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A Monthly Journal of
The Chamber of Tax Consultants

The Chamber's Journal

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Your Monthly Companion on Tax & Allied Subjects

Hospitality Industry

Other Contents

THE CHAMBER OF TAX CONSULTANTS

THE CHAMBER'S JOURNAL
HOSPITALITY INDUSTRY
MAY - 2014 VOL. II | NO. 8

TRANSFORMING INFORMATION INTO KNOWLEDGE

INTERNATIONAL TAXATION COMMITTEE

Intensive Study Course on FEMA held on 18th, 19th, 25th & 26th April, 2014

CA Yatin Desai, President, welcoming the delegates. Seen from L to R: S/Shri Paresh Shah, Chairman, International Taxation Committee, Shri V.H. Patil, Past President, CA Rashmin Sanghvi, Faculty.

CA Rashmin Sanghvi, inaugurating the course by lighting the lamp. Seen From L T R: Shri V.H. Patil, Past President, CA Paresh Shah, Chairman, International Taxation Committee, CA Yatin Desai, President

CA Rashmin Sanghvi, giving inaugural address. Seen from L to R: Shri V.H. Patil, Past President, CA Paresh Shah, Chairman, International Taxation Committee, CA Yatin Desai, President, Ms Varsha Galvankar, Course Co-ordinator.

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CA Shabbir Motorwala

CA N. C. Hegde

CA Nishit Parikh

CA Prakash Kotadia

CA Dhishat Mehta

CA Paresh P. Shah

CA Anup Shah, Brains Trustee replying to the queries. Seen from L to R S/Shri Rajesh L: Shah, Convenor, International Taxation Committee, Paresh Shah, Chairman, Int Tax Committee, CA Shabbir Motorwala, Brains Trustee, CA Yatin Desai, President, Ms Varsha Galvankar, Course Co-ordinator.

Section of Delegates

CONTENTS

Vol. II No. 8
May – 2014

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The Chamber's Journal

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Editorial

Friends by the time this issue reaches you results of the 16th Lok Sabha Elections would have come. This will bring to an end the political career of Dr. Mannmohan Singh who was the 12th Prime Minister of our country and the 2nd Prime Minister after Pandit Jawaharlal Nehru, who was Prime Minister for two full consecutive terms. Many refer to him as accidental Prime Minister. He started his accidental political career in May, 1991 when Mr. P. V. Narsimha Rao appointed him as the Finance Minister of the country. All will agree that his tenure as Finance Minister was a milestone in many ways.

In May, 2004 he was elected by the UPA-I as Prime Minister of India. The journey of a scholar, who was inclined towards academics and research, who led our country for 10 long years, is full of ups and downs. As he mentioned at the national press conference held on 3rd January, 2014, "I honestly believe that history will be kinder to me than the contemporary media, or for that matter, the Opposition parties in Parliament." We all wish that he gets his due place in the history of our country. In a recent book written by Mr. Sanjaya Baru – "The Accidental Prime Minister" published by Penguin Books Ltd., it is claimed that Dr. Manmohan Singh said that "There cannot be two centres of power. That creates confusion. I have to accept, that the party president is the centre of power." (Page-256). It is very difficult to reconcile that a person who has taken the oath of office that he will bear true faith and allegiance to the Constitution of India continued to hold office and accepted an extra Constitutional centre of power. If he has really made the above statement, then it is very unfortunate and by doing so he has undermined our Constitution itself.

This month we bring to you an industry specific Special Story – 'Hospitality Industry'. The lead article has been written by a subject specialist academic, Mrs. Bhalerao, a Professor of the SVT College of Home Science, an autonomous College of the SNDT University. She has highlighted the various segments, which now form the Hospitality Industry. This issue brings you some tax and allied aspects relating to the Industry and the next month's issue will contain the rest.

I thank our Vice President, Shri Paras Savla, who provided the design for the Special Story.

K. GOPAL
Editor

From the President

Dear Members,

While writing this page for the month, I realised that this will be last but one communication with you all through this column. Last ten months passed with a blink of eyes.

Last couple of months was very hectic for the Chamber's activities. This month is a month of vacation for most of us. At Chamber also activities have slowed down for this month as members will be on vacation. However, it is totally opposite at the Delhi Chapter. We had fewer activities at our Delhi Chapter for most part of the year. It has now become very active and has planned various programmes for the month of May and June. Vice President and I recently visited Delhi Chapter and met the office Bearers. I am very happy to share that our Delhi Chapter witnessed overwhelming response to the seminar on Companies Act, 2013.

At Chamber, we are taking benefit of this lean period and have undertaken renovation of the office. Chamber's activities have increased which requires more support staff. With the existing arrangement, it is difficult to accommodate more people. This renovation will make it possible to accommodate more staff members. During this period of three weeks, all the routine work will continue at the Chamber without any break. However, it may create some inconvenience to the members and their staff visiting the office of Chamber. Let me assure you that we have made all arrangements to make it as smooth as possible. However, I sincerely regret any inconvenience which you may face when you visit Chamber's office.

As you must have read in the Newsletter, we have convened an Extraordinary General Meeting for approval of amendments in the Rules and Regulations of the Chamber. This meeting has been convened after receiving suggestions from the Past Presidents and then approved

by the Managing Council members. I request members to attend the Extraordinary General Meeting to be held on 27th May, 2014.

One of the mega events of the Chamber is its Residential Refresher Course on International Taxes which is scheduled in the month of June at Hotel Novotel at Hyderabad. The Conference has received overwhelming response and it is almost full. Very few seats may be available and request members to enroll themselves to avoid any disappointment.

The Corporate Committee had successfully concluded workshop on Companies Act, 2013 in the month of March 2014. In the last week of the same month, the Ministry of Corporate Affairs notified rules under various chapters which are effective from 1st April, 2014. With new rules it was necessary to have an in-depth understanding of the provisions of the Act with Rules. The Allied Laws Committee and Corporate Members Committee have jointly organised a study course on the Companies Act 2013 including new rules spread over eight sessions. The course will benefit us all to understand the provisions of the law and implementation process.

By the time you all receive this communication, citizens of India would have exercised their right to vote in the ongoing General Elections. In my last communication, I had mentioned about apathy amongst people of India, especially in urban areas to vote and requested to vote without fail. I am happy to mention that till date in all States voters' turn out is much better than the last time. The fate of India will be decided once countdown starts from 16th May. May the people of India get what is good for them.

The Chamber's Journal for the month is on Hospitality Industry. The subject will be divided in two parts. I congratulate our Vice President CA Paras Savla who has designed the issue.

Before I end, let me wish good luck to all the students appearing for IPCC and Final CA exams which is starting from 26th of this month.

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

CHAPTER X

THE YOGA OF SUPREME MANIFESTATION VIBHUTI YOGA

After taking full resume of the first part of Bhagavad Gita containing Chapters I to IX, now let us start with the second part of Bhagavad Gita containing Chapters X to XVIII.

Now, Chapter X entitled Vibhuti Yoga, the yoga of supreme manifestation. The Chapter reveals to us that in manifest Brahman pervades all manifestations of the entire universe. He causes effects, sustains and dissolves the entire creation. Brahman is unborn and beginningless (Anadi) and endless (Anant) and is beyond all Form and conception. He manifests himself in the entire universe with his Guna (Nature). There is no place which is not pervaded by his manifestation.

The Chapter's title, Vibhuti Yoga, means the Yoga of Supreme Manifestation. This chapter contains forty-two verses revealing Brahman as the source of the manifest world. Even highly evolved persons do not know the origin of Brahman. The wise, however, pursue Brahman with devotion and steadfastness until they become one with Brahman.

Arjuna stands aghast at the astounding knowledge and personality of Krsna. He asks how Krsna (Brahman) manifests Himself in the world. Krsna responds by detailing His (Brahman's) manifested expressions analytically. How Brahman permeates the whole universe. And towards the end of the Chapter He points out to Arjuna that the entire universe is an insignificant, infinitesimal fraction of Brahman.

Chapter X can be summarised into four topics.

I.	Knowledge Its supreme nature the wise attain Brahman	1 – 11
II.	How does Brahman pervade the world, how Does one know Brahman	12 – 18
III.	Brahman's supreme manifestation shown Analytically	19 – 38
IV.	Brahman transcends the world – mere fragment of Its Being	39 – 42

I. Knowledge Its supreme nature the wise attain Brahman

Sri Bhagavan uvaca

Bhuya eva Mahabaho srnu me paramam vacah
yate'ham priyamanaya vaksyami hitakamyaya I

The blessed Lord said:

1. O Mahabaho, listen again to My supreme world which I will speak to you who are delighted, for your welfare.

Na me viduh suraganah prabhavam no maharasyah

Ahamadirhi devanam maharsinam ca sarvasah 2

2. Neither the hosts of gods nor the great sages know My origin, for in all respects, I am the source of all the gods and the great sages.

Yo mamajamanadim ca vetti lokamahesvaram

asammudhah sa martyesu sarvapapaih pramucyate 3

3. He who knows Me as unborn, beginningless and the supreme Lord of the world, he undeluded among mortals, is liberated of all sins.

Buddhirjnanamasammohah ksma satyam damah samah

sukham dukham bhavo bhavo bhayam cabhayameva ca 4

Ahimsa samata tustistap danam yaso yasah

bhavanti bhava bhutanam matta eva prthagvidhah 5

4. Intellect, knowledge, non-illusion, forgiveness, truth, control over senses and mind, joy and sorrow, existence and non-existence, fear and fearlessness also…

5 Non-injury, equanimity, contentment, austerity, charity, fame and infamy – different kinds of characteristics of beings arise from Me alone.

Maharsayah sapta purve catvaro manavastatha

madbhava manasa jata yesam loka imah prajah 6

6. The seven great sages, the ancient four and the Manus, with their being in Me, were born of mind, from them are these creatures of the world.

Etam vibhutim yogam ca mama yo vetti tattvatah

so vikampena yogena yujyate natra samsayah 7

7. He who knows in reality this supreme manifestation and my yoga (union) he becomes established in unshakable union; there is no doubt about it.

Aham sarvasya prabhavo mattah sarvam pravartate

Iti matva bhajante mam budha bhavasamanvitah 8

8. I am the origin of all, from Me everything evolves; understanding thus, the wise worship Me, endowed with devotion.

Maccita madgataprana bodhayantah parasparam

kathayantasca mam nityam tusyanti ca ramanti ca 9

9. Those with mind in Me, with pranas (life's activities) absorbed in Me, enlightening one another and always speaking of Me, they are contended and delighted.

Tesam satatyuktanam bhajatam pritipurvakam

dadami buddhiyogam tam yena mamupayanti te 10

10. To those, ever steadfast, worshipping Me with love, I give the buddhi-yoga (union by intellect) by which they come to Me.

Tesamevanukampafrthamahamajnanajam tamah

nasayamyatmabhavastho jnanadipena bhasvata 11

11. Out of mere compassion for them dwelling as Self, I dispel the darkness born of ignorance by the shining lamp of wisdom.

Brahman reigns supreme. The entire universe arises from Brahman – things, beings and all their characteristics. Even the sages and gods do not know the origin of Brahman.

But the wise, undeluded by this world, understand Brahman's absolute nature and Its expression. Its transcendence and Its immanence. Identifying with Brahman they maintain this supreme knowledge of Brahman until they become one with Brahman. This topic outlines the preparation, the Sadhana (spiritual practice) and the meditation required for a seeker to realize Brahman within his own Self.

II. How does Brahman pervade the world, how Does one know Brahman

Arjuna uvaca

Param brahma param dhama pavitram paramam bhavan

purusam sasvatam divyamadidevamajam vibhum 12

Ahustvamrsyah sarve devarsirnaradastatha

asito devalo vyasah svayam cava bravisi me 13

Arjuna said:

12. You are the supreme Brahman, the supreme Abode, the supreme Purifier, the eternal, divine Purusa (Being), the primeval God, unborn, all pervading.

13. All the sages acclaim Thee, also the divine sage Narada, Asita, Devala, Vyasa and so do You Yourself say to me.

Sarvametadrtam manye yanmam vadasi Kesava

Na hi te bhagavanvyaktim vidurdeva na danavah 14

14. I regard all this that You say to me as true O Kesava, Verily, O blessed Lord, neither the gods nor the demons know Your manifestation.

Svayamevatmanatmanam vettha tvam Purusottama

bhutabhavana bhutesa devadeva jagatpate 15

15. Verily, You Yourself know Yourself by Yourself O Purusottama, O Source of beings, O Lord of beings, O God of gods, O Ruler of the world.

Vaktumarhasyasesena divya hyatmavibhutayah

yabhirvibhutibhirlokanimamstvam vyapya tisthasi 16

16. You should indeed speak without reserve of Your divine glories, by which glories pervading these worlds You exist.

Katham vidyamaham yogimstvam sada paricintayan

Kesu kesu ca bhavesu cintyo'si bhagavanmaya 17

17. How may I know You, O Yogin through constant meditation? In what all aspects are You to be thought of by me, O blessed Lord?

Vistarenatmano yogam vibhutim ca Janardana

Bhuyah kathayatrptirhi srnvato nasty me mrtam 18

18. Tell me again in detail, O Janardana, of Your yoga and manifestation; for there is no satiety for me in hearing the nectarine.

Arjuna acclaims Krsna as the supreme Brahman. The primeval God, eternal and all-pevading. The divine sages have acknowledged Krsna as supreme. So has Krsna Himself. Arjuna pleads to Krsna: Neither the gods nor demons know Your divine manifestations. You alone know your real Self – the Source of all beings, the God of gods, the Lord of the universe. You should now speak to me of Your divine glories in Your countless manifestations. How may I contemplate and meditate on Your existence? How am I to unite with the supreme Self through this manifested world? Krsna remains silent as Arjuna speaks throughout the topic.

III. Brahman's supreme manifestation shown Analytically

Sri Bhagavan uvaca

Hanta te kathayisyami divya hyatmavibhutayah

pradhanyatah kurusrestha nastyanto vistarasya me 19

The blessed Lord said:

19. Well, I will declare to you My divine glories in chief O best of the Kurus, there is no end of My detailing.

Ahamatma gudakesa sarvabhutasayasthitah

ahamadisca madhyam ca bhutanamanta eva ca 20

20. I am the Self, O Gudakesa, seated in the heart of all beings; I am the beginning, the middle and also the end of all beings.

Adityanamaham visnuriyotisam raviramsuman

maricirmarutamasmi naksatranamaham sasi 21

21. Of Adityas I am Visnu, of luminaries the radiant sun, I am Marici of Maruts, of asterisms I am the moon.

Vedanam samavedo' smi devanamasmi vasavah

indriyanam manascasmi bhutanamasmi cetana 22

22. Of Vedas I am Sama Veda, of gods I am Vasava, of senses I am the mind and of living beings I am Consciousness.

Rudranam sankarascasmi vitteso yaksaraksasam

vasunam pavakascasmi meruh sikharinamaham 23

23. And of Rudras I am Sankara, Vittesa of Yaksas and Raksasas, of Vasus I am Pavaka and of Mountains I am Meru.

Purodhasam ca mukhyam mam viddhi Partha Brhaspatim

senaninamaham Skandah Sarasamasmi sagarah 24

24. And of household priests, O Partha, know me to be the chief, Brhaspati, of generals I am Skanda, of lakes I am the ocean.

Maharsinam bhrguraham giramasmyekamaksaram

yajnanam japayajno smi sthavaranam Himalayah 25

25. Of the great sages I am Bhrgu of speech I am the monosyllable (Om), of yajnas (sacrifices) I am japayajna (sacrifice of chant), of immovables Himalaya.

Asvatthah sarvavrksanam devarsinam ca Naradah

gandharvanam Citrarathah siddhanam Kapilo munih 26

26. Asvattha (Pipal tree) of all trees and of celestial sages Narada, of Gandharvas Citraratha, of Sidhas (perfected souls) sage Kapila.

Uccaihsravasamasvanam viddhi mamamrtodbhavam

airavatam gajendranam naranam ca naradhipam 27

27. Of horses know Me as Uccaihsravas born of nectar, of lordly elephants Airavata, and of men the kind.

Ayudhanamaham vajram dhenunamasmi kamadhuk

prajanascasmi kandarpah sarpanamasmi vasukih 28

28. Of weapons I am Vajra (thunderbolt), of cows I am Kamadhuk and I am Kandarpa the progenitor, of serpents I am Vasuki.

Anantascasmi naganam Varuno yadasamaham

pitrnamaryama casmi Yamah samyamatamaham 29

29. And I am Ananta of Nagas (snakes), I am Varuna of water-beings and of forefathers I am Aryama, I am Yama of controllers.

Prahladascasmi datyanam kalah kalayatamaham

mrganam ca mrgendro ham vainateyasca paksinam 30

30. I am Prahlada of Daityas, I am time of reckoners and of beasts I am the lion and Vainateya of birds.

Pavanah pavatamasmi Ramah sastrabhrtamaham

jhasanam makarascasmi srotasamasmi jahnavi 31

31. I am the wind of purifiers, I am Rama of warriors and of fishes, I am the shark, of rivers, I am the Jahnavi (Ganga).

Saranamadirantasca madhyam carvahamarjuna

adhyatmavidya vidyanam vadah pravadatamaham 32

32. Of creations of I am the beginning and the end of also the middle, O Arjuna, of knowledges I am the Knowledge-of-Self, of arguments vadaI (logic),

Aksaranamakaro smi dvandvah samasikasya ca

ahamevaksayah kalo dhataham visvatomukhah 33

33. Of letters I am (A) and dvandva (dual) of all compounds, I am verily the everlasting time, I am the supporter facing all directions.

Mrtyuh sarvaharascahamudbhavasca bhavisyatam

Kirtih srirvakca narinam smrtirmedha dhrtih ksama 34

34. And I am the all-devouring death and the birth of future beings, of the feminine (I am) Kirti (fame), Sri (prosperity), Vak (speech), Smriti (memory), Medha (intelligence), Dhrti (firmness) and Ksama (forgiveness).

Brhatsama tatha samnam Gayatri chandasamaham

masanam margasirsohamrtunam kusumakarah 35

35. Also Brhtsama of Sama hymns, I am Gayatri of metres, of months I am Margasirsa, of seasons the flowery season (spring).

Dyutam chalayatamasmi tejastejasvinamaham

jayo smi vyavasayo smi sattvam sattvavatamaham 36

36. I am gambling of the fraudulent, I am splendour of the splendid, I am victory, I am determination, I am sattva (purity) of the sattvika (pure).

Vrsninam Vasudevo smi Pandavanam Dhananjayah

muninamapyaham Vyasah kavinamusana kavih 37

37. Of the Vrsnis I am Vasudeva, of the Pandavas Dhananjaya, also of sages I am Vyasa, of seers the seer Usana.

Dando damayatamasmi nitirasmi jigisatam

maunam caivasmi guhyanam jnanam jnanavatamaham 38

38. I am the sceptre of rulers, I am righteousness of those who seek victory and also I am silence of secrets, I am knowledge of knowers.

In this topic Krsna enumerates some of His divine glories in an endless list. He begins by declaring Himself as the Self in all beings. Beings emerge from Him, exist in Him and ultimately merge into Him. He is the essence in everything and every being. Like the mind is the essence in the dream. Clay, the essence in all clay pots, Gold, the essence in all gold ornaments. While declaring Himself as the quintessence of every being and everything, Krsna chooses Himself as the very best among all species and objects. The deliberate use of the superlative makes it easier for even the less-evolved to recognize the latent glories of His countless manifestations.

IV. Brahman transcends the world – mere fragment of Its Being

Yaccapi sarvabhutanam bijam tadahamarjuna

na tadasti vina yatsyanmaya bhutam caracaram 39

39. And also I am that which is the seed of all beings, O Arjuna, there is no being moving or unmoving which can exist without Me.

Nanto'sti mama divyanam vibhutinam Parantapa

esa tuddesatah prokto vibhutervistaro maya 40

40. There is no end of My divine manifestations O Parantapa; this is only a brief statement by Me of the extent of My manifestation.

Yadyadvibhutimatsattvam srimadurjitameva va

tattadevavagaccha tvam mama tejomsasambhavam 41

41. Whatever being is glorious, prosperous or powerful, know you that only to be a manifestation of a part of My splendour.

Athava bahunaitena kim jnatena tavarjuna

vistabhyahamidam krtsnamekamsena sthito jagat 42

42. But what is the knowledge of these details to you, O Arjuna? Having pervaded this entire universe by one fragment, I remain.

In the preceding topic Krsna presents a grand litany of His divine glories. Claiming these glorious, prosperous and powerful manifestations as a fragment of His original splendour, Krsna captures Arjuna's attention. Arjuna requires such repetitive assertions for recognising the Divinity that pervades everywhere. Having enumerated His endless glories, Krsna admonishes Arjuna's interest in knowing all these glories as they form only an insignificant part of His infinite Being. In the concluding verse He rebukes Arjuna: Of what use is the knowledge of these details that you seek? His rebuke implies that Arjuna, representing mankind, is missing the essential Reality while he directs his attention towards the non-essentials of life.

In this chapter Arjuna requested Lord Krishna to explain His glories, His power of Yoga and the form to meditate upon. The Supreme Lord explains the technique for meditation. In meditation one will have to take the mind from grosser to subtler levels of consciousness so as to reach its (mind's) source which is Pure Consciousness. The mind is always extroverted and depends upon sensory perception. When one is convinced, as described by the Lord, that in everything He alone exists as its essence (consciousness), then the mind will being to perceive, even in the grosser level of sensory perception, the essence of the object, i.e., Consciousness, which is its own essential nature. The consciousness outside without any effort or obstacle. By this, the Lord teaches that one can be always in God-consciousness.

With human understanding, only vague glimpses of God are possible. But every query of a devotee's heart will be answered when in cosmic consciousness he attains realization of the Lord's transcendental omnipresence – in and beyond creation. All the magnificence in the cosmos, evident and hidden, will be seen as but a glimmer resting on an infinitesimal thought in the eternally blissful consciousness of Spirit.

As Upanishad puts it—

"O Thou Self-manifested cause and substance of creation, O Thou indwelling Self of all, Thou source of Illumination, guide me beyond Thy rays of creation, transport me beyond Thine objective form that, by Thy grace, I may behold Thy glorious Self. That absolute Self abiding in the transcendental effulgence, verily, I am He".

Isha Upanishad

Manjiri Bhalerao*

Hospitality Industry

1.0 Hospitality Industry

1.1 Overview of Hospitality Industry

'Hospitality Industry' is a broad category of fields within the service industry that includes lodging, event planning, theme parks, transportation, cruise line, and additional fields within the tourism industry. It is a several billion dollar industry that mostly depends on the availability of leisure time and disposable income.

1.1.1 Within India

As per the latest update from the Tourism Ministry, Government of India, the number of Heritage Hotels and Star category hotels in India are 1,677 and 81,687 respectively.

An article highlighted the country's need for around 180,000 additional rooms in this decade based on the forecasted number of an investment of US$ 25.5 billion and 211,000 people to operate them. (The 2012 HVS Whitepaper on Investment and Manpower Requirement by 2021 – India).

1.1.2 Outside India

The 'International Hotel Industry' report (2009), by Mintel using UN World Tourism Organisation (UNWTO) data, estimated that in 2008, the number of rooms in hotels and similar establishments was 20.1 million and that it had been growing at an estimated rate of 2.2% over the previous five years. However it is important to note that UNWTO statistics include not just hotels but also inns, bed & breakfasts and other 'similar establishments', thus overestimating the size of the actual hotel industry.

International tourist arrivals grew in 2011 to 980 million, according to the latest UNWTO World Tourism report. With growth expected to continue, this reached the milestone of one billion mark in 2012. International tourist arrivals are expected to reach 1.8 billion by 2030, according to the latest UNWTO long-term forecast (www.hotelanalyst.co.uk).

1.2 Components of Hospitality industry

Hospitality means "hospitable treatment / reception / disposition" (Merriam-Webster

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S.N.D.T. Women's University, Mumbai

Dictionary, 2003). Hospitality Industry Management, however, is a comprehensive term for the business management disciplines which include the provision of hospitality-related services to travellers, visitors, and also locals (Walker, 1999). The services provided are food and beverage, transportation, entertainment, recreation, and lodging.

The sub-segments prevalent within Hospitality Industry are lodging, travel and tourism industry, Cruise and theme park management, food service management, accommodation and restaurant management etc. These sub-segments operate and exist under the larger umbrella of the hospitality industry.

The hospitality industry is one that is primarily focused on customer satisfaction. For the most part, it is built on leisure or is luxury-based, as opposed to meeting basic needs. Hotels and resorts, cruise lines, airlines and other various forms of travel, tourism, special event planning, and restaurants all generally fall under the realm of the hospitality industry.

This service-based industry thrives on the leisure activities of patrons. Some of the business that the hospitality industry garners is transient and intermittent, but collectively, it accounts for a large source of its revenue. For example, a vacationing family may fly from one country to another, book a hotel room for the duration of their visit, dine at local restaurants, and tour theme parks or other area attractions. All of these activities involve the services provided by various areas of the hospitality industry.

Exceptional service is very important for all of these businesses. Customer satisfaction usually leads to consumer loyalty, which helps to ensure the success of a company in the hospitality industry. For example, if an individual chooses a particular airline and has a positive experience, he / she is likely to use it again in the future. Alternatively, if the flight is unpleasant or the customer is otherwise displeased with the service, he or she is less likely to return to that airline the next time the opportunity arises. (www.wisegeek.com).

1.3 Tourist

Tourism is travel for recreational, leisure or business purposes. The World Tourism Organisation defines tourists as people "traveling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes".

1.3.1 Local tourist

These are also called domestic tourists as they are citizens of a country visiting places in their home country. Usually they form more or less a homogenous group in terms of preferences, language and cultural background, expectations about hospitality services etc. But in India, Hospitality business has to deal with a wide variety of clients even among locals.

1.3.2 Foreign tourist

In the Tourism industry 'In-bound tourists' are foreigners visiting a particular country. It is a good idea to train the work force in the service industry to become more sensitive to the needs of these guests. Training is also pertinent in the area of etiquettes and fluent communication skills and also certain foreign languages.

It is important for the staff to understand that along with promptness the service standards expected are quite high. The 'Atithi Devo Bhava' policy of India Tourism Development Corporation reflects the true image of our traditional values about hospitality.

1.4 Dynamics of the industry

Changing Consumers:

Today, consumers adopt variety of identities and have developed varied tastes. This presents a lot of challenges to marketers in organisations in the areas such as consumer needs, customer orientation, product image, perceived value.

According to a recent study, it has been identified that the new millennials who form a major part of consumers, like to stay in places which understand their needs of being in the midst of like-minded people, feel the need to be connected and want to be a part of the experience rather than being pampered with the frills and fancies of traditional service. The report has also underlined the factors which have brought these dynamic changes as, rising affluence, globalisation and Technological changes.

Mike Bernstein, Director of Media and Communications for Darden Restaurants, Italy, characterises the "affluent attitude" of today's consumer as a major trend. "Consumers feel entitled to be treated as the company's best customer." He says. "and that's a challenge. Every customer wants to be recognised — not left waiting — and be treated with respect and caring." That sense of consumer privilege also is responsible for the trend toward more menu customisation at restaurants.

1.4.1 Growth drivers

Growth of the hospitality industry:

As per the report of the World Travel and Tourism Council, in 1997 the hospitality industry was the world's largest industry with approximately $3.8 billion in gross output and an expectation of $7.1 trillion by the year 2007 (Ricci, 2004). Globally, the hospitality industry has grown even more substantially since the 1960s, due to the availability of high-speed transportation, increasing presence of inexpensive technology, and individuals' on-going desire for travel experiences (Angelo & Vladimir, 2001; Walker, 1999).

Technological enhancements permitted faster, further, and less-taxing modes of communication and travel. Hence, Travel and Hospitality flourished in all corners of the globe. The 1960s and beyond saw hospitality truly identify itself as a viable career alternative. In the late 1990s, the travel and tourism industry directly generated over 7.5 million jobs. An additional 9.4 million jobs were supported by indirect and induced sales, resulting in a total of 16.9 million jobs. To meet consumer demand, employment in major travel and tourism sectors was forecast to grow more than 21% between 1996 and 2006. Even with the economic downturn of early 2001 and 2007 and also the devastating effects of the September 11, 2001 terrorist attacks on the World Trade Centre in New York City, U.S., hotels have soon rebounded and shown growth. The tourism and hospitality industry is bound to get affected from such changes.

The information intensiveness of the tourism and hospitality product, the increasing sophistication and needs of guests and travellers as well as the penetration of ICT in all aspects of business operations and strategy (Sigala, 2001) are intensifying the shift of the industry towards the growth economy.

1.4.2 Challenges

An article published by HVS, India, (September 2013) listed a number of challenges faced by Hotel owners in India. Some of them are mentioned below.

Funding Related Challenges:

- Ego-driven spending on product in escalation of development costs, making loan repayment difficult.
- Lending terms by the banking sector are not investment-friendly.
- Innovative ways in which capital requirement can be structured are limited.

Development Related Challenges:

- Government approvals and licenses are several and non-uniform, causing loss of time and money.
- Land cost is very high, making it necessary to create more revenue-generating space.

- Absence of infrastructure status that is free of riders for the hotel industry

Human Capital Related Challenges:

- International brands are not investing in hotel education in the country.
- Career development opportunities for employees within a hotel are few.
- Operators do not take adequate ownership of training quality.

Operator Related challenges:

- Performance clause in management contracts typically protects the interests of the brand making it nearly impossible for the clause to be effected.
- Owners are seldom informed and involved in hotel operations.
- Hotel owners in India enjoy less favourable management contract terms in comparison to their western counterparts.

1.5 Hotel Classification

The global size of the hotel industry is not as easy to quantify as one might imagine. Data on the size of the global hotel market is scarce, subjective (with regard to what constitutes a hotel) and is only published with relative infrequency outside the US. There are also some factors that cloud the issue:

- The hotel industry ranges from very small privately owned family businesses to major international groups with over 600,000 rooms.
- The industry covers the whole of the globe from the US to the smallest of islands.
- There is no official definition of 'hotel' nor is there an internationally recognised grading system.
- Countries each have their own systems of quantifying the industry and grading it.

Hotels are an important component of the tourism product. They contribute in the overall tourism experience through the standards of facilities and services offered by them. With the aim of providing contemporary standards of facilities and services available in the hotels, the Ministry of Tourism, Government of India, has formulated a voluntary scheme for classification of operational hotels which will be applicable to the following categories: Star Category Hotels and Heritage Category Hotels.

1.5.1 Star category

The Hotel and Restaurant approval and Classification Committee of Government of India inspects and assesses the hotels based on the facilities and services offered.

- Hotel projects are approved at implementation stage.
- Operational hotels are classified under various categories.

The sub-classes include, 5-Star Deluxe, 5-Star, 4 Star, 3-Star, 2-Star and 1-Star hotels

The various considerations for classification are location, use of land, eco-friendly measures, accommodation and restaurant facilities, décor, services and other facilities such as swimming pool, indoor and outdoor games, gym, spa, and shopping arcade.

1.5.2 Heritage hotels

For the hospitality industry players, old classics locations are of special advantage. The initial and on-going investment support is reflected in the material upkeep of facilities and the luxuries located therein. The particular themes adopted by the marketing arm of the organisation as in a theme restaurant also affect other major decisions (Wikipedia).

'Heritage Hotels' cover running hotels in palaces/ castles / forts / havelies / hunting lodges / residence of any size built prior to 1950. The facade, architectural features and general

construction should have the distinctive qualities and ambience in keeping with the traditional way of life of the area. The architecture of the property to be considered for this category should not normally be interfered with. Any extension, improvement, renovation, change in the existing structures should be in keeping with the traditional architectural styles and constructional techniques harmonising the new with the old. After expansion / renovation, the newly built-up area added should not exceed 50% of the total built-up (plinth) area including the old and new structures. For this purpose, facilities such as swimming pools, lawns etc., are excluded.

The sub-classification includes categories such as Heritage Grand, Heritage Classic & Heritage Basic. These differ in appearance, décor, number of air-conditioned rooms, variety of cuisine served – traditional and continental, and the additional facilities such as Swimming Pool, Health Club, Lawn Tennis, Squash, Riding, Golf Course, provided the ownership vests with the concerned hotel.

Apart from these facilities, credit would also be given for supplementary sporting facilities such as Golf, Boating, Sailing, Fishing or other adventure sports such as Ballooning, Parasailing, Wind-surfing, Safari excursions, Trekking etc., and indoor games.

1.6 Segments

The Tourism sector has several segments and sub-segments depending on the purpose of travel. All the requirements such as accommodation, travel arrangements and other services etc., differ among these segments.

1.6.1 Business

The business of MICE tourism (Meetings, Incentives, Conferences & Exhibitions) holds enormous potential for any country. It is estimated that a person travelling to a country for a conference or convention spends anywhere between four to eight times more than a normal leisure traveller. They spend more on food and on business centre services. Many foreign delegates do plan leisure tours to some of the prominent spots in the country. India is in a continual process of upgrading its MICE facilities.

1.6.2 Budget

Budget traveller forms a big portion of the clients coming to a travel agency. There should always be economy tour packages available for them. The staff should be able to suggest ways to further cut down costs wherever possible. Many organisations offer loan for travel thus making even the foreign tours within the reach of common people. An efficient travel agent offers all services such as travel documentation, booking for travel and accommodation arrangements, forex, etc. This is like one-window facility and a great convenience to the clients.

1.6.3 Leisure

Most of the people associate mainly 'Leisure travel' with the term 'Tourism' though now there are several forms of alternative tourism well acknowledged. It's said that Indians prefer a well-packed tour with maximum places of sight –seeing, shopping, visits to gardens, museums, religious places and all. Many of them try to economise on travel, accommodation and meals. Whereas, foreigners enjoy relaxed schedules with sufficient time for activities picked and chosen well in advance. They like meal timings to be respected and proper meal arrangements. They do not want to visit each and every tourist spot in a place but only the few most important ones.

1.6.4 Pilgrimages

People of all ages, individuals, families and other groups go on pilgrimage in our country. Due to the unique cultural history of India one can find a variety of pilgrimage related places and activities here. Pilgrimage is usually a seasonal activity and brings bulk business for the hospitality industry.

1.7 Overview of Hotels, Motels & Resorts

A Hotel or Inn may be defined as an establishment whose primary business is providing lodging facilities for the general public, and which furnishes various services such as food and beverage, housekeeping, conference and banqueting etc.

The term motel is a contraction of motor hotel. It is a lodging facility that caters primarily to guests arriving by automobiles. Early motels often provided parking spaces near guestrooms, but that has changed in recent years as motel owners and franchisors have become more aware of guest security.

Motels may be located in any setting, but are usually found in suburban or roadside areas. They became especially successful in the 1950's and 1960's with the development of the inter-state highway system in the US. Many motels are two-story or low-rise buildings located near major highways. Pool areas with shrubbery, trees, and children's playground etc. are also provided.

Resorts are mainly for vacationers and are also useful for MICE tourism. These hotels are usually located in the mountains, on an island, or in some other exotic locations away from cities. These hotels have recreational facilities, scenery, golf, tennis, sailing, skiing and swimming. Resort hotels provide enjoyable and memorable guest experiences that encourage guests to repeat the resort.

1.8 Benefits of Hospitality industry

Hospitality and Tourism Industry is one of the largest industries of the world creating millions of jobs every year. The facilities once in place can influence many people to travel to various destinations within their home country and also abroad. Thus it is a major contributor to a nation's economy.

