various judgments charitable trust can claim double deduction.

B] There are number of Court judgments in case of Charitable Trusts that amount spent on charity is more in particular year, the same can be considered while computing income of subsequent year. Revenue's argument is that there is no such provision under the Act to carry forward. Please give your valued opinion (SR)

Ans. As the querist has pointed out in his query, that there are number of decisions holding that a Charitable Trust can claim deduction by way of application of income and also depreciation allowed on the property it is holding by way of investment of its funds. The leading case being Bombay High Court decision in *264 ITR 110- CIT vs. Institute of Banking*.

The case of the Supreme Court decision in Escorts case was not under S. 11 and 12 of I. T. Act. It was in respect of a building for a Research Centre, under the provisions of S.35(1)(i)(ii)(iii) of the Act where the whole amount of investment can be claimed as deduction in the year of purchased and on such building, the Supreme Court held that the institute cannot claim, in respect of the said building, depreciation allowance.

As such the querist is right in its claim that it can claim Depreciation Allowance.

"In order to change we must be sick and tired of being sick and tired."

— *Unknown Author*

"From the bitterness of disease man learns the sweetness of health."

— *Catalan Proverb*

CA. Ninad Karpe

THE LIGHTER SIDE

Why can't I become the PM?

With elections round the corner, there is no shortage of daily dose of some interesting news. Every day, a new Politician publicly proclaims that she/he wants to become the Prime Minister. And to add to this drama, there are prominent people who support these aspirations.

After reading all this, a simple question popped up in my mind "Why can't I become the PM of this country?" After all, I am educated and have led a professional life for many years now. My education could possibly become a disadvantage; but I will pursue my dream and I hope to get some public support from the community of tax professionals.

Will you support my candidature for becoming the PM of this country?

Since I aspire to become the PM, I must articulate my agenda for the country. The first thing I will do is to abolish Direct taxes. No more Income tax! Obviously, that would save all of you from the sleepless nights interpreting all these complex laws. But, it would also mean that you could become jobless and that would diminish my popularity. Also, what will CTC do?

So, if that is not a politically correct option, I would do the next best thing – appoint a committee to simplify direct tax laws – which inevitably would lead to more complications and more work.

In either of the options, tax work will continue to go on and on, with the amount of pending work and litigation.

Hence, why aspire to become a PM – why not continue with tax practice?

Property Tax relief for owners

The Bombay High Court has granted relief to all property owners who have to pay steep property tax on the basis of a new system introduced in 2010. They can now pay property taxes under the old un-amended rates with 50% differential between the old and new rates, the HC directed recently.

The HC bench of Chief Justice Mohit Shah and Justice M. S. Sanklecha passed the order while hearing a bunch of 47 petitions by the Property Owners' Association, societies and individual property owners, among others. The petitioners had challenged the new property tax regime based on capital value of the property as "arbitrary and unconstitutional". Several private charitable trusts like Bombay hospital and others had also challenged the new regime since it took away exemptions granted to them earlier. The new system took the capital value of the property to calculate the amount of property tax instead of the "reasonable rent" premises would fetch as a base value under the old law. The POA represented by advocate H N Vakil and others said the new taxes as result were exorbitant and discriminatory.

[Source : The Times of India, dated 10-3-2014 page. 7]

CA Hitesh R. Shah & CA Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Important events and happenings that took place between 9th February, 2014 to 8th March, 2014 are being reported as under:

I. ADMISSION OF NEW MEMBERS

1) The following new members were admitted in the Managing Council Meetings held on 17th February, 2014.

