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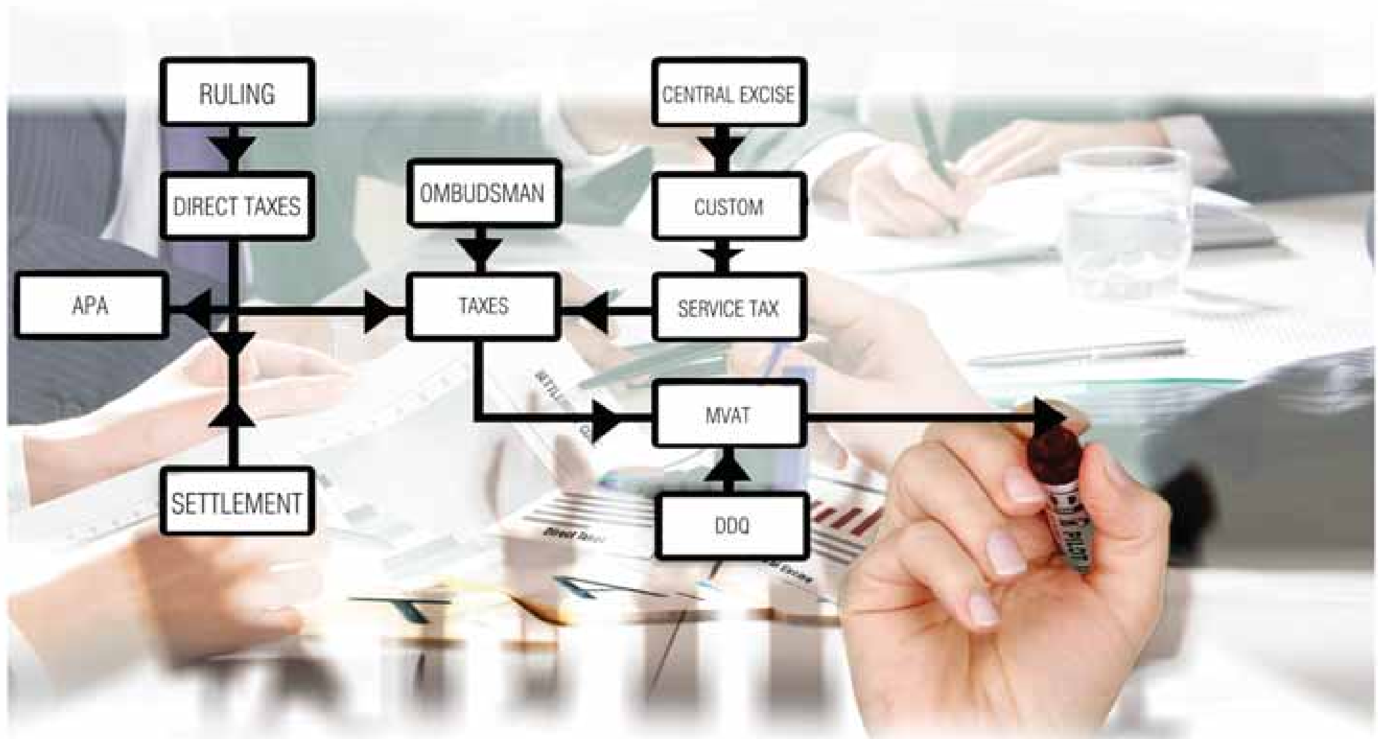
April - 2015 Vol . III | No. 7

ADVANCE RULING & SETTLEMENT COMMISSION



Other Contents

- Direct Taxes
- Other Laws
- International Taxation
- Indirect Taxes
- The Chamber News
- Best of the Rest
- Corporate Laws
- Economy & Finance

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THE CAPITALIZING CHALLENGES

INTERNATIONAL TAXATION COMMITTEE

5th Intensive Study Course on Transfer Pricing (Including Domestic Transfer Pricing) held on 14th, 20th March, 2015 at Hotel West End, Mumbai.

Mr. C. S. Gulati, DIT-International Taxation inaugurating conference by lighting the lamp. Seen from L to R : CA Hinesh Doshi, Hon. Jt. Secretary, CA Vispi T. Patel, Faculty, CA Naresh Ajwani, Chairman and CA Paras K. Savla, President.

Dignitaries during the 5th Intensive Study Course on Transfer Pricing. Seen from L to R : CA Hinesh Doshi, Hon. Jt. Secretary, CA Vispi T. Patel, Faculty, Chief Guest Mr. C. S. Gulati, DIT – International Taxation, CA Paras K. Savla, President, CA Naresh Ajwani, Chairman and CA Namrata Dedhia, Course Co-ordinator.

Mr. C. S. Gulati, DIT-International Taxation delivering keynote address. Seen from L to R : CA Hinesh Doshi, Hon. Jt. Secretary, CA Vispi T. Patel, Faculty, CA Paras K. Savla, CA Naresh Ajwani, Chairman and CA Namrata Dedhia, Course Co-ordinator.

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C NTENTS

Vol. III No. 7
April – 2015

Editorial .... *K. Gopal* 5
From the President .... *Paras Savla* 6
Chairman's Communication .... *Sanjeev Lalan* 8

1. **SPECIAL STORY : Advance Rulings & Settlement Commission**

DIRECT TAXES

1. Authority for Advance Ruling (AAR) – Procedure .... *Sunil Moti Lala* 9
2. Authority for Advance Rulings – Concept & Scope of Advance Rulings under Direct Taxes .... *Paras S. Savla & Dharan V. Gandhi* 16
3. Why and Who can approach Settlement Commission .... *Sanjay R. Parikh* 19
4. What can Settlement Commission do? .... *Ajay R. Singh* 24
5. Advance Pricing Agreement – Scope & Procedure – Will it mitigate Litigation? .... *Rajesh S. Athavale* 35
6. Advance Pricing Agreement Rollback Rules – Will it mitigate Litigation? .... *Waman Kale, Bhavesh Dedhia & Anjul Mota* 51

INDIRECT TAXES

7. Advance Rulings Central Excise, Customs and Service Tax) .... *Nishant Shah* 58
8. Authority on Advance Rulings Practices Global experiences (Indirect Taxes) ... *Heetesh Veera* 65
9. Advance Rulings (Central Excise, Customs, Service Tax) – Snapshot of Important Judicial Rulings .... *Jayesh Gogri* 70
10. Settlement Commission (Central Excise, Customs & Service Tax) – Salient features of Settlement Commission in brief & some critical issues ..... *Shailesh Sheth* 75
11. No more crawling over entrails of tax disputes – Settlement Commission .... *Bharat Raichandani* 83
12. Settlement Commission (Central Excise, Customs & Service Tax) Snapshot of Important Judicial Ruling .... *Vishal Agrawal & Manya Bhardwaj* 88
13. Salient Features of DDQ Mechanism in brief & Some Critical Issues .... *C. B. Thakar* 94
14. Snapshot of Important DDQs .... *Kiran Garkar* 99
15. OMBUDSMEN – A Road Seldom Taken .... *Manish R. Gadia & Jinit R. Shah* 106
16. Case Laws Index 114

2. **DIRECT TAXES**
   - Supreme Court .... *B. V. Jhaveri* 115
   - High Court .... *Ashok Patil, Mandar Vaidya & Priti Shukla* 121
   - Tribunal .... *Jitendra Singh & Sameer Dalal* 123
   - Statutes, Circulars & Notifications .... *Sunil K. Jain* 126

3. **INTERNATIONAL TAXATION**
   - Case Law Update .... *Tarunkumar Singhal & Sunil Moti Lala* 133

4. **INDIRECT TAXES**
   - VAT Update .... *Nikita R. Badheka* 144
   - Service Tax – Statute Update .... *Rajkamal Shah & Naresh Sheth* 148
   - Service Tax – Case Law Update .... *Bharat Shemlani* 149

5. **CORPORATE LAWS**
   - Company Law Update .... *Janak C. Pandya* 153

6. **OTHER LAWS**
   - FEMA Update .... *Mayur Nayak, Natwar Thakrar & Pankaj Bhuta* 156

7 **BEST OF THE REST** .... *Ajay Singh & Suchitra Kamble* 160
8. **TAX ARTICLES FOR YOUR REFERENCE** .... *Kishor Vanjara* 165
9. **ECONOMY & FINANCE** .... *Rajaram Ajgaonkar* 173
10. **THE CHAMBER NEWS** .... *Hinesh R. Doshi & Ajay Singh* 176

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Editorial

On 23rd March, 2015, Lee Kuan Yew, founding Prime Minister of Singapore passed away. He was a visionary leader who gave shape to present day Singapore. The great jurist Mr. Nani A. Palkhivala in his annual budget speeches on the Union Budget 1990-91, while concluding his speech, mentioned "At a recent meeting of the world economic forum at Davos, Prime Minister Lee Kuan Yew said to a leading Indian businessman, "Indian economy is like a sleeping giant, which if awakened, could by itself transform the face of the global economy. India has a potential to form independent economic block on her own without too much dependence on anybody else." Palkhivala further added that "But in keeping with our forty year hallowed tradition, the budget this year will not be so rude as to disturb the slumber of the sleeping giant".

The Special Story for the Chamber's Journal's April issue is on Advance Ruling and Settlement Commission. We are covering provisions pertaining to direct as well as indirect taxes. The initial design as proposed by my good friend Mr. Bakul Mody was with respect to indirect taxes only. However, our Chairman, Mr. Sanjeev Lalan persuaded me to include provisions pertaining to direct taxes also. While covering direct tax provisions, we have restricted ourselves to Advance Ruling and Settlement Commission, though the provision pertaining to dispute resolution panel were brought on statute book by Finance (No. 2) Act, 2009 to create an alternative dispute resolution mechanism within income tax department and section 144C was inserted ((2009) 314 ITR St 160 notes on clauses of Finance No. 2 Bill, 2009). The tax legislation has suffered due to huge litigation it has generated. Many attempts by the policy makers to reduce litigation or tax disputes by providing alternative dispute resolution has not succeeded. However, as Max Lucade says "conflict is inevitable, but combat is optional." The authority of advance ruling provides opportunity to avoid litigation before the event of tax happens. Settlement Commission in many ways gives an opportunity to the assessee to catch the bus which he had missed by avoiding long drawn appeal provisions provided under the statute. However, it is difficult to say that the object for which these institutions were created have been achieved. I am reminded of Sandra Day O'Connor's observation, "The courts of this country should not be the place where the disputes end after alternative methods of resolving disputes have been considered and tried". This observation is true if one looks at the number of writ petitions filed by the department challenging orders of the Settlement Commission.

I thank all the professionals who have contributed to this issue of the Chairman's journal and I would like to extend my special thanks to Mr. Bakul Mody for helping us with the design of the Special Story and the editorial work.

K. Gopal
Editor

From the President

The Supreme Court has struck down section 66A of the Information Technology Act. While striking off, it had made vital observations that the provisions are arbitrary and excessively and disproportionately invade the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right. Hon'ble Bench made another very important observation on scope of interpretation of terms too. It was pointed that if judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, an offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. At this juncture it is worthwhile to note that India is placed at 42nd position amongst 65 nations for Freedom on Net. During 2014 it has moved 5 places up.

Robustness of the Indian judicial system is again proved beyond doubt by this decision of the Supreme Court. Court has consistently protected fundamental rights of the Indian citizen. So as, in this decision too, Supreme Court heralded victory of freedom of speech. However, post decision of Apex Court, while replying one of the query raised by an MLA, Maharashtra Chief Minister has stated that the Centre is working on formulating a new law on the lines of Section 66(A) that was struck down by the SC. There was no conviction in the previous law and thus a law is being formulated that will be strong and which will result in convictions. Irony is that this verdict was welcomed by current Government and members of then Government too. Hence now time would only tell how much would be real freedom of speech in days to come. It is to be noted that the Supreme Court has already observed that an intelligible difference having a rational relation to the object sought to be achieved is necessary – that there can be definition of offences which are applied to free speech over the internet alone as opposed to other mediums of communication.

Net neutrality! It's a principle where all data on the Internet should be treated equally, not discriminating or charging differently by user, content, site, platform, application, type of attached equipment, or mode of communication. Net neutrality allows users to access any website without restriction of charges, speed of accessing etc. In India, currently no law prevails on the Net neutrality. Certain telecom service providers initially proposed to levy special charges on certain VOIP, over-the-top services. However, proposal was highly criticised and finally dropped for time being. But recently again same telecom introduced another product wherein telecom would provide free access to the products developed by specific app developers.

Development of such platform would allow rich companies to subsidise data charges for customers. Another telecom has already developed product wherein facebook can be accessed without paying for data charges. Such strategies would certainly deny level playing field for many, especially startups. Another contrary argument is that this provides win-win situation for marketers and users. One may certainly agree that development of internet is only because of Net neutrality. Hence DOT or TRAI should take up this matter and come up with the rules before the party is spoiled.

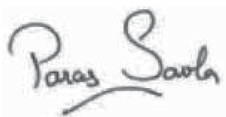
At the Chamber various activities have been planned for the members. Recently CBDT has issued Income Computation and Disclosure Standards effective from April 1, 2015. The Chamber has objected against the issuance of the same as it goes against principles of ease of doing business. Nevertheless once these standards are issued, the Chamber's role is to educate its members for proper compliance. Keeping this in mind Direct Taxes Committee has planned to organise full day seminar in the month of April. Post issuance of these Standards, probably the Chamber is the first organisation to announce and hold a programme on the same. NBFC regulations have undergone changes over last few months. Hence to keep members abreast on these regulation, Allied laws and Direct Tax Committee has organised programme on NBFC. At the programme officials from RBI would also address the delegates. The Chamber has also organised musical programme for fellowship. Various other programmes are being held. For details refer to the CITC News or visit the Chamber's website.

Post change in the name of the Chamber, name of monthly newsletter CITC News, also warranted change. Hence a step for changing name was initiated under the guidance of Editor of Newsletter and Past President Shri Kishor Vanjara. Registrar of Newspapers of India has approved new name as The CTC News. On completion of other formalities Newsletter would be printed under new name.

When this journal reaches all, probably school exams would have been over and vacation mood is setting in. This also reminds me of my golden schools days. In words of Valsa Geoge holiday means –

> **H**alting from all weary work
> **O**n a trip we went to avert nervous wreck
> **L**ively days with many a jocund friend
> **I**n a jovial mood with no deadlines to tend
> **D**iving into amusements gay
> **A**ll anxiety kept wide at bay
> **Y**earning to suck life in full
> **S**weet, those days savouring life to the fill

Happy Summer Vacations!



Paras Savla
President

Chairman's Communication

Dear Esteemed Readers,

We get into a new fiscal year 2015-16 from this month with a sense of optimism. Though this optimism is not in a sense euphoric, but due to various decisions being taken by the Government on policy front and certain economic data revealing slow pick-up in economy, there is indeed a hope slowly creeping in to suggest a better year ahead and the said optimism is reflected in guidance issued by rating agencies. There is definitely a sense of dejection in public mind on the pace of improvement expected post general elections. Maybe the expectations that were built up in run-up to the general elections were just too high. However, if one were to closely observe the decisions that are being taken are firm and sure albeit a bit slower than would be desired. To be fair, in a democratic governance set-up one cannot expect the decision making to be off-hand and there has to be some delays that have to be accepted. However, the manner in which coal auctions took place or certain clarifications in respect of Companies Act were issued one gets a feeling that the concerns of businesses are being addressed.

The month of March each year has become a hectic one for tax professionals and the problem this year was compounded, as far as income-tax assessments were concerned, due to restructuring that took place in December and January and resultant changes in incumbent officers made it really challenging for assessees and tax representatives. Hopefully, the current year would turn out to be better one.

Year after year the litigation under taxation law has been increasing manifold and the complexities are adding to the same at an increased pace. There are certain measures, both within direct and indirect tax regimes which can be effectively used to either avoid litigation or to mitigate the impact of the same. These measures can be classified into two categories one before the stage of computation of tax liabilities and another before determination of tax liabilities. While measures like Advance Rulings, Advance Pricing Agreements, Determination of Disputed Questions etc. would fall in the first category measures like approaching the Settlement Commission would fall in another category. Of course, there is also the mechanism of Ombudsman available under both the regimes for grievance redressals. In this issue the special story tries to look at some of these avenues which one can effectively look into in appropriate circumstances.

I would like to thank S/Shri Sunil Moti Lala, Paras S. Savla, Dharan V. Gandhi, Sanjay Parikh, Ajay Singh, Rajesh Athavale, Waman Kale, Bhavesh Dedhia, Anjul Mota, Nishant Shah, Heetesh Veera, Jayesh Gogri, Shailesh Sheth, Bharat Raichandani, Vishal Agrawal, Manya Bhardwaj, C.B. Thakar, Kiran Garkar, Manish Gadia and Jinit R. Shah for sharing their knowledge for the benefit of the readers. I would like to specially thank Shri Bakul Mody for structuring the Indirect taxes section of the special story as also the editor Shri K. Gopal for his contribution in structuring the Direct tax section. I am sure the articles in this special story shall give ideas to the readers for possible exploration of the different avenues in appropriate circumstances.

CA. Sanjeev Lalan
Chairman – Journal Committee

Sunil Moti Lala, Advocate

Authority for Advance Ruling (AAR) – Procedure

1.1 Who can apply for Advance Ruling?

As per the provisions of clause (b) of section 245N, the following persons can apply for advance ruling:

a) A non-resident who has entered or proposes to enter into a transaction in India

b) A resident who has entered or proposes to enter into a transaction with the non-resident

c) A resident falling within any such class or category of persons as the Central Government may by notification in the Official Gazette specify, in relation to a transaction entered or proposed to be entered by it. Till date no such residents have been notified.

d) A resident falling within any such class or category of persons as the Central Government may by notification in the Official Gazette specify. Public sector companies which have been notified *vide* notification No. 725(E) dated 3rd August, 2000 (2000) 245 ITR (St.) 5.

e) Any person, resident or non-resident for determining whether an arrangement proposed to be undertaken by him is an impermissible avoidance agreement as referred to in Chapter X-A.

After reading the provisions of clause (b) of section 245N, the following questions may arise as to:

1.1.1 Whether a resident Indian can apply for an Advance Ruling?

Yes, a resident Indian can apply for an advance ruling to determine the tax liability of a non-resident arising out of a transaction which has been or is proposed to be undertaken by him with a non-resident. Resident assessees who are notified under sub-clause (iii) of clause (b) of section 245N can also apply (Presently only public sector companies have been notified). Further, a resident can also apply for an advance ruling to determine its tax liability arising out of a transaction which has been or is proposed to be undertaken by him. However, no such resident has been notified yet. Also, a resident can apply for an advance ruling to determine whether an arrangement proposed to be undertaken by him is an impermissible avoidance agreement as referred to in Chapter X-A.

1.1.2 Whether a resident but not ordinary resident can apply for an Advance Ruling?

As a resident but not ordinary resident person would fall within the broader category of "resident", he would also be entitled to apply for a ruling in situations specified above.

1.1.3 Whether a resident, who is liable to withhold tax on the payment to be made to non-residents can apply for an Advance Ruling?

Yes. (See Advance Ruling in the case of *McLeod Russel Kolkata Ltd. In Re (2008) 215 CTR 230 (AAR)*

1.1.4 Whether it is necessary that the applicant should be non-resident on the date of application?

It would be very difficult to enforce the condition that an applicant is a non-resident at the time of making an application as the residential status would be determined on the basis of his stay in India throughout the previous year. Accordingly, if a person were a non-resident in the previous year immediately preceding the previous year in which the application is made, the application would be maintainable. *(See Robert W. Smith (1995) 212 ITR 275, Monte Harris (1996) 218 JB 413, P. No. 20 of 1995 (1999) 237 ITR 382)*

1.1.5 Can a person seek a ruling in respect of his tax liability on his return to India and becoming a resident?

Yes. (See Advance Ruling No. P-5 of 1995 (1997) 223 ITR 379, Advance Ruling P-12 of 1995 (1997) 228 ITR 61).

1.1.6 Can a ruling be sought even if alternate remedy to make an application under section 195(2) in respect of determination of applicability of TDS provisions or rate of TDS is available?

Yes, even if the applicant has alternate remedy under section 195(2), he can file advance ruling application. *(See Airport Authority of India, In Re (2008) 299 ITR 102 (AAR).)*

1.2 When can an application for Advance Ruling be filed?

As evident from section 245N of the Act, an application for advance ruling can be made in respect of a transaction which is proposed to be undertaken or a transaction which has already been undertaken. (also see para 3.2)

2. Procedure for making an application seeking Advance Ruling

2.1 Form

The application has to be made in the following forms:

i) By non-residents – Form 34C

ii) By resident in relation to transaction with non-resident – Form 34D

iii) By residents notified by the Government (public sector company notified)- Form 34E

iv) By any person, resident or non-resident, for determining whether an arrangement proposed to be undertaking by him is an impermissible avoidance agreement as referred to in Chapter X-A (see para 1.1(e) above) – Form 34EA

Application forms for residents referred to para 1.1(c) above have not yet been notified.

Application must be made in quadruplicate

2.2 Address where Application is to be filed

It should be presented by the Applicant in person or by an authorised representative or may be sent by post at the following address:

Authority for Advance Ruling
5th Floor, NDMC Building,
Yashwant Place, Satya Marg,
Chanakyapuri
New Delhi - 110 021 (India)

2.3 Filing Fees

The application must be accompanied by draft of ` 10,000 drawn in favour of "Authority of Advance Ruling" payable at New Delhi. The demand draft should be drawn in Indian Rupees and not in any foreign currency [section 245Q(2)].

2.4 Signature and Verification of Application

The application must be signed and verified as per the provisions of Rule 44E (2) of the Income Tax Rules, 1962

If the Applicant is	The application shall be signed
a) An individual	
As a general rule	By the Individual himself
If for any unavoidable reason, it is not possible for the individual to sign	By an authorised person (see Note below)
b) An HUF	
As a general rule	By the Karta
If for any unavoidable reason, it is not possible for the Karta to sign	By any other adult member of the HUF
c) A Company	
If the company has an M.D.	By the M.D.
If for any unavoidable reason the M.D. is not able to sign	By any director of the company
If the company has no M.D.	By any director of the company
If for any unavoidable reason the Director is not able to sign	By an authorised person (see Note below)
d) A Firm	
If the firm has a Managing Partner (M.P.)	By the M.P.
If for any unavoidable reason the M.P. is not able to sign or no M.P.	By any partner of the firm (other Partner (M.P.) than a minor
e) Association of Persons	By any member of the Association or by the Principal Officer thereof
f) Any other person	By that person or by some other person competent to act on his behalf

Note:

Where in case of an individual or a company, the application is signed by an authorised person, such person should be the one who holds a valid power of attorney from the individual/company and such power of attorney should be attached to the application.

The signature of the person mentioned in the above table should be put on

i) The application form;

ii) The verification appended to the said form;

iii) The annexures to the said application and the statements and documents accompanying such application. {Rule 44E(2)]

2.5 Enclosures to the Application

2.5.1 A statement listing question(s) relating to the transaction on which the advance ruling is required. This is optional. The question(s) may be stated in the application form itself. If, however, space provided is insufficient, separate enclosure may be used for this purpose.

It may be noted that the question(s) raised in the application should be exhaustively drafted covering all aspects of the issue involved and all alternative claims that the applicant may wish to make without prejudice to each other. This is because if at a later stage the applicant desires to raise an additional question which is not set forth in the application, he may have to obtain permission of the AAR. Granting of such a permission is at the discretion of the AAR (refer Rule 12 of the AAR (Procedure) Rules, 1996).

2.5.2 A statement of relevant facts having a bearing on the question(s) on which the advance ruling is required, (Annexure l)

2.5.3 A statement containing the applicant's interpretation of law or facts, as the case may be, in respect of the question(s) on which the advance ruling is required. (Annexure II)

2.5.4 Where the application is signed by an authorised representative, the power of attorney authorising him to sign.

2.5.5 Where the application is signed by an authorised representative, an affidavit setting out the unavoidable reasons which entitles him to sign.

2.5.6 Separate enclosures may be used where the space provided for any of the items in the relevant forms is insufficient.

2.5.7 In the covering letter, the applicant may make a request for being, heard before pronouncing the ruling. All annexures to the application and other statements and documents accompanying the application are also required to be signed by the person who can sign the application, [Rule 44E(2)]

3. Procedure to be followed by the AAR after application is filed by the applicant

The proceedings before the AAR can be classified in two stages. First is the stage where the application is either allowed or rejected under section 245R(2). The next stage is where the question(s) raised in the application are determined and the Advance ruling is pronounced in writing u/ s. 245R(6) read with section 245R(4).

3.1 On receipt of application

On receipt of the application, the AAR will forward a copy to the Principal Commissioner or Commissioner. The Principal Commissioner or Commissioner may be called upon to furnish the relevant records. AAR shall examine the application and such records.

3.2 Admission / Rejection of the Application

After examination, an order shall be passed u/s. 245R(2) to either allow or reject the application. A copy of order u/s. 245R(2) is sent to the applicant and to the Principal Commissioner or Commissioner. Under first proviso to section 245R(2), the AAR shall not allow the application where the question raised in the application:-

i) Is pending in the applicant's case before any IT authority, the ITAT or any Court; (except in case of application by residents belonging to the class/categories notified by the Government); or

ii) Involves determination of fair market value of any property; or

iii) Relates to a transaction or issue which is designed *prima facie* for avoidance of income-tax (except in case of application by residents belonging to the class/ categories notified by the Government or application made by any person, resident or non-resident for determining whether an arrangement proposed to be undertaking by him is an impermissible

avoidance agreement as referred to in Chapter X-A)

Further, if the application is rejected, the reason for such rejection shall be given by the AAR in the order.

3.3 Withdrawal of application

As per the provisions of section 245Q(3), a valid application complete in all respects can be withdrawn by the applicant within 30 days from the date of filing. However, time limit of 30 days is not sacrosanct in so far as that the withdrawal may be made even after the final hearing is concluded but the ruling is yet to be pronounced. In such cases, whether to allow the applicant to withdraw the application or not is at the discretion of tile Authority and depends on the facts of each case.

3.4 Pronouncement of Ruling

If the application is allowed *vide* order u/s. 245R(2), the AAR shall:

- Examine such further material as may be placed before it by the applicant;
- Examine such further material as may be obtained by the Authority *suo motu*; and
- Pronounce its Advance Ruling on the question specified in the application within six months of the receipt of the application either with or without giving the assessee a hearing. However, the time limit of six months is only recommendatory and a ruling given after the period of six months is not invalid. Every ruling pronounced by the Authority is signed by the members who heard the application and will bear the official seal of the Authority. A copy of the ruling certified in the prescribed manner is communicated to the applicant and to the Principal Commissioner or Commissioner after the pronouncement.

3.5 Opportunity of hearing

The second proviso to section 245R(2) states that at the first stage (i.e., admission), an application cannot be rejected without giving the applicant an opportunity to be heard. By implication, therefore, if the application is to be allowed, there is no compulsion for the AAR to give an opportunity to the applicant or to the Principal Commissioner or Commissioner of being heard.

Section 245R states that at the second stage (i.e., final hearing for pronouncement of ruling), the AAR shall provide an opportunity to the applicant of being heard “on a request received from the applicant". In other words, if the applicant does not make a request for hearing, the AAR is not bound to provide such an opportunity. It is therefore advisable for the applicant to make a request for hearing in his covering letter while filing the application itself. The notice of hearing can be served to the applicant or his authorised representative either by hand, through process server, or by registered post or by FAX. Rule 13 of Authority for Advance Rulings (Procedure) Rules, 1996 provides as follows:-

> "On receipt of an application, the AAR shall notify the applicant and the Commissioner of the date and place of hearing the application and forward a copy of the application to the Commissioner calling upon him to furnish the relevant records of the case along with his comments, if any, on the contents of the application and nominate his authorised representative if he desires to be heard".

3.6 Ex parte Ruling

If on the date of hearing or a date on which the hearing is adjourned, the applicant or the Commissioner does not appear in person or through an authorised representative, the AAR may decide the application ex parte on merits. However, if an application is made within 15 days of the receipt of the order and the applicant or the Commissioner satisfies the Authority that

there was sufficient cause for his non-appearance when the application was called for hearing, the AAR may, after allowing the opposite party. a reasonable opportunity of being heard, make an order setting aside the ex parte order and restore the application for fresh hearing [Rule 17 of Authority for Advance Rulings (Procedure) Rules, 1996].

3.7 Authorised representative

An applicant's authorised representative should fulfil the requirements spelt out in section 288(2) of the Act. The expression "authorised representative", in relation to the Commissioner, means a person authorised by him in writing to appear, plead and act for him in any proceedings before the Authority.

3.8 Proceedings before the AAR are not open to general public

Rule 24 of Authority for Advance Rulings (Procedure) Rules, 1996, specifies that the proceedings before the Authority are not open to public. Accordingly, no person other than the applicant, the Commissioner or their Authorised Representatives can remain present during such proceedings.

4. Relevant provisions of the Act, Relevant rules & forms under the Income Tax Rules, 1962, Rules under the A.A.R. (Procedure) Rules, 1996 and important Circulars & Notifications dealing with A.A.R.

4.1 Relevant provisions of the Income-tax Act, 1961 dealing with A.A.R.

Section No.	Description
245N	Definitions of certain terms
245O	Provisions for Constitution etc. of Authority for Advance Rulings
245P	Vacancies in the A.A.R. etc., not to invalidate proceedings
245Q	Application for Advance Ruling
245R	Procedure on receipt of application
245RR	Appellate Authority not to proceed in certain cases
245S	Applicability of advance ruling
245T	Advance ruling to be void in certain circumstances
245U	Powers of the Authority for Advance Ruling
245V	Procedure of the Authority for Advance Ruling
153	Time limit for completion of assessments and reassessments
153-B	Time limit for completion of assessment under section 153A

4.2 Relevant Rules & Forms under the Income Tax Rules, 1964 pertaining to AAR.

Rule No. in the Income Tax Rules, 1964	Description
44E	Form 34C – Application by a non-resident for obtaining Advance Ruling
44E	Form 34D – Application by a resident for obtaining Advance Ruling in relation to transactions with a non-resident
44E	Form No. 34E – Application by a resident falling within notified category as per Section 245N(b)(iii) for obtaining Advance Ruling
44E	Form No. 34EA – Application by a person falling within category as per Section 245N(b)(iiia) for obtaining Advance Ruling (for determining whether an arrangement proposed to be entered by the applicant is an impermissible avoidance agreement as referred to in Chapter X-A)

4.3 Rules under the AAR (Procedure) Rules, 1996

Rule No.	Description
1	Short title and commencement
2	Definitions
3	Language of the Authority
4	Sittings of the Authority
5	Powers of the Authority
6	Power to remove difficulty
7	Powers and functions of the Secretary
8	Signing of notices, etc.
9	Mode of service of notices
10	Procedure for filing applications
11	Submission of additional facts before the Authority
12	Questions contained in the application
13	Date and place of hearing to be notified
14	Authorisation to be filed
15	Continuation of proceedings after the death, etc., of the applicant
16	Hearing of application
17	Hearing of application ex parte
18	Modification of the order
19	Rectification of mistakes
20	Amendment of the Record
21	Fees for supply of additional certified copies
22	Inspection of records and fees thereof
23	Declaration of advance rulings to be void in certain circumstances
24	Proceedings not open to the public
25	Publication of orders
26	Authentication and communication of orders
27	Proceedings of the Authority
28	Procedure in case of other application
29	Dress regulations

4.4 Important Circulars & Notifications

Circular No. and Date	Details
Circular No. 657 dated 30-8-1993	Setting up of Authority for Advance Rulings in the case of non-residents
Circular No. 728 dated 30-10-1995	Correct rates of tax applicable in case of remittance to a country with which Double Taxation Avoidance Agreement is in force
Circular No. 772 dated 23-12-1998	Extending the scope of Authority for Advance Ruling to resident applicants
Notification No. 11456 (FF No. 142/37/2000-TPL) XIX-B Date of Issue: 3-8-2000	Specifying public sector company as applicant for the purposes of Chapter of the Income-tax Act
Circular No. 794 dated 9-8-2000	Provisions relating to the Authority for Advance Ruling rationalised for resident applicants
Circular No. 7/2003 Dated 5-9-2003	Clarification in the definition of Advance Ruling

Paras S. Savla, Advocate and CA. Dharan V. Gandhi

Authority for Advance Rulings – Concept & Scope of Advance Rulings under Direct Taxes

Disputes between the Income-tax Department and the taxpayers is a never ending phenomenon. Three ways could be perceived to resolve such disputes. Firstly, there could be a consensus between the parties; secondly, there could be an adjudication, which is presently the recognised process. Thirdly, there could be an advance ruling on the question involving substantive issues.

The first one namely, consensus, is the most unlikely solution because the tax department and the taxpayers are not likely to have consensus in most cases. Though, lately, some steps are being taken by the Government to bring about consensus between the two parties by way of Advance Pricing Agreement. Second solution viz., adjudication is a long drawn process until certainty is achieved. In 1991, when the doors of Indian economy were opened by the then Finance Minister to take India out of the economic turbulence and when the investors abroad were welcomed with red carpets, investors were wary about the uncertain tax atmosphere, including the time consuming litigation process, subsisting in India.

The scheme of advance rulings (Chapter XIX-B) was, introduced from 1st June, 1993 in the Income-tax Act, 1961 ('Act') for the benefit of non-residents so as to enable them to obtain a ruling in advance from the Authority for Advance Rulings so that they are not saddled with problems of uncertainty with regard to the taxability of income arising out of the activities or transactions undertaken or proposed to be undertaken in India. This scheme sought to expedite the resolution of disputes between the Incomes-tax authorities and the taxpayers to achieve finality. Some of the objects of the said scheme are:

a. The non-resident investor can be sure of its liability towards income-tax even before the start of investment in India. Hence, it can plan its investment accordingly and it would be able to avoid long-drawn litigation.

b. The AAR is best suited to sort out complex issues of taxation including those concerning interpretation of Double Taxation Avoidance Agreements (DTAA) which arise consequent to difference of opinion between the tax collectors and the taxpayers.

c. The rulings of the AAR are binding on the applicant as well as the Commissioner of Income-tax and authorities below him, not only for one year but for all the years unless the facts or the law change; therefore, having obtained the ruling on a given set of facts the taxpayer may be sure about his tax liability in future.

d. The AAR is to pronounce its ruling within six months of the receipt of the application. This enables the investor to obtain the ruling without undue delay and with certainty regarding its tax implications.

e. The statute does not preclude the AAR, if the circumstances so warrant, from allowing the applicant to modify or reframe the questions, agreements or projects till the time of hearing. Such a facility is generally not available before other courts or tribunals.

f. Under the rules, the proceedings before the AAR are not open to the general public. Confidentiality of the proceedings is maintained by the AAR as contents of the application are not revealed to any unauthorised person. Thus, there is no danger of the business secrets of the applicant being leaked out to its rivals or others.

g. Protracted hearing of the application is avoided. If a complicated issue of law or fact is not involved and the point of view put forward by the applicant is acceptable, a ruling will be pronounced by the AAR without personal hearing. In other cases, the applicant, if he so desires and, if considered necessary, a representative of the Department will be heard and a reasoned ruling will be given by the AAR in writing.

With the above background, let us have a look at the framework of Authority for Advance Rulings [AAR] – Section 245-O

The AAR is located at New Delhi. Recently, *vide* Finance Act (No. 2) of 2014, the Central Government also enacted provision for having more than one bench of AAR at such places as the Central Government may by notification specify.

The AAR consist of (a) one Chairman, who is a retired judge of the Supreme Court; (b) such number of vice-chairmen, who are retired judges of the High Court; (c) Revenue members from Indian Revenue Service who are either a Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General and (d) Law Members from Indian Legal Service, who are Additional Secretary to the Government of India. The Benches of AAR shall be presided over by either the Chairman or the Vice Chairman and shall consist of one Revenue Member and one Law Member.

By virtue of the provisions of section 24SU(1), the Authority has been provided with all the powers of a Civil Court under the Code of Civil Procedure, 1908 as are referred to in section 131 of the Income-tax Act when trying a suit. Further, under section 245U(2), the Authority is deemed to be a Civil Court for the purposes of section 195 of the Code of Criminal Procedure and every proceeding before the Authority is deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code.

One of the objectives of the AAR scheme was to bring a certainty about the tax implications of the transactions undertaken or proposed to be undertaken by a non-resident investor. To achieve the same, section 245S provides for the binding force of the ruling. Section 245S (1) specifies that the ruling would be binding on the applicant who had sought it. Further, the Ruling would be binding only in respect of the transaction in relation to which the ruling had been sought. The ruling would also be binding on the Commissioner and the Income-tax authorities subordinate to them, in respect of the applicant and the said transaction. Therefore, Rulings pronounced by the Authority would not be binding in case of any other assessee or the departmental authorities. However, such rulings would have persuasive value and may be relied upon by the AAR itself or by

the Applicant/department in their cases. Sub-section (2) of section 245S provides that the ruling shall be binding unless there is a change of law or facts on the basis of which the ruling was pronounced. Accordingly, if there was an amendment to the law, the ruling would not be binding. Similarly, if there is a change in facts – say an agreement is modified; the ruling may not be applicable.

Section 245T enables the authority to declare a ruling pronounced by it as void *ab initio* if such ruling is obtained by the Applicant by fraud or misrepresentation of facts. As a consequence, all the provisions of the Income-tax Act shall apply to the applicant as if such ruling had never been made

Advance Rulings system in other countries

The Advance Rulings system is in vogue in many countries, albeit with substantial variations. Advance Rulings is internationally recognised as "A more or less binding statement from the revenue authorities upon the voluntary request of a private person, concerning the treatment and consequences of one or a series of contemplated future actions or transactions". Despite the fact that Advance Rulings facility serves similar purposes in all countries, there are significant differences in the procedure adopted in the various countries. In most countries, tax authorities are generally willing to answer inquiries made by taxpayers even without a formalised ruling procedure whereas in some countries there is a statutory back up procedure for pronouncing such rulings on questions of fact or law emanating from the queries of the taxpayers.

Rulings in certain countries like USA, Sweden can be obtained only if the question is a question of law, whereas in countries like Germany and India, advance rulings can be obtained on factual as well as legal questions.

In most countries, taxpayer or the representative of the taxpayer are entitled to apply for a ruling. Some countries allow only the residents to apply for advance rulings. India, by contrast, has formal ruling procedure applying specifically to non-residents. In Sweden, the tax authorities may also apply for an advance ruling.

In many countries, the advance rulings are issued by the Revenue Department as an administrative measure; the three exceptions are Sweden, Denmark and India. In India, unlike most other countries, advance rulings are given as a quasi-judicial pronouncement by a high level statutory and independent authority.

In so far as the binding effect of the rulings are concerned, in some countries the ruling does not have a binding effect like in Austria and Canada. Further, the countries like USA, France, Netherlands, Germany, Sweden, the taxpayer has the right to renounce the ruling as against India where the ruling is binding both on the taxpayer and the department.

Certainly, the concept of AAR is a win–win situation for the taxpayer as well as the department, and consequently to the economy as a whole. AAR has been able to achieve most of its objectives. However, one believes that there are many areas for improvement. The major area of concern is the increasing pendency of applications before the AAR and as a result of which, time limit for disposal of matters provided in the statute is not adhered to. Unless this is assured, the entire intention of the framework of the AAR fails. The recent vacancy in the appointment of chairman of the AAR has led to delays in the disposal of the applications. Further, it was only *vide* Finance Act (No. 2) of 2014 that provision for increasing the number of benches have been inserted in the statute book. However, no such benches have been notified yet. Government should immediately act upon this and in order to make the AAR function to its full potential, fill in the vacancies of members and constitute more benches.

CA. Sanjay R. Parikh

Settlement Commission – Why and Who can Approach Settlement Commission

1) The Wanchoo Committee in its recommendations to the Government had in connection with Black Money and tax evasion in Chapter 2 recommended that an errant taxpayer should be given an option for compromise with the administration. In paragraph 2.32, the Committee recommended as follows:

"2.32 This, however, does not mean that the door for compromise with an errant taxpayer should forever remain closed. In the administration of fiscal laws, whose primary objective is to raise revenue, there has to be room for compromise and settlement. A rigid attitude would not only inhibit a one-time tax-evader or an unintending defaulter from making a clean breast of his affairs, but would also unnecessarily strain the investigational resources of the Department in cases of doubtful benefit to revenue, while needlessly proliferating litigation and holding up collection. We would, therefore, suggest that there should be a provision in the law for a settlement with the taxpayer at any stage of the proceedings. In the United Kingdom, the `confession' method has been in vogue since 1923. In the US law also, there is a provision for compromise with the taxpayer as to his tax liabilities. A provision of this type facilitating settlement in individual cases will have this advantage over general disclosure schemes that misuse thereof will be difficult and the disclosure will not normally breed further tax evasion. Each individual case can be considered on its merits and full disclosure not only of the income but of the modus operandi of its built-up can be insisted on, thus sealing off chances of continued evasion through similar practices."