1.8.1 Society

Hospitality and Tourism are important and in some cases vital for the economy of many countries, such as France, Egypt, Thailand, and many island nations, such as the Maldives, and the Seychelles.

When people of different origins meet they learn about each other and cultural exchange can take place. This is a small step towards world peace.

1.8.2 Other industries

People travelling away from their homes require a variety of goods and services. Most of them like to collect souvenirs in the form of locally made handicrafts, textiles, food and other products. Thus hospitality and tourism directly and indirectly create business opportunities for the other industries.

Alternative forms of tourism such as Medical tourism, Agro-tourism, Adventure tourism etc. give rise to demands for specific goods and specialised services. Thus many other industries thrive on the clientele brought by hospitality and tourism industries. There is a great deal of opportunities for self-employed individuals as well, such as craftsman, tourist guides, folk artists etc.

1.9 Industry Business Structures

A hospitality unit such as a restaurant, hotel, or even an amusement park consists of multiple groups such as facility maintenance, direct operations (servers, housekeepers, porters, kitchen workers, bartenders, etc.), management, marketing, and human resources.

Competition and usage rate:

For the hospitality industry, 'usage rate' or its inverse 'vacancy rate' is an important variable. Every businessman would wish any productive asset to be in use as much as possible (as opposed to having to pay fixed costs while it isn't producing), so do restaurants, hotels, and theme parks. They seek to maximise the number of customers they "process" in all sectors. This leads to formation of services with the aim to increase usage rate provided by

hotel consolidators. Information about required or offered products is brokered on business networks which are being used by vendors as well as purchasers.

The most important thing is the characteristics of the personnel working in direct contact with the customers. The authenticity, professionalism, and actual concern for the happiness and well-being of the customers that is communicated by successful organisations is a clear competitive advantage. (Wikipedia)

Hotels are classified in a number of ways such as, location of the hotel, number of rooms, Types of service, quality and number of facilities provided to the guests, length of stay of the guests, target markets, etc.

Ownership and affiliation provide another means by which to classify hotel property. There are two types, one is Individual / independent hotel and another is chain hotel.

Independent Hotels: They do not have identifiable ownership or management affiliation with other properties. That means these properties do not have any relationship to another hotel regarding policies, procedures, marketing or financial obligations. Example for the same would be family owned and operated hotel that is not following any corporate policies or procedures. The advantage of an individual property is its autonomy. An independent hotel however does not get the advantage of vast advertising exposure or management insight and consultancy of an affiliated property.

Chain hotels: this kind of ownership usually imposes certain minimum standards, rules, policies and procedures to restrict affiliate activities. In general the more centralized the organization, the stronger the control over the individual property. Some chains have strong control over the architecture, management and standards of affiliate properties. Others concentrate only on marketing, advertising and central purchasing.

1.9.1 Owned facilities

Here the owner and manager of the hotel property is the same hence it is an autonomous unit.

1.9.2 Managed facilities

Some owners prefer to have an MOU with another company to manage the hotel business. Here the owner may be member of the policy making body, hence, has some say in the major decisions.

1.9.3 Leased / licenced facilities

Certain properties are leased out for specific period to a particular company for the purpose of running a hotel. Here the owner does not have any say in the day-to-day business matters.

1.9.4 Alliance

Hoteliers have their associations / federations working at various levels from local to global for discussing common concerns and finding solutions.

Hospitality industry in India is evolving and is trying to attain the level of sophistication like that of the Western hotels. The entry of several international brands in India during the last decade has helped the hotel owners to adapt to the changing environment. The new age hotel owners are a lot more aware, well-travelled and conscious about their commitments and rights. They are members of their professional bodies where discussions happen for the betterment of the business. Hotel owners are open to new ideas and want to train their personnel to be successful in their endeavours.

CA Payal Agarwal

Impact of Technology on Hospitality Industry

Background and what are we trying to achieve?

Hospitality industry in India is expected to have a high growth rate in the near future and would require investment on technology to be able to support the growth and provide effective products. Pro-active improvements by the government in licencing and implementing developmental policies will further facilitate the growth of the hospitality industry, it is expected that the industry will witness strong performance and India may become a much improved competitor in the global arena.

But before we delve deeper into the future of technology in hospitality industry, let's understand the impact of technology till date on business at large, customer expectation and experience.

Impact of Technology

Recently more hotel brands are jumping on the "tech bandwagon," providing guests with technological advances to alleviate the stress of travel. It is innovating quickly, and swiping through menus on a tablet or controlling the temperature of your suite using an iPod. Guests are able to text or e-mail their exact preferences in advance through their mobile device so that rooms are set up to their requirements upon arrival. They are able to request a room on their preferred floor, temperature and lighting are set to their required specification, music chosen for a particular ambience, a cold drink waiting and perhaps even a hot bath already run for them.

In case you think that all this sounds far-fetched for India, then you're behind the times. We're already seeing these kinds of uses for technology in hotels and restaurants here. Radisson Blue, ITC Grand Chola, Sheraton Bangalore Hotel at Brigade Gateway, etc. are some of the examples.

Hence, IT has significantly changed the way the hospitality industry plans, controls and manages operations.

Customer Experience: Use of self-service technologies has grown considerably, especially in the areas of self check-in, in-room check-out, and foodservice kiosks. Wireless technologies have also experienced an unprecedented growth despite the rising concerns about security issues. Some of the most significant IT applications involve the use of mobile handheld devices, such as personal digital assistants (PDA), tablet PCs, and cellular phones. Starwood has partnered with Swedish lock manufacturers Assa Abloy to develop a feature that lets guests use an app instead of a key or card to enter their rooms. The app can be used for making a booking, or looking up information about a hotel and the points of interest nearby. At restaurants like Hai

Bao in Mumbai, the entire menu is presented on an iPad - you can swipe through the items, see pictures and read descriptions, before ordering.

Business Operations: Beside customer experience, the impact is also seen in bringing in the operational efficiency, it has impacted both front-of-house and back-of-house staff in a positive way. Many electronic components are currently used in hotels to make work easier for employees and reduce cost. E.g. Energy management systems (EMS) have aided many hotels in reducing energy bills. A motion sensor that is placed in guest rooms can detect when the guest has left, which then essentially shuts the room down (lights, television, air conditioning) saving energy and saving costs.

In this day and age, there is a technologic device or software used by a device for every operation in the hospitality world, such as reservation systems, security cameras, point of sale systems, property management systems, mobile communication, meeting matrix, energy management systems, key card encoder, etc. By incorporating the use of such devices into the workplace, it has changed the way it conducts business while saving time and money as it dismisses many time consuming tasks.

Integration of services with others within the travel industry is also being looked upon to increase the sales / revenue. A combination of offers which include Hotel + Airfare / Railways + Cars + local entertainment. This is to provide one shop combination to the travellers without having any hassle of multiple bookings.

Social Media Revolution: Another important factor is that technology has brought about a social media revolution which is greatly affecting the business. For the first time in history, anyone can give a feedback of their experience which would be shared with people from all over the world simply and easily from home. Using Facebook, Twitter, Travelocity and other social networking websites, people can easily give feedback which can positively or negatively affect a business depending on the type of feedback given. Thus, businesses have no choice but to provide the best service possible as guest experiences have become more transparent. Hospitality industry has to invest in resources that are responsible to monitor feedback through social media and take appropriate action to resolve negative feedback, if any. Customers' feedback through social sites are being taken very seriously by the Industry.

Online Sales Portal: The Internet remains the primary channel through which guests reserve at hotels. Yet other channels are growing in importance. Faced with a proliferation of communication channels, hospitality industry will need to determine how to most effectively become relevant to consumers. With multiple channels and consumers often switching among them, hoteliers must tightly manage consumer experiences across all channel investments to maximise value. According to a survey published by MCD, 70% of travellers, a hotel's website and app impact their decision to book a stay. Travellers often feel that a hotel's digital offerings reflect what the experience will be like at the hotel itself.

Online sales portal also provides transparency in the pricing across the hotels. Guests can now compare prices and services offered to make the best choices. There are online portal like Make Mytrip, Cleartrip, Trip Advisor which provide analysis of hotel pricing within a particular segment.

As technology continues to evolve, consumers expect companies across all industries to create and deliver a relevant and personalised experience. Technology developments will continue to evolve away from mass marketing and products and in the direction of personalisation and individual choice. An integrated, full self-service website that serves as a direct portal for the guest. Consumers go to the Web for all aspects of commerce and communication. Accordingly, they expect hotels to offer websites (in the local language) that allow them to make and modify reservations;

book on-property or near-property services such as spa appointments, entertainment and dining/ room service; facilitate purchase of amenities or merchandise; and print or e-mail copies of bills.

Hospitality Response and Technology Trends

Travel brands have been slow adapting to new technologies because they are concerned it will negatively impact longstanding business models. Hotels have long relied on outdated loyalty programms, which sought to differentiate themselves from their competitors while offering perks to their customers. The original goal was to create an emotional bond with customers to keep them loyal.

It's not working.

According to Magnani Caruso Dutton (MCD), a digital customer experience agency for several of the world's most recognised brands, interviewed 1000 U.S consumers evenly segmented as business travellers, leisure travellers and family travellers about their hotel digital experiences, expectations, and needs. What they discovered is that a solid digital experience will increase brand loyalty, and consumers want to use mobile technology to customise their stay.

If travel brands want to stay competitive, they need to step up their efforts in creating a memorable experience that is in line with the average traveller's digital expectations – mobile tools, seamless integration, and personalised travel related data that is readily accessible.

The tremendous pressure from accelerated growth in technology and customer expectations will drive the hospitality industry to rethink the business model of operation. It will not be an option to consider but an imperative. The savings and improvements that technology can deliver mean that managers and directors really need to keep one eye on the following trends:

1. **Cloud computing** – Given the strong pressure on organisation to reduce cost, there will be shift from the held on premise to software as a service. This will also help the hospitality industry to implement new technology faster resulting in immediate and obvious benefits in obtaining time to value.
2. **Integration** – As customer expectations evolve and organisations try to cater to ever more complex needs there will be a greater requirement to integrate various lines of services catering to customer requirements.
3. **Globalisation** – As international trade and business expand, there is no question that international links will become more important for the hotel industry. This means that the technology systems in use – especially those in large chains – must account for the global perspective.
4. **Personalised systems** – Customers expect their experience within a hotel to be totally personalised to them: from the welcome message on the television screen and food preferences to additional services such as personal training or flowers in the room. This quickly creates a huge range of valuable customer preference data that needs to be fed into the hotel management system in order to deliver a personalised, high quality service for each return visit
5. **Smartphones** – It's amazing how, in a few short years, smartphones have changed the way businesses interact with us— bringing us better service and more convenience in our everyday lives. Companies are in the race to significant opportunities to better leverage digital (especially mobile devices) to increase customer satisfaction. Today's travellers are increasingly accustomed to using their smartphones to make their travel experiences better. But, many of these guests are disappointed when the hotel's digital experience doesn't measure up.

In fact, travellers rate the hotel industry below several other major industries (including banking, retail, airlines and restaurants) when it comes to leveraging smartphone capabilities to enhance their experiences.

As per the survey done by Deloitte for Hospitality 2015, investment by hospitality industry in Information Technology have not kept pace with the other industry and are behind time. According to the survey, one of the game changers will be to develop a multi-channel approach with increased use of smartphone technology

Technology downfalls

We all love new technology, especially when we have access to it free while staying at a hotel. However, despite the fact that in-room technology makes guests' stay nothing less than an exceptional experience, and makes hotel staff jobs nearly effortless compared to the past, there are some definite downfalls. Using electronic components has also made us much less interactive with the real world. Studies from the University of Gothenburg have shown that heavy use of technology has been linked to depression, sleeping disorders, stress and mental health issues.

From the hotel side of things, there are also issues regarding the use of technology in business. While doing anything online, hotel staff must be aware of copyright issues and security. All hotels use guest credit cards for either payment or authorisation, so credit card theft is another critical reality hotels could potentially face, so it is crucial that the hotel meets all of the Payment Card Industry Compliance (PCI) requirements in order to avoid this circumstance. Faceless. Globally, there are regulations which a company needs to comply with respect to data security. Any compromise on the data security of customer personal data may lead to huge penalties and goodwill issues.

Conclusion

Future will be a far more complex and different world than we live in today. The corporate landscape will be more advanced, more complicated, more competitive and more dynamic. Technological change will only accelerate. Rapid globalisation will continue to occur. And shifting demographics and workforce behaviours will shape the future.

By 2025, hotel rooms may include features such as alarm clocks to wake up guests by increasing the light in the room, rather than emitting a noise, giving a calmer start to the day. Floors may have built in sensors to light the way for guests, to avoid the midnight stumble to the bathroom.

Televisions may work via voice recognition to answer any questions guests may have, avoiding the obligatory call to reception to find out what time breakfast is served. Instead of keys, doors may be unlocked via mobile phone interface. All rooms are likely to be fitted with iPod docks, broadband, laptop docking and universal phone chargers to make the stay as comfortable and as functional as possible.

Other innovations may take a little longer, such as windows that turn into televisions at the touch of a button; beds that rock guests to sleep; or multi-functional pillows with built-in speakers and wireless capability so guests can make that midnight conference call without having to find their phone.

What works today won't work tomorrow. Hospitality Industry needs to think more strategically and analyse information faster. Need to be innovative and create opportunities for sustainable growth. In reality, the new normal is continuous change – not the absence of change.

CA Ashwin Mehta

Financing of Hospitality Projects

I. GENERAL

The financing of hospitality projects is a specialised lending and, though one might hear names of several lenders, not all of them are geared up to do the same.

The success of a hospitality venture is dependent on various factors such as; city in which it is located, location of the hotel within the city, occupancy levels, category of the hotel (regular, 3/4/5 star, deluxe/luxury, etc), who is the operator (brands like Taj, Oberoi, ITC, Marriott, Hyatt, etc.), amenities, etc. Further it is dependent on the economic growth of our country and also the global economic situation.

In the last few years India has seen several new hotels which have come up in different parts of the country and most of them are operated by International brands though the hotels are owned by various Indian companies, predominantly real estate companies. There are several more hotels under construction which are likely to be operative in the next 2/3 years and these will further add to the branded rooms inventory.

It is expected that most of these hotels will do well as India has very low inventory of branded hotels compared to USA and China. Also it is expected that if our GDP improves the hotel room demand will increase tremendously and there is enough scope for growth in this sector.

It is expected that the Indian government and several State governments are likely to promote tourism activity as it is one of the largest employment generator and has a cascading effect on the economic growth. Already many states have successfully promoted tourism and the results are visible.

While the outlook for the sector is very positive as per industry experts, the current scenario is of gloom all around with lenders shying away from funding new projects and quite a few existing borrowers are finding it difficult to fulfil their financial obligations towards lenders.

With this background in mind and practical experience of having raised monies for several projects I am attempting to give an over view of the process of raising funding for hospitality projects.

II. VARIOUS COST COMPONENTS OF HOSPITALITY PROJECT

2.1 **Land Cost**: The land is the most important ingredient to put up a hotel project and suitable land at the most desired location is the key to ultimate success of the project. All of us know that in the past few years the cost of land has gone up phenomenally and it has become one of the major costs.

Generally the funding for the land is not available from banks. However, the amount

spent on acquiring the land is counted as promoter's contribution if he has paid for the land. In effect it is bringing your contribution upfront to that extent.

In most of the states across India higher FSI is available on land on which a hotel is constructed.

2.2 **Construction cost:** This is the cost spent on construction of all the buildings in the project and landscaping.

2.3 **Furniture & Fixtures:** Depending upon the class of the hotel to be constructed this cost will vary and invariably results in cost overruns.

2.4 **Plant & Machinery:** Items such as HVAC, DG sets, Plumbing & fire fighting, Electrical, Lifts & elevators, Kitchen equipments, laundry set up, Health club, Swimming pool, etc., are an integral part of the hotel project and cost a huge amount of money.

2.5 **Information Technology:** Every good hotel requires world class information technology like internal communications system and equipments, software for managing the hotel and reservation system, etc. and are quite expensive.

2.6 **Consultant fess:** Setting up a hotel project is a complex process and requires services of various experts like; municipal architects, design architects, concept consultants, interior designers, MEP consultants, structural consultants, kitchen consultants, HR consultants, finance consultants, etc. These costs can go as high as 3 to 5% of the project cost.

2.7 **Preoperative expenses:** It takes at least 3 to 4 years to complete a hotel project after commencement of construction and the preoperative expenses are incurred even before that and during construction.

2.8 **Interest during construction:** The interest to be paid on loans taken for the project during the construction period is an integral part of the project cost and many a times this is the project killer especially when project gets delayed.

2.9 **Contingency:** A reasonable amount is to be provided for contingent expenses.

III. TYPES OF LENDERS

3.1 **Public & Private sector banks:** These institutions are the major source of debt (loans) for hotel projects.

3.2 **Private Equity/Venture Funds:** Theoretically they are one of the sources of equity funding over and above the promoters' own equity. Many a times they enter the project at a very initial stage (e.g. land acquisition stage). In reality this option is not very much in vogue as there are hardly any PE funds active in this sector.

3.3 **Non Banking Finance Companies (NBFC):** Though these companies actively lend to the real estate sector, most of the time they do not lend to hotels. These companies have a lending horizon of 3 to 4 years whereas hotels require debt for 10 to 15 years.

IV. TYPES OF FINANCIAL FACILITIES

4.1 **Term loan:** This is the main type of financial facility availed by all the projects and is mainly availed for 10 to 15 years.

4.2 **Buyer's credit:** This facility is availed as a sub limit from the main term loan when there is an import component in the project.

4.3 **Letter of Credit:** This facility is availed as a sub limit from the main term loan when there is a need to issue letter of credit for Indian purchase or for foreign purchase.

4.4 **Bank Guarantee :** This facility is required over and above the term loan facility as bank guarantees are required to be submitted for various purposes including for availing imports at concessional custom duty.

4.5 **External Commercial Borrowing (ECB):** This is another form of term loan and is to be availed in foreign currency and is regulated by RBI. This should be availed only in a hotel project which is likely to generate revenues in foreign currency as the lenders are otherwise not comfortable in lending. Also there are restrictions on the tenor of the loan, etc. While the rate of interest is lower for ECB, the lenders insist on hedging the risk and therefore, it makes it almost as expensive as rupee loans.

4.6 **Working Capital facilities:** On the hotel becoming operative it may require working capital limits against its stocks and debtors and these are sanctioned by banks either at the time of initial sanction or at a later stage.

V. LENDERS' REQUIREMENTS & CONSIDERATIONS

5.1 **Promoters' track record:** One of the prime considerations in deciding to lend monies on a project is dependent upon the financial strength of the borrower and conduct of his existing accounts with the banking system. As per banking norms banks have to ensure that the borrower is not a defaulter in any of his existing or past borrowing. Also bankers will call for Credit Report from existing bankers.

On being satisfied about the track record of the borrower and resourcefulness of the promoter, the bank will proceed to process the application for the project loan.

5.2 **Legal due diligence :** The bankers will ask for the title search report of the land on which the project is to be constructed from their empanelled solicitors and such report will also specify that the subject land is mortgageable.

Also the bankers will ask for a Registrar of Companies search report to cross verify all the charges/encumberances created by the company till date and for other compliances. Also bankers study the hotel operating agreements and ensure that some of the clauses of those agreements do not hamper their security creation or collection of dues from the project.

5.3 **Project feasibility study:** The bankers have empanelled various experts to carry out a feasibility study for the project. This feasibility study has to be conducted before hand and submitted to the bank during the course of processing the loan application. This study generally covers information and analysis of location/ city specific demand supply assessment for the hotel project, expected Average Room Rate (ARR), occupancy levels, product type which is likely to succeed at a particular location, revenues from food & beverages, banqueting and other services, statistics of the visitors inflows in the past, justification for absorption of new rooms of the project, projections for next 10 to 15 years, estimates of project cost, etc.

In case the project is big, the lenders will also call for feasibility reports from very specialised firms who may or may not be empanelled with them.

5.4 **External Credit Rating (ERA):** In the current scenario many lenders are insisting on an ERA at the time of processing the loan application as against the earlier trend of getting ERA done post sanction of facilities. The ERA is done by credit rating agencies.

5.5 **Valuation & lenders' engineer:** Normally for a hotel project the lenders will appoint a Valuer to do the valuation of the project including land at the time of initial processing and thereafter they monitor the project through Lenders' engineer who prepares the report of physical work done, cost estimates of the work done, etc.

Many a times bankers obtain cost validation certificate from the Lenders' Engineer

to verify the cost estimates given by the borrower.

5.6. Security: The entire project consisting of land, building, equipments, plant & machinery, furniture & fixtures, electrical installations, etc. is mortgaged by banks as primary security.

Sometimes banks ask for additional security (collateral) which can be any other real estate, shares and stocks, any other valuable assets.

Also bankers will insist for a personal guarantee of all the promoters and also corporate guarantee of the holding company or a group company where the project is put up in a SPV.

5.7 Project report, etc.: For availing the project loan one has to submit several documents like; Detailed Project Report, last 3 years audited accounts of the applicant company, last 3 years Income-tax Return copies of all the directors, KYC documents of the applicant and all the directors, land papers with all the chain documents, copies of all the permissions/approvals, financial projections for 10 to 15 years, justification for each assumption, approved plans, concept plans, etc.

5.8 Other aspects: The lenders want to be doubly sure of the resources of the borrower. This is one project where debt: equity ratio is preferred at 1 as most of the hotel projects are able to generate revenues only in the long-term and higher interest burden can make the unit sick unless the promoters are resourceful.

Also most of the lenders will insist that at least a sum equivalent to soft costs (consultant fees, interest during construction, preoperative expenses, contingent expenses, etc.) and land cost is brought in by promoters as their equity.

Also bankers will put a condition that unsecured loans from promoter group, though treated as quasi-capital, cannot be withdrawn till the loan is fully repaid.

Many a times bankers insist on promoters bringing pure equity as their contribution as against quasi-capital.

The lenders also see which local or international brand is going to run the hotel as most of the owners do not have experience to run a hotel unless they are local chains.

VI. PRECAUTIONS TO BE TAKEN BY BORROWER

6.1 Debt Equity Ratio: Most hotel developers come from a real estate background and are used to high risk, high gearing, etc. and naturally expect high debt even on a hotel project.

The most important aspect to be noted is that the source of revenue for hotel project is from room sales, food and beverage sales, banqueting, etc. and the quantum is not very high even if the hotel is doing very well.

In most of the projects that I have seen the debt equity ratio was proposed as 1.

There is no formula to arrive at a prudent debt equity ratio, but I suggest that one must work out a figure that project can bear over the tenor of the loan and arrive at the debt component.

6.2 Return on Equity vs. Return on Ego: While I do not want to be sounding harsh on the promoters of the hotel projects my feeling is that the decision to put up a hotel project is most of the time driven by promoters Ego rather than financial returns one can expect from the project. Many promoters perceive hotels as a steady income yielding asset and huge valuation a few years down the line.

It is pertinent to note that the hotel project even if it is a run-away success will still

take at least 12 to 15 years to pay back assuming all other external factors are favourable.

One needs to carefully consider a decision of putting up a hotel and must earmark sufficient resources not only for the project but also for supporting the operations of the hotel till it stabilises and starts generating cash surplus.

I also feel that only promoters with deep pockets should venture to put up a hotel project as it is highly cyclical and the revenue generation may not happen as per the projections, whereas the interest payments and repayment of principal amount has to be done strictly as per the repayment schedule of the lender.

6.3 Cost estimates: The promoter has to plan and estimate several things like cost of the project, construction and completion time, time required for approvals and permissions, etc.

Most important is the cost estimate. The hotel project typically takes 3 to 4 years to complete assuming all the permissions and resources are in place. The project involves lot of designing and interior work where the trends change very fast and also the costs are rising year after year. This also involves imports for which amount is to be spent in foreign currency. All of the above put together invariably result in cost overrun. Also the brand operator may change the specifications and this may involve additional cost.

The cost overrun is to be funded by the promoters as banks are very hesitant in funding extra amount as the project cannot take the additional interest and repayment burden.

Normally the hotel cost is also calculated as per room cost and this is one single norm which gives indications of several factors such as; whether one has over/ under spent on the project, whether the current Room Rates support such cost. Industry experts expect a room rate of ` 1000/= per room per day for a spend of ` 10 lakhs per room and if one is spending ` 1 crs per room, an asking rate of more than ` 10000/= per day per room is required to make a profit. So if one has spent let us say ` 1 crs per room and is getting ` 7000/= per room per day then chances are that the project will lose money.

Also lenders calculate debt per room to assess whether the project is viable or not.

6.4 Project implementation & COD: The project has to be completed in a particular time frame based on a practical implementation schedule. Also one needs to understand that the promoter needs to declare COD (commercial operation date) and this date is recorded by the lenders. The project needs to achieve this date otherwise, if the project is still not complete after a grace period of 6 months, banks will have to declare the project as a technical NPA in spite of the fact that there is no financial default at all. This is as per the RBI guidelines.

So our suggestion is that promoters must start the construction only after obtaining all possible permissions which are required to completely construct the building. There is no relief from RBI for COD not achieved because of non receipt of timely approvals. E.g. in the recent past MCGM had stopped giving approvals of building plans as they

were coming out with new development control rules and several projects in Mumbai got stuck for a period of about 12 months, but no borrower got a relief on this ground from lenders and they missed the deadlines of COD.

Having said the above, RBI has recently come out with a circular which gives some relaxation in the above situation as a one time relief.

Also there are very efficient project management companies available to execute the project and one should think of hiring them for achieving timely completion.

6.5 Upfront equity infusion: This suggestion looks harsh on the promoters but it helps in several ways as follows:

6.5.1 It helps in complying with lenders sanction terms of bringing a particular portion of promoters' contribution upfront and increases confidence level of the lenders.

6.5.2 It reduces the interest expenses during construction as initial construction work is carried out with own money and bank's money is deployed at a later stage.

6.5.3 It helps in indirectly increasing door to door tenor of the loan as one can always get a sanction for the tenor from the date of first disbursement.

6.5.4 It helps in case of delays as COD can be tied up stating so many months from the date of first disbursement.

6.6 Tenor of the Loan: In any project loan the door to door tenor of the loan is very important and needs to be planned properly. Normally banks are giving 10 years tenor for a hotel project.

Please note that this is not at all sufficient and many hotel projects with this kind of tenor have faced problems of insufficient surplus to service interest and repay principal.

Normally a longer tenor of 15 to 20 years with a stipulation for accelerated prepayment in case of surplus is the ideal situation. But this long tenor is generally not available from any banks. though I have seen cases sanctioning 14 years tenor.

It is important to understand that banks are reluctant to sanction longer tenor loans not because of lack of willingness but because of the non availability of long-term funds to them resulting in asset liability mismatch (ALM) at their end.

6.7 **Repayment Schedule of the Loan:** One has to be very careful in drawing up repayment schedule for the loan over the loan tenor. Normally the lender will propose equal repayments.

One must first of all attempt to get a moratorium period of at least 18 to 24 months after the hotel becomes operative, so during this period only interest is to be serviced.

The repayments should be planned taking into seasonality of the hotel business. For e.g. higher amount can be repaid during peak tourist season from October to March and lower amount can be repaid during April to September.

Similarly one can plan for stepped up (ballooning) repayment. That is the instalment amount will increase in progressive manner. So initially smaller repayment and then it will increase gradually over the loan tenor.

6.8 **Selection of Brand Operator:** Unless a promoter is already a hotelier with long standing experience and established brand name, the bankers will insist on a tie up with reputed local or international brand for running the hotel. The choice of the brand is very important as each brand operator has a different way of working and all these contracts are for a period of 20 to 30 years and with stringent deterrence for removing them from operations.

So promoters need to be very careful in this selection and must hire the services of consultants who are experts in the field if they do not have adequate knowledge in this area.

VII. OTHER COMPLICATIONS

7.1 Refinancing of existing debt: There are several situations during the life cycle of a loan tenor which necessitates need for refinancing of loans. Given below is the illustrative list of such situations:

- Misunderstanding/discomfort with existing lender/s
- For extending the overall tenor of the loan so that servicing becomes easy
- Change in scope of work of the project and therefore, need for additional loans
- To come out of technical defaults with existing lenders
- To leverage a operative income yielding hotel project, etc.

Refinancing is a very difficult exercise due to lack of regulatory clarity, each bank's own system for take over/ refinance, reluctance on part of banking system to do such transactions.

There is a need to revisit this matter by the regulator and banks and bring in flexibility in refinancing deals, as on one hand hotel projects require long-term funds of 15 to 20 years which no bank can give due to their own asset liability mismatch (ALM) and on other hand short tenor lending invariably leads to difficulty to the borrower and the only alternative is to refinance.

In a developed economy there are separate loans available for the construction period which are meant to be refinanced by another set of lenders when the project becomes operative. This is much desired for India as well and is a long standing demand from borrowers and banks but not yet fulfilled by the regulator.

7.2 Restructuring of existing debt: When the project becomes sick due to several factors and is unable to fulfil its obligations of interest and/or repayment and the promoter also runs out of his resources but still can be revived by giving some concessions, the banks consider this option. In this option the borrower gets a tag of restructured account and it becomes extremely difficult for him to borrow even for other ventures. So unless a promoter feels that he is not able to fulfil his obligations, he should not go for restructuring his account.

CA Bhavesh Thakkar

Incentives and Subsidy

BACKGROUND

Tourism as an industry has always been modestly rated in the Indian context. Given the fact that tourism has significant direct and indirect potential for generation of employment; the recognition of tourism as an independent industry came in very late for our Government. If we study statistics around the ratios of employment in this sector to the total employment in the economy, we are ranked lower as compared to neighbouring Asian economies also, like Sri Lanka. The situation has improved in the past 5 - 6 years where conscious efforts have been put towards this sector with special focus to strengthening Infrastructure & Marketing fronts.

Campaigns like "Incredible India" display serious intent on the part of the state to put India & its cultural heritage on the world tourism map.

The state is now exploring various avenues to support the tourism industry comprehensively. Subsidies towards business interests form a very important part of this intent. Both the Central and the State Governments have been providing subsidies through various means to units in the tourism sector.

These subsidies can broadly be classified into three heads:

a) Cash Subsidy;

b) Exemption in relevant Government taxes;

c) Cost reimbursement resulting in savings.

There has been general lack of awareness of these subsidies owing to which tourism units have not been able to claim these benefits. Also, sometimes the procedure laid down to claim such benefits have been cumbersome for industries to actually take out time and claim these benefits.

Before we further the discussion, we need to understand, that a subsidy alone cannot determine the growth potential of an industry. Other defining aspects like physical infrastructure, facilities, marketing reach-out for awareness, also need to be in place, for making the industry favourable to the end-audience.

Let us first discuss the subsidies provided by the Central Government:

The basic framework of these subsidies has been laid down by the Ministry of Tourism, Central Government. There are some subsidies which are provided to other Government departments by Ministry of Tourism for advertising and promoting tourism. E.g., Ministry of Tourism giving financial assistance to Ministry of Railways for promoting tourism. Also there are subsidies available for institutes or trade associations, which fall outside the purview of this discussion. This article is tailored to cover the subsidies from the perspective

of the hospitality sector or unit, available to private enterprises.

CENTRAL GOVERNMENT SUBSIDIES

As discussed earlier most of the Central Government subsidies are in the nature of providing financial assistance to other Central Agencies like ITDC, ASI etc. for development of tourist infrastructure.

In the category of infrastructure development there is one scheme available for private parties or Public private partnerships along with State Government authorities which has been discussed:

I. Assistance for large revenue generating projects

Who is eligible?

It should be a project which is a tourist attraction or used by tourists or/and generates revenue through a levy or fee collected from visitors. E.g Tourist Trains, Golf Courses, Convention Centres, Theme Parks, Amusement Parks etc. *However the same is not an exhaustive list and the Ministry of Tourism would critically examine all the cases for the final approval looking at the impact of tourism.* ***However hotel and restaurant component would not be eligible for assistance under this scheme.***

The projects promoted by private sector or public private projects recommended by State Government will be eligible for the benefits.

Conditions to be fulfilled

a. The projects selected for assistance in this scheme will not be eligible to claim benefit under any other scheme for this component floated by Central or State Government.

b. A Special Purpose Vehicle (SPV) will have to be formed to meet with the prescribed guidelines as laid down for SPV, if there is private promoter.

c. Project appraisal report to be submitted should be carried out by an independent public financial institution with a willingness to finance the project.

d. The financial assistance to the project in case of private players will be released only through the SPV.

e. The quantum of subsidy will be determined by competitive bidding process and there may be exemption from bidding process if suggested by high level Committee of Ministry of Tourism. There is a need for clear cut and transparent guidelines being formed for the bidding process.

f. Minimum 25% of the project cost has to be a loan component.

g. The subsidy will be credit linked and will be disbursed in tranches as per the rules specified.

h. The scheme and disbursement needs to be monitored by the financial institution.

What are the subsidies?

a. Grant-in-aid for preparation of the project and appraisal report, to the extent of 50% of the actual cost, subject to maximum of ` 25 lakhs per project. So it can be seen that for preparation of project report, there is a substantial amount being granted. For large projects the cost of preparation of project report is very high and hence the subsidy needs to match the scale of the cost.

b. The subsidy under this scheme will be capped to ` 50 crores, subject to maximum of 25% of the project cost or 50% of equity contribution by promoters whichever is lower. The subsidy amount is substantial and would be of great help to large players who are planning to have substantial investment in this sector.

What is happening at the Ground level?

The statistics provided by the website of the Tourism Ministry throws some interesting results. The scheme was released in February 2013 which is more than a year ago. The number of projects sanctioned under this scheme are **"1" (ONE)** that too in the state of Manipur and the total amount

sanctioned till date is ` **10 lakhs** only. This really puts a question mark on the awareness level of the scheme for private players or even State Government authorities to as basic as, claiming the benefit. The Central Government in the budget of 2013-14 has set aside a sum of ` **1,282 crores** for this scheme.

As per RTI guidelines and applications made, at-least this data is available on Central Government website easily under the head PMIS (Project Monitoring Information systems) which provides us with all the data of the funds disbursed under various schemes. This is a commendable factor where the Central Government is being transparent to provide the details. **Surprisingly this data is not available in State Government website of Maharashtra. So we get no information of the effectiveness of the State Government schemes.**

So of all the Central Government schemes the above scheme is the only one available, for private sector turning to a substantial amount. There are smaller subsidies available to hoteliers and tour operators for sale-cum-study tours, Participation in trade fairs, study tours for promoting tourism but are not very popular or substantial. Also the conditions laid down are very typical like foreign tour needs to be carried out only by Air India or Indian Airlines which makes it practically very difficult to claim.

STATE GOVERNMENT SUBSIDIES

We will deal with the benefits available with the Maharashtra Tourism Policy in detail.

I. Period of operation

This scheme comes into operation with effect from 1st November, 2006 and shall remain in force for a period of **ten years** or until substituted by a new package scheme of incentives. Effectively this scheme will be applicable till October 2016 and considering current policing pace, the probability of a replacement policy until 2016, seems improbable.

II. Coverage

Tourism Projects in the private sector, state public sector/joint sector and the co-operative Sector but not in the central public sector will be considered for the incentives under "The Tourism Policy-2006". However it is very important to note that the proposed tourist facilities shall be open to all and shall not be confined to the exclusive use of any particular individual or members of any group or club or have any other such restrictions. So in some cases where rights of admission are reserved, it should be noted that the admission policy should be in line with the intention of the scheme.