LIFE MEMBERSHIP

1	SHRI YEOLA GHANSHAM GAJANAN	CA	NASHIK
2	SHRI CHHEDA KALPESH TALAKSHI	ADVOCATE	MUMBAI

ORDINARY MEMBERSHIP

1	SHRI VERMA JAGDISH GAUTAMLAL	CA	MUMBAI
2	SHRI SHAH HITEN KANTILAL	ITP	MUMBAI
3	SHRI JAIN ANKIT RAJKUMAR (Oct. 2013 to Mar. 2014)	CA	NOIDA
4	MS. SHAH SALONI HITESH (Oct. 2013 to Mar. 2014)	CA	MUMBAI
5	SHRI KALRA JAY NARENDER	CA	MUMBAI
6	SHRI SHAH VISHAL HEMENDRA	CA	MUMBAI

STUDENT MEMBERSHIP

1	SHRI PRADNYA VINAYAK GOKHALE	FINAL CA
2	SHRI LAKHANI KEVAL MILAN	FINAL CA
3	SHRI JAIN SHREYANSH MOTILAL	FINAL CA

II. PAST PROGRAMMES

Details of programmes conducted by the Chamber are given below:

Sr. No.	*Programme Name / Committee/ Venue*	*Date/Subjects*	*Chairman/Speakers*
1.	**Allied Laws Committee**		
	Study Circle Meetings Venue : 2nd Floor, Babubhai Chinai Committee Room	**26th February, 2014** *Wills & Testamentary Succession*	Ms. Shaishvi R. Kadakia, Advocate & Solicitor
		6th March, 2014 *Section 53A of Transfer of Property Act & Stamp Duty Provisions on agreement for Sale*	Shri J. S. Solomon, Advocate & Solicitor

Sr. No.	*Programme Name / Committee/ Venue*	*Date/Subjects*	*Chairman/Speakers*
2.	**Direct Taxes Committee**		
	8th Intensive Study Group (Direct Tax) Meeting Venue - CTC Conference Room	**20th February, 2014** *Recent Important Decisions under Direct Taxes*	Shri R. K. Sinha, Retd. IRS Officer
3.	**Indirect Taxes Committee**		
	Workshop on MVAT Act & Allied Laws (Jointly with STPAM, BCAS, AIFTP (WZ) & WIRC of ICAI) Venue - Mazgaon Library, Vikrikar Bhavan, Mumbai	15th February & 1st March, 2014 • (i) Issues in Taxation of Intangible goods & Leasing/ Franchisee Transaction under MVAT and CST Act (ii) Issues in Taxation of Intangible goods & Leasing/ Franchisee Transaction under Service Tax Act • Issues in Branch Transfer & Sales in Transit under CST Act and High Seas Sale	Mr. Vinayak Patkar, Advocate Ms. Nikita Badheka, Advocate
4.	**International Taxation Committee**		
A)	***5th International Tax Conference*** Venue - Hotel Sahara Star, Vile Parle	**28th February & 1st March, 2014** 1. *Keynote Address* 2. *Permanent Establishment – Emerging Issues including Challenges in Digital Economy* 3. *Transfer Pricing: Emerging Controversies and Challenges – Way Forward* 4. *GAAR – Issues and Challenges in Implementation (with Case studies impacting Inbound and Outbound Investments) and global developments concerning GAAR* 5. *Emerging International Tax Trends and India's Tax Treaty Policy* 6. *Transfer Pricing – Structuring of Business Reorganisation and Issues* ***Felicitation of Shri Y. P. Trivedi, Past President of The Chamber of Tax Consultants, by the hands of Shri V. H. Patil, Past President of The Chamber of Tax Consultant for completing 50 years in the profession***	Mrs. Malathi Sridharan, DIT (TP)-I, Mumbai CA Geeta Jani CA Karishma Phatarphekar Shri Kuntal Kumar Sen, Ex-IRS CA T. P. Ostwal CA Sanjay Tolia