2) The recommendations of the Wanchoo Committee were implemented by the Government and the Taxation Laws (Amendment) Bill, 1973 proposed to insert Chapter XIX-A in the Income-tax Act. After considering the suggestions of the Select Committee, the Chapter was inserted by the Taxation Laws (Amendment) Act, 1975. The Chapter was effective from 1st April, 1976. Various changes have been carried out from time to time with respect to the Chapter on Settlement of Cases. The Chapter consists of section 245A to section 245L. Some of the salient features with respect to the provisions of Settlement Commission are discussed in this article. The thrust of the article is to make the readers aware of the basic provisions of Settlement Commission.

3) Section 245A defines certain terms for the purposes of Chapter XIX-A. Here,

the important definition is that of "case". As per section 245C(1), an assessee may at any stage of a "case" relating to him, make an application before the Settlement Commission. Accordingly, in order to understand which assessee can make an application, one needs to understand the definition of "case". Clause (b) of section 245A defines a "case" to mean any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application is made. Explanation to the said clause provides for certain clarifications. As per clause (i) of the Explanation, in a case where a notice u/s. 148 has been issued, the proceedings shall be deemed to be commenced from the date on which a notice u/s. 148 is issued. Accordingly, if a notice u/s. 148 is issued, the case would be considered to be pending till an assessment or reassessment is made in pursuance to such notice. Clause (iii) provides that where an assessment is set aside or cancelled for passing a fresh order by the Tribunal u/s. 253 or the Commissioner of Income Tax u/s. 263 or 264, assessment shall be deemed to have been commenced from the date on which such order, setting aside or cancelling an assessment is passed. Accordingly, an application can be made from the date of such order u/s. 253 or 263 or 264 till the fresh assessment is made by the Assessing Officer. Clause (iiia) provides that where a notice u/s. 153A or 153C has been issued, the case would be deemed to have commenced on the date of issue of notice and concluded on the date on which the search assessment is passed. Accordingly, on a notice u/s. 153A or 153C being issued, any person can approach the Settlement Commission as his case would be pending. Clause (iv) provides for a situation in any other situation not covered earlier i.e. normal situation. In such a case, assessment or reassessment shall be deemed to have commenced from the 1st day of the assessment year and concluded on the date on which the assessment is made. Accordingly, unless the assessment is pending before the Assessing Officer either under normal circumstances or in pursuance of a notice u/s. 148 or a notice u/s. 153A or 153C, an assessee cannot approach the Settlement Commission. Settlement Application can be filed with respect to all the years in respect of which an assessment is pending. Accordingly, in a case where a search has taken place, Settlement Application can be filed for all the years for which notice u/s. 153A has been received.

4) The Finance Bill, 2015 proposes to amend the Explanation to clause (b). One of the major changes proposed by the Finance Bill is that even in cases where no notice u/s. 148 is issued, as long as a notice u/s. 148 can be issued, the same would constitute a case provided a return has been furnished u/s. 139 or in response to a notice u/s. 142. Accordingly, if a return u/s. 139 has been furnished, the same would constitute a case if a notice u/s. 148 can be issued, which in most of the cases would be six assessment years from the end of the relevant assessment year (except in cases where the income is in relation to any asset located outside India has escaped assessment, in which case it would be sixteen assessment years from the end of the relevant assessment year). Accordingly, as per the proposed amendment, a case would be considered to be pending for Assessment Years 2009 – 10 onwards, if a return for the said year has been filed u/s. 139 or u/s. 142(1) even though no notice u/s. 148 has been issued. Further, with respect to clause (iv) which deals with other situations other than reopening of assessment, set

aside assessment and search assessments, earlier the case would be considered to be pending from the 1st day of the assessment year till the date on which the assessment is made. The Finance Bill proposes to make a change to this clause. As per the proposed amendment, in such a case, the case would be considered to be pending from the date on which notice u/s. 139 or 142 is filed and will be concluded on the date on which the assessment is made or on the expiry of two years from the end of the relevant assessment year, in case where no assessment is made.

5) Apart from a case being pending, section 145C provides for certain other conditions and also prescribes the form and manner in which an application can be made before the Settlement Commission. Section 245C(1) provides that an assessee may at any stage of a case relating to him, make an application in the form and in the manner prescribed and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed. Accordingly, as per the section, an assessee may at any stage of a case, make an application in the form prescribed i.e. Form 34B. Further, the said application has to contain a full and true disclosure of his income which has not been disclosed before the Assessing Officer and the manner in which such income has been derived. Accordingly, the disclosure of income has to be of such income which has not been disclosed to the Assessing Officer or which has not been unearthed by the Assessing Officer. Further, the manner in which such income has been earned has also to be specified in the Settlement Application. Apart from the disclosure and manner of deriving income, the additional amount of income tax payable on such income is also to be specified. This is necessary as the proviso to section 245C(1) provides for certain monetary limits below which a Settlement Application cannot be filed.

6) As per clause (i) to the proviso to section 245C(1), in a case where proceedings for assessment or reassessment are initiated in pursuance of a search, no application would be maintainable unless the additional amount of income-tax on the income disclosed in the application does not exceed ` 50 lakhs. Accordingly, if the additional income offered in a search case would result in additional tax payable of only say ` 10 lakhs, the application would not be maintainable. It is only when the tax payable on the additional income exceeds ` 50 lakhs, an application would be maintainable. Accordingly, in search cases, the additional income required to be disclosed should result in an additional tax payable of at least ` 50 lakhs for a person to be entitled to make an application before the Settlement Commission. However, where a search has taken place in the case of a family, the above condition of additional tax payable exceeding ` 50 lakhs is applicable only with respect to any members. The other members too can approach the Settlement Commission. However, such members should be a person specified and further such other person should disclose additional income which would result in an additional tax of at least ` 10 lakhs. This is illustrated by way of an example. Say a search has taken place on ABC building, which is occupied by a joint family consisting of Mr. A, Mr. B, Mr. C, Mr. D, Mrs. A, Mrs. B, Mrs. C and Mrs. D. Further, Mr. A, Mr. B, Mr. C and Mr. D are brothers. In this case, any member can make a disclosure which would result in additional tax

liability of ` 50 lakhs. All other members need not disclose additional income to the extent that the tax liabilities in each case exceeds ` 50 lakhs. They can disclose income to the extent that their additional tax liability would exceed ` 10 lakhs. Now suppose the tax rate is 30%. In the above example, at least one member would have to make a disclosure of additional income of ` 1,66,66,667/-. This person would be considered to be the specified person. The other members, who are considered in relation, can disclose additional income of ` 33,33,333/-.

7) Explanation to section 245C(1) specifies the relations to the specified person who can avail of the benefit in search cases and apply to the Settlement Commission by declaring additional income which would result in additional tax of ` 10 lakhs or more. In the case of an individual, any relative of the specified person are covered. In a case where the specified person is a company, firm, association of persons or Hindu Undivided Family, any director of the company, partner of the firm or member of the association or family or any relative of the director, partner or member are covered. Any individual who has a substantial interest in the business or profession of the specified person, or any relative of such individual can also make a declaration. A company, firm, association of persons or Hindu Undivided Family having a substantial interest in the business or profession of the specified person or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member are also covered.

8) In a case where no search has taken place, a person can file an application before the Settlement Commission. However, the additional income offered in such a case has to result in additional tax liability of at least ` 10 lakhs.

9) Sub-sections (1A) to (1D) specify how the additional amount of income-tax payable in respect of the income disclosed in the application has to be determined. In case where no return has been filed, the additional tax payable would be determined on the total income declared in the application. Where a return has been filed, the tax payable would be determined on the total income declared before the Settlement Commission and such tax would be reduced by the tax paid on the returned income. Where an application is made for more than one year, additional tax would have to be determined for each of the years as above and aggregated. The limit of additional tax payable of ` 50 lakhs or ` 10 lakhs is applicable *qua* application. Accordingly, if an application is for disclosure of income for more than 1 year, one would have to aggregate amount of tax payable to determine whether the total tax payable exceeds ` 50 lakhs or ` 10 lakhs respectively.

10) A person who is approaching the Settlement Commission has to pay the additional tax and the interest thereon on or before filing the application and the proof of such payment is required to be filed along with the application.

11) As per section 245C(2), an application shall be accompanied by a fee of ` 500/-.

12) As per section 245C(3), an application once made will not be allowed to be withdrawn.

13) As per section 245C(4), the assessee, who makes an application to the Settlement Commission is also required to intimate his Assessing Officer on the same date in Form No. 34BA of having made such application.

14) Section 245E permitted the Settlement Commission to reopen any proceeding if in its opinion (such opinion to be recorded

in writing) it was necessary for proper disposal of the case pending before it, to reopen any proceeding connected with the case but which has been completed. However, before such proceedings were reopened, the Settlement Commission was required to take concurrence of the applicant. On reopening such other proceedings, the Settlement Commission would pass such order thereon as it thinks fit. However, as per proviso to section 245E, the power of the Settlement Commission to reopen any proceeding was restricted. If the period between the end of the assessment year to which such proceeding relates and the date of application for settlement exceeded nine years, the Settlement Commission did not have power to reopen such proceedings. The second proviso to section 245E has withdrawn the power of the Settlement Commission to reopen any proceedings if the application is made on or after 1st June, 2007.

15) As per section 245H, the Settlement Commission has power to grant immunity from prosecution and penalty. However, this power to grant immunity is subject to the following conditions:

a) The Settlement Commission is satisfied that the person who has made the application for settlement has co-operated with the Settlement Commission in the proceedings before it;

b) Has made a full and true disclosure of his income; and

c) Has disclosed the manner in which such income has been derived.

On these conditions being satisfied, the Settlement Commission can grant immunity from prosecution under the Income-tax Act and Wealth-tax Act. The Settlement Commission can also waive the whole or part of penalty under the Income-tax Act. If the application was made prior to 1st June, 2007, the Settlement Commission also had to power to grant immunity from prosecution for any offence under the Indian Penal Code or any other Central Act. However, if proceedings for prosecution for any offence have been instituted before the date of receipt of application u/s. 245C, the Settlement Commission had no power to grant immunity from prosecution. While granting immunity from penalty and prosecution, the Settlement Commission could impose such conditions as it may think fit to impose. The Finance Bill, 2015 seeks to provide that the immunity cannot be granted by the Settlement Commission unless the reasons for granting immunity are recorded in writing by the Settlement Commission.

16) The setting up of Settlement Commission is in the interest of the assessee as it enables an assessee to settle his case or group of cases without protracted litigation and by way of give and take. However, with the increase in limit of additional tax payable on the additional income offered, the Settlement Commission has become unaffordable to small and medium assessees. The very purpose for which Settlement Commission has been formed would in such cases be lost. One can understand the increase in limits in cases of search and seizure or in connected cases. However, the additional tax of ` 10 lakhs would be a big deterrent for small and medium assessees to approach the Settlement Commission. One hopes that the Settlement Commission would be available to small and medium assessee to compromise and settle their disputes.

Ajay R. Singh, Advocate

What can Settlement Commission Do?

Introduction

Income-tax Settlement Commission is a premier Alternative Dispute Resolution (ADR) body in India. Its mandate is to resolve tax disputes in respect of Indian Income-tax & Wealth Tax Laws between the two disputing parties, Income Tax Department on one side and litigating taxpayer on the other.

This institution was set up in 1976 (w.e.f. 1st April, 1976 *vide* the Taxation Law amendment Act, 1976) by the Central Government on the recommendations of the Direct Taxes Enquiry Committee (1971) set up under the Chairmanship of Justice K. N. Wanchoo, the retired Chief Justice of the Supreme Court of India. The said committee was popularly known as Wanchoo Committee. The committee had conceived of the Settlement Commission as a mechanism to allow a one-time tax evader or an unintending defaulter to make clean breast of his affairs. Some of the recommendations contained in chapter 2 (titled "Black Money and tax evasion" of the report) are worth reading. At present, there are four benches of the Commission located at New Delhi, Mumbai, Kolkata and Chennai.

The Income Tax Settlement Commission is an independent quasi-judicial authority. It is an attached office of the Department of Revenue, only for its administrative matters.

The settlement mechanism allows taxpayers to disclose additional income before it over and above what has been already disclosed before the Income-tax Department. The applicant has to pay full amount of tax and interest on the additional income disclosed before the Commission, before filing the application. The Commission then decides upon the admissibility of the application and in case of admitted applications, carries out the process of settlement in a time bound manner by giving opportunity to both parties.

A Constitution Bench of the Supreme Court [in *CIT vs. Anjum M. H. Ghaswala – (2001) 252 ITR 1] inter alia,* held that:

"Chapter XIX-A was included for the purpose of quick settlement of the cases before it so that the tax due to the Revenue is collected at the earliest. The object of chapter XIX-A is not to give amnesty to a tax-evader from paying the tax due". And that "the object of the legislature in introducing this section [section 245C] is to see that the protracted proceedings before the authorities or in courts ae avoided by resorting to settlement of cases. In this process, an assessee cannot expect any reduction in amounts statutorily payable under the Act."

Similarly, in *CIT vs. Om Prakash Mittal (2005) 273 ITR 326 (SC)* the Hon'ble Supreme Court

observed that the object to the constitution of Settlement Commission is speedy disposal and not reduction in statutory liability.

Scope and Nature of Power

At present the benefit of the settlement mechanism can be availed by a taxpayer only once in life-time, who has made the first application on or after 1st June, 2007.

As per Finance Act, 2010 doors of Settlement Commission in search cases have been re-opened. Normally approaching the Settlement Commission is advised when the facts are very complicated and more than two views are possible on the factual matrix of the case. In appropriate cases it may be desirable to approach the Settlement Commission. The issues regarding determination of undisclosed income after search may be quite complicated. The determination by A.O. of the undisclosed income gives rise to long drawn litigation. In many such cases, it will be advisable to take up the matter with the Settlement Commission. If any assessee desires to approach the Settlement Commission it may be desirable to approach before passing of order by the Assessing Officer. Settlement Commission has power to waive penalty and grant immunity from prosecution not only under Income-tax Act but also other Central Acts. But settlement is no bar to the state proceedings. One of the best recourse for the person searched could be Settlement Commission forum since the forum has power to grant immunity from penalty, if not interest, and also to grant immunity from prosecution.

An applicant can approach the Income Tax Settlement Commission in respect of a particular assessment year only if no assessment order is passed by the concerned income tax authority and the statutory time-limit for passing of assessment order for that year has not lapsed. The proceedings are considered to be pending from the first day of the assessment year and it is not needed that a return of income is filed or a notice for scrutiny is issued before filing of application. *[Shriniwas Machine Craft Pvt. Ltd. vs. ITO (2014) 361 ITR 313 (Bom.)(HC)].*

The order of settlement passed by the Settlement Commission provides for the terms of settlement including any demand by way of tax, penalty or interest and also provides for the manner in which such demand is to be paid. Such an order shall also address other matters to make the settlement effective. The final settlement order of the Settlement Commission is applicable for the case of the particular applicant only and its ratio is not applicable for other cases and for proceedings before other authorities.

Settlement of disputes relating to Income-tax and Wealth-tax is based on the objective of dispute resolution alternate. It is in the nature of mediation or arbitration. The Settlement orders passed by the Income Tax Settlement Commission are final and conclusive in nature.

Sec. 245D: Procedure on receipt of an application u/s. 245C

Section 245D of the said Act sets out the procedure which is to be adopted by the Settlement Commission on receipt of an application under Section 245C. The time limit for each step to be taken by the Settlement Commission is now prescribed by the Finance Act, 2007.

An application can be rejected by the Commission during the course of proceedings under section 245D(1) within 14 days of filing of the Settlement application. If the application is not rejected by the Commission within 14 days, it is deemed to have been admitted by it. Thus as per proviso to sec. 245D(1) an application filed is considered admitted and allowed to be proceeded with if it is not rejected by the Commission within 14 days under section 245D(1) of the Act.

The Commission can reject the application (as stated anove), if the applicant does

not satisfy the essential condition mentioned in Sec. 245C. Further, an application not accompanied by the proof of payment of full amount of additional tax and interest and the prescribed fee of ` 500/- is also liable to be rejected. A copy of the application is to be sent to the concerned income tax Authority on the date of application, failing which it may be rejected.

An applicant whose application has been rejected under section 245D(1) can still file another application for settlement *[CIT vs. Bahskar Picture Palace (2001) 247 ITR 391 (SC)].*

As per Section 245K(2) of the said Act which stipulates that where a person has made an application under Section 245C on or after the first day of June, 2007, and if such application has been allowed to be proceeded with under Section 245D(1), such person shall not subsequently be entitled to make an application under Section 245C. The bar from making another application under Section 245C would only apply if the earlier application had been allowed to be proceeded with under Section 245D(1). But, if the applications had been rejected at the threshold for want of payment of the full amount of the additional tax and interest due etc., then the bar of Sec. 245K would not be applicable.

An applicant cannot withdraw the application after filing before the Settlement Commission.

Once an application is filed before the Settlement Commission, the jurisdiction for the purpose of Income-tax Act and the Wealth-tax Act, gets shifted to the Income-tax Settlement Commission for the assessment proceedings for which the application has been filed before settlement. However, sometimes Income-tax Settlement Commission authorises the Commissioner of Income-tax to carry out specific investigation to assist the Income-tax Settlement Commission in the matter. However one must verify whether the Commissioner has been authorised by the Income-tax Settlement Commission or not. However, nothing prevents the Settlement Commission from looking into material collected even subsequent to the filing of the report by the Commissioner, if he thinks such a course is called for in the interest of justice. The power of Settlement Commission to entrust case to the Commissioner is discretionary *(Sushil Kumar Modi vs. State of Bihar (1998) 233 ITR 671 (Pat.).*

But this power is confined to the case before the Commission, which means the case relating to the assessment year for which the application for Settlement is filed and admitted for Settlement. *[CIT vs. Paharpur Cooling Towers (P) Ltd. (1996) 219 ITR 618 (SC)].*

After this, the Commission calls for the report from the Principal Commissioner or Commissioner of Income-tax under section 245D(2B) to be furnished within a period of 30 days. The Commission may treat an application as invalid by passing an order under Section 245D(2C) on the basis of the report. If the report of the Commissioner is not received within the period of 30 days from the day the letter from the Commission is received by him, the Commission shall proceed further in the matter without the report. The order of the Commission is to be passed within 15 days of the expiry of the period of 30 days given to the Principal Commissioner or Commissioner for submitting the report. The Hon'ble Bombay High Court had upheld the rejection of an application wherein the petition was made after search and there were foreign exchange dealing leading to the inference of tax evasion. *(Hassan Ali Khan vs. Settlement Commission (2008) 299 ITR 127 (Bom.)(HC).*

The Commission is required to give an opportunity before rejecting the application under Section 245D(1) or before treating the application as invalid under Section 245D(2C) of the Act.

In such eventuality, the Settlement Commission is enjoined to send a copy of such order to the applicant and the Commissioner. Thus the first proviso to Section 245D(2C) ensures that an application shall not be declared invalid by the Settlement Commission unless an opportunity has been given to the applicant of being heard. Further, the second proviso thereto stipulates that where the Commissioner has not furnished the report within the specified period, the Settlement Commission is enjoined to proceed further in the matter without the report of the Commissioner.

Once the application is rejected that is end of the matter. The Hon'ble Bombay High Court in the case of *Puranchandra J. Rao vs. ITSC (2009) 318 ITR 209 (Bom.)* had observed that non-admission of an application will ordinarily not be entrained in a writ-petition before the Court. Thus, one has to be very careful while filing the settlement application.

The next stage is under Section 245D(3) wherein, the Settlement Commission, *inter alia,* in respect of an application which has not been declared invalid under Section 245D(2C) of the said Act may call for the records from the Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and to furnish a report on the matters covered by the application and any other matter relating to the case. Thus the further enquiry or investigation may cover not only matters mentioned in the application but also matter contained in any report of the Commissioner (Preliminary report u/s. 245D(1)]. The Principal Commissioner/Commissioner is required to furnish the report within a period of 90 days of receipt of the communication from the Settlement Commission. It is further provided that where the Commissioner does not furnish a report within the said period of 90 days, the Settlement Commission may proceed to pass an order under sub-section (4) without such report. Once a Settlement application has been held as valid, the Commission shares the confidential part of the application with the Commissioner of Income tax and calls for his reports. A copy of this report is shared with the applicant to allow him to give rejoinder. The Commission takes into account both and provides opportunity to both sides, i.e. the Income Tax Department and the applicant by fixing hearings on different dates. The Commission is required to pass the final settlement order under section 245 D(4) within 18 months on the application. If the Settlement Commission is not able to pass settlement application within 18 months, the case gets abated to the concerned Income tax authority.

Thus under Section 245D(4) of the said Act, the Settlement Commission, after examination of the records and the report of the Commissioner, if any, received under, *inter alia,* sub-section (2B) or sub-section (3) and after giving an opportunity to the applicant as also to the Commissioner to be heard, may pass such order as it thinks fit, in accordance with the provisions of the said Act, on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner. The proceedings before the Commissioner shall be *in camera*.

Section 245D(6) is also of some importance. It provides that every order passed under sub-section (4) of Section 245D is to provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement is to be paid and all other matters to make the settlement effective. It is specifically provided that the terms of settlement are to indicate that the settlement would be void if it was subsequently found

by the Settlement Commission that it had been obtained by fraud or misrepresentation of facts. As a corollary to sub-section (6), sub-section (7) of Section 245D provides that where a settlement becomes void under sub-section (6), the proceedings in respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the income tax authority concerned, may, notwithstanding anything contained in any other provision of the said Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

Thus, from the above discussion, it is apparent that the settlement application passes through several stages before the final order providing for the terms of settlement is passed by the Settlement Commission. The first stage is under Section 245D(1). This is followed by the next step under Section 245D(2C) and finally by the order passed under Section 245D(4). The orders under Section 245D(1) and 245D(2C) are not final orders and they are subject to the final orders that may be passed under Section 245D(4). It is, therefore, clear that the issue of full and true disclosure on the part of the applicants and the manner in which the undisclosed income was derived is still open for discussion and debate and the Settlement Commission would have to give its final decision on these aspects before an order of settlement is passed under Section 245D(4) of the said Act. Therefore, on reading of the provisions, it is clear that the entire issue remains open and at any stage of the proceedings till the order under Section 245D(4) is passed by the Settlement Commission, the issue with regard to full and true disclosure and the manner in which the undisclosed income had been derived would be open and can be raised by the Revenue.

A reference can be made to an order passed by the Supreme Court in the case of *CIT vs. K. Jayaprakash Narayanan (2009) 184 Taxman 85 (SC).* The order was passed on a Special Leave Petition and the same reads as under:-

> *"1. Delay condoned. This Special Leave Petition is filed against the decision of the Settlement Commission admitting the application of the Assessee under Section 245D of the Income-tax Act, 1961. It is the case of the Department that the Assessee had failed to make full and true disclosure in the first instance and that the said declaration made at a later date by way of second declaration cannot be the ground for admitting the application under Section 245D. Since this Special Leave Petition is filed only against the order of the Settlement Commission admitting the application of the Assessee under Section 245D, we do not wish to interfere at this stage. However, we make it clear that on the point of maintainability of the Application, it would be open to the Department to raise the contention before the Settlement Commission who would be entitled to examine that question at the final hearing of the matter.*
>
> *2. The Special Leave Petition is disposed of accordingly."*

It is apparent that the Supreme Court was considering a matter wherein the decision of the Settlement Commission admitting an application of an assessee under Section 245D of the said Act was in question. One of the specific pleas taken by the Department was that the assessee had failed to make a full and true disclosure in the first instance and that a declaration made at a later date could not be ground for admitting an application under Section 245D. The Supreme Court refrained from interfering with the order passed by the Settlement Commission in as much as it was only an order admitting the application of the assessee under Section 245D. The Supreme Court made it clear that even on the point of

maintainability of the application, it would be open to the Department to raise the contention before the Settlement Commission which would be entitled to examine that question at the final hearing of the matter. From this, it is clear that the point of maintainability of an application under Section 245C(1) does not get foreclosed by virtue of the Settlement Commission passing an order under Section 245D(1) or Section 245D(2C) of the said Act and that such an issue could be examined by the Settlement Commission at the final hearing of the matter, that is, at the stage of passing an order under Section 245D(4) of the said Act.

Similarly in *Ajmera Housing (2010) 326 ITR 642 (SC),* an order had been passed by the Income-tax Settlement Commission under Section 245D(1) on 17-11-1994, allowing the settlement application filed on behalf of the assessee to be proceeded with. That order was not challenged by the Revenue. The Settlement Commission proceeded with the said settlement application and passed a final order under Section 245D(4) of the said Act on 29-1-1999. That settlement order was challenged by the Revenue before the Bombay High Court which set aside the same on, *inter alia,* the ground that no finding had been returned by the Settlement Commission as to whether there was a full and true disclosure of income on the part of the assessee/applicant. The Bombay High Court also held that the order dated 17-11-1994 passed under Section 245D(1) of the said Act was void and remitted the case to the Settlement Commission for a decision afresh and kept all the questions open. The applicant/assessee, being aggrieved by the said decision of the Bombay High Court, went up in appeal before the Supreme Court which, by an order dated 11-7-2006, set aside the Bombay High Court order and remitted the matter to the High Court for a fresh decision. In the second round, the Bombay High Court again set aside the Income Tax Settlement Commission's order dated 29-1-1999 and remanded the case to the Settlement Commission for fresh adjudication. While doing so, the Bombay High Court observed as under:-

> *"In view of the facts and the legal position noted above, even though we find that the respondents had not made full and true disclosure of their income while making applications under Section 245C, it would not be proper to set aside the proceeding. However, at the same time, the Commission appears to have misdirected itself on several important aspects while passing the final order. The Settlement Commission had not supplied the annexure dated 19-9-1994 declaring additional income of ` 11.41crore and thus, due opportunity was not given to the Revenue to place (sic) its stand properly. Huge amount of unexplained expenses, unexplained loans and unexplained surplus, total of which is more than ` 14 crore, was not taken into consideration while passing the final order. Thirdly, the Settlement Commission has imposed token penalty of ` 50 lakhs while in its own assessment leviable penalty would be ` 562.87 (sic ` 562.87 lakhs). In fact if the amounts, which were not taken into consideration while assessing the total undisclosed income, are also taken into consideration, the amount of leviable penalty may be much more. Taking into consideration the multiple disclosures and the fact that the respondents had failed to make true and full disclosure initially as well as at the time of second disclosure, we do not find any justifiable reasons to reduce or waive the amount of penalty so drastically.*
>
> *Taking into consideration all these circumstances, in our considered opinion, it will be in the interest of justice to set aside the final order passed by the Settlement Commission and to remand the matter back to the Settlement Commission for hearing parties afresh and to pass orders as per law. Facts and circumstances noted in respect*

of writ petition No. 2191 of 1999 are also relevant for the remaining writ petitions and, therefore, it will be necessary that the final orders passed in all these proceedings should be set aside."

(underlining added)

The matter was again carried to the Supreme Court by the applicant/assessee. It is at that stage that the decision in Ajmera Housing (supra) was rendered by the Supreme Court. It may be pointed out that the Supreme Court recorded its disapproval with the view of the Bombay High Court that it would not be proper to set aside the proceedings before the Settlement Commission even though it was convinced that the assessee had not made full and true disclosure of their income while making an application under Section 245C of the said Act.

In Ajmera Housing (supra), the Supreme Court considered the provisions of the said Act with regard to settlement. In the context of Section 245C of the said Act, the Supreme Court observed as under:-

"27. It is clear that disclosure of "full and true" particulars of undisclosed income and "the manner" in which such income had been derived are the prerequisites for a valid application under Section 245-C(1) of the Act. Additionally, the amount of income tax payable on such undisclosed income is to be computed and mentioned in the application. It needs little emphasis that Section 245-C(1) of the Act mandates "full and true" disclosure of the particulars of undisclosed income and "the manner" in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the matter covered by the application."

Thus, it is clear that it is mandatory for the Settlement Commission to record its findings with regard to the issues of "full and true disclosure" of particulars of undisclosed income and "the manner" in which such income was derived by the assessee. It is also clear that unless the Settlement Commission records its satisfaction on these aspects, it would not have the jurisdiction to pass any order under Section 245D(4) of the said Act setting out the terms of settlement.

The Supreme Court further observed as under:-

"34. In our opinion, even when the Settlement Commission decides to proceed with the application, it will not be denuded of its power to examine as to whether in his application under Section 245-C(1) of the Act, the assessee has made a full and true disclosure of his undisclosed income. We feel that the report(s) of the Commissioner and other documents coming on record at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application would be most germane to the determination of the said question."

These observations are extremely significant. The Supreme Court has made it clear that even when the Settlement Commission decides to proceed with the application when it passes an order under Section 245D(1) or Section 245D(2C), it would not be denuded of its power to examine as to whether the assessee has made a full and true disclosure of his undisclosed income in the application for settlement. The Supreme Court specifically noted that the report of the Commission and other documents would be coming on record of the Settlement Commission at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application, and, all these would be germane to the determination of the said question.

In the context of the factual matrix of the case before it, the Supreme Court observed that a disclosure made in a settlement application cannot be permitted to be revised in as much

as no such revision is contemplated under the scheme of the Act.

It is obvious that revision of a disclosure made in a settlement application would clearly imply that the initial disclosure was neither true nor full. In the case before the Supreme Court, the disclosure had been revised and it is for that reason that the Supreme Court expressed its opinion that the same was neither true nor full. However, the Supreme Court did not pursue that avenue any further in as much as the Commissioner had chosen not to challenge that part of the impugned order.

After having examined the decision of the Supreme Court in Ajmera Housing (supra) in detail even when the Settlement Commission decides to proceed with the settlement application, it is not denuded of its power to examine as to whether the said application is in accord with the conditions stipulated in Section 245C(1) of the said Act including the conditions of the applicant making a full and true disclosure of his undisclosed income as also the manner in which the said undisclosed income was derived by him.

Section 245D(6B) newly inserted (w.e.f. 1-6-2011) by the Finance Act, 2011 (8 of 2011), ordains that the Settlement Commission may, at any time within a period of 6 months from the date of the order, with a view to rectifying any mistake apparent from the record – Amend any order passed by it under section 245DE(4).

However, the proviso to section 245D(6B) provides that an amendment which has the effect of modifying the liability of the applicant shall not be made under this section 245D(6B) unless the Settlement Commission has given notice to the applicant and the Principal Commissioner or Commissioner of its intention to do so and has allowed the applicant and the Principal Commissioner or Commissioner an opportunity of being heard.

In the case of *Brij Lal & Ors. vs. CIT (2010) 328 ITR 477 (SC)* the Court held that interest under Ss. 234A to 234C is payable only up to the date of the S. 245D (1) order and not up to the date of the S. 245D (4) order.

The Legislature has not contemplated levy of interest between the S. 245D(1) stage and the S. 245D(4) stage. Interest u/s 234B is chargeable only till the order of the Settlement Commission u/s 245D(1), i.e., admission of the case.

In view of S. 245I which provides that the order of the Settlement Commission shall be final and conclusive and also in view of the controversy as to liability for interest, the Settlement Commission cannot re-open concluded proceedings by having recourse to S. 154 to levy interest u/s. 234B if it was not done in the original proceedings.

Section 245DD : Power of Settlement Commission to order provisional attachment and protect Revenue

Proviso to section 245DD(2) has been amendment (w.e.f. 1-6-2008).

The first and second proviso to sec. 245DD provide that where a provisional attachment u/s. 281B is pending immediately before the application for settlement, the provisional attachment so made can be continued, by an order under section 245DD(1), up to the date up to which the provisional attachment would be in force u/s. 281B and thereafter any order made by the Settlement Commission will have the same force as an original order made by it under sec. 245DD(1) and the provisions of sec. 245DD(2) shall apply accordingly.

Under section 245DD(2), every provisional attachment order made u/s. 245DD(1) by the Settlement Commission shall cease to have effect after the expiry of a period of six months from the date of such order.

However, the Settlement Commission is empowered, for reasons to be recorded in writing, to extend the aforesaid period up to a maximum period of two years. The proviso to sec. 245DD(2) enacts that the Settlement Commission may for reasons to be recorded to writing, extend the aforesaid period by such further period or period as it thinks fit.

Sec. 245F : Powers and Procedure of Settlement Commission

Now we will deal with the provisions of Section 245F of the said Act. The said section deals with the powers and procedures of the Settlement Commission. Sub-section (1) stipulates that in addition to the powers conferred on the Settlement Commission under the said Act, it would also have all the powers which are vested in an income tax authority under the said Act. The benefit of a circular beneficial to an assessee can be conferred also on the assessee who approaches the Settlement Commission U/s. 245C on such terms and conditions as are specified in the circular. It is for this purpose that Sec. 245F has empowered the Settlement Commission to exercise the powers of an Income Tax Authority. Sub-section (2) of Section 245F further stipulates that where an application under Section 245C has been allowed to be proceeded with under Section 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of Section 245D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the said Act in relation to the case. We must also notice the proviso to Section 245F(2) which makes it clear that where an application has been made under Section 245C on or after the first day of June, 2007, the Settlement Commission shall have exclusive jurisdiction from the date on which the application was made.

The second proviso to Section 245F(2) of the said Act which, *inter alia*, makes it clear that where an application which has been made on or after the first day of June, 2007 is rejected under Section 245D(1) or is declared invalid under Section 245D(2C), the Settlement Commission, in spite of such an application, would have exclusive jurisdiction up to the date on which the application is rejected or declared invalid as the case may be. Thus the Settlement Commission would have exclusive jurisdiction in relation to the cases on and from the date on which the applications under Section 245C were made and not from the dates of the orders passed under Section 245D(1) and 245D(2C) of the said Act. Obviously, as the applications have not been rejected or declared invalid, the exclusive jurisdiction of the Settlement Commission continues till the Settlement Commission passes the final order under Section 245D(4) of the said Act.

Sec. 245E : Power of Settlement Commission to reopen completed proceedings

This section empowers the Commission to reopen any assessment completed before the application u/s. 245C was made to give effect to its decision subject to the following conditions:

a) An assessment completed under the 1922 Act cannot be now reopened.

b) The concurrence of the applicant assessee to such reopening is necessary.

c) No proceeding shall be reopened if the period between the end of the assessment year to which it relates and the date of application for settlement under sec. 245C exceeds nine years. Prior to 1st June, 1987, no proceeding could be reopened after the expiry of a period of eight years from the end of the assessment year to which it relates.

d) The commission should record, in writing, its reasons for considering that such reopening is necessary.

Section 245E empowers the Commission to reopen any completed proceedings connected with the case before it. However, this power is circumscribed by the requirement that such reopening of completed proceedings should be necessary or expedient for the proper disposal of the case pending before it. There are two other limitations on this power, viz. that the reopening of the completed proceedings can be done only with the concurrence of the assessee and secondly, that this power cannot extend to a period beyond eight years from the end of the assessment year to which such proceeding relates. These two features make it abundantly clear that the section contemplates reopening of the completed proceedings not for the benefit of the assessee but in the interests of the Revenue. It contemplates a situation where the case before the Commission cannot be satisfactorily settled unless some previously concluded proceedings are reopened which would normally be to he prejudice of the assessee. It is precisely for this reason that the section provides that it can be done only with the concurrence of the assessee and that too for a period within eight years. This section cannot be read as empowering the Commission to do indirectly what cannot be done directly. The power conferred by Section 245E is thus a circumscribed and a conditional power. It can be exercised only in accordance with and subject to the conditions aforementioned and in no other manner. Power of Settlement Commission to deal with connected cases by assuming jurisdiction for reopening them is withdrawn from 1st June 2007.

Section 245G – Inspection etc. of Reports

Section 245G – provides for right to documents in the possession of the Settlement Commission on application and payment of requisite fee. There is, however, discretion to withhold any document in its discretion. It follows that such discretion may not be exercised in a manner that will affect the rights of the applicant for settlement. Rule 44D contains the provision regarding fee payable for inspection.

Section 245HA : Abatement of proceeding before Settlement Commission

All pending applications are required to be disposed by 31st March 2008, those filed on or after 1-6-2007 will be completed within 9 months from the end of the month in which application is made.

There have been number of writ petitions filed by those, whose petition could not be disposed within the statutory time limit of 31st July, 2007 by the Finance Act, 2007, so as to revert to the authorities before whom the matter was pending.

The Supreme Court itself has granted stay against such abatement in *Prabhu Dayal vs. Union of India in Civil No. 113 of 2008* granting interim stay against abatement. [Also see *UOI vs. Rajendra Construction Co. (2010) 217 Taxation 273 / 187 Taxman 135 / 31 DTR 186 / 227 CTR 241 (SC)].*

The Bombay High Court in *Star Television News Ltd. vs. UOI [2009] 317 ITR 66*, held that to save these sections from vice of discrimination an applicant could not be punished for inability or failure of Settlement Commission to dispose of its application within specified period; where such delay in disposal was not attributable to applicant u/s. 245D(4A) and consequently, where applicants had prevented Settlement Commission from fulfilling its statutory mandatory duty u/s. 245D(4A), such applications would abate as per s. 245HA. Constitutional validity of s. 245D(4A) and

s. 245HA was thus protected from vice of discrimination. The department SLP against the above order is heard and dismissed on 25-3-2015. The Hon'ble Supreme Court was of the opinion that the decision of Bombay High Court is a well-considered judgment and does not call for any interference.

This section is enacted to ensure the co-operation of the persons making application to the Commission for the settlement of their cases. It provides that if the Settlement Commission is of opinion that any person who made an application for settlement has not cooperated in the proceedings before it, it may send the case back to the Assessing Officer who shall thereupon dispose of the case in accordance with the provision of this Act as if no application for settlement had been made. The Assessing Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the results of the enquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, enquiry and evidence had been produced before the AO or held or recorded by him in the course of the proceedings before him.

Where there is an abatement of proceedings, the normal assessment/appeal procedure will get revived from the stage at which it was suspended due to the pendency of settlement petition. An assessment made beyond the time limit after abatement of proceedings before the Settlement Commission is invalid requiring return of seized materials and refund of tax over and above the admitted tax.

Benefits of the Settlement Commission.

The main benefits of the Settlement Commission to both Government and the assessee are :-

i) Department to get over long and continued litigation in complicated cases with doubtful benefit to revenue.

ii) Final Settlement for settling liabilities across the board in complicated cases with doubtful benefit to Revenue, avoiding endless and prolonged litigation and subsequent strain on investigational resources of the Department.

iii) Provided its disclosure was "full and true", the assessee had a forum wherein complicated matters could be decided by one forum.

iv) Time consuming litigation in the regular appellate procedure was avoided by the Department and the assessee.

v) Provided its disclosure was full and true, benefits of waiver of penalties and prosecution are available to the assessee.

vi) Confidentiality of the assessee's disclosure is maintained, as the same could be used only in the Settlement Commission except as provided in Sec. 245HA(3) of the Act.

Thus according to me the best highlighting features of Settlement Commission are (a) To pass the Settlement order within 18 months of filling of the application (b) It has wide power of granting immunity from penalty and prosecution, which are major sources of litigation (c) The orders passed by the Commission are final and conclusive.

CA. Rajesh S. Athavale

Advance Pricing Agreement – Scope & Procedure – Will it mitigate Litigation?

Globally, transfer pricing has emerged as one of the largest tax controversial issues for multinational companies. One needs to understand and appreciate that the exercise of transfer pricing has direct and significant bearing on the tax revenue of a country. Therefore, transfer pricing is the focal point for revenue authorities around the world, which has led to documentation requirements, indepth examinations and the resultant litigation.

India introduced detailed transfer pricing regulations in 2001 and since then India has been no exception to the above development cycle as experienced by other countries. Transfer pricing assessments in India have generated heated controversies, due to an exponential rise in assessment activity and resulting transfer pricing adjustments. Indian tax authorities seem to be focused on generating huge revenues from transfer pricing adjustments, due to alleged non-adherence to the arm's length price (ALP) by related parties in their cross-border dealings. India is aggressively pursuing tax claims against multinational companies operating in the country as the Government seeks to bridle its budget deficit, taking particular aim at Information Technology and back-office functions. Critics are worried that in view of zealous approach of the tax authorities in making huge transfer pricing adjustments there could be hindrances to the foreign investment.

In view of the above, India has been witness to the rapid development which is taking place in transfer pricing by way of legislative amendments and a significant number of judicial precedents having far reaching impact. Although the Transfer Pricing Law was enacted almost 14 years ago, it is still evolving and we find new trend in transfer pricing adjustment year after year. In order to absolve taxpayers from the protracted future transfer pricing litigation and lot of compliance procedures, Advance Pricing Agreement is considered to be an efficient forum to resolve transfer pricing issues and provide certainty for the taxpayer.

Evolution of Advance Pricing Agreement

Advance Pricing Agreements (APAs) have served as an effective tool to proactively address transfer pricing issues across the globe. Many countries have used APAs in order to provide certainty to both taxpayers and the Government, thereby reducing transfer pricing audits and litigation. The system of APA was first introduced in Japan in 1987. It was developed to ensure proper and smooth enforcement of transfer pricing regulation. United States Internal Revenue Service adopted APA system in 1991, subsequently Canada adopted it in 1994, Australia adopted it in 1995. China adopted it in 1998, UK and France adopted it in 1999.

Germany adopted it in 2000. The system became a focus of global interest. In India APA was introduced in 2012.