III. Who is eligible

Eligible units: The following tourism projects shall be included as eligible units for the purpose of incentives under the Tourism Policy, 2006.

a. Hotels, Resorts, Health Farms, Health and wellness Spa
b. Motels
c. Service Apartments
d. Water Sports and Amusement Parks
e. Art and Craft Villages
f. Golf Courses
g. Camping and Tent Facilities
h. Aerial Ropeways
i. Convention Centres
j. Development of Hill Stations
k. Adventure Tourism Projects
l. Houseboats
m. Eco Tourism Projects
n. Museum and Aquariums
o. Any other projects approved

It can be seen that the list is quite exhaustive and the benefits are also substantial. The criteria as laid down for each category needs to be met. So if the scheme is known & understood by all, the benefits can be claimed, resulting in an overall boost to the hospitality industry.

The conditions and other covenants are nearly the same for the categories mentioned above. We would discuss the Hotel Industry in particular.

DEFINITIONS

1. Tourism Undertaking

"Tourism Undertaking" means a legal entity in the form of a registered company under the Companies Act, 1956, or a partnership firm, a Registered Trust or a legally registered co-operative society or an individual proprietary concern, engaged in or to be engaged in one or more tourism projects.

2. New Tourism Unit

A "New Tourism Unit" means a new tourism project set up for the first time by a tourism undertaking satisfying the following conditions:

a. The new project should have obtained a registration with the registering authority, as may be required after **this policy comes into force.**

b. The new project should have separately identifiable capital investment and it should not be an expansion of the existing project except as that provided in following point.

c. Expansion of an existing project will also be eligible for the incentives under this scheme provided that the existing tourism unit increases its investment in either its fixed capital, or in capacity by at least 50% of the gross fixed capital and capacity at the end of the last financial year.

The benefits of this scheme are available for both new and expansion units as well. There is a misconception that all benefits are available only to new units but in this scheme even expansion is treated as tourism unit and is eligible for benefits.

3. Eligible Capital Investment (What is included in investment)

The term "Eligible Capital Investment" means investment in capital assets acquired and **paid for** & shall include investment in:-

a. Land/area in effective possession.

b. Building (including administrative building and residential quarters).

c. Plant and Machinery, amusement rides/ games, air-conditioning equipments and other equipment including water sports equipment but will not include vehicles, furniture and fixtures, cutlery, crockery and utensils.

d. The cost of development of the site of the location of the eligible unit, such as fencing, construction of internal roads, landscaping etc.

e. Consultancy charges/feasibility report charges (not more than 2% of total project cost).

f. Installation charges.

g. The amount paid as non-refundable interest-free deposit to the electricity service provider.

What is not Included

a. Working Capital

b. Goodwill

c. Pre-operative Expenses

d. Second Hand Plant and Machinery

e. Interest Capitalised

f. Vehicles

g. Any asset with life span of less than 5 years

There are some points what we need to consider in the Fixed Assets Investment. Second-hand Indian assets is not included in Fixed Capital Investment but foreign second hand assets are included. Also the creditors are to be paid within the eligibility period. So fixed assets where the creditors are unpaid would not be considered as part of cost.

The operative period of this scheme is November 2006 to October 2016, so the investments

made only within this operative period will be considered as an Investment

There is also a beneficial provision for existing hotels who have not claimed any benefits in the earlier scheme. Such set-ups shall be allowed 75% of the project cost if they convert to atleast a three star rating category. But such benefit will be restricted to 3 years only.

On the procedural front the application has to be made within the prescribed time limit of completion of Initial effective step and Final effective step. So we need to understand the meaning of these steps.

Initial Effective Steps

a. Effective possession of land

b. Registration of the entity under Companies Act, Partnership Act as the case may be.

c. Submission of project report mentioning the category and incentive proposed to be availed.

d. Permissions from all concerned statutory and executive authorities.

e. Registration with respective tourism authority.

Final Effective Steps

a. Clearances from authorities, both Central and State for implementing the project.

b. Arranging of finance for the project

c. Acquisition of fixed assets at site to the extent of 10% of the total fixed assets.

d. Expenditure on the project aggregating to atleast 25% of the capital cost.

The application for these benefits is to be made to MTDC (presently at Mumbai, in Churchgate).

What are the benefits and what are they based on

The State of Maharashtra for this scheme has been divided into zones which is given in Annexure A to this study. The zones are based on the development index of the area. So lesser developed zone gets higher benefit and so on. Hence the benefit depends on the zone and the capital invested. There is a minimum investment which needs to be made to be applicable under this policy which is tabulated below. The investment is to be made within the time frame as specified from the date of registration of the unit.

Zones	Minimum Amount required	Investment period
A	` 1 crore	36 months
B	` 50 lakhs	24 months
C	` 25 lakhs	18 months

The benefits are available to the extent of 100% of capital invested or completion of the eligible period whichever is earlier. This needs to be understood by way of an example.

For this let us tabulate the benefits available zonewise which is bifurcated as Tax Benefits and other benefits:

I. Tax benefits available (In exemption mode)

Zones	Eligibility Period in years	Luxury Tax	Entertainment Tax/ Amusement Tax	Stamp Duty
A	5	50% exemption	100% exemption	50% exemption
B	7	100% exemption	100% exemption	100% exemption
C	10	100% exemption	100% exemption	100% exemption

Let us assume by way of illustration, the case of a Hotel set up in Zone A with an investment of ` 2 crores. Then the maximum amount of benefit eligible will be 100% of the investment which is ` 2 crores. This will be calculated

as total of all the three taxes mentioned above. So if the hotel collects ` 2 crores as total of the taxes in the third year itself, the exemption will stop from year four, though the eligibility period is 5 years ***(whichever is earlier).***

Please note that this benefit is in exemption mode and not a cash back subsidy. So the unit would be able to pass on this benefit to the customer and stay ahead of the competition.

The luxury tax in Maharashtra ranges from 4% to 10%.This is a very huge component of tax for which the benefit can be passed to the customer and be made cheaper vis-a-vis the competition. Even entertainment tax is substantial in Maharashtra, so exemption from that is very beneficial to the unit.

II. Other benefits

There are substantial other benefits also which add to the profitability of the unit and improve its cash flow.

a. **Electricity Duty Benefits**: If we analyse the power bill of any entity there is an element of electricity duty which is being charged in the bills. The rate of duty differs with respect to the end consumer. The rate of duty for commercial usage is 17% and the rate of duty for industrial usage is 9%. So normally a hotel will be charged duty @ 17% in its bill. But if we obtain eligibility certificate under this scheme the duty rate would be 9%. This is a substantial benefit available to a unit as the power bill reduces substantially.

b. **Water Tariff:** On obtaining the eligibility certificate the Industrial rate would be levied.

c. **Property Tax:** The holder of this eligibility certificate would be eligible for property tax rates at residential rates. *There is a wide gap between rates of commercial and residential units especially in cities like Mumbai.*

d. **Registration Charges and Permit Charges-** There is a concession available of 75% and 50% in payment of registration and permit charges respectively on sightseeing buses.

e. **Renewal of Licences**: There are various licences applicable to a Tourism unit like Shop Act, Eating Licence, food and drug licence etc. With this policy guideline the licences which need to be reviewed every year, need to be done every 5 years. *This provides a huge administrative relief as this is a time consuming process which can be avoided to be done every year.*

MEGA PROJECTS

As tourism has been conferred with the status of an industry, even larger investments in this sector would be eligible for benefits of Mega Projects. The investment limit for Mega Projects is tabulated below.

Zone	Investment in Crores	Employment Generation
A	100	500
B	50	300
C	25	100

It should be noted that either you need to meet the Investment criterion **or the** employment criterion to be called a Mega Project. The conditions are not cumulative in nature. The benefits for Mega Projects are customised and tailor made which is decided by the High Power Committee.

Procedure for Application of the benefits

The eligible unit will apply to Maharashtra Tourism Development Corporation (MTDC) with an initial application **after completion of Initial steps** and on verification MTDC will issue a Provisional Registration Certificate. The unit is expected to start the commercial activity within three years of this registration.

After completion of the final steps and completion of all the documents the unit will apply to MTDC for Eligibility Certificate (EC) and post verification of all documents MTDC will issue the final EC. The EC is the base document for claiming the benefits wherein all the conditions and do's and don'ts are specified.

The units need to inform MTDC within 180 days of the commencement of commercial production of the project of the details along-with necessary evidence.

So if we analyse the above, if the intimation is not received within 180 days would it result in loss of the whole benefit? This is harsh in nature. If we study the scheme available to manufacturing units if the application is made late, this results in pro rated curtailment. Like if the total benefit is for 5 years and the unit has made application late by one month, then the benefit would be for 4 years and 11 months, in case of manufacturing unit. But in this scheme the pro rata clause is missing. which implies that if we miss the initial registration deadline or the intimation deadline there are NO benefits. This is very harsh to the tourism Industry and strong representation needs to be made on this front.

Other Conditions to be fulfilled

The grant of incentives to tourism units under this scheme shall be subject to the following conditions and on breach of any of these conditions, the incentives granted will be withdrawn with immediate effect.

a. The unit availing the incentives under this scheme shall install and effectively operate and maintain pollution control measures as per the standards prescribed by the Competent Authority in this regard.

b. The unit shall remain in commercial operation continuously for at least 8 to 17 years as mentioned in the EC after it is commissioned. However, in cases where the operation is discontinued due to any reason, the unit shall have to repay the amount of incentives availed.

c. The unit shall furnish details regarding commercial operation, employment, or any other information, which the State Govt. may require from time to time. The unit shall follow guidelines of the employment policy of the Govt. regarding employment of local persons.

d. The unit, after getting the eligibility certificate must submit quarterly details to the MTDC regarding the incentives availed during the eligibility period. Any excess claims of incentives by a unit will be recovered with interest of 2% per month.

The above conditions sum up the procedural aspects of the scheme and also instate the importance the concept of Operative period, which needs to be understood. The unit should be in operation for the specified period. There are compliances of a minor nature which the unit needs to follow. These compliances are mentioned and form part of the Eligibility Certificate.

It can be hence be concluded that the benefits are substantial and can change the cash flow of the project. There may be some compliances that need to be made but the benefits far outweigh them. The basic hindrance for this scheme has been lack of knowledge of the benefits available.

Hoping that this paper shall enlighten potentially eligible companies to avail this scheme & enjoy the benefits that have been made available.

ANNEXURE "A"
CLASSIFICATION OF AREAS

Sr. No.	Zone A	Zone B	Zone C
1	2	3	4
1	Mumbai, Mumbai Suburban District, Navi Mumbai, Thane and Pune Municipal Corporation and Pinpri Chinchwad Municipal Corporation areas.	All Municipal Corporations (except areas in Zone A) and A Class Municipalities.	All districts of Maharashtra except areas in Zones A and B

CA Shekhar Singhania

Internal Audit and Industry issues

The importance & effectiveness of Internal Audit in Hotel Industry has always been an area of high priority for all the stakeholders due to various inherent risks in the business processes. Before going into the various practical audit issues involved during Internal audit of Hotel Industry, let me broadly provide a short background on Internal Audit & Risk Based Audit Approach / Methodology.

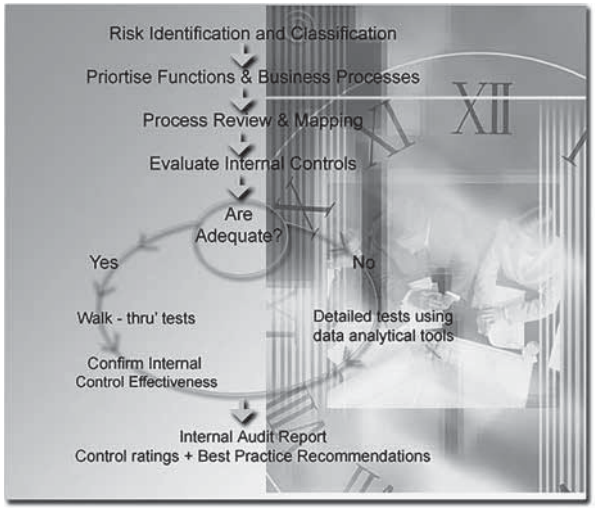
Definition of Internal Audit

Internal Auditing is an independent, objective assurance and consulting activity designed to add value and improve an organisation's operations to accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and governance processes..... ***The Institute of Internal Auditors***

According to Institute of Internal Auditors, providing assurance on the Risk Management, control, and governance processes within an organisation, internal auditing is one of the key cornerstones of effective organisational governance.

Internal Audit Methodology

Internal Audit involves a regular review of operations with emphasis on Risk Based Audits to provide assurance on controls, compliance & effectiveness. A typical Risk Based Internal Audit Approach is given below:



The importance & effectiveness of Internal Audit in Hotel Industry have always been an area of high priority for all the stakeholders due to various inherent risks in the business processes.

Key Challenges in Hotel Business:

- Greater focus on Customer Services at the cost Internal Controls at times.

- Dynamic pricing for room revenues linked to occupancy, season, festivals, events, etc.
- Model that operates on high fixed costs & low variable cost that lead to severe pressure on margins during economic slowdown
- High quantum of Cash Collection thereby increasing risk of fraud / misappropriation.
- Need for providing ancillary / support Services such as Travel desk, Laundry, Room Services, In-house Entertainment, Health Clubs, Internet / Communication etc, increasing costs & requiring effective revenue controls.
- Multiple stakeholders such as Property Owner, Franchisee / Hotel Chain Owners, Vendors, etc.
- Absence of single integrated information system (ERP) as different systems are usually used for different processes:
  - ✓ Opera for PMS,
  - ✓ Micros for F&B,
  - ✓ Inventory Accounting Software for Material Accounting,
  - ✓ SUN / Other ERP for Financial Accounting
- Safety & Security threats that can create Reputation Risks.

Internal Audit Programme for Hotel needs to be comprehensive to cover all the business processes / departments / functions after carrying out a proper Risk Management. Broadly the Internal Audit Programme may cover following critical processes:

A. Revenue Function
- ✓ Room Revenue
- ✓ Food &Beverage Revenue
- ✓ Banquet Revenue
- ✓ Other Revenues (Travel Desk, Laundry, Room Service, Internet, Telephone, etc.)

B. Operator Charges
- ✓ Validation of Charges levied Hotel Operators

C. Procurement
- ✓ Procurement to Pay F&B / Consumables
- ✓ Materials Receiving Procedure - Quality Checks, etc.
- ✓ Inventory Management

D. Finance / Compliance / Assets Movement
- ✓ Accounts & Controls
- ✓ Banking / Treasury including Forex Management
- ✓ VAT & Service Tax
- ✓ Property, Plant & Equipments - Fixed Asset Management
- ✓ Legal Compliance

E. TALENT MANAGEMENT
- ✓ HR & Payroll
- ✓ Travel, Entertainment & Employee Reimbursements

F. Capex & Renewals

G. OVERHEADS & EXPENSE REVIEW (Transport, Laundry, Electricity, Hospitality, Credit & Collection Expense, etc.)

There is commonly a concept of night auditors in hotels who verifies day-to-day controls like matching empty / occupied rooms as per Housekeeping report, Room Service billing with front office records based on which

Room revenue is accounted, reconciliation of daily F & B invoices with revenue accounted (relevant where integrated systems don't exist), Free Kitchen Order Tickets (KOT) & their authorisation, daily cash collected at various outlets with cash deposited, etc. This is more like an concurrent audit wherein the critical transactions are verified on daily basis.

Key Audit Issues

a) Room Revenue

This is the basic source of revenue for any hotel. Key risks in this audit area includes revenue leakages due to under billing, reputation risks due to over / incorrect billing, no periodic review of Best Available Rates (BAR), unapproved/ unauthorised discounts given to customers, etc.

Although, majority of big reputed hotel chains have software (such as Opera / Marsha) to update Best Available Rates (BAR) on real time basis, one needs to verify that access for rate updation is given only to limited persons in central reservation team. For smaller hotels not having standardised software, manual controls on BAR rates, Agreed Rates & actual billed rates needs to be verified by the auditor.

Process of deriving room rates by forecasting occupancy for the future period, seasonal changes, etc., also needs to be looked into.

Since majority of the collections are through Credit Cards & Cash, fraud risk to also consider while auditing this process. Controls such as segregation of duties (person maintaining physical cash not allowed access to books of accounts), daily depositing of cash collections in bank, frequent cash verification by Senior person from Accounts, periodic Credit Card Reconciliation (amount swiped & actual amount credited), etc. needs to be tested & verified.

In case of online or group bookings wherein only nominal amount is received in advance, ensuring recovery from customers on account of room cancellations becomes a challenge. In such cases, Auditor may suggest practice of taking details of Credit Cards during room booking which can be swiped for cancellation amount after informing the same to the customers. There can be instances wherein charges for room cancellations are not levied. In such cases, auditor should insist for appropriate approval as per authority matrix.

Majority of hotels offered special rates to groups or corporate in the form of Annual Corporate Deal wherein discounts are offered on BAR Rates based on minimum Nos of room nights. One needs to verify the special rates proposed to groups or corporate, compliance to authority matrix for proposing special rates, actual utilisation of the committed room nights by groups or corporate and monitoring & reporting of unutilised room nights to management / general manager.

b) Food & Beverages Revenue

This is a critical audit area & is prone to leakages. Key risks include additional cost due to non-review / revision of price-list, non-billing of Food / Beverages consumed by customers / guests, material shortages at Outlets, etc.

Key audit steps includes verification of controls such as updation & periodic review of price-list, price approval process, Invoicing Controls on Sales from Outlet & Buffet, Wastage Monitoring, Inventory Controls at Outlets, Physical Verification Process, Reconciliation of Theoretical Consumptions & Sales, etc.

Usually, majority of the hotels have multiple in-house outlets which sell F&B. Accounting of direct cost & allocation of indirect costs between various outlets facilitates calculating outlet-wise profitability and identifying loss making outlets.

c) Banquet Revenue

Key risks include unauthorised discounts given to customers / guests by sales team, under billing for minimum number or actual plates used, bad debts, etc.

Process of quoting rates for using banquet services & compliance to authority matrix for giving discounts (if any) needs to be reviewed. Other process review includes service agreement signed by the hotel & the client, collection of committed revenue as per the collection schedule mentioned in the agreement, recovery of minimum revenue planned for banquets, food wastage at banquets, recovery of various charges from the guest for services procured from outside vendors, etc.

Monitoring of accounts receivable & collections for banquet revenue needs to be looked into as many times advances mentioned in the service agreement are not collected. Also one needs to be make sure that entire amount is received as per the actual plates or minimum commitment whichever is higher before customer vacates the banquet.

d) Non-Room Revenue (Laundry, Transport, Entertainment, Internet, etc.): Key risks include non / under billing of billable services, paid services considered as complementary and hence not billed, unauthorised complementary services, etc.

At times there are several gaps observed between billable services & actual services billed leading to revenue leakages. A very critical system controls to test by auditors is to verify whether all the services such as Breakfast, Internet, Transport, etc., is required to be mandatorily specified as complementary & chargeable services in the system at the time of customer check-in to facilitate adequate billing from the system. Access to modify / increase nos of complementary services in the system to be restricted only to seniors from Front Office or to be allowed only at Back office. In case of small Hotels not having standardized software, this controls is exercised manually and hence the auditor to tae larger samples to verify the correctness/ adequacy of billable / actual used services *vis-à-vis* actually billed to the customer.

Specific sub-processes for non-room revenue which needs to be audited includes the following:

Transportation: Approved Price list, periodic review / revision of Prices based on fuel costs, invoicing controls, contract between hotel & transport vendor, complementary & paid services, deployment of vehicles as per contract, etc.

In addition, quality of transport vendor assumes significant importance as the same carries reputation risk. Safety & Security Measures such as having GPS in all the vehicles, Police Verification of Drivers, Fire Extinguishers, Medical

kits, etc. needs to be ensured & regularly monitored by Hotel Travel Desk.

Laundry: Approved price-list, documents prepared by the hotel for collection of laundry from the rooms, posting of laundry services used by guest in the system, complementary & paid services, etc.

Room Service: Approved price-list, invoicing controls on various services provided to the guest in the room, process of order acceptance / service provided to rooms, logs maintained for the same and actual posting of charges to the room as per rate card, etc.

Key audit steps in Laundry & Room Services involves comparison of actual numbers of laundry/ food items used as per manual service sheet and number of laundry/ food items billed to the customers to ensure that there is no revenue leakage. Adequate segregation of duties & maker checker controls needs to be put in place to ensure the above.

e) Operator Charges

This includes charges levied by Hotel Operators (Group / Hotel Chain) usually through Wash Invoices & for which there is formal agreement with the hotel owners. This includes charges such as Central Reservation Charges, Usage of Central system, International Training, etc.

There may be a possibility that in case of many Hotels, there are no independent verification carried out for Operator Charges by local Accounts team as there exits a conflict of interest (Accounts team reports both to Hotel Group & Owner's Office). This is very critical from Owner's prospective. Internal Auditors to suggest for robust validation process for Operator charges w.r.t. agreement including verification of supporting documents for various charges such as Reservation Charges, Training, etc, approving authority for exception, etc.

f) Procurement:

Significant part of total Procurement includes procurement of F&B and Consumables items. Key risks include procurement at non-competitive rates, single source vendors, receipt of sub-standard quality of food items, etc.

Major reputed Hotels have very stringent quality norms for Food Items (particularly non-pack products) and hence would not prefer to procure from any vendor in the market. Usually these Hotels have approved list of vendors on Group level and they prefer to buy only from these selected & approved vendors although the prices are on higher side.

From a process prospective, the Internal Auditors needs to verify whether there are multiple quotations from approved vendors and orders placed accordingly after getting approval as per Authority Matrix. There may be instances wherein orders are not placed on lowest vendors. What the auditor needs to be ensure in such cases is whether reasons for not placing orders to lowest vendors are documented and conscious decision taken for placing orders to L2 / L3 vendors is approved by appropriate authority.

In case of single source vendors, auditor needs to verify how frequently rates are

reviewed and periodically benchmarked against the rates of very similar items available in the market. Availment of quantity discount (based on annual estimate) is one thing which can be verified as a part of effectiveness of negotiation process.

For packed items, general followed best practice is to enter into agreement with super markets / retail chains to avail best rates.

Most critical part of materials receiving procedure is to verify whether the materials received conforms to the quality as agreed with the vendors & approval process of deviations / quality non-compliances. Auditor needs to verify whether the PO specifications are communicated to the Stores / Quality department to ensure adequate quality checks which is documented.

g) Inventory Management

This includes inventory planning, inventory standards, movement of material from receiving area to the central stores, updation of system records on receipt of material at the central stores, movement of material from central stores to outlets, physical verification process for stocks maintained at central stores and outlet, MIS on inventory management, etc.

At times there are frequent materials write off particularly in food items. Auditor needs to be ensure whether reasons for materials write off are analysed and write off are approved as per the authority matrix (say CFO / GM). In case there are continuous trend for few items / few departments (say one particular outlet), auditor needs to specifically highlight the same and suggest for further investigation & corrective actions such as improve the billing system at outlet, etc.

h) Controls Over Forex

Foreign Exchange collected by hotels from customers / guests is yet another area of fraud risks since hotels offer a exchange rate lower than the market rate and such forex can actually be sold in open market by showing Rupee collections. Controls such as accounting of forex against invoices & collections, physical verification (book & physical), segregation of duty, timely depositing forex into the Bank Account, etc. needs to be verified.

i) Other Issues

From a fraud risk Perspective, having adequate fidelity insurance for all the HK employees / personnel including employees involved in cash collections, stores, outlets operations, etc. is very critical.

Conclusion

As seen from the above, there are various control issues which needs to be kept in mind to conduct an effective audit of Hotel. There exist larger reputation risks to the Hotel Industry on account of security threats, theft in the hotel, legal non-compliances particularly on food adulteration Act, etc. wherein the Internal Audit needs to assess whether there are adequate Risk Mitigation Controls put in place by the Management to address the same. Benchmarking & suggesting best practices/ controls followed by other hotels in industry would definitely add significant value add to the client by the Internal Auditor.


CA Rohit Jain & CA Shreyas Sangoi

Overview of Indirect Taxes on Hospitality Industry

Revenues in hospitality sector, historically, have been often correlated with the economic plight of a country. During the bullish phase of an economic cycle, the industry accelerates and the revenues are on a thinner side, during the downturn. However, irrespective of the economic environment, the hospitality industry is plagued with multiple levies of indirect taxes.

The hospitability sector deals with a host of indirect taxes viz. Central levies of Customs, Service Tax and Central Excise duty, Central Sales Tax and, State-specific taxes such as Value Added Tax ('VAT'), Entertainment Tax, Luxury Tax and Entry Tax. Let us delve into the key taxes to understand their impact on the industry.

CONSTITUTIONAL SCHEME FOR LEVY OF TAX

Revenue from sale of food and beverages

Article 246 of the Constitution of India ("Constitution") provides for the division of powers to frame legislations with respect to various matters between the Union of India and the States. The Seventh Schedule to the Constitution enumerates the subjects in respect of which the Union and the States may legislate. While the Union of India has the exclusive power to legislate with respect to matters enumerated in List I of the Seventh Schedule, the States have the exclusive power to legislate with respect to matters specified in List II of the said Schedule.

The Union derives its power to levy Service tax under Entry 92C of List I (though presently levied under residuary Entry No. 97). On the other hand, taxes on the sale or purchase of goods find mention in Entry 54 of List II. Clearly, it can be seen that Union Government has the constitutional mandate to levy Service tax, while levy of Sales tax/VAT is state a subject. Despite the lucid division of powers, consideration from restaurants is subjected to Service tax as well as VAT. To understand this anomalous situation, let us understand how the law has evolved over a period of time.

In the year 1972, the Supreme Court in the case of *State of HP vs. Associated Hotels of India [2002-TIOL-65-SC-CT]*, held that when a hotel charges a consolidated bill, the Department cannot split the transaction into one of service and one of sale of food stuff for the purpose of levy of sales tax. Further, in the case of *M/s. Northern India Caterers (India) Limited vs. Lt. Governor of Delhi [(1980) 2 SCC 167]*, the Supreme Court held that when meals were served to casual visitors in the restaurant operated by the assessee in its hotel, the

service was for satisfaction of a human need and did not constitute a sale of food.

To overcome the said decisions of the Supreme Court, the Parliament amended the Constitution *vide* the Constitution (Forty Sixth Amendment) Act, 1982. The Statement of Objects and Reasons appended to the Bill specifically noted the aforesaid judgments holding that the sale of food and beverages at a restaurant is a transaction in service not exigible to sales tax under Entry 54 of the List II. Thereafter, new Clause (29A) was inserted in Article 366 and the Parliament also validated the laws levying tax on the supply of food or drinks by the State. Thus, the Parliament consciously amended the Constitution to include a tax on the supply of food or drinks by way of service or as a part of service within the exclusive power of the State Legislatures under Entry 54 of the List II.

Service tax on restaurant services

From 1-5-2011, Service tax was levied on Restaurant Service. Service tax was levied on services provided to any person, by a restaurant, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage including alcoholic beverages or both, in its premises.

Under negative list regime of taxation, the declared list of services encompasses service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating), are supplied in any manner as part of the activity. The requirement of having licence to service alcoholic beverages has been removed. The question that now arises for consideration is whether Service tax and VAT both can be levied on supply of food or drink in a restaurant.

In this connection, it is pertinent to note the Supreme Court decision of *K. Damodharaswamy Naidu and Brothers vs. State of Tamil Nadu [(2000) 117 STC 1]*, wherein it was held that the price that the customer pays for supply of food in a restaurant cannot be split up and sales tax is leviable on the entire amount that is charged to the customer. Going by that analogy, only Sales tax/VAT should be levied on the entire value and the levy of Service tax cannot sustain. On a similar footing is the decision of the Kerala High Court, in *Kerala Classified Hotels and Resorts Association and Others vs. Union of India and Others [(2013-TIOL-533-HC-Kerala-ST)]*, which held the levy of Service tax, on supply of food and beverages by restaurants and services of lodging provided by hotels, as unconstitutional. The Court held that when a deeming provision allows States to impose VAT; Service tax cannot be imposed on the same component.

However, in a recent decision in the case of Indian Hotels and Restaurant Association [2014-TIOL-498-HC-Mum-ST], the Bombay High Court differed from the above-mentioned Kerala High Court decision and upheld the levy of Service tax on restaurants and hotels. The Court held that in the case of a restaurant, Service tax law does not tax the sale of goods but taxes only the service element of the sale. While the former decision was pronounced by a Single member Bench, the latter is by a Division Bench (which has also dissented with the former case) and therefore assumes significance. Also under the negative list based taxation, this rational has been put forth in the Education Guide dated 20-6-2012, wherein, it has been stated that the declared list entry restricts itself only to the service element in contract and does not encroach upon the area of deemed sales.

Further, in relation to levy of VAT on sale of food in restaurants, reference is drawn to the recent decision of the High Court in Valley Hotel and Resorts [TS-129-HC-2014(UTT)-

VAT] wherein it has been held that VAT could not be imposed on service portion of the bill amount, which would be taxed under Service tax laws. Accordingly, no VAT can be levied on 40% of the bill amount (which is subjected to Service tax). The said decision has been rendered in context to the negative list regime and hence assumes significance, however, the Department is likely appeal against the same, at the Supreme Court.

Hotel accommodation

The issue of dual levy of taxes also crops for hotel accommodation as the room revenue is subject to the levy of Service tax as well as Luxury tax. The Union levies Service tax under the residuary Entry No. 97 of List I, whereas taxes on luxuries, including taxes on entertainments, amusements, betting and gambling has been enumerated in Entry 62 of List II (State list). It is squarely evident that the Union Government has the constitutional mandate to levy Service tax, while the levy of luxury tax is a State subject.

Service tax on accommodation services

Short-term accommodation services were brought under the Service tax net w.e.f. 1-5-2011. The Service tax levy was attracted under this category on the services provided to any person, by a hotel, inn, guest house, club or campsite, by whatever name called, in relation to providing of accommodation for a continuous period of less than three months.

Under the negative list based taxation, Service tax is levied on services provided by way of renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff, for a unit of accommodation, equal to or more than rupees one thousand per day or equivalent.

On the other hand, the respective State Governments levy Luxury tax on the room tariffs under State specific Acts. The question that arises, therefore, is whether Service tax and Luxury tax both can be levied on short-term accommodation.

In this regard, recently the Kerala High Court in the case of *Kerala Classified Hotels and Resorts Association and Others vs. Union of India and Others [(2013-TIOL-533-HC-Kerala-ST)]* held that Service tax imposed on services by a hotel, inn, guest house, club or campsite for providing of accommodation would be trenching on Entry 62 of List II [State list] which taxes luxuries. Accordingly the levy of Service tax on providing services in relation to accommodation, is unconstitutional. However, there is an absence of a binding Supreme Court decision on the said issue. On the other hand, the Luxury tax on accommodation has been held constitutional in the case of Express Hotel [(1989) 74 STC 157].

Given the above, it is apparent that though constitutional challenges exist for dual levy of taxes; the same is the order of the day and the dividing line for levying taxes between the Union and the States is getting blurred more than ever before. Setting aside the issue of constitutionality, below are the key taxes applicable to the hospitality industry.

Service tax

The hospitality industry being a species of the service sector, it is perhaps obvious that it would be subjected to Service tax. A major chunk of the hospitality industry comprises hotels and restaurants. Typically, the revenue stream of the hotel industry comprises room revenue, sale of food and beverages, revenue from business centre, internet, telephone, banquet halls, health club/spa, car rentals, entertainment parks, corporate tie-ups, membership fees, etc. All the aforesaid attract the levy of Service tax.

Under the negative list regime of taxation of services, the levy of Service tax under Section 66B of the Finance Act, 1994 ('Finance Act') is on provision or rendition of all services

except those services which are specified in the negative list (Section 66D) or are specifically exempted services. In relation to sale of food and beverages by hotels or restaurants, it is pertinent to note that the entry in the declared list of services (under section 66E of the Finance Act), states that the service portion in an activity involving supply of food or drinks is a taxable service.

While there is no specific entry in the negative list to cover any activity connected with hotels and restaurants, the following have been exempted in the mega exemption notification:

— Services by way of renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff of a unit of accommodation below rupees one thousand per day or equivalent;

— Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year.

Apart from the aforementioned services, all other services typically provided by hotels and restaurants are taxable. Further, in order to aid in arriving at the taxable value of services, the Service tax law has provided certain abatements and have also provided for a valuation mechanism in the Service Tax (Determination of Value) Rules, 2006 ('Valuation Rules'). Abatement is a mechanism to arrive at the value of taxable service from the gross amount (which includes value of goods also) by way of an *ad hoc* deduction. Similarly, Valuation Rules provide for determining the effective portion of service in a composite contract. Below is the tabular summary of effective rates of Service tax on various services, after taking into account the abatements offered and the Valuation Rules:

Particulars	Abatement	Effective ST	Comments
Hotel accommodation services	40%	7.416%	CENVAT credit only on input services is available. Credit on inputs and capital goods is not available.
Restaurant services (restaurants having AC)	60%	4.944%	CENVAT credit is not permitted on inputs under Chapters 1 to 22 of Central Excise Tariff Act, 1985 (food stuffs and consumables).
Outdoor catering services	40%	7.416%	CENVAT credit on inputs (except inputs under Chapters 1 to 22), input services and capital goods available
Bundled service of supply of food or drinks in a premises (including hotel, convention centre, club, pandal, shamiana or any place specially arranged for organising function) together with renting of such premises	30%	8.652%	CENVAT credit on inputs (except inputs under Chapters 1 to 22), input services and capital goods available

Particulars	Abatement	Effective ST	Comments
Rent-a-cab services	60%	4.944%	CENVAT credit on inputs, input services and capital goods are not available
Other services – internet services, health/fitness club services, telephone services, business centre services, renting of space	–	12.36%	

Entertainment events / amusement facilities

Services in relation to 'admission to entertainment events or access to amusement facilities' have been enumerated in the negative list of services i.e. fees collected as admission fees would not be subjected to Service tax. Accordingly fees payable as entry tickets, charged in events such as cinematographic films, circus, concerts, sporting events, fairs, award functions, dance/musical/theatrical performances and amusement facilities such as rides, gaming devices or bowling alleys in amusement parks, water parks, theme parks, will not be subjected to Service tax. However, membership fees of a club providing amusement facilities and other charges, would attract the levy of Service tax.

Excise duty

Excise duty is levied on manufacture of goods in India. While the hospitality industry is not majorly involved in manufacture of any goods, its impact needs to be analysed for making of food items. Food preparations, prepared or served in a hotel, restaurant or retail outlet, are exempted from the levy of Excise duty. While the food preparations are exempt, it is pertinent to note that cakes, pastries and cookies, prepared in hotels, attracts Excise duty of 6.18%, while chocolates attract Excise duty of 12.36%.

State Value Added Tax

Value Added Tax ('VAT') is levied on sale of food, at rates, which vary with the type and nature of goods and the State in which the sale takes place. Under the Maharashtra Value Added Tax Act, 2002 ('MVAT Act'), caterers supplying food and drinks (non-alcoholic) or any other articles for human consumption are generally liable to tax at 12.5%. In respect of catering contract, the State Government has not provided for any *ad hoc* deduction/ abatement in respect of the service component, in order to arrive at the value of goods sold, for the levy of MVAT. The State Government has, instead, notified a Composition scheme *vide* notification No. VAT-1505/CR-105/ Taxation-1 dated 1st June, 2005, according to which restaurants (below the gradation of 'Four Star hotel') can pay composition tax of 5% of the turnover of sales (not including sales of alcoholic drinks). However, the claimant dealer cannot claim any set off in respect of the purchases, corresponding to any goods which are sold or resold or used in packing of goods referred above.