Sr. No.	Programme Name / Committee/ Venue	Date/Subjects	Chairman/Speakers
		7. *Service Tax on Cross Border Transactions* 8. *Case studies on International Taxation and Transfer Pricing – Panel Discussion*	CA A. R. Krishnan Chairman : Rajan Vora Panellist : Shri Sunil Lala, Advocate, Shri Kanchun Kaushal, Advocate
B)	***4th Intensive Study Course on Transfer Pricing*** (Including Domestic Transfer Pricing) **24 Sessions – 6 Days** Venue - West End Hotel	**8th March, 2014** • Inauguration and Keynote address • *Introduction, Brief History, General Philosophy of Transfer Pricing, Comparison between Indian & OECD regulations, Associated Enterprise, International Transaction, Specified Domestic Transaction and other nuances in Indian Transfer Pricing* • *FAR Analysis, Comparability Principles, Search of uncontrolled transactions, tested party concept, general principles of documentation* • *Methods of determining ALP Transaction based Methods – CUP, Other method as prescribed by Rule 10AB, RPM, CPM, Meaning, with examples.* • *Methods of determining ALP Profit based Methods – PSM, TNMM, Concept of Most Appropriate Method, ALP determination, Meaning, with examples*	Mr. Mahendra Singh, CIT(A), Transfer Pricing CA Vispi T. Patel CA Vaishali Mane CA Vishwanath Kane CA Anis Chakraborty
C)	***Intensive Study Group on International Taxation Meeting:*** Venue - CTC Conference Room	**19th February, 2014 & 25th February, 2014** *Fundamental Principle of Royalty Taxation Historical development of Royalty taxation Source Rules in Act Source Rules under the treaties*	CA Rajesh L. Shah, CA Ganesh Rajgopalan & CA Deepak Kanabar
		4th March, 2014 *Royalty Taxation – Software*	Mr. Devendra Mehta, Mr. Shreyas Shah & Mr. Rajesh Lakhara

Sr. No.	*Programme Name / Committee/ Venue*	*Date/Subjects*	*Chairman/Speakers*
5	**Residential Refresher Course & Public Relations Committee**		
	37th Residential Refresher Course Venue - Anandha Inn Convention Centre & Suites, Pondicherry	**13th February, 2014 to 16th February, 2014** • *Reassessments / Revision / Rectification* • *Case Study under Direct Taxes* • *Case Study in Taxation of Real Estate Transactions [Secs. 2(1A), 2(14), 43CA, 50C, 50D, 56(2)(vii)(b), 145 & TAS and 194-IA)* • *Brains' Trust : Direct Tax*	• **Paper Writer** : CA Mahendra Sanghvi **Chairman** : Shri Keshav Bhujle, Advocate • **Paper Writer :** Dr. Anita Sumanth, Advocate (Chennai) **Chairman**: Shri S. N. Inamdar, Sr. Advocate • **Paper Writer** : CA Pradip Kapasi • **Brains Trustee** : Shri Arvind Datar, Sr. Advocate (Chennai) Mr. S. Rajaratnam, Sr. Advocate (Chennai)
6	**Study Circle & Study Group Committee**		
A)	**Study Group Meeting** Venue : Babubhai Chinai Committee Room, IMC	**21st February, 2014** *Recent Judgments under Direct Taxes*	CA Yogesh Thar
B)	Study Circle Meetings Venue : 4th Floor, Walchand Hirachand Hall, IMC.	**24th February, 2014** *Practical aspect of First Appeal before income tax authority and art of presentation*	Mr. Ajay Singh, Advocate
	Venue : Jaihind College, Churchgate.	**3rd March, 2014** *Rectification and Revision under Income Tax Act 1961 – Secs 154, 263 and 264*	**Chairman** : Shri Keshav B. Bhujle, Advocate **Group Leader** : CA Ketan Vajani
7	**Amita Memorial Lecture Meeting Jointly with BCAS** Venue : Walchand Hirachand Hall, IMC	**18th February, 2014** *Spirit of Service : Connecting to the Inner-Net*	Mr. Nipun Mehta