APA in India

APA mechanism has been introduced by the Finance Act, 2012 by inserting Sections 92CC and 92CD which have come into effect from 1 July, 2012. Rules 10G to 10T and 44GA have been introduced *vide* notification on 30 August 2012 to govern the APA mechanism. As per the memorandum explaining the provisions of the Finance Act, 2012, APA is an agreement between a taxpayer and a taxing authority on an appropriate transfer pricing methodology for a set of transactions over a fixed period of time in future. The APAs offer better assurance on transfer pricing methods and are conducive in providing certainty and unanimity of approach. Therefore, the purpose of APA is to absolve taxpayers from the future transfer pricing litigation and lot of compliance procedures.

Meaning of APA

An APA is an agreement between the taxpayer and the tax authority [Central Board of Direct Taxes (CBDT)] in relation to an international transaction entered between associated enterprises (AEs) for the purposes of determining an ALP or transfer pricing methodology in advance for future transactions. This agreement has to be entered into after taking the necessary approval from the Central Government. Once the APA has been entered between the taxpayer and the tax authority, the ALP of the transaction covered under an APA should be determined in accordance with the APA so entered. Accordingly, APA Scheme would provide conducive transfer pricing environment wherein taxpayer can be sure of certainty and consistency in respect of acceptability of intercompany pricing and transfer pricing methodology. Thus, the APA is a pre-transaction analysis, rather than a post mortem exercise. The APA process is voluntary and will supplement appeal and other disputes resolution measures as provided under the Double Tax Avoidance Agreement (DTAA) for resolving transfer pricing disputes.

OECD Transfer Pricing Guidelines for MNEs and Tax Administrations (OECD Guidelines) define an APA as an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time.

Types of APA

There are 3 types of APA. They are as follows:

Type of APA	Number of countries involved	ALP is determined by	Application of ALP is handled by
Unilateral	1	Tax Authorities of resident country	APA Directorate
Bilateral	2	After the consultation with two tax administrations that have jurisdiction	Competent authority
Multilateral	More than 2	After consultation with more than 2 tax administrations have jurisdiction	Competent authority

The comparison between these different types of APA is as under:

Unilateral APA	Bilateral APA	Multilateral APA
Unilateral APA is an agreement between the tax authority and the taxpayer, it would be seeking confirmation of transfer pricing or methodology by the tax authority for the taxpayer within India.	Bilateral APA is an agreement between the tax authority and the taxpayer subsequent to, and based on agreement between Indian competent authority and competent authority of another jurisdiction	Multilateral APA is an agreement between the tax authority and the taxpayer subsequent to, and based on agreement between Indian competent authority and competent authorities of other jurisdictions
Accordingly, unilateral APA does not allow the taxpayer to avoid the risk of taxation by foreign tax administrations.	In general, bilateral APA is preferred above unilateral APA since bilateral APA does provide certainty on two sides of the transaction whereas unilateral APA does provide certainty on one side of the transaction only.	In general, multilateral APA is entered wherein stakes are high and more than two tax jurisdictions are involved
Unilateral APA might be preferable wherein in the foreign jurisdiction there is no or less active transfer pricing regime or say wherein India does not have tax convention with the other country. However, unilateral APA may prove to have limited utility where both tax administrations actively review the transactions between group companies from transfer pricing perspective	Before concluding on unilateral APA vis-à-vis bilateral APA, it is suggested that the taxpayer must carry out the cost benefit analysis of Unilateral APA vis-à-vis bilateral APA	

It is to be noted that the process for bilateral or multilateral APA cannot be initiated unless the AE situated outside India has initiated process of APA with the competent authority in the other country, a DTAA exists between India and other country(ies) containing an article on "Mutual Agreement Procedure (MAP)" or in case of international transactions leading to economic double taxation arising out of transfer pricing adjustments and said DTAA contains provisions similar to Article 9(2) provided in OECD model convention on "AE".

Eligibility

As per sub section (1) of section 92CC of the Act read with Rule 10G of the Rules:

(a) Any person, resident or non-resident, who proposed to enter into a new international transaction with its AE, and/or

(b) Any person, resident or non-resident, who is having continuing international transaction with its AE can file an application for an APA.

Scope of APA

Applying for an APA for transactions is generally left to the discretion of the taxpayer. There is no statutory obligation for a taxpayer to cover all the related party or inter-company transaction in an APA. However, it is generally recommended to disclose all the inter-company transactions proposed to be entered into by the taxpayer to the relevant tax authorities so that both the parties may discuss and come to a consensus to include such transactions. The APA proposals are independent in nature and binding only on the person in whose case the agreement has been entered into and only in respect of the transaction in relation to which the agreement has been entered into.

The scope of an APA also states the time period for which the APA shall remain in force. In India APA can be entered for maximum period of 5 years with an option of renewal. Minimum time period is neither mentioned in the Income -tax Act nor in the Rules. However, looking into the time, money and efforts that are expected to be spent before entering into APA, it is likely that application APA would normally be for a period not less than 3 years.

APA entered for past transactions is called roll back APA. Recently, roll back APA is allowed to be entered into. Therefore, in India APA can be entered for present, futuristic and past transactions also.

APA Team

There are two different set-ups for processing of APA and to help the CBDT to enter into an APA. First set-up comprises of the competent authority of India [which is Joint Secretary (FT & TR-I) in the Ministry of Finance], and his representative (i.e., one Director and two Under Secretaries).

The second set-up is the APA team which is defined in Rule 10F. At present the APA team, constituted by the CBDT, consists of one Commissioner, 4 Additional Commissioners and 4 Deputy Commissioners. The APA team reports to Director General of Income Tax (DGIT) (International Taxation). DGIT may include experts in economics, statistics, law or any other field in the team who would be drawn from the Government Departments.

APA Process

The Indian APA Scheme involves following process:

(1) Pre-filing consultation – Prior to an APA application, a taxpayer is required to make a written request, in Form 3CEC, to the DGIT (International Taxation). In this stage the taxpayer is required to submit entity and group level business information, details of AEs, details of international transactions including Function, Asset and Risk ('FAR') analysis, proposed transfer pricing methodology, comparable data and history of transfer pricing audit. In case if the applicant is seeking bilateral or multilateral APA, Indian competent authority would also be a party to the consultation.

The objectives of the pre-filing consultation includes determining the scope of an agreement, identifying transfer pricing issues, determining the suitability of international transaction for the agreement and discuss broad terms of the agreement. The APA scheme specifies that pre-filing consultation is neither binding on the tax authorities and nor on the applicant. The application can also be made on an anonymous basis by an authorised representative with sufficient information about the business operation and international transaction in order to making meaningful discussion. Further, at this stage, the applicant is not required to deposit any fees. In particular, the opportunity to hold pre-filing meetings with the APA team on an anonymous basis will encourage taxpayers to explore the APA option.

The understanding reached on various issues in pre-filing consultations would be reduced in writing and a copy of the same will be given to the applicant.

This pre-filing consultation process has now been made optional *vide* notification dated 14 March 2015. Therefore, going forward an applicant can directly file the main APA application without filing for pre-filing consultation.

(2) Formal Application for an APA – If in pre-filing consultation, the suitability of entering into an APA is determined, then after pre-filing consultation the applicant can file the application for an APA in Form 3CED to the DGIT (International Taxation) in case of Unilateral APA and to the Competent Authority in case of Bilateral or Multilateral APA. As mentioned above, since pre-filing consultation process has now been made optional *vide* notification dated 14 March 2015, going forward the application can be directly filed in Form 3CED to the respective authority depending upon the types of APA. Along with an application, the proof of payment of the required fees should be attached.

Amount of international transaction entered into or proposed to be undertaken in respect of which agreement is proposed during the proposed period of agreement.	Fees (INR)
Amount not exceeding INR 100 crore	10 Lakh
Amount not exceeding INR 200 crore	15 Lakh
Amount exceeding INR 200 crore	20 Lakh

It is clarified that the fee is to be computed on the basis of likely value of international transaction for which the APA application is filed. Fee paid is non-refundable except when the application is not allowed to be proceeded with under Rule 10K.

The application must be filed within the time as provided in Rule 10I(3). If the international transaction is of a continuing nature, from dealings that have already occurred, the application must be filed before the first day of the previous year relevant to the first assessment year which the application seeks to cover. For example, if the APA application seeks to cover 5 years starting from AY 2017-18 to AY 2021-22, the application must be filed before 1 April 2016. However, if the international transaction is new one, the application may be filed before the undertaking such transaction. For example, if the applicant is entering into a transaction first time from 1 December 2015 and the application is made before 1 December 2015, the applicant has a choice to include AY 2016-17 as the first assessment year in the APA application. In that case, the first condition that for AY 2016-17 the application should be filed before 1 April 2015 shall not apply.

(3) Analysis and Evaluation – Upon receipt of the APA application from the taxpayer, the tax authorities will evaluate the contents of the application and may seek further clarification from the taxpayer, if necessary. In case the application is defective or if any relevant document is not attached or the application is not in accordance with understanding reached in pre-filing consultation, the application may be rejected after providing an opportunity of being heard to the applicant. Fee will be refunded in case the application is rejected.

Since processing and negotiation of an APA application takes time, it is possible that assessment process by the assessing officer (AO)/transfer pricing officer (TPO) with respect to the year under APA might be required to be initiated or completed. Such proceedings by the AO and TPO shall continue without taking cognisance of the fact that APA process with respect to that year has already been started. It is clarified that merely filing of an APA application will not have any impact on the action of the AO or TPO that is required to be taken under the Income tax Act.

The applicant may request in writing for an amendment to its application at any time before the finalisation of the terms of the agreement.

This may be allowed by the DGIT (International Taxation) for unilateral APA or the competent authority of India and other country for bilateral or multilateral APA, if such an amendment does not have the effect of altering the nature of the original application. The applicant is also required to pay additional fee, if any, due to the amendment. The request for conversion of unilateral APA application to bilateral or multilateral APA application will not be taken to have effect of altering the nature of the original application.

A taxpayer who makes an APA application should note that acceptance of an APA application does not necessarily mean that the proposed transfer pricing methodology and other variables, e.g., arm's length range, etc. put forth in the APA application will be accepted in its entirety. The APA team reserves the right to propose alternative methodologies, whether on its own, or in consultation with its treaty partner (in a bilateral or multilateral APA). In case of a unilateral APA, the DGIT (International Taxation) shall assign the APA application to one of the APA teams. In the course of the APA review and negotiation process, the APA team shall examine and analyse the APA application and undertake negotiation with the applicant. The APA team shall make an endeavour to arrive at a negotiated settlement with the applicant.

In the case of bilateral and multilateral APA, the competent authority of India shall send the application to DGIT (International Taxation) for necessary enquiry, analysis and for preparation of draft report. The DGIT (International Taxation) shall then assign it to one of the APA teams. The APA team shall then carry out detailed enquiry and analysis and prepare a draft Indian position in consultation with the (International Taxation), the competent authority of India and the applicant. The draft Indian position paper shall then be forwarded by the DGIT (International Taxation) to the competent authority of India.

The APA team may ask for additional information, proactive support in providing the requisite information, which might be critical to the success of the APA process. In this connection, certain powers have been given to the APA team and the competent authority to hold meetings, call for additional documents/ information, visit applicant's business premises and make enquiries as per Rule 10L(2). The applicant is expected to give full co-operation for this purpose. The APA team is required to do detailed functional analysis and examine the APA application in a reasonable and fair manner taking into consideration all the evidences and information given by the applicant.

The taxpayer may withdraw the application at any time by filing an application in Form 3CEE, however, fees paid would not be refunded back.

A unilateral APA can be converted into a bilateral APA before the mutually agreed draft agreement is forwarded by DGIT (International Taxation) to the CBDT. While converting a unilateral APA application to a bilateral APA application, the applicant or its AE needs to make a similar request with the competent authority of the other country. The bilateral request of the applicant shall be forwarded by the DGIT (International Taxation) to the competent authority of India.

(4) Finalising and signing an APA – Once the analysis, discussion and evaluation is over, the tax authorities would proceed to finalise and formally sign an APA. The CBDT with the approval of the Central Government would enter into an APA with the taxpayer. The terms on an agreement might include international transactions covered by the agreement, transfer pricing methodology, determination of ALP, critical assumptions etc. Once a unilateral APA has been entered into, there will not be any MAP benefit available to the taxpayer with respect to the covered transactions.

In the case of bilateral or multilateral APA, once the draft Indian position paper is received,

the competent authority of India will carry out the negotiation with other competent authority (ies) in accordance with the provision of Rule 44GA. During this process the competent authority of India will be free to deviate from the draft Indian position paper in order to arrive at negotiated settlement. The applicant will not be a part of the negotiation between the two competent authorities; but he may be consulted for the purpose by the Indian competent authority. On successful completion of negotiations, the competent authority of India shall formalise a MAP arrangement with the competent authorities of other country (ies) and intimate the same to the applicant. The applicant is required to convey acceptence or otherwise of the arrangement within 30 days of such communication. Once it is accepted by the applicant, the competent authority of India and applicant shall prepare a mutually agreed draft agreement and the APA shall be entered into by the CBDT with the taxpayer after taking the approval from the Central Government. In case of failure to reach a MAP arrangement, the applicant shall be informed of the failure to reach an arrangement with the competent authority of the other country (ies). However, the applicant shall have an option to convert the request for bilateral APA to unilateral APA, without payment of additional fee.

Where in respect of an assessment year covered in the APA, a return of income has been filed prior to the date of entering into an APA, then within 3 months of entering into APA, the taxpayer is required to file a modified return in accordance with and limited to the APA. The modified return shall be deemed to be return under Section 139 and all the provisions of the Income-tax Act shall apply accordingly. If the assessment or reassessment for the assessment year/s covered under the APA is pending, the AO is required to complete that assessment or reassessment in accordance with the APA taking into consideration the modified return so furnished. Where the assessment or reassessment has already been completed, the AO shall reassess or recompute the total income of the relevant assessment year having regard to and in accordance with the APA.

It may be noted that a particular assessment year may involve non-covered international transactions. In such a case, the assessment of non-covered international transactions will not be affected by APA.

In case where a reference to TPO is pending with respect of any covered transaction of APA, the AO shall inform the TPO about the filing of modified return in respect of that transaction. This communication shall be sent immediately after filing of the modified return by the taxpayer with respect of such covered transaction. On receipt of such communication, the TPO shall not proceed further for scrutinising the covered transaction. Similarly, if the covered transaction is pending before the Dispute Resolution Panel (DRP) immediately after filing of modified return by the taxpayer. On receipt of such communication, the DRP shall not give any direction with respect to the covered transaction.

The procedure consequent to the filing of the modified return in relation to the covered transactions for the assessment years, included in the APA, would include:

- Withdrawal of any appeal pending before the Commissioner of Income tax (Appeal) by the taxpayer with respect to the covered transaction(s);
- Withdrawal of appeal filed before the Income tax Appellate Tribunal (ITAT)/ High Court/Supreme Court by the tax department as well as taxpayer with respect to the covered transaction(s);
- Withdrawal of objections filed before the DRP by the taxpayer with respect to the covered transaction(s)

(5) Execution, monitoring and review – Once the agreement is entered into, it would be

binding on the taxpayer and the tax authority. However, in case there is a change in any of the critical assumptions or failure to meet the conditions subject to which the agreement has been entered into, the agreement can be revised or cancelled, by the tax authorities. It is required that the taxpayer must file the annual compliance report, in Form 3CEF,in quadruplicate, for each of the years covered in the agreement, within 30 days of the due date of filing the income tax return for that year, or within 90 days of entering into an agreement, whichever is later.

The compliance audit shall be carried out by the jurisdictional TPO in accordance with Rule 10P in order to ensure compliance with the terms of the APA, including satisfaction of the critical assumptions and consistency of the application of transfer pricing methods. The TPO has to submit the report to DGIT (International Taxation) in case of unilateral APA and to the competent authority of India in case of bilateral or multilateral APA.

The cancellation and revision of APA may be carried out in accordance with Rule 10Q and 10R respectively. In case of revised agreement, the procedure as regard to original agreement shall be repeated.

Once concluded, the APA would be in effect for a maximum period of 5 years, depending on the actual agreement between the taxpayer and the tax authority. APAs may be revised, renewed or cancelled depending upon the change in the facts and assumptions. The renewal request will follow the same forms and procedures as initial APA request. The renewal application would be treated as a fresh application and procedure and fee would apply accordingly. The renewal request may be filed well in advance before the expiration of the terms of the existing APA.

Roll Back Provision

The Finance Act, 2014 introduced roll back mechanism in the APA scheme, which would be effective from 1 October 2014. The APA may, subject to such prescribed conditions, procedure and manner, provide for determining the ALP or for specifying the manner in which ALP is to be determined in relation to an international transaction entered into by a taxpayer during any period not exceeding 4 previous years preceding the first of the previous years for which the APA applies in respect of the international transaction to be undertaken in future.

The APA Rollback Rules have been notified on 14 March 2015 setting out the applicability and the requirement for applying rollback. Some of the salient features of the rollback rules are highlighted below:

- The international transaction proposed to be covered under the rollback is to be same as covered under the main APA;
- The return of income for the relevant rollback year should be furnished by the applicant before the due date specified in Explanation 2 to sub-section (1) of Section 139;
- The applicant must have filed report in respect of the international transaction in accordance with Section 92E in the relevant rollback years;
- The rollback provisions shall be applied for all the rollback years in which the relevant international transaction has been undertaken;
- The rollback provisions will not be applicable for a particular year where the ITAT has passed an order disposing off the appeal prior to the date of signing of APA;
- In case the application of rollback provision has the effect of reducing the total income or increasing the loss as declared in the return of income of a

particular rollback year, the rollback provisions would not be applicable for that year;

- The manner in which ALP shall be determined in relation to an international transaction undertaken in any rollback year shall be the same for all the years covered under the APA;
- The applicant has to file an application for rollback in Form No. 3 CEDA with proof of payment of an additional fee of INR 5 lakh;
- The application for rollback is to be filed on or before 31 March 2015 in the case of applications filed before 1 January 2015 or where APA has been entered into before 1 January 2015. The deadline of 31 March 2015 has now been extended to 30 June 2015; and
- The other procedural aspects like filing of modified return, withdrawals of appeal at various appellate levels, etc. would apply to give effect to the rollback provisions.

Status of APAs in India so far

In Financial Year 2012-13, 146 companies had applied for APA and out of that, the CBDT has signed 8 'unilateral APA' making it one of the fastest turnarounds in transfer pricing history across the world. These agreements cover different industrial sectors like pharmaceutical, telecom, exploration and financial services. These agreements cover a range of international transactions, including interest payments, corporate guarantees, non-binding investment advisory services and contract manufacturing. The CBDT has also signed its first bilateral APA with Japanese company, which has been concluded in 1.5 years, which is shorter than the time normally taken in finalising APA internationally.

The tax department received 232 applications from MNCs in Financial Year 2013-14 and out of that 206 companies are seeking 'unilateral APA'. The rest applied for bilateral APA.

Advance Pricing Agreement Guidance with FAQs

To increase the awareness of the taxpayers about the APA scheme and its implementation, the CBDT has published the booklet on 'Advance Pricing Agreement Guidance with FAQs' *vide* Notification No. 35 dated 30 August 2013. The Guidance booklet explains in detail the concept of an APA, different types of APAs, advantages of the APA, administrative set up of APA scheme, process involved in APA, fee structure of APA, disclosure obligations of the applicant, consequences of withdrawals of APA application, legal effect of APA, renewal of APA, relevant regulations and forms prescribed under APA scheme, etc. The said booklet also covers frequently asked questions (FAQs). The CBDT has tried to clarify certain issues around composition of APA team from the tax department, pre-filing consultation, impact of concluded or pending Mutual Agreement Procedure (MAP)/domestic litigations on APA negotiation, Bilateral/Multilateral APAs, conversion of unilateral into bilateral/ multilateral APAs and *vice versa*, APA for transactions with Permanent Establishment, confidentiality of information, documentation requirement, remedy against cancellation of APA, roll back of APA, etc.

Advantages of APA

For the Taxpayer

- Provide tax certainty with regard to determination of ALP of the international transaction with respect to which the PAP has been entered into;
- Reduce the risk of potential double taxation through bilateral or multilateral APA;

- Reduce compliance cost by eliminating the risk of transfer pricing audit and resolving long drawn and time consuming litigation;
- Reduce the burden of record keeping, as the taxpayer knows in advance the required documentation to be maintained to substantiate the agreed terms and conditions of the agreement.

For the Government

- An APA scheme is a close fit with the Government's strategic direction of developing a co-operative compliance model with taxpayers;
- Potential increase in foreign direct investment as a result of obtaining more certainty around TP matters;
- Reduced administration and enforcement costs over the duration of an APA;
- Removal of potential for disputes and any consequential litigation time and costs; and
- Experience gained from APA schemes potentially helps with future improvements in the substantive regulations

Disadvantages of APA

- **Time limit** – There is no timeline prescribed for conclusion of APA. The taxpayer would be anxious to know the fate of his application in reasonable time bound period.
- **Critical assumption** – The fulcrum of the entire mechanism lies on the critical assumptions, which are very important at the time negotiation and final agreement on the APA. Therefore, drafting of critical assumptions is an important ingredient of the APA process. If the assumptions are not precise it may result into much hassle for both the taxpayer and the tax authorities. In the US APA programme, there is a standard template for critical assumptions. In the absence of any standard template of critical assumptions in India, the exercise of identifying critical assumptions (business or situation specific) would be very important. If the critical assumptions do not attain any consensus from tax authorities, either APA needs to be revised or a new APA needs to be entered. This leads to additional hassles for the taxpayer as it results in outflow of substantial time and money.
- **Fees** – As the filing fees, initial costs and time involved in the initial stages of APA are huge, the large taxpayers can only afford to enter into an APA. This would discourage the small taxpayer or taxpayer having small transaction values.
- **Confidentiality is not assured** – Confidentiality is also an important concern for the taxpayer. The information shared by the taxpayer while negotiating an APA may contain the group policy, pricing policy, future business predictions, trade secrets, revenue model which are of strategic importance to the multinational group. Sharing of these with the competitors can adversely affect the tax-payers market position. Therefore, the information shared with the tax authorities during the course of finalising an APA needs to be handled with great amount of diligence. As per the Guidance issued by the CBDT on APA, it has been clarified that internationally, most countries allow such sharing of APA information with on-field audit officers. The confidentiality provision of the Income-tax Act also allows such sharing within the income tax department. There is a great concern among the industry about the possibility of ill-use of the data by the tax authorities.
- **Risk of Conflicts to attain the mutual consensus** – Besides they may come

across a situation where tax authorities and taxpayers don't reach a unanimous conclusion. This may lead to a waste of resources from both the ends.

- **Specified Domestic Transactions not covered** – The scope of APA is restricted to international transactions only. Therefore, the taxpayer does not have an option to enter APA for specified domestic transactions.

APA Regime Globally

As discussed above, APA was introduced in other countries long ago. Countries like USA, Japan, UK, Canada and Australia have developed regime of APA. This annex highlights different aspects in the guidelines issued by 6 select countries: Australia, Canada, Germany, Japan, UK and the US. For further information, links to full texts are also provided.

1. AUSTRALIA

Regulation: Practice Statement Law Administration 2011/1

Link to the full text: http://law.ato.gov.au/atolaw/view.htm?docid=%22psr/ps20111/nat/ato/00001%22

Concept: An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (for example, method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing of those transactions over a fixed period of time (generally for 3 to 5 years but may be longer). The term of the agreement is discussed during the pre-lodgment meeting and specified in the APA.

An APA may be applied by any Australian taxpayer who has international related party dealings between:

- Related separate legal entities (including PE of separate legal entities).
- Permanent establishment and its head office
- Two permanent establishments of the same entity.

Types: An APA might be concluded either unilaterally, bilaterally or multilaterally. Rollback APA is allowed.

Fees: The ATO does not impose charges or fees for APAs.

Depending on the complexity of the dealings, APA are designed as under:

- Simplified APA designed for taxpayers with low value or low risk international related party dealings. It is less time consuming and less costly for taxpayers. Available for unilateral APA.
- Standard APA deals with dealings that do not qualify for the simplified or complex type. Available for both unilateral and bilateral APAs
- Complex APA deals with complex international related party dealings (complexity for different reasons: dealings are considered to be high risk, lack of comparables, significant amount of tax involved, etc).

Process: The content of each step will depend on the type of APA (simplified, standard or complex) :

- Pre-lodgment. The taxpayers provide an APA proposal that will be reviewed by ATO. The proposal will be discussed at the pre-lodgment meeting. The aim of this stage is to identify the scope of the APA and collateral issues.
- Lodgment of formal application.
- Analysis and evaluation.
- Negotiation and agreement. The taxpayer and the ATO will finalize the APA based on the outcomes of the negotiation.

Effect: When the APA comes into effect and the taxpayers comply with its terms, the ATP is prevented from imposing any additional income tax on the covered international related party dealings under the APA.

Annual Report: The taxpayer will be required as part of the APA to prepare an Annual Compliance Report for each year of the APA, containing sufficient information to demonstrate compliance with the terms of the APA. If the taxpayers fail to comply with annual reporting requirements the ATO could consider cancelling the APA where the records did not enable the ATO to confirm readily that the terms of the APA were applied.

Renewal: A unilateral or bilateral APA may be renewed by the consent of all the parties to it (including the tax treaty partner who is a party to a bilateral APA). A request for renewal of the APA should follow the same procedures that apply to the initial APA request.

2. CANADA

Regulation: Information circular on Advanced Pricing Arrangements, March 16th, 2001

Link to the full text: http://www.cra-arc.gc.ca/E/pub/tp/ic94-4r/ic94-4r-e.pdf

Concept: An APA is defined as an arrangement between the Minister of National Revenue and a taxpayer. It covers certain transactions and arrangements between the taxpayer and non-resident entities. APA confirm appropriate transfer pricing methodologies, in advance, and their application to specific cross-border non-arm's length transactions or arrangements for specified periods of time, under specified terms and conditions, for purposes of the Act. The term of an APA is usually 3 to 5 years, but it may depend on the facts and circumstances.

APAs may also be applied to issues similar or related to transfer pricing, such as the proper attribution of income between permanent establishments and other parts of the same entity.

Any taxpayer may apply for APA consideration, regardless of the size of the organisation, the type or scope of its operations, or the nature of the transactions and proposed transfer pricing methods (TPMs).

The Canadian Circular includes (in appendix VI) a model of APA.

Types: An APA might be concluded either unilaterally, bilaterally or multilaterally. Rollback is allowed.

Fees: The Canada Customs and Revenue Agency (CCRA) will levy a non-refundable user charge for each accepted APA request or renewal to cover anticipated "out-of-pocket" costs, such as travel and accommodation expenses. The need for travel will be carefully evaluated. Currently there is no charge for staff time. User charges for APAs will be outlined in an APA acceptance letter between the taxpayer and the CCRA and payable upon taxpayer's reply to the CCRA's APA acceptance letter.

Process:

- Pre-filing meeting – Attended by taxpayer and CCRA officials in order to explore the suitability of an APA and to informally discuss the APA process and the matters set out in the information circular.
- APA request – CCRA will accept or decline the request. The agency has preference for bilateral and multilateral agreements rather than unilateral ones.
- Review, analysis and evaluation.
- Consideration by the competent authority.

Effect: An approved APA is regarded as binding on the CCRA and on the taxpayer. If the taxpayers comply with the terms and conditions of an APA, the Tax Administration will consider that the results of applying the agreed transfer pricing methodology have satisfied section 247 of the Act (arm's length principle) for the transactions and periods specified in the APA.

Report: The taxpayer will need to file APA reports according to the terms of the APA. The report will describe the actual operations for the period and demonstrate the compliance with the conditions of the APA. The Reports will be reviewed by the competent authority.

Renewal: Requests to renew the APA will follow the same form and procedures in effect at the time the request for renewal is made that apply to initial APA requests.

3. GERMANY

Regulation: Information Circular on bi or multilateral mutual agreement procedures under double taxation agreements for reaching APA aimed at granting binding advance approval of transfer prices agreed between international associated enterprise (issued by the Federal Ministry of Finance of Germany in 5 October 2006)

Link: to the full text: http://www.oecd.org/tax/transferpricing/47655669.pdf

Concept: An APA is an agreement between one or more taxpayers and one or more tax administrations. It lays down (before controlled transactions between associated enterprises in different countries are carried out) a transfer pricing method in accordance with the arm's length principle, for fixing transfer prices for given business transactions over a given period. Further criteria for determining transfer prices can be agreed (e.g. identification of comparables, calculations for suitably effecting adjustments, critical assumptions with regard to future incidents, etc.).

Types: Unilateral, bilateral and multilateral Taxpayers may seek bilateral or multilateral APAs. Multilateral APAs are treated as several bilateral APAs. Unilateral APAs are generally not accepted. Rollback APA is allowed.

Fees: In 2007, user fees for APAs were introduced. The base fee for every APA application amounts to € 20,000. For the renewal of an existing agreement, a fee of € 15,000 is charged. If the taxpayer applies for a change/modification of an APA, €10,000 becomes due. However, these fees may be reduced for taxpayers with minor transactions to foreign affiliated companies.

Process:

- **Preliminary talks (pre-filing)** – Discussion between the taxpayer and the Federal Central Tax Office about the procedure to follow the content of the APA request and the documents to include.
- **Request** - The scope of application in terms of both content and period has to be defined in the request. The other country with which an advance agreement is to be reached has to be named. The applicant may restrict its APA request to certain exactly specified types of transactions or to transactions with certain exactly specified associated enterprises, or to transactions with associated enterprises in given countries. The applicant must justify why the proposed transfer pricing method complies with the arm's length principle
- Rejection/Acceptance

Effect: Tax authorities are bound by the APA, provided the underlying facts of the APA have been implemented and the critical assumptions have been satisfied. The taxpayer is under no obligation by reason of the APA to implement underlying facts used as a basis for the APA. If it fails to so, then the APA becomes obsolete and losees all legal effect. If the taxpayers implement the facts, then it is also bound by the agreement. If it charges prices other than those agreed in the APA, then the tax authorities may base taxation on the provisions of the APA, notwithstanding any diverse amounts charged.

Report: The taxpayer must draw up and submit an annual report showing that the matter underlying the agreement has been realised in

the fiscal year concerned, and in particular that the critical assumptions have been satisfied.

Renewal: An APA may, with the country's permission, be extended beyond the period of application, if a request to this effect is duly filed and it is credibly proved that the underlying facts in future will match the underlying facts on which the APA has been based.

4. JAPAN

Regulation: Commissioner's Directive on the Operation of Transfer Pricing (Administrative guidelines) issued by National Tax Agency of Japan, on June 1st 2011 (last amendment June 25th, 2007). Chapter 5: Advance Pricing Arrangements.

Link to the full text: http://www.nta.go.jp/foreign_language/07.pdf

Concept: The confirmation made by a District Director of a Tax Office or a Regional Commissioner of a Regional Taxation Bureau with regard to the methodologies of calculation of arm's length price and the specific details thereof (hereinafter referred to as TPM) deemed to be the most reasonable to be adopted by a corporation. The term is, in principle, from 3 to 5 taxable years.

Types: Unilateral and bilateral. Rollback is allowed.

Fees: No filing fees are imposed for APAs.

Process:

- Pre-filing consultation – The RTB division shall accede to requests from corporations for a pre-filing consultation. These consultations are intended to help make APA procedures more convenient for corporations and to expedite APA procedures.
- Request to be filed along with the prescribed documents.
- Review of the request by the examination group of the Tax Office.
- Acceptance/Rejection.

Effect: Tax returns complying with the content of the APA for the confirmed taxable years shall be treated by the District Director as having been conducted at the arm's length price.

Report: Taxpayers shall be requested to submit reports with the prescribed information, justifying that they filed tax returns complying with the contents of the APA. The RTB division shall evaluate the report submitted and determine whether the corporation complies with the content of the APA.

Renewal: When a corporation files a request for renewal of its APA, the request shall be processed in accordance with the conditions envisaged by the Circular for the request.

5. UNITED KINGDOM

Regulation: Statement of Practice 2/10 on Advanced Pricing Agreements (this SP updates an earlier statement on APAs published in 1999). Guidance about how HM Revenue and Customs (HMRC) interprets and applies the APA legislation.

Link to the full text: http://www.hmrc.gov.uk/agents/sop.pdf (Page 319)

Concept: Written agreement between a business and the Commissioners of HMRC which determines a method for resolving transfer pricing issues in advance of a return being made. When the terms of the agreement are complied with, it provides assurance to the business that the treatment of those transfer pricing issues will be accepted by HMRC for the period covered by the agreement. Typically the term is from 3 to 5 years. An APA can be used to resolve questions relating to the following broad situations giving rise to transfer pricing issues:

- Transfer prices between separate business enterprises where questions may arise as to the determination of the arm's length principle.
- Attribution of income or profit between parts of a business enterprise which operates in more than one country where questions may arise as to the taxable income to be recognised in any such part.

Thin capitalisation issues will be dealt via a separate Advance Thin Capitalisation Agreement (ATCA).

Types: Unilateral, Bilateral and Multilateral. Rollback is allowed.

Fees: No filing fees are charged.

Process:

- Informal talk – HMRC strongly recommend that an enterprise interested in submitting a request contacts it first to informally discuss its plans before presenting a formal application (what is called an Expression of Interest).
- Formal request – By any UK business, any non-resident trading in the UK through a PE and any UK resident trading through a PE outside the UK. This formal request should follow the content envisaged by the Statement of practice.
- Review – HMRC will consider the request on the basis of its facts and features. If there are not complex transfer pricing issues (no matter if the size of the transaction or the enterprise), HMRC would not accept the request.
- Acceptance/Rejection.

Effect: The APA provides assurance to the business that the treatment of those transfer pricing issues will be accepted by HMRC for the period covered by the agreement. On the business side, it commits itself to demonstrate adherence to the agreed method for dealing with the transfer pricing issues during the term of the APA in the form of an annual report.

Report: An annual report will generally accompany the business tax return. The requirements of each report will be set out in the APA. The broad intention is that annual reports should demonstrate in a concise format whether the business has complied with the terms and conditions of the APA.

Renewal: The business may request renewal of an APA. The renewal application should expressly consider any changes or anticipated changes in facts and circumstances since the existing agreement was reached. HMRC will conduct a review of the renewal application.

6. UNITED STATES

Regulation: Internal Revenue Proc. 2006-2009 issued by Internal Revenue Service, released on 19th December, 2005.

Link to the full text: http://www.irs.gov/pub/irs-drop/rp-06-9.pdf

Concept: Voluntary process whereby the IRS and taxpayers may resolve transfer pricing issues under section 482 of the Internal Revenue Code. An APA is an agreement between a taxpayer and the Service in which the parties set forth, in advance of controlled transactions, the best transfer pricing method (TPM) within the meaning of 482 of the Code and the regulations. The agreement specifies the covered controlled transactions, TPM, term, operational and compliance provisions, appropriate adjustment, critical assumptions, annual reporting responsibilities, etc.

The taxpayer must propose a term for the APA appropriate to the industry, products and transactions involved. Although the APA term is determined on a case-by-case basis, a request for an APA should propose an APA term of at least 5 years unless the taxpayer states a compelling reason for a shorter term.

Types: Unilateral, Bilateral and Multilateral. Rollback is allowed.

Fees: The fee is USD 50,000 for original APA requests and USD 35,000 for routine renewal requests; USD 22,500 for small business taxpayer APA original and renewal requests; and USD 10,000 for amending APA requests or a completed APA.

Process:

- Pre-filing conference. A taxpayer may request it with the APA Programme in order to discuss informally the suitability of an APA. Among the areas of discussion are the covered transactions, the potentially applicable TPMs, etc.
- Request. The Internal Revenue Procedure specifies the items to be included in the request.
- Review by IRS.
- Acceptance/Rejection.

Effect: An APA is a binding agreement between the taxpayer and the IRS. If the taxpayer complies with the terms and conditions of the APA, the IRS will not contest the application of the TPM to the subject matter of the APA except as provided in this revenue procedure. The taxpayers remain otherwise subject to US income tax laws and applicable income tax conventions. An APA will have no legal effect except with respect to the taxpayer, taxable years and transactions to which the APA specifically relates.

Report: Taxpayers must file an annual report for each taxable year covered by the APA. The taxpayer must file a timely and complete annual report describing its actual operations for the year and demonstrating compliance with the APA's terms and conditions.

Renewal: A taxpayer may request renewal of an APA using the procedures for initial APA requests. To expedite the preparation and evaluation of an APA request, however, taxpayers are encouraged to request a pre-filing conference to discuss with the APA Programme. The APA Programme will endeavour to expedite the processing of a renewal APA.

Conclusion

APA is introduced with the objective of resolving transfer pricing disputes. It is hoped that the APA mechanism will bring in better assurance on transfer pricing issues and will be conclusive in providing certainty and unanimity of approach which would lead to reduction in the litigation and cost of compliance. It would be win-win situation for both the taxpayers and for our Government, if the same is implemented fairly, in time bound and professional manner. Although the volume of applications filed so far is encouraging, most of the taxpayers would still like to wait and watch and understand how the agreements will be negotiated and how the typical transactions will be looked at. Only time can tell about the effectiveness of the APA in India in dealing with the transfer pricing challenges faced by the taxpayers.

"Too many pieces of music finish too long after the end."

— *Igor Stravinsky*

CA. Waman Kale, CA. Bhavesh Dedhia &
CA. Anjul Mota

Advance Pricing Agreement Rollback Rules – Will it mitigate Litigation ?

Across the globe, there is a substantial increase in transfer pricing ('TP') disputes over the years in several countries, India is no exception.

In the past few years, TP issues in India have been highly contentious and there is a significant spurt in high-pitched TP litigation. A summary of year-wise TP adjustments carried out in India is tabulated below[1]:

Financial Year	Assessment Year	Adjustments (` in crores)
2001-02	2002-03	1,403
2002-03	2003-04	2,631
2003-04	2004-05	3,947
2004-05	2005-06	5,060
2005-06	2006-07	10,000
2006-07	2007-08	23,237
2007-08	2008-09	44,531
2008-09	2009-10	70,016
2009-10	2010-11	60,000
2010-11	2011-12	47,000

The factors contributing to this phenomenon are mounting fiscal demands on the Governments, need to safeguard the tax base and constant competitive pressure on the businesses to structure their operations in an efficient manner due to constantly evolving economic scenario.

Amidst this, the multinational enterprises ('MNEs') often face challenging tasks of planning and managing its business affairs in a manner which meets the expectation of the tax authorities in home and overseas countries. Such challenges are further compounded when a MNE operates in multiple jurisdictions. In such a scenario, the MNE has limited options i.e. to pursue lengthy and time-consuming litigation battles, to devise counter strategies, to surrender to the aggressive tax authorities or to negotiate certainty through programmes like Advance Pricing Agreement ('APA').

Indian APA Programme

The APA programme was introduced in India by the Finance Act, 2012 as a method of proactive dispute resolution and was formally operationalised on 1st July, 2012. An APA is an agreement between the Indian Government and the taxpayer that determines in advance the most appropriate TP methodologies or the Arm's Length Price ('ALP') for covered intercompany international transactions for

1. Financial Express, 24th March, 2015

a future period of time (five years as per the Indian APA regulations, subject to fulfilment of agreed critical assumptions).

During the five-year APA period, the taxpayer shall not be subject to the conventional TP scrutiny, however, it shall be required to file an annual report confirming compliance with the terms of the APA. A limited assessment shall be conducted by the Income-tax authorities seeking to ensure compliance with the terms of the APA. The APA may be renewed, revised or cancelled under certain circumstances.

Indian APA Programme – Journey so far

Though taxpayers were only cautiously optimistic of the programme, approx. 550 applications[2] have been filed till 31st March, 2015. Within a year of its introduction, on 31st March, 2014, the Government of India has signed 5 Unilateral APAs. Further, 3 Unilateral APA and 1 Bilateral APAs has been signed recently[3].

Pre-filing consultation, although made optional, may be an important step in discussing relevant questions with the authorities and help strategise the discussions for APA accordingly. Pre-filing consultation, which earlier was mandatory has been recently made optional. To cope up with increasing applications, the Government has created additional Commissioner post to deal with APAs, which is a commendable step.

India, although being in initial stages, is at par with the APA resolution timelines internationally. While the international experience of finalising an APA is typically 2 to 3 years, India has achieved finality on the aforesaid APAs within shorter duration of less than 2 years.

The progress on other APAs has been slightly delayed. One of the reasons for delay seems to be attributable to the taxpayers, who were awaiting Rollback provisions, thus the finalisation of several other APAs have been deferred. As Rollback provisions are announced recently, it is likely that many APA applications could not be signed in the due course. Further, change in the Central Government, the APA field teams, etc. besides the delay in providing requisite information/documents by the taxpayers have slowed down progress of other APAs.

Rollback rules

In Budget 2014, the Finance Minister had announced provisions for Rollback Rules for APA. Detailed rules with respect to the same were recently announced.