Further, hotels providing lodging and boarding services for a composite consideration attract VAT for supply of food. For example, in the State of Maharashtra, VAT is payable at the rate of 5% to 30% of the composite charges (depending upon whether the composite charges include breakfast, lunch or dinner).

Sale of food items and beverages by hotels from room bar /mini bar are also liable to VAT. In Maharashtra, typically, the sale of food items and non-aerated, non-alcoholic beverages attracts VAT at 12.5%, while sale of aerated and alcoholic beverages attract VAT at a higher rate of 20%. As far as dealers who have not opted for the composition scheme, set off is generally allowed on purchase of food, beverages and other article bought for sale. However, in terms of restrictions under Rule 53(6) and Rule 54(k), no set off is available on purchase of goods that are used for rendering of services. Also, *vide* Notification No. 1511/CR 57, dated 30-4-2011; set-off of VAT paid on purchase of liquor has been disallowed.

Luxury tax

Luxury tax is levied by most State Governments on hotel rooms and hospitality services. It is usually on to the base price of a room. The rate is set according to the various price ranges of hotel rooms. The Luxury tax rate also varies significantly, from State to State.

In the State of Maharashtra, Luxury tax is levied under The Maharashtra Tax on Luxuries Act, 1987 ('Maharashtra Luxury Act') on the room tariff charged by the hotelier. At present, the rates are as under:

On Actual Room Tariff	Rate
Up to ` 750	Nil
` 750 to ` 1199	4%
` 1,200 and above	10%

It would be pertinent to note that in terms of Section 3(6) of Maharashtra Luxury Act, Luxury tax should not be levied on consideration received for supply of food and drinks on which VAT has been paid by the hotelier. It is equally important to note the Trade Circular No. 18T of 1988, dated 20-5-1988, which mentions that receipts on account of telephone calls, laundry services, health club services, valet services do not form part of 'luxury provided in a hotel' and hence should not be subjected to Luxury tax.

Entertainment tax

Entertainment tax is typically levied by the State governments on various forms of entertainment. Each State taxes different types of entertainments, at varying rates. Across India, entertainment providers often levy this tax on the price of the tickets. The activities and places, most likely to levy an entertainment tax, are:

— Amusement parks

— Cinema halls/movie theatres

— Cable/satellite television stations

— Pubs, discos and lounges

— Casinos

— Ticketed exhibitions

— Ticketed performances (dance, music and theatre)

— Sport activities such as horseracing

— Boat rides, cruises and water sports

It can be seen that the hospitality industry has to deal with multiple levies of indirect taxes on essentially a singular transaction. A summation of all the taxes either cuts into the already drooping margins of the industry players or, in most cases, is ultimately borne by the consumers. The real challenge lies in best managing, rationalising and optimising the tax costs, especially when the industry is facing confronting times, amid volatile economic environment. Well, if they are not well managed, hospitality may soon turn into hostility for the consumers!!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Indirect tax issues in Hospitality Industry

The hospitality industry is marred with a plethora of indirect taxes. In recent times, the Government kitty has exponentially grown on account of revenue from indirect taxes and so have the disputes, litigations and ambiguities. Introduction of Negative List of services is perceived as a harbinger to the introduction of Goods and Service Tax ('GST'). However, lack of political will to implement the GST, has resulted in perplexing times for the industry. Through this article, an attempt has been made to highlight the current indirect tax issues faced by the industry and the possible tax optimisation avenues.

SERVICE TAX

Valuation of restaurant services

Section 67 of the Finance Act, 1994 ('Finance Act'), sets out the basis for valuation of all taxable services and states that Service tax is leviable on the gross amount charged for the services rendered. The said provision is reproduced below:

"Section 67 – Valuation of taxable services for charging Service tax

(1) Subject to the provisions of this Chapter, where Service tax is chargeable on any taxable service with reference to its value, then such value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

…."

Section 67 stipulates that only those amounts are chargeable to Service tax, which are charged for the service provided. In other words, it is not any amount paid by the service recipient to the service provider that can be charged to tax, but only those amounts which represent the consideration for the service provided.

Generally, the price charged for food and beverages by the restaurant owners is a composite price which is inclusive of value of goods and services. In this regard, Rule 2C of the Service Tax (Determination of Value) Rules, 2006 ('Valuation Rules') provides that Service tax can be computed on 40% of the total amount charged to the customer. In other words, 40% (or 60% for outdoor caterer) of total amount charged will be assumed to be attributable towards provision of services and liable to Service tax at 12.36%. However, CENVAT Credit on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985, ('CET Act') would not be available.

The CBEC's Guidance Notes clarifies that in order to ensure transparency and standardisation in the manner of determination of the value of such service provided *in a restaurant*, which provide composite services, a new Rule 2C of the Valuation Rules has been inserted in the Valuation Rules.

Issues

- When actual bifurcation is available in terms of value of services and the value of property in goods transferred in the contract, is the option to discharge Service tax on actual value of services available to the restaurant owner or is it mandatory to follow Rule 2C. Well, on a cursory reading of the provisions, it seems that the only valuation mechanism is to compute Service tax under Rule 2C, i.e., on 40% of the total amount charged to the customer. Problems may surface for a restaurant owner who charges separate consideration for the value of food and service, and where the value of service is in lower proportion (less than 40%). In this case, opting for valuation route may not be ideal.

  In this regard, one can argue that Valuation Rules are triggered only if the value of services in not ascertainable. If the value of services can be ascertained, Service tax can be discharged on the actual value under Section 67 of the Finance Act, as there is no need to refer the Valuation Rules[1]. Also, Rule 2C starts with the words 'subject to the provisions of Section 67' indicating that Section 67 will have overriding effect over the Rules, for the valuation purposes. However, there is possibility that the authorities, especially at lower levels, may dispute the said contention.

- Further, Rule 2C which provides that Service tax is to be computed on 40% of the total amount charged, is applicable only to "restaurants". In this connection, doubts arise whether ice-cream parlours, soda houses, canteens or mess which may not qualify as "restaurants"[2], can also adopt the valuation mechanism. While the exemption notification, provides a broader exemption to restaurants, eating joints and mess (without having air-conditioning or air heating facility), Rule 2C is applicable only to restaurants. Hence, in the absence of normal valuation mechanism and inapplicability of Rule 2C, do other eating joints and mess having air-conditioning facility, have to discharge Service tax at 12.36% on the entire value? Surely, that is not the intention of the Government, but a plain reading of the provisions, leads to an ambiguous situation.

Supply of food at various outlets / Take away parcels / Home deliveries

Various restaurants, hotels or coffee / ice cream/ pastry shops may sell food items, beverages, ready-to-drink products, smoothies, pastries including food pre-packaged at their outlets. The arrangement may be (1) sale at outlet for consumption within the premises or (2) sale over the counter or (3) sale of MRP products.

The declared list entry (i) of Section 66E of the Finance Act is very wide and covers service portion of an activity of supply of food or any article of human consumption or any drinks in any manner. Given this wide definition, Service tax will be payable whenever supply of food

1. *M/s. S. V. Jiwani vs. CCE, Vapi [2014-TIOL-559-CESTAT-AHM], Bhayana Builders P. Ltd. vs. CST, Delhi [2013(32) STR 49]*
2. "A public eating place" – Webster's Ninth Collegiate Dictionary; "A building or room where meals and drinks are sold to customers sitting at tables" – Macmillan dictionary

involves any service element and the transaction is not merely a 'transfer of title' in goods. The issue which requires determination is whether sale of food items and beverages is a transaction of merely 'transfer of title' in goods or involves any service element as part of supply of food and beverages.

Qua the determination of what is 'Sales' under Article 366(29A) of the Constitution and prior thereto, various decisions[3] have evolved the law to the effect that:

- The predominant transaction is a 'Sale' or 'Service' must be determined from the facts of each case;
- Where supply is made in a restaurant and if the customer has the right to take away the food or dispose it off at his discretion, it may qualify as 'Sale' and rendition of services in this situation is incidental;
- Further, in relation to 'over the counter' sales it may qualify as sale of goods, as the services are not significant.

It is also pertinent to note that the scheme of Negative List and Declared List were not before the Courts when the earlier judgments were passed. It is however significant that these judgments concluded squarely the issue of what constitutes 'Sale', as contemplated in the exclusion in the definition of 'Service'. These decisions will therefore be relevant in the context of interpretation of scheme of Negative List and Declared List.

In this regard, reference may also be made to the clarification issued by CBEC *vide* Circular No. 334/3/2011 TRU dated 28-2-2011 ('CBEC Circular') when the taxing entry of 'restaurant services' was introduced (under the erstwhile Service-tax regime). The CBEC Circular provides that mere sale of food by way of pick-up or home delivery as well as goods sold at MRP will not attract Service tax. Though this Circular was issued in the context of 'Restaurant Services', the principle applied by CBEC may be relevant under the Negative List regime. As discussed earlier, as 'Sale' is covered under the exclusion from the definition of 'Service', there can be no levy of Service tax under the Declared List. In light of the above discussion, Service tax implications under various scenarios are illustrated below:

Situation	Comments
Restaurant having facility of air-conditioning and seating arrangement	The activities performed may be covered under the entry (i) of Section 66E and therefore, liable to Service tax. However, if the food is sold by the restaurant by way of home delivery, it may not be liable to Service tax.
Outlets situated at Mall / Food Court wherein the air-conditioning facility, common seating arrangement and other facilities is provided by the Mall Owner	The food is prepared and served by the outlet's employees, and the customers have the option to consume food or beverages within the premises of the Food Court. The activities performed by the restaurant owners at these outlets may be covered under the entry (i) of Section 66E and therefore, the activities may be liable to Service tax.

3. *Doveton Café vs. The State of Tamil Nadu, [1981] 47 STC 345 (Mad.)], Northern India Caterers (India) Limited vs. Lt. Governor of Delhi [1980 045 STC 212], Polaris Hotel vs. Comm. of Sales Tax, UP, Lucknow, [1998] 110 STC 353 (All.)], Durga Bhavan and Ors. vs. The Deputy CTO, Anantapur and Anr. [1981] 47 STC 104 (AP)]*

Situation	Comments
Outlets situated at Mall, which is not a part of food court	The food or beverages are intended to be served for consumption anywhere within or outside the mall premises. Such outlets are regarded as a 'KIOSK' where food or beverages are sold over the counter to walk-in customers. Further, there is no particular place provided by the restaurant owners where such food or beverages can be consumed by the customers. Accordingly, the activity performed by these KIOSK's are in the nature of mere sale of goods and therefore, may not be liable to Service tax.
Goods sold at MRP	Certain coffee shops or franchise outlets are also engaged in the business of selling MRP goods like coffee packets, mineral water, cold drinks etc. In view of the aforesaid analysis, it can be argued that the goods which are supplied under MRP are mere sale of goods and do not involve any service component and therefore, not liable to Service tax.
Outlets providing Drive-Through facility	The only activity undertaken is provision of take away parcels/ sale over the counter. Accordingly, the activities performed by the drive-through outlets are in the nature of mere sale of goods and therefore, may not be liable to Service tax.

In-room dining

A further question arises as to whether food and beverages delivered by the hotels in the room of the guests attracts Service tax, as no service element may be present in the said activity. In this connection, it is pertinent to note that neither the negative list nor the mega exemption notification provides for any exemption to in-room dining. Therefore, with the advent of negative list of services, in-room dining may be exigible to Service tax. A further issue arises is whether Rule 2C of Valuation Rules (40% of total amount) applies to in-room dining as on a strict reading, the Valuation Rules apply only to supply of food *in a restaurant* and not to food supplied in hotel rooms. However, one can argue that like home delivery, in-room dining is in the nature of sale of goods only and hence not liable to Service tax.

VALUE ADDED TAX

VAT on banquet arrangements

Typical, banquet arrangements include various services being provided by the hotels including serving of food and drinks. For example, if a marriage function is arranged in a banquet hall, then there will be arrangement for a stage, furniture, decoration, music, etc., and also supply of food and drinks.

In case of banquet hall, the service provider i.e. hotels etc., are liable to pay Service tax as mandap keepers. It is a common practice in banquet arrangements, that hotels charge fees per plate e.g. ` 750 per plate. The issue that merits consideration is on what value should VAT be payable. Logically, VAT should be payable only on the value of food and drinks. However, the

authorities are seeking to levy VAT on the entire consideration.

Reference in this regard is made to the Determination of Disputed Question ('DDQ') in the case of ***Tip Top Enterprises***, wherein the Commissioner held that the whole amount charged by the dealer (banquet hall) will be liable to VAT. An Appeal against the DDQ was filed before the Maharashtra Sales Tax Tribunal (Appeal No. 41 of 2009), which held that VAT can be levied only on amount towards food and drinks as agreed between the parties. The Tribunal observed that the hotel has quoted separate charges, towards rent of hall, about food and drinks and decorating etc. The charges towards food and drinks were almost at par with charges for same menu, when provided by hotel, in other than banquet. Also, in relation to decoration charges, which were also charged separately in the quotation, Tribunal held that the same items may attract tax as lease transaction.

Hence, if the consideration is split, resort can be taken of the aforesaid decision and VAT can be levied only on the portion of food and drinks. However, if the consideration is combined i.e., price per plate, VAT authorities may seek to levy VAT on the entire amount.

VAT on complementary food and beverages during conferences

Hotels provide complementary food products or mineral water to guests free of cost and also provide complementary beverages and stationery during conferences. Whether such supply on free of cost basis attracts VAT?

In order to ascertain applicability of VAT, it is essential that the transaction qualifies as 'sale'. It is settled law that in order to qualify a transaction as sale, it is essential that the contract must be supported by monetary consideration. The term 'sale' has been defined in most state VAT Acts to mean *"a sale of goods within the State for cash or deferred payment or other valuable consideration and includes..."*

From the definition of 'sale' and the law as laid down by various decisions of the Hon'ble Supreme Court, it is evident that for a transaction to qualify as a 'sale', it is essential that the property in goods is transferred for a monetary consideration. If the transaction does not involve monetary consideration, the same cannot be considered as 'sale' under various State VAT laws. Accordingly, complementary food and beverages provided to guests in hotels and to participants at conferences should be liable to VAT.

Multiplicity of taxes / Duality of taxation

The revenue from hotel industry suffers multiple levies such as Service tax, VAT and Luxury tax. It is no secret that a singular transaction is now subject to multiple taxes. With set-off provisions becoming more stringent and various taxes not being allowed to be set off against each other, these levies have significantly mobbed up the transaction costs.

An equally detrimental issue is of duality of taxation as various options for payment of Service tax and VAT are not reconciled. Let us take an example of air-conditioned restaurant, which has not opted for composition scheme under VAT laws.

Particulars	Price `	Quantity	Amount
Food items	95	4	380
Soft drinks	20	1	20
Alcoholic drinks	150	1	150
Sub total			**550**
Service charge (5%)			28
Service tax [(550+28)*40%*12.36%]			28
VAT (400*12.5%+150*20%)			80
Gross total			**686**

In the above example, it can be seen that an amount of ` 550 is subject to tax twice, Service tax and VAT both being levied on the same amount. In essence, the service portion involved in a catering contract is taxed twice, once under the Service tax Laws and also under the VAT laws.

Given that VAT is applicable on full value in case of supply of food or beverages, it may be argued that levying Service Tax on the same activity of supply of food or beverages would result in dual levy of taxes on the same transaction. In this regard, the Constitution of India has prescribed the levy of Sales tax and Service tax on sale of goods and rendition of service respectively. The power to levy tax on the activity of Sale of goods is with the State Government under Entry 54, List II of the Seventh Schedule to the Constitution of India, whereas, the legislative mandate for levy of Service tax is found in the Central list under Entry 92C of List-I to Seventh Schedule of the Constitution of India.

It is pertinent to note that the levy of Sales tax / VAT cannot so overreach and transgress so as to be applied on a field or subject that correctly falls within the domain of the Central Government[4]. The States are not allowed to entrench upon the Union List and tax services by including the cost of such service in the value of the goods[5]. Further, it has been held that, the payments of Service Tax as also the VAT are mutually exclusive in a transaction[6]. However, presently the issue of duality of taxation persists and the industry has to been the brunt of various taxes.

OPTIMISATION AVENUES

Given the above issues and ambiguities, it is important to plan, structure and optimise the transactions. It is important to first identify the taxes which are a cost in the chain and then devise ways to mitigate the same. In this connection, the following needs to be explored:

Actual method vis-à-vis composition scheme

An important avenue of rationalising the costs is finding the most optimum method under Service tax and VAT legislations to discharge the taxes. There is no strait jacket formula to arrive at the best method but each time the assessee needs to do a cost benefit analysis of the tax payable and credit available under abatement/ composition schemes and the actual method. This assumes significance as today many hoteliers are paying Service tax at full rates on value of the entire bill and availing CENVAT credit *vis-à-vis* opting for composition scheme / payment on actual basis. Paying Service tax on full contract value allows taking CENVAT

4. *ASL Motors Pvt. Ltd. vs. CCE [2008 (9) STR 356 (Tri.-Kolkata)]*
5. *Bharat Sanchar Nigam Ltd vs. Union of India [2006 (002) STR 0161 (SC)]*
6. *Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes [2008 (9) S.T.R. 337 (SC)]*

Credit, however, ultimately adds to the cost for the consumers as the room tariffs become dearer on account of the additional Service tax component.

Schemes under Foreign Trade Policy, 2009-14 ('FTP')

Served From India Scheme ('SFIS')

In order to accelerate growth in export of services, the Government of India has introduced the SFIS. Under the scheme, a service exporter is entitled to procure goods up to a Duty Credit Scrip equivalent to 10% of the net foreign exchange earned by them in the preceding Financial Year. The Duty Scrip can utilised for procurement of capital goods, spares, office furniture, consumables (including food items and alcoholic beverages) and vehicles for tourists. It is important to note that Duty Scrip can be utilised for payment of Excise duty as well, on procurement from domestic sources.

Export Promotion Capital Goods ('EPCG') Scheme

The EPCG scheme allows a Company to import Capital goods at Zero Custom duty, subject to fulfilment of prescribed conditions such as fulfillment of Export Obligation ('EO') i.e., EO can be fulfilled by export of services rendered by the applicant. EO is equivalent to 6 times of the duty saved on Capital goods, to be fulfilled in 6 years reckoned from authorization issue date.

Hotels providing services to foreign customers can opt for the EPCG scheme. Under the scheme, 'capital goods' have been widely defined as compared to the definition of capital goods under the CENVAT Credit Rules. Accordingly, hotels can save significant Customs duty on import of capital goods as also Excise duty on domestic procurements.

It is worthwhile to note that both the schemes under FTP can simultaneously be utilised to rationalise the impact of Customs and Excise duty to the optimum. Apart from the above, the industry can also look to structure EPC contracts entered for construction of new hotels and utilising the input credit during the construction phase to the optimum.

Certainly, there are issues and ambiguities in the current indirect tax framework and the panacea for all problems is seen as the GST regime. However, until it is implemented, the industry can look forward to the aforementioned measures to rationalise the tax costs.

Case Laws Index

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DIRECT TAXES
Supreme Court

S. 158BC/ 158BD: Law on how & when "satisfaction" has to be recorded by AO to exercise jurisdiction over non-searched person explained

CIT vs. Calcutta Knitwears Civil Appeal No. 3958 of 2014 (Special Leave Petition (C) No.10542 of 2011) dated 12th March, 2014

A search u/s. 132 was carried out in the premises of the Bhatia Group on 5-2-2003 and certain incriminating documents pertaining to the assessee firm were found. The assessment on the Bhatia group was completed on 30-3-2005. Thereafter, on 15-7-2005, the AO recorded his "satisfaction" that the seized papers revealed the undisclosed income of the assessee and the said papers were passed on to the AO of the assessee for making an assessment u/s. 158BC read with s. 158BD. The assessee argued that the proceedings initiated again him were invalid as the said "satisfaction note" was prepared after the proceedings in the case of the searched party were completed. The AO and CIT(A) rejected the assessee's claim though the Tribunal and the High Court upheld it. The Tribunal & High Court held that as the recording of satisfaction by the AO as contemplated u/s. 158BD was on a date subsequent to the framing of assessment u/s. 158BC in case of the searched person, that is, beyond the period prescribed u/s. 158BE(1)(b), the notice issued u/s. 158BD was belated and consequently the assumption of jurisdiction by the AO in the block assessment was invalid. On appeal by the Department the Supreme Court allowing the appeal held:

(i) While it is true that before initiating proceedings u/s. 158BD, the AO who has initiated proceedings for completion of the assessments u/s. 158BC should be satisfied, on the basis of cogent and demonstrative material, that the seized documents belong to a person other than the searched person, the said satisfaction note could be prepared by the AO either at the time of initiating proceedings for completion of assessment of a searched person u/s. 158BC or during the stage of the assessment proceedings. It does not mean that after completion of the assessment, the AO cannot prepare the satisfaction note to the effect that there exists income tax belonging to any person other than the searched person. The language of the provision is clear and unambiguous. The legislature has not imposed any embargo on the AO in respect of the stage of proceedings during which the satisfaction is to be reached and recorded in respect of the person other than the searched person. Further, s. 158BE(2)(b) only provides for the period of limitation for completion of block assessment u/s. 158BD in case of the person other than the searched person as two years from the end of the month in which the notice under this Chapter was served on such other person in respect of search carried on after 1-1-1997. The said section does neither provides for nor imposes any restrictions or conditions on the period of limitation for preparation the satisfaction

note u/s 158BD and consequent issuance of notice to the other person;

(ii) The result is that for the purpose of sec. 158BD a satisfaction note is *sine qua non* and must be prepared by the AO before he transmits the records to the other AO who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person u/s 158BC of the Act; (b) along with the assessment proceedings u/s. 158BC of the Act; and (c) immediately after the assessment proceedings are completed u/s 158BC of the Act of the searched person.

S. 244A: Deductor entitled to interest on refund of excess TDS from date of payment

Union of India vs. M/s. Tata Chemicals Ltd. (CIVIL Appeal No. 6301 of 2011, dated 26th February, 2014.)

The assessee made an application u/s. 195(2) for permission to remit technical service charges and reimbursement of expenses to a foreign company without deduction of tax at source. The AO passed an order directing the assessee to deduct TDS at the rate of 20% before making remittance. The assessee effected the deduction and filed an appeal before the CIT(A) in which it claimed that the said remittance was not subject to TDS. The CIT(A) upheld the claim with regard to the reimbursement of expenses with the result that the TDS thereon was refunded to the assessee. However, the AO declined to grant interest u/s 244A on the said interest by relying on Circular Nos. 769 dated 6-8-1998 and 790 dated 20-4-2000 issued by the CBDT. The CIT(A) upheld the AO's stand though the Tribunal and High Court upheld the assessee's stand. On appeal by the department to the Supreme Court, dismissing the appeal, held as under:

(i) A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorisedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company;

(ii) Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/ tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductor's lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course;

(iii) The said interest has to be calculated from the date of payment of such tax.



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DIRECT TAXES
High Court

1. Sec. 32 – Assessee autonomous body constitutued by the Government – Land and buildings transferred to it – such transfer not documented by a registered deed – Depreciation allowable

CIT v. Jawahar Kala Kendra (2014) 100 DTR (Raj.) 65

The assessee is a cultural society constituted as a autonomous body by the Government of Rajasthan *vide* order dated 11-8-2003 to preserve and promote art and culture in Rajasthan. Subsequently the society was formed and registered under the Societies Registration Act, 1958. Prior to the constitution of the assessee society, Jawahar Kala Kendra was managed by the Government of Rajasthan. On constitution of the assessee as a society the Government transferred all the assets and liabilities to the society. The society claim depreciation on the assets even though the same were not transferred by a registered document to the assessee and the name of the Government of Rajasthan continued on assets. The AO disallowed the interest as the assets were not transferred by a registered deed. The CIT(A) and ITAT held in favour of the assessee. The High Court also in deciding in favour of the assessee held that assessee becoming owner of assets on transfer by the Government and using it in its own right, it was entitled to depreciation, merely because the same is not registered under the Indian Registration Act, depreciation cannot be disallowed.

2. Sec. 56 – Where there was no inextricable link between investment and project, interest income on said investment could not be permitted to be adjusted against pre-operative expenses in respect of said project

CIT vs. Indian Vaccines Corporation Ltd. [2014] 44 taxmann.com 130 (Delhi)

Assessee was incorporated as a company with object of manufacturing human vaccines and it received substantial financial grant. It invested said funds and promoters capital with banks under 'Portfolio management scheme' under which assured return was guaranteed by bank – assessee adjusted interest income on said bank deposit against pre-operative expenses relating to a project. The assessee's appeal to the CIT (Appeals) was dismissed. The Tribunal took the view that the funds which were invested by the assessee were not borrowed funds but they were funds provided by the promoters and held that the promoter's funds were inextricably linked with the installation of the project and, thus, the interest could not be separately assessed under the residual head, but was to be adjusted against the capital work-in-progress. On further appeal in High Court, High Court allowed the appeal of the revenue and held that the investment of the funds has nothing to do and was not inextricably linked with the construction of the project. It was an investment

under the 'portfolio management scheme' operated by banks under which an assured return was guaranteed by the banks. It was a conscious act of investment of funds by the assessee and if such investment results in income, the same must be brought to tax under the residual head, even if the company has not commenced its business. The assessee in the present case had invested the funds under the scheme operated by the banks for an assured return. That had nothing to do with the project and there was no inextricably link between the investment and the project. The interest income could not, therefore, be permitted to be adjusted against the capital work-in-progress on pre-operative expenses. Both the Assessing Officer and the Commissioner (Appeals) were right in bringing the interest to tax under the head 'Income from other sources.

3. Sec. 2(22)e - Failure to establish that substantial part of business of company was money lending and loans and advances received by assessee were in ordinary course of money lending business - Treated as deemed dividend under section 2(22)(e)

Krishna Gopal Maheshwari [2014] 44 taxmann.com 127 (Allahabad)

Assessee took an unsecured loan from a company in which he was a director and was holding 10 per cent voting power. He submitted that substantial part of business of said company was of money lending. However, Assessing Officer considered such sum as deemed dividend under section 2(22)(e) and made addition. Commissioner (Appeals) and Tribunal confirmed such addition. On further appeal in High Court, the court dismissed the appeal of the assessee and held that it appeared that neither company nor assessee had licence of money lending business. Further the court also held that since assessee had failed to establish that substantial part of business of company was money lending and loans and advances received by assessee were in ordinary course of money lending business, impugned order passed by lower authorities was to be upheld.

4. Sec. 194I, 194C – Receipts from provision of passive infrastructure services to the mobile operators - amounts to renting and would attract TDS deduction under S/194-I and not under section 194C

Indus Towers Ltd. vs. CIT [2014] 44 taxmann.com 3 (Delhi)

The petitioner, Indus Towers Ltd., provided passive infrastructure services to the mobile operators ('customers'), which, *inter alia*, included, tower, shelter, diesel generator sets, batteries, air conditioners, etc. It applied for issue of a lower deduction certificate at rate of 0.5% on its project receipts under sec. 194C of the IT Act, but AO issued lower deduction certificate at rate of 2.5% under sec. 194-I of the IT Act. Writ was filed to challenge the revisionary order of CIT who affirmed the decision of AO. The issue before the High Court was whether the activity, i.e., provision of passive infrastructure services by petitioner to the mobile operator would constitute renting within the extended definition under Explanation to section 194-I or whether the activity was service without any element of hiring or letting out of premises? Dismissing the Writ Petition, the court held that it was the 'operative intention of the parties' which had to be ascertained to decide whether the arrangement amounted to a lease or a mere licence as decided by the Supreme Court in case of *Rajbir Kaur vs. S. Chokesiri and Co.*, *AIR 1988 SC 1845*. As per the service agreement between assessee and the customers it was found that, although the access to infrastructure was given to the mobile operators, yet the possession and control of the property were with the petitioner. The dominant intention in these transactions – between petitioner and its customers – was the use of the equipment or plant or machinery. Therefore, the submission of the petitioner that the transaction was not 'renting' and would be covered under section 194C, was incorrect. Equally, the revenue's contention that the transaction was one where the parties intended the renting of land (because of the right to access being given to the customer) was also incorrect. The underlying object of the

arrangement or agreement was the use of the machinery, plant or equipment, i.e., the passive infrastructure.

5. Sec. 2(42A) – period of 36 months in respect of booking rights of an apartment with a builder has to be counted from date of execution of agreement to sell, i.e., buyer's agreement

Gulshan Malik v. CIT [2014] 43 taxmann.com 200 (Delhi)

The assessee and his wife had booked an apartment *vide* an application dated 31-7-2004, by payment of certain booking amount. The builder DLF issued a letter dated 6-8-2004 provisionally allotting the apartment. Consequent to said arrangement, regular payments were made as per the payment plan of the builder. A buyer's agreement was executed on 4-11-2004 between DLF and the allottees, i.e., the assessee and his wife. Subsequently, the assessee entered into an agreement to sell dated 2-11-2007 to sell their booking rights/rights or interest in the apartment. In the return of income, the assessee had declared a long-term capital gain on the sale of booking rights/extinguishment of rights in the apartment. An exemption was claimed under section 54 as the same was invested in purchase of another apartment. The Assessing Officer treated income declared by the assessee as 'short-term capital gain'. Accordingly, no deduction under section 54 was allowed since it was available only in respect of long-term capital gain. The CIT(A) and ITAT upheld the order of Assessing Officer. On appeal, High Court dismissed the appeal of the assessee and held that a 'capital asset' under the Act is property of 'any kind' that is 'held' by the assessee. Necessarily, a capital asset must be transferable. The question of law to be considered for consideration before the court was whether booking rights to the apartment accrued to the assessee on the date of application for allotment/confirmation of allotment or on the date of execution of the agreement to sell, i.e., the buyer's agreement. The court held that a right or interest in an immovable property can accrue only by way of an agreement embodying consensus *ad idem*. The nature of the right sought to be transferred here is the right to purchase the apartment and obtain title, termed 'booking rights'. Only that agreement which intends to convey these rights according to both parties can be considered as the source of accrual of rights to the assessee. The confirmation letter dated 6-8-2004 specifically states first, that no right to provisional/final allotment accrues until the buyer's agreement is signed and returned to the builders and second, that no right to claim title/ownership results from the confirmation letter itself. Thus, it was clear that the builders do not intend to convey any right of provisional/final allotment or any right to claim title/ownership under the confirmation letter. There being no intention to convey rights in this document, it would be impermissible to find that the right to obtain title/'booking rights' emanated from the confirmation letter. These rights may only be located in buyer's agreement, and thus, the date of acquisition of the capital asset must be considered the date of signing of said agreement, i.e. 4-11-2004. Those rights were transferred by the assessee on 2-11-2007. Thus, the capital asset in the form of these rights was held for a period of 35 months and 28 days, i.e., a short-term capital asset thus rendering the profits from the transfer of this capital asset was taxable as short-term capital gain.

6] Sec. 12A – If the creation of a trust is illegal and contrary to law, no registration can be granted to it under section 12A

DIT vs. Guru Harkishan Medical Trust [2014] 43 taxmann.com 400 (Delhi)

The Delhi Sikh Gurudwara Management Committee ("the Committee") constituted under the Delhi Sikh Gurudwara Act, 1971 ('the 1971Act'), constructed a hospital at Gurudwara Bala Saheb. The Guru Harkishan Medical Trust i.e., the respondent herein ("the Trust"), was created. A trust deed was drawn up, by which the Committee was described as the settler.

The Deed also stated that the Committee was running a number of charitable institutions, and that it was interested in establishing a speciality hospital to provide medical services at affordable rates. The Deed further stated that the trust is being established to run and operate the hospital either by itself or in collaboration with other organizations with experience and expertise in this field. The Trust, after its constitution, entered into a collaboration agreement with Manipal Health Systems Pvt. Ltd., in terms of which the hospital was to be run by the latter, with a certain part of the revenue paid to the Trust. (revenue-sharing arrangement).The DIT (Exemption) rejected the application of the trust under section 12A of the Act on the ground that the 1971 Act, especially section 24, concerning the powers of the Committee, did not empower the Committee to create a trust. The Trust carried the matter in appeal to the ITAT, which reversed the decision, and held that the Committee did have such powers under sub-clause (iv) of section 24 of the 1971 Act. The instant appeal filed by Revenue before HC where the Revenue impugned the decision of the ITAT arguing that the powers outlined in section 24 are specific and exhaustive, such that the creation of a trust and transfer of property are not contemplated to lie within the powers of the Committee, which - as a creation of statute - cannot exceed the permissible limits. Dismissing the appeal the court held that the dispute between the parties before the ITAT concerned the question of its legality vis-à-vis the powers of the Committee under section 24 of the 1971 Act. The court held that the Committee was a creation of the statute; its functions in the nature of obligations, or duties, were outlined in section 24 of the 1971 Act. The reliance was placed by ITAT on section 24 (iv) of the 1971 Act which was misplaced. That empowered the Committee to do all incidental acts and things necessary to carry out the duties of the Committee itself under section 24 (ix) one of the duties of such Committee was to establish and manage "free clinics"; section 24 (xi) enables the maintenance of "research centres". Neither section 24 nor section 40 (which empowers the Committee to frame regulations) enables the Committee to efface their duties and create other entities for carrying out their functions. Even more importantly, such creations cannot do what Committees are not permitted to perform, i.e. utilize Committee's properties or monies through the device of trusts and societies, to engage in indirect commercial activity, which the trust was authorised and created to indulge in the present case. As a consequence, the ITAT clearly fell into error in holding that the Act permitted the Committee to enter into the agreement which enabled it to set up a joint venture for a hospital, on revenue sharing basis. Clearly such trust was *ultra vires* the Committee's powers and beyond its statutory mandate. Therefore the order of ITAT was set aside and denial of exemption u/s. 12A by DIT (Exemptions) was restored.

7. Recalling order since no opportunity provided

Subrata Roy, In re. [2014] 43 taxmann.com 30 (Allahabad)*

Assistant of assessee's counsel requested for one day adjournment as senior advocate was coming from another city. In view of such request being made, counsel for assessee did not advance any argument in respect of any of questions of law to be adjudicated by High Court. More so, written submissions filed on behalf of department was neither served upon assessee and as such, assessee was not provided any opportunity to rebut written submissions filed by department However, judgment and order was passed against assessee in *CIT v. Subrata Roy [2013] 38 taxmann.com 324/219 Taxman 133 (All.)*. Allowing the appeal the court held that in instant application, assessee's senior advocate requested to consider said matter sympathetically and to recall order so passed. Since cause shown by applicant was satisfactory and as such, to secure ends of justice, it was apt to recall impugned judgment and order.

Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

REPORTED DECISIONS

1. Capital gains – Exemption – Section 54 of the Income-tax Act, 1961 - To claim deduction under section 54 of the Act, the intention of parties while entering into development agreement and obtaining municipal permissions, which determines the nature of property acquired is to be seen – Subsequent change in user of property does not disentitle assessee to relief under section 54 of the Act. A.Y.: 2005-06

Smt. K. Pratibha vs. ITO [2014] 44 taxmann.com 282 (Hyderabad-Trib.)