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**		
	Full Day Seminar on Charitable Trusts (Jointly with BCAS) Venue : M. C. Ghia Hall, Kalaghoda, Mumbai – 400 023	**22nd March, 2014** 1. *Key Note Address / Recent Issues in Case of Charitable Trusts*	Mr. Vishwas Jadhav, Charity Commissioner and DIT (Exemption) Mr. Rajiv Nabar, Director, Income Tax (Exemption) & CA Arvindbhai Dalal, Chairman
		2. *Important Provisions of Bombay Public Trust Act, Drafting of Trust Deed, etc.*	Eminent Faculty
		3. *Formation of Trust, Provisions relating to Accounts & Audit, etc.*	CA Vipin Batavia
		4. *Registration with I. T. Dept. Exemption u/s. 80-G & under section 10(23)(c)*	CA Paras Savla
		5. *Taxation of Charitable Trust*	CA Gautam Nayak
		6. *Foreign Contribution Regulation Act provisions of DTC*	CA Anil Sathe
2.	**Corporate Members Committee**		
	Workshop on Companies Act, 2013: Venue : Babubhai Chinai Hall, IMC	**14th, 15th, 28th & 29th March, 2014** 1. Inaugural Address : *Overview of Companies Act, 2013*	Shri K. L. Kamboj, Regional Director, Western Region, MCA. Dr. S. D. Israni, Advocate
		2. *Amendments pertaining to Accounts & Audit*	CA Himanshu Kishnadwala
		3. *Important definitions Company Formation & Management & New Concepts like OPC, Small Company*	CS N. L. Bhatia, Company Secretary
		4. *Important Amendments affecting Private Companies & unlisted Public Companies*	CA Nilesh Vikamsey
		5. *Provisions relating to BoD, Independent Directors (ID), Audit Committee, N & R Committee & other mandatory committee*	Dr. V. R. Narasimhan, Chief-Regulations National Stock Exchange of India Ltd.
		6. *Merger & Acquisition*	Shri Nitin Potdar, Solicitor
		7. *Corporate Social Responsibilities (CSR)*	CA Anup Shah
		8. *Companies Act 2013 vis-à-vis IFRS*	CA Jayesh Gandhi

Sr. No.	*Programme Name / Committee / Venue*	*Day / Subjects*	*Speakers / Chairman*
3.	**Indirect Taxes Committee**		
A)	**Workshop on MVAT Act & Allied Laws** (Jointly with STPAM, BCAS, AIFTP & WIRC of ICAI) Venue - Mazgaon Library, Vikrikar Bhavan, Mumbai.	**15th & 29th March, 5th & 19th April and 3rd May, 2014** • *Issues in Place of Provision of Service Rules, 2012* • *Issues in Place of Provision of Service Rules, 2012* • *Issues in Definition of Service, Exempt & Declared Service Issues in Valuation of Service, Abatement & Reverse Charge Mechanism* • *Issues in Interest, Penalties and Show cause Notices /Summons CENVAT Credit Rules* • *Filing of Returns (Including E-Filing & Payment of Taxes, Assessment, Interest, Penalties & Prosecutions, Maintenance of Books, Registers)* • *Input Tax Credit & Refunds*	CA Rajiv Luthia Eminent Faculty CA Manish Gadia Shri Vidyadhar Apte, Advocate CA Jayesh Gogri CA Naresh Sheth Shri Deepak Bapat, Advocate Shri Kishor Lulla, Advocate
B)	***Indirect Tax Study Circle Meeting*** Venue : 2nd Floor, Babubhai Chinai Hall, IMC	**12th March, 2014** *Circulars and Notifications issued during 2013-14 under Service Tax Laws*	**Chairman** : CA Naresh Sheth **Group Leader** : CA Jinal Shah
4.	**International Taxation Committee**		
A)	***Transfer Pricing Study Circle*** Venue - Kilachand Hall, IMC	**20th March, 2014** *Overview of T. P. Provisions in India & Provisions of Chapter X (Sec. 92 Definition of Associated Enterprise and International transactions)*	CA Ganesh Rajgopalan Ms. Rukhsar Sidhwa
B)	***Intensive Study Group on International Taxation Meeting*** Venue - CTC Conference Room	**11th March, 2014** *Royalty Taxation – Software*	Mr. Shreyas Shah, Mr. Devendra Mehta & Mr. Rajesh Lakhara
C)	**Intensive Study Course on FEMA** Venue : West End Hotel	**18th, 19th, 25th & 26th April, 2014** 1. *Inaugural session* 2. *Introduction and Overview of FEMA* 3. *Important Definitions, structure of the Act, Rules and Regulations*	CA Manoj Shah CA Mayur Nayak CA Hinesh Doshi Mr. Ajit Shah CA Amit Purohit