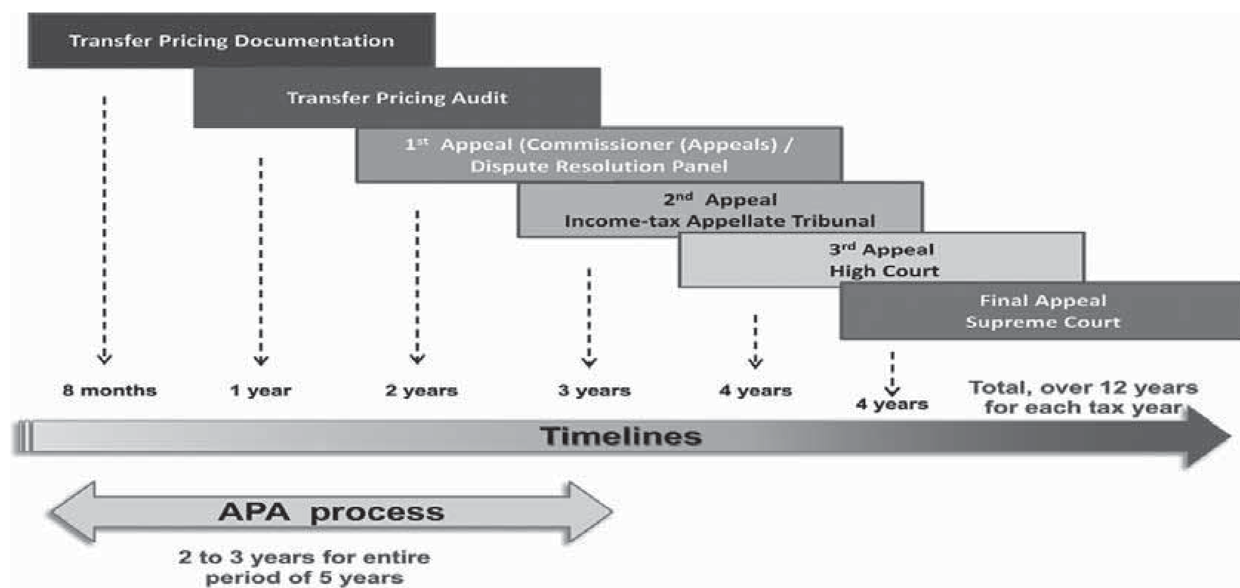
On 14th March, 2015, the Finance Ministry has notified the much-awaited Rollback Rules for APAs. With the APA Rollback process in place, taxpayers can look at achieving certainty for the period up to 9 years. This includes 4 prior years and 5 future years.

The Rollback of an APA would typical entail agreement between the Income-tax authorities and the taxpayer with respect to the transactions and pricing mechanism agreed in the APA, to be applied to past years. The Rollback would be helpful for the years where assessment has taken place and the taxpayers are under litigation before Appellate Authorities or for the years where assessment is yet to take place.

The taxpayers expect that the non-adversarial approach should be extended to Rollback of APA on the same lines as done for APA programme. The determination of arm's length prices for international transactions based on validation of functional, asset and risk (FAR) analysis, even for the preceding years, is expected to encourage and enhance consistency and certainty for the taxpayers.

A chart showing the time taken for a taxpayer to achieve resolution through Appellate route and through APA route (including Rollback) is shown below:

2. Taxsutra report, 2nd April, 2015
3. Taxsutra report, 2nd April, 2015



As seen from the above chart, by entering into an APA, taxpayers can achieve resolution in a span of 2 to 3 years for total of 9 years i.e. 5 future years and 4 past years whereas the regular Appellate route will take much longer period.

Impact on litigation

"The King should collect the revenue like the bee collecting honey without harming the flower"

— Chanakya

Chanakya's dictum seems to be completely forgotten in today's time. The statistics showing year-wise TP adjustments at the beginning of this article aptly summarise the litigation scenario thus far. Apart from some cases where high assessments are made on justifiable grounds, more often, such actions are result of aggressive, inconsistent and blatant pro-revenue approach adopted by the tax officers.

The efforts made in the past to curb TP litigation did not bear the desired fruits e.g. the safe harbour provisions failed to attract taxpayers; the Dispute Resolution Panel ('DRP') did not prove to be much effective, etc. Today, there is long list of cases are pending before the Income-tax Appellate Tribunal ('ITAT'). In the majority of the cases, the ITAT has remanded the matter back to the lower authorities either for fresh adjudication or for further fact-finding. There is a huge inventory of remand matters besides the regular cases pending disposal at various stages. It seems litigation is a never ending journey.

Hopefully, Rollback of APA will enable taxpayers to achieve resolution in the pending cases and reduce the backlog of the outstanding matters. The APA program is globally considered as an effective and proactive dispute mitigation option. It is heartening to note that the Government of India has been able to conclude the 5 out of 8 Unilateral APAs, within a span of 12 months as against the international average norm of approximately 24 months. Further, on 19th December 2014, the Government of India also signed its first bilateral APA, with a timeframe of approx. 18 months, much shorter than the average time taken internationally of 30 to 36 months. Such speedy successful negotiations of unilateral and bilateral APAs are regarded as positive steps towards tax certainty and propel taxpayer to adopt APA route vis-à-vis regular assessment and appeal mechanism.

It is further understood that at least 50 cases[4] are under final round of discussions at the level of the Central Board of Direct Taxes ('CBDT').

4. Financial Express, 24th March, 2015

A faster and efficient disposal would aid in developing the confidence of the investor and business fraternity and foster the investment climate.

Introduction of APA programme in India definitely provides an effective option to taxpayers to mitigate litigation. With introduction of the Rollback provisions, the litigation could be reduced to a large extent for the Rollback years. Besides, the outcome of the APAs would also have a persuasive value for the years pending before the Appellate authorities prior to the Rollback years. Thus, it would be win-all situation for both the parties.

While the Rollback Rules have been made effective immediately, there are several questions posed by the taxpayers, which need to be addressed at the earliest. Few of the critical issues are discussed hereunder:

Stringent criteria for applicability of Rollback

Rollback to be applied only in respect of the 'same' international transaction

- Whether the term 'same international transaction' entails that transactions during the APA period and the Rollback period has to be with the same AEs or even transaction with different AEs would also be covered considering no change in the functional and risk profile and remuneration policies of the MNE?

  e.g. if during APA period, the transaction of provision of engineering services is between Indian company and its AEs in the USA, whereas during the Rollback period, the same transaction is between the Indian company and its AEs in the UK, whether it would be regarded as 'same transaction' for the purpose of Rollback or not.

- Whether certain changes to the services / processes within the broad category of an international transaction would still be regarded as 'same' international transaction, especially considering no change in the functional and risk profile and remuneration policies of the MNE?

  E.g. Indian company proposes to distribute capsules A and B in India for APA period; whereas during the Rollback period, it has distributed capsules A and D, whether the transaction of import of capsules for distribution would still be regarded as 'same' transaction, would need to be analysed.

- Whether Rollback can be done for only certain international transactions out of several international transactions to be agreed in the APA?

  E.g. Indian auto manufacturer proposes to enter into import of goods for manufacturing, availing corporate guarantee and availing of services from its AE in the USA, during the APA period. Although it has entered into all said transactions during the Rollback period, it may want to enter into Rollback only for corporate guarantee transaction, as the other transactions have been accepted to be at an arm's length in the appellate proceedings before the Hon'ble Tribunal. In such case, there is no clarity in the Rules, whether the taxpayer can choose to avail for Rollback for 1 transaction only out of 3 transactions.

  Further, in case where a matter in a particular year is before the Hon'ble Tribunal for hearing and where Rollback is sought for only 1 transaction out of 3 transactions, whether the Hon'ble Tribunal would dispose-of the matter for remaining 2 transactions or whether the approach adopted by the Hon'ble Tribunal in earlier years would be followed for the transactions under consideration?

Rollback to be requested for 'all' rollback years

- The extant Rule 10MA(2)(iv) provides that the taxpayer needs to apply for the Rollback provisions for all the four years.

  Whether the taxpayer can choose any of the prior four years under Rollback provisions especially in the cases where for certain years, the Income-tax authorities have accepted the transactions to be at an arm's length?

  e.g. In the above example of Indian auto manufacturer, where it has applied for an APA for the period F.Y. 2013-14 to F.Y. 2017-18, the Rollback period would be from FY 2009-10 to F.Y. 2012-13. In case TP assessment has been completed for F.Y. 2009-10 and F.Y. 2010-11 without any adverse remarks, the Rollback exercise for the said years would be an effort in vain and may unnecessarily drag the finalization of an APA.

Return of income filed on time

- The Rollback provisions contain a condition that Return of Income has to be filed with the statutory time-limits allowed as per the Explanation to section 139(1) of the Act, for applicability of Rollback. It seems the taxpayers who have filed belated returns due to genuine difficulty for any previous year may be deprived and may not be eligible to apply for Rollback provision for respective year. In such situation the taxpayer may have to follow regular assessment and appeal route.

The conditions laid for applicability and eligibility of the Rollback provisions seem to be very stringent in contrast to the positive intention of the Regulators to extend benefit to maximum tax payers and make APA programme successful. During the initial phase of the APA programme it was very encouraging to see that the senior Revenue officials in various fora assured adoption of non-adversarial approach and advised taxpayers to make use of the beneficial APA regime.

Thus far the APA programme has been conducted in a cordial and amicable manner. Considering such approach, it will be useful if the CBDT issues suitable clarification in order to avoid ambiguity resulting from interpretation of the Rollback provisions.

Withdrawal from Rollback

- Whether the taxpayer can choose to withdraw from Rollback for any or for all the years?

  Currently, the Rules do not seem to address this aspect. It is pertinent to note that the taxpayer can withdraw its application for APA, however in absence of relevant provisions the taxpayer cannot withdraw the Rollback. In such case, there could be a question that whether disagreement over finalisation of Rollback would have an effect of cancellation of the entire APA.

  This may not be a desired approach and a clarification on this issue may be issued by the CBDT at the earliest.

  Further, due to circumstances, there may be an agreement for transactions for future years, however, the discussions may not conclude for past transactions, in such a case, clarity is required on whether agreement for future years only can be entered.

Tax demand and penalty implications

Tax demand

- While the taxpayer is negotiating pricing of certain transactions with the APA authorities for APA period as well as Rollback period, whether there would be a stay of demand for the ongoing proceedings.

  This question assumes relevance in the context that TP assessments for F.Y. 2009-10 and F.Y. 2010-11 have been completed.

In fact, for F.Y. 2009-10, even final order post DRP directions would have been issued and the authorities would have also started initiating notices for collection of tax demand. In such cases, if the taxpayers have applied for Rollback, the tax demand for transactions under Rollback should be automatically kept in abeyance till the time of disposal of Rollback application.

In case such matter travels to the Hon'ble Income Tax Appellate Tribunal and due to stay hearing, the matter is scheduled for an early hearing, whether the Tribunal would keep the hearing in abeyance pending finality of Rollback. If not, and as seen, whether any direction or remand from the Hon'ble Tribunal to the Assessing Officer to take the Rollback into consideration before passing an order, be regarded as 'disposal by the Tribunal' in terms of Rule 10MA needs to be seen.

In such case, the CBDT may consider issuing safeguard for its interest like requirement of bank guarantee, etc. instead of enforcing the demand.

Penalty:

- In another scenario, a back office service provider agrees for a mark-up of 18% for the Rollback vis-à-vis 15% that it has agreed with its AE, whether there would be levy of penalty on additional 3%?

A suitable and quick clarification with respect to the above is a need of the hour.

Critical assumptions

- The APA plus Rollback period covers a total period of 9 years i.e. close to a decade. In today's ever-changing business environment with new opportunities and newer threats / risks arising frequently, it needs to be clarified whether there could be a possibility to assume different assumptions for both periods / for specific years.

- Further, clarity is awaited on whether the authorities would be willing to agree for different mark-ups in different years, considering change in commercial scenario. This would be more relevant in technology intensive businesses.

Other issues:

- The Rollback provisions were made effective from 14th March, 2015 allowing the taxpayers to file for Rollback by 31st March, 2015 i.e. effectively 12 working days. The time limit in itself was squeezed which did not allow the taxpayers to analyse, understand the effects and arrive at a decision to file for Rollback or not.

  Further, clarity is awaited on various factors – some of the crucial ones are discussed above.

  Hence, various taxpayers sought for extension of time limit however, the same was issued *vide* a press release by the CBDT at the end of the day on 31st March 2015, creating some hardship for the taxpayers.

- In cases where an APA is about to conclude or in the final rounds of discussions, initiation of Rollback would entail additional time and efforts and would further delay the signing of the APA.

  With the increase in workload of the APA teams due to new applications and Rollback applications, the field teams needs to be *beefed* up to ensure faster resolution of the applications.

Issuing timely clarifications with respect to the above shall help the Government and taxpayers to focus their time and resources on sorting the crucial issues rather than focus on procedural aspects. A list of frequently asked questions on this front would help address many concerns and clear the ambiguity.

While the Rollback is expected to mitigate litigation to a large extent, the actual implementation on the ground would be the key to the same. Further, due to ambiguity / subjectivity at field level, newer issues may arise in the future.

Rollback – An international experience

Rollback provisions are covered within the APA programmes of various countries such as China, Canada, Japan, Netherlands, Germany, the USA, the UK, etc.

Different countries prescribe different applicability criteria for rollback of APAs.

China: Rollback of APA is subject to approval from tax authorities and applicable to the rollback period as far as 10 years.

Canada: APAs cannot be rolled back to taxation years once a TP audit has commenced.

Japan: The National Tax Agency (NTA) prefers Bilateral APAs and a rollback of up to six years is possible in the case of a Bilateral APA. Rollback is not permitted in Unilateral cases.

Germany: offers Rollback to be covered however, within a separate Mutual Agreement Procedure ('MAP') which is conducted along with the APA programme.

The Netherlands: Provides for rollback if the relevant facts and circumstances have not changed, or if accurate adjustments can be made.

UK: Rollback is allowed only in the case of Bilateral or Multilateral APAs.

USA: The Internal Revenue Services' (IRS) policy is to use rollbacks, whenever feasible, based on the consistency of the facts, law and available records for the prior years. For Unilateral APA requests, the said policy does not apply in cases where rollback would decrease taxable income on a return filed for a taxable year not covered by the APA.

Way forward

The Indian APA Rollback regime has been introduced and designed to bring in positive changes in the Indian TP litigation system which was being perceived internationally as highly aggressive. Its aim is to be to reduce TP litigation by making tax authorities and taxpayers work in collaboration.

The objective of an APA regime is to provide tax certainty for cross-border transactions by encouraging taxpayers to present all the relevant facts before the tax authorities to arrive at mutually acceptable TP methodology. The highlight of the APA regime is the pragmatic, rational and business-like approach of Indian APA authorities with determination to make the programme successful. The APA Rollback regime is an important step towards providing certainty to taxpayers.

Having said that, the APA programme in India is still at an initial stage and it undoubtedly holds a great potential to reduce TP litigation. However, realistic expectations and transparency is required from both the taxpayer and APA authorities for amicable and quicker resolution.

The APA Rollback is a time and resource intensive process. A taxpayer should choose the APA Rollback option depending on the structure of its business and countries involved in the transaction. Pre-filing consultation is an important step – even though the same has been made optional, the tax payers should make use of this opportunity to discuss relevant questions with the APA authorities and make an informed decision.

The effective implementation of the Rollback rules will require few clarifications and the Rollback Rules in itself may require few tweaks. The clarifications from the CBDT on priority on Rollback Rules will help in boosting investor confidence, thereby benefiting the Indian economy and providing impetus to 'Make in India' program.

CA. Nishant Shah

Advance Rulings
(Central Excise, Customs and Service Tax)

A) SALIENT FEATURES OF AAR MECHANISM IN BRIEF AND SOME CRITICAL ISSUES

Introduction

Tax law has always been and continues to be inherently complex and ambiguous. This creates uncertainty in tax liabilities and consequences, the magnitude of both further exacerbated by frequent changes in law. The uncertainty, in turn, deters taxpayers from carrying out contemplated transactions, while others who do carry out the transactions bear the risk of potential loss and contracted litigation stemming from erroneous assessment or non-assessment of tax liability, as the case may be.

It was the dire need for certainty concerning tax consequences of a contemplated transaction as also for an ability to assess potential liabilities that created scope for advance rulings in the realm of tax administration and tax compliance. Advance ruling gives the taxpayer a much-needed opportunity or rather an interface to turn to the tax authorities for a binding ruling on the tax consequences of the transaction and then decide whether the transaction should be carried out or not. It also helps obviate long-drawn and expensive litigation at a later date. Accordingly, advance tax rulings have received considerable attention from tax scholars, practitioners and assessees alike.

Genesis

In India, the scheme of advance rulings first found its way into the law relating to income tax in the year 1993. Thereafter, on June 1, 1998, Shri Yashwant Sinha, the then Minister of Finance, announced his intent to incorporate the procedure of advance rulings into the law relating to Central Excise and Customs as under:

"I also propose to set up an authority for Advance Tax Rulings for Excise and Customs in view of the need for foreign investors to be assured in advance of their likely indirect tax liability".

Legislative provisions for advance rulings were introduced in Customs Act, 1962 and Central Excise Act, 1944 *vide* the Finance Act of 1999. The legal provisions pertaining to advance rulings were subsequently introduced for the law relating to levy and collection of Service Tax *vide* the Finance Act, 2003.

Objective

The scheme of advance rulings seeks to achieve, through an inexpensive and expedited process, the following goals:

- Clarity and certainty of tax liability in relation to a proposed activity, in advance;
- Finality and avoidance of protracted litigation; and
- Transparency.

Given the above objectives and the high pendency of tax cases at both the quasi-judicial and judicial fora, the scheme of advance rulings also serves as an effective Alternative Dispute Resolution (ADR) Mechanism.

Who can seek an advance ruling?

The following persons can apply for an advance ruling:

- A non-resident setting up a joint venture in India in collaboration with a non-resident or a resident;
- A resident setting up a joint venture in India in collaboration with a non-resident; or
- A wholly-owned subsidiary Indian company with a foreign holding company or a foreign company that proposes to undertake any business activity in India; or
- A joint venture in India, that is to say, a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is non-resident having substantial interest in such arrangement; or
- A resident falling within any such class or category of persons as the Central Government may by notification in the Official Gazette specify in this behalf. The Central Government has specified the following categories of persons as being eligible to seek advance rulings:-

  (a) Any Public Sector Company;

  (b) Residents proposing to import goods under the project import facility (heading 9801 of the Customs Tariff) for seeking rulings under the Customs Act,1962;

  (c) Residents proposing to import goods from Singapore under the Comprehensive Economic Co-operation Agreement for seeking rulings on origin of goods under the Customs Act, 1962;

  (d) Resident Public Limited Company;

  (e) Resident Private Limited Company; and

  (f) Resident firm.

While the categories of applicants who could seek an advance ruling remain same under the law relating to Customs, Central Excise and Service Tax, the finer nuances of the procedure may differ for each of the said laws.

Scope of Advance Rulings

Generally speaking, advance rulings in the context of indirect taxes would indicate, in advance, the duty/tax liability in respect of:

- An 'activity', viz. 'import' or 'export' under the Customs Act, 1962, as amended;
- 'Production' or 'manufacture' of goods, under the Central Excise Act, 1944, as amended; and
- 'Service' specified as taxable in Chapter V of the Finance Act, 1994, as amended;

proposed to be undertaken by an applicant.

Specifically, an advance ruling may be sought in respect of the following issues:

Customs Law	Central Excise Law	Service Tax Law
• Classification of any goods under the Customs Tariff Act, 1975. • Applicability of a notification issued under sub-section (1) of section 25 of the Customs Act, 1962 having a bearing on the rate of duty. • Principles to be adopted for the purposes of determination of value of goods under the provisions of Customs Act, 1962. • Applicability of notifications issued in respect of duties under the Customs Act, 1962, Customs Tariff Act, 1975 and any duty chargeable under any other law for the time being in force in the same manner as duty of customs under the Customs Act, 1962. • Determination of origin of goods in terms of the rules notified under the Customs Tariff Act, 1975 and matters related thereto.	• Classification of any goods under the Central Excise Tariff Act, 1985. • Applicability of a notification issued under sub-section (1) of section 5A of the Central Excise Act, 1944 having a bearing on the rate of duty. • Principles to be adopted for the purposes of determination of value of the goods under the provisions of the Central Excise Act, 1944; • Applicability of notifications issued under the Central Excise Act, 1944, Central Excise Tariff Act, 1985 and any duty chargeable under any other law for the time being in force in the same manner as duty of excise leviable under the Central Excise Act, 1944. • Admissibility of credit of service tax paid or deemed to have been paid on input service or excise duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of the excisable goods. • Determination of the liability to pay duties of excise on any goods under the Central Excise Act, 1944	• Classification of any service as taxable service under Chapter V of the Finance Act, 1994 as amended. • Valuation of taxable services for charging service tax. • Principles to be adopted for the purposes of determination of value of taxable service under the provisions of Chapter V of the Finance Act, 1994 as amended. • Applicability of notifications issued under Chapter V of the Finance Act, 1994 as amended. • Admissibility of credit of duty or tax in terms of the rules made in this regard. • Determination of the liability to pay service tax on a taxable service under the provisions of Chapter V of the Finance Act, 1994 as amended.

However, an advance ruling cannot be sought where the question:

- Is already pending, in the applicant's case, before any officer of the Customs/Central Excise/ Service Tax, the Appellate Tribunal or any Court; or
- Is the same as in a matter already decided by the Appellate Tribunal or any Court.

The situations above-referred create an embargo on the admission of the application.

Making an application for advance ruling and withdrawal

The process of obtaining a ruling is simple, inexpensive and transparent. An applicant desirous of obtaining an advance ruling may make an application to the Authority for Advance Ruling, Central Excise, Customs & Service Tax (AAR), stating the question on which the advance ruling is sought. The application is required to be submitted to the Secretary, AAR in quadruplicate in the prescribed format[1]. Additionally, a demand draft of ` 2,500/- in favour of AAR payable at New Delhi is also to be submitted along with application. Separate applications are required to be filed under the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994 as amended.

The applicant may withdraw his application within thirty days from the date of such application and thereafter, only with the leave of the Authority.

Application checklist

At the time of making the application, the applicant ought to take note of the following:

- Details in the application and the Annexures are required to be filled properly without leaving blanks and facts stated in the application are to be explained properly.
- Names and addresses of jurisdictional Commissioner(s) should be mentioned in the application.
- The designation and authorisation in favour of person who is signing the application should be filed with the application.
- Legible copies of documents should be furnished along with application.
- If the applicant is a Joint Venture or a Wholly owned Indian Subsidiary Company, certified copies of the following documents are to be enclosed, by way of proof of being a valid applicant:–
  - i) Present shareholding pattern duly certified by a Chartered Accountant /registered Company Secretary;
  - ii) Copy of Memorandum of Articles & Associations, last Balance Sheet, if any, etc.;
  - iii) Copies of Joint Venture Agreement, MOU, etc.;
  - iv) List of present Chairman/Managing Director/Directors along with their status, whether Indian/Non-Resident or whether representative of foreign holding company or Indian company.
- The proposed economic/business activity should be properly explained in the application.
- Issue / question, on which the ruling is sought, should be framed properly.
- Statement containing the applicant's interpretation of law and/or facts in respect of questions should be enclosed with application.
- Expert opinion, if required, should be obtained in support of the applicant's interpretation.
- Technical literature or precedents favouring the applicant's stand ought to be collated and annexed to the application.

The AAR – Composition, Powers and Conduct of Proceedings

The AAR is a high level quasi-judicial body headed by a retired judge of the Supreme Court

1 AAR (Cus-I) for Customs, AAR (CE-I) for Central Excise and AAR (ST-I) for Service Tax

of India. Besides the Chairman, there are two Members (of Additional Secretary rank) who have wide experience in technical and legal matters[2]. The seat of the AAR is in New Delhi.

The powers of the AAR can be summarised as under:

- To hear and determine all applications and petitions;
- To remove any difficulty that may arise in giving effect to its order/advance ruling, either suo motu or on a petition made by the applicant or the Commissioner, within a period of three months of noticing the difficulty, by appropriate order that is just and necessary in the circumstances of any case;
- To re-open, for sufficient cause, the hearing of any case, before pronouncement of its order/advance ruling;
- To direct examination of any records, conduct any technical, scientific or market enquiry of any goods or services, to call for reports from experts and order such further investigation as may be necessary for effectual disposal of the application;
- To assume all the powers of a civil court with regard to: (i) discovery and inspection; (ii) enforcing the attendance of any person and examining him on oath; (iii) issuing commissions; and (iv) compelling production of books of account and other records.

Insofar as conduct of proceedings by the AAR is concerned, it may be noted that:

- Typically, such proceedings are open to the public. However, the AAR may, in a given case, order that no person other than the applicant, the Commissioner or their authorised representatives shall remain present during the proceedings, based on specific request from the applicant or the Commissioner, as the case may be.
- When one or both of the Members of the AAR, other than the Chairperson, is/ are unable to discharge his / their functions owing to absence, illness or any other cause or in the event of occurrence of any vacancy or vacancies in the office of the Members, the Chairperson alone or the Chairperson and the remaining Member may function as the AAR.
- Should there be a difference of opinion among the Members hearing an application, the opinion of the majority of Members shall prevail and order/advance ruling of the AAR shall be expressed in terms of the view of the majority. Any Member dissenting from the majority view may record his reasons separately. Where the Chairperson and one other Member hear a case and are divided in their opinion, the opinion of the Chairperson shall prevail.

Procedure on receipt of an application

On receipt of an application, the AAR is required to forward the application to the concerned Commissioner of Customs, named by the applicant in the application, calling for relevant records. If no Commissioner is specified by the applicant, the application is required to be forwarded to the Chairman, CBEC calling upon him to designate, a Commissioner for the purposes of the application, failing which the application shall be proceeded with in the absence of a Commissioner. The AAR may either allow or reject the application, post examination of the application and the records called for.

Where an application is allowed the AAR shall, after examining such further material as may be placed before it by the applicant or obtained

2 At present Mr. Justice V.S. Sirpurkar is the Chairman and Shri S.S. Rana is the Member

by the Authority, pronounce its advance ruling on the question specified in the application. Rulings are pronounced after providing an opportunity of being heard by the Authority and in pursuance of other accepted judicial norms. The process of obtaining a ruling is highly expeditious as the Authority is statutorily required to pronounce the ruling within 90 days of receipt of an application. A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner is sent to the applicant and to the Commissioner of Customs, as soon as may be, after such pronouncement. But, the applicant is not bound to undertake the proposed activity in relation to which he has obtained an advance ruling.

The application is liable to be rejected where the question on which the ruling is sought is either already pending adjudication before any officer of the Customs/Central Excise/Service Tax, the Appellate Tribunal or any Court; or is the same as in a matter already decided by the Appellate Tribunal or any Court. Even in the event of a rejection, the applicant is granted an opportunity of being heard and an order recording reasons for rejection of the application is issued.

Modification / Rectification of advance ruling

The AAR may, *suo motu* or on a petition by the applicant or the Commissioner, but before pronouncement of an advance ruling or before an advance ruling pronounced has been given effect to, on being satisfied that an order/advance ruling was pronounced under mistake of law or fact, modify such order / advance ruling in such respects as it considers appropriate.

Similarly, an advance ruling may be rectified/ amended for errors apparent from the face of the record prior to such ruling being implemented. Such amendment may be made *suo motu* or when the mistake is brought to the notice of the AAR by the applicant or the Commissioner.

Both in the case of a modification or rectification, the applicant and the concerned Commissioner are granted a reasonable opportunity of being heard.

Binding nature of advance ruling

An advance ruling is binding only on the applicant and on the authority with jurisdiction over such an applicant. This position is affirmed by the decision of the Hon'ble Delhi High Court in *UAE Exchange Centre Ltd. vs. Union of India [2010 (19) S.T.R. 599 (Del.)].* Further, such rulings remain binding unless there is a change in the basic law or facts that support the advance ruling. Taxable persons cannot appeal against advance rulings. However, taxable persons may challenge advance rulings by way of writ petitions filed with the jurisdictional High Court or the Supreme Court of India.

The Hon'ble Supreme Court in *Columbia Sportswear Co vs. Director of Income Tax, Bengaluru [2012 (283) E.L.T. 321 (S.C.)]* laid down the principle of writ in a High Court versus Special Leave Petition (SLP) in the Supreme Court against an AAR ruling, laying the controversy to rest by holding that the aggrieved party to a dispute can file a writ against the ruling of the AAR; and only in exceptional situations, the Apex Court shall exercise discretion in allowing an SLP against an AAR ruling. Further, while advance rulings are not binding on other persons or assessees, the ruling bears persuasive value in cases of other persons or assessees.

When is an advance ruling rendered void?

Where the AAR finds, on a representation made to it by the Commissioner of Customs or otherwise, that an advance ruling pronounced by it has been obtained by the applicant by fraud or misrepresentation of facts, it may, by

order, declare such ruling to be void ab initio. Thereupon, all the provisions of the concerned tax statute shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made. The applicant, however, does get an opportunity of a notice and of being heard before the AAR decides about the question as to whether an advance ruling is to be declared void ab initio or not.

Is the AAR an effective ADR mechanism after all?

The efficacy of an advance ruling lies its finality and timeliness. However, in the recent past, there have been increasing instances of both applicants as also tax authorities exploring constitutional remedies against otherwise binding rulings of the AAR, either by way of a writ under Article 226 of the Constitution of India or a special leave petition (SLP) before the Apex Court under Article 136 thereof. The Tax Administration Reform Commission (TARC), in its First Report dated 30th May, 2014, criticised the present AAR system for its flaws, as under:

- Inordinate delays in pronouncing rulings despite a statutory limit of 6 months;
- Delayed appointment of the chairman/ member(s) of the AAR;
- Inconsistency in decisions;
- Limited reach being accessible only to certain classes of taxpayers;
- Limited utility and precedential value of the ruling by virtue of it being applicable to the applicant taxpayer alone and binding only on the facts of each ruling; and
- Lack of accessibility, with the AAR being located at New Delhi and without having any bench elsewhere in the country.

To address the flaws aforementioned, the TARC has recommended that the jurisdiction of the AAR should be made available for domestic cases also with a view to achieve consistency. It also recommended that more benches of AAR should be established at Mumbai, Bengaluru, Chennai and Kolkata to be chaired by retired judges of High Courts, with the principal bench at Delhi to hear complex and high value cases only.

A non-functional AAR causes hardship to investors who want to plan their tax affairs and avoid disputes. The Government would do well to plan appointments to such key positions well in advance and ensure that the AAR disposes applications expeditiously, without sitting on applications for a year or more. This would ensure better tax compliance and smoother tax administration, thereby laying the foundation for a non-adversarial tax regime that the Modi-led government aspires to create!

> "All the powers in the universe are already ours. It is we who have put our hands before our eyes and cry that it is dark."
>
> — *Swami Vivekananda*

CA. Heetesh Veera

Authority on Advance Rulings Practices Global experiences (Indirect Taxes)

As we all are aware, economic health of any country could be determined by the growth of industry and entrepreneurial activity within the country. However, one of the primary factors that can act as an obstacle to the same is the uncertainty of taxation structure operating in the country.

The world is increasingly changing into a global village more so with the advent of e-commerce which is changing the way businesses operate. In this backdrop, the fact that the taxation structure followed by every country is varied adds to the uncertainty factor which has the ability to stifle enterprise and is a road block to growth of industry and in turn the prosperity of a country. It is in this scenario that the concept of 'Advance Rulings' gains significance.

The term 'Advance Ruling' typically means a written and authoritative or acceptable interpretation of the relevant Act, given to a specific person, stating how specific provision of the Act will apply for a particular business arrangement or a specific transaction. An advance ruling request relates to the interpretation of the law for a given set of issues; it is not about information or clarification on what is already provided in the law.

Advance Rulings which are pronounced by the relevant Authority in various countries are typically binding on the department engaged in assessment of goods and services and hence rule out possibilities of disputes and litigation, subsequently. However, a ruling given in respect of an applicant is binding only in that applicant's case and for a given transaction or identical transaction.

The World Trade Organisation ('WTO') *vide* Article 3 of the "Agreement on Trade Facilitation" [referred to as Trade Facilitation Agreement ('TFA')] signed in December 2013 at Bali, Indonesia has made it obligatory for the member countries to have a mechanism for advance rulings which mandates (amongst other features) that:

- The member countries issue advance rulings in a reasonable and time bound manner to an applicant that has submitted a written request containing all necessary information (unless declined)
- The member countries issue of advance ruling may be declined if the question raised in the application is already pending in the applicant's case before any governmental agency, appellate

tribunal or court or has already been decided by any appellate authority or court.

- The ruling shall be valid for a reasonable period of time unless the law, facts or circumstances supporting the ruling changes.

- Revocation, modification or invalidation of advance ruling be based on a written notice to the applicant giving the relevant facts and basis for its decision. Only rulings that had been issued based on incomplete, incorrect, false or misleading information should be revoked/modified/invalidated with retroactive effect.

- The ruling would be binding on the member country in respect to the applicant that sought it and it may be provided that the ruling is binding on the applicant.

- Rulings be issued with regard to the tariff classification and the (non-preferential) origin of goods at the time of importation.

- Member countries also encouraged to provide advance rulings around customs value under a particular set of facts, applicability of member country requirement for relief or exemption from Customs duties, application of member country requirements for quotas, including tariff quotas and any other matter the member country may consider appropriate for issue of an advance ruling.

In the above backdrop it would be worthwhile going through the mechanism of Advance Rulings prevailing in certain countries namely US, Australia and Singapore and the practice followed in India.

Practice followed in Australia

The key aspects with regard to the Australian Advance Ruling mechanism for Customs matters are as follows:

- Australia's Free Trade Agreements generally include provisions addressing the use of advance rulings, in recognition of the role of such rulings in complementing the tariff commitments in these agreements. In particular, binding advance rulings provide greater certainty to companies to facilitate business decisions on investing and making use of the tariff commitments in trade agreements

- Under the Australian law, advance ruling typically covers the following:

  - **Classification advice:** Under this, the identification of the proper tariff heading and subheading determines the duty rate applying to commodities. The authority also provides advice on tariff classification to assist the collection of accurate trade information and statistics, monitoring of controlled goods, collection of revenue, industry compliance with tariff laws, and the effective administration of some industry assistance schemes.

  - **Rules of origin advice:** The Rules of origin determine the eligibility of goods for preferential tariff treatment under free trade agreements. The authority provides origin based advice to importers and exporters to assist them to determine whether goods are eligible for preferential treatment. The advice can be valuable to business in circumstances where the business operators need to have certainty,

when entering into a commercial transaction to be eligible for preferential tariff treatment. In respect of Certificate of Origin ('COO') issued by a third party for the exporting nation, an origin ruling given by the authority of the importing county, provides more certainty to business than a COO. Furthermore, a COO is normally only granted at the time of export of the goods, whereas a customs authority can provide an origin ruling before export and in time to allow business to consider the ruling in its commercial decision-making.

- **Valuation advice**: The authority also provides industry with advice on how to calculate the value of goods to provide greater certainty about duty and other related tax liabilities.

Typically, advance rulings are issued within 30 days from submission of a valid application and sufficient supporting materials and are valid for 5 years from the date of issue of the relevant advice.

Practice followed in United States of America ('U.S.')

The U.S. Customs Department encourages parties who are engaged in transactions relating to the importation of goods into the United States to opt for binding advice from the U.S. Customs Service prior to undertaking such a transaction.

Under the U.S. Customs law, advance ruling typically covers the following:

- **Valuation advice:** The authorities under this category of advice decide upon the valuation methodology that is to be adopted by the importer.
- **Classification advice:** The authorities under such an advice will decide upon whether the goods are from a non-NAFTA (North American Free Trade Agreement) country and used in the production of a good and whether the said commodity is required to undergo any applicable change in tariff classification under the rules of origin if the same had been produced in the NAFTA territory.
- **Rule of Origin advice:** Under the said advice the authorities decide upon the rule of origin so as to ascertain whether the same meets the requirement and there is no change in the classification due to the change in the origin of the goods or whether proposed or actual marking of a good satisfies country of origin marking requirements.

Typically, advance rulings are issued within 120 days from receipt of a request in proper form, including any required supplemental information and are valid unless the law changes or it is modified or revoked.

Practice followed in Singapore

Under the Indirect Tax legislation for Singapore (specifically GST), the companies who wish to seek greater clarity and certainty on how specific provisions of the GST Act will apply for a particular business arrangement or a specific transaction may make an application to the Comptroller of GST ("CGST") for an advance ruling in accordance with Schedule of the GST Act. An advance ruling issued in accordance with these provisions will bind the CGST on the ruling made.

The advance ruling will be binding in the following cases:

- An advance ruling applies to the applicant and the particular

arrangement that is the subject of the ruling request and, where applicable, to the year(s) or period(s), and the provisions of the GST Act, stated in the ruling. The applicant cannot rely on an advance ruling given for a different arrangement, even though the circumstances may be similar, or on an advance ruling given to someone else for a similar transaction.

- An advance ruling binds the CGST to apply those statutory provisions in the manner set out in the ruling issued.

Typically, advance rulings are issued within 1 month from receipt of complete information and are valid for 3 years from the date of issue of the ruling.

Practice followed in India

The Indian Government in order to facilitate trade in the country has set-up an Authority for Advance Rulings (Central Excise, Customs and Service Tax) to give binding rulings, in advance, on Central Excise, Customs and Service Tax matters. The scheme of Advance Rulings had assumed special significance in the context of greater emphasis on Foreign Direct Investment. Advance Rulings afford far greater certainty to foreign investors in respect of their prospective indirect tax liabilities on account of their proposed transactions in goods or services.

Typically, following persons are eligible to apply for advance rulings in Central Excise, Customs and Service Tax legislation:

- Any of the following persons, who proposes to undertake any business activity in India
- A non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or
- A resident setting up a joint venture in India in collaboration with a non-resident; or
- A wholly owned subsidiary Indian company, of which the holding company is a foreign company,
- A joint venture in India; or
- A resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf

Considering the varied indirect tax structure prevailing in India, the Authority for Advance Rulings issues advance rulings under the following three Central legislations for matters as specified below:

- **Customs**
  - Classification of any goods under the Act
  - Applicability of a notification issued under law with regard to the rate of duty
  - Principles to be adopted for the purposes of determination of valuation of goods
  - Determination of origin of goods in terms of the rules notified under the Act.
- **Central Excise**
  - Classification of any goods under the Act
  - Applicability of a notification issued under the law in regards to the rate of duty
  - Principles to adopted for the purposes of determination of value of the goods

  - Admissibility of credit of service tax paid or deemed to have been paid on input service or excise duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of the excisable goods.

  - Determination of the liability to pay duties of excise on any goods under the Act.

- **Service Tax**
  - Classification of any service as taxable service under the Act

  - Valuation of taxable services for charging service tax

  - Principles to be adopted for the purposes of determination of value of taxable service under the provisions of Chapter V of Finance Act, 1994

  - Applicability of notifications issued under Chapter V of Finance Act, 1994;

  - Admissibility of credit of duty or tax in terms of the rules made in this regard

  - Determination of the liability to pay service tax on a taxable service under the provisions of Chapter V of Finance Act, 1994.

However, application for advance ruling is not allowed under the following cases

- Where the case is already pending, in applicant's case, before any officer of the Customs/Central Excise/Service Tax, the Appellate Tribunal or any Court; or

- Where the same has already been decided by the Appellate Tribunal or any Court

Typically, advance rulings are issued within 90 days of receipt of application for advance ruling free from any defect or deficiency and are valid till there is change in law or facts on the basis of which the ruling was pronounced.

Conclusion

The above stated practices in Australia, U.S. and Singapore indicate that these developed countries have an Advance Ruling mechanism in place which takes care of the need of industry to have a certainty to their operations from indirect tax perspective. Advance Rulings are a proven means of facilitating trade, promoting transparency and consistency in customs operations and fostering the participation of enterprises of all sizes in global commerce. Further, the benefits derived from Advance Rulings match up to the mandate of the WTO on trade facilitation.

In the current context given that India is poised to be the next growth story, the requirement of having an advance ruling mechanism which brings certainty to indirect taxation levy on entrepreneurs cannot be overemphasised.

We need to have an advance ruling mechanism which is in sync with the vision of the Government that is "Make in India" and which derives the best practices adopted by various developed economies. Also creating a robust Advance Ruling mechanism which would be able to suitably adapt to the challenges that the biggest game changer for indirect taxation in India i.e. the Goods and Service Tax ('GST') would throw up, is undoubtedly something the architects of GST would have to bear in mind.

(With inputs from Jayakrishna Naidu, Manager, Ernst & Young LLP)

CA. Jayesh Gogri

"Advance Rulings (Central Excise, Customs, Service Tax) – Snapshot of Important Judicial Rulings"

Advance Rulings play a very important role in settling the uncertain situations which are likely to arise in uncertain and ever changing Indirect tax laws, well in advance. At the same time, they also play a very important role in laying down the pathway for the future legal stands to be taken by the assessee as well as the Department, as the same are given normally, when the business activity is at initial stage.

In the present article, an attempt has been made to analyse some of the recent and important Rulings. In some rulings, the important aspects of levy have been clarified whereas, some indicate that Advance Ruling mechanism, cannot be used to circumvent any adverse ruling which is likely to get delivered by some other Judicial forum.

1. Export of services by Indian company to other foreign companies of the same group

1.1 Background

The services provided out of the taxable territory are not taxable in India in terms of section 66B of the Finance Act, 1994. However, the same are treated as 'export' only if satisfy conditions laid down under Rule 6A of Service Tax Rules, 1994. One of the conditions of Rule 6A provides that if the services are provided by an establishment of a person in the taxable territory to another establishment of the same person in the non-taxable territory, such transaction will not qualify as 'exports' (clause (f)). Consequently, even though such transactions may not be taxable in India, may not be entitled to export linked reliefs/ benefits like CENVAT refund, incentives, etc.