During relevant year, assessee filed its return declaring long-term capital gain arising from sale of a residential house property. The long term capital gain was claimed as exempted under section 54 of the Act, as the sale proceeds were invested by the assessee in another house property. The Assessing Officer denied the claim of exemption under section 54 of the Act holding that the construction of the building in which the assessee acquired the property was in violation of the municipal permission further, the property was converted into commercial property as against the sanctioned plan of residential flat.

On appeal the Tribunal allowing the benefit of section 54 of the Act to the assessee held that the intention of the parties when the development agreement was entered into was to construct a residential property, even the permissions from Municipal Corporation were obtained only for construction of a residential complex. The assessee received possession of the property as a residential property. Subsequently, if the property was put to use by the assessee himself or by the leasee of the property for commercial use, the same is not relevant, as during the year under appeal, the nature of the property remained 'residential' only.

2. Income from house property - Annual value - Section 23, r.w.s. 263 of the Act – order passed by assessing officer without considering the direction of the CIT – is bad in law. A.Y. 2004-05

Ramon Publications (P.) Ltd. vs. ACIT [2014] 44 taxmann.com 207 (Mumbai-Trib.)

The Commissioner of Income Tax invoking the provisions of section 263 of the Act set aside the assessment order by observing that the rent offered by the assessee was not the fair market rent of the property. He further observed that Assessing Officer has not examined the cost of assets leased/rented and the adequacy of the rent in comparison to its value and further that whether the interest free deposit of ` 7 crores was in lieu of rent which was not offered by the assessee. The comparative market rates were not called for and the applicability of section 23(1)(a) was not examined. The Commissioner remanded the case back to the file of the Assessing Officer for *de novo* assessment on this issue. The Assessing Officer instead of examining the above issues as per the directions of the Commissioner and making necessary enquiries passed the assessment by making addition of notional rent at the rate of 6.25 per cent on the deposit amount of ` 7 crores relying upon the judgment of the Tribunal in the case of *Tivoli Investment & Trading Co. (P.) Ltd. vs. Asstt. CIT [2004] 90 ITD 163 (Mum.)*.

The assessee being aggrieved by the assessment order preferred an appeal before the First Appellate Authority. Before the Commissioner, the assessee submitted that the Assessing Officer did not follow the directions issued by the Commissioner in his order under section 263 and that the calculation of deemed interest is wrong and illegal. The learned CIT(A) however allowed only partial relief to the assessee.

The assessee being aggrieved by the order passed by learned CIT(A) carried the matter in further appeal before the Hon'ble Appellate Tribunal, Mumbai. The Tribunal set aside the order with the Assessing Officer for *de novo* assessment in accordance with law by holding that the assessing officer while making *de novo* assessment relied on the decision of the co-ordinate bench of the appellate tribunal however failed to take into consideration directions given by Commissioner for making necessary enquiries for determining fair rental value of property.

UNREPORTED DECISIONS

3. Expenditure incurred in relation to exempt income – Section 14A of the Income-tax Act, 1961 read with Rule 8D of the Income-tax Rules, 1962 – Assessee is able to show availability of own funds, which may not be exactly available on date of investment or advancement of loan but, within a reasonable short period of time – Even then presumption will be that investment was made by assessee from its own funds or in anticipation of availability of its own funds within a short period of time. A.Y.: 2009-10

Binayak Tex Processors Ltd. vs. Asstt. CIT – [I.T.A. No. 7740 / Mum. / 12; Order dated 21-3-2014; Mumbai Bench]

The assessee was engaged in the business of manufacturing textiles. During the assessment proceedings, it was noticed by the Assessing Officer that the assessee had earned dividend income of ` 2,000/- but the assessee had not claimed the same as exempt. The assessee had not made any disallowance u/s. 14A in terms of rule 8D(ii) while computing the total income of the assessee. The assessee submitted before the Assessing Officer that as it had offered the dividend income for tax and not claim any exempt income, the provisions of section 14A were not applicable. The assessee, however,

offered 0.5 per cent of the average investment as disallowance in relation to expenditure incurred. However, the Assessing Officer held that the provisions of section 14A were clearly applicable in the case of the assessee and made disallowance of ` 17.25 lakhs, as he was not satisfied with the working of disallowance under section 14A of the Act submitted by the assessee. He made disallowance of taking into consideration the expenditure on account of interest under rule 8D(ii) and on account of administrative expenses under rule 8D(iii).

On appeal the Tribunal held that even if on the date of investment, own funds may not be available with the assessee but, if the investment is made in anticipation of availability of own funds and the own funds are available to the assessee within a very short period of time, then under such circumstances disallowance cannot be made of the entire loan amount but a very reasonable proportionate disallowance can be made and even in certain cases can be ignored due to the shortness of the period between the date of advancement and date of availability of own funds. Accordingly, considering the facts in the assessee's case, that the capital and free reserves of the assessee had increased during subsequent years and the borrowings decreased. Further, in the current assessment year as, there were no fresh investment and there was no disallowance under section 14A of the Act up to assessment year 2008-09, the Tribunal held that no disallowance was called for in relation to interest expenditure under rule 8 D(ii) for the year under consideration.

4. Search and seizure – Assessment – Section 153A of the Income-tax Act, 1961 – No incriminating material found during search – Assessing Officer made fresh assessments under section 153A of the Act for various assessment years and made additions to income of assessee on protective basis – Held, as no incriminating material was found during search operation under section 132, assessments made under section 153A of the Act were liable to be set aside. A.Y.s: 2003-04, 2006-07 & 2007-08

Atul Barot vs. Dy. CIT - [I.T.A. Nos. 2889 to 2991/ Mum. / 11; Order dated 26-2-2014; Mumbai Bench]

A search action under section 132 of the Act was conducted against the assessee on 19-7-2007. No incriminating material was found during search. Thereafter, the assessee in response to notice issued under section 153A filed the returns of income for the assessment years 2003-04, 2006-07 and 2007-08. The assessee contented that the assessment in relation to the assessment year 2003-04 has already been completed under section 143(3), whereas for the assessment years 2006-07 and 2007-08 the limitation period for issuing notice under section 143(2) had already been expired and as such the assessments in relation to above assessment years had attained finality. The Assessing Officer however, framed assessments under section 153A of the Act for the above assessment years and made additions in the income of the assessee on protective basis.

On appeal the Tribunal quashing the assessment framed under section 153A read with section 143(3) of the Act held that when no incriminating evidence is found during search, it is not open for the Assessing Officer to make reassessment of concluded assessment in the garb of invoking the provisions of section 153A. Further, the Tribunal observed that such an action will defeat the other

relevant provisions of the Act and also the rights of the assessee accrued therein.

5. Revision – Section 263 of the Act – CIT cannot invoke the provisions of section 263 of the Act when the same issue is pending for consideration in appeal before the CIT(A). A.Y.s: 2003-04 to 2009-10

M/s. R.B. Enterprises vs. CIT - [I.T.A. Nos.: 2340 to 2346 / Del. / 2013; Order dated 31-3-2014; Delhi Bench]

The assessee before the Hon'ble Delhi Appellate Tribunal is a firm engaged in the business of development and sale of land. A search action under section 132 of the Act was conducted against the assessee on 4-3-2009. Pursuant to the search action notice under section 143A was issued by assessing officer. The assessee in response to the said notice filed a letter dated 31-5-2010 and requested the Assessing Officer to treat the original return filed under section 139 of the Act as filed in response to the said notice. The Assessing Officer thereafter passed the assessment order making addition on account of unaccounted sale of land relying on rates mentioned on the backside of plot of booking forms. The Assessing Officer however allowed rebate of 35% from the calculated unaccounted sale by observing that the same must have been incurred for earning the income. The assessee being aggrieved by the assessment order preferred an appeal before the learned CIT(A).

The Dy. CIT examined the record of the assessee and formed an opinion that the Assessing Officer has granted rebate out of unaccounted sale is without any basis. Therefore, she addressed a letter to the CIT to take necessary action under section 263 of the Act. The CIT thereafter issued a show cause notice under section 263 of the Act. The assessee made a detailed reply objecting the issuance of notice under section 263 of the Act. However, the CIT without appreciating the facts and circumstances of the case passed the impugned order setting aside the assessment order passed by Assessing Officer treating the same as erroneous as well as prejudicial to the interest of the revenue.

The assessee being aggrieved by the above order preferred an appeal before the Hon'ble Delhi Appellate Tribunal. During the pendency of appeal before the Hon'ble Appellate Tribunal the appeals filed by the assessee against the order passed under section 153A r.w.s. 143(3) of the Act has taken up for hearing. The learned CIT(A) dismissed the appeal filed by the assessee treating the same as infructuous in view of the order passed by CIT under section 263 of the Act.

The Delhi Appellate Tribunal dismissed the order passed under section 263 of the Act by holding that the issue agitated in the appeals of the assessee before the learned CIT(A) is an integrated common issue, it cannot be segregated in two different proceedings i.e. partly before the learned CIT(A) and partly before learned CIT under section 263 of the Act. The learned CIT(A) has power co-terminus with that of Assessing Officer and while evaluating the evidence demonstrating the appropriate amount of unaccounted sales, if any, to be made in the hands of the assessee, would authorise him to issue notice for enhance under sub-section (6) of section 250 of the Act but there cannot be two parallel proceedings on one common issue.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Notifications

Income-Tax (Third Amendment) Rules, 2014 – Amendment in Rule 6AAE and Substitution of Rule 6AAD – Guidelines for approval of agricultural extension project under section 35CCC

The Central Board of Direct Taxes made the rules to amend the Income-tax Rules, 1962 which shall come into force on the date of their publication in the Official Gazette. In the Income-tax Rules, 1962 for rule 6AAD, the rules have been substituted regarding the agricultural extension project to be considered for notification if it fulfils all of the conditions mentioned therein.

(Notification No. 18/2014 - Dated 21-3-2014)

Section 10(15), Item (H) of Sub-Clause (IV) of the Income-tax Act, 1961 – Exemptions – Interest on Bonds/ Debentures – Specified Companies Authorised to issue Tax-Free, Secured, Redeemable, Non-Convertible Bonds During F.Y. 2013-14 Subject to Specified Conditions – Amendment In Notification No. 61/2013 Dated 8-8-2013

The Central Government made the amendments in the notification dated 8th of August, 2013, Accordingly tn the said notification, in the Table, (a) for serial number 10 and entries relating thereto, the following serial number and entries have been substituted, namely—

(1)	*(2)*	*(3)*
"10.	*Indian Railway Finance Corporation Limited (IRFC)*	*8853";*

(b) after serial number 13, the following serial number and entries shall be inserted, namely:–

(1)	*(2)*	*(3)*
"14.	*IFCI Limited (formerly known as Industrial Finance Corporation of India)*	*430".*

(Notification No. 19/2014 [F.No.178/9/2014-(ITA-I)]/ SO 899(E), dated 26-3-2014)

Section 80-IA, sub-clause (III) of sub-section (4) of The Income-tax Act, 1961 – Deductions – In respect of Profits and Gains From Industrial Undertakings, or Enterprises Engaged in Infrastructure Development, etc. – Notified Undertakings – Amendment In Notification – Dated 1-4-2002

The Central Government under the Industrial Park Scheme, 2002 dated the 1st April, 2002, had granted approval to the undertaking

being developed and being maintained and operated by *M/s Pantheon Infrastructure Pvt. Ltd., Mumbai at Logitech Park, Mathuradas Vasanji Road, Andheri (East), Mumbai-400 072, M/s. Finest Promoters Private Ltd., New Delhi at Khasra Nos. 1961/2 and 1962/1, Sector 54, Taluka Gurgaon, District Gurgaon and M/s Creative Infocity Ltd., Gandhinagar at Indroda Circle, Gandhinagar, Gujarat,* as an Industrial Park; and, had notified the above undertaking(s) being developed and being maintained and operated by said companies an Industrial Park for the purposes of the said clause of the section and subsequently the Central Government *vide* dated 3rd February, 2014 had withdrawn the said approval granted to the said undertaking(s) under the Scheme;

Now, the Central Government rescinds the said Notification(s).

(Notification No. 20/2014. 21-22/2014 dated 26-3-2014, 27-3-2014 Respectively)

Section 90 of the Income-tax Act, 1961 - Double Taxation Agreement – Agreement For Avoidance of Double Taxation and Prevention of Fiscal Evasion with Foreign Countries – Sri Lanka

An Agreement between the Government of India and the Government of the Democratic Socialist Republic of Sri Lanka for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income was signed in India in January, 2013 and shall enter into force on the 22nd day of October, 2013, being the date of the later of the notifications after completion of the procedures as required by the laws of the respective countries for the entry into force of DTAA, in accordance with Article 30 of the said DTAA.

Now, the Central Government notified that the provisions of DTAA annexed thereto shall be given effect to in the Union of India with effect from the 1st day of April, 2014.

(Notification No. 23/2014 dated 28-3-2014)

Income-Tax (Fourth Amendment) Rules, 2014 – Amendment in Rule 12 & Substitution of Forms SAHAJ (ITR-1), ITR-2, SUGAM (ITR-4S) AND ITR-V

The Central Board of Direct Taxes made the rules further to amend the Income-tax rules, 1962, called the Income-tax (4th Amendment) Rules, 2014 which shall come into force with effect from the 1st day of April, 2014. In the said rules, in Appendix-II, for "Forms SAHAJ (ITR-1), ITR-2, SUGAM (ITR-4S) and ITR-V" the "Forms SAHAJ (ITR-1), ITR-2, SUGAM (ITR-4S) and ITR-V" respectively have been substituted.

(Notification No.24/2014 - dated 1-4-2014)

Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 2014 – Amendment in Paragraph 3

Central Government amended the *Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993,* called the *issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) (Amendment) Scheme, 2014* which shall be deemed to have come into force from the date of publication of Notification; and in the *Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993*: wherein Paragraph 3(1)(B)(b) the words "They shall comply with SEBI's disclosure requirements in addition to that of the primary exchange prior to the listing abroad" shall be substituted by the words "They shall comply with SEBI's disclosure requirements when they apply for listing in India".

(Notification No. GSR 282(E) [F.No.4/13/2012-ECB], Dated 15-4-2014)

8% Savings (Taxable) Bonds, 2003 – Amendment in Paragraph 9

The Government of India notified that sub-paragraph (i) in Paragraph 9 (Applications) of

the aforesaid Notification notified on March 21, 2003. Accordingly Applications for the Bonds would now be made in the Revised Form 'A' attached thereto or in any other form as near as thereto incorporating all the fields in the revised form. The other terms and conditions of the notification shall remain unchanged.

(Notification No. F.4 (10)-W&M/2003, dated 21-4-2014)

Circulars

Section 10(2A) of the Income-tax Act, 1961 – Firm – Share of Profits to Partner of Firm – Clarification on Interpretation of Provisions of Section 10(2A) in cases where income of firm is exempt

In connection with the interpretation of provisions of section 10(2A) of the Income-tax Act, 1961 ('Act') seeking clarification as to what will be the amount exempt in the hands of the partners of a partnership firm in cases where the firm has claimed exemption/deduction under Chapter III or VI A of the Act. Sub-section (2A) of section 10 was inserted by the Finance Act, 1992 w.e.f. 1-4-1993 due to a change in the scheme of taxation of partnership firms. Since assessment year 1993-94, a firm is assessed as such and is liable to pay tax on its total income. A partner is not liable to tax once again on his share in the said total income.

The Board clarified that 'total income' of the firm for sub-section (2A) of section 10 of the Act, as interpreted contextually, includes income which is exempt or deductible under various provisions of the Act. It is, therefore, further clarified that the income of a firm is to be taxed in the hands of the firm only and the same can under no circumstances be taxed in the hands of its partners. Accordingly, the entire profit credited to the partners' accounts in the firm would be exempt from tax in the hands of such partners, even if the income chargeable to tax becomes NIL in the hands of the firm on account of any exemption or deduction as per the provisions of the Act.

(Circular No. 8/2014 - dated 31-3-2014)

Section 79 of the Income-tax Act, 1961 – Losses – Carry Forward and set off of in Case of Certain Companies – Department's Objections to Merger/Amalgamation/Demerger / Reconstruction Scheme of Companies Not Entertained by High Courts - Remedial Measures to be taken by Department Therefor

On the above-mentioned subject in a recent case of proposed amalgamation, it was noted that the scheme of amalgamation was designed seeking amalgamation with retrospective dates so as to claim set off of losses of loss-making companies against the profits of profit making companies of the group and thus impacting adversely the much needed public revenue. This fact of proposed amalgamation was not brought to the notice of Income Tax Department either by the Ministry of Corporate Affairs (MCA) or Registrar of Companies (ROC). The Department had to file an intervention application opposing such amalgamation before the High Court which was rejected on the ground that the Department had no locus standi in the matter and that Regional Director, MCA has been delegated power in this regard.

In this connection Circular No. 1/2014 dated 15-1-2014 has been issued by MCA to Regional Directors which lays down that while furnishing any report regarding reconstruction or amalgamation of companies under the Companies Act, comments and inputs from the Income Tax Department may invariably be obtained so as to ensure that the proposed scheme of reconstruction or amalgamation has not been designed in such a way as to defraud the Revenue and consequently being prejudicial to public interest. It has further been said that

the Regional Directors would invite specific comments from the Income Tax Department within 15 days of receipt of notice before filing response to the Court. It is emphasised that this is the only opportunity with the Department to object to the scheme of amalgamation if the some is found prejudicial to the interest of Revenue.

It is therefore desired that the comments/ objections of the Department are sent by the concerned CIT to Regional Director, MCA for incorporating them in its response to the Court, immediately after receiving information about any scheme of amalgamation or reconstruction, etc.

(Letter [F.No.279/MISC./M-171/2013-ITJ], dated 11-4-2014)

Instructions to subordinate authorities – Clarification on Treatment of Expenditure incurred for Development of Roads/Highways in BOT Agreements – Section 119, read with section 32, of the Income-tax Act, 1961

The disputes have arisen as to whether the expenditure incurred on development and construction of infrastructural facilities like roads/highways on Build-Operate-Transfer ('BOT') basis with right to collect toll is entitled for depreciation under section 32(1)(ii) of the Act or the same can be amortised by treating it as an allowable business expenditure under the relevant provisions of the Income-tax Act, 1961. In such projects, the developer (hereinafter referred to as 'assessee'), in terms of concessionaire agreement with Government or its agencies is required to construct, develop and maintain the infrastructural facility of roads/ highways which, *inter alia*, includes laying of roads, bridges, highways, approach roads, culverts, public amenities, etc. at its own cost and its utilisation thereof for a specified period. In lieu of consideration of the expenditure incurred on construction, operation and maintenance of the infrastructure facility covered by the period of the agreement, the assessee is accorded a right to collect toll from users of such facility. The expenditure incurred by such assessee on development and construction of such infrastructural facility are capitalised in the accounts. It is seen that in returns-of-income, assessees are generally claiming depreciation on such capitalised expenditure treating it as an 'intangible asset' in terms of section 32(1)(ii) of the Act while in assessments, such claims are being disallowed by the Assessing Officer on the grounds that such infrastructural facility is not owned wholly or partly, by the taxpayer which is an 'essential condition for claiming depreciation and further right to collect toll does not fall in any of the categories of intangible assets' specified in sub-clause (ii) of sub-section (1) of section 32 of the Act.

In BOT arrangements for development of roads/highways, as a matter of general practice, possession of land is handed over to the assessee by the Government/notified authority for the purposes of construction of the project without any actual transfer of ownership and such assessee has only a right to develop and maintain such asset. It also enjoys the benefits arising from use of asset through collection of toll for a specified period without having actual ownership over such asset. Therefore, the rights in the land remain vested with the Government or its agencies. Thus, as assessee does not hold any rights in the project except recovery of toll fee to recoup the expenditure incurred, it cannot therefore be treated as an owner of the property, either wholly or partly, for purposes of allowability of depreciation under section 32(1)(ii) of the Act. Thus, present provisions of the Act do not allow claim of depreciation on toll ways due to non-fulfilment of ownership criteria in such cases. Where the assessee incurs expenditure on a project for development of roads/highways, he is entitled to recover cost incurred by him towards development of such facility (comprising construction cost and other pre-operative expenses) during the construction period. Further, expenditure incurred by the

assessee on such BOT projects brings to it an enduring benefit in the form of right to collect the toll during the period of the agreement Hon'ble Supreme Court in the case of *Madras Industrial Investment Corporation Ltd. vs. CIT 225 ITR 802* allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a period. Therefore, analogously, expenditure incurred on an infrastructure project for development of roads/highways under BOT agreement may be treated as having been made/incurred for the purposes of business or profession of the assessee and same may be allowed to be spread during the tenure of concessionaire agreement.

In view of above, Central Board of Direct Taxes clarified that the cost of construction on development of infrastructure facility of roads/highways under BOT projects may be amortised and claimed as allowable business expenditure under the Act. The amortization allowable may be computed at the rate which ensures that the whole of the cost incurred in creation of infrastructural facility of road/ highway is amortised evenly over the period of concessionaire agreement after excluding the time taken for creation of such facility. In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highways under BOT projects in earlier year, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration may be deducted from the initial cost of infrastructure facility of roads/highways and the cost 'so reduced' shall be amortized equally over the remaining period of toll concessionaire agreement. It is further clarified that this Circular is applicable only to those infrastructure projects for development of roads/highways on BOT basis where ownership is not vested with the assessee under the concessionaire agreement.

(Circular No. 9/2014 - dated 23-4-2014)

Instructions

Section 142 of the Income-tax Act, 1961 – Procedure for assessment – Inquiry before Assessment – Standard Operating Procedure (SOP) for verification and Correction of Demand Available or Uploaded by AOS in CPC Demand Portal

In connection with above the CBDT has issued the Central Action Plan for the First Quarter of Financial Year 2014-15 wherein all assessing officers ('AOs') are required to verify and clean outstanding demand by 30th April, 2014 (reference: para LA – Correction of demand). The Instructions provide the steps to be followed by AOs in this regard which should be adhered to by all Assessing Officers in there respective region. As required in para VI of the Central Action Plan for first Quarter of the year 2014-15, all Chief Commissioners and Commissioners have been directed to monitor the action taken by Assessing Officers as per this instruction and report the progress in their Monthly DOs.

The instructions consist of the following :

- Categories of Demand in CPC FAS
- The broad Steps for Verification and Confirmation of Demand
- Handling Different Scenarios during Verification and Confirmation of Demand by the Assessing Officer
- If the taxpayer's reply or Departmental records show that demand is in duplicate, the duplicate demand should be marked in CPC demand verification portal as per procedure provided in the SOP and such duplicate demands will be subsequently deleted.

(Instruction No. 4/2014 [F.No.225/151/2014/ITA.II], Dated 7-4-2014)

Press Releases

Section 139D of the Income-tax Act, 1961 – Filing of Return in Electronic Form – Extension of Facility to Taxpayers to verify if demand in their Case is due to tax Credit Mismatch on Account of Incorrect Furnishing of Specified Particulars and Submit Rectification Requests with Correct Particulars of TDS/Tax Claims For Correction of these Demands

Detailed instructions have been issued by the CBDT to all the Assessing Officers laying down a Standard Operating Procedure (SOP) for verification and correction of demand by the AOs. As per this SOP, the taxpayers can get their outstanding tax demand reduced/deleted by applying for rectification along with the requisite documentary evidence of tax/demand already paid. The SOP also makes special provisions for dealing with the tax demand upto ` 1,00,000/- in the case of Individuals and HUFs in order to accommodate certain extraordinary situations. The SOP is expected to mitigate the long standing grievances of taxpayers by way of reduction/deletion of tax demands.

The CBDT has further noted that many taxpayers are committing mistakes while furnishing their tax credit claims in the return of income. Such mistakes include quoting of invalid/incorrect TAN; quoting of only one TAN against more than one TAN tax credit; furnishing information in wrong TDS Schedules in the Return Form; furnishing wrong challan particulars in respect of Advance tax, Self-assessment tax payments, etc. As a result of these mistakes, the tax credit cannot be allowed to the taxpayers while processing returns despite the tax credit being there in 26AS statement. The CBDT, therefore, desires the taxpayers to verify if the demand in their case is due to tax credit mismatch on account of such incorrect particulars and submit rectification requests with correct particulars of TDS/tax claims for correction of these demands. The rectification requests have to be submitted to the jurisdictional Assessing Officer in case the return was processed by such officer, or the taxpayer is informed by CPC, Bengaluru that such rectification is to be carried out by Jurisdictional Assessing Officer. In all other cases of processing by CPC, Bengaluru, an online rectification request can be made by logging into e-filing website http://incometaxindiaefiling.gov.in as per the procedure given in detail in its Help Menu.

(Press Note No.402/92/2006-MC, dated 17-4-2014)

DTC, 2013 - Significant changes in the proposed Direct Taxes Code, 2013

The Income-tax Act was passed in 1961 and has been amended every year through the Finance Act. The Wealth-tax Act was passed in 1957 and has also been amended many times. Numerous amendments have rendered the two Acts incomprehensible to the average taxpayers. Besides, there have been several policy changes due to change in economic environment, complexity in the market, increasing sophistication of commerce, and development of information technology. There has also been a multitude of judgments (at times conflicting) rendered by the courts at different levels. This necessitated drafting of a Code to consolidate and amend the law relating to all direct taxes. Accordingly, a draft Code along with a concept paper was released on 12th August, 2009 inviting suggestions from the public. The Code sought to consolidate and amend the law relating to all direct taxes so as to establish an

economically efficient, effective and equitable direct tax system which would facilitate voluntary compliance and also reduce the scope for disputes and minimise litigation.

Having considered the suggestions received from various stakeholders a revised discussion paper was released on 15th June, 2010. Thereafter, taking into account the suggestions which were accepted by the Government, the Direct Taxes Code Bill, 2010 was introduced in the Lok Sabha on 30th August, 2010. The Bill was referred to the Standing Committee on Finance (SCF) on 9th September, 2010 for examination and report thereon. The SCF presented its report to the Speaker, Lok Sabha in March, 2012. The report contains general recommendations in Part I and deals with specific clause wise recommendations in Part-II. A large number of recommendations of the SCF along with other suggestions which were forwarded at the examination stage have been accepted by the Government. Further, the Kelkar Committee in its report on 'Road Map for Fiscal Consolidation' submitted to the Government in September, 2012 made the following observations on the Bill:—

"The Direct Taxes Code Bill, 2010 which intends to revamp the law relating to direct taxes is likely to result in considerable unacceptable losses on a continuing basis. Given the low tax-GDP ratio and the existing fiscal crisis, there is absolutely no fiscal space for such large revenue loss. Therefore, the Direct Taxes Code Bill, 2010 should be comprehensively reviewed before it is enacted into law for implementation."

Since the Direct Taxes Code Bill, 2010 was introduced in the Parliament, amendments were carried out in the Income-tax Act, 1961 and the Wealth-tax Act, 1957 through Finance Acts, 2011, 2012 & 2013. These amendments were consistent with the policy laid down in the DTC Bill, 2010. Incorporating these amendments in the DTC Bill, 2010 would require a large number of official amendments making the Bill incomprehensible and the legislative process cumbersome. Hence, it was decided to revise the Direct Taxes Code incorporating all the amendments and presenting it as a fresh Bill. Accordingly, a new revised Direct Taxes Code was drafted.

Recommendations of SCF which are proposed to be accepted: Out of 190 recommendations made by the SCF, 153 are proposed to be accepted wholly or with partial modifications. In addition to the recommendations forming part of the report, 61 suggestions forwarded by the SCF at the discussion stage have also been accepted for incorporation in the revised Code.

Recommendations of the SCF which have not been incorporated in the proposed DTC, 2013: The recommendations of the SCF which were not in harmony with the broad taxation policy of the Government have not been incorporated in the revised Code.

Other significant changes in the Code: Taking into account, the report of the SCF and the amendments carried out in the Income-tax Act, 1961 and the Wealth-tax Act, 1957 which are consistent with the policy laid down in the Bill, the revised Code has been drafted. While drafting the revised Code, a comprehensive review of the provisions of DTC Bill, 2010 was also carried out in the light of the observations made by the Kelkar Committee in its report on 'Road Map for fiscal consolidation'.

The press release may be referred for full text *vide* below.

(Press Release, dated 31-3-2014)


CA Tarunkumar Singhal & CA Sunil Moti Lala

INTERNATIONAL TAXATION
Case Law Update

A] HIGH COURT JUDGMENT

I. In absence of sufficient degree of joint action between consortium members in either execution or management of project, consortium would not be deemed as an AOP for purposes of Act – The fact that the contractual obligations of one of consortium members were not limited to merely supplying equipment, but were for due performance of the entire Contract, would not necessarily imply that the entire income relatable to the Contract could be deemed to accrue or arise in India – The taxable income in execution of a contract may arise at several stages and the same would have to be considered on the anvil of territorial nexus

Linde AG, Linde Engineering Division vs. DDIT [2014] 44 taxmann.com 244 (Delhi)

Facts

1 ONGC floated a Tender Notice inviting bids executing the work (including undertaking all activities and rendering all services) for the design, engineering, procurement, construction, installation, commissioning and handing over of the plant on a lump sum turnkey basis.

2 The petitioner has entered into a consortium with Samsung in order to submit a bid to secure the above contract which was subsequently awarded to the consortium.

3 The petitioner filed application before the Hon'ble AAR seeking an advance ruling with regard to the status of the petitioner and Samsung as an Association of Persons ("AOP") and also as to the tax liability of the petitioner in India in respect of income received / receivable for the offshore supply of goods and for rendering of offshore services under the contract.

4 The Hon'ble AAR *vide* its order dated 20 March, 2012 ruled that the Consortium constituted an AOP. It noted that the Notification of Award was in the name of the Consortium and not in the name of the petitioner and Samsung individually. The liability of the petitioner and Samsung towards ONGC, for due performance of the contract, was joint and several. It further held that the contract was an indivisible contract and was incapable of being split up into different components/ parts and thus the income received/

receivable by the petitioner for offshore supply of equipment, materials and spares and for offshore supply of drawings and designs relating thereto was taxable in India.

5 Aggrieved, the petitioner filed a writ petition before the Hon'ble High Court.

Judgment

Constitution of an AOP

1 The Hon'ble High Court held that an association can be considered as a separate taxable entity (i.e., an APO), if it exhibits the following essential features:

- Two or more persons must constitute it.
- The constituent members must have come together for a common purpose.
- The association must move by common action and there must be some scheme of common management.
- The cooperation and association amongst the constituent members must not be perfunctory and / or merely in form. The association amongst members must be real and substantial which is sufficient to treat the association as a separate homogenous taxable entity.

2 It observed that in the instant case the petitioner and Samsung had joined together for the purpose of:

- Bidding for the contract;
- Presenting a facade of a consortium for execution of the contract and accept joint and several liability for due performance of the contract and completion of the project; and
- Putting in place a management structure for *inter se* coordination and execution of the project. However, in all other respects, both the petitioner and Samsung were independent of each other and were responsible for their own deliverables under the contract, without reference to each other.

3 The Hon'ble High Court held that the mere fact that the petitioner and Samsung agreed to be jointly and severally liable for due performance of the Contract only indicated that they had accepted a contractual obligation towards a third party, the same would not by itself lead to a conclusion that the said members had formed an AOP. In order to consider independent agencies as an AOP, it is necessary that they should form a joint enterprise with a greater level of common management. An element of mutual agency and joint action for mutual purpose are also necessary. Mere obligation to exchange information between independent agencies, for co-ordinating their independent tasks would not result in an inference that the agencies had constituted an AOP.

4 It further noted that the petitioner and Samsung had neither shared costs nor the risks. Both managed their own deliverables. Thus, the facts of the case did not indicate a sufficient degree of joint action between the petitioner and Samsung in either execution or management of the project to justify a conclusion that they had formed an AOP and thus the Hon'ble AAR had erred in concluding so.

Taxability in India

5 The Hon'ble High Court held that the mere fact that the contractual obligations of the applicant were not limited to merely

supplying equipment, but were for due performance of the entire contract, would not necessarily imply that the entire income which was relatable to the contract could be deemed to have accrued or arisen in India;

6 It relied on the judgment of the Hon'ble Supreme Court in the case of *Ishikawajima-Harima Heavy Industries Ltd. vs. DIT [2007] 158 taxmann 259 (SC)* wherein after considering the aforesaid aspect it held that merely because a project was a turnkey project would not necessarily imply that for the purposes of taxability, the entire contract had to be considered as an integrated one. Accordingly, it held that the impugned ruling of Authority was, clearly contrary to the decision of the Hon'ble Supreme Court in Ishikawajima-Harima Heavy Industries

7 It further observed that Explanation 1(a) to Section 9(1)(i) of the Act clearly embodies the principle of apportionment. In cases where all the operations of business are not carried out in India, the income arising therefrom is required to be apportioned and only that portion of income which is reasonably attributable to operations carried on in India would fall within the net of tax in India under Section 9(1)(i) of the Act.

8 The Hon'ble High Court held that where the equipment and material were manufactured and procured outside India, the income attributable to the supply thereof could only be brought to tax if it was found that the said income arose through or from a business connection in India. However, in view of the decision of the Hon'ble Supreme Court in Ishikawajima-Harima Heavy Industries it could not be concluded that the Contract provided a "business connection" in India and, accordingly, the Offshore Supplies could not be brought to tax under the Act.

9 It further observed that Hon'ble Supreme Court in Vodafone International Holdings B.V. [2012] 6 SCC 613 held that the "look at" principle must be applied to see the transaction as it existed and piercing of the Corporate Veil was not necessary where the transactions were genuine and had commercial substance. However, in the present case, there was no controversy which involves lifting of the corporate veil or "looking at" any scheme to find whether a transaction is a sham or has any substance. Both the Revenue and Linde were accepting the Contract as it stands and the controversy only revolved around the *situs* of the income accruing or arising from the contract. Thus, the Hon'ble AAR read the principles applied by the Supreme Court completely out of context.

10 Accordingly, it set aside the impugned ruling and remanded the case to the Hon'ble AAR for deciding the same afresh in accordance with the views expressed.

B) Tribunal Decisions

I) India-Denmark DTAA – Shipping Business – Where assessee, a Denmark based company, recovered certain cost from its Indian agent towards usage of software which was directly connected with its shipping operations, the same had to be treated as covered under Article 9(1) of the DTAA and, hence it could not be taxed in India

DDIT vs. A.P. Moller Maersk [2013] 39 taxmann.com 39 (Mumbai - Trib.)

ASSESSMENT YEAR 2008-09

Facts

1) The assessee was engaged in the operation of ships in international traffic. In order

to carry on its business operations in the efficient manner and also as a necessary business requirement, the assessee developed and maintained SAP based ERP system software solution called FACT for tracking and recording various transactions. The assessee required its agents to only use FACT system software for smooth operation of Containers Inland Services (CIS) around the world.

2) For said purpose, the assessee entered into service level agreement with its Indian agent i.e., MIPL in terms of which expenditure incurred towards FACT system software was allocated on the basis of weighted number of users.

3) The assessee contended that since software was used wholly for shipping operations only, the payment made for use of such software could not be segregated from shipping business and, thus, it was exempt from tax under Article 9 of the India-Denmark DTAA.

4) The A.O. held that what had been termed as 'reimbursement of cost' was payment for technical services provided by the assessee and the same had to be treated as fees for technical services in the hands of the assessee under Article 13 of India-Denmark DTAA.

5) The Commissioner (Appeals) held that the amounts received by the assessee towards FACT system software were not FTS but were its income derived from operation of ships in international traffic and therefore not chargeable to tax in India under the provisions of Article 9(1) of the India-Denmark DTAA.