Sr. No.	*Programme Name / Committee / Venue*	*Day / Subjects*	*Speakers / Chairman*
		4. *Entry strategy, Establish-ment of branch/ project office by Non-residents in India* 5. *Import and Export of Goods and Services* 6. *Bank Accounts and Deposit Regulations* 7. *Borrowings and Lending in Rupees and Foreign Currency* 8. *Investment in India of Immovable Property and outside India by Residents* 9. *Inbound Investment – Foreign Direct Investment – Schedule 1* 10. *Inbound Investment – Schedules 2 to 8 and investment in Partnership – Proprietorship concerns* 11. *Outbound Investment* 12. *Miscellaneous Remittances* 13. *Change in Residential Status under FEMA* 14. *Adjudication and Compounding of Contraventions* 15. *Case Studies on FEMA – A day-to-day Practice* 16. *Brain Trust*	CA N. K. Hegde CA Naresh Ajwani CA Shabbir Motorwala Mr. Nishit Parikh CA Zulfiqur Shivji RBI officials and Eminent Faculties
D)	**4th Intensive Study Course on Transfer Pricing** (Including Domestic Transfer Pricing) **24 Sessions – 6 Days** Venue - West End Hotel	**22nd March, 2014 (Saturdays)** **4th & 5th April, 2014 (Friday & Saturday)** **11th & 12th April, 2014 (Friday & Saturday)** • *Benchmarking* • *Industry Specific Sessions* • *Key Controversy Areas – Recent TP Audit experience* • *Practice Areas* • *Other areas having TP implications* • *Domestic Transfer Pricing* • *The Road Ahead* • *Attribution issues, experiences, recent rulings and Revenue's perspective* • *Closing Session*	From the profession – Ms. Alpana Saxena, Amol Tibrewala, Ameya Kunte, Suchi Ray, Bipin Pawar, Darpan Mehta, Freddie Daruwala, Hasnain Shroff, Jigar Saiya, Karishma Phatarphekar, Kumar Sampat, Kuntal Kumar Sen, Milind Kothari, Sanjay Tolia, Samir Gandhi, Sudhir Nayak, Vaishali Mane, Vishwanath Kane, Vispi Patel, Waman Kale From Revenue Department – C. S. Gulati.

Sr. No.	*Programme Name / Committee / Venue*	*Day / Subjects*	*Speakers / Chairman*
E)	8th Residential Conference on International Taxation, 2014 Venue : Novotel Hyderabad Convention Centre	**19th June, 2014 to 22nd June, 2014** *Topics for Group Discussion:* *1) Emerging Issues in Interpretation of Tax Treaties* *2) Structuring of FDI – Interplay with other laws* *3) Case Studies in International Taxation and Transfer Pricing* *Brains' Trust:* *1) On Practical issues in International Taxation* *Papers for Presentation:* *1) Emerging controversies in Taxation of Software, IPRs & E-commerce (Tax & Non-tax Issues)* *2) Recent developments in OECD MC, India's Reservations & Emerging Jurisprudence* *3) International Tax Jurisprudence on Current TP Issues*	The Conference will be addressed by CA H. Padamchand Khincha, Shri Arvind P. Datar, Advocate, Dr. Anita Sumanth, Advocate, CA Anup P. Shah and other eminent faculties in the field of International Taxation
5.	**Study Circle & Study Group Committee**		
	Study Circle Meetings: Venue: 2nd Floor, Babubhai Chinai Committee Room. IMC.	**10th March, 2014** *Issues related to Survey (including TDS Survey) under the Income-tax Act, 1961*	CA Bhupendra K. Shah
		9th April, 2014 *Issues u/ss. 45 (3) and 45(4) of Income-tax Act*	**Chairman** : Shri Vipul B. Joshi, Advocate **Group Leader** : CA Ashok L. Sharma