In the given case, the applicant was a wholly owned subsidiary in India of a Singapore based Company. The applicant provided marketing and incidental services to another Group companies located in US and China. In consideration, of the above services, the Applicant used to earn convertible foreign currency.

Apart from other questions related to exports, the question before the Authority for Advance Rulings (AAR) was whether the services provided by the Indian company to another group companies out of India, be regarded as services provided by one establishment to other establishment and therefore, whether disqualify as exports as per clause (f) of Rule 6A.

1.2 Ruling

The transaction between two entities can be considered not to be exports only if the transaction is between two 'establishments' of the same person. AAR held that the group companies based at US and China were incorporated as separate legal entities under the respective laws as evidenced by Certificates of Incorporation, and therefore they were not 'merely establishments' of the same person. They were 'distinct entities'. In

view of which, the services provided by Indian Company to other group companies would qualify as exports.

1.3 Comments

Due to subsequent amendments pertaining to intermediary of goods, in Place of Provision of Rules, 2012; Indian service providers providing marketing services to foreign manufacturers may be considered to be provided in India and therefore, may not qualify as exports. However, the ratio laid down by AAR in respect of group entities still holds prime importance. Therefore, the transaction between two group companies can qualify as exports, as the same are different legal entities and not just establishments of the same person as envisaged in Rule 6A(f) of Service Tax Rules, 1994.

Tandus Flooring India Pvt Ltd. Ruling No. AAR/ ST/ 03/2013 dated 26-8-2013. 2014 (33) S.T.R. 33 (A.A.R.)

2. Software – Goods or Services?

2.1 Background

Software has remained one of the biggest bone of contentions as far as various indirect taxes are concerned. For the longest time the same was considered to be goods until Service tax levy was imposed on software in the year 2008. Since then various judgments have been delivered highlighting various aspects of the software.

In the given case, the applicant was engaged in Software related business activities and there were two main variants of their software business:

A. **FPP Model:** the software on a media and its licence supplied in a box, are normally sold to individual customers

B. **PKC/CAL/VL Model:** The software has been obtained by the customer separately (by way of direct electronic downloads in majority cases) and the licenses are procured separately by way of password keys supplied on cards/CDs/e-mails.

The important questions before the AAR were as under:

a. Is service tax leviable in both the models?

b. If the activity of manufacturing of such FPP products, licence keys is outsourced to some other parties, will it be liable to service tax?

c. Whether royalties, if any, paid to the US based parent company would be liable to Service tax under reverse charge?

2.2 Ruling

In respect of FPP model, relying upon the Supreme Court decision in the case of *Oracle Software India Limited 250 ELT 161 (SC),* the AAR held that the activity of supplying software in a pre-packaged condition was not within the ambit of Service tax. The AAR observed that the contention of the applicant was accepted by the Department and therefore, no intervention of AAR required and hence, affirmed the applicant's stand that the same are not subject to Service tax.

However, sale of software through electronic downloads, product keys, were held to be liable to Service tax. Reliance was placed on another Supreme Court Judgment in the case of *Idea Mobile Communications Ltd. 23 STR 433 (SC).*

The activity of outsourcing manufacturing CDs, key cards, etc. were considered to be outside the purview of Service tax, as the same were amounting to manufacture, which is carved out of the service tax net by way of negative list.

Moreover, the royalty paid to the foreign-based parent company was considered to be taxable in India under reverse charge basis.

2.3 Comments

An important judgment delivered by the Madras High Court in the case of Infotech Software Dealers Association on the subject matter was not considered by the AAR while delivering the Ruling. In the said judgment, Madras High Court held that even in the case of sale of "off the shelf" software, there is a possibility of treating the same as provision of service if it is not exclusive sale

and if the sale of such software is subject to the user agreeing to the "end user licence agreement (EULA)". The High Court observed that in such cases, only a licence is granted to the user for usage of data contained in the software, which is a service.

In view of the present AAR ruling and the Madras High Court Judgment, applicability of Service tax on software is unclear. However, the applicant, having got Advance Ruling in their favour, can always take shelter of the same and the Department is bound to follow the AAR ruling in resect of the applicant. It may be interesting to note that Education Guide issued by CBEC, without differentiating the point of EULA, clarifies that sale of any off the shelf software is not subjected to Service tax!

Microsoft Corporation (India) Pvt. Ltd. Ruling no. AAR/ST/04/2013 dated 2-9-2013. 2014 (33) S.T.R. 599 (A.A.R.)

3. Discretionary powers of Advance Ruling Authority

3.1 Background

As per Section 96D(2) of the Finance Act, 1994; AAR can reject the application in following two situations:

(a) If the question raised before AAR is already pending in the applicant's case before any Central Excise Officer, the Appellate Tribunal or any Court

(b) If the question raised before AAR is already decided by the Appellate Tribunal or any Court.

The applicant was subsidiary of a company whose matter was pending before the Customs, Central Excise and Service Tax Appellate Tribunal (CESTAT) on the identical question. The applicant argued that they are having a distinct, separate legal identity independent of their parent company and therefore, they are entitled to apply for the Advance Ruling. The applicant contended that the bar of making application under Section 96D(2) can be invoked only if the question is pending in any matter before any authority in their 'own' case. Since, there was no matter pending in their own case, their application must be entertained even though the identical matter might be pending in case of their parent company before CESTAT.

3.2 Ruling

The matter pending before the CESTAT was identical to the question raised before the AAR. Therefore, the same was not pending in the case of applicant's own case, but was pertaining to the holding company of the applicant. Therefore, there is a possibility that the CESTAT order could be different from the order given by AAR. To avoid, incompatibility in the decisions by two different authorities, the AAR preferred to reject the application in the present case citing a ruling delivered by Income tax advance ruling authority in the case of *Microsoft Operations Pte. Ltd. 310 ITR 409.*

3.3 Comments

Even if the application for advance ruling is made within the four corners of law, if AAR is of the view that the same may not mitigate the objectives of Advance rulings or the application is made to avoid an incompatible situation, it may exercise discretion under Section 96D and may reject the application.

GSPL India Transco Ltd. Ruling No. AAR/ST/4-5/2012, dated 30-3-2012. 29 S.T.R. 642 (A.A.R.)

4. Maintainability of Advance Ruling under Customs Law

4.1 Background

Section 28E of the Customs Act, 1962 provides that the Advance Ruling can be determined in relation to an activity which is proposed to be undertaken by the applicant. The activity as defined under the same Section means export or import.

The applicant was a wholly owned subsidiary of US based company and was engaged in sale

of software and related services. The applicant was also importing certain software or hardware for self use. The US company started providing hardware and related services therefore, the Indian company i.e. the applicant also proposed to import hardware and sell in India. To ascertain the Customs duty implications, the application was made to the AAR.

4.2 Ruling

The term 'activity' as per the provisions of Customs Law is expressly defined to mean export and import. The applicant was already engaged in importing hardware and software though for its own consumption. The activity of importing hardware on commercial basis, cannot be regarded as a distinct activity, as the same is also pertaining to the activity of import. Therefore, the activity of import cannot be regarded as the activity which was not carried out by the applicant prior to making the application and therefore, the application was rejected. AAR further observed that there is no need to assign any extended meaning to the term 'activity' when the same is expressly defined under the law.

4.3 Comments

Even if the applicant might have imported once in its life time any commodity in India, howsoever small or insignificant it may be, and the same may not be for further sale in India, it may still be regarded as an activity of import and in such cases, the AAR may reject the application stating that it is in respect of an ongoing 'activity'. The Ruling was based on the literal interpretation of the definition.

The same may also be true in respect of export.

It is not relevant whether the product being proposed to be imported or exported is distinct from the existing one and if the same is for self use or commercial use.

Oracle India Pvt. Ltd. Order no. AAR/Cus/6-7/ 2011, dated 13-5-2011. 2012 (277) ELT 128 (AAR)

5. Modification of Advance Ruling

5.1 Background

The procedural aspects of Advance Rulings have been codified and find place in Authority for Advance Rulings (Customs, Central Excise and Service Tax) Procedure Regulations, 2005. Apart from various other aspects, the Regulations also provide that in case of any mistake apparent from the records, or if the Advance Ruling is pronounced based on any mistake of law or fact, the authority may rectify/modify the Ruling. (Regulations 18, 19 and 20)

In the instant case, the AAR had issued a Ruling in respect of import of bicycle assemblies in Complete/Semi knocked down condition. However, being aggrieved by the ruling, Commissioner made an application for modification/rectification of the Ruling citing various reasons.

5.2 Ruling

AAR observed that all the pleas raised by the Commissioner had already been discussed and noted by the Authority in its original Ruling. Moreover, the evidence based on which the Commissioner was pleading to get the Ruling modified, was advanced at much later date when the arguments from both the sides had already taken place and the Ruling was reserved. Therefore, the additional evidence, advanced at a much later stage, not to be considered by the Authority.

AAR observed that under the disguise of Modification or rectification, the Commissioner can not ask for an ab *initio* review of the Ruling.

5.3 Comments

Though, it is possible for AAR to modify/rectify the Ruling given but only in the following circumstances:

- There is a mistake apparent from the record
- The Ruling has been pronounced under the mistake of law or fact

Moreover, such modification/rectification of the Ruling needs to be done before the Ruling is given effect of.

Furthermore, under the disguise of modification or rectification, the entire Advance Ruling proceedings cannot be revisited.

H.D. Motors Company India Pvt. Ltd. Order No. AAR/Cus/1/2011, dated 18-2-2011. 2012 (277) STR 113 (AAR)

6. Stage at which the application needs to be made for Advance Ruling

6.1 Background

As per section 96A of the Finance Act, 1994; the application for an advance ruling can be made in respect of any service proposed to be provided.

In the present case, the applicant was engaged in manufacture and export. The applicant was availing Goods transportation by road services for the purpose of dispatching its goods to the ports. Service tax under reverse charge was imposed on GTA services. Therefore, the applicant wanted to know if Service tax is applicable on receipt of GTA services.

6.2 Ruling

Even if the services in respect of which the Advance ruling was sought, had been taxed recently, since the same were pertaining to the ongoing activity and not in relation to any activity which was proposed to be undertaken, application was rejected by AAR.

6.3 Comments

Even if the activity was not taxed at the time of Advance Ruling, but as the same were ongoing activity, the same do not qualify for Advance Ruling. A similar view was also taken in respect of *IJM (India) Infrastructure Ltd. in Order No. AAR/05/(ST)/2006. dated 9-11-2006. 2007 (5) STR 314 (AAR). Orissa Chrome Export and Mining Company Ltd. Order No. AAR/07(ST)/ 2006, dated 14-12-2006. 2007 (6) STR 74 (AAR)*

Conclusion

From the various Rulings discussed above, it appears that the AAR is very strict in admitting any application for Advance Rulings. In most of the above cases, a literal and strict interpretation has been given to the definition dealing with the term 'advance ruling' under various indirect tax laws. It appears, that none of the existing activities are entertained, irrespective of the fact that they were miniscule in quantum or the same were not taxable prior to approaching AAR. Moreover, if the Department does not argue the case against the contentions made by the applicant, the ruling gets pronounced as per the contentions of the applicant.

If an attempt is made to get the advance ruling using the route of subsidiary, the same may not succeed if the department proves that a similar matter is pending in case of the Holding company.

From the past track record, it appears that the rout of Advance Rulings proves to be very fast and assured mode of determining tricky issues pertaining to taxability, as compared to other available alternatives such as adjudication, appeals to tribunals and references/petitions to Courts.

Though there are very less number of Advance Rulings so far due to limited entry of applicants, the same may increase manyfold in view of the recent amendments made *vide* Finance Bill, 2015 permitting resident firms to apply for Advance Rulings. In such a scenario, the strength of the AAR will have to be increased. Presently, in the whole country, the AAR sits only at one location i.e. Delhi, which, with the increase in number of applications, may be spread in other parts of the country.

Shailesh Sheth, Advocate

Settlement Commission (Central Excise, Customs & Service Tax) – Salient features of Settlement Commission in brief & some critical issues

Introduction

The institution of 'Settlement Commission' was first established to deal with the cases relating to Direct Taxes and was based upon the following sanguine observations of the Wanchoo Committee Report:

> *"There is a delirious effect of frequent disclosure schemes on the level of compliance among the tax paying public and the morale of administration. However, this does not mean that the door for compromise with an errant taxpayer should remain forever closed. In the administration of fiscal laws, whose primary objective is to raise revenue, there has to be some room for compromise and settlement. A rigid attitude would not only inhibit a one time tax-evader or an unintending defaulter from making a clean breast of his affairs, but would also unnecessarily strain the investigation resources of the Department in cases of doubtful benefit to revenue while needlessly proliferating litigation and holding up collections. We would therefore, suggest that there should be a provision in law for a settlement with a taxpayer at any stage of the proceedings."*

Vide the Taxation Laws (Amendment) Act, 1975, Chapter XIX-A consisting of Sections 245A to 245M titled "Settlement of Cases" was inserted in the Income-tax Act, 1961 w.e.f. 1-4-1976.

However, for some strange reasons, the Indirect Tax Regime remained without this expeditious remedial mechanism to deal with the ever-proliferating disputes for more than two decades. Ultimately, *vide* Section 110 of the Finance (No.2) Act, 1998, Chapter V containing Sections 31 to 32P titled 'Settlement of Cases' was inserted in the Central Excise & Salt Act, 1944 (as was known at the material time) extending the benefit of this speedy remedy to the Indirect Tax assessees. Simultaneously, similar provisions (Chapter XIVA comprising of Section 127A to 127N) were inserted under the Customs Act, 1962 ('the CA' for short) *vide* the same Finance Act.

Following is the abstract of the Budget Speech of the then Hon'ble Finance Minister, Shri Yashwant Sinha presenting the Union Budget 1998-99 and announcing the setting up of 'Settlement Commission' for Indirect Taxes:

> *"Litigation has been the bane of both Direct and Indirect Taxes. A lot of energy of the Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in*

such disputes. Declogging the system will not only incentivise honest taxpayers, enable government to realise its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-friendly."

Even though, the levy of 'Service Tax' was introduced in 1994, the benefit of 'Settlement of Cases' eluded the Service Tax assessees for almost 18 years. It was only as late as in 2012 that provisions of Sections 32 and 32A to 32P of Central Excise Act, 1944 ('the CEA' for short) relating to 'Settlement of Cases' were made applicable to Service Tax *vide* Section 83 of the Finance Act, 1994 ('the FA' for short) as amended by the Finance Act, 2012 w.e.f. 28-5-2012.

The name of the Commission was 'Customs and Central Excise Settlement Commission' till 6-8-2014, but was changed to 'Customs, Central Excise and Service Tax Settlement Commission' *vide* the Finance (No.2) Act, 2014 effective from 6-8-2014.

The provisions relating to Settlement Commission for Indirect Taxes are on the lines similar to the Settlement Commission for the Direct Taxes. In Re: *Santogen Textile Mills Ltd. – 2002 (141) ELT 580 (Sett. Comm.),* it is observed that the provisions of Settlement under Customs and Central Excise are pari-materia to that of provisions in direct taxes.

[The discussion in the ensuing paragraphs is mainly confined to the statutory provisions relating to 'Settlement Commission' for Central Excise and Service Tax, but is relevant also for Customs]

Objective of Settlement Commission

Needless to say, Settlement Commission provides quite a few advantages to the taxpayers as well as the Government like:

- Expeditious settlement of cases avoiding protracted and costly litigation;
- Applicant can pay the tax dues with interest and can start his life on a 'clean slate';
- Grant of complete/partial waiver of penalty and fine to the applicant;
- Grant of immunity from prosecution to the Applicant-Company/firm as well as the Co-applicants like Directors, Partners and other noticees involved in the proceedings.

In *N. Krishnan vs. Settlement Commission – (1989) 180 ITR 585 (Kar. HC),* it is observed as under:

> *"Settlement Commission is constituted for settling complicated cases of chronic tax evaders as an extraordinary measure, for giving an opportunity to such persons to make a true confession and to have matters settled once for all, and earn peace of mind. It is a forum of self-surrender and not a forum of challenging the legality of assessment order."*

The Apex Court in *Sanghvi Reconditioners vs. UOI – 2010 (252) ELT 3 (SC)* observed:

> *"Settlement Commission is a compromise measure of a statutory settlement machinery, where a big evader could make a disclosure, disgorge what the commission fixes and thus buy quittance for himself and accelerate recovery of taxes in arrears by the State, although less than what may be fixed after long protracted litigation and recover proceedings."*

Statutory Conditions & Procedural Requirements for Applications before the Settlement Commission

Various conditions have been prescribed and procedure laid down for an Applicant who intends to approach the Settlement Commission ('the Commission' for short). These are briefly explained below:

(a) Persons eligible to approach the Commission:

Following persons are eligible to approach the Commission:

(i) An Assessee (in case of Central Excise)

(ii) An Importer or Exporter or any other person (in case of Customs)

(iii) An Assessee (in case of Service Tax)

Can a Co-noticee approach the Commission?

Sections 31 read with 32E of CEA do not specifically provide for a Co-noticee (who is not an Assessee) to approach the Commission. However, in Re: *Gopal Agarwal – 2002 (139) ELT 470 (Sett. Comm.),* it was held that Co-noticees can file applications in same proceedings as main applicant, even if Co-noticees are not 'assessees'.

Also, see In Re: *Oriflame India P. Ltd. – 2000 (122) ELT 601 (Sett. Comm. – 3 Members' Bench).*

However, it shall be noted that Co-noticee can make an application only along with main applicant and he cannot make an application after an application of main applicant is disposed of and settled, when the matter is only of penalty against him and not duty as held in Re: *Sanjay Kumar – 2004 (170) ELT 121 (Sett. Comm.).*

(b) Conditions for filing application (Section 32E of CEA)

Following conditions are prescribed *vide* Section 32E of CEA for making an application before the Commission:

(i) The applicant should have filed Returns showing production, clearance and Central Excise duty paid in the prescribed manner (or ST-3 Returns) for the relevant period;

(ii) A show cause notice for recovery of duty (or service tax) issued by the Central Excise Officer has been received by the Applicant;

(iii) The additional amount of duty (or service tax) accepted by the Applicant in his application exceeds rupees three lakhs; and

(iv) The Applicant has paid the additional amount of excise duty (or service tax) accepted by him along with interest due under Section 11AA of CEA (or Section 75 of FA).

However, *vide* Second Proviso to Section 32E(1) as substituted vide the Finance (No. 2) Act, 2014 w.e.f. 6-8-2014, Commission has been empowered, if it is satisfied that circumstances exist for not filing the Returns, to allow, for the reasons to be recorded in writing, the filing of application.

It is rather unfortunate that the Government has gone only half-way while relaxing the rigour of the condition relating to the filing of periodical Returns by the Applicant for the relevant period to which the application relates. This condition in the first place, never made any sense and was only proving to be an irritant besides leading to waste of paper, time and energy. The applications filed by the Applicant – whether in cases relating to central excise or service tax – who have not obtained the registration since were not discharging their duty/service tax liability at all – either *bona fide* or by design – were being rejected since the Returns were not filed by them. This is despite the fact that the evasion cases were specifically brought within the purview of the Settlement Commission. It was also disturbing that the applications relating to service tax were being rejected even when the Applicant had subsequently filed the ST-3 Returns for the relevant period with late fees. It was therefore imperative that this condition relating to filing of Return is omitted from the statute altogether. Instead, it is now left to the discretion of

the Commission to condone the non-filing of Return and admit the application for the reasons to be recorded in writing. This discretionary power and the manner in which it is to be or it may be exercised may lead to a whole set of new problems.

(c) **Procedure for filing application**

Section 32E of CEA, *inter alia*, provides that an application before the Commission shall be filed in such form and in such manner as may be prescribed. For this purpose, Rules viz. Central Excise (Settlement of Cases) Rules, 2007, Customs (Settlement of Cases) Rules, 2007 and Service Tax (Settlement of Cases) Rules, 2012 are framed.

Following procedure is required to be followed for filing an application before the Commission:

(i) Application shall be filed in Form SC(E)-1 (in case of Central Excise); Form SC(ST)-1 (in case of Service Tax) and Form SC(C)-1 (in case of Customs);

(ii) Application shall be filed in Quintuplicate and shall be accompanied by a fee of ` 1,000/-;

(iii) Application shall be filed by the specified person and verified;

(iv) Application shall be accompanied by the TR-6/GAR-7/E-Challan/s showing (a) payment of application fee and (b) payment of admitted duty (or tax) along with interest.

It shall be kept in mind that the admitted duty (or service tax) along with interest is required to be paid along with application only.

(v) Application shall contain a full and true disclosure of duty (or service tax) liability which has not been disclosed before the Jurisdictional Central Excise Officer, the manner in which the liability has been derived, the additional amount of duty (or service tax) accepted to be payable by the Applicant and such other particulars as may be prescribed including the particulars of such excisable goods (or taxable services) in respect of which the short levy on account of mis-classification, undervaluation, inapplicability of exemption notification or CENVAT Credit or otherwise is admitted.

However, Commission is debarred from entertaining the applications in cases which are pending with the Appellate Tribunal or any Court (Third proviso to Section 32E(1) of CEA refers).

Similarly, an application for the interpretation of the classification of excisable goods under the Central Excise Tariff Act, 1985 (or classification of a taxable service under the FA) cannot be made before the Commission (Fourth proviso to Section 32E (1) of CEA refers).

Application only if the case is pending before the adjudicating authority

Section 32E(1) of CEA, *inter alia*, provides that an application thereunder before the Commission can be made only when a '**case**' is pending before the adjudicating authority on the date of application. The expression 'case' is defined *vide* clause (c) of Section 31 of CEA as under:

> *"S.31 – Definitions – In this Chapter, unless the context otherwise requires,-*
>
> *(a) …. ..*
>
> *(b) …. ..*
>
> *(c) "case" means any proceeding under this Act or any other Act for the levy, assessment and collection of excise duty, pending before an*

> *adjudicating authority on the date on which an application under sub-section (1) of Section 32E is made:*
>
> ***Provided** that when any proceeding is referred back in any appeal or revision, as the case may be, by any Court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause".*

Thus, Commission cannot be approached when a matter is remanded for fresh adjudication to the adjudicating authority by a Court or any appellate authority. It is only when original adjudication is pending that the Commission can be approached.

In an interesting case, it was held that application can be made to Settlement Commission before assessment order is served on assessee (even if order was passed prior to date of submitting application to Settlement Commission) – In Re: *Varinder K. Arora (2009) 180 Taxmann 412 (ITSC MUM).*

Also, see *Vishnu Steels vs. UOI – 2014 (299) ELT 292 (Bom).*

In Re: *Wipro GE Medical Systems – 2001 (134) ELT 305 (Sett.Comm.),* it was held by a majority order (2:1) that an application to Settlement Commission can be made even if customs duty and interest demanded in show cause notice was paid during course of investigation as such amount is only a deposit and not against assessed levy, since assessment is incomplete till adjudication order is passed.

True and full disclosure

An applicant approaching the Settlement Commission is obliged in law to make true and full disclosure of his duty (or service tax) liability which has not been disclosed before the Jurisdictional Central Excise/Customs Officer and the manner in which such liability has been derived as well as the additional amount of duty (or service tax) accepted to be payable by him. It is observed in In Re: *Modi Alkalies & Chemicals – 2001 (133) ELT 240 (Sett. Comm.)* that full and true disclosure is the very basis of approaching Settlement Commission. If full and true disclosure is not made, application is not to be proceeded with.

It was held by the Bombay High Court in the case of *Haji N. Abdulla vs. ITST – 2008 (235) ELT 609 (Bom)* that if full disclosure is not made at the first instance, making disclosure at subsequent proceeding in second application cannot be considered.

However, in *Proctor & Gamble Hygiene in Re – 2001 (134) ELT 847 (Sett. Comm.),* the Applicant had admitted liability only for six months, but not for earlier period. It was held that this is not full and true disclosure and hence, application was not admitted. Later, the company made fresh application. It was held that subsequent application is not barred under Section 32O of CEA as order of Settlement was not passed under Section 32F(7) nor the case was sent back to excise officer under Section 32F(1) – In Re: *Proctor & Gamble Hygiene – 2002 (141) ELT 290 (Sett. Comm.)*

Procedure to be followed by the Commission (Section 32F of CEA)

Following procedure is to be followed by the Commission on receipt of the application:

- On receipt of application, Commission will issue notice within 7 days to explain in writing why the application should be allowed to be proceeded and then within 14 days from the date of notice, will either allow the application to be proceeded with or reject the application. If no notice is issued within the prescribed period, the application shall be deemed to have been allowed to be proceeded with.
- Commission will call report from Jurisdictional Commissioner of Excise/Customs within 7 days from the date of order passed by it allowing the application to be proceeded with. Commission shall

send copy of the application while calling for his report, alongwith Annexures, statements and other documents. The Commissioner should sent report within 30 days. However, even if report is not submitted, Commission can proceed with the application.

- Commission can order Commissioner (investigation) to make further enquiries and submit his report within 90 days but can proceed without report.
- Commission, after considering report and granting hearing to the parties, shall pass order within 9 months from last day of month in which application was made.

  However, Commission can extend the period of 9 months by further 3 months.

  Thus, the application shall be disposed of within the maximum period of 12 months as prescribed.

  Here, it may be noted that once an application is allowed to be proceeded with the Commission, the Commission shall have exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise/Customs Officer in relation to the case. In other words, the Jurisdictional Central Excise/Customs Officer shall not be entitled to proceed with the adjudication of the show cause notice under reference once the Commission is seized of the matter.

Powers of Settlement Commission

Commission has been vested with various powers under the statute as described below:

- Commission has all powers of Central Excise/Customs Officer [Section 32I(1) of CEA/Section 127F(1) of the CA refers]
- Commission can attach property of applicant during pendency of proceedings to protect revenue [Section 32G of CEA/Section 127D of CA refers]
- Commission can regulate its own procedure and decide places where the bench will sit [Section 32J(4) of CEA/Section 127F(3) of CA refers]
- Commission has powers to grant immunity from prosecution, penalty and fine but not interest [Section 32K(1) of CEA/Section 127H(1) of CA refers]
- Commission cannot reopen an earlier case connected with pending case, in respect of applications received on or after 1.6.2007 [Proviso to Section 32H of CEA/Section 127H of CA as amended w.e.f. 01.06.2007 refers]. Commission can reopen in case of applications received up to 31-5-2007.
- Powers to send back a case to proper officer if applicant has not cooperated with Settlement Commission [Section 32L(1) of CEA/Section 127-I(1) of CA refers]
- The proceedings before the Commission are judicial proceedings within the meaning of Section 193 and 228 of IPC and for purposes of Section 196 of Indian Penal Code (IPC) [Section 32P of CEA/Section 127M of CA refers]
- Every order of settlement passed under Section 32F(5) of CEA/127C(5) of CA is conclusive as to the matters covered by the order and cannot be reopened except where provided in any law [Section 32M of CEA /Section 127J of CA refers].

Bar on subsequent application for settlement (Section 32O of CEA)

Vide Section 32O of CEA, restrictions are placed on filing of applications subsequently by a person in relation to any other matter under certain circumstances as follows:

(a) Where an order for settlement has been passed by the Commission and penalty is imposed on the person who made the application for settlement on the ground of concealment of particulars of his duty liability (clause (i) of Section 32O(1) of

CEA as proposed to be amended by the Finance Bill, 2015 refers).

The Explanation to Section 32O(1)(i) as inserted *vide* the Finance (No.2) Act, 2014 w.e.f. 6-8-2014 reads as under:

"Explanation – In this clause, the concealment of particulars of duty liability relates to any such concealment *made from the Central Excise Officer."*

(Emphasis provided)

(b) After an order of settlement is passed in relation to a case, if the concerned person is convicted of any offence under this Act in relation to that case (clause (ii) of Section 32O(1) of CEA refers).

(c) If the case of the Applicant is sent back to the Central Excise Officer having jurisdiction by the Commission under Section 32L (clause (iii) of Section 32O(1) of CEA refers).

Under the aforesaid circumstances, the Applicant who has already approached the Settlement Commission, would not be entitled to approach the Commission again for settlement under Section 32E of CEA in relation to any other matter.

Issue for consideration

The restrictive provisions of Section 32O of CEA as aforesaid and particularly, the restriction contained in clause (i) thereof, virtually makes approaching the Settlement Commission a 'once in a life time opportunity'!

It will be observed from the careful reading of clause (i) that if, the Commission by its order passed on an application, imposes a penalty on the Applicant for the concealment of particulars of duty liability, then such applicant is debarred from making an application for settlement before the Commission in relation to any other matter. The Explanation inserted *vide* the Finance (No.2) Act, 2014 (highlighted above), makes it clear that the 'concealment' here refers to the concealment of duty liability before the Central Excise Officer. The implications of this provision and the Explanation thereto are quite serious. It may be mentioned here that even prior to the insertion of Explanation w.e.f. 6-8-2014, certain Members of the Commission have been taking the view, on the basis of clause (i) as existed, that any penalty imposed by the Commission on the Applicant for the concealment of duty liability before the Central Excise Officer would render him ineligible for approaching the Commission again in future in relation to any other matter. Acting on this view, at least, the Mumbai Bench of the Commission have even been rejecting the fresh applications filed by an Applicant in relation to a new case if it is found that such Applicant has been penalised earlier by the Commission for the concealment of duty liability. The submissions made by the Applicant that the 'concealment' here would and can mean only the 'concealment before the Settlement Commission', unfortunately, did not find acceptance by the Bench. The Explanation inserted by the Finance (No.2) Act, 2014 has practically put the stamp of approval on this view point of the Bench and has sealed the fate of the Applicant forever once he has been penalised by the Commission as above.

What is however, not appreciated is the fact that in majority of the cases, the assessee approaching the Settlement Commission would have been guilty of evasion or concealment of duty liability from the department. Such assessees may then see the merit in approaching the Commission and settle the case once for all at a lesser cost of time, money and energy. Since imposition of penalty on such assessees/Applicants, albeit nominal or reasonable, by the Commission has nowadays been more a norm rather than an exception, such persons would automatically be debarred from approaching the Commission again in relation to any other matter. If the objective of the Settlement Commission is to encourage, mainly the tax evaders, to come clean and disclose and pay its tax dues, the restriction contained in clause (i) read with Explanation thereto would frustrate this very objective.

Here, it is also pertinent to note that *vide* the Finance Act, 2007, a specific provision had been inserted in Section 32O of CEA, Section 127L of CA and Section 245K of Income-tax Act, 1961 providing for the bar on approaching the Settlement Commission again once an application is filed and allowed to be proceeded with. This restriction was introduced *vide* sub-section (2) inserted in the relevant Section 32O of CEA or Section 127L of CA or Section 245K of IT Act, as the case may be. **The stated purpose behind this restriction had been to not allow the scheme of settlement being treated as a permanent amnesty scheme by the tax evaders.**

What is significant here is the fact that this restriction came into play, the moment an application filed by the Applicant was allowed to be proceeded with by the Commission. However, the restriction co-existed with the aforesaid restriction in clause (i) that provide for the bar on subsequent application in case the person has already been penalised by the Commission *vide* a Final Order. It is therefore evident that the restriction inserted vide Finance Act, 2007 was much wider and pervasive in nature since it came into play even before the Final Order was passed by the Commission. Both the restrictions as contained in clause (i) of Section 32O(1) and sub-section (2) thereof thus have been operating in different areas and would apply in different circumstances. This also strengthens the argument that the 'concealment' referred to in clause (i) would mean 'concealment before Settlement Commission' only.

It is also important to note that whereas the restriction inserted *vide* the Finance Act, 2007 in Section 245L of the Income-tax Act,1961 is still operative, the similar restriction inserted in Section 32O of CEA and Section 127L of CA were removed *vide* the Finance Act, 2010 w.e.f. 8-5-2010. If the intention of the Government, while introducing the restriction in 2007 was not to make the scheme of Settlement, a permanent amnesty scheme by the tax evaders, then there was really no reason to remove the restriction from Central Excise & Customs statutes in 2010 while retaining it in Income Tax Act. Keeping this historical background in mind, the same consequence cannot be allowed to befall an unsuspecting Applicant on the strength of the restriction contained in clause (i) read with Explanation thereto.

The Explanation as inserted by the Finance (No.2) Act, 2014 may therefore prove to be a body-blow for the Settlement Commission. The net impact of the Explanation can be summed up in just these words – **"the institution is a dead horse!"** That the Commission has been kept functional would mean that we are **"flogging a dead horse!"**

Finally, let us remember the following sage observations of the Bombay High Court made in the case of *Mandhana Dyeing vs. UOI – 2010 (251) ELT 451 (Bom):*

> *"14. The object of the legislation as stated hereinabove is not to close the door for settlement. The object of the Legislature is to open the doors for settlement. It is well settled canon of construction that in construing the provisions of a beneficial legislation, the Court should adopt the construction, which advances, fulfils and furthers the object of the Act rather than the one, which would defeat the same and prevent settlement. Beneficial statutes should not be construed too rigidly as it was for the protection of certain class of persons that the statute was enacted. … ……*
>
> *15. … …. A rigid attitude would inhibit a one time tax evader or unintending defaulter from making a clean breast of his affairs and would also unnecessarily strain the investigation resources of the Government."*

"I'll be judge, I'll be jury' said cunning old fury I'll try the whole cause, and condemn you to death."

(Lewis Carroll in 'Alice in Wonderland')

Bharat Raichandani, Advocate

"No more crawling over entrails of tax disputes" – Settlement Commission

In India, there are burgeoning number of tax disputes, apart from the large number of pending cases that the Indian judicial system is already encumbered with. Tax laws, by nature, seem to be ambiguous and are subject to conflicting interpretations/opinions, through various appellate levels, before being blessed with a final verdict, only to note that, in some cases, finality is the horizon. Significant amount of time, money and effort is being put in both by taxpayers and the Government in long drawn litigations.

Indirect Tax (Customs and Excise) litigation across various levels in India as of November, 2012 (which number definitely must have increased manifold):-

Level at which case is pending	Number of pending cases	Amount disputed (USD billion)*
Commissioner (Appeals)	33,135	1.5
Tribunal	58,994	15
High Court	14,654	2
Supreme Court	3,004	2
Total	109,787	20.5

(*Figures approximated) Source: Federation of Indian Chambers of Commerce and Industry (2013) Dispute Resolution in Tax Matters)

To mitigate the burden on the current system and for expeditious settlement of disputes, India needs to reform, develop and create higher awareness about various dispute settlement and resolution mechanisms available. In reaction to the high costs and delays associated with conventional litigation, there has been a conscious development of alternatives to litigation over the last 20 years in societies around the world[1]. Liberal structure for settlement of tax disputes is now a norm in many countries.

Settlement Commission

As early as 1992, in the Budget speech, the Finance Minister had proposed setting up of Settlement Commission for Customs and Central Excise disputes. However, provisions were introduced only in the Finance Bill, 1998. The stated objective was that the door to settlement with errant taxpayer should be kept open keeping in mind the primary objective of augmentation of Revenue. There has to be

1 JONE, M & MAPLES, A. (2012). Mediation as an alternative option in Australia's tax disputes resolution procedures. Australian Tax Forum. 12 (February), p. 531.

room for compromise and settlement. A rigid attitude would inhibit a onetime tax evader or unintending defaulter from making a clean breast of his affairs and unnecessarily strain the investigation resources of the Government. The settlement machinery is, thus, meant for providing a chance to a tax-evader who wants to turn a new leaf as recommended by the Direct Taxes Inquiry Committee, popularly known as the "Wanchoo Committee".

A settlement by the Settlement Commission is based on the principle of alternative dispute resolution which is in the nature of arbitration or intercession between the taxpayer and the Indian Revenue Authorities. The commission is a mechanism for speedy settlement of cases without going through the adjudication stages having legal challenges, recoveries and other procedural tangles. It may also be referred to as "out of court" settlement. The proceedings before the Settlement Commission are deemed to be judicial proceedings for the purpose of Indian Penal Code.

Keeping the aforesaid objective in mind, the Settlement Commission was constituted under Section 32 of the Act with effect from 9th June, 1999. The various provisions of sections in Chapter V provide details of the functioning of the Settlement Commission. The Central objective of the Settlement Commission is to provide quick and easy settlement of tax dispute of high revenue stake so as to save the time and energy of both, the Litigant and the Department adding to the proverb "Time saved is money saved". Any assessee can make an application to the Settlement Commission containing full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer. The applicant has to accept the additional amount of central excise duty payable by him and such liability should be not less than ` 2/- lac in a particular case.

However, the conditions for availing this facility are restrictive and need to be liberalised. Any proceeding for the levy, assessment and collection of excise duty, pending before the adjudicating authority may be settled by the Settlement Commission. Classification disputes, disputes relating to interpretation of law, disputes below a certain monetary limit and disputes for short levy on goods for reasons other than misclassification, undervaluation and application of exemption notification or CENVAT credit cannot be settled by the Commission.

The scope and jurisdiction of the Settlement Commission also been subject to challenge in courts of law. In Australian Foods Limited case[2], the Madras High Court held that the Settlement Commission, which has been established as a quasi-judicial body under the statute cannot proceed to deal with an aspect which is completely out of its purview and jurisdiction. The jurisdiction of the Settlement Commission is limited to the "case" before it. The expression "case" has been statutorily defined. The said expression has had its share of litigation. In *Ashok Kumar Jain's* case[3], the Delhi High Court held that the Settlement Commission has jurisdiction to settle cases relating to baggage imports. The Special Bench of the Settlement Commission (Order No.01/SB/CEX/2012) held that co-noticees can approach the Commission after the "case" of the main noticee is settled, provided case of the co-noticee is pending. However, in *Viva Herbal Private Limited* case[4], the Bombay High Court held that the orders passed by the Settlement Commission are amenable to writ jurisdiction.

The resort to settlement of disputes finds its roots in mature tax jurisdictions. Hence, it becomes imperative, for us, to look at the dispute resolution mechanisms globally.

2 254 ELT 392 (Mad)
3 292 ELT 32 (Del)
4 260 ELT 168 (Bom)

United Kingdom ('UK')

The UK tax mediation regime is at a comparatively nascent stage. In 2009, when Her Majesty's Revenue and Customs ('HMRC') was burdened with a backlog of tax appeals, there was a growing sense that many tax disputes could be resolved through collaboration between the taxpayer and the tax authority. In 2010, HMRC created a Dispute Resolution Unit ('DRU') to co-ordinate development of a Litigation and Settlement Strategy ('LSS'), which was codified and revised in 2011. HMRC introduced Alternate Dispute Resolution ('ADR') which is a formal procedure for tax dispute resolution. The Civil Procedure Rules carried specific directions to Courts to encourage parties to use ADR procedures so as to achieve fair and expeditious settlement of disputes without unnecessary waste of resources.[5]

Government Departments go to court, as a last resort, and a formal pledge was published committing Government departments and agencies to settle legal cases by ADR techniques, whenever the other side agrees to it. The approach is considered appropriate in cases where the parties are at an impasse and litigation might have to be considered. ADR also helps parties prepare for litigation, which would ultimately reduce litigation costs if ADR efforts do not succeed. However ADR cannot be used to resolve cases involving avoidance schemes or issues for which HMRC has a clear policy position that cannot be compromised.

Within 30 days of application for ADR, an ADR panel of senior HMRC officers decides whether to accept the case or not. If the case is accepted, reasons are provided in writing together with suggestions on how the parties might proceed towards resolution. At least two independent facilitators appointed by the UK Centre for Effective Dispute Resolution ('CEDR') are appointed. The parties sign an ADR agreement, when they commit to work towards resolution in good faith and acknowledge that their discussions will be on a without prejudice basis. The parties exchange position papers summarising their arguments. Facilitated mediation is held with all decision makers present. The goal is to reach resolution and prepare a draft agreement within one day.

Since 2011, HMRC conducted pilot projects for evaluating the benefits of implementing ADR in tax disputes. The statistics highlight how average age of VAT disputes is 8 months and how the average elapsed time for all closed ADR cases is 53 days.[6] In light of the above, it is clear that the UK has progressively developed its tax dispute settlement mechanisms and such approach adopted by the HMRC is a sunshine path for resolving the problem of large numbers of pending tax disputes. Even though the ADR process in the UK is relatively new, they have made considerable progress.

Australia

The Australian-based National Alternative Dispute Resolution Advisory Council ('NADRAC') defines ADR as "those practices, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them." Alternative disputes resolution processes include arbitration, conciliation, mediation, negotiation, conferencing, adjudication, case appraisal and neutral evaluation.[7]

The Australian Taxation Office's ('ATO') Code of Settlement Practice 'provides guidelines on the settlement of taxation disputes in relation to all taxpayers. It provides guidance as to the situations in which settlement could be

5 GOVIND, S. & VARANASI, S. (2013). Dispute Resolution in Tax Matters: An India-UK Comparative Perspective. International Taxation. 9 (September). P. 318.

6 THE UNITED KINGDOM. HMRC. (2011). Alternative Dispute Resolute for SME's and individuals: Project Evaluation Summary.

7 AUSTRALIA. NADRAC. (2003) Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution.

considered and outlines the processes which should be followed'. It also assists in ensuring that 'settlements of taxation disputes occur only in appropriate cases and in accordance with established practices that provide the necessary checks and balances, and there is transparency and accountability in the settlement process.' The Model Litigant Policy, which binds all agencies (including the ATO) under the Financial Management and Accountability Act, 1997 requires agencies to endeavour to avoid, prevent and limit the scope of legal proceedings, wherever possible, including by giving consideration to alternate dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution where appropriate.