Decision

The Tribunal held in assessee's favour as follows:

1. Article 9(1) of Indo-Denmark DTAA provides that the profits derived from operation of the ships in international traffic shall be taxable at a place where the effective management of the enterprise is situated and such a profit is exempt from tax in the other contracting State.

2. The term 'profit' under this Article has to be construed more broadly so as to include not only the activities directly connected with the shipping operations but also to include income from activities which facilitate or support such operation as well as any ancillary activities.

3. The OECD commentary on Article 8 (similar to Article 9 of the Indo-Denmark DTAA) also expresses the same view. If any activity is directly linked with carrying on shipping operations and results into some kind of an income, then it has to be treated as a part of such shipping operations only.

4. In the instant case, software in fact is a tool and integrated part of shipping operations only. Usage of software cannot be segregated from activities of over all shipping operations so as to hold it as rendering of any independent technical services [Para 10].

5. Once it has been held that the cost recovered from the various agents towards usage of software are directly connected with the shipping operations then the same has to be treated as covered under Article 9(1) of India-Denmark DTAA and, hence, it cannot be taxed in India.

II) Where foreign branches of assessee made payment to foreign suppliers for services rendered outside India and said suppliers did not have permanent establishment in India, assessee was not required to deduct TDS on such payments – Section 9(1)

(vii)(b) r/w section 195 and section 40(a)(i)

DCIT vs. Motech Software (P.) Ltd. [2014] 43 taxmann.com 122 (Mumbai-Trib.)

ASSESSMENT YEARS 2002-03, 2005-06, 2006-07 & 2007-08

Facts

1) The assessee was engaged in the business of software development/Information Technology Enabled services.

2) The A.O. disallowed the software development expenses and administrative and other expenses incurred and paid by assessee's branches in USA, UK and Japan by invoking provisions of section 40(a)(i) on the ground that the assessee had failed to deduct TDS from payments made for expenses incurred and paid from those branches.

3) The Commissioner (Appeals) set aside the order of the Assessing Officer holding that since recipients had no permanent establishment in India, said amount could not be held as chargeable to tax in India and, moreover, said payments fell under exception to clause (b) of section 9(1)(vii) and section 195 had no application to such payments.

Decision

The Tribunal held in assessee's favour as follows:

1) There is no dispute to the fact that the assessee's branches operating in foreign countries, namely, Japan, UK and USA had made payments to the foreign suppliers for services received by them in foreign countries.

2) As per section 195, TDS is required to be deducted on the payments made/credited to a non-resident only if said payment is chargeable to tax under provisions of the Act. Provisions of section 5(2)(b), read with section 9(1), apply only when income of the non-resident has accrued or arise or is deemed to accrue or arise in India.

3) India has DTAA with UK, USA and Japan and as per section 90, provisions of DTAA will prevail over the provisions of the Income-tax Act. Therefore, even if said payments made by the foreign branches of Indian concern to foreign suppliers are concerned as business profits under Article 7 of the Tax Treaty with USA, UK and Japan, they are not taxable in India unless said recipients have permanent establishment in India as envisaged under Article 5 of the Tax Treaty with said foreign countries. There is no case of the department that said foreign recipients have permanent establishment in India within the meaning of Article 5 of the Tax Treaty with respective countries.

4) Hence, no TDS is required to be deducted under section 195 as the said payments cannot be taxed as per provisions of section 5(2)(b) read with section 9(1)(i).

5) As per section 9(1)(vii)(b), fees for technical services paid by a resident in respect of services utilised in a business carried on by the resident outside India or for the purposes of earning any income from any source outside India, does not constitute an income liable to tax under the Act as it falls in the exception to clause (b) of section 9(1)(vii).

6) Further, there is no dispute to the fact that rent has also been paid by the assessee in respect of property which is situated in the said country abroad and as per Article 6 of the DTAA with respective country it is taxable in that country and not in India. Accordingly, there is no tax payable by the recipient in India for rent received in respect of property situated abroad.

Hence, provisions of section 195 are also not applicable in respect thereof.

7) Considering above facts and also in the light of decision of the Apex Court in the case of *GE India Technical Centre (P.) Ltd. vs. CIT [2010] 327 ITR 456/193 taxmann 234/7 taxmann.com 18*, if payment is made to a non-resident which is not taxable under the provisions of Income-tax Act, question of making deduction under section 195 does not arise. Consequently, no disallowance under section 40(a)(i) could be made.

III) India-USA DTAA – Payment of annual maintenance charges (AMC) in connection with rendering annual maintenance services relating to an equipment sold by US Company to assessee – Whether so called AMC services rendered constituted 'included services' in sense of Article 12(4)(a) – Whether AMC payment constituted 'fees for included services' – Held : No – Payment for repairs of machinery does not constitute 'fees for technical services'

DCIT vs. VSNL Broad Band Ltd. VSNL Broad Band Ltd. [2013] 38 taxmann.com 287 (Mumbai - Trib.)

Facts

1) The assessee, engaged in business of providing broadband services, purchased an equipment, i.e., Dense Wave Multiplexing Equipment, from a US company, 'Sycamore'. It paid a sum as annual maintenance charge (AMC) to said US company in connection with said equipments without making TDS.

2) The Assessing Officer held that payment towards AMC constituted 'fees for technical services' (FTS) and he, accordingly, disallowed said payment under section 40(a)(i).

3) The Commissioner (Appeals) held that AMC payment did constitute FTS as per Article 12(4)(b) of DTAA between India and USA and, therefore there was no need to deduct TDS thereon.

Decision

The Tribunal held as under:

1) Sycamore, USA allows the assessee to reach him through the online/web-based processes developed and owned by it and on acquiring the equipment, the customers like the present assessee acquires the 'right to use' such processes of Sycamore. Commissioner (Appeals) has not gone into these issues, which he should have, when the assessee has chosen to opt for the treaty provision. Further, it is evident, the paragraph 5 of the Article 12 enlists the list of services which do not amount to FIS. Thus, there is a need for analysing if the services rendered to the assessee do not fall in sub-paragraph (a) or (b) of Article 12 of Indo-USA DTAA. It is the case of the Commissioner (Appeals), the impugned payments do not come under the 'make available' provisions *vide* sub-paragraph (b) of Article 12(4) of the Treaty. But, it is a fact that Commissioner (Appeals) has not gone into the applicability of the provisions clause (a) of the Article 12(4) of the Treaty. [Para 15]

2) If the online facilities are available to the assessee through which technical troubles are sorted out by using such processes. There is no whisper about this 'processes' which should be done considering the nature of sub-clause (b) of Article 12(4). Further there is no discussion about the applicability of the Article 12(4)(a) which deals with ancillary and subsidiary services. As such, it is an undisputed

fact that the assessee obtained purchased machinery and the payments were made in accordance with the Article 12(3) of the Treaty. The Tribunal does not have access to the relevant agreement for purchase of the machinery if the so called AMC services rendered constitute 'included services' in the sense of Article 12(4)(a) of the Indo-USA DTAA.

3) The Commissioner (Appeals) restricted his enquiry and adjudication inadequately to the provisions of Article 12(4)(b) of the Treaty and left the issues to like 'processes' and further of course, he had not considered the provisions of Article 12(4)(a) of the Treaty entirely. He completely ignored the fact that the service agreements have real genesis in the purchase agreement *qua* the equipment i.e. Dense Wave Division Multiplexing Equipment. The impugned service agreements, as amended from time to time, are required to be studied in conjunction with the purchase agreement of the equipment if the services which are rendered constitutes extended warranty with additional payments by way of AMC.

4) Regarding the finding of the Commissioner (Appeals) on the applicability of the provisions of article 12(4)(b) of the Treaty, to the extent he adjudicated, the same do not need any interference subjected to the like finding of the Commissioner (Appeals) in the ensuing remand proceedings on if the 'processes' are not made available to the assessee and the online and web-based services do not constitute making available to the assessee. As such, on perusal of the agreement between the assessee and Sycamore, USA in isolation, the said provisions do not imply the transfer of technical knowledge or skills to the assessee or to its employees. However, considering the peculiar facts of this case, there is need for analysing the purchase agreement of the equipment if any and related clause on warranty and services enlisted therein and the subsequent service agreements as amended subsequently. The subsequent service agreements are merely the 'automatic extension' and therefore, there is need for examining the applicability of the provisions of Article 12(4)(a) if these services constitute 'ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received.

5) Otherwise, the annual maintenance charges paid by the assessee to the Sycamore Networks Inc., USA do not involve any deputation of its employees to the assessee for equipping them with the technical knowledge, technical skill, etc. imparted by the Sycamore, USA. There is also no imparting of such knowledge as of technical nature for which assessee needs any rights of ownership or expertise. Therefore, from the point of view of the provisions of Article 12(4)(b), it is a case of mere attending to the services by the Sycamore, USA to the complaints/ troubleshooting of the assessee/assessee's customers through online requests. As such nothing is brought on record by the revenue to counter the findings of the Commissioner (Appeals) with regard to his conclusions on the applicability of the provisions of Article 12(4)(b) to the extent analysed and adjudicated. Thus, for the limited purpose of examining the (i) applicability of Article 12(4)(a); and (ii) the Article 12(4)(a) to the extent of 'make available' of the 'processes' mentioned therein, the matter is remanded to the files of the Commissioner (Appeals) for fresh examination and adjudication after obtaining the relevant facts.

IV) India-China tax treaty – Income from supply of telecommunications network equipment and software taxable as business income

Facts

1) The assessee, a Chinese company, was engaged in the business of supplying telecommunications network equipment. i.e., core and access network equipment, mobile network equipment and data communications equipment. The assessee did not file its return of income in India.

2) During the year under consideration, a survey was undertaken at the office premises of Huawei India Pvt. Ltd. (Huawei India), a assessee's subsidiary. During the course of survey, several documents were found and impounded and statements of various senior executives were recorded.

3) On the basis of the said documents and statements, the Assessing Officer (AO) issued notice under section 148 of the Income-tax Act, 1961 (the Act). It was held that the existence of wholly owned subsidiary of the assessee creates a business connection under section 9(1)(i) of the Act. The AO also held that the assessee had PE in India and the income from the supply of telecommunications network equipment was taxable in India.

4) The AO artificially allocated the revenue from supply of equipment between two portions i.e. hardware supplied and the software, which is embedded with hardware/equipment. The AO treated receipt from the software as royalty and receipt from sale of hardware as business income under the tax treaty. The Dispute Resolution Panel (DRP) upheld the order of the AO.

Decision

A. On Business Connection & Permanent Establishment in India, the Tribunal held as follows:

I. Re : Business connection in India

Huawei India was economically, technically and financially all dependent upon the assessee. Further the telecom equipment supplied by the assessee are invariably installed and commissioned by its wholly owned subsidiary Huawei India and hence, it is clear that the assessee has a business connection in India.

II. Re : Fixed place PE

On the basis of various information collected during the survey it was clear that the assessee was carrying out the business in India. The business of the assessee in India is being conducted with active involvement of the employees of Huawei India.

Such employees of Huawei India along with employees of the assessee have jointly prepared bidding documents for contracts, negotiated and concluded the contract on behalf of the assessee with its Indian customers.

The assessee has given power of attorney in favour of its employees for signing the contracts, conducting negotiation and executing all necessary matters for the project in India.

The assessee's business in India was carried out with the help of its employees, who regularly work from the premises of Huawei India.

In view of the above, it was clear that the assessee, being tax residents of China, had fixed place PE in India in form of office premises of Huawei India.

III. Re : Agency PE

The employees of Huawei India forms the sales teams of the assessee, such employees have habitually secured orders in India, wholly or almost wholly for the assessee. The documents in the form of agreements/purchase orders/ copies of contracts also prove the active involvement of the employees of Indian company in the conclusion of contracts on behalf of the assessee.

Huawei India was economically, technically and financially all dependent upon the assessee. Therefore, Huawei India also constitutes the agent other than an agent of independent status of Huawei China. This results into the creation of the dependent agent PE under the tax treaty and business connection under the Act.

Further, the process of joint bidding by the assessee and Huawei India constitutes Dependent Agent PE.

IV. Re : Installation PE

The assessee's employees also visited India to perform activities relating to installation projects lasting for more than 180 days, which constitutes Installation PE.

V. Re: Service PE

The statements recorded during the survey also show that the employees render technical services continuing for more than 183 days, constituting Service PE.

VI. The facts recorded by the AO and upheld by the DRP in their order have not been controverted before the Tribunal. Accordingly, the Tribunal held that assessee had PE in India.

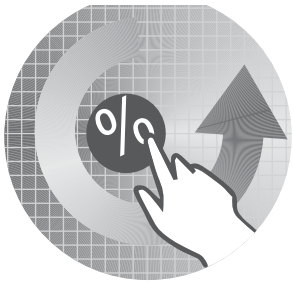
B) Taxability of income from supply of equipment and software

1) The facts of the present case are identical with facts of the Delhi High Court in the case of *Ericsson A.B. vs. ADIT [2012] 341 ITR 162 (Del.)* where it was held that the software that was loaded on the hardware did not have any independent existence. The assessee sold the hardware and software together and therefore, both software and hardware cannot be assessed separately. Similar view is also expressed by the High Court in the case of *DIT vs. Infrasoft Ltd. [2014] 220 taxmann 273 (Del.).*

2) On referring to the clauses of the agreement, it was evident that the software is a set of programme embedded in the equipment necessary for control, operation and performance of the equipment. The contract price was for supply of equipment and thus there was a consolidated price for the supply of equipment which consists of hardware and software.

3) Perusal to the agreement, it was evident that the equipment, i.e. the hardware supplied by the assessee, contained the software and the software was not supplied separately. The buyer was granted a non-exclusive, non-transferable and non-sub-licensable licence to use the software. Further, the buyer was granted no title or ownership rights or interest in the software.

4) Accordingly, following the decisions of jurisdictional High Court in the case of Ericsson A.B. and Infrasoft Ltd. it has been held that there was only one contract for supply of equipment which included hardware and software both and, therefore, the income from supply of the equipment is to be assessed as business income arising from the assessee's business connection/PE in India.



CA Janak Vaghani

INDIRECT TAXES
VAT Update

1) Trade Circular No. 12T of 2014, dated 17-4-2014

FAQ on Computation of VAT by Developers, Rule 58

The Commissioner of Sales tax by above referred trade circular has clarified in respect of FAQs on computation of tax liability by builders as per amended Rule 58.

2) Website Updates

Following additional information is made available on the website of the vat department (www.mahavat.gov.in):-

i) Compilation of important judgment of SC and High Courts on vat reported in cases reported in 45 VST to 62 VST

ii) Location wise helpdesk for e-cst

iii) FAQ for dealers requesting for e-cst forms

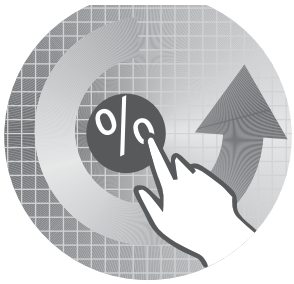
iv) Periodicity of vat and cst returns for the period 2014-15

v) e-annexure to vat returns for period April 2014 onwards

vi) List of non genuine dealers as on April 2014

To be good is noble, but to teach others how to be good is nobler - and less trouble.

– Mark Twain



CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Airport Service

1.1 Mahesh Sunny Enterprises P. Ltd vs. CST, New Delhi 2014 (34) STR 21 (Del.)

The appellant in this case was engaged in providing parking facility of car/scooters at airport. The department sought to tax them under Airport Service. The High Court held that, parking facility was specifically excluded from the definition of Renting of Immovable Property w.e.f. 1-6-2007, therefore parking services regardless of wherever they are carried on, are excluded entirely and it is not open for revenue to argue that it falls within expression 'Airport service'. If Parliament had intended to bring tax part of activity, carried out in airport premises, it would have expressed it in clearer terms.

Security Service

1.2 CST, Mumbai vs. Boparia's Martial Security Services Pvt. Ltd. 2014 (34) STR 45 (Del.)

The assessee in this case provided security services to bank building along with fixtures, fittings and equipments, cash, other securities, etc. and claimed benefit of Exemption Notification No. 56/98-ST. The Tribunal held that, the services provided by the assessee does not amount to providing security services in relation to safe deposit lockers or security of safe vaults and therefore benefit of Notification No. 56/98-ST is not available.

Erection, Commissioning or Installation Service

1.3 CCE, Bhopal vs. Sonali India 2014 (34) STR 47 (Tri.-Del.)

The assessee in this case had contract with IOCL for erection of tanks and pumps, wherein IOCL has supplied tanks and pumps as free supplies. The assessee has claimed 67% abatement in terms of Notification No. 1/2006-ST. The Tribunal after relying on larger bench decision in Bhayana Builders Pvt. Ltd. 2013 (32) STR 49 (Tri.-LB) held that, value of free supplies cannot be considered for computing 67% abatement.

Clearing & Forwarding Agency Service

1.4 Kotdwar Steels (P) Ltd. vs. CCE, Meerut- I 2014 (34) STR 82 (Tri.-Del.)

The Tribunal in this case held that, mere trading on behalf of client and charging commission for same is not enough to be covered under Clearing & Forwarding Agency Service. To cover under C&F Agency service activities have to be more than mere procurement of orders for clients on commission basis, viz. dispatch of goods as per direction of principal, maintaining record of receipt, dispatch of goods and stock available at warehouse and preparing facts on behalf of principal. It is further held that, the burden to prove is no revenue as they have made allegations and failure on part of assessee to produce agreement copies could not result in confirmation of demand.

1.5 Hariram Packaging & Polymers vs. CCE, Nagpur 2014 (34) STR 243 (Tri.-Mumbai)

The Tribunal in this case held that, the assessee's role was limited to procuring order and guaranteeing payments for goods sold and therefore services were not covered under Clearing & Forwarding Agency Service.

Business Auxiliary Service

1.6 IDAA Infrastructure Pvt. Ltd. vs. CST, Mumbai 2014 (34) STR 87 (Tri.-Mumbai)

The appellant in this case executed contract for construction of road with MSRDC, NHAI, Govt. of Maharashtra on BOT basis and collected toll charges from road users to finance/compensate cost of construction. The department sought to tax the same under BAS. The Tribunal held that, collection of toll charges for road users does not amount to rendering of BAS. The CBEC Circular No. 152/3/2012-ST dated 22-2-2012, clarified that no liability to pay service tax under BAS.

1.7 Shakeel Afzal Ladak vs. CCE, Mumbai-I 2014 (34) STR 144 (Tri.-Mumbai)

The appellant in this case let out immovable property for running Café Coffee Day outlet under an agreement which is termed as Franchise Agreement. The department raised demand of tax under sub-clauses (i) to (vi) of BAS. The Tribunal held that, certain conditions enumerated in agreement to ensure smooth functioning of outlet on daily basis and no role has been played by assessee in day-to-day running of outlet therefore, activity is not covered under BAS.

Manpower Recruitment or Supply Agency Service

1.8 Volkswagen India (Pvt.) Ltd. vs. CCE, Pune-I 2014 (34) STR 135 (Tri.-Mumbai)

The appellant in this case employed foreign nationals, i.e. Global employees, previously employed with foreign/holding company and paid salaries through foreign/holding company. The department sought to tax the amounts paid to foreign companies under manpower service under RCM. The Tribunal held that, global employees working as employees and employee-employer relation is present in this case and the appellant has not received manpower service from foreign company. Further, the method of disbursement of salaries not to determine the nature of transaction.

1.9 Neelav Jaiswal & Brothers vs. CCE, Allahabad 2014 (34) STR 225 (Tri.-Del.)

The Tribunal in this case held that, consideration for taxable service remitted including amount of remuneration of personnel deployed and provident fund payable to Provident Fund Authorities constitute gross amount charged for taxable service rendered.

Maintenance or Repair Service

1.10 Kumar Beheray Rathi vs. CCE, Pune-III 2014 (34) STR 139 (Tri.-Mumbai)

The department in this case sought to tax, collection of one time deposit by builder/developers from customers on account of maintenance and repairs of common areas and facilities, wages, revenue assessment, electricity and water charges under Maintenance or Repair Service. The Tribunal held that, payment of behalf of various buyers to various authorities and service providers on cost basis and debited to deposit account and the appellant acts as trustee or pure agent. Upon formation of co-operative society, deposit account will be shifted to Flat Owners Co-operative Society in terms of MOFA, 1963 and therefore, the appellant has not provided any Maintenance or Repair Service.

1.11 CCE, Allahabad vs. Shiv Engineering 2014 (34) STR 236 (Tri.-Del.)

The assessee in this case was engaged in repair/testing of transformers and replacement of LV/HV Leg coils, Transformer oil and other items supplied and claimed deduction for value of goods sold under Notification No. 12/2003-ST. The Tribunal held that, total repair cost constituting total labour cost, cost of impugned replaced and supplied items and VAT paid on goods/materials hence, there is no reason to deny benefit of Notification No. 12/2003-ST.

Commercial Training or Coaching Service

1.12 CST, Delhi vs. Ashu Exports Pvt. Ltd. (34) STR 161 (Del.)

The department in this case sought to demand tax on the ground that Notification No. 3/2010-ST provided for expression 'vocation training institute' to institutes affiliated to National Council for Vocational Training offering courses in designated trade is applicable retrospective. The High Court held that, for the period 1-7-2003 to September, 2008 courses were entitled to exemption from service tax under Notification No. 9/2003-ST and No. 24/2004-ST and the Notification No. 3/2010-ST which has narrowed down the expression 'vocational training institute' to institutes affiliated to National Council for Vocational Training offering courses in designated trade was not applicable.

Consulting Engineer's Service

1.13 CCE&ST vs. Simplex Infrastructure & Foundry Works (34) STR 191 (Del.)

The High Court in this case held that, assessee being a private limited company registered under Companies Act, 1956 not covered by definition of Consulting Engineer existing during the relevant period as the definition of consulting engineer did not employ word 'person' at all and the provisions of section 3(42) of General Clauses Act, 1897 would not be applicable.

2. Interest/Penalties/Others

2.1 Kandra Rameshbabu Naidu vs. Superintendent (AE) ST, Mumbai-II 2014 (34) STR 16 (Bom.)

In this case the assessee collected amount of service tax before arrest provisions under section 89 came into effect from 10-5-2013 was more than ` 50 lakhs and after that, less than this amount. The assessee was arrested on 22-1-2014 for not depositing service tax of ` 2.39 crores despite collecting it from customers. The High Court has held that, the offence was continuing and hence entire outstanding amount to be deposited with Government had to be considered. Arrears as on 10-5-2013 had to be taken into account while calculating limit of ` 50 lakhs stipulated by section 89(1)(d) (ii). It is further held that, as on 10-5-2013 and on arrest of assessee, there were huge outstanding, hence it was not a case in which assessee could be released on bail, and more so when investigation was still going on.

2.2 CCE (Appeals-II), Bengaluru vs. Tata Tele Services Ltd. 2014 (34) STR 43 (Tri.-Bang.)

The assessee in this case claimed refund of amount of service tax paid on amounts not realised by them. The Tribunal held that, under service tax liability to pay service tax arise only when money consideration is received and there is no provision for recovery of service tax if money consideration is not received. Further, the amounts not received and written off in books of account and CA certificate produced, hence the appellant is eligible for refund.

2.3 Momentum Strategy Consultants P. Ltd. vs. CST Bengaluru 2014 (34) STR 201 (Tri.-Bang.)

The appellant in this case argued that, the Notification No. 21/2003-ST in respect of export of services purports to reinstate benefit of Notification No. 6/99-ST and therefore clarificatory and retrospective in nature. The Tribunal held that, impugned notification issued as independent notification granting benefit of exemption from service tax on taxable service for which consideration is received in convertible foreign exchange and it is not related to rescission of Notification No. 6/99-ST. Further during interregnum between recession and issue, no clarification provided disclosing consistent policy in favour of provider of taxable service, therefore the appeal filed by the assessee is rejected.

2.4 Faizan Shoes Pvt. Ltd. vs. CST Chennai 2014 (34) STR 205 (Tri.-Chennai)

The Tribunal in this case after relying on judgment in WNS Global Services (P) Ltd. 2008 (10) STR 273 (Tri.-Mumbai) held that, in respect of refund under Notification No. 41/2007-ST the amended provisions as applicable on the date of filing claims to be applied.

2.5 Ralson Carbon Black Ltd. vs. CCE, Chandigarh-I 2014 (34) STR 227 (Tri.-Del.)

The department sought to levy penalty under section 76 of FA, 1994 for failure to pay service tax due to financial crisis. The Tribunal held that, there was no allegation of non-payment due to fraud or with intention to evade tax and therefore no penalty is imposable.

2.6 CCE, Indore vs. Sojatia Auto (P) Ltd. 2014 (34) STR 234 (Tri.-Del.)

The Tribunal in this case observed that, since service tax along with interest and penalty has been deposited by assessee the proceedings deemed to be concluded and there is no requirement for imposition of separate penalties under sections 76 and 77.

Also refer to *Eskay Shipping (P) Ltd. vs. CCE, Visakhapatnam 2014 (34) STR 235 (Tri.-Bang.)*

3. CENVAT Credit

3.1 CCE, Kolkata-IV vs. Vesuvious India Ltd. 2014 (34) STR 26 (Cal.)

The assessee in this case claimed CENVAT credit of service tax paid for outward transportation of goods up to the point of delivery to the customer. The High Court held that, the amendment made in the definition of Input Service w.e.f. 1-4-2008 substituting the word 'from' by the word 'up to' all that has been done to clarify the issue. The services rendered to customer for the purpose of delivering the goods at the destination was neither covered by the definition of input service prior to 1-4-2008 nor is the same covered after 1-4-2008.

3.2 Sterling Tools Ltd. vs. CCE, Delhi-IV 2014 (34) STR 53 (Tri.-Del.)

The Tribunal in this case observed that, there is no dispute that service was received by the appellant and service tax not paid by service provider and once service tax element has come to treasury, there is no bar to grant CENVAT credit pertaining to service availed without dispute of use in manufacture.

3.3 CCE, Delhi-III vs. Hero Honda Motors Ltd. 2014 (34) STR 54 (Tri.-Del.)

In this case, the lower Appellate Authority allowed CENVAT credit of service tax paid on housekeeping, nursery and horticulture by observing that, much importance is given in keeping environment of factory in proper form. The Tribunal held that, there is no infirmity in view adopted by Commissioner (Appeals).

3.4 CCE, Surat vs. Shree Chalthan Vibhg Kand Udhyog Sahakari Mandli Ltd. 2014 (34) STR 65 (Tri.-Ahmd.)

In this case, the assessee claimed CENVAT credit of service tax paid on the basis of debit notes raised for service tax and value of service provided. The Tribunal held that, as per rule 9(2) of CCR, 2004 the documents should contain certain essential details for claiming CENVAT credit and rule does not bar availment of credit on the basis of debit note. If the services on which credit has been taken received and accounted for, credit can be allowed.

Also refer to *CCE&C, Daman vs. Jalaram Plastic Pack 2014 (34) STR 66 (Tri.-Ahmd.)*

3.5 CCE Goa vs. Asia Pacific Hotels Ltd. 2014 (34) STR 90 (Tri.-Mumbai)

The department in this case contended that, taking of credit and utilisation of credit are distinct and different and therefore 'allowing of credit' in rule 6(5) of CCR, 2004 to include only taking of credit and not utilisation. The Tribunal held that, purpose and objective of CCR, 2004 is to allow manufacturers/service providers not only to take credit but also to utilise same and the impugned objective is not achieved if utilisation of credit allowed is not permitted. There is no reason to interpret 'allow' in narrow and restrictive manner and defeating the object and purpose of CCR, 2004.

3.6 Hi Tech Power & Steel Ltd. vs. CCE, Raipur 2014 (34) STR 276 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on coal shed for storage as the same is constructed for storage of coal required for manufacture of finished goods.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law #1

[2014] 183 Comp Cas 322 (Mad.)
[In the Madras High Court]
Natarajan Ramesh Rajan vs. Government of India, Ministry of Finance and Company Affairs.

A show cause notice seeking explanation as to why certain punishment cannot be levied upon a contravention of provisions of the Act is not an order and hence a writ petition against it cannot be maintainable under Article 226 of the Constitution of India

Brief Facts

This writ petition has been filed by the Petitioner against the show-cause notice issued by the respondent for alleged violation of Section 233 of the Companies Act, 1956 ("Act").

The petitioner is a one of the partners of the petitioner firm of Chartered Accountants. As required under the Companies Act, 1956, the said firm was appointed as the Statutory Auditor of a listed software company, DSQ Software Limited. The Act was amended from time-to-time and one of the amendments related to Section 227 of the Act (powers and duties of auditors). The amendment which has been effective from December 30, 2000 had inserted clause (e) to Section 227(3). The said amendment required the auditor to report certain matters in its audit report while auditing the accounts of a company and that the same should be in ***bold italics.***

Further, if such auditor's report is not in conformity with the provisions of Section 227(3)(e), then it states that if such default is wilful, then Section 233 of the Act provides for a fine which may extend to ` 10,000.

The petitioner firm had received a letter from the respondent stating that the petitioner firm had not stated the observations in *bold italics* in the auditor's report for the balance sheet dated December 31, 2000 in relation to paragraphs (xii) and (xiv). The said letter also mentioned about certain other matters related to the Company.

The petitioner firm gave a detailed reply to the said letter. With respect to Section 227(3)(e), it pointed out that to provide comments under the said sub-section, there should be existence of adverse effect on the functioning of the Company. It also placed reliance on the Statement of Audit Practice (SAP-7) issued by the Institute of Chartered Accountants of India ("ICAI"). It also reproduced the necessary paragraphs from the said guidance note regarding the aforesaid. Further, it also produced another statement of Audit Practice (SAP-2) on "objective and scope of audit of financial statements" which states "users should not assume that the auditor's opinion is an assurance as to the future viability of the enterprises or the efficiency or effectiveness with which management has conducted the affairs of the enterprise".

The respondent issued a show cause notice to the petitioner firm as to why prosecution should not be levelled for alleged violation of Section 233 of the Act.

The petitioner claimed that the said show cause notice dose not refer to any of the explanations provided by it. Thus, it assumed that despite giving detailed explanations, the respondent must have concluded to launch the prosecution against the Petitioner.

Judgment and reasoning

The Hon'ble Court rejected the writ petition and observed that the impugned show-cause notice was a preliminary notice for seeking explanation regarding the disclosures of adverse remarks in the Auditors report and was not an order. Thus, Court did not find any infirmities in the said show cause notice being issued to auditors.

Case Law #2

[2014] 183 Comp Cas 462 (AP)
[In the Andhra Pradesh High Court]
Triumphant Institute of Management Education P. Ltd and Another vs. Inspire Educational Services P. Ltd. and Others.

The power of the CLB under Sections 397, 398 and 402 of the Act for oppression and mis-management or for winding up of the company is a statutory remedy. An arbitration clause cannot cover the statutory remedy provided under the Act

Brief Facts

The Applicant has filed this appeal under Section 10F of the Companies Act, 1956 ("Act") against the Hon'ble Company Law Board ("CLB"), Chennai Bench's order. The main contention of the Applicant is that under the Act, a statutory remedy against oppression and mismanagement can be adjudicated only by the CLB and not by an arbitrator.

The Applicant is engaged in the business of providing training and coaching of various competitive examination to students. The Applicant adopted a franchise model and appointed franchisees in various cities. The joint venture company (First Respondent) was incorporated by the Applicant and other respondents. The respondents also entered into a franchise agreement with the Applicant. The Applicant terminated the franchise agreement of first respondent company due to unsatisfactory performance for certain courses.

The respondents later floated a new company and started diverting the business and funds of the said Joint Venture Company.

The Applicant filed a petition with the CLB under Sections 397, 398, 402 and 406 of the Act for oppression and management against the respondents. The CLB granted an interim order directing the respondents to deposit certain amount as fixed deposit. The respondents filed another petition before the CLB under Section 8 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). In its petition, the respondents claimed that as per the shareholders agreement, the franchise agreement and the Articles of Association of the joint venture company, if any dispute arises between the parties thereto, the same would be settled as per the Arbitration Act. The CLB allowed the petition of the Respondent directing the parties to refer their dispute to arbitration.

The Applicant contended that irrespective of the arbitration clause, any statutory remedy under Sections 397, 398 read with Section 402 of the Act cannot be delegated to an arbitrator. The Applicant also submitted various acts of oppression by the respondents.

It also submitted that the CLB has not undergone into any other allegation related to oppression and mis-management and only relied upon the violation of non-compete clause to refer the matter to arbitration. The respondents relied on various judgments to support its arguments such as (1) *Sumitomo Corporation vs. CDC Financial Services (Mauritius) Ltd. [2008] 142 Comp Cas 114 (SC), 4 SCC 91; Smt. Sundershan Chopra vs. Company Law Board [2004] 118 Comp Cas 341 (P & H); [2004] 2 Arb. LR 241 (P&H)* etc.

From the respondent's side, the preliminary objection raised was on the maintainability of the application under Section 10F of the Act. It was submitted that an order was passed under Section 8 of the Arbitration Act and thus can be appealable under Section 37 of the Arbitration Act. It also placed reliance on the judgment of Bombay High Court in *Masusmi SA Investment LLC vs. Keystone Realtors P. Ltd. (CA (L) No. 47 of 12* and batch dated November 6, 2012). The Delhi High Court judgment in case of *Vijay Sekhri vs. Tinna Oils and Chemicals [2010] 160 Comp. Cas 550 (Delhi) [2010] 174 DLT 462*. It also submitted that even assuming that the appeal is maintainable under Section 10F of the Act, the CLB has not passed any order related to oppression and mis-management and thus no appeal is maintainable. In support, various judgments were referred such as Supreme Court judgment in *V.S. Krishnan vs. Westfort Hi-Tech Hospitals Ltd. [2008] 142 Comp Cas 235 SC [2008] 3 SCC 363*.

The questions before the Court were as follows:

a. Whether the CLB was correct in dismissing the petition under Sections 397, 398 and 402 of the Act, which was a statutory remedy and cannot be referred to the Arbitration Act?

b. Whether the CLB was correct in referring the matter to arbitration based on the arbitration clause provisions contended in the shareholders' agreement, franchise agreement and articles of association of the company?

c. Whether the CLB was right in reliefs sought for violation of the Articles of Association, shareholders agreement and the franchise agreement without looking at the powers of the CLB under Section 402 of the Act?

Judgment and Reasoning

The Hon'ble Court allowed the appeal and set aside the order of the CLB for referring the matter to arbitration. The Court also directed the CLB to adjudicate the petition of the Applicant on merits in accordance with the law. The Court observed that any questions of law arising out of CLB judgment are entertainable by the High Court under Section 10F of the Act.

The Court further observed that the CLB powers under Sections 397, 398 and 402 of the Act are statutory and such powers, including order for winding up, cannot be exercised by the arbitrator. With regards to when the judicial proceedings can be referred to arbitration by a judicial authority, the Court relied on two judgments of the Supreme Court.

In case of *P. Anand Gajapathi Raju vs. P.V.G Raju [2000] 4 SCC 539*, Supreme Court has laid down the conditions to be satisfied for referring the matter to arbitration. The said conditions are as follows.

1. There is an arbitration agreement;
2. A party to an agreement brings the action against other party to the agreement.
3. Subject matter of action and arbitration agreement must be same.
4. Party moves the court for arbitration reference before it submits his first statement.

The Court noticed that condition no. (3) above was not satisfied in the present case. It also observed that the arbitration clause dose not and could not cover the statutory remedy provided under the Act.