6. Renewal Notice – 2014-15

The renewal fees for Annual Membership, Subscription of The Chamber's Journal, Study Group and Study Circles meeting and Other Subscription for the financial year 2014-15 falls due for payment on 1st April, 2014.

The details of the Fees are as under:

		Fees	Service Tax & Cess *	Total
1.	Membership Renewal Fees (for 1 year)	₹ 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/-

IV. Forthcoming Journal by Journal Committee:

The Chamber's Journal for the month of April, 2014 will cover topic on "Important Judgments of Direct Taxes".

V. PUBLICATIONS FOR SALE:

A) International Taxation - A Compendium

Four hardbound volumes set containing approx. 4000 pages.

B) Study Material of 37th Residential Refresher Course held on 13-16 February, 2014 at Pondicherry.

(For Enrollment and further details of all the future Events, please refer to the March, 2014 Issue of CITC News or visit the website www.ctconline.org)

RESIDENTIAL REFRESHER COURSE & PUBLIC RELATION COMMITTEE

37th Residential Refresher Course held on 13th to 16th February, 2014 at Anandha Inn Convention Centre & Suites, Pondicherry.

Paper Writers | **Brains' Trustees**

CA Mahendra Sanghvi

Dr. Anita Sumanth, Advocate (Chennai)

CA Pradip Kapasi

Shri S. Rajaratnam, Advocate (Chennai)

Shri Arvind Datar, Sr. Advocate (Chennai)

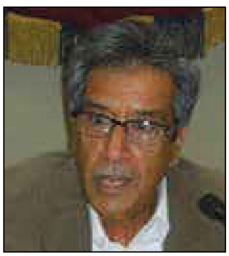
37th RRC – Group Photo

ALLIED LAWS COMMITTEE

Allied Laws Study Circle Meeting held on 26th February, 2014 on the subject "Wills & Testamentary Succession".

Ms. Shaishvi R. Kadakia, Advocate & Solicitor addressing the members. Seen from L to R : CA Ashok Manghnani, Convenor; CA Jagdish Punjabi, Vice Chairman; CA Ashok Sharma, Chairman & Shri Pravin Veera, Advocate.

Allied Laws Study Circle Meeting held on 6th March, 2014 on the subject "Section 53A of Transfer of Property Act & Stamp Duty Provisions on Agreement for Sale".



Shri J. S. Solomon, Advocate & Solicitor addressing the members.

INTERNATIONAL TAXATION COMMITTEE

5th International Tax Conference held on 28th February to 1st March, 2014 at Hotel Sahara Star, Mumbai.

CA Yatin K. Desai, President addressing the delegates. Seen from L to R : CA Rutvik Sanghvi, Conference Co-ordinator; Mrs. Malathi Sridharan, Chief Guest, DIT (TP) – I, Mumbai; CA Paresh P. Shah, Chairman & CA Rajesh L. Shah, Convenor.

CA Paresh P. Shah, Chairman welcoming the delegates. Seen from L to R: CA Rutvik Sanghvi, Conference Co-ordinator; CA Yatin K. Desai, President; Mrs. Malathi Sridharan, Chief Guest, DIT (TP) – I, Mumbai & CA Rajesh L. Shah, Convenor.