The Code lists certain circumstances in which it is appropriate or inappropriate to settle a matter. Appropriate circumstances include circumstances when the cost of litigation outweighs the amount of tax in dispute, when there are opportunities to narrow facts or issues in dispute, when a party is a tax avoidance or other arrangement has come to accept the Commissioner's position and settlement is around the steps necessary to unwind existing structures and arrangements, when certainty or early payment can be achieved, when settlement will achieve compliance by taxpayer in a cost-effective way and when there is a unique issue that cannot be litigated upon. Inappropriate circumstances include matters subject to escalation, matters contrary to law policies and precedential positions, when a similar matter is being litigated and awaiting outcome, and when it is in public interest to have judicial clarification on an issue, etc.

According to ATO, ADR may be applied "at any stage of the dispute".[8] Settlement negotiations are used in Courts and Tribunals in both State and Federal jurisdictions. The ADR process can be mandatory or voluntary, depending on the jurisdiction and the type of ADR used. The ATO ADR process is an interactive one whereby facts, circumstances and information are shared, explained and heard at every stage. The ATO has a Dispute Resolution Network, Dispute Resolution Sub-Committee and Dispute Management Advisory Panel to facilitate and assist in the increased use of AR across the ATO.

Australia's ADR procedures have produced good results in achieving resolutions much more frequently and much earlier in the objection and appeals process.

United States ('US')

The US tax mediation regime is most mature. The US Internal Revenue Service ('IRS') offers a number of ADR mechanisms that can be engaged at various points in the assessment and appeals process. These include Fast Track Settlement ('FTS'), Fast Track Mediation ('FTM') and Post-Appeals Mediation ('PAM').

The FTS programme was introduced about 10 years ago and is the most popular IRS ADR mechanism. The approach is available to all Large Business and International Division taxpayers and has been extended to smaller taxpayers and tax-exempt entities. Both factual and legal issues can be negotiated. FTS appeals are resolved by utilising the assistance of a FTS Appeals official trained in mediation and dispute resolution techniques. The FTS Appeals official serves as a neutral mediator and also has the ability to use delegated settlement authority to offer a settlement in the event parties cannot reach a settlement through the use of mediation techniques. Taxpayers can request FTS once an examination letter has been sent to the taxpayer and after an issue is fully developed, but before a 30-day preliminary notice of deficiency has been sent. Settlements can be based on the hazards of litigation, allowing the examination team to weigh the potential litigation costs as it negotiates settlement. With few set rules, the

8 JONE, M & MAPLES, A. (2012). Mediation as an alternative option in Australia's tax disputes resolution procedures. Australian Tax Forum. 12 (February), p. 538.

parties have considerable leeway to agree on how DAR will unfold. FTS usually involves a one or two-day informal mediation process.

The goal of FTS is to reach resolution within 120 days of acceptance. A key advantage of FTS is that it can occur while the issue is still with the Examination division, thus, interest on tax dispute will not accrue while the FTS proceeds. Another upside is that taxpayers can withdraw from the procedure at any point without losing their traditional rights to appeal.

Canada

Canada has negotiation as a part of its ADR process. ADR processes that are more adjudicative in nature include settlement conferences. ADR is not a regularly used Canadian dispute resolution tool.

The Canadian Revenue Authority ('CRA'), traditionally, has been reluctant to allow third-party involvement in disputes, but the Tax Court of Canada ('TCC') does have its own means of resolving cases before they go to court. Taxpayers and the revenue authority may arrange a settlement conference, where a TCC judge presides over the discussion between both parties. However the judge is only allowed to make non-binding recommendations, resulting in many cases proceeding to a court hearing. The difficulty in resolving tax disputes is that they must be resolved on a principled basis in accordance with fiscal statutes. There is no ability to negotiate on matters based on a single technical legal question.

Germany

ADR is Germany is relatively new. It was introduced in 2012 as an option in the Mediation Act.

Under German law, judicial mediation is not mandatory; its use is left to the discretion of the courts. In deciding whether to allow mediation in their courts, judges and others questioned whether the tax law is open as a public right to intervention of negotiated solutions. As a result, no tax claims can be negotiated or settled by agreement. Further mediation can only be practiced at the tax courts as courts of first instance. No mediation is permitted at the federal Fiscal Court, which is a pure Court of Appeals on legal matters.

New Zealand, Netherlands and Portugal have seen the benefits of ADR in resolving tax disputes.

France has no formal ADR practice in place. However, a number of administrative processes exist trying to reduce incidents of cases reaching court. Tax disputes in Brazil are strictly reserved for the courts because the Brazilian tax code has never formally regulated ADR.

On a comparative analysis, it appears that Indian tax mediation strategy, though developing, is at a nascent stage. For astute administration and favourable management of the tax system, a legal framework which allows the Indian tax administration to explore ADR as well enable settlement should be encouraged. Resolving disputes through ADR will be cost effective and expeditious for both the Revenue authorities as well as the taxpayer, apart from withdrawing the burden from the judiciary. Needless to state, there is no bargain of the tax liability, it is an amicable way of resolving a tax dispute.

Additionally, willingness to embrace tax mediation is paramount. As noted above, tax mediation regimes in other jurisdictions are mandatory before the appeals stage. India can model a structure based on those archetypes. A successful tax mediation regime must be implemented as a fundamental part of the wider outlook of the tax authorities. Associated operational costs will increase, however, there will be consequent decrease in litigation and investigation costs.

All in all, ADR settlements rests on good faith of the parties to negotiate. It is a collaborative process and its success will bolster India as an investor-friendly jurisdiction.

CA. Vishal Agrawal & Manya Bhardwaj, Advocate

Settlement Commission (Central Excise, Customs & Service Tax) Snapshot of Important Judicial Ruling

Historical background

The Income Tax Settlement Commission was first set up in 1976 by the Central Government based on the recommendation of the Justice K. N. Wanchoo Committee. The Wanchoo Committee was appointed "to examine and suggest legal and administrative measures for countering evasion and avoidance of direct taxes". The recommendations of the Wanchoo Commitees embodied in para 2.32 of the Report are the cornerstone for the foundation of Settlement Commissions for tax matters in India. Para 2.32 of the report reads as under:

> "This however, does not mean that the door for compromise with an errant tax-payer should forever remain closed. In the administration of fiscal laws, whose primary objective is to raise revenue, there has to be room for compromise and settlement. A rigid attitude would not only inhibit one-time tax-evader or an unintending defaulter from making a clean breast of his affairs, but would also unnecessarily strain the investigational resources of the Department in cases of doubtful benefit to revenue, while needlessly proliferating litigation and holding up collections. **We would, therefore, suggest that there should be a provision in the law for a settlement with the taxpayer at any stage of the proceedings.** In the United Kingdom, the 'confession' method has been in vogue since 1923. In the U.S. law also there is a provision for compromise with the tax payer as to his tax liabilities. A provision of this type facilitating settlement in individual cases will give this advantage over general disclosure schemes that misuse thereof will be difficult and the disclosure will not normally breed further tax evasion. Each individual case can be considered on its merits and full disclosures not only of the income but of the modus operandi of its build up can be insisted on, thus sealing off chances of continued evasion through similar practices."

It was noted in the case of *Alpesh Navinchandra Shas vs. State of Maharashtra [2007 (210) ELT 13 (SC)]* that the Settlement Commission came into being as a culmination of the Wanchoo Committee set up for toning up the administration of direct taxes.

The then Hon'ble Finance Minister in his Budget Speech in the year 1992 proposed to set up a Settlement Commission, on the lines

of the Settlement Commission for Direct taxes, for dealing with Customs and Central Excise disputes between the Department and the assessee, with the aim and objective of speedy settlement of tax disputes. The Settlement Commission was accordingly established in 1998 by insertion of sections 31 to 32 PA under the Central Excise Act, 1944 and sections 127A to 127N under the Customs Act, 1962. Provisions relating to settlement of cases were also introduced in the Service Tax enactment in 2012.

Jurisprudence of settlement in tax matters

The concept of settlement in tax matters arose from the need for bringing down tax litigation, and extending a chance to defaulters to come clean with their tax liability ***suo motu***, whilst taking a liberal approach towards assessees who approach the Settlement Commission after disclosing their full liability. The machinery of settlement is not only to encourage un-intending or one-time defaulters to admit their duty liability, but also quicken the process of tax recovery and reduce the strain on the resources of the Government's investigative agencies. While explaining the purpose and objective behind setting up of Settlement Commissions, the Hon'ble High Court of Karnataka in the case of ***Krishnan vs. Settlement Commission [1989 (180) ITR 585]*** held that

> "the Settlement Commission was to be constituted for settling complicated claims of chronic tax evaders as an extraordinary measure, for giving an opportunity to such persons to make a true confession and to have the matters settled once for all and earn peace of mind."

The second primary aim of Settlement Commissions, as embodied in the report of the Wanchoo Committee, is to decipher the modus operandi for tax evasion, so as to allow revenue officers to avoid further tax evasion by the same assessee/clinch tax evasion by other assessees using same tactics.

Voluntary settlement, not adjudication!

"Settlement", as commonly understood, is a voluntary act of ending a dispute on mutually understood terms. This was the rationale behind setting up statutory bodies for settlement of tax disputes, and was also the view adopted by the Bombay High Court, in the case of ***Mandhana Dyeing vs. Union of India reported at 2010 (251) ELT 481 (Bom.)***, wherein it was held that:-

> "Keeping the objective of the Legislation in mind and the scheme framed, any assessee can make application to the Settlement Commission containing full and true disclosure of his liability which was not disclosed by him before the Central Excise Officer. The applicant is expected to deposit additional amount of excise duty admitted to be payable by him as per his own calculations. sub-sections (1) to (5) of section 35F is a stage prior to determination of controversy on merits. At the stage of making application, the question of determination of liability by the Settlement Commission does not arise. The provision contemplates a voluntary act on the part of the applicant. Under these circumstances, the amount of additional duty admitted contemplates voluntary admission on the part of the applicant itself."

From a perusal of the above referred case law, it becomes clear that the machinery of settlement was set up to enable voluntary disclosure and settling of liability. Settlement involves consent and is a voluntary act of the party. However, settlement has to be distinguished from adjudication. No Court can issue any direction to a party to enter into any compromise. As per the Advanced Law

Lexicon by P. Ramanatha Aiyar 3rd Edition 2005, a 'settlement' means the conclusion of a dispute by agreement, generally implying some compromise between the parties, as distinguished from 'adjudication', which means to hear or try and determine as a court; to award judicially; giving or pronouncement of a judgment or decree *(Royal Electronics Pvt. Ltd. vs. Collector of Central Excise [1990 (45) ELT 447 (Tri.-Mad)].*

While distinguishing between the two, the Delhi High Court in the case of *Union of India vs. Dharampal Satyapal vs. Union of India [2013 (298) ELT 653 (Del.)]* while placing reliance on *Picasso Overseas and Others vs. Director General of Revenue (Intelligence) and Another* [W.P. (C) No. 1495 of 2007 and W.P. (C) No. 4401 of 2007] decided on 3-8-2009 by a Division Bench of the Delhi High Court held that

> "the Settlement Commission cannot substitute itself for the adjudicating officer by deciding complicated and highly disputed or contentious questions and issues of facts themselves, because the expression "settlement" is used in the Customs Act in contra-distinction with "adjudication" and the very scheme of the settlement provisions is to settle and not adjudicate."

Jurisdiction and scope of Settlement Commission

In the case of *Express Newspapers [(1994) 206 ITR 443 (SC)]*, the Apex Court has sought to confer wide and liberal powers upon the Settlement Commissions. It was therein that:

> "It is equally evident that once an application made under section 245-C is admitted for consideration (after giving notice to and considering the report of the Commissioner of Income Tax as provided by section 245-D) the Commission shall have to withdraw the case relating to that assessment year (or years, as the case may be) from the assessing/appellate/revising authority and deal with the case, as a whole, by itself. In other words, the proceedings before the Commission are not confined to the income disclosed before it alone.
>
> .... It is neither possible nor advisable to seek to lay down exhaustively the several situations in which the Commission would decide to allow the application to be proceeded with or in which the application has to be rejected. **A case may be a complex one; it may involve prolonged or cumbersome investigation. Another situation may be where having regard to the nature of the case and other circumstances, the Commission may feel in the interest of the Revenue and in the interest of justice that it is better to give a quietus to the case once for all instead of allowing it to be fought through the usual channels. The decision has to be taken by the Commission having regard to all the facts and circumstances before it, in the light of the object, purpose and scheme of the enactment. It is precisely because such wide discretion is given to the Commission that the Act requires that it should be manned by men of integrity and outstanding ability, having special knowledge of direct taxes and business accounts."**

In the case of *Tata Teleservices (Maharashtra) vs. Union of India [2006 (201) ELT 529 (Bom.)]*, the Bombay High Court held that the Settlement Commission has a wide jurisdiction to entertain all kinds of settlement claim applications, with the liberty to reject the same even at the preliminary stage, depending upon the nature and circumstances of the case and the complexity of the case, provided they satisfy the mandatory requirements of filing a Bill of Entry/Shipping Bill and making a full and

true disclosure of duty liability which was not disclosed earlier.

In the case of *Union of India vs. Hoganas Ltd. [2006 (199) ELT 8 (Bom.)]*, the Bombay High Court held that all applications fulfilling mandatory requirements have to be entertained. Thereafter, the Commission has the liberty to reject them at the preliminary stage depending on the circumstances and the complexity. It was further held that the Settlement Commission's jurisdiction is not limited to misdeclaration/similar cases. It has very wide powers to settle matters including those involving show cause notice for confiscation or immunity from criminal prosecution in serious fraud causes, and its jurisdiction could not be limited in the absence of express provisions. Therefore, it was held by a restrictive interpretation of statutory provisions, jurisdiction of the commission cannot be restricted to entertaining settlement applications of *bona fide* cases only.

However, despite a wide jurisdiction having been conferred upon the Settlement Commissions, Courts have directed that the power to settle cases and confer immunity upon errant taxpayers be sparingly utilised, depending from case to case. In the case of *Commissioner of Income Tax vs. B.N. Bhattacharjee & Anr. [AIR 1979 SC 1725]*, it was observed that the Settlement Commission should take due note of the gravity of the economic offence on the wealth of the nation which the Wanchoo Committee had emphasised and should exercise its power of immunisation against criminal prosecutions by using its power only sparingly and in deserving cases.

The Settlement Commission should also refuse to exercise jurisdiction in cases where the difference between the amount demanded and the liability admitted is huge, or in cases which would entail long and detailed investigations. In *Director General of Central Excise (Intelligence) vs. Murarilal Harishchandra Jaiswal Pvt. Ltd. and Ors., [172 (2010) DLT 593 = 2013 (291) E.L.T. 484 (Del.)]*, the Court held that:

> "where at the admission stage under section 127C(1) the case throws a high degree of variation between the facts and contentions of both the parties before the Settlement Commission, then in such a case the Settlement Commission should not even admit an application because it is clear that the Department of Customs does not accept the duty which an applicant feels is payable by him and, therefore, is bound to inquire into highly disputed questions of facts".

The Division Bench, however, hastened to add that these observations will not apply to demands which are totally unsupported. This case was also cited with approval in *Dharampal Satyapal vs. Union of India*, cited supra.

Who can approach Settlement Commission

Any assessee in the case of Central Excise and importer/exporter or any other person in case of Customs may, in respect of a 'case' relating to him make an application for Settlement in the prescribed form and manner. In *Re: Oriflame P. Ltd. [2000 (122) ELT 601 (Sett Comm)]* it was held that Directors can also file an application for settlement as they also fall under the definition of 'assessee'. In *Gopal Agarwal In re [2002 (139) ELT 470 (Sett Comm)]* it was held that co-noticees can file an application in the same proceedings as the main applicant, even if co-noticees are not assessees.

In *S.K. Colombowalla vs. Commissioner of Customs [2007 (220) ELT 492 (Tri-Bom.)]*, the Tribunal held that "the scheme of settlement does not contemplate a situation where a case is settled partly for some applicants and remains pending for others. Reading of the provision relating to settlement makes it clear that only an importer (specified category of person) can file an application for settlement of a case and that once such a case is admitted and settled, the entire case gets settled." The

Tribunal concluded that the case gets settled in its entirety and that such a case then cannot be adjudicated against other co-noticees, even if they did not file an application for settlement.

Scope of the term 'case':

In *Mahendra Petrochemicals Ltd. vs. Union of Inda [2004 (165) ELT 499 (Guj.)]*, wherein the DGFT had been issuing notice for payment of Customs duty on unutilised imported material upon failure to meet export obligation, and the Customs department was encashing the Bank Guarantee, the Hon'ble Gujarat High Court held that it was a 'case' with respect to which the proceedings were pending whereupon settlement application could be filed. It is thus clear that for an application to be filed before the Settlement Commissions, it is not necessary that the proceedings must be under the Customs Act, 1962. The definition of 'case' expressly includes 'any proceedings under any other Act' if such proceeding is for levy, assessment and collection of duty. This decision was maintained by the *Supreme Court in 2004 (174) ELT A35 (SC).*

Application for settlement of cases – Full and fair disclosure

Section 32E of the Central Excise Act, 1944, as well as section 127B of the Customs Act,1962 provide that an assessee/importer/exporter or any other person shall make an application for settlement containing a full and true disclosure of his liability. Requirement of full and true disclosure is a continuing requirement that needs to be satisfied from beginning of proceedings till conclusion and needs to be examined and authoritatively determined at the admission stage only *(CCE vs. True Woods P. Ltd. 2006 [(199) ELT 388 (Del.)* maintained by the Apex Court in *2006 (201) ELT A130 (SC)].* Whether a full and fair disclosure has been made by an applicant has to be decided by the Settlement Commission based on the facts of each case. The Bombay High Court in *Leighton Contractors (India) Pvt. Ltd. vs. Union of India reported at 2014 (306) ELT 281 (Bom.)*, held as follows:

> "We have considered the submissions. It cannot be disputed that an applicant before the Settlement Commission is obliged to make a full and true disclosure in its application and also co-operate with the Commission. This is so as the basis of Chapter XIVA of the Act is meant for an assessee suffering from contriteness. Therefore, the proceeding before the Settlement Commission is not adversorial. However, in this case the petitioners proceeded on the basis that in law they were not required to produce the original purchase invoice of the lessor of the barge as the issue to be settled is a dispute between the Customs Department and the petitioners as formulated in the show cause notice. The petitioners having accepted the valuation made in the show cause notice and the report of the Commissioner of Customs made before the Settlement Commission, no interference in respect of valuation of the barge is called for. Besides, our attention has been invited to the decision in *Hazel Mercantile Ltd. vs. Union of India, 2012 (285) E.L.T. 352 (Bom.) = 2012 (28) S.T.R. 349 (Bom.)*, wherein this Court has held that when the entire duty liability and interest as demanded in the show cause notice has been paid by the assessee, it is not possible for the Settlement Commission to conclude that the petitioners have not co-operated or not disclosed full and true facts in their application for settlement."

It follows that the applicant is not to restrict himself to the duty demanded in the Show Cause Notice. The Settlement Commission, is therefore required to adjudge not merely the Show Cause Notice but to go beyond that.

(Crest Communications Ltd. In re [(2003) 152 ELT 452 (Sett Comm)]. However, mere filing of an application for settlement does not amount to admission of guilt. *(Chassis Systems vs. CCE [(2008) 232 ELT 622 (Tri.)].* Inference of fraud has to be drawn from pleadings and findings of the Commission.

Admissions by the Settlement Commission

In the case of *Light Engineering vs. Union of India [2007 (207) ELT 40 (P&H)],* the Hon'ble High Court held that Settlement Commission is justified in not entertaining an application where full and true disclosure is not made by an assessee, which is a ***sine qua non*** for entertainment of a settlement application. This was also enunciated in the case of *Sanghvi Reconditioners Pvt. Ltd. vs. Union of India [2010 (251) ELT 3(SC)]* and also in *Mars Therapeutics and Chemicals Ltd. vs. CCE [2008 (223) ELT 363 (AP)].*

Powers of the Settlement Commission

The Settlement Commission enjoys the exclusive jurisdiction to exercise the powers and perform the functions of any officer of Customs or Central Excise, as the case may be. An Order passed by the Settlement Commission should provide for the terms of settlement including any demand by way of duty, penalty or interest. It was held in the case of Mahendra Petrochemicals cited supra, that there is no power conferred for waiver of Customs duty. In the case of *B.K. Industrial Corpn vs. Union of India [2004 (169) ELT 13 (Bom.)],* the Bombay High Court held that the Settlement Commission exercising the very same powers as the adjudicating authority was entitled to levy interest on the duty. It was held that if the adjudicating authority was entitled to recover interest, then the Settlement Commission exercising the very same powers was entitled to levy interest on the duty payable. This decision was maintained by the Supreme Court in 2005 (183) ELT A32 (SC).

The Settlement Commission is also vested with the powers to call for a report after a detailed investigation *(Shri Renuga Soft-X Towels vs. Commissioner of Central Excise [2008 (229) ELT 359 (Mad.)].*

Grant of immunity

The Settlement Commission may, if it is satisfied that any applicant has co-operated with the Settlement Commission and has made a true and fair disclosure of his duty liability, grant complete or partial immunity from prosecution for an offence under the Act, as well as complete or partial immunity from the imposition of penalty and fine, with respect to any case covered by the Settlement. However, the Settlement Commission loses its power to grant such immunity where proceedings for prosecution for any such offence have been instituted before the date of receipt of the application for Settlement. In the case of *Ashirwad Enterprises vs. State of Bihar [2004 (168) ELT 433 (SC)],* wherein the criminal prosecution had commenced before making an application for settlement, it was held that immunity cannot be granted in such cases as otherwise it would encourage belated application and become a magnet for attracting tax dodgers. However, with regard to the bar on Settlement Commission to grant immunity for prosecution, the Punjab & Haryana in the case of ***Sukhdeep Bhoday vs. Joint Director General** of Foreign Trade [2007 (216) ELT 181 (P&H)],* opined that the expression "proceedings for prosecution of any offence" cannot be regarded to have commenced on registration of an FIR, which implies only magisterial intervention. Only when a chargesheet is presented before a Magistrate, it could be said that proceedings for prosecution for any offence have been instituted.

C. B. Thakar, Advocate

Salient Features of DDQ Mechanism in brief & Some Critical Issues

Introduction

Under fiscal laws, like Sales Tax, there is always uncertainty about various issues like rate of tax, nature of transaction and others. One of the ways by which any dispute can get resolved is order passed by Revenue Authority like assessment order etc. However, if the order is not in favour of the assessee the matter will go into the litigation and it will take its own time.

Under above circumstances, the law provides resolution to the probable dispute by way of Determination of Disputed Question (referred to as DDQ). Under such system, assessee can approach the designated authority with his issue in advance of any assessment proceeding. The concerned authority can statutorily determine the issue and thus the dealer can get guidance on the issue in advance of assessment.

Statutory Provision

Under MVAT Act, 2002 such power is given under section 56 of the MVAT Act, 2002. The said section is reproduced below for ready reference.

> **"56. Determination of disputed questions:-**
>
> (1) If any question arises, otherwise than in a proceedings before a Court or the Tribunal under section 55, or before the Commissioner has commenced assessment of a dealer under section 23, whether, for the purposes of this Act,-
>
> (a) Any person, society, club or association or any firm or any branch or department of any firm, is a dealer, or
>
> (b) Any particular person or dealer is required to be registered, or
>
> (c) Any particular thing done to any goods amounts to or results in the manufacture of goods, within the meaning of that term, or
>
> (d) Any transaction is a sale or purchase, or where it is a sale or purchase, the sale price or the purchase price, as the case may be, thereof, or
>
> (e) In the case of any person or dealer liable to pay tax, any tax is payable by such person or dealer in respect of any particular sale or purchase, or if tax is payable, the rate thereof, or
>
> (f) Set-off can be claimed on any particular transaction of purchase and if it can be claimed, what are the conditions and restrictions subject to which such set-off can be

claimed, the Commissioner shall, subject to rules, make an order determining such question.

Explanation.- For the purposes of this sub-section, the Commissioner shall be deemed to have commenced assessment of the dealer under section 23 when the dealer is served with any notice by the Commissioner under that section.

(2) The Commissioner may direct that the determination shall not affect the liability under this Act of the applicant or, if the circumstances so warrant, of any other person similarly situated, as respects any sale or purchase effected prior to the determination.

(3) The Commissioner, for reasons to be recorded in writing, may, on his own motion, review an order passed by him under sub-section (1) or (2) and pass such order thereon as he thinks just and proper. The Commissioner may direct that the order of review shall not affect the liability of the person in whose case the review is made in respect of any sale or purchase effected prior to the review and may likewise, if the circumstances so warrant., direct accordingly in respect of any other person similarly situated :

Provided that, no order shall be passed under this sub-section unless the dealer or the person in whose case the order is proposed to be passed has been given a reasonable opportunity of being heard:

Provided further that, before initiating any action under this sub-section, the Commissioner shall obtain prior permission of the State Government.

(4) If any such question arises from any order already passed under this Act or any earlier law, no such question shall be entertained for determination under this section; but such question any be raised in appeal against such order.

(5) The Commissioner, in so far as he may, shall decide the applications for determination in the chronological order in which they were filed."

Practical Utility

The provision is meant to know the liability in advance of assessment. However, the Determination application can be filed only after effecting transaction. In other words it cannot be used in absence of at least one transaction.

There is one more section (section 55) in MVAT Act for Advance Ruling by Tribunal.

In that provision application can be done even before actual transaction is effected, that is based on draft transaction. However said section is not brought into operation till today. Therefore, at present only above provision i.e. Determination upon effecting actual transaction is in operation.

Though the section can be activated only upon effecting transaction, the exception is that it will be for guidance in future and hence the application will be decided immediately or in shortest time. However, the practical experience is against. There is no time limit laid down in provision for disposal. The Determining authority i.e. Commissioner of Sales Tax takes his own time and at times it runs into years. Therefore, sometime it appears to be ornamental piece of legislature rather than of practical use. Further aspects in relation to above are discussed subsequently.

Important Aspects

The importance aspects of the above provisions can be noted as under:

The application should be before assessment commences.

As per Explanation in section 56(1) assessment is deemed to commence when any notice for assessment u/s. 23 is served on the concerned applicant for DDQ. Therefore, the desiring applicant can file DDQ application before any

such notice is served. Once the notice is served for any particular period then applicant cannot apply for Determination in relation to transaction covered by such notice period.

However, applicant can apply for determination of similar transaction of any other period for which notice is not issued.

Amazing Interpretation

There is order in case of *Balaji Telefilms Ltd. (DDQ No.Addl. CST/(PT & Allied Acts)/DDQ/11-2001/Adm-5/81 & 82/Adm-22/B-725 dt. 26-9-2013)* in which the learned determining authority has held that even if the application is filed prior to initiation of assessment, if by the time such application is decided, assessment for the concerned transaction period is completed then the said application becomes non-maintainable. In this case the application was filed in 2001 and kept pending by department. Ultimately in 2013 a writ petition was filed for directing the authority to decide the application. Upon such direction by High Court, application was taken up for hearing. The Determination authority noted that the assessment for 2001 period is already over somewhere in 2008. Therefore, the Determination authority held that now the application is not maintainable. Is it not an amazing interpretation?

It is nothing but mockery of provision. Firstly, to invite application, then to keep pending for years and if compelled to determine, throw it away on ground that the assessment for concerned transaction is over !

The above order is under challenge before Hon'ble Tribunal and we expect Tribunal to give real justice on above issue. In light of Special Bench Judgment in case of *Bharat Pulverising Mills Pvt. Ltd. (Appeal No. 28 of 1979 dated 22-8-1988)* it appears that the above order of determination (Additional Commissioner of Sales Tax) cannot be said to be correct. In above judgment, Tribunal has observed that if against such assessment, in which the concerned transaction for DDQ is covered, no further action is taken and the matter is not kept live then the DDQ cannot be decided. This shows that if against the concerned assessment, appeal etc. is filed and matter is kept live then the DDQ should be decided. If this view is not taken then the provision will become a show piece and without any fault on part of applicant dealer, the department will shirk from its duty and will take benefit of its own delay.

Issues to be covered and manner of Application

The issues relating to which application can be filed are noted in sub-clauses (a) to (f) reproduced above in section 56(1).

The application should be in the format given in rule 64 of MVAT Rules, 2005. The said rule is reproduced below for ready reference.

> **"64. Application for Determination of Disputed Questions, summary rejection, etc.**
>
> (1) A separate application for Determination of a Disputed Question shall be made in respect of each question that is sought to be determined.
>
> (2) The application shall
>
> (a) be in writing,
>
> (b) contain the name and address of the applicant
>
> (c) be accompanied with proof of payment of fees
>
> (d) contain a statement of relevant facts in detail along with supporting evidence, if any;
>
> (e) contain a statement explaining the circumstances in which the dispute has arisen, and
>
> (f) be signed and verified by the applicant himself and not by

any person authorised to appear before the commissioner in such proceedings or by any agent, in the following form, namely:

Verification

I _____________ do hereby declare that the particulars furnished and statements made above are correct and complete to the best of my knowledge and belief.

Place : Signature:

Date : Full Name:

Status:

Address:

(3) The application may be summarily rejected

(a) if it is incomplete with regard to any of the provisions of sub-rule (2), or

(b) if the applicant fails to reply to any query made, or

(c) if, in case of any question posed under clause (e) or (f) of sub-section (1) of section 56, the applicant is not liable to pay (sales tax or as the case may be, purchase tax) into the Government treasury, or, as the case may be, is not entitled to claim set-off on the transaction;

(d) on any other ground which the Commissioner may consider sufficient and which shall be reduced to writing by him:

Provided that, before an order summarily rejecting the application is passed under this sub-rule, the applicant shall be given a reasonable opportunity of being heard."

The applicant should comply with above requirements.

Binding effect of DDQ

The DDQ order is given in case of applicant dealer. However, Hon'ble Bombay High Court in case of ***Kulko Engineering Works Limited vs. The State of Maharashtra (46 STC454)(Bom)*** has held that such DDQ is binding on sales tax authorities in other cases also, which are similar.

However, such DDQ is not binding on the dealers and they can litigate the matter and the Appellate Authority or Tribunal, which is superior to Commissioner of Sales Tax, can consider the validity of existing DDQ.

It can also be mentioned that against the very DDQ, the applicant dealer is entitled to file appeal to Tribunal, if DDQ is against it. From Tribunal order it can further be litigated before Hon. High Court by way of appeal.

Appeal against DDQ by State

It is normally understood that against any order passed by Department officer there is no power of appeal to State Government.

The impropriety, if any, can be corrected by revision/review order by Superior.

In case of DDQ it was believed that since it is passed by Commissioner of Sales Tax, the highest authority in chain of hierarchy, it will not be disturbed except as per review provision. If dealer is aggrieved it can file appeal to Tribunal. However, Department itself cannot challenge it. At the most, there can be review of said order by following procedure discussed subsequently.

However, all above things are laid to rest. In case of DDQ given in case of ***Bharat Petroleum Corporation and Reliance Industries Ltd.*** read with (VAT Appeal No.113 of 2007 dt. 9-9-2014) & others, it was held that the transaction concerned was about goods return and thus it was in favour of dealer.

Surprisingly, State of Maharashtra filed appeal against said DDQ before Tribunal. The action

was challenged before High Court. Hon. Bombay High Court confirmed that State has power to file appeal against DDQ. Now, the matter is being decided by Tribunal.

The moral of story is that the order by higher statutory authority is also not final, if in favour of dealer. Whether DDQ provision is really for benefit of Dealer, itself appears to be disputed issue and the same should be determined first.

Prospective effect

U/s. 56(2) of the MVAT Act, 2002, a very useful power is given to the Determining authority. Under this section the Determining authority can order the effect of the order to be prospective. In other words, if the DDQ is against the expectations of the dealer then Commissioner of Sales Tax has power to protect the liability for the past period under this section and he can order that the adverse DDQ order should operate from the date of the DDQ order. This power is meant to avoid unexpected burden on the dealer. The Determining authority is supposed to utilise the above power in genuine cases to avoid hardship to the concerned dealer. There are various reasons based on which such prospective effect can be given.

It can be noted that the order u/s 56(2) for prospective effect is applicable to the concerned applicant dealer only and others cannot take benefit of the same. The other dealers desiring to have similar effect will be required to apply separately. Reference can be made to the DDQ order in the case of *Safilo India (No.DDQ-11/2009/* ***Adm-3/58/B-3 dt. 25-2-2010)*** in which the above issues are discussed alongwith application of section 56(4).

The department is contemplating that the prayer for prospective effect should be alongwith main application and if it is filed separately, after the DDQ order is passed, then the said prayer will not be maintainable. However, the said position cannot be said to be correct. Reference can be made to the DDQ in case of ***Bharat Milling Industries (DDQ-10-2011/Adm-3/78/B-2 dt. 7-4-2012)*** in which the above issue is discussed.

Review of DDQ

Normally, once the DDQ is passed, it will remain operative till the law changes or it gets overruled because of any judgment of the higher forum. However, to overcome in between position, the power of review is given as per scheme of section 56(3) as reproduced above. Without Review also now orders are being tried to be ineffective by filing appeal as already discussed above.

Effect of section 56(4)

Section 56(4) provides that if the issue raised is already decided by any other order then such issue should not be maintainable in DDQ proceedings. However, the legitimate interpretation of this section is that if such issue is decided in case of same applicant only then on the same transaction DDQ may not be permissible. However, if the DDQ is in some other party then there cannot be any bar for such other dealer. This issue also gets referred in the above DDQ of *Safilo & others dated 25-2-2010.*

Conclusion

The overall situation about DDQ is that though the said provision is for resolving issues of dealers in advance and for guidance, the practical experience is totally discouraging. The time taken to decide itself is frustrating the intention of provision. The technicalities raised are also dampening the hopes of dealers. We hope the above provision will be made more useful by timely disposal and keeping dealer friendly administration.

CA. Kiran Garkar

Snapshot of Important DDQs

In this article, Editor had given me leverage to cover important Determination orders from Commissioner of Sales Tax, Maharashtra State [CST, hereafter]. I have chosen them with specific reasons. Some of them were tested on touchstone by Bombay High Court or Maharashtra Sales Tax Tribunal [MSTT].

I] M/s. Bunge India Pvt Ltd.

DDQ.11/2006/Adm.5/05/B.Mumbai.Dt. 22-2-2008 & DDQ.11/2009/Adm.3/09/B.1 Mumbai. Dt. 19-11-2009.

It was contended in application that 'Margarine' is nothing but 'Vanaspati' and requires to be classified as covered by entry C-100.

The CST deliberated in detail as to how 'Margarine" is not 'Vanaspati' and how though they belong to the same genus they are of different species. Further that Courts have held time to time that classification of product should be governed by common man's perception of it. The present entry compared with earlier entries leaves no scope for any confusion between 'Margarine' & 'Vanaspati'. However, he determined that 'Margarine' is covered by entry C-107(11)(f) from 1-2-2006 to 31-1-2008 and entry E-1 thereafter.

Aggrieved by the order, the applicant preferred appeal before MSTT on 19-3-2008. When it was heard before Tribunal and when it came to the prayer for grant of prospective relief, it was seen that no such prayer was made in original DDQ application. As such, the applicant once again approached CST for prospective effect.

The applicant contended for prospective for prospective relief on following effect.

1) Issue is highly debatable about coverage under entry C-100

2) In the past, Margarine has been held as covered by the expression 'Hydrogenated Vegetable Oil' in 2 DDQs, M/s Hindustan Lever Ltd. (Dt. 14-12-1960) & M/s. Berar Oil Industries (9-7-1975)

3) All along in the past, Margarine has been subjected to tax under entries C-II-37, C-II-30 and C-19 which covered 'Hydrogenated Vegetable Oil' including 'Vanaspati'.

4) Certificate to the nature and composition of margarine from Professor of Institute of Chemical Technology, Mumbai University was produced

The CST opined that there was no confusion in the matter and there was no statutory misguidance as entries have changed from time to time. He refused to give prospective effect DDQ dated 22-2-2008.

Remark: MSTT reversed this determination order on 9-7-2010 and held that 'Margarine' is

covered by entry C-100 and is taxable @ 4%. Department approached Bombay High Court against this decision. *Vide* judgment dated 4th March, 2011; Bombay HC confirmed the decision of MSTT. It brushed aside Revenue's argument that Vanaspati and Margarine are classified differently under Central Excise Act, as it is to be decided independently under MVAT Act. It relied on the opinion of expert who had certified that 'Margarine' is "Vanaspati with about 12 to 16% water with other additives".

It harped on the principle of parity as other manufacturers paid tax @ 4% and even the original appellant paid 4% tax since inception of VAT till determination order. Reliance was placed on ratio laid in M/s Merind Ltd. 136 STC 462 (Bom HC) that once a particular view is taken by the authority, it should not be disturbed.

II] M/s. Chheda Marketing

DDQ. 11/2008/Adm.3/38/B-2 Mumbai Dt. 29-8-2009.

Rate of tax applicable to 'Sunglasses': The applicant had come for determination as Enforcement officials had made it pay tax @ 12.5%. Oxford Dictionary states 'Goggles – Close fitting protective Glasses'. Further clarification to this effect of the goods being covered by C-107(8) was issued by JC (HQ) I. Notification for said entry at Sr. No. 5 refers to excise heading 9004- 'Spectacles, Correctives, Protective or other'.

In determination order, CST has elaborately discussed 'Sunglasses' & 'Goggles' and concluded that they are rightly referred to as 'Sunglasses' during hearing. The term 'Sunglasses' includes both prescription and non-prescription Sunglasses. In the case on hand, he opined that the products are non-prescription sunglasses covered by expression spectacles – Protective.

Then he referred to schedule entry for the purposes of which the notification has been issued. The entry is 'Medical device or a medical implant'. These products under determination can in no terms be said to be 'Medical devices & implants'. Since the Schedule entry itself bars entry to the product, the inclusion in notification does not act otherwise. There may be instances when a particular heading is covered by notification issued for the purposes of any entry, however considering the import of the entry any particular good covered by the heading and thereby the notification does not deserve to be placed in the entry. Any particular excise heading covers a number and variety of articles. It would not be possible and practicable for the legislation to identify all such possibilities where in some goods are not covered by the Schedule entry but are covered by the heading which is sought to be included. In such circumstances, the words used for the purpose of Schedule entry should be looked into and accordingly it should be ascertained whether going by the nature of the product, the same is covered by entry or not.

Then he also observed that States like Tamil Nadu, Rajasthan also have 12.5% on sunglasses. It is common practice to wear sunglasses during the summer season and they are just bought off the shelf. This being so, the coverage of the products in notification would not place such products in the category of 'Medical Devices & implants'. He held them to be covered by Residuary entry E-1 taxable @12.5%

He felt that inclusion of products in notification and clarification given by the Department can be said to mislead the appellant to some extent. As such prospective effect was given to order and liability protected till the date of order, if the applicant has not collected tax @ 12.5%.

The applicant approached MSTT against the said determination order. MSTT ruled down the said order to hold that 'Sunglasses' would be taxable @ 4% under entry C-107(8).

The State then approached Bombay HC. *Vide* order dated 9-8-2012; Bombay HC upheld the MSTT order. "If the legislature in its wisdom has included the sunglasses within the category of 'Medical devises and implants' (by notification dated 23-11-2005), it would not be open to the CST to hold that non prescriptive sunglasses are not medical devises". It also noted that said

notification was amended with effect from 1-5-2011 substituting words 'Corrective spectacles' in place of 'Spectacles – corrective, protective or other'. Thus protective sunglasses are outside the purview of entry C-107(8) with effect from 1-5-2011.

III] M/s. DFM Foods Ltd.

DDQ.11/2012/ADM-6/3/B.1 Dt. 16-10-2014

The applicant dealt in Crax corn rings. The ingredients of the product are corn meal, edible Vegetable Oil, Spices, Condiments, Sugar, acidifying agent & Starch.

It was contended that applicant is dealing in these items since March 2012 and charging 12.5%. However, its competitors are charging 5% on similar products. It was contended that item is covered by entry C-94b as 'Varieties of farsan' as may be notified from time to time by the State Government in the Official Gazette. The entire industry has been treating it as farsan for considerable period of time. The tax has been paid on item as 'farsan' since BST era. It is an established principle of law that where a classification has been accepted but though not strictly covered in the wordings of the entry, such classification is binding on the revenue. *Merind Ltd. (136 STC 462 Bom. HC)* was relied upon.

The CST observed that impugned item does not find a mention in list of items notified as farsan. Each of the notified items does not represent any genus or class or species. The notified items represent individual products having a distinct and known existence. No case could be made for coverage of impugned products under any of the notified items.

Reliance on Merind Ltd. was distinguished and he observed that no Court or Tribunal would approve or endorse such a forced presumption neither would it seek to enlarge legislative intention to hold products not covered by a notification as falling therein. Crax Corn Rings (in different flavours) were held as covered by entry E-1, taxable @ 12.5%.