In the case of *Haryana Telecom Ltd. vs. Sterlite Industries (India) Ltd. [1999] 97 Comp Cas 683 (SC) [1999] 5 SCC 688*, the Court observed that winding up of a company is contained under the Act and arbitrator has no jurisdiction for passing such order even though the same is part of an arbitration agreement.

The Court also analysed the judgments referred by both the parties while providing the aforesaid judgment.



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 and FDI Policy issued by DIPP:-

A. RBI CIRCULARS

1. Advance Remittance for Import of Rough Diamonds

To further facilitate the import of rough diamonds, RBI has decided that henceforth it will not notify the names of overseas mining companies from whom an importer (other than PSC or Department / Undertaking of Government of India / State Government) may import rough diamonds into India, by way of advance payments, without any limit / bank guarantee/ stand-by letter of Credit.

AD category – I banks are, henceforth, permitted to take decision on overseas mining companies to whom an importer (other than PSC or Department / Undertaking of Government of India / State Government) can make advance payments, without any limit / bank guarantee/ stand-by letter of Credit.

While allowing the advance remittance without bank guarantee for import of rough diamonds, the AD Category – I banks must ensure the following:

1. The overseas mining company should have the recommendation of GJEPC.
2. The importer should be a recognised processor of rough diamonds and should have a good track record.
3. AD Category - I banks should undertake the transaction based on their commercial judgment and after being satisfied about the bonafides of the transaction.
4. Advance payments should be made strictly as per the terms of the sale contract and should be made directly to the account of the company concerned, that is, to the ultimate beneficiary and not through numbered accounts or otherwise.
5. Further, due caution may be exercised to ensure that remittance is not permitted for import of conflict diamonds (Kimberly Certification).
6. KYC and due diligence exercise should be done by the AD Category - I banks as per the existing guidelines.
7. AD Category - I banks should follow-up submission of the Bill of Entry / documents evidencing import of rough diamonds into the country by the importer, in terms of

the Act / Rules / Regulations / Directions issued in this regard.

8. In case of an importer entity in the Public Sector or a Department / Undertaking of the Government of India / State Government/s, AD Category - I banks may permit the advance remittance subject to the above conditions and a specific waiver of bank guarantee from the Ministry of Finance, Government of India, where the advance payments is equivalent to or exceeds USD 100,000/- (USD one hundred thousand only).

AD Category - I banks are required to submit a report of all such advance remittances made without a bank guarantee or standby letter of credit, where the amount of advance payment is equivalent to or exceeds USD 5,000,000/- (USD five million only), to the concerned Regional Office of Reserve Bank of India, in the prescribed format, within 15 calendar days of the close of each half year.

(A.P. (DIR Series) Circular No. 116 dated 1st April, 2014)

(This is a welcome move which will help the Diamantaires, especially the small and medium ones; to directly import rough diamonds from mines around the world of their choice).

2. Foreign Exchange Management Act, 1999 (FEMA) Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules) – Compounding of Contraventions under FEMA, 1999

RBI has announced further delegation of powers to regional offices in respect of compounding of contraventions as follows-

Sr. No.	FEMA Regulation	Brief Description of Contravention
1.	Paragraph 9(1)(A) of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Delay in reporting inward remittance received for issue of shares.
2.	Paragraph 9(1)(B) of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Delay in filing form FC (GPR) after issue of shares.
3.	Paragraph 8 of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Delay in issue of shares/refund of share application money beyond 180 days, mode of receipt of funds, etc.
4.	Paragraph 5 of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Violation of pricing guidelines for issue of shares.
5.	Regulation 2(ii) read with Regulation 5(1) of FEMA 20/2000-RB dated May 3, 2000	Issue of ineligible instruments such as non-convertible debentures, partly paid shares, shares with optionality clause, etc.
6.	Paragraph 2 or 3 of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Issue of shares without approval of RBI or FIPB respectively, wherever required.

The above contraventions can be compounded by all Regional Offices (except Kochi and Panaji) without any limit on the amount of contravention. Kochi and Panaji Regional offices can compound the above contraventions for amount of contravention below Rupees one hundred lakh (` 1,00,00,000/-). The contraventions above Rupees one hundred lakh (` 1,00,00,000/-) under the jurisdiction of Panaji and Kochi Regional Offices and all other contraventions of FEMA will continue to be compounded at Cell for Effective

Implementation of FEMA (CEFA), Mumbai, as hitherto.

(A.P. (DIR Series) Circular No. 117 dated 4th April, 2014)

(This is a welcome step by RBI authorising concerned officials in the regional offices in direct knowledge of the contravention to deal with the matter. This will also result in faster disposal of the compounding applications).

3. Foreign investment in India in Government Securities

The present limit for investment in Government Securities by SEBI registered FIIs, QFIs, long term investors and FPIs registered in accordance with SEBI guidelines stands at USD 30 billion. Out of the above limit, a sub-limit of USD 5.5 billion is available for investment in Treasury Bills (T-bills). Further, a sub-limit of USD 10 billion for investment in Government dated securities within the total limit of USD 30 billion is available to long term investors registered with SEBI – viz., Sovereign Wealth Funds (SWFs), Multilateral Agencies, Pension/ Insurance/ Endowment Funds and foreign Central Banks.

It has now been decided that foreign investment by all eligible investors including RFPIs shall henceforth be permitted only in Government dated securities having residual maturity of one year and above and existing investments in T-bills and Government dated securities of less than one year residual maturity shall be allowed to taper off on maturity/ sale.

The revised position in respect of the investment limit in Government dated securities is given below:

Instrument/s	Limit	Eligible Investors	Remarks
Government dated securities – Securities having residual maturity of one year and above.	USD 30 billion	RFPIs (including existing FIIs and QFIs) and long term investors registered with SEBI – SWFs, Multilateral Agencies, Pension/ Insurance / Endowment Funds and foreign Central Banks.	Existing investment in T-bills and Government dated securities of less than one year residual maturity shall be allowed to taper off on maturity/sale. No fresh investment in T-bills and Government dated securities of less than one year residual maturity allowed.

(A.P. (DIR Series) Circular No. 118 dated 7th April, 2014)

(Through this move RBI has discouraged short-term investments in G-Secs of less than one year maturity)

4. Risk Management & Inter-Bank Dealings: Booking of Forward Contracts – Liberalisation

It has now been decided to allow all resident individuals, firms and companies, who have actual or anticipated foreign exchange exposures to book foreign exchange forward contracts up to USD 250,000 on the basis of a simple declaration without any requirement of further documentation. The existing facilities in terms of the aforementioned circular for Small and Medium Enterprises (SMEs) having direct and/ or indirect exposures to foreign exchange risk permitting them to book/ cancel/ roll over forward contracts without production of underlying documents to manage their exposures effectively subject to conditions specified therein shall remain unchanged.

(A.P. (DIR Series) Circular No. 119 dated 7th April, 2014)

5. Rupee Drawing Arrangement – 'Direct to Account' Facility

In order to facilitate receipt of foreign inward remittances directly into bank accounts of the beneficiaries, it has been decided to allow foreign inward remittances received under Rupee Drawing Arrangement (RDA) to be transferred to the KYC compliant beneficiary bank accounts through electronic mode, such as, NEFT, IMPS, etc. The procedure to be followed for the purpose will be as under:

Foreign inward remittances received by the AD Catagory-I Bank (termed as 'Partner Bank') having RDA with Non-Resident exchange Houses may be credited directly to the account of the beneficiary held with a bank other than the AD Catagory-I Bank (termed as 'Recipient Bank') electronically, subject to the following conditions:

1. The Recipient Bank will credit the amount transferred by the Partner Bank only to the KYC compliant bank accounts.
2. In respect of the bank accounts which are not KYC compliant, the Recipient Bank shall carry out KYC/CDD of the recipient before the remittance to such account is credited or allowed to be withdrawn.
3. The Partner Bank (i.e., the AD Catagory-I Bank receiving foreign inward remittance through non-resident exchange houses under RDA) shall appropriately mark the direct-to-account remittances to indicate to the Recipient Bank that it is a foreign inward remittance.
4. The Partner Bank shall ensure that accurate originator information and necessary beneficiary information is included in the electronic message while transferring the fund to the Recipient Bank. This information should be available in the remittance message throughout the payment chain, i.e., the non-resident exchange house, the Partner Bank and the Recipient Bank. The Partner Bank should add an appropriate alert in the electronic message indicating that this is a foreign inward remittance and should not be credited to a KYC non-compliant account.
5. The identification and other documents of the recipient shall be maintained by the Recipient Bank as per the provisions of Prevention of Money Laundering (Maintenance of Records) Rules, 2005. All other requirements under KYC/AML/CFT guidelines issued by the Reserve Bank of India from time-to-time shall be adhered to by the Partner Bank.
6. The Recipient Bank may seek additional information from the Partner Bank and shall report suspicious transactions to the FIU-IND with details of the Partner Bank through which they received the remittances.

(A.P. (DIR Series) Circular No. 120 dated 10th April, 2014)

6. External Commercial Borrowing (ECB) Policy – Review of all-in-cost ceiling

On a review it has been decided that the all-in-cost ceiling as specified below will continue to be applicable till June 30, 2014 and is subject to review thereafter.

Average Maturity Period	All-in-cost ceiling over 6 months LIBOR*
Three years and up to five years	350 bps
More than five years	500 bps
*for the respective currency of borrowing or applicable benchmark	

(A.P. (DIR Series) Circular No. 121 dated 10th April, 2014)

7. Trade Credits for Imports into India – Review of all-in-cost ceiling

On a review it has been decided that the all-in-cost ceiling as specified below will continue to be applicable till June 30, 2014 and is subject to review thereafter.

Maturity period	All-in-cost ceiling over 6 months LIBOR*
Up to one year	350 basis points
More than one year and up to three years	
More than three years and up to five years	
*for the respective currency of credit or applicable benchmark	

(A.P. (DIR Series) Circular No. 122 dated 10th April, 2014)

8. Foreign Direct Investment (FDI) in Limited Liability Partnership (LLP)

Earlier, Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry, Government of India *vide* Press Note No. 1 (2011 series) dated May 20, 2011 permitted FDI in Limited Liability Partnership (LLP) formed and registered under the Limited Liability Partnership Act, 2008 subject to certain terms and conditions. The same was also incorporated in paragraph 3.2.5 of the Consolidated FDI Policy Circular 1 of 2013 dated April 5, 2013 issued by DIPP, in the matter.

Subsequently, RBI amended the Principal Regulations through the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Third Amendment) Regulations, 2014 notified *vide* Notification No. FEMA 298 /2014-RB dated March 13, 2014 c.f. G.S.R. No. 190(E) dated March 19, 2014.

Under the Policy, Limited Liability Partnership (LLP) formed and registered under the Limited Liability Partnership Act, 2008 would be eligible to accept Foreign Direct Investment (FDI) subject to certain conditions as given under:

- **Eligible Investors**

A person resident outside India or an entity incorporated outside India would be an eligible investor for the purpose of FDI in LLPs. However, the following persons would not be eligible to invest in LLPs:

(i) A citizen/entity of Pakistan and Bangladesh, or

(ii) A SEBI registered Foreign Institutional Investor (FII), or

(iii) A SEBI registered Foreign Venture Capital Investor (FVCI), or

(iv) A SEBI registered Qualified Foreign Investor (QFI), or

(v) A Foreign Portfolio Investor registered in accordance with Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 (RFPI).

- **Eligibility of LLP for accepting foreign Investment**

(i) An LLP, existing or new, operating in sector/activities where 100% FDI is allowed under the automatic route of FDI Scheme would be eligible to receive FDI. For ascertaining such sectors, reference has to be made to Annex-B to Schedule 1 of Notification No. FEMA 20/2000-RB dated 3rd May 2000, as amended from time-to-time.

(ii) An LLP engaged in the following sectors/activities cannot be eligible to accept FDI:

a) Sectors eligible to accept 100% FDI under automatic route but are subject to FDI-linked performance related conditions (for example minimum capitalisation norms applicable to 'Non-Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects', etc.); or

b) Sectors eligible to accept less than 100% FDI under automatic route; or

c) Sectors eligible to accept FDI under Government approval route; or

d) Agricultural/plantation activity and print media; or

e) Sectors not eligible to accept FDI i.e., any sector which is prohibited under the extant FDI policy (Annex-A to Schedule 1 to Notification No. FEMA. 20/ 2000-RB dated 3rd May 2000) as well as sectors/activities prohibited in terms of Regulation 4(b) to Notification No. FEMA. 1/ 2000-RB dated 3rd May 2000, as amended from time-to-time.

• **Eligible investment**

Contribution to the capital of an LLP would be an eligible investment under the Scheme. Investment by way of 'profit share' would fall under the category of reinvestment of earnings.

• **Entry Route**

Any form of foreign investment in an LLP, direct or indirect (regardless of nature of 'ownership' or 'control' of an Indian Company) would require Government/FIPB approval.

• **Pricing**

FDI in an LLP either by way of capital contribution or by way of acquisition / transfer of 'profit shares', would have to be more than or equal to the fair price as worked out with any valuation norm which is internationally accepted/ adopted as per market practice (hereinafter referred to as "fair price of capital contribution/profit share of an LLP") and a valuation certificate to that effect would have to be issued by a Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

In case of transfer of capital contribution/ profit share from a resident to a non-resident, the transfer should be for a consideration equal to or more than the fair price of capital contribution/profit share of an LLP. Further, in case of transfer of capital contribution/profit share from a non-resident to a resident, the transfer should be for a consideration which is less than or equal to the fair price of the capital contribution/profit share of an LLP.

• **Mode of payment for an eligible investor**

Payment by an eligible investor towards capital contribution/profit share of LLPs would be allowed only by way of cash consideration to be received:

i) By way of inward remittance through normal banking channels; or

ii) By debit to NRE/FCNR(B) account of the person concerned, maintained with an AD Category - I bank.

• **Reporting**

(i) LLPs would have to report to the regional office concerned of the Reserve Bank, the details of the receipt of the amount of consideration for capital

contribution and profit shares in Form FOREIGN DIRECT INVESTMENT-LLP(I) as given in Annex-II to this circular, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor in Annex-IV to this circular, through an AD Category – I bank, and valuation certificate (as per paragraph 5 above) as regards pricing within 30 days from the date of receipt of the amount of consideration. The report would be acknowledged by the Regional Office concerned, which would allot a Unique Identification Number (UIN) for the amount reported.

(ii) The AD Category – I bank in India, receiving the remittance have been instructed to obtain a KYC report in respect of the foreign investor from the overseas bank remitting the amount.

(iii) Disinvestment / transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) would require to be reported within 60 days from the date of receipt of funds in Form FOREIGN DIRECT INVESTMENT-LLP(II) as given in Annex-III to this circular.

• **Downstream investment**

a) An Indian Company, having foreign investment (direct or indirect, irrespective of percentage of such foreign investment), would be permitted to make downstream investment in an LLP only if both, the company as well as the LLP, are operating in sectors where 100% FDI is allowed under the automatic route and there are no FDI-linked performance related conditions. Here the onus would be on the LLP accepting investment from the Indian Company registered under the provisions of the Companies Act, as applicable, to ensure compliance with downstream investment requirement as stated above.

b) An LLP with FDI under this scheme would not be eligible to make any downstream investments in any entity in India.

• **Other Conditions**

(i) In case an LLP with FDI, has a body corporate as a designated partner or nominates an individual to act as a designated partner in accordance with the provisions of Section 7 of the Limited Liability Partnership Act, 2008, such a body corporate would only be a company registered in India under the provisions of the Companies Act, as applicable and not any other body, such as an LLP or a Trust. For such LLPs, the designated partner "resident in India", as defined under the 'Explanation' to Section 7(1) of the Limited Liability Partnership Act, 2008, would also have to satisfy the definition of "person resident in India", as prescribed under Section 2(v)(i) of the Foreign Exchange Management Act, 1999.

(ii) The designated partners would be responsible for compliance with all the above conditions and also liable for all penalties imposed on the LLP for their contravention, if any.

(iii) Conversion of a company with FDI, into an LLP, would be allowed only if the above stipulations (except the stipulation as regards mode of payment) are met and with the prior approval of FIPB/ Government.

(iv) LLPs would not be permitted to avail External Commercial Borrowings (ECBs).

(A.P. (DIR Series) Circular No. 123 dated 16th April, 2014)

(Comments:

- *It is to be noted that pricing norms were not in statute until the amendment made by RBI hereunder. Departing from custom of including only Chartered Accountant and Merchant Banker under qualified valuers, along the lines of new Companies Act, RBI has modified the class to include Chartered Accountant/practicing Cost Accountant/ approved valuer from panel maintained by the Central Government;*
- *Stipulation of any internationally accepted market practices for determining fair price would allow the valuer to capture the fair market value of existing assets as well as future profit earning capacity of the firm;*
- *Reporting under Form FOREIGN DIRECT INVESTMENT-LLP(I) and Form FOREIGN DIRECT INVESTMENT-LLP(II) is along lines of Form FC-GPR and FC-TRS.)*

9. Foreign Direct Investment in Pharmaceuticals sector

Currently, the FDI policy for pharmaceutical sector permits Foreign Direct Investment (FDI) up to 100 per cent under Automatic Route for greenfield investments and FDI up to 100 per cent under Government Approval Route for brownfield investments (i.e., investments in existing companies) in pharmaceuticals sector.

Pursuant to issuance of Press Note No.1 of 2014 dated 8-1-2014 by DIPP, RBI has notified *vide* Notification No. FEMA.296/2014-RB and this circular that 'non-compete' clause would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board (FIPB).

(A.P. (DIR Series) Circular No. 124 dated 21st April, 2014)

(It may be noted that this condition of prohibiting insertion of 'non-compete' clause has been incorporated in the FDI Policy because of Government apprehension of effect of take-over of Indian drug companies by foreign MNCs on public healthcare.)

10. Reporting of Cross Border Wire Transfers

With the amendments to Prevention of Money Laundering (PML) Rules, as notified by the Government of India *vide* Notification No. 12 of 2013 dated August 27, 2013 and in terms of amended Rule 3, RBI has mandated every reporting entity to maintain the record of all transactions including the record of all cross border wire transfers of more than ` 5 lakh or its equivalent in foreign currency, where either the origin or destination of the fund is in India. Further, FIU-IND has advised that the information of all such transactions shall be furnished to Director, FIU-IND by 15th of the succeeding month.

(A.P. (DIR Series) Circular Nos. 125 & 126 dated 25th April, 2014)

11. A] Fund/Non-Fund based Credit Facilities to Overseas Joint Ventures / Wholly Owned Subsidiaries / Wholly owned Step-down Subsidiaries of Indian Companies

B] ECBs extended by overseas branches/subsidiaries of Indian banks

C] Issue of guarantees in respect of debt, obligation or other liability

incurred by an exporter on account of exports from India

A] RBI Circular DBOD.IBD.BC.No.96/23.37.001/2006-07 dated May 10, 2007, permits banks to extend fund/non-fund based credit facilities to overseas Joint Ventures (JV)/Wholly Owned Subsidiaries (WOS)/Wholly owned Step-down Subsidiaries (WoSDS) of subsidiaries of Indian companies up to 20 per cent of their unimpaired capital funds (Tier I and Tier II capital) subject to certain conditions. The resource base for such lending should be funds held in foreign currency accounts, such as FCNR(B), EEFC, RFC etc., in respect of which banks have to manage the exchange risk. Further, as per paragraph 5(b) of Notification No.FEMA 8/2000-RB dated May 3, 2000, RBI allows Authorised Dealer Banks to extend guarantees to or on behalf of overseas JV/WOS of an Indian company in connection with its business. In terms of A.P. (DIR Series) Circular No. 29 dated March 27, 2006, guarantees issued by banks in India in favour of overseas JV/WOS of Indian companies are subject to prudential norms issued by the Reserve Bank from time-to-time.

RBI has stated that the above measures were intended to assist Indian companies in their overseas business. However, it observed that banks are extending non-fund based credit facilities like guarantees/stand-by letter of credits/letter of comforts etc. on behalf of JV/WOS/WoSDS for purposes which are not connected with their business, rather, in certain cases, used to avail foreign currency loans for repayment of Rupee loans. Accordingly, RBI has instructed that banks, including overseas branches/subsidiaries of Indian banks, cannot issue standby letters of credit/guarantees/letter of comforts etc. on behalf of overseas JV/WOS/WoSDS of Indian companies for the purpose of raising loans/advances of any kind from other entities except in connection with the ordinary course of overseas business. Further, while extending fund/non-fund based credit facilities to overseas JV/WOS/WoSDS of Indian companies in connection with their business, either through branches in India or through branches/subsidiaries abroad, banks should ensure effective monitoring of the end use of such facilities and its conformity with the business needs of such entities.

B] In terms of circular A.P. (DIR Series) Circular No. 134 dated June 25, 2012, Indian Companies in the manufacturing and infrastructure sector were allowed to avail of external commercial borrowings (ECBs) for repayment of Rupee loans availed of from domestic banking system and / or for fresh Rupee capital expenditure, under the approval route, subject to satisfying certain conditions. RBI noted that however, if the ECB is availed from overseas branches/subsidiaries of Indian banks, the risk remains within the Indian banking system and therefore, it has instructed that repayment of Rupee loans availed of from domestic banking system through ECBs extended by overseas branches/subsidiaries of Indian banks would, henceforth, not be permitted.

C] As per instructions contained in paragraph 4(1)(i) of Notification No. FEMA 8/2000-RB dated May 3, 2000, RBI has allowed Authorised Dealer Banks to issue guarantees in respect of a debt,

obligation or other liability incurred by an exporter, on account of exports from India which was states to have been intended to facilitate execution of export contracts by the exporter. But, it has noticed that some exporter borrowers were using export advances, received on the strength of guarantees issued by Indian banks, for repayment of loans availed of from Indian banks. RBI has issued a stern warning that it would constitute a clear violation of their instructions except in cases where banks have received approvals under FEMA and has instructed banks to desist from such practices.

(DBOD.No.BP.BC.107/21.04.048/2013-14 dated 22th April, 2014)

B. CONSOLIDATED FDI POLICY THROUGH DIPP CIRCULAR NO. 1 OF 2014

Department of Industrial Policy and Promotion (DIPP) (which comes under Ministry of Commerce and Industry) has recently published 'Consolidated FDI Policy' vide Circular 1 of 2014 which takes effect from 17th April 2014.

Consolidated FDI Policy is issued yearly by DIPP to consolidate and subsume all Press Notes / Press Releases / Clarifications / Circulars issued by DIPP since the issuance of previous year's Consolidated FDI Policy, although changes in FDI regime have also been introduced by DIPP through Consolidated FDI Policy in the past.

Changes introduced *vide* Consolidated FDI Policy of 2014 are summarised as below:

9. **Agriculture & Animal Husbandry Sector:** Presently 100% FDI is allowed in Animal Husbandry "under controlled conditions". Reference of National Livestock Policy 2013 has now been given while defining the scope of term "under controlled conditions".

10. **Defence Sector:** *Vide* Press Note 6 of 2013 dated 22nd August 2013, DIPP had prohibited portfolio investment by FIIs in the Defence Sector but had not clarified about the status of existing FII investments. The Consolidated Policy has clarified that FII investments existing as on 22nd August 2013 would remain capped at the level existing on such date and that no fresh FII/FPI investments would be permitted in the event of decrease in existing level of FII investments.

11. **Telecom Sector:** *Vide* Press Note 6 of 2013 dated 22nd August 2013, DIPP had reclassified services under Telecom Sector along with changes in FDI caps too. It has now specified that Service Providers other than for those services listed under the Telecom Sector would be eligible for 100% FDI under automatic route.

12. **Pharmaceutical Sector:** An undertaking in the form of Certificate from Prospector Investor as well as Recipient Entity has been prescribed for brownfield investments in Pharmaceutical Sector. Such undertaking *inter alia* contains declaration about the agreements entered into between Prospector Investor and Recipient Entity as well as declaration about non-insertion of non-compete clause in any of the agreements.


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Misconduct by advocate on record – Power to remove his name from register – Can be exercised *suo motu* by Court – Word 'otherwise' in R. 8A has to be read *ejusdem generis* – Advocate role played in administration of justice. Constitution of India, Article 145 – Supreme Court Rules, 1996, O. 4, R. 8A – Advocates Act, 1961, S. 35

One Civil Appeal filed before the Supreme Court was dismissed in default as none appeared to press the appeal. An application for restoration of the said appeal was filed by Advocate on Record. The Court was of the view that the facts contained in the application were not correct and the counsel appearing for the applicant was not able to clarify the same.

The Supreme Court held that lawyers play an important part in the administration of justice. The profession itself requires the safeguarding of high moral standards. As an officer of the Court the overriding duty of a lawyer is to the Court, the standards of his profession and to the public. Since the main job of a lawyer is to assist the Court in dispensing justice, the members of the Bar cannot behave with doubtful scruples or strive to thrive on litigation. Lawyers must remember that they are equal partners with Judges in the administration of justice. If lawyers do not perform their function properly, it would be destructive of democracy and the rule of law. "Law is no trade, briefs no merchandise". An advocate being an officer of the Court has a duty to ensure smooth functioning of the Court. He has to revive the person in distress and cannot exploit the helplessness of innocent litigants. A wilful and callous disregard for the interests to the client may in a proper case be characterised as conduct unbefitting an advocate.

The institution of Advocates On Record (AOR) is to facilitate the working of the Court as contained in Order IV, Rule 6. It entitles an AOR to act, plead, conduct and prosecute before Supreme Court in respect of all matters filed by him. To act means to file an appearance or any pleading or any application in the Court and such a task has been entrusted solely upon an AOR and no other advocate can file an appearance or act for the party without his authorisation. The Court conducts an examination before enrolling a person as an AOR and the basic purpose to have such an examination is to

verify whether the person is well versed with the rules, practice and procedure of the Court and to test his legal acumen and ethics. He must be fully acquainted with the drafting of proceedings as well as its manner of filing in the Registry. An AOR is not beneficial only to the Court but also assists in the working of the Registry. In such a fact-situation, an AOR cannot lend his signatures just to camouflage the requirement of rules. He, in addition to doing the work of drafting, filing appearance and assisting the Court, must maintain professional ethics and proper standards so that the Court may rely upon him without any reservation. If the AOR does not discharge his responsibility in a responsible manner because he does not appear whenever the matter is listed or does not take any interest in conducting the case, it would amount to not playing any role whatsoever. In such a fact-situation, lending signatures for consideration would amount to misconduct of his duty towards Court. In case the AOR is only lending his signatures without taking any responsibility for conduct of a case, the very purpose of having the institution of AOR stands defeated.

An AOR is the source of lawful recognition through whom the litigant is represented and therefore, he cannot deviate from the norms prescribed under the Rules. The Rules have been framed to authorise a legally trained person with prescribed qualification to appear, plead and act on behalf of a litigant. Thus, not only his physical presence but effective assistance in the Court is also required. He is not a guest artist nor is his job of a service provider nor is he in a professional business nor can he claim to be a law tourist agent for taking litigants for a tour of the Court premises.

The Apex Court further held that the conduct of the AOR has been reprehensible and not worth pardoning but considering the fact and circumstances involved in the present case, his conduct is censured and he was warned by the Supreme Court not to behave in future in such manner and to appear in Court in all the cases wherever he has entered appearance.

In Re : Rameshwar Prasad Goyal, Advocate AIR 2014 Supreme Court 850

2. Sale deed – Genuine consideration set forth – Mere fact that value of transaction is less than Bench Mark Valuation not enough to invoke S. 47-A for determination of market value – Stamp Act, 1899, S. 47-A

The fact of the case are two writ petitions were filed before the High Court whereby in one there was challenge to action of Collector demanding 'deficit' stamp duty and registration fee and in another there is a challenge to the proceedings, for realization of the dues towards deficit stamp duty and registration fee, initiated in violation of the order of the District Judge.

Question for consideration before the High Court was whether the Collector can interfere with genuine valuation of a transaction only on the ground that the same was less than the market value calculated with reference to the 'Bench Mark Valuation' fixed by the State.

The Managing Committee of Shree Jagannath Temple sold the land in question in favour of M/s. Bright Projects Pvt. Ltd., opposite party for certain amount by way of negotiation. The land was earlier sought to be sold by way of public auction, but in absence of sufficient bidders, the auction was not held

and by way of negotiation the land was sold to the opposite party for amount higher than the reserve price. 50% of the amount was deposited and the remaining amount afterwards. The sale deed was executed after approval of the competent authority. Even though the stamp duty was paid with reference to the said consideration money, the registering authority took recourse to Section 47-A of the Indian Stamp Act, 1899 on the ground that the said consideration was less than the market value with reference to the 'Bench Mark Valuation' and the Collector determined the market value of the land at particular rate and asked the opposite party to deposit the deficit stamp duty with reference to the said valuation. The opposite party preferred an appeal before the District Judge, Bhubaneswar questioning the order of the Collector on the ground that the valuation has been duly approved by the Collector and the State Government while approving the transaction in question under the provisions of Shree Jagannath Temple Act, 1965. The transaction being genuine, the Stamp Duty will be attracted on the consideration money and not on the Bench Mark Valuation notified in accordance with the Orissa Stamp Rules, 1952. Mere fact that consideration was less than market value was no ground to invoke Section 47-A in absence of under-valuation. This plea was upheld by the District Judge.

The High Court observed that once the genuine consideration has been set forth, as in the instant case, even if the same was less than the value determined as per the Bench Mark Valuation, Section 47-A of the Act is not attracted. The Stamp Duty is to be paid, under the charging provision of Section 3, as per the value of instrument. Section 47-A applies to the case of under valuation. The said provision is not attracted otherwise.

In the present case, the valuation had been duly approved by the State authorities. As the Managing Committee of Shree Jagannath Temple itself is controlled by the State and valuation was also approved by the Revenue Divisional Commissioner (RDC), who is the Chief Administrator of Shree Jagannath Temple, there could be no question about the genuineness of the consideration. This excluded the scope of invocation of Section 47-A of the Act. Therefore, the High Court dismissed the writ petition filed by IG Registration.

Inspector General of Registration-Cum-Stamp Collector, Orissa & Ors. vs. M/s. Bright Projects Pvt. Ltd. AIR 2014 Orissa 38

3. Acknowledgment of debt by partner of firm – Can be said to be on behalf of firm – Said acknowledgment is binding on firm. Limitation Act, 1963, S. 20 (2)

Document is executed on the date of attestation:

This is defendants' second appeal challenging the judgment and decree of the First Appellate Court whereby appeal of Plaintiff respondents against dismissal of their suit by the Trial court was accepted and suit for recovery of a sum along with interest @ 9 % per annum from particular date till its realisation was decreed. The appellants have framed following questions of law for consideration of this Court: "a) Whether the affidavit will bring the suit filed within limitation? b) Whether the limitation on the basis of acknowledgement/ affidavit will start from the date of signing or from the date of attestation etc.?"

The High Court held that admittedly, the affidavit/acknowledgement was attested on particular date. It was attested by the Notary Public at the instance of the appellants and the deponent of the affidavit himself got it attested from the attesting authority. The counsel for the appellants cannot dispute that the affidavit is supposed to be attested by the attesting authority when the deponent of such an affidavit puts his signatures in the presence of such authority by presenting himself before him and in view of the aforesaid fact, it was held that the document is to be taken to be executed on the date of attestation.

It is well settled that every partner of a firm has a right to act on behalf of the firm and any action taken by one of the partners will be good enough to bind such a firm. In view thereof, the argument raised is liable to be rejected.

The suit was dismissed by the Trial Court but the issue of limitation was decided against the appellants, yet the aforesaid findings were not challenged by the appellants by filing an appeal or revision. Thus, having not raised the plea of limitation before the lower Appellate Court, the same would amount to waiver on the part of the appellants. Thus, appellants cannot raise such plea of limitation by filing this appeal when no other point has been raised. Thus the petition was dismissed.

M/s. Dharam Rice & Oil Mills & Others vs. Punjab State Civil Supplies Corpn. Limited, Chandigarh & Ors. AIR 2014 Punjab and Haryana 44

4. Words and Phrases – Words '*corpus possessionis*' and '*animus possidendi*' – Meaning of, explained

The essentials of possession in the first instance include a fact to be established like any other fact. Whether it exists in a particular case of not, will depend on the degree of control exercised by the person designated as possessor. If his control is such that he effectively excludes interference by others then he has possession. Thus the possession in order to show its existences must show "*corpus possessionis*" and an "*animus possidendi*".

Corpus possessionis means that there exists such physical contact of the thing by the possessor as to give rise to the reasonable assumption that other persons will not interfere with it. Existence of corpus broadly depends on (1) the nature of the thing itself, and the probability that others will refrain from interfering with the enjoyment of it; (2) possession of real property, i.e., when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exists no factors negativing his control, for example the continuance in occupation of one who denies his right; and (3) acquisition of physical control over the objects it encloses. Corpus, therefore, depends more upon the general expectations that others will not interfere with an individual control over a thing, than upon the physical capacity of an individual to exclude others.

The *animus possidendi* is the conscious intention of an individual to exclude others from the control of an object.

Possession confers on the possessor all the rights of the owner except as against the owner and prior possessors. "Possession in law" has the advantage of being a root of title.

The concept of adverse possession contemplates a hostile possession, i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person

who does not acknowledge the other's right and, in fact denies the same. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed.

Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that persons title. Possession is not held to be adverse if it can be referred to a lawful title.

A person who enters into possession having a lawful title cannot divest another of that title by pretending that he had no title at all.

State of U. P. through Estate Officer vs. 1st Addl. District Judge, Lucknow & Ors. AIR 2014 (NOC) 216 (All.)

5. Secondary Evidence – Admissibility – Photocopy of revenue map of village, allegedly prepared by lekhpal of village sought to be produced – Evidence Act, 1872, Ss. 65, 66.

Photocopy of revenue map of village, allegedly prepared by lekhpal of village sought to be produced – nothing available on record as to how and when plaintiff had occasion to obtain Photostat copy of revenue map, who allowed him to obtain it and wherefrom he got it.

Where original document is in existence, but not produced, secondary evidence by production of copies is not admissible unless conditions are satisfied. The provision has been designed to provide protection to persons who, in spite of their best efforts, are unable to, for the circumstances beyond their control, place before the court, primary evidence of a document as required by law. Secondary evidence should not and cannot be allowed unless the circumstances exist to justify as provided under Act, 1872. Further, if the document is to be admitted in secondary evidence, the facts thereof have to be proved. The certified copy of the original can be treated as secondary evidence. But the contents of the documents sought to be marked as secondary evidence cannot be admitted in evidence without production of the original document. Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence. Under what circumstances the secondary evidence relating to document must be proved by primary evidence is an exception to the cases falling under Sections 65 and 66 of Act, 1872. The person seeking to produce secondary evidence relating to a document can do so only when the document is not in his possession. To enable a person to take recourse to Sections 65 and 66 of Act, 1872, it would be necessary to establish that the document sought to be summoned was executed and that the said document is not with him, but in possession of the person against whom the application is made to be produced proving against him.

Also whenever a secondary evidence is to be admitted, very existence of such a document has to be established.

Nothing on record to prove authenticity of said document. Document not admissible as secondary evidence.

Ram Das Singh v. Duli Chand AIR 2014 (NOC) 218 (All.)

CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

WINDS OF CHANGE

The month of April did not create any major surprises for the world economy and the steady progress of the developed world towards higher growth continued. There were some anxious moments such as the dispute between Ukraine and Russia, which created risks to the stability of the region and supply issues regarding oil and gas, causing uncertainty. However, with the global pressure, the issue has been tamed down though not fully resolved and the damage to the sentiment is controlled to an extent. Therefore, the tempo of positive growth is likely to continue in the world.