Mrs. Malathi Sridharan inaugurating conference by lighting the lamp. Seen from L to R : Mrs. Geeta Jani, Faculty; CA Yatin Desai, President; CA Rajesh L. Shah, Convenor & CA Paresh P. Shah, Chairman.

Mrs. Malathi Sridharan, DIT (TP) – I, Mumbai giving keynote address. Seen from L to R : CA Rutvik Sanghvi, Conference Co-ordinator; CA Yatin K. Desai, President; CA Paresh P. Shah, Chairman and CA Rajesh L. Shah, Convenor.

Speakers

CA Geeta Jani

CA Karishma Phatarphekar

Shri Kuntal Kumar Sen

CA T. P. Ostwal

CA Sanjay Tolia

CA A. R. Krishnan

Chairman

CA Rajan Vora

Panelists

CA Sunil Lala

CA Kanchun Kaushal

INTERNATIONAL TAXATION COMMITTEE

FELICITATION OF SHRI Y. P. TRIVEDI, SENIOR ADVOCATE & PAST PRESIDENT

Shri V. H. Patil, Advocate & Past President sharing his memories in Profession with Shri Y. P. Trivedi. Seen from L to R : CA Yatin K. Desai, President; Shri Y. P. Trivedi, Sr. Advocate, Past President & CA Hinesh R. Doshi, Hon. Jt. Secretary.

CA Yatin Desai, President felicitating Shri Y. P. Trivedi, Sr. Advocate & Past President by presenting a shawl. Seen from L to R : S/Shri V. H. Patil, Past President, CA Hinesh Doshi, Hon. Jt. Secretary.

Shri Y. P. Trivedi, Sr. Advocate & Past President was felicitated by Shri V. H. Patil, Past President for completing 50 years excellence in service. Seen from L to R : CA Hitesh R. Shah, Hon. Jt. Secretary, CA Yatin K. Desai, President & CA Hinesh R. Doshi, Hon. Jt. Secretary.

Shri Y. P. Trivedi, Sr. Advocate & Past President addressing the delegates on his Journey of 50 years in Profession. Seen from L to R : S/Shri CA Hitesh R. Shah, Hon. Jt. Secretary; CA Yatin K. Desai, President; Shri V. H. Patil, Advocate & Past President & CA Hinesh R. Doshi, Hon. Jt. Secretary.

Section of members

Transfer Pricing Study Circle Meeting held on 20th February, 2014 on the subject "Overview of T. P. Provisions in India & Provisions of Chapter X" (Sec. 92, Definition of Associated Enterprise and International Transactions).

CA Ganesh Rajgopalan addressing the members.

Ms. Rukhsar Sidhwa addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Group Meeting held on 21st February, 2014 on the subject "Recent Judgments under Direct Taxes".

CA Yogesh Thar addressing the members. Seen from L to R : CA Dinesh Shah, Convenor, Shri Sameer Dalal, Advocate, CA Paras Savla, Vice President; CA Dilip Sanghvi, Vice Chairman, CA Ashok Sharma.

Study Circle Meeting held on 24th February, 2014on the subject "Practical Aspect of First Appeal before Income tax Authority and Art of Presentation".

Shri Ajay Singh, Advocate addressing the members.

Study Circle Meeting held on 3rd March, 2014 on the subject "Rectification and Revision under Income-tax Act 1961 – Secs. 154, 263 and 264".

Shri Keshav B. Bhujle, Advocate chairing the session.

CA Ketan Vajani addressing the members.

AMITA MEMORIAL LECTURE MEETING

Amita Memorial Lecture Meeting jointly with BCAS held on 18th February, 2014 on the subject "Spirit of Service: Connecting to the Inner-Net".

Shri Nipun Mehta addressing the members.

THE CHAMBER'S JOURNAL

Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 15th & 16th March 2014

No. MA/MR/South-365/2013-15
R.N.I. No. MAHENG/2012/47041
Date of Publishing 12th of Every Month

Printed and Published by Shri. Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.