IV] M/s. Dev Enterprises Ltd. (On behalf of Poona Footwear Dealers Association) Rate of tax on 'Escort 111 SYN Black footwear'.

The Association after spate of surveys made representation about rate of tax on specific footwear. It is their contention that it is not covered by residual entry but is 'Plastic moulded footwear' covered by entry C-74. Relevant excise tariff was 6409.90.90. It is also certified by FDDI Ministry of Commerce as being 'Plastic Moulded footwear'.

It was brought to the notice of Association that representation cannot be treated as application u/s. 56 of the Act. Hence representative application from Dev Enterprise was admitted and informed that conclusions reached in this order is applicable to all dealers of association and on all dealers producing similar products.

Having seen VCDs of manufacturing process, CST concluded that impugned product which is made by DIP (Direct Injection Process) is a 'moulded footwear'. Then CST proceeded to decide if the footwear is plastic footwear. The applicant has admitted that the shoe upper is made of plastic coated materials and not of plastic. The schedule entry covers only 'Plastic footwear' which implies footwear made entirely of plastic. The product cannot strictly be termed as 'Plastic footwear'. The FDDI certificate was given on the basis of clarification in section 12 Chapter 64 Note No.3 of Brief Tariff Notes. Reference in FDDI and also the HSN is unnecessary as well as irrelevant as the entry C-74 does not define products covered by it as per the HSN. Even observations of Karnataka HC in (35 MTJ 139) were relied upon to conclude that impugned footwear is not plastic footwear.

The Association also prayed for prospective effect as the belief was reinforced by the order of JC (Appeals), Karnataka. However, the order passed under a different Act cannot be a ground of prospective effect. Hence said prayer was rejected.

MSTT allowed the appeal against the said determination order. The State posed two questions before Hon'ble High Court:

1] Whether the Tribunal was justified in construing the Schedule Entry C-74 to mean footwear predominantly made of plastic and not as footwear exclusively/entirely made of plastic.

2] Whether 'Escort black' (item in determination) though admittedly not wholly made of plastic would be covered by schedule Entry C-74..

The Court observed 'Adding the expression "predominant" to the imperative process is to add words to the entry. That is to amend the entry – something that is impossible'. Bombay HC referred to *O.K. Play India Ltd. (2 SCC 460), Geep Flashlight Industries [1985 2 ELT 3 (SC)] & A. Nagaraju Bros. [1996 84 ELT 18 (SC)]* while deciding the case. Setting aside MSTT decision, original determination order was upheld.

V] Lalbaugcha Raja Sarvajanik Ganeshotsav Mandal

DDQ/11-2012/Adm-6/30/B.2 dt. 30-12-2013

The applicant had posed 2 questions for determination

1) Whether it is dealer for the purposes of section 2(8) of MVAT Act, 2002?

2) Whether its activity to auction gold & silver ornaments amounts to 'sale'?

The mandal is registered under the Public Trust Act, 1950 and conducts Ganeshotsav every year by raising donations from public and its members. Further that Gold & Silver ornaments are offered in the Hundies secretly. To keep them in custody, in absence of lockers in Bank or any other institution is difficult task. These are made available to the devotees at a very minimal rate, but devotees themselves try to bid to get these ornaments for themselves as a matter of 'Holy Prasad'. The Trust gives a receipt of this donations and it is used for various wide ranging charitable activities carried out for a society at large.

In view of above, it was contended by the applicant that it is not a dealer and it is not doing any business in the form of transactions of sale or purchase.

The CST stated that 'Public Charitable Trust' is deemed to be a dealer for the purposes of the MVAT Act. The explanation itself states that the fiction 'deemed dealers would operate notwithstanding anything contained in clause (4) for 'Business' definition. One has not to ascertain whether deemed category carries on business or not. As such the applicant is a 'dealer' under MVAT.

Further he observed that the offerings received are property of the applicant and disposal of the same is at sole discretion of the applicant. The Sale of Goods Act, 1930 recognises a sale by auction. The terminology used for receipt on account of such 'sale' would not alter the nature of transaction.

There was no scope for ambiguity or scope for misinterpretation. There was no statutory mis-guidance. In view of this, prospective effect was declined.

The applicant had approached MSTT in VAT Appeal 178 of 2014. *Vide* order dated 26-11-2014, the determination order has been upheld. Reliance placed by applicant on *Tirumala Tirupati Devasthanam 1972 STC 266* and *Sai Publication Fund 2002 STC 288* has been distinguished by Tribunal.

VI] M/s. Vipassana Research Institute

DDQ/11-2008/Adm-3/34/B.4 Dt. 18-9-2008

The applicant had requested to determine whether the Institute [VRI] is a 'dealer' liable to take registration under MVAT Act?

The Institute is a registered Public Charitable Trust registered under 'Educational Category'.

It is engaged in the spread and pursuance of the educational studies of vipassana as a system of meditation. It was stated that institute is engaged to carry out educational, meditation and literature activities. Sale of books and publications, Audio-Video CDs and purchase of raw material for the same are incidental activities.

The CST opined that as per explanation due to inclusion of Public Charitable Trust, VRI is a dealer for the purpose of Clause 2(8) but proceeded to check if it gets covered by exception II for educational Institution.

He referred to DDQ in the case of M/s North Point Research & Training Institute (DDQ 11/2003 Dt. 14-9-2006) where the then CST has laid certain criteria to define educational institution. He went through object of trust, discussed if learning meditation is education. He looked into activities pertaining to teaching of Pali language. He arrived at opinion that objects of the Trust were solely aimed at education and research. That criteria stated in North Point are entirely fulfilled. There was no dichotomy in object and activities. The secondary activities were integrally connected with objects of the Trust.

It was held that VRI is not a dealer in view of exception II to the explanation to clause 2(8) of MVAT Act.

VII] M/s. L. G. Electronics India Pvt.Ltd.

DDQ/11/2011/Adm-3/16/B.7 Dt. 30-11-2013.

The question and transaction posed for determination is

"Whether sale of goods by M/s. L. G. International (Singapore) [LGIS, hereafter] to M/s. L.G. Electronics India Pvt. Ltd. [LGEIPL] for USD 70 by effecting delivery of goods through Arshiya Supply Chain Management Pvt. Ltd. [ASCMPL] duly authorised warehousing agent from Free Trade & Warehousing Zone, District Raigad, Maharashtra is a sale effected in the course of import u/s. 5(2) of CST Act or a sale effected within the State of Maharashtra liable for payment of VAT under the MVAT Act?"

The applicant's main harp was on section 50 of SEZ Act which provides exemption from state taxes to the Developer or entrepreneur. Section 53 states that SEZ, shall be deemed to be a territory outside the customs territory of India for the purpose of undertaking the authorised operations and SEZ, with effect from such date as Central Government may notify, be deemed to be apart, inland container depot land station and land customs station, as the case may be, under Section 7 of the Customs Act, 1962. Section 30 provides that any goods removed from SEZ to DTA shall be chargeable to duties under Customs Tariff Act, 1975. It was contended that LGIS has consigned goods in favour of ASCMPL from territory out side India. The said goods were stored in the unit in FTWZ IN SEZ, Panvel and sold there from by LGIS to LGEIPL. The goods are sold before crossing the area where the goods are stored before clearance by the Customs Authorities. Reliance was placed on SC decision dated 3-2-2012 in the case of M/s Hotel Ashoka. It was submitted that LGIS has effected sale to LGEIPL by transfer of delivery order which is document of title to the goods before the goods have crossed the Customs frontiers of India and hence covered by second limb of Section 5(2) of CST Act.

The CST noted that after receipts of goods in Custom station, ASCMPL files bill of entry for Home Consumption which is for transhipment of goods from Customs port to ASCMPL. There is no payment of duty at this stage. Bond is required to be submitted to the Customs Authorities. Clarification about this and entries in books of ASCMPL was sought by CST.

The CST concluded that till issue of commercial invoice, it is ASCMPL acting in the capacity of an agent of LGIS who is holding goods in India. The goods may be at Nhava Sheva Port in Maharashtra or FTWZ i.e. Arshiya in Maharashtra but both these places form a part of territory of India, more particularly State of Maharashtra. The reference to 'Territory of India' is in keeping with general understanding of what comprises the territory of India and not as per the Customs

or SEZ Act. After detailed deliberation, CST concluded that transaction is not covered by both the limbs of Section 5(2) of CST Act.

He distinguished applicant's reliance on Hotel Ashoka's decision. Further he relied on some court judgments wherein after discussing Sections 30.50 & 51 of SEZ Act, the Courts have decisively held that SEZ forms a part of the territory of India.

1) *Kolkata High Court (6237/2011 Dt. 24-8-2012)*
2) *Gujarat High Court (Essar Steel Ltd. 2010/249-ELT 3)*
3) *Karnataka High Court (Shyamaraju & Co. (I) Pvt. Ltd. 256 ELT 193)*

The determination order was passed to read the impugned transaction is not u/s. 5(2) of CST Act, but sale effected within State of Maharashtra liable for payment of tax under MVAT Act.

VIII] M/s. M. Hastimal Textiles (India) Pvt. Ltd.

DDQ/11-2005/Adm.3/58-59/B.2 Dt. 25-2-2010

The applicant had desired to know rate of tax applicable to about 7 products. One of the products was: Cloth for Blouse in running length.

It is observed that the applicant has neither submitted the excise heading under which the product might be covered nor has he produced the excise invoice of the product. The information being incomplete, no determination can be given on the product.

Remarks: With utmost respect to the CST, he failed to do justice to the job entrusted to him. Courts also seek assistance from 'amicus curiae' if need arises. CST should have sought such help. If officer of highest rank does not decide the applicable rate, one can imagine plight of retailer in Ghatkopar/Santacruz market area wherein officer insists to give excise invoice or reference to entry for allowing tax free sales. In fact, in the same DDQ one finds elaborate analysis of entries 61 to 63 of Central Tariff Act, when he comes to rate of tax on 'Covers for mattresses'.

IX] M/s. Sujata Painters

DDQ.11/2007/Adm.3/16/B.1 Dt. 20-1-2012

One of the questions posed for determination was "Whether service tax paid by the company on the transaction forms the part of sale price liable to tax?"

The process charges for powder coating were levied in the bill. It was comprehensive contract for powder coating. The CST observed that property along with services, if any, passes in relation to goods. The service tax is imposed as per provisions of Finance Act, 1994 (Sec. 66). It is in fact on the process of powder coating on base metal which is obviously in respect of goods involved and therefore forms part of sale price liable to tax. Reliance was placed on SC decision in the case of *M/s. Hindustan Sugar Mills Ltd. (43 STC 13).* What SC has said is that whatever constitutes the consideration which buyer pays to the seller is the 'Sale Price'.

The consideration in present case includes tax paid on processing charges and therefore it is a part of sale price. Second part of 'Sale Price' definition enacts an inclusive clause. 'Any sum charged for anything done by the dealer in respect of goods at the time of or before delivery thereof, is to be regarded as sale price. Therefore even if does not fall within first part of definition it gets covered in later part.

In current State budget, there is announcement from Finance Minister, Maharashtra State that they do not intend to collect tax on service tax. Further it has to be noted that very recently on 9-3-2015, MSTT in VAT Appeal 18 of 2013 has reversed the said decision in DDQ. It is held that service tax is not part of sale price, especially when tax on works contract is paid under rule 58. Ratio of Supreme Court decisions in George Oaks Pvt. Ltd. as well as Delhi Cloth & General Mills Co. Ltd. as explained in *Bata India Ltd. [53*

STC 132] by Bombay High Court was considered. MSTT also relied on *M/s. Imagic Creative Pvt. Ltd. 12 VST 371 (SC).* Reference was also made to decision of AP Sales Tax & VAT Appellate Tribunal in the case of M/s. Metafim Irrigation India Pvt. Ltd.

X] M/s Tip Top Enterprises

DDQ.11/2007/Adm.3/21.B.1 Dt. 25-5-2009

The questions posed for determination were

1. Whether in relation to food sales included in composite Banquet Charges, the Sales Tax (VAT tax) payment on 40% portion (i.e., net of 60% service charges subject to service tax) is correct?
2. Whether payment of tax on sale of sweets/ farsan from shopping area as per respective entries C-94 (a)/(b) is correct?
3. Whether discharging tax liability @ 8% under Composition on Restaurant/Banquet hall food charges & food supplies in room services is correct?

CST referred to Bombay High Court decision of *M/s. East India Hotel (99 STC 197),* wherein the Court unequivocally ruled out splitting up of the price of food in service and sale and held that entire price charged in the Menu is taxable.

He also referred to *M/s. K. Damodarswami's case (117 STC 1 SC)* to conclude that when the consideration is paid as a whole for services in hotel, no splitting should be done. If the splitting up is done, that itself would defeat purpose of 46th amendment to Constitution. The bifurcation itself being non-permissible, the question of legislative competence of State to levy tax on the so called service to provide banquet does not come in question.

He distinguished applicant's reliance on

1] *Tamil Nadu Kalyan Mandapam Association (135 STC 480) (SC)*

2] *Imagic Creative P. Ltd. (12 VST 371) (SC)*

3] *Nirmal Agencies (86 STC 450) (Karnataka HC)*

4] *Shree Sanyeeji Ispat Pvt. Ltd. (147 STC) (Guwahati HC)*

CST held that applicant has to pay tax on entire charges charged by him in the bill and not only on the 40% irrespective of how the bill is prepared.

For second question, he observed that as facts are not stated clearly but there is reference that counter sale takes place from the shopping area. He directed to refer to determination order in the case of M/s Jumbo King foods Pvt. Ltd.(Dt. 24-12-2008)

As regards third question, it was determined that benefit of composition scheme for the purposes of section 42 would be eligible, subject to conditions specified in the notification.

MSTT approved reliance on *Builder's Association of India (33 STC 370) (SC), Cap 'N' Chops Caterers (37 VST 226) (Punjab & Har),* and above stated cases. As per Service tax provision tax is required to be paid on 60% portion of composite charge. Therefore such billing manner can't affect the real nature of transaction which is separately dealt in by the customer for the purpose of levy of value added tax. It was held that levy of VAT on entire amount is not justified as having no support of law as well as facts.

It further held that value of goods transferred in passage decoration, flower decoration, sound system with mike, welcome flakes, rose buds are liable to tax as per definition of sales u/s. 2(23) as per rate applicable to them.

As regards second question about sale of sweet meats/farsan from shopping area, it was observed that DDQ order in case of Jumbo King Food was applied without verifying details of such sales seating arrangement, topping material etc. The matter was remanded back. *(Ref.: VAT Appeal No. 41 of 2009 dated 23-4-2013).*

CA. Manish R. Gadia & CA. Jinit R. Shah

OMBUDSMEN – A Road Seldom Taken

Introduction

1. Ombudsman, the use of the term began in Sweden and it essentially means "representative" with the word "Ombud" meaning proxy, attorney i.e. someone who is authorised to act for someone else. There can be Ombudsman is various sectors such as Banking, Insurance, etc.

2. For taxation, Ombudsman would mean a person who is duly appointed and authorised for resolving the grievances or complains of the complainant against the junior-most officers of various departments i.e. Income Tax, Customs, Central Excise and Service Tax.

3. For Income Tax, guidelines are introduced called "The Income Tax Ombudsman Guidelines, 2010", came into force from 1st May, 2010 and for Customs, Central Excise and Service Tax separate guidelines called the "Indirect Tax Ombudsman Guidelines, 2011" were introduced which came into force from 11th May, 2011.

4. The guidelines are introduced with the objective of enabling the resolution of complaints relating to public grievances against the Income Tax, Customs, Central Excise and Service Tax Department and to facilitate the satisfaction or settlement of such complaints.

5. In this article, the author shall be dealing with various aspects of the Ombudsman such as nature of grievances that can be represented, procedure of representing a compliant, etc. under both Direct Tax i.e. Income Tax and Indirect Tax i.e. Customs, Central Excise and Service Tax.

6. The Ombudsmen are independent of the jurisdiction of the Income Tax Department and Customs, Central Excise and Service Tax Department, as the case may be.

For resolution of complaint relating to the grievances against officers of Customs, Central Excise and Service Tax complaint has to be made to Indirect Tax Ombudsman.

Against whom the complaint can be made?

7. The complaints can be filed against the junior-most officers as tabulated under:

Under Income Tax	Under Indirect Tax[1]
• The junior-most Income Tax Officer not below the rank of an Income Tax Officer who has caused grievance to the complainant	• The junior-most Customs, Central Excise and Service Tax Officer not below the rank of an Appraiser of Customs or a Superintendent of Central Excise or Service Tax who has caused grievance to the complainant

[1] Hereinafter Customs, Central Excise and Service Tax collectively shall be referred to as Indirect Tax.

• If the grievance has been caused by an official lower in rank than an Income Tax Officer then against the Income Tax Officer who is in-charge of such official	• If the grievance has been caused by an official lower in rank than an Appraiser of Customs or a Superintendent of Central Excise or Service Tax then against the Officer in the rank of an Appraiser of Customs or a Superintendent of Central Excise or Service Tax who is in-charge of such official

The grounds on which the complaint can be filed

8. The complaints relating to the deficiency in the working of the Income-tax Department and Customs, Central Excise and Service Tax Departments has to be filed before the Ombudsman.

9. The grounds on which the complaint can be filed before the Ombudsman, which are common under both Income Tax and Indirect Tax, are as under:

9.1. Delay in issue of refunds or rebates beyond time limits prescribed by the law or under relevant instruction issued by CBDT or CBEC, as the case may be.

9.2. In sending of refunds, the principle of 'First Come First Served' not adhered to.

9.3. Non-acknowledgement of letters or documents sent to department.

9.4. Delay in giving effect to Appellate orders.

9.5. Delay in release of seized books of account and assets, relevant to particular proceedings, even after the said proceedings are completed.

9.6. Non-adherence of prescribed working hours.

9.7. Unwarranted rude behaviour of the officials with the assessee.

9.8. Any other matter relating to violation of the administrative instructions and circulars issued by the CBDT or CBEC, as the case may be, in relation to administration.

10. Further, additionally complaints, under Income Tax, can be filed for:

10.1. Delay in allotment of Permanent Account Number (PAN).

10.2. Not giving credit of tax paid including tax deducted at source (TDS).

10.3. In case of refunds, sending envelopes without refund vouchers.

10.4. Not updating the demand and other registers leading to harassment of assessees.

10.5. Lack of transparency in identifying cases for scrutiny and non communication of reasons for selecting the case for scrutiny.

10.6. Delay in disposing cases of interest waiver.

10.7. Delay in disposal of Rectification Applications.

11. Furthermore, in case of Indirect Tax complaints can be additionally filed for:

11.1. Delay in adjudication.

11.2. Delay in registration of taxpayer.

11.3. Not adhering to the rules prescribed for disbursement of drawback.

12. It is provided in the Indirect Tax Guidelines that if on any of the grounds in Indirect Tax, the responsibility for taking action is with the CBEC or on a Centralised Authority such as Director General (Systems), then the Ombudsman shall not have the power to give a decision on the matter and in such cases the Ombudsman can only give recommendations

and the same shall be forwarded in writing to the Revenue Secretary or the Chairman, CBEC or the Centralised Authority, as the case may be.

13. The CBDT / CBEC also have powers to include any other ground on which a complaint may be filed with the Income Tax Ombudsman or the Indirect Tax Ombudsman, as the case may be.

Complaints before the Ombudsman can be filed for delaying the allotment of PAN, not giving credit of tax paid including TDS, delaying the issue of refunds and rebates, delaying adjudications, delaying in registration of taxpayer, etc.

Appointment and tenure

14. The Central Government may appoint one or more persons as Ombudsman, in Income Tax and Indirect Tax.

15. The said appointment shall be on the recommendations of a Committee consisting of the Secretary, Department of Revenue in the Ministry of Finance, the Chairman of CBDT (in case of Income Tax) / CBEC (in case of Indirect Tax) and the Member (Personnel) of CBDT (in case of Income Tax) / Member (Personnel & Vigilance) of CBEC (in case of Indirect Tax).

16. The Ombudsman, both Income Tax and Indirect Tax, shall be appointed for tenure of 2 years extendable by one year based on performance appraisal or till they attain the age of 63 years, whichever is earlier. Further, there shall be no reappointment.

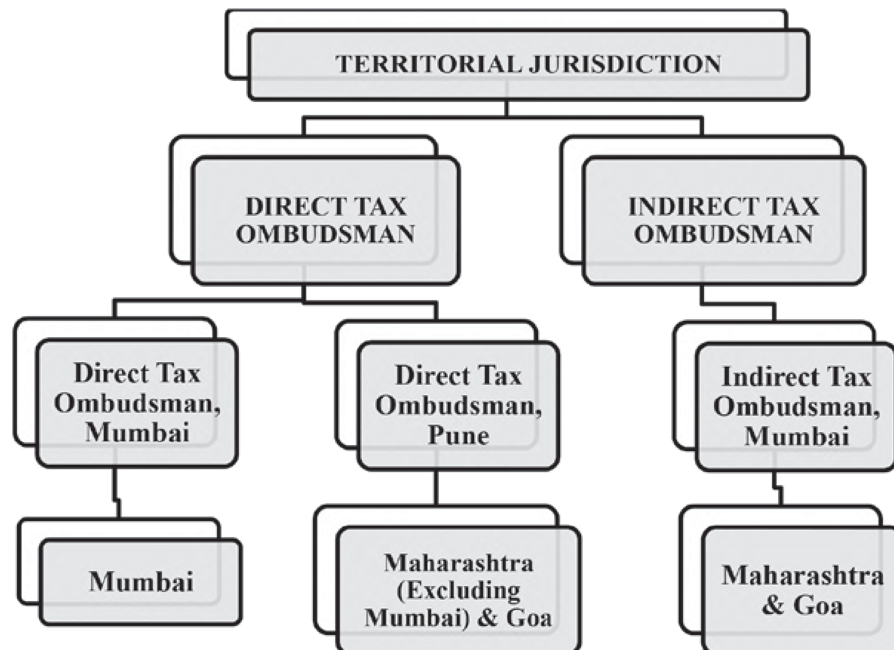
Location of offices and territorial jurisdiction

17. The offices of Indirect Tax Ombudsman shall be located at Delhi, Mumbai, Chennai, Kolkata, Bengaluru Ahmedabad and Lucknow.

18. Whereas, the offices of Income Tax Ombudsman, in addition to the above locations, shall also be located at Hyderabad, Pune, Chandigarh, Bhopal and Kochi.

19. The territorial jurisdiction of Indirect Tax Ombudsman, Mumbai is areas covering the State of Maharashtra and Goa, whereas that of Direct Tax Ombudsman, Mumbai shall cover Mumbai and the Direct Tax Ombudsman, Pune shall cover the State of Maharashtra (excluding Mumbai) and Goa.

20. The Central Government specifies the territorial jurisdiction of each Ombudsman.



Procedure for filing of complaint

21. Any person having grievances may either by himself or through an authorised representative file a complaint against the concerned official to the Ombudsman having jurisdiction over that office i.e. office of concerned official.

22. The complaints can be made in two ways either in writing or in electronic mode (e-mode).

22.1. *Complaint in writing:* If the complaint is made in writing then it shall be signed by the complainant or his authorised representative and shall contain the -

- Complainant's name and address,
- Name of the office and the concerned official against whom the complaint is made,
- Facts giving rise to complaints and the supporting documents, and
- Relief sought from the Ombudsman.

22.2. Where the complaint in writing can be made: The complaint for any grievance can be made in writing (written representation) before the Ombudsman at the following addresses, covering only Maharashtra and Goa:

- **Income Tax Mumbai:** Income Tax Ombudsman, Mittal Tower, 'B' Wing, Room No. 115, Nariman Point, Opp. Vidhan Bhawan, Mumbai – 400 021.
- **Income Tax Maharashtra (excluding Mumbai):** Income Tax Ombudsman, Room No. 301, 3rd Floor, Annex Building, 60/61, Praptikar Sadan, Erandwane, Karve Road, Pune – 411 004.
- **Indirect Tax Mumbai:** Indirect Tax Ombudsman, Plot No. C-24, Sector E, Utpad Shulk Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051.

Note: *Currently, the office of Income Tax Ombudsman, Mumbai is vacant.*

(Source: http://www.incometaxindia.gov.in/Pages/ombudsman/knowyourombudsman.aspx)

22.3. Complaint in e-mode: In case of e-mode, the print out of the complaint shall be taken into the records by the Ombudsman. The said print out shall be signed by the complainant at the earliest possible time before the conciliation or settlement by the Ombudsman and the said signed print out shall relate back to the date on which the complaint was made through electronic means.

22.4. E-mail addresses for electronic complaints: The e-mail addresses of the Ombudsman which covers the Maharashtra area are as under:

- **Income Tax Mumbai:** mumbai-itombuds@nic.in
- **Income Tax Maharashtra (excluding Mumbai):** ombudsman.pune@incometaxindia.gov.in
- **Indirect Tax Mumbai:** ombudsman-mum@nic.in

Conditions to be fulfilled before making the complaint

23. Certain conditions are required to be adhered to before making of complaint to Ombudsman, both Income Tax and Indirect Tax. The said conditions are as under:

23.1. Written representation to the superior authority: Before making the complaint to the Ombudsman written representation should be made to the authority, superior to the one complained against and such authority has either -

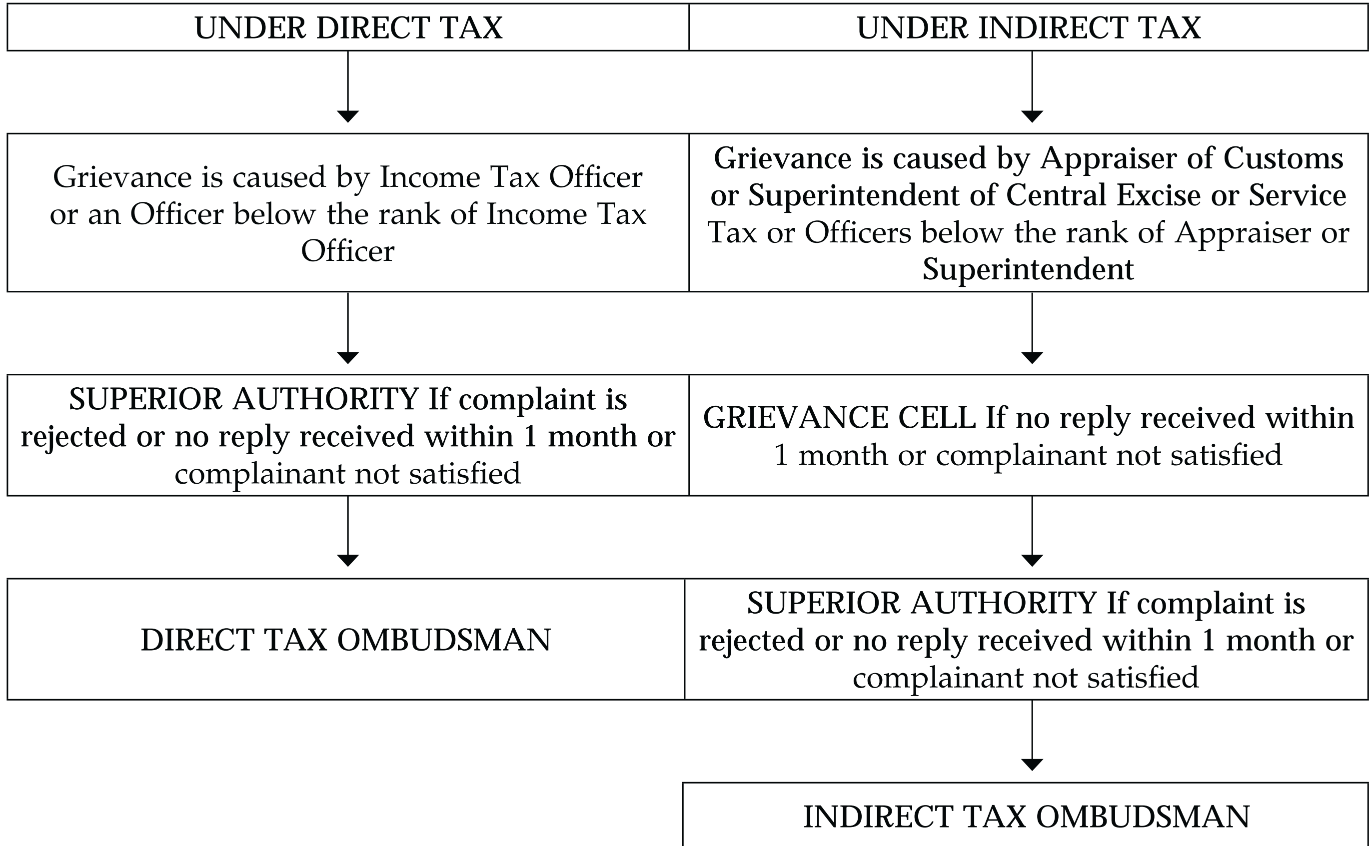
- Rejected the complaint OR
- No reply has been received within one month of such representation OR
- Complainant is not satisfied with the reply.

Note: *In respect of complaints before the Indirect Tax Ombudsman additional condition is required to be fulfilled. The written representation has to be made to the Grievance Cell before making written representation to the superior authority.*

Written representation to the Grievance Cell: Before making the complaint to the Ombudsman written representation should be made to the Grievance Cell of the concerned Customs, Central Excise and Service Tax office and for the said representation if -

- No reply has been received within one month of such representation OR
- Complainant is not satisfied with the reply.

The aforesaid is summarised as under:



23.2. *Time period for making of complaint:* Complaint to the Ombudsman should be made within –

- *One year:-* After the receipt of reply from the authority for representation made OR
- *One year and one month:-* If no is reply is received for the representation made.

23.3. *Condition regarding same subject matter:* Complaints should not be made in respect of the same subject matter which was settled earlier through the office of the Ombudsman in any previous proceedings, irrespective of the fact whether the complaint has been received from the same complainant or by any other parties concerned with the same subject matter.

This condition is a very strange as the complainant may not be aware or may not be in a position to verify as to whether on the same subject matter in respect of which the complaint is pursued has already been settled earlier or not, in case of any other party.

23.4. *Condition regarding pending subject matter:* No complainant shall be made to the Ombudsman on an issue which has been or is the subject matter of any proceeding in an

appeal, revision, reference or writ before any Income Tax Authority or Customs, Central Excise and Service Tax Authority, as the case may be, or Appellate Authority or Tribunal or Court.

23.5. *No frivolous or vexatious complaint:* The issue or issues involved in the complaint should not be frivolous and vexatious. However, the terms frivolous and vexatious are not defined in the Income Tax Guidelines and Indirect Tax Guidelines. But taking into consideration the general meaning of these terms it would mean that the issues involved in the complaints should not be silly and no complaints shall be made which is with the main intention of the complainant to cause annoyance to the Officer(s) and not merely to further the ends of justice.

24. In respect of complaints before the Indirect Tax Ombudsman additional condition is required to be fulfilled. The written representation has to be made to the Grievance Cell before making written representation to the superior authority.

24.1. Written representation to the Grievance Cell: Before making the complaint to the Ombudsman written representation should be made to the Grievance Cell of the concerned Customs, Central Excise and Service Tax office and for the said representation -

- No reply has been received within one month of such representation OR
- Complainant is not satisfied with the reply.

Proceedings and Settlement by Agreement

25. The Ombudsman shall not be bound by any legal rules of evidence and may follow any such procedure that appears to him to be fair and proper to carry out the proceeding of settlement.

26. The proceedings before the Ombudsman shall be summary in nature i.e. the cases / complaints are to be adjudged promptly without any delay and without any unnecessary procedure of evidence, etc.

27. Regarding the settlement of the complaint, the Ombudsman shall as soon as possible sent the notice of receipt of complaint and a copy of the complaint has to be sent to the authority against whom the complaint is made.

28. The Ombudsman shall endeavour to promote the settlement of the complaint by agreement between the complainant and such authority (against whom the complaint is made) through conciliation or mediation and for the purpose of arriving at the agreement the Ombudsman can follow any such procedure as he may consider appropriate.

Award to be passed by Ombudsman if no settlement by agreement

29. *Priority of settlement by agreement:* The prime responsibility of the Ombudsman is to arrive at a settlement by an agreement between the concerned parties i.e. the complainant and the authority against whom the complaint is made.

30. *Passing of an Award:* However, if the complaint is not settled by agreement within the period of one month from the date of receipt of the complaint or such further period as the Ombudsman may consider necessary, he may pass an award after giving the parties a reasonable opportunity to present their case.

31. *Guiding factors for passing award:* The Ombudsman shall be guided by -

- the evidences placed before him by the parties concerned,
- the principles of Income Tax law or Customs, Central Excise and Service Tax law, as the case may be and practice, directions, circulars, instructions and guidelines issued by the CBDT / CBEC or the Central Government from time to time, and

- such other factors which in his opinion are necessary in the interest of justice.

Priority of the Ombudsman should be to close the matter with settlement by agreement between the parties concerned, however if the settlement by agreement is not possible then the Award can be passed by Ombudsman.

Award by Ombudsman

32. *Speaking Order:* The award passed by an Ombudsman must be a speaking order consisting of following –

32.1. *Directions to concerned authority* on performance of its obligations like expediting delayed matters, giving reasons for decisions and issuing apology to complainants, etc. However, no award should be passed giving directions which affect the quantum of tax assessment or imposition of penalties under the relevant statutes.

32.2. *A Token Compensation* amount not exceeding ` 1,000/- (in case of Income Tax) or ` 5,000/- (in case of Indirect Tax) to be awarded for the loss suffered by the complainant. The token compensation, if any, given as a part of the award shall be paid by the concerned Income Tax or Indirect Tax Department, as the case may be, out of the budget allocated under the head 'Office Expenses' of the office of the authority complained against and such payments shall take priority over any other expenditure from this allocation.

32.3. *Designation* of the Income Tax Officer or Indirect Tax Officer, as the case may be, to whom the letter of acceptance of the award is to be communicated.

33. *Communication of award:* A copy of the award shall be sent to the complainant and the authority complained against.

34. *Award on whom binding:* The award shall be binding on the Income Tax Authority or Indirect Tax Authority, as the case may be and on the complainant. However, the award shall be binding on the Authority only when the complainant, within a period of 15 days from the date of receipt of a copy of the award, furnishes a letter of acceptance of the award in full and final settlement of his complaint.

35. *Non-acceptance of award:* If the complainant does not accept the award passed by the Ombudsman or fails to furnish his letter of acceptance within the said period of 15 days or within such time, not exceeding a period of 15 days that may be granted by the Ombudsman, the award shall lapse and be of no effect.

36. *Compliance of Award:* The relevant authority complained against shall, within one month from the date of the award, comply with the award and intimate compliance to the Ombudsman.

Powers to Ombudsman

37. The Powers of the Ombudsman are highlighted below –

- Receive complaints
- Facilitate satisfaction or settlement by agreement between the aggrieved parties
- Require authorities to provide any information or furnish certified copies of any document
- Suggest remedial measures
- Reporting
- Making recommendations, in case having no power of settling a case or passing of award

38. Further, in case of Indirect Tax Ombudsman it is specifically provided that the Ombudsman shall not have any authority over the CBEC and Directorates under CBEC and that the Indirect Tax Ombudsman shall not have jurisdiction in cases where proceedings have been initiated under Conservation of Foreign Exchange and Prevention of Smuggling

Activities Act, 1974 and Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

Duties of Ombudsman

39. The duties of the Ombudsman is to exercise general powers of superintendence and control over his office and be responsible for the conduct of business in his office and other duties are highlighted below –

- To maintain confidentiality of any information or document
- To comply with the principles of natural justice and fair play in the proceedings
- To protect individual taxpayer's rights
- To identify issues that increase compliance burden or create problems for taxpayers and to bring those issues to the attention of CBDT/CBEC and the Ministry of Finance
- Go send monthly report recommending appropriate action and highlighting cases where action needs to be taken against erring officers
- To furnish annual report on general review of activities of his office, review on quality of the working of the Departments and making recommendations to improve the administration
- to compile list of awards passed and report it to the controlling Chief Commissioners of the officers concerned and the CBDT / CBEC.

Before Concluding

40. In which jurisdictional office of Ombudsman does the complainant have to file the complaint? In the one where the complainant office is located or where the authority against whom the complaint is made is located.

40.1. In the author's view the jurisdictional office of Ombudsman shall be the area covering the office of the authority against whom the complaint is made irrespective of the fact as to where the complainant's office is located.

41. Is there any prescribed format in which the complaints can be made before the Ombudsman?

41.1. No, there is no prescribed format in which the complaints are to be made. However, it is to be noted that the complaints should be duly signed and contain the complainant's name and address, the name of office and the official of Income Tax or Indirect Tax, as the case may be against whom the complaint is made, the facts of the grievance alongwith supporting documents, if any and relief sought from the Ombudsman.

Conclusion

42. The representation of grievances through the Ombudsman not only helps the complainant, but also helps the department, CBDT / CBEC and Government. The department becomes cautious in their approach and become answerable, the CBDT / CBEC and the Ministry can understand and appreciate the entire tax administration and their problems. But it is observed that many taxpayers are not even aware of the existence of such Ombudsman facility in Income tax and Indirect Tax. Thus, even though it is a good way for taxpayers to represent their grievances and to bring improvement in the tax administration through a distinctive channel called Ombudsman, but it is a road seldom taken.

Case Laws Index

Alpesh Navinchandra Shas vs. State of Maharashtra [2007 (210) ELT 13 (SC)]......88
Ashirwad Enterprises vs. State of Bihar [2004 (168) ELT 433 (SC)]......93
B.K. Industrial Corpn vs. Union of India [2004 (169) ELT 13 (Bom.)]......93
Brij Lal & Ors. vs. CIT (2010) 328 ITR 477 (SC)......31
CCE vs. True Woods P. Ltd. 2006 [(199) ELT 388 (Del.)......92
Chassis Systems vs. CCE [(2008) 232 ELT 622 (Tri.)]......92
CIT vs. Anjum M. H. Ghaswala – (2001) 252 ITR 1]......24
CIT vs. Bahskar Picture Palace (2001) 247 ITR 391 (SC)].......26
CIT vs. K. Jayaprakash Narayanan (2009) 184 Taxman 85 (SC)......28
CIT vs. Om Prakash Mittal (2005) 273 ITR 326 (SC)......24
CIT vs. Paharpur Cooling Towers (P) Ltd. (1996) 219 ITR 618 (SC)].......26
Commissioner of Income Tax vs. B.N. Bhattacharjee & Anr. [AIR 1979 SC 1725],......91
Director General of Central Excise (Intelligence) vs. Murarilal Harishchandra Jaiswal Pvt. Ltd. and Ors., [172 (2010) DLT 593 = 2013 (291) E.L.T. 484 (Del.)]......91
Express Newspapers [(1994) 206 ITR 443 (SC)]......90
Haji N. Abdulla vs. ITST – 2008 (235) ELT 609 (Bom)......79
Hassan Ali Khan vs. Settlement Commission (2008) 299 ITR 127 (Bom.)(HC).......26
Hazel Mercantile Ltd. vs. Union of India, 2012 (285) E.L.T. 352 (Bom.) = 2012 (28) S.T.R. 349 (Bom.)......92
Krishnan vs. Settlement Commission [1989 (180) ITR 585] held that......89
Leighton Contractors (India) Pvt. Ltd. vs. Union of India reported at 2014 (306) ELT 281 (Bom.)......92
Light Engineering vs. Union of India [2007 (207) ELT 40 (P&H)]......93
Mahendra Petrochemicals Ltd. vs. Union of Inda [2004 (165) ELT 499 (Guj.)]......92
Mandhana Dyeing vs. Union of India reported at 2010 (251) ELT 481 / 451 (Bom.)......82, 89
Mars Therapeutics and Chemicals Ltd. vs. CCE [2008 (223) ELT 363 (AP)].......93
Modi Alkalies & Chemicals – 2001 (133) ELT 240 (Sett. Comm.)......79
N. Krishnan vs. Settlement Commission – (1989) 180 ITR 585 (Kar. HC)......76
Picasso Overseas and Others vs. Director General of Revenue (Intelligence) and Another [W.P. (C) No. 1495 of 2007......90
Prabhu Dayal vs. Union of India in Civil No. 113 of 2008......33
Proctor & Gamble Hygiene – 2002 (141) ELT 290 (Sett. Comm.)......79
Proctor & Gamble Hygiene in Re – 2001 (134) ELT 847 (Sett. Comm.)......79
Puranchandra J. Rao vs. ITSC (2009) 318 ITR 209 (Bom.)......27
Royal Electronics Pvt. Ltd. vs. Collector of Central Excise [1990 (45) ELT 447 (Tri.-Mad)].......89
Sanghvi Reconditioners Pvt. Ltd. vs. Union of India [2010 (251) ELT 3(SC)]......93
Sanghvi Reconditioners vs. UOI – 2010 (252) ELT 3 (SC)......76
Shriniwas Machine Craft Pvt. Ltd. vs. ITO (2014) 361 ITR 313 (Bom.)(HC)].......25
Shri Renuga Soft-X Towels vs. Commissioner of Central Excise [2008 (229) ELT 359 (Mad.)].......93
S.K. Colombowalla vs. Commissioner of Customs [2007 (220) ELT 492 (Tri-Bom.)]......91
Star Television News Ltd. vs. UOI [2009] 317 ITR 66.......33
Sukhdeep Bhoday vs. Joint Director General of Foreign Trade [2007 (216) ELT 181 (P&H)]......93
Sushil Kumar Modi vs. State of Bihar (1998) 233 ITR 671 (Pat.).......26
Tata Teleservices (Maharashtra) vs. Union of India [2006 (201) ELT 529 (Bom.)]......90
Union of India vs. Dharampal Satyapal vs. Union of India [2013 (298) ELT 653 (Del.)]......90
Union of India vs. Hoganas Ltd. [2006 (199) ELT 8 (Bom.)]......91
UOI vs. Rajendra Construction Co. (2010) 217 Taxation 273 / 187 Taxman 135 / 31 DTR 186 / 227 CTR 241 (SC)].......33
Vishnu Steels vs. UOI – 2014 (299) ELT 292 (Bom).......79
Wipro GE Medical Systems – 2001 (134) ELT 305 (Sett.Comm.)......79

B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Loss returned liable for additional tax u/s. 143(1A) – It can apply only to tax evaders and not to honest assessees – The burden of proving that the assessee stated a lesser amount in the return in an attempt to evade tax is on the revenue

CIT vs. M/s. Sati Oil Udyog Ltd. & Anr. – [Civil Appeal Nos. 9133-9134 of 2003, dated 24th March, 2015

Section 143(1A)(a) was substituted with retrospective effect by the Finance Act of 1993 from 1-4-1989 to provide that even a reduction of loss on account of a *prima facie* adjustment would entail levy of additional tax. The retrospective amendment was enacted to supersede the judgments of the Delhi High Court in *Modi Cement Limited vs. Union of India, (1992) 193 ITR 91* and *JK Synthetics Limited vs. Asstt. Commissioner of Income-Tax, (1993) 200 ITR 594,* and the Allahabad High Court in *Indo Gulf Fertilizers & Chemicals Corpn. Ltd. vs. Union of India, (1992) 195 ITR 485* which held that losses were not within the contemplation of section 143(1A) prior to its amendment. The assessee challenged the retrospective amendment as being arbitrary and *ultra vires.* This was upheld by the Guwahati High Court. The High Court held that the retrospective effect given to the amendment would be arbitrary and unreasonable inasmuch as the provision, being a penal provision, would operate harshly on assessees who have made a loss instead of a profit, the difference between the loss showed in the return filed by the assessee and the loss assessed to income tax having to bear an additional income tax at the rate of 20%. On appeal by the department to the Supreme Court reversing the High Court judgment held:

(i) The object of section 143(1A) is the prevention of evasion of tax. By the introduction of this provision, persons who have filed returns in which they have sought to evade the tax properly payable by them is meant to have a deterrent effect and a hefty amount of 20% as additional income tax is payable on the difference between what is declared in the return and what is assessed to tax;

(ii) The definition of "income" in section 2(24) of the Income-tax Act is an inclusive one. Further, it is settled law at least since 1975 that the word "income" would include within it both profits as well as losses. This is clear from *Commissioner of Income Tax Central, Delhi vs. Harprasad & Company Pvt. Ltd., (1975) 3 SCC 868;*

(iii) Even on a reading of Section 143(1)(a) which is referred to in Section 143(1A), a loss is envisaged as being declared in a return made under Section 139. It is clear, therefore, that the retrospective amendment made in 1993 would only be clarificatory of the position that existed in 1989 itself. All assessees were put on notice in 1989 itself that the expression "income" contained in Section 143(1A) would be wide enough to include losses also.