The US economy continued its upward movement with increased vigour. The statistical data published is encouraging. Unemployment is coming down and the consumer confidence is growing. The overall growth rate is on an upward move and it is likely that the quantitative easing maybe withdrawn within the current calendar year, without affecting the economy of the country. This is a great relief, not only to the US, but to the whole world. The quarterly results published by many American multinationals have been showing positive growth and many of them have beaten the estimates of the experts. This has impacted the US markets positively and stock indices in the US are near an all time high. They are likely to strengthen further, resulting in an increase in wealth of the investors in the US markets, which can positively affect the consumption in that country and many other developed countries. This will also improve the investor sentiments in many developing countries. To cater to the increased need of consumption, new investments in manufacturing will emerge, resulting in increased investments across the world. The story of US is looking good and will hopefully continue in the same fashion for some years to come, unless some unexpected severe crisis develops in the world.

Though the uncertainty of Ukraine has hampered the sentiments of European economies, especially the erstwhile East European economies, the damage is under control and has not affected the tempo of economic growth of the region. The countries in Western Europe are economically more linked with the US and the developments therein are positively affecting them, resulting in better growth and reduction of unemployment. These benefits can percolate to Eastern Europe if peace prevails therein. The European companies are lagging behind their American counterparts as the growth in the US is much better. It is expected that European multinationals will follow suit of their American peers due to improved traction of economic growth around the world. Europe has started coming out of

its slumber of economic stagnation after a long time, and it is expected that it will pick up, creating opportunities for the investors in the region.

China seems to be slowing down, though there are intermittent patches of positive data coming from that economy. Cooling of the Chinese economy to a certain extent is not undesirable as it was heated for a long period. However, if the economic growth slips below 7%, then it can impact the global growth as this economy has already become the second largest in the world. A lot of economies in Asia and especially Asia Pacific region are dependent on China for their growth as they supply raw material to its industry. Many of them also supply components, which are consumed by Chinese manufacturers. Slowing of Chinese economy can hamper growth of these countries which are currently clocking good growth rate. Even some of the African countries can get affected due to a slowdown in China. It being a major consumer of minerals, it can negatively affect mining across the world.

Japan, though a major economy, has reduced its influence on the global scenario due to its prolonged slackness. The phenomenon may not change quickly, as this stagnation is continuing for a long time. The strength of the Japanese currency is one of the major dampeners and it will continue to affect the economy. Japan cannot be expected to contribute much to the global growth in the near future, though some of the Japanese corporations will do well and create wealth for its investors.

The tension in the Middle-East has somewhat eased, which has a stabilising effect on the oil prices. The shale gas discovered by many countries has gradually started changing the equation. The cost of energy is stabilising and may even come down in spite of the shutdown of the nuclear power plants by many developed countries. The fall in energy prices can fuel industrial growth in many parts of the world and pave the way to progress in many developed and developing economies. The dependence of the world on non-renewable resources of energy is not coming down. These resources are limited. Though the energy crisis seems to have been delayed, the world will have to do quite a bit of innovation to completely de-risk itself from the energy risks.

The month of April was a month of positive sentiments in India. Major rounds of Parliamentary Elections were conducted in the month and though no comment can be made on the outcome, there is a growing feeling that a stable Government will emerge in the centre. Though this outcome is uncertain as of now, the sentiments have already started improving, though the statistical data is still indicating that the economy seems to be in reverse gear. The whole world lives on hope and India is not an exception. Most of the Indians are feeling that the worst is over and things can be better from now on. Things are likely to be better in the months to come, but the important question is, how quickly can it become better and how much better. Though the new Government may take quick steps and assuming it takes positive steps, the Indian economy is likely to turn around slowly and no miracles should be expected. Such expectations can cause disappointment. It is more likely that the Indian economy will turn around slowly and may cross 5% growth rate only next year. The Indian markets which are expecting great turnaround may get disappointed with the speed of the turnaround and it can be frustrating for many. The investor expectations have gone high and a slow turnaround will cause disillusionment for many, which may hamper the sentiments, especially in the second half of the financial year 2014-15. The expectations from the new Government need to be moderate as whichever party or a coalition of the parties comes to power; miracles cannot be made to happen. India will need to struggle hard to overcome the hindrances which have lowered the growth rate and dropped the economic performance of the country.

The global stock markets are moving up and so are the stock markets in India. The major stock markets of the world are on an up swing because of the US growth and resultant increase in corporate earnings. Indian stock markets are near their all time high because of the expectations of a stable Government after the elections. The growth in the US is more certain and backed with fundamentals, but the euphoria in India is more on expectations. If the expectations come true, the market can immediately rise by 5-10%. If the expectations are belied, the markets may immediately tank by 5-10%. The recent rise in the Indian stock markets is more sentiment driven, than driven by the fundamentals. If the sentiments get punctured, the momentum will reverse within no time and investors may lose substantially. The risk in the developed economies is much lesser than that in Indian markets, in the short run. However, in the long run, India is also expected to perform well by turning around and accelerating economic growth. Considering the potential, the Indian stock markets may not be overpriced as of now, but they may not be underpriced as good news may have already been factored in. In such a situation, there can be high volatility and high risks. The risk reward ratio can be low and therefore, investors need to be cautious about their moves in the month of May, till the election results are out and there is clarity about formation of the Government. If a stable Government comes to power and the Indian economy turns around as expected there can be great opportunities in India, in the years to come. Last five years have not been very fruitful for stock investors in India. The policy paralysis has slowed down the economy and the investments. Infrastructure is lagging much behind the requirement. However, a stable Government can remove the lacunae quickly and the growth can resume. Many Indian fund managers are expecting good rise in the stock prices over the next couple of years. The reasons advanced by them are varied and expectations are quite high. Though it is not impossible to achieve that performance, the story cannot be so simple and smooth. It is likely that after the elections, the markets may rally for a while, but the momentum may taper off in the second half of the financial year. Though currently, it is advisable to exercise caution, if a stable Government comes to power, the stock markets will have a possibility of generating good returns over the next couple of years and investors will benefit well from the same. Though some profit booking is advised before the election results, based on the election results, aggressive investment strategy in equity can benefit the equity investors in India.

The warning of El Nino had already been issued for the current year. El Nino may affect rainfall in India and so the agriculture production. Low production may harden the prices due to supply constraint and it can reduce the demand due to reduction of disposable income in the hand of farmers. As the farming community constitutes majority of the Indian population, there can be reduction of demand in many sectors of the economy, which may ultimately result in slow economic growth. It can affect the corporate results adversely and impact the share prices.

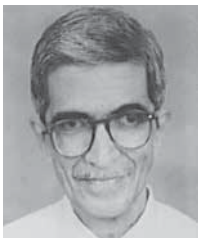
The attractiveness of fixed deposits and bond investments is not tapering. Due to high inflation, the interest rates are remaining strong and the Reserve Bank of India (RBI) will try to control the inflation by keeping the interest rates high for at least some more months to come. There is a possibility of shortage of rainfall in the Indian sub-continent, which may result in supply side pressure on food articles and many commodities. This pressure can increase the inflation in the economy as more money will chase less goods. Therefore, it is likely that high interest rates for fixed deposits and high yield for bonds will continue for quite some time to come. Investment in debentures and fixed deposits will be rewarding for risk averse investors. The only concern is high inflation can reduce the real value of their investments over the years.

Indian Rupee is stabilising. In fact, it has appreciated over the last few months. The appreciation can be the pre-election phenomenon but that will come to light only after a couple of months. Currently there is a good demand for Indian stocks from the foreign investors and they are pouring in money into India. However, the inflow can increase or decrease depending upon the Government which comes into power. A growth oriented Government coming in clear majority can be very good for the Indian economy and it will generate more inflow of funds resulting in strengthening of the Indian Rupee. Considering the current economic situation, strengthening of the Indian currency beyond a level may turn out to be a risk for Indian growth, and the Government as well as RBI is very likely to discourage the same. Therefore, the Indian Rupee may appreciate to the extent of 5% from the current levels, but any further strengthening may turn out to be risky for India's growth prospects.

As the interest rates are not likely to fall quickly, the rise in prices of immovable properties will remain slow. The pressure on land will continue and therefore land prices may keep on appreciating, but they might have already reached to a bubble level, which may not allow quick appreciation from the current prices. The high property prices in India are not only affecting the investors, but may be one of the factors causing high inflation in the country. The high property prices result in high rentals, which necessitate high gross margins for traders and specially retailers. High rental also increases the cost of services. The hotel industry in the country is suffering as the room rents are not appreciating adequately to justify the investment required in setting up the hotels, which is becoming exorbitant due to high property prices. This phenomenon needs to be reversed, but when and how it can be reversed remains a million dollar question. It is possible that the property prices may not appreciate much and may stagnate for a while. Still, in certain areas having higher demand and low supply, the property prices will continue to increase. Investors need to be cautious about the situation and the decision of investment needs to be taken after considering all the factors.

Gold has suddenly jumped on Akshay Tritiya day but the rise may be temporary. The global prices of gold have hardened a bit and that has partly contributed for the upward movement of gold in India. The current curbs and duty structure on import of gold may not last long and there can be some easing in the second half of the current financial year. This may result in easing of gold prices over the next year. The price of silver has dropped substantially over the past few months and there is no apparent reason for its immediate revival. The price of precious stones will not appreciate much as the market is stagnating due to slow economy and appreciation of Rupee against US Dollar. Investors may remain underweight on this asset class.

The current scenario in India is not great but the expectations are high. Investors should take long term calls based on the election results after the power equations in the centre get stabilised. There may be great opportunity in store for the Indian equity investor in the near future. The retail investor needs to revisit the stock market for better returns and as a hedge against inflation.



V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Q.1 Wealth Tax

Facts & Query

Urban Land is liable to Wealth Tax. It includes land within municipal limits and in notified area. However it further says it does not include land on which construction of a building is not permissible under any law for the time being in force in the area in which land is situated.

Question for your kind consideration is whether agricultural land can fall under this exception as no construction is possible on agricultural land.

In the following Judgments similar view is taken

I] CWT vs. CIT vs. L.T. Gen [Retd.] R. K. Mehra [2010] 325 ITR 601 [P&H]

II] CWT vs. D.C.M. Ltd. [2007] 290 ITR 615 [Del.]

However in the case of Sunil Kumar vs. WTO 51 SOT 95 Del. it is held that agricultural land within the municipal limit is to be treated as urban land. That may be because issue of no construction was not there in the facts of the case. Please give your valued opinion.

Ans. Under S. 3 of Wealth Tax Act, Wealth Tax is payable on the net wealth of every Individual a HUF, and a Company at the rates prescribed under Schedule I of the Act.

Now as a rule, all assets are taxable subject to the exemptions provided.

Now Urban Land is one of such taxable assets. Now urban land would include land within the prescribed limits from a city or of a Municipality or a civic body on which construction work is permitted. Now an agricultural land is an asset on which buildings are not allowed to be constructed, even if they are within the above prescribed limits.

As such, in the case of the querist, as the land is an agricultural land through within the said limits, it is not liable to Wealth Tax.

Q.2 *Section 54/54F provide that even if property is purchased one year before, it will qualify for exemption. The issue is what is meant by purchase in this section, when it can be said that property is purchased one year before.*

On the following facts, what will qualify for exemption.

Asset sold in 2012.

- *Agreement to purchase was made 3 years back and at that time 20% payment (20% of purchase price) was made.*
- *2 years back another 20% payment was made and possession was taken. Can Assessing Officer take a view that since Agreement to purchase was made 3 years back, no exemption can be allowed.*

Can assessee argue that since substantial payment was made in last one year and possession was taken, that is the date of purchase. In that case exemption will be available to the extent of 60% OR 100%. If reverse facts are there i.e. 60% 3 years before, 20% 2 years back and 20% 1 year before, then what will be the position?

Ans. Under Sec. 54/54F to claim exemption from Capital Gain arising on transfer of a capital

asset being a house property or any other asset assessee has to purchase a new house property within the time limit prescribed. Now purchase means under these sections, if an agreement to purchase is entered into and some consideration is paid towards such agreement it amounts to purchase and then when full payment is made is not relevant. In such case full exemption is available and not only on a part payment. One may rely on the following case.

253 ITR 343 (Delhi) – CIT vs. Smt. Brinda Kumar

Q.3 *Nowadays, no action is taken on intimation for partition u/s 171(1)? Can the assessee presume that his application has been accepted or would be make any difference?*

Ans. H.U.F. will be assessed as an H.U.F. till it is partitioned totally or partially. If such partition is effected and it is claimed in the return filed thereafter claiming partition of HUF, and an intimation of partition by filing a partition deed is given to the department; such partition is effective irrespective of the fact as to whether Department has taken any action on such intimation or not.

Q.4. *Long-term capital gain arising on transfer of a long term capital asset not being a residential house is exempt u/s 54F of the Act if the assessee within two years after the date of transfer of original asset purchases a residential house and if all other conditions stated in S. 54F are satisfied. S. 54F(2) provides that if such house (acquired on transfer of original asset) is transferred within a period of 3 years from the date of its purchase then the amount of long-term capital gain arising on transfer of original asset which was not charged to tax u/s 45 on the basis of cost of new house purchased shall be deemed to be income chargeable under the head `Capital Gains' relating to long-term capital asset of the previous year in which such new asset is transferred. The question is whether on transfer of such new asset, exemption can be claimed again u/s. 54F(1) by purchasing another house on the ground that the gain which is now being charged is a deemed long term capital gain.*

Ans. Now under S. 54F investment in purchase of new house property within the time allowed it will not attract liability to capital gain arising on such transfer of such asset if he purchases another house and for getting such exemption on such new asset, purchased it will not be sold within 3 years from the date of its purchase and if he so sells, he will loose the exemption and in the year of such sale he will be taxed for capital gain.

Now the fact, it will be taxed, as long-term capital gain is for only for rate purposes and not for all purposes of sec. 54F. As such the querist cannot claim again the benefit of investment of such capital gain on such transfer, by purchasing another house property.

Q.5 A. *In the Development Agreement between the landlord and the developer, developer has agreed that he will construct 20 flats. 10 flats will be given to the landlord and 10 developer can sell. This is the only consideration landlord is entitled to. The possession of the flats will be given to the landlord after 2 years. What will be the consideration in the hands of the landlord, it will be cost of construction or fair market value of the flats, and on what date.*

B. *In such a case can we structure a transaction so that only one half share in land is transferred to the developer. Later, landlord and developer both will give conveyance in favour of society.*

Ans. On the facts of the case, the landlord would be getting 10 constructed flats by way of consideration. As such what he would be getting for bringing his lands into the Jt. Venture would be the actual cost that the builder has incurred and not the market value of such flats. It will be taxable when he gets the actual possession of the newly constructed flats.

The consideration he is getting is the actual construction cost of the builder is incurring and not the market value of such flats and not when he is getting part payment, or on possession some flats he will be getting but only on getting, the possession of all 20 flats.

NOTICE OF ELECTION

To
The Members,
The Chamber of Tax Consultants, Mumbai

The election of the President and Thirteen Members of the Managing Council for the ensuing year 2014-15 shall take place on **Saturday, 14th June, 2014** at the **Office of the CTC, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai-400 020.**

Nominations in the prescribed form should be filed so as to reach the office of the CTC not later than **6.00 p.m.** on **Tuesday, 3rd June, 2014**. The nomination forms shall be available at the CTC office from **Tuesday, 20th May, 2014.**

FOR AND ON BEHALF OF THE MANAGING COUNCIL

Sd/- Sd/-

HITESH R. SHAH / HINESH R. DOSHI

Hon. Jt. Secretaries

Place: Mumbai
Dated: 16th April, 2014
Office : 3, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020.

Notes:

1. **Only** Ordinary and Life Members are eligible to vote at the election.
2. A Member who has completed at least **two full years** as a member shall be entitled to contest the election for Managing Council or to propose or second a candidate for the election. Each member can propose not more than **three** candidates.
3. Members in arrears of membership subscription shall not be entitled to contest the election or to propose or second any candidate for the election or to vote at the election.
4. Withdrawal of nomination for the elections can be made by the candidate on or before 6.00 p.m. on **Friday, 6th June, 2014.**
5. If elections are required to be held, the names of the valid candidates shall be intimated through the website of the Chamber as well as through the Notice Board at the Chamber's office. The Members are requested to check through these mediums.
6. If elections are not required to be held, due to any reason whatsoever, the same shall be intimated through the website of the Chamber as well as through the Notice Board at the Chamber's office. The Members are requested to check through these mediums.
7. The voting, if required, will commence at 11.00 a.m. and end at 5.00 p.m.


CA Hitesh R. Shah & CA Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Important events and happenings that took place between 9th April, 2014 and 8th May, 2014 are being reported as under.

I. ADMISSION OF NEW MEMBERS

1) The following new members were admitted in the Managing Council Meeting held on 16th April, 2014.

LIFE MEMBERSHIP

1	Shri Iyer Ramesh (Tr from Ord to Life)	CA	Mumbai
2	Shri Patki Shyamkant Madhukar (Tr from Ord to Life)	CA	Pune
3	Shri Sejpal Nehal Amrutlal	CA	Mumbai
4	Ms. Padwal Sanjita Vinayak	CA	Mumbai
5	Shri Khandelwal Neelkanth Rajiv	CA	Mumbai
6	Shri Shah Mukesh Punamchand	CA	Mumbai
7	Shri Mota Gautam Rajesh	CA	Mumbai
8	Mrs. Lalwani Divya Avinash	CA	Mumbai
9	Shri Gandhi Nirmal M.	CA	Pune

ORDINARY MEMBERSHIP

1	Shri Patel Manish Girish	ITP	Ahmedabad
2	Shri Chheda Mulraj Kalyanji	CA	Mumbai
3	Shri Ramchandran Vinod	CA	Mumbai
4	Ms. Jadhav Neelam Chandrakant	Advocate	Mumbai
5	Shri Sivaswamy N. S.	CA	Coimbatore
6	Shri Shah Siddharth Vijay	CA	Mumbai
7	Shri Sheth Jimmy Vinaychandra	CA	Mumbai
8	Shri Shah Devang Kishor	CA	Mumbai
9	Shri Dedhia Champak Kalyanji	CA	Mumbai
10	Mrs. Daga Madhu Aniruddha	CA	Mumbai
11	Shri Jain Vinod Jaisingh	CA	Mumbai
12	Mrs. Garg Shikha Gaurav (Oct., 2013 to Mar., 2014)	CA	Mumbai
13	Shri Bhosle Santosh	ITP	Mumbai

STUDENT MEMBERSHIP

1	Ms. Dalmia Sweta Santosh	CA Student	Thane
2	Ms. Vira Vidhi Jayesh	CA Student	Mumbai
3	Shri Godhani Ashish B.	CA Student	Mumbai

ASSOCIATES MEMBERSHIP

1	Hindalco Industries Limited	Mumbai
2	K C P L And Associates LLP	Mumbai
3	Shaparia & Mehta	Mumbai
4	Asa & Associates LLP	Mumbai

II) The following new members were admitted in the Managing Council Meeting held on 29th April, 2014.

LIFE MEMBERSHIP

1	Shri Hegde Nandkishore Chidamber (Tr from Ord to Life)	CA	Mumbai
2	Shri Shah Milind Pravinchandra	CA	Mumbai
3	Shri Gogri Ketan Jivraj	CA	Mumbai
4	Shri Mathia Viren Madhusudan	CA	Mumbai
5	Shri Shah Pushpat Shivlal	CA	Mumbai
6	Shri Gudipudi Hari Venkata Narayana	Advocate	Visakhapatnam
7	Shri Somani Vidyadhar Sudhakar	CA	Mumbai
8	Shri Jain Girish Prakashchand	CA	Mumbai
9	Ms. Pandit Amogh Ashok (Tr from Ord to Life)	CA	Mumbai
10	Shri Shah Sujal A. (Tr from Ord to Life)	CA	Mumbai
11	Shri K. Subrahmanyeswara Rao	CA	Visakhapatnam
12	Shri Edara Sai Ram	CA	Hyderabad
13	Ms. Agrawal Pooja Ajay	CA	Mumbai
14	Shri Sharma Milind Deendayal	CA	Pune
15	Shri Doshi Devendrakumar K.	CA	Mumbai

ORDINARY MEMBERSHIP

1	Shri Joshi Sudeshkumar Vidyadhar	CA	Mumbai
2	Ms. Thakkar Eesha Ajit	CA	Mumbai
3	Ms. Saboo Niral Karan	CA	Mumbai
4	Shri Salian Hemant Kumar Raghu	CA	Mumbai
5	Shri Sutar Hiten Premit	CA	Mumbai
6	Shri Damania Malay Vijaysen	CA	Mumbai
7	Shri Dedhia Taral Vasanji	CA	Mumbai
8	Shri Purani Atul Amritlal	CA	Mumbai
9	Shri Jamshedji Hormuzd Phiroze	CA	Mumbai
10	Shri Shah Ajit Jyotishkumar	CA	Mumbai
11	Shri Gulani Prem Srichand	CA	Mumbai
12	Shri Trivedi Dharmesh Lalitkumar	CA	Mumbai

13	Shri Dedhia Poojan	CA	Thane
14	Ms. Keswani Sudha Subhash	CA	Mumbai
15	Shri Dodhia Nikhil B.	CA	Mumbai
16	Shri Mehta Sujoy Pankaj	CA	Baroda
17	Shri Shah Akshaya Navnitlal	CA	Mumbai
18	Shri Shah Ankit Amit	CA	Mumbai
19	Shri Saraf Samit Subhash	CA	Mumbai
20	Shri Chheda Jay Manoj	CA	Mumbai
21	Ms. Dosi Mitali Vilas	CA	Mumbai
22	Shri Bakshi Bharat Vipinchandra	CA	Mumbai
23	Shri Agarwal Rajneesh	CA	Kolkata
24	Shri Rao Arvind Ajith	CA	Mumbai
25	Ms. Shah Namita Vijay	CA	Mumbai
26	Ms. Shah Jinal Yogesh	CA	Mumbai
27	Shri Dakhera Balmukund Kalyanmal	CA	Mumbai
28	Shri Paranjape Mukund Dhundiraj	CA	Mumbai
29	Shri Naik Bhushan Chadrakant	CA	Mumbai
30	Shri Satra Viraj Vinod	CA	Mumbai
31	Shri Subedar Farokh Nariman	CA	Mumbai
32	Shri Tambe Akshay Anil	CA	Mumbai
33	Shri Sheth Surendra Girdharlal	CA	Mumbai

STUDENT MEMBERSHIP

1	Shri Patil Prathamesh Shankar	B.com	Mumbai
2	Ms. Thakkar Dhara Bhupendrakumar	IPCC-ICAI	Ahmedabad
3	Shri K. Jeevanandam	ICAI (CA FINAL)	Kanchipuram
4	Ms. Sundararaman Roshnee	ICAI	Mumbai
5	Ms. Badola Komal Mahendra	CA STUDENT	Mumbai
6	Ms. Anwesha Banoyopadhyay	CA STUDENT	Mumbai

ASSOCIATES MEMBERSHIP

1	V. K. Surana & Co.	Mumbai
2	Motilal Oswal Securities Limited	Mumbai

II. PAST PROGRAMMES

Details of programmes conducted by the Chamber are given below:

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
1.	**Direct Taxes Committee**		
	Intensive Study Group (Direct Tax) Meeting Venue - CTC Conference Room	***23rd April, 2014*** *Recent Important Decisions under Direct Taxes*	CA Dilip Sanghvi

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
2.	**Indirect Taxes Committee**		
A)	***Indirect Tax Study Circle Meeting*** Venue – 2nd Floor, Babubhai Chenai Hall, IMC.	**16th April, 2014** Issues in Place of Provision of Services Rules, 2012	Chairman : Shri Naresh Thacker, Advocate Group Leader : Shri Jitendra Motwani, Advocate
B)	***Workshop on MVAT Act & Allied Laws*** (Jointly with STPAM, BCAS, AIFTP (WZ) & WIRC of ICAI) Venue – Mazgaon Library, Vikrikar Bhavan, Mumbai.	**19th April and 3rd May, 2014** • Assessment of Builders & Developers under MVAT Act, 2002 • E- filing of Returns and Declaration Forms under MVAT/CST Act	Shri Deepak Bapat, Advocate CA Pranav Kapadia
3.	**International Taxation Committee**		
A)	**Intensive Study Course on FEMA** Venue – West End Hotel	**18th, 19th, 25th & 26th April, 2014** • Inaugural Session-History and origin, Cardinal principles, Liberalisation with FEMA, Rationale of Sec. 3 on Statute, recent trend, penalties and appeal • Introduction and Overview of FEMA • Important Definitions, structure of the Act, Rules and Circulars, powers of RBI and Government • Entry strategy, Establishment of branch/ project office by Non-residents in India, procedure with RBI, ROC, Income Tax, FRO, Commissioner of Police. • Import and Export of Goods and Services • Bank Accounts and Deposit Regulations	CA Rashmin Sanghvi CA Manoj Shah CA Mayur Nayak CA Hinesh Doshi Shri Ajit shah, LLM CA Amit Purohit CA Zulfiqur Shivji

ML-544

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• Miscellaneous Remittances, Import, Exports and retention of currencies, Repatriation of Foreign Exchange, remittances in case of change in Residential status such as employment, self employed, etc.	CA Naresh Ajwani
		• Investment in India of Immovable Property and outside India by Residents	CA Shabbir Motorwala
		• Inbound Investment – Foreign Direct Investment, portfolio and other avenues of Investment	CA N. C. Hegde
		• Inbound Investment - other than FDI	CA Nishit Parikh
		• Outbound Investment	CA Prakash Kotadia
		• Borrowings and Lendings in Rupees and Foreign Currency	CA Dhishat Mehta
		• Change in Residential Status under FEMA	Chairman CA Dilip J. Thakkar
		• Adjudication and Compounding of Contraventions Adjudication Procedure, Compounding Procedure, Penalty & Appeal, Practical Experience at compounding forum/Cell	CA Paresh Shah
		• Case Studies on FEMA • Brain Trust	CA Anup Shah and CA Hitesh Gajaria
B)	**4th Intensive Study Course on Transfer Pricing** (Including Domestic Transfer Pricing) Venue – West End Hotel	**11th & 12th April, 2014 (Friday & Saturday)** A) Other areas having TP implications	CA Arun Saripalli

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• Critical Issues in Transfer Pricing surrounding incurrence of Advertising and Marketing Expenses, Valuation, Issue of shares, etc.	
		B) The Road Ahead–	Ms. Alpana Saxena
		• Advance Pricing Arrangements, MAP and Safe Harbour	
		C) Attribution Issues, experiences, recent rulings and Revenue's perspective	
		• Recent Landmark decisions on Transfer Pricing	CA Amol Tibrewala
		• Convergence between Custom and Transfer Pricing / Application of Transfer Pricing to Section 10A/10B, Corporate Governance	CA Milnd Kothari
		• Approach of the Revenue and their expectations	Mr. R. S. Srivastava, Add.CIT-TPO 2(4), Mumbai
		• International developments, BEPS Report of OECD, GAAR and their inter-play with transfer pricing	CA Sanjay Tolia
		• Panel Discussion	Shri C. S. Gulati/ CA Vispi T. Patel (Moderator), Shri Kuntal Kumar Sen, CA Rohan Phatarphekar
		• Closing session	CA Vispi T. Patel
C)	***Intensive Study Group on International Taxation Meeting*** Venue – CTC Conference Room	**10th April, 2014** *Royalty – Equipment Leasing*	CA Natwar Thakrar & CA Kirit Dedhia
4.	**Study Circle & Study Group Committee:**		
	A) Study Circle Meeting Venue – 2nd Floor, Babubhai Chinai Committee Room. IMC.	**9th April, 2014** Issues u/s. 45 (3) and 45(4) of Income-tax Act	Chairman : Shri Vipul B. Joshi, Advocate Group Leader : CA Ashok L. Sharma

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
	B) Study Group Meeting Venue – 2nd Floor, Babubhai Chinai Committee Room, IMC	**21st April, 2014** Recent Judgment under Direct Taxes	Group Leader : CA Mahendra Sanghvi Latin Term Speaker : Shri Mandar Vaidya, Advocate
	C) Study Circle on International Taxation Meetings Venue – 2nd Floor, Kilachand Hall, IMC	**30th April, 2014** Selected issues in Taxation of Capital Gains for Non-residents	CA Rutvik R. Sanghvi

III. FUTURE PROGRAMMES

Future programmes of the Chamber's are as follows:

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
1.	*Extra ordinary General Meeting*	**27th May, 2014** To Consider adoption of the changes to the Rules & Regulations of the Chamber	
2.	**Election of President and 13 Managing Council Members**	**14th June, 2014**	
3.	**Corporate Members Committee**		
A)	***Study Course on the Companies Act, 2013*** Venue – Conference Room, 20 Down Town, Eros Bldg., Churchgate, Mumbai- 400 020	**12th, 13th, 24th, 27th & 28th June, 2014** Incorporation Process Private Companies, One Person Companies and Small Companies Accounts and Audit Management, Administration and General Meeting Roles and Responsibilities of Director, Independent Director, Managing Director and Key Managerial Personnel and Board Procedure - Session - I & II Action Plan and Transitional Provisions under the Companies Act, 2013	 CS Janak Pandya CA Sanjeev Shah CA P. R. Ramesh Eminent Speaker Eminent Speaker CA Mahavir Lunawat

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		Penalties, Prosecution, Class Action Suits and Other penal provisions	Mr. Sanjay Buch, Advocate
		Corporate Social Responsibility	Eminent Speaker
		Related Parties Transactions	Eminent Speaker
D)	**8th Residential Conference on International Taxation, 2014** Venue – Novotel Hyderabad Convention Centre.	**19th June, 2014 to 22nd June, 2014** *A) Group Discussion* • Case Studies on taxability of EPC contracts and related issues of AOP, Consortium, offshore services and presumptive tax provisions including Sections 44BBB, 44DA & 44BB	Dr. Anita Sumanth, Advocate
		• Structuring of FDI – Interplay with other laws	CA Anup P. Shah
		• Case Studies on International Taxation and Transfer Pricing	CA H. Padamchand Khincha
		B) Brains' Trust • On Practical Issues in International Taxation	CA K. C. Devdas - Chairman
		C) Papers for Presentation • Emerging controversies in Taxation of Software, IPRs & E-Commerce (Tax and Non-Tax Issues)	Shri Arvind Datar, Sr. Advocate
		• International Tax structuring under GAAR and other Anti Abuse Provisions including OECD's BEPS action plan - Way Forward	CA Shefali Goradia
		• Recent issues, trends and jurisprudence in Transfer Pricing - Indian & Global perspective	CA Vijay Iyer
4.	**Study Circle & Study Group Committee**		
A)	***Study Circle on International Taxation Meetings*** Venue – Conference Room, 20 Down Town, Eros Cinema Bldg., Churchgate, Mumbai- 400 020	**12th, May, 2014** US Tax and Reporting	CA Lloyd Pinto

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
B)	***Study Group Meeting***	**16th June, 2014**	
	Venue – 2nd Floor, Babubhai Chinai Committee Room, IMC	Recent Judgment under Direct Taxes	Group Leader : Mr. Keshav Bhujle, Advocate

VI. 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 was due for payment on 1st April, 2014. **Pl renew you membership to avoid uninterrupted service of the Chamber's Journal.**

The details of the Fees are as under:

		Fees	Service Tax & Cess *	Total
1.	Membership Renewal Fees (for 1 year including Chamber's Journal)	` 1,900/-	` 235/-	` 2,135/-
2.	The Chamber's Journal Subscription (For Life Members)	` 900/-	—	` 900/-
3.	The Chamber's 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 Chamber's Journal Subscription (For Students)	` 700/-	—	` 700/-
7.	Study Group (Direct Taxes)	` 2,200/-	` 272/-	` 2,472/-
8.	Study Circle (Direct Taxes)	` 1,500/-	` 186/-	` 1,686/-
9.	Study Circle (Indirect Taxes)	` 1,200/-	` 148/-	` 1,348/-
10.	Study Circle (International Tax)	` 1,500/-	` 186/-	` 1,686/-
11.	Study Circle (Allied Laws)	` 1,200/-	` 148/-	` 1,348/-
12.	Self Awareness Series	` 600/-	` 74/-	` 674/-
13.	Intensive Study Group on Direct Tax	` 1,500/-	` 186/-	` 1,686/-
14.	Intensive Study Group on International Taxation	` 2,000/-	` 247/-	` 2,247/-
15.	All Study Circle & Study Group Meetings ` 11,700/- Less : 10% Discount ` 1,170/- (*) (Sr. Nos. 7 to 14)	` 10,530/-	` 1,303/-	` 11,833/-
16.	Study Circle (Sr. Nos. 8 and 11) (Direct Tax & Allied Laws Combined)	` 2,200/-	` 272/-	` 2,472/-

V. Forthcoming Journal by Journal Committee

The Chamber's Journal for the month of June, 2014 will cover topic on "Hospitality Industry - Part II".

VI. PUBLICATIONS FOR SALE

A) International Taxation - A Compendium

Four hardbound volumes set containing approx. 4000 pages.

(For Enrollment and further details of all the Future Events, please refer to the May, 2014 Issue of CITC News or visit the website www.ctconline.org)

INTERNATIONAL TAXATION COMMITTEE

4th Intensive Study Course on Transfer Pricing (Including Domestic Transfer Pricing) held on 11th & 12th April, 2014

FACULTIES


CA Amol Tibrewal


CA Arun Saripall


CA Bipin Pawar


CA Milind Kothari


CA Rohan Phatarphekar


CA Vispi T. Patel


Mr. C. S. Gulati


Mr. R. S. Srivastava


Ms. Alpana Saksena

Transfer Pricing Study Circle Meeting held on 23rd April, 2014 on the subject "Methods of computing ALP under Transfer Pricing


CA Kirit Dedhia and CA Kinjal Shah addressing the Members.

Intensive Study Group on International Taxation held on 22nd April, 2014 on The Subject Royalty Copyright – "Other Than Software"


Devendra Mehta addressing the Members.


Shreyas Shah addressing the Members.

DIRECT TAXES COMMITTEE

Intensive Study Group on Direct Taxes Meeting held on 23rd April, 2014 on the subject "Recent Important Decision under Direct Tax"


CA Dilip Sanghvi addressing the Members.

INDIRECT TAXES COMMITTEE

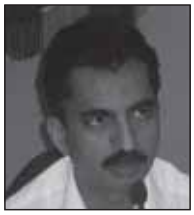
Indirect Tax Study Circle Meeting held on 16th April, 2014 on the subject "Issues in Place of Provision of Services Rules, 2012.


Shri Naresh Thacker, Chairman addressing the Members.


Shri Jitendra Motwani, Group Leader addressing the Members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting held on 9th April, 2014 on the subject "Issues u/ss. 45(3) and 45(4) of Income-tax Act


Chairman Vipul Joshi, Advocate addressing the Members.


Group Leader CA. Ashok Sharma addressing the Members.

Study Group Meeting held on 21st April, 2014 on the subject "Recent Judgments under Direct Taxes".


CA Mahendra Sanghvi addressing the Members. Seen from L to R: CA Ashok Sharma, CA Haresh Kenia, Chairman, Study Circle & Study Group Committee, Mandar Vaidya, Advocate, CA Yatin Desai, President, CA Dilip Sanghvi, Vice Chairman, Study Circle & Study Group Committee, Paras S. Savla, Advocate, Convenor, Study Circle & Study Group Committee

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