(iv) The object of Section 143(1A) is the prevention of tax evasion. Read literally, both honest assessees and tax evaders are caught within its net, an example being *Commissioner of Income Tax, Bhopal vs. Hindustan Electro Graphites, Indore, (2000) 3 SCC 595.* We feel that since the provision has the deterrent effect of preventing tax evasion, it should be made to apply only to tax evaders. In support of this proposition, we refer to the judgment in *K.P. Varghese vs. ITO, (1982) 1 SCR 629.* Taking a clue from *K.P. Varghese vs. ITO, (1982) 1 SCR 629,* we therefore, hold that Section 143(1A) can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully payable by the assessee. The burden of proving that the assessee has so attempted to evade tax is on the revenue which may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it. Subject to the aforesaid construction of Section 143(1A), we uphold the retrospective clarificatory amendment of the said Section and allow the appeals.

Normally revenue expenditure incurred in a particular year has to be allowed in that year and if the assessee claims that expenditure in that year, the Department cannot deny the same – Fact that assessee has deferred the expenditure in the books of account is irrelevant – However, if the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'Matching Concept' is satisfied – Sec. 36(1)(iii) & 37(1)

Taparia Tools Limited vs JCIT – [Civil Appeal Nos. 6366-6388 of 2003, dated 23rd March, 2015]

The assessee issued debentures in which two options as regards payment of interest were given to the subscribers/debenture holders. They could either receive interest periodically, that is every half yearly @ 18% per annum over a period of five years, or else, the debenture holders could opt for one time upfront payment of ` 55 per debenture. In the second alternative, ` 55 per debenture was to be immediately paid as upfront on account of interest. At the end of five years period, the debentures were to be redeemed at the face value of ` 100. The assessee paid to the debenture holder the upfront interest payment and claimed the same as a deduction. In the accounts, the interest expenditure was shown as deferred expenditure. However, the AO, CIT(A), ITAT and High Court rejected the assessee's claim and held that though the amount was paid, the same was only allowable as a deduction over the tenure of the debentures. On appeal by the assessee to the Supreme Court HELD allowing the appeal:

(i) U/s. 36(1)(iii) when the interest was actually incurred by the assessee, which follows the mercantile system of accounting, the assessee would be

entitled to deduction of full amount in the assessment year in which it is paid. While examining the allowability of deduction of this nature, the AO is to consider the genuineness of business borrowing and that the borrowing was for the purpose of business and not an illusionary and colourable transaction. Once the genuineness is proved and the interest is paid on the borrowing, it is not within the powers of the AO to disallow the deduction either on the ground that rate of interest is unreasonably high or that the assessee had himself charged a lower rate of interest on the monies which he lent;

(ii) The High Court wrongly applied the "Matching Concept" to deny the deduction of the upfront interest payment in the first year. As per the terms of issue, the interest could be paid in two modes. As per one mode, interest was payable every year and in that case it was to be paid on six monthly basis @ 18% per annum. In such cases, the interest as paid was claimed on yearly basis over a period of five years and allowed as well and there is no dispute about the same. However, in the second mode of payment of interest, which was at the option of the debenture holder, interest was payable upfront, which means insofar as interest liability is concerned, that was discharged in the first year of the issue itself. By this, the assessee had benefited by making payment of lesser amount of interest in comparison with the interest which was payable under the first mode over a period of five years. We are, therefore, of the opinion that in order to be entitled to have deduction of this amount, the only aspect which needed examination was as to whether provisions of Section 36(1)(iii) read with Section 43(ii) of the Act were satisfied or not. Once these are satisfied, there is no question of denying the benefit of entire deduction in the year in which such an amount was actually paid or incurred;

(iii) The moment second option was exercised by the debenture holder to receive the payment upfront, liability of the assessee to make the payment in that very year, on exercising of this option, has arisen and this liability was to pay the interest @ ` 55 per debenture. In *Bharat Earth Movers vs. Commissioner of Income Tax [2000] 6 SCC 645,* the Supreme Court had categorically held that if a business liability has arisen in the accounting year, the deduction should be allowed even if such a liability may have to be quantified and discharged at a future date. The present case is even on a stronger footing inasmuch as not only the liability had arisen in the assessment year in question, it was even quantified and discharged as well in that very accounting year;

(iv) The principle that emerges from *Madras Industrial Investment Corporation Limited vs. Commissioner of Income Tax [1997] 4 SCC 666* is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the IT Department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'Matching Concept' is satisfied, which up to now has been restricted to the cases of debentures. In the instant case, the assessee did not want spread over of this expenditure over a period of five years as in the return filed by it, it had claimed the entire interest paid upfront as deductible

expenditure in the same year. In such a situation, when this course of action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee to claim the expenditure in the year in which it was incurred, merely because a different treatment was given in the books of account cannot be a factor which would deprive the assessee from claiming the entire expenditure as a deduction. It has been held repeatedly by this Court that entries in the books of account are not determinative or conclusive and the matter is to be examined on the touchstone of provisions contained in the Act.

(v) At the most, an inference can be drawn that by showing this expenditure in a spread over manner in the books of account, the assessee had initially intended to make such an option. However, it abandoned the same before reaching the crucial stage, inasmuch as, in the income tax return filed by the assessee, it chose to claim the entire expenditure in the year in which it was spent/paid by invoking the provisions of Section 36(1)(iii) of the Act. Once a return in that manner was filed, the AO was bound to carry out the assessment by applying the provisions of that Act and not to go beyond the said return. There is no estoppel against the statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed.

Principles for deduction of business expenditure reiterated – Sec.37(1)

Premier Breweries Ltd. vs. CIT

[Civil Appeal No. 1569 of 2007 dated 10th March, 2015]

The question that was posed by the High Court was whether acceptance of the agreements, affidavits and proof of payment would debar the assessing authority to go into the question whether the expenses claimed would still be allowable under Section 37 of the Act. This is a question which the High Court held was required to be answered in the facts of each case in the light of the decision of this Court in *Swadeshi Cotton Mills Co. Ltd. vs. Commissioner of Income Tax 1967 (63) ITR 57* and *Lachminarayan Madan Lal vs. Commissioner of Income Tax West Bengal 1972 (86) ITR 439.* In Lachminarayan it was held that "The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income Tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made. It is still open to the Income Tax Officer to consider the relevant facts and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under Section 37 of the Act." There were certain Government Circulars which regulated, if not prohibited, liaisoning with the Government corporations by the manufacturers for the purpose of obtaining supply orders. The true effect of the Government Circulars along with the agreements between the assessee and the commission agents and the details of payments made by the assessee to the commission agents as well as the affidavits filed by the husbands of the partners of M/s. R. J. Associates were considered by the High Court. In performing the said exercise the High Court did not disturb or reverse the primary facts as found by the learned Tribunal. Rather, the exercise performed is one of the correct legal inferences that should be drawn on the facts already recorded by the learned Tribunal. The questions reframed were to the said effect. The legal inference that

should be drawn from the primary facts, as consistently held by this Court, is eminently a question of law. No question of perversity was required to be framed or gone into to answer the issues arising. In fact, as already held by us, the questions relatable to perversity were consciously discarded by the High Court. We, therefore, cannot find any fault with the questions reframed by the High Court or the answers provided.

S. 10(23C)(v) & (vi): Mere surplus does not mean institution is existing for making profit. The predominant object test must be applied. The AO must verify the activities of the institution from year to year

Queen's Educational Society vs. CIT – [Civil Appeal No. 5167 of 2008, dated 16th March, 2015]

The Supreme Court had to consider appeals arising from the judgments of the Uttarakhand High Court in Queens Educational Society 319 ITR 160 and the Punjab and Haryana High Court in *Pine Grove International Charitable Trust vs. Union of India (2010) 327 ITR 273* concerning the interpretation of s.10(23C)(iiiad) and (vi) of the Income-tax Act. The Supreme Court reversing Queen's Educational Society and affirming *Pine Grove International Charitable Trust vs. Union of India* held:

(1) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(2) The predominant object test must be applied – the purpose of education should not be submerged by a profit making motive.

(3) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be ceased to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons.

(6) The correct tests which have been culled out in the three Supreme Court judgments, namely, *Surat Art Silk Cloth 121 ITR 1 (SC), Aditanar Educational Institution 224 ITR 310 (SC),* and *American Hotel and Lodging Association Educational Institute (301 ITR 86),* would all apply to determine whether an educational institution exists solely for educational purposes and not for purposes of profit.

(7) In addition, we hasten to add that the 13th proviso to section 10(23C) is of great importance in that assessing authorities must continuously monitor from assessment year to assessment year whether such institutions continue to apply their income and invest or deposit their funds in accordance with the law laid down. Further, it is of great importance that the activities of such institutions be looked at carefully. If they are not genuine, or are not being carried out in accordance with all or any of the conditions subject to which approval has been given, such approval and exemption must forthwith be withdrawn. All these cases are disposed of making

it clear that revenue is at liberty to pass fresh orders if such necessity is felt after taking into consideration the various provisions of law contained in section 10(23C) read with section 11 of the Income-tax Act.

While an amendment to overrule a judgment is not valid, it is permissible to retrospectively alter the character of the levy so as to save it from illegality

Assistant Commissioner of Agricultural Income Tax & Ors. vs. Netley 'B' Estate & Ors. – [Civil Appeal Nos. 8617-8635 of 2003, dated 17th March, 2015]

The Supreme Court had to consider the validity of an Explanation added retrospectively to Section 26(4) of the Karnataka Agricultural Income-tax Act. The said Explanation was inserted to supersede the judgment in *L. P. Cardoza and Others vs. Agricultural Income Tax Officer and Others [(1997) 227 ITR 421.* On the validity of the retrospective amendment, the High Court held, following the judgment in *D. Cawasji and Co., Mysore vs. State of Mysore and Another [1984 (Supp) SCC 490],* that the amending Act of 1997 suffered from the vice that was found in Cawasji's case, namely that it interfered directly with the judgment of a High Court and would therefore, have to be struck down as unconstitutional on this score alone. This the Division Bench found, because in the statement of objects and reasons for the 1997 amendment, it was held that the object of the amendment was to undo the judgment of the High Court of Karnataka in Cardoza's case. On appeal by the revenue to the Supreme Court reversing the High Court's judgment held:

(i) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(ii) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.

Ashok Patil, Mandar Vaidya & Priti Shukla
Advocates

DIRECT TAXES
High Court

1] Sec. 10B – Compiling material, collating text, images, designing layout, etc. for ready to print books which is transmitted – Is computer software that is produced or manufactured which qualifies for deduction u/s.10B.

CIT vs. Ms Kiran Kapoor (2015) 115 DTR (Del.) 97

The assessee was involved in the activity of collection, collation, formatting of data and information and its export, on which it had claimed deduction u/s. 10B. The AO had disallowed the claim of the assessee u/s. 10B. The Hon'ble High Court held that in the instant case there was a four stage process of compiling material, collating the text, designing the layout, scanning, image editing, and final arrangement of data, which is ultimately transmitted as per the customers specifications is manufacture and production of software, and the same is also covered by the notification No. SO 890(E) dated 26-9-2000, and hence the assessee is eligible for exemption u/s.10B.

2] Section 54EC – Claim investment of 1 crore in two financial years – Allowable – Amendment restricting the investment 50 lakhs is applicable from A.Y. 2015-16.

CIT vs. Jaichander (2015) 115 DTR (Mad.) 237

Sec. 54EC restricts the time limit for the period of investment after the property has been sold to six months. The first proviso restricts the investment to 50 lakhs during each financial year, so in case the six months post sale of capital asset is spread over two financial years the assessee is eligible to invest 50 lakhs in each financial year. To remove this ambiguity the legislature inserted a second proviso restricting the investment to 50 lakhs, which is applicable from A.Y. 2015-16. The Hon'ble High Court held that, the assessee is eligible for deduction of 1 crore in respect of investment of 50 lakhs in two different financial years, as the amendment is made applicable from A.Y. 2015-16.

3] Section 271(1)(c) – Explanation furnished which was not sustained – Penalty livable

Clariant Chemicals India Ltd. vs. ACIT (2015) 274 CTR (Bom.) 353

The question of law in penalty proceedings in High Court was whether Tribunal was justified in upholding the imposition of penalty pertaining to addition of research

and development expenditure confirming the penalty leviable u/s. 271(1)(c) Expl. 1. High Court held that all in all stages, whether in quantum proceedings or in penalty proceedings, the materials were the bills which were required to be produced. It was not the case of the assessee that these have been destroyed or lost. Claim was that there was other material. However, it has been concurrently found that the bills have not been produced. On relation to such an act on the part of the assessee, it was open for the authorities to take assistance of Section 271(1)(c) r/w Expl. 1(B). This was a case where the explanation given was not sustained. Genuineness of the claim itself was in issue and Tribunal while upholding the order of CIT(A) and that of the Assessing Officer partially did not act perversely nor committed error of law apparent on the face of the record.

4] Section 251 – Powers of CIT(A) – Power to grant Stay

Gera Realty Estates vs. CIT(A) & Ors. (2015) 274 CTR (Bom) 358

The assessee filed WP for application of stay of assessment order in its pending appeal for A.Y.: 2011-12 which was dismissed by CIT(A) after recording that though he has inherent power to consider the stay application, yet the same will not avoid multiple stay application before different authorities . Allowing the Writ Petition, the court held that jurisdiction of the CIT(A) to deal with application for stay of the order in appeal before it is inherent in it as an Appellate Authority. The jurisdiction with the AO to stay the demand is on different considerations, i.e, including other factors over and above the order. The court also held that the CIT(A) to stay the demand is on different considerations i.e. including other factors over and above the order. The court also held that CIT(A) ought not to have confused his jurisdiction as an Appellate Authority with that of either the AO u/s. 220(6) or that of the CIT in his administrative capacity. Impugned order was set aside and CIT(A) directed to dispose of stay application of assessee.

5] Sec. 40A(3) – Applicability of R. 6DD (K) of IT Rules

Mrs. Roadways vs. CIT (2015) 116 DTR (Kar.) 126

Assessee being Partnership firm undertook the work of transporting contract for transportation of goods for various organisations. During the year, the assessee spent ` 4.77 crores towards lorry hire charges of which the assessee had paid a sum of ` 1,06,69,600 in cash, contrary to the provisions of Section 40A(3) of the IT Act. The AO disallowed the said amount. The assessee preferred an applicability of Rule 6DD of IT rules in HC. The HC confirmed the order of lower authorities and held that the appellate authorities found that the assessee was engaging lorries on hire from the market through brokers. Assessee was not paying any amount to the concerned lorry owners. Even according to the assessee, lorry freights were finalised with the lorry owners. Lorry drivers cannot be considered as the agents of the assessee. Both the CIT(A) and Tribunal having found that the claim of assessee for exception under proviso to S.40A(3) was not justifiable, no substantial question of law arose in this case.

True happiness involves the full use of one's power and talents.

Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

REPORTED

(i) Search and seizure – Section 153C of the Income-tax Act, 1961 – Assessment of income of any other person – Satisfaction – Where Assessing Officer of the searched person did not record satisfaction that the money, bullion, jewellery or books of account or other documents found from the searched person belonged to assessee – Initiation of proceedings and assessment order passed under section 153C of the Act on assessee – Void *ab initio*. A.Y. 2003-04

Tanvir Collections (P.) Ltd. vs. Asstt. CIT – (2015) 168 TTJ 145 (Del.)

The Assessing Officer of the assessee recorded in assessment order that, during the course of search and seizure action under section 132 of the Act carried out in the cases of certain individuals and their concern, some documents belonging to the assessee were seized. Accordingly, the A.O initiated proceedings against the assessee under section 153C read with section 153A of the Act on the basis of such documents.

The assessee contended that a proper satisfaction was not recorded by the correct Assessing Officer before taking up the proceedings under section 153C of the Act, thus the proceedings were not valid.

On appeal the Tribunal held that provision of section 153C of the Act provides that where the Assessing Officer of the person searched is satisfied that any money, bullion, jewellery, books of account or other documents, etc., belong to a person other than the person searched, then, such documents or assets, etc., shall be handed over to the A.O. of the 'other person' and the later A.O. shall proceed against such 'other person' to assess or reassess his income. However, in the present case, the Tribunal noted that the Assessing Officer of the searched persons, did not record any satisfaction that certain money, bullion, jewellery or books of account or other documents found from these persons belonged to the assessee. The absence of such satisfaction the A.O. of the assessee did not have a lawful jurisdiction to proceed with the matter of the assessment under section 153C of the Act. Thus, the initiation of proceedings under section 153 C of the Act and the assessment order so passed under section 153 C was void ab initio.

(ii) Speculative transactions (Currencies) – Section 43(5) of the Income-tax Act, 1961 – Section 43(5) do not apply to currencies – Loss incurred in currency swap contract cannot be denied to be set off against other heads of income treating the same as speculative loss. A.Y. 2008-09

Adani Enterprises Ltd. vs. Addl. CIT – [2015] 55 taxmann.com 375 (Ahmedabad - Trib.)

The assessee was engaged in export/import and domestic trading of various commodities. The

assessee during the impugned assessment year claimed currency swap loss of ` 6.04 crores under the head 'Financial expenses' in the profit and loss account. The A.O. allowed the claim of the assessee while finalising the assessment under the section 143(3) of the Act. The Commissioner passed order under section 263 of the Act on the ground that transaction in question was speculative transaction within the meaning of section 43(5) and resultant loss could not be set off against profits and gains of non speculative business as per the provisions of section 73(1) of the Act. The assessee being aggrieved by the order passed by learned Commissioner of Income Tax preferred an appeal before the Hon'ble Ahmedabad Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee by observing that provisions of section 43(5) do not apply to currencies and, therefore, loss incurred by assessee in currency swap contract cannot be denied to be set off against other heads of income taking it as speculative loss.

(iii) Method of accounting – Section 145, of the Income-tax Act, 1961 –Valuation of stock – Advertisement, sponsorship and brand-building expenses represents selling costs of the developer and hence, the same cannot be capitalised to be included in valuation of work-in-progress. A.Y. 2009-10

Vardhman Developers Ltd vs. ITO [2015] 55 taxmann. com 370 (Mumbai - Trib.)

The assessee is a builder/developer engaged since 1990 primarily in executing projects, i.e., after bidding for and taking such projects from various housing societies. The assessee has claimed advertisement, sponsorship and brand-building expenses in its returns as revenue expenditure. However, the A.O. disallowed the same treating the same by observing that the entire expenditure was in relation to the assessee's construction business, which represented its principal activity. The assessee had at the relevant year-end 13 projects, the cost of which stand capitalised under WIP. Further, analysing each of the several incomes earned by the assessee said expenditure could not be related to any of the said incomes, so that the assessee's claim was not maintainable. On appeal, the learned CIT(A) upheld the view of the A.O. The assessee being aggrieved by the order of the learned CIT(A) preferred an appeal before the Hon'ble Mumbai Appellate Tribunal. The Tribunal allowed the claim of the assessee and held that advertisement, sponsorship and brand-building expenses are only in the nature of selling costs, i.e., of the construction business, and which would not therefore stand to be capitalised, inasmuch as the same could only be in respect of a direct cost which adds value to or otherwise adds to its cost of production to the assessee. As regards the argument of there being no corresponding income, or it being not relatable to any revenue stream, the same is to our mind of little consequence. As long as the assessee is carrying a particular business during the year, income there-from has to be computed u/s. 28 of the Act, allowing it all permissible deductions, i.e., in accordance with the provisions of sections 30 to 43D of the Act.

UNREPORTED

(iv) Charitable Trust – Section 12A of the Income-tax Act, 1961 – Registration – Provisions of section 13 cannot be applied to deny registration to a trust under section 12A. A.Y.

Kul Foundation vs. CIT - [I.T.A. No. 1692 / PN / 2013; Order dated 30-1-2015; Pune Bench]

One of the objects of the assessee trust was limited to the benefit of a specific community. The Commissioner of Income Tax denied registration to the trust, as according to him the trust violated provisions of section 13(1) (b) of the Act as it was established for the benefit of a specific religious community.

On appeal the Tribunal held that in order to avail of the deduction under sections 11 and 12 of the Act, the trust or institution has to make an application for registration under section 12AA of the Act. The CIT after satisfying himself about the objects of the

trust and about the genuineness of its activities, had to pass an order in writing granting or refusing the registration. Fulfilment or non-fulfilment of the conditions laid down in section 13(1)(b) of the Act is to be examined by the Assessing Officer during assessment proceedings, while allowing deduction under sections 11 and 12 of the Act to the trust. Thus, the CIT was not authorised to consider violation by the trust on account of provisions of section 13(1)(b) of the Act while granting registration under section 12A of the Act and therefore, he was not justified in refusing to grant registration under section 12A of the Act to the assessee trust.

(v) Capital gains – Section 50C of the Income-tax Act, 1961 – Provisions of section 50C do not apply in case of transfer of leasehold rights in land or building. A.Y. 2006-07

Kancast (P.) Ltd. vs. I.T.O. - [I.T.A. No. 1265 / PN / 2011; Order dated: 19-1-2015; Pune Bench]

The assessee transferred leasehold rights in factory land, building and shed in an industrial area during the year under consideration. The gain accrued on the sale/transfer was offered by the assessee as capital gain.

The Assessing Officer during the assessment proceedings adopted value of the land as per the stamp valuation authority as per provisions of section 50 C of the Act and substituted the full value of consideration received by the assessee thereby, enhancing the amount of capital gain.

On appeal the Tribunal held that leasehold right in land is also a capital asset, however, every kind of a 'capital asset' is not covered within the scope of section 50C of the Act for the purposes of ascertaining/determining the full value of consideration. The phraseology of section 50C of the Act clearly provides that it would apply only to 'a capital asset, being land or building or both'. Thus, capital asset being land or building or both are only covered within the scope of section 50C of the Act, and not all kinds of capital assets.

Note: Similar view is taken by Mumbai Tribunal in the case of, *ITO vs. Pradeep Steel Re-Rolling Mills P. Ltd. – (2013) 155 TTJ (Mum.) 294.* However, in *Shavo Norgren P. Ltd. vs. Dy. CIT - (2013) 152 TTJ (Mum.) 482* – Where assessee had taken plot of land in question on lease for a long period and thereafter, transferred rights in part of said plot as well as rights in building standing on said plot, Tribunal held that the provisions of section 50C of the Act were attracted.

(vi) Wealth Tax – Section 2(ea) of the Wealth-Tax Act, 1957 – Asset – Factory premises let out and used for productive purpose is in nature of commercial establishment – Could not be included in net wealth of assessee. A.Ys. 2003-04 & 2004-05

WTO vs. Ferrolite Products Ltd – [W.T.A. Nos. 47 & 48 / Kol / 2010; Order dated 15-2-2015; Kolkata Bench]

The assessee let out a premise owned by it to a company. The rental income so earned was assessed under the head 'Income from House Property'. For the purposes of Wealth tax, the assessee claimed that said let out premises was in the nature of commercial establishment and as per sub-clause (5) of clause (i) of section 2(ea) of the W.T Act, it could not be included in the net wealth of assessee.

The Assessing Officer treated the factory premise as taxable wealth within the meaning of section 2(ea) of the W.T. Act.

On appeal the Tribunal held that sub-clause (5) of section 2(ea) (i) of the W.T. Act covers all those properties which are in the nature of commercial establishment or complex meaning thereby that the property must be in the nature of commercial establishment or complex which in turn indicates that the property must also be actually used for the purpose of any business or trade carried on in those commercial establishments or complexes. Thus, let out factory premises which is used for productive purpose and is in nature of commercial establishment, fell under exception of 'any property in nature of commercial establishments or complexes' as per Exception (5) of clause (i) of section 2(ea) of the WT Act and therefore, could not be included in net wealth of assessee.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

NOTIFICATIONS

Section 35(1)(ii) of the Income-tax Act, 1961 – Scientific Research Expenditure – Approved Scientific Research Associations/Institutions

The organisation Indian Institute of Technology (BHU), Varanasi (PAN - AAAJI0396R) has been approved by the Central Government for the purpose of section 35(1)(ii) of the Income-tax Act, 1961 (said Act), read with Rules 5C and 5E of the Income-tax Rules, 1962 (said Rules), from assessment year 2014-15 and onwards in the category of *"University College and other Institution"*, engaged in research activities subject to the conditions, mentioned:—

The Central Government shall withdraw the approval if the approved organisation(s) (a) fails to maintain separate books of account or (b) fails to furnish its audit report or (c) fails to furnish its statement of the donations received and sums applied for scientific research or (d) ceases to carry on its research activities or its research activities are not found to be genuine; or (e) ceases to conform to and comply with the provisions of clause (ii) of sub-section (1) of section 35 of the said Act read with rules 5C and 5E of the said Rules.

(Notification No. 22/2015 dated 13-3-2015)

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

- **Croatia**

An Agreement and Protocol was entered into between the Government of the Republic of India and the Government of the Republic of Croatia for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income that was signed in February, 2014; with the date of entry into force of the said Agreement and Protocol being the 6th February, 2015,

Now the Central Government directed that all the provisions of the said Agreement and Protocol between the Government of the Republic of India and the Government of the Republic of Croatia for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income, as set out in the Annexure thereto, shall be given effect to in the Union of India with effect from the first day of April, 2016.

- **Czechoslovak Socialist Republic**

An Agreement between the Government of the Republic of India and the Government of the

Czechoslovak Socialist Republic was signed in January, 1986 for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; And whereas the Slovak Republic is one of the independent States that have succeeded the Czechoslovak Socialist Republic; And whereas under the applicable international laws regarding application of treaties in case of succession of States, this Agreement continues to be applicable in respect of the Slovak Republic, being one of the independent States to have succeeded the Czechoslovak Socialist Republic;

Now, the Central Board of Direct Taxes clarified that the Agreement signed between the Government of the Republic of India and the Government of the Czechoslovak Socialist Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income continues to be applicable to the residents of the Slovak Republic.

(Notification No. 24 - 25/2015 dt. 17-3-2015 and 23-3-2015 respectively)

Section 10(46) of the Income-tax Act, 1961 – Exemptions – Statutory Body/ Authority/Board/Commission: For the purpose of section 10(46) of the Income-tax Act, the Central Government notified

1. *'Uttar Pradesh Electricity Regulatory Commission'*, a Commission constituted under the Uttar Pradesh Electricity Reforms Act, 1999 (UP Act No. 24 of 1999), in respect of the specified income arising to the said Commission, (a) amount received in the form of government grants; (b) amount received as licence fees and fines; and (c) interest earned on government grants, licence fees and fines.

2.. *"Kerala Toddy Workers' Welfare Fund Board"*, a Board established under the Kerala Toddy Workers' Welfare Fund Act, 1969 (Kerala Act No. 22 of 1969), in respect of the specified income arising to that Board, on account of (a) sums received under Kerala Toddy Workers' Welfare Fund Act, 1969 (Kerala Act No. 22 of 1969); (b) contribution from the members as defined in clause (b) of section 2 of the Kerala Toddy Workers' Welfare Fund Act, 1969 (Kerala Act No. 22 of 1969); and (c) interest earned from deposits in banks and shall be applicable for the financial years 2013-14 to 2017-18

3. *"Joint Electricity Regulatory Commission for the State of Goa and Union territories"*, a Commission constituted by the Government of India, in respect of the specified income arising to that Commission, on account of (a) petition fees; (b) licence fees; and (c) interest earned from deposits in banks and shall be applicable for the financial years 2011-12 to 2015-16.

4. *"Bihar Electricity Regulatory Commission"*, a Commission constituted by the Government of Bihar in respect of the specified income arising to that Commission, on account of (a) amount received in the form of Government grants; (b) amount received as licence fee from licensees in electricity, (c) amount received as licence fee from licensees in electricity (d) interest earned on Government grants and fee received and shall be applicable for the financial years 2011 -12 to 2015-16.

5. *"West Bengal Transport Workers' Social Security Scheme"* of West Bengal State Social Security Board established by Government of West Bengal, in respect of the following specified income arising to that Board, on account of (a) amount received in the form of Government grants; (b) amount received as cess under the West Bengal Motor Transport Workers' Welfare Cess Act, 2010 (West Bengal Act V of 2010) and rules framed thereunder; (c) amount received as registration fees and renewal fees paid by the registered beneficiaries; and (d) interest earned on fixed deposits and shall be applicable for the financial years 2014-15 to 2018-19.

All these notifications shall be subject to the conditions that the above said bodies shall not engage in any commercial activity, the activities and the nature of specified income remains

unchanged throughout the financial year and files return of income in accordance with the provision of section 139(4C)(g) of the said Act.

(Notification No. 21/2015 dated 10-3-2015 and 26/2015, 27/2015, 28/2015, and 31/2015 respectively all dated 24-3-2015)

CBDT notifies Income Computation and Disclosure Standards

The Central Government notified the income computation and disclosure standards as specified in its Annexure to be followed by all assessees, following the mercantile system of accounting, for the purposes of computation of income chargeable to income-tax under the head "Profit and gains of business or profession" or "Income from other sources" in respect of the following:

1. Income Computation and Disclosure Standard I relating to accounting policies.
2. Income Computation and Disclosure Standard II relating to valuation of inventories.
3. Income Computation and Disclosure Standard III relating to construction contracts.
4. Income Computation and Disclosure Standard IV relating to revenue recognition.
5. Income Computation and Disclosure Standard V relating to tangible fixed assets.
6. Income Computation and Disclosure Standard VI relating to the effects of changes in foreign exchange rates.
7. Income Computation and Disclosure Standard VII relating to government grants.
8. Income Computation and Disclosure Standard VIII relating to securities.
9. Income Computation and Disclosure Standard IX relating to borrowing costs.
10. Income Computation and Disclosure Standard X relating to provisions, contingent liabilities and contingent assets.

This notification shall come into force with effect from 1st day of April, 2015, and shall accordingly apply to the assessment year 2016-17 and subsequent assessment years.

(Notification No. 32/2015 - dt. 31st March, 2015)

CIRCULARS

Section 261 of the Income-tax Act, 1961 – Appeal to Supreme Court – Constitution of bench of Supreme Court to deal exclusively with tax matters

A bench has been constituted by the Hon'ble Supreme Court to deal exclusively with tax matters on all working days which will be functional w.e.f. 9th March, 2015. This will necessarily entail briefing the counsels for the Department as well as meeting the requirements of the court on real time basis. The Member (A&J) has desired that all the Principal Chief Commissioner/Chief Commissioner/Pr. Commissioner/Commissioner(s) may check the website of the Supreme Court on daily basis, which generally displays advance cause list for next 10 days, and keep themselves prepared for cases in their jurisdiction for any briefing/service of notice/information as may be required by the Counsels or the Supreme Court at very short notice. In case of any officer proceeding on leave etc., their successor in office must be kept duly informed of such cases listed during the period of their absence.

All requests from DGIT (L&R) in this regard, in respect of listed cases or other cases which may be fixed by the Hon'ble Supreme Court at short notice, should be attended to on priority basis; Shri K. K. Mishra, Addl. DIT (L&R), New Delhi, Phone No. 011-2337 8627 Mobile No. 9212721578 has been designated as Nodal Officer in the Directorate of Legal & Research to deal with

all such cases and may be contacted for any clarifications or information.

(Letter [F.No. 279/MISC./45/2015-SO (ITJ)], dated 10-3-2015)

Sukanya Samriddhi Account Rules, 2014 – Reporting of Sukanya Samriddhi Account Transactions

The Government of India notified the Sukanya Samriddhi Account Rules, 2014, which came into force with effect from December 2, 2014. Reporting of the Sukanya Samriddhi Account transactions i.e. receipt, payment, penalty, etc. may be directly done through the Government Account at Central Account Section, Reserve Bank of India, Nagpur on daily basis like the transactions of PPF, 1968, in order to have uniformity in reporting, reconciliation and accounting. The Agency banks are required to observe the rules and regulations of the Scheme, and non-observance of rules and regulations would attract penal action, including de-authorisation of the branch or bank. Pecuniary liabilities, if any, arising from such non-observance shall be borne entirely by the bank. The banks would therefore, approach Central Account Section, Reserve Bank of India, Nagpur for necessary arrangements to report Sukanya Samriddhi Account transactions with immediate effect.

(Circular IDMD (DGBA). CDD. No. 4052/15.02.006/2014-15, dated 11-3-2015)

Section 143 of the Income-tax Act, 1961 – Assessment – Processing of returns filed during F.Y. 2013-14 getting time barred on 31-3-2015 on Standalone TMS/Online TMS (category 2) in ITD Application

In view of difficulties reported in the processing of returns in AST of foreign technicians filed by representative assessees, the CBDT has approved 'Online TMS (category 2)' for processing of such returns. Therefore, an online 'Online TMS (category 2)' functionality has been provided in ITD-AST application under AST TMS Online TMS – Category 2. Under 'Online TMS (category 2)', credits of TDS (26AS) and challan under OLTAS are not allowed through System. Moreover, the PAN mentioned in the return either does not belong to the assessee or has other infirmities, therefore, the data will not get integrated with AST at a later date. The functionality of Standalone TMS will cover all contingent cases for processing including (i) PAN not available in the system, (ii) Invalid PAN mentioned in return and (iii) Name in the PAN data base & return of income do not tally.

It will be compulsory for the Assessing Officer to mention the compelling reason, which caused using this facility. For reasons (i) to (iii) above, it is presumed that the AO has initiated a communication with the assessee for obtaining correct PAN or getting the PAN data corrected through NSDL/UTIISL. However, no refund will be allowed to be issued as the cases do not have valid PANs. Only time barring cases which could not be processed in AST would be allowed to be processed in 'Online TMS (category 2)' up to 31-3-2015. The procedure has been enumerated in the user manual available on i-Taxnet and ITO. This functionality may be brought to the knowledge of officers working in your charge.

(Letter [DGIT(S)/DIT(S)-3/AST/TMS/17/2015-16, dated 18-3-2015)

Section 260A of the Income-tax Act, 1961 – High Court – Appeal to – Responsibility of CIT to give assistance to department counsels pursuant to Instruction No. 7/2011

It came to the notice of Board that in a recent incident, the Hon'ble High Court has passed certain remarks against the Department. It appears that the High Court had sought certain information regarding the case from the Departmental Counsel, which was communicated to the CIT concerned but not followed up properly and the standing counsel

could not assist the Hon'ble High Court in the matter. Para 14 of Instruction No. 7/2011 casts a responsibility on the CIT to ensure that whenever the Departmental Counsel seeks Instructions/clarifications in a case the same are attended to by the officers concerned promptly. The Counsel should be briefed properly to strengthen Revenue's case. The CIT should personally involve himself in cases involving intricate issues of facts/law having wide ramifications or involving high revenue stake. A copy of the scrutiny report for filing appeal to High Court should invariably be made available to the appearing counsel for his assistance in preparation of the case and arguments; further Para 4 of the Instruction No. 4/2011 dated 9-3-2011 mandates that every CCIT (CCA)/ CCIT shall set up a High Court Cell (HCC) at each station within his jurisdiction where a Bench of the High Court is situated. Further, this HCC shall obtain particulars of cases finally heard from Standing Counsel at the end of each working day and intimate the summary of proceedings to CIT concerned without any delay.

(Letter – F. No. 279/MISC/54/2015-SO (ITJ) dated 20-3-2015)

Section 260A of the Income-tax Act, 1961 – High Court – Appeal to – Responsibility of standing counsel in communicating court's decision

CBDT noted that in a recent incident, the Hon'ble High Court has passed certain remarks against the Department. It appeared that the High Court had sought certain information regarding the case from the Departmental Counsel. The Standing Counsel had communicated the directions of the Hon'ble Court, in the said case, in a routine manner but did not follow up the matter even though the said case was listed for almost a year till the Hon'ble High Court was constrained to issue directions in writing.

CBDT now directed that Standing Counsel have a duty to uphold the interests of the Department. Further it is their burden to obtain the information called for and comply with the directions of the Court from the CIT concerned and if the issue is not resolved at that stage, the matter should immediately be brought to the notice of the controlling officer, i.e., the CCIT concerned. Para 8.5 of the Instruction No. 3/2012 dated 11-4-2012 mandates that the counsel shall keep the CIT informed of the important developments in the case from time to time particularly with regards to dates of hearing, conclusion of hearing etc. The Counsel cannot absolve himself from his responsibility to get the directions of High Court complied with under any circumstances. It further said that such incidents should be taken note of while evaluating their performance.

(Letter F.No. 279/MISC/54/2015-SO (ITJ) dated 20-3-2015)

Section 9 of the Income-tax Act, 1961 – Income deemed to accrue or arise in India – Clarification regarding Explanation 5 to or section 9(1)(i) of Income-tax Act

As per section 9 of the Income-tax Act, 1961: The following incomes shall be deemed to accrue or arise in India:– (i) all income accruing or arising, whether directly or indirectly through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India."

The Finance Act, 2012 also inserted Explanation 5 to clause of section 9(1) (i);

A number of representations have been received by the Board stating that the purpose of introduction of Explanation 5 was to clarify the legislative intent regarding the taxation of income accruing or arising through transfer of a capital asset situated in India. The matter therefore was examined by the Board. The Explanatory Memorandum to the Finance Bill

2012 explains the purpose of the amendment to section 9(1)(i); Further certain judicial pronouncements have created doubts about the scope and purpose of sections 9 and 195. Further, there are certain issues in respect of income deemed to accrue or arise where there are conflicting decisions of various judicial authorities. Therefore, there is a need to provide clarificatory retrospective amendment to restate the legislative intent in respect of scope and applicability of sections 9 and 195 and also to make other clarificatory amendments for providing certainty in law."

The Explanatory Memorandum clearly provides that the amendment of section 9(1)(i) was to reiterate the legislative intent in respect of taxability of gains having economic nexus with India irrespective of the mode of realisations of such gains. Thus, the amendment sought to clarify the source rule of taxation in respect of income arising from indirect transfer of assets situated in India as explicitly mentioned in the: Explanatory Memorandum. Viewed in this context, Explanation 5 would be applicable in relation to deeming any income arising outside India from any transaction in respect of any share or interest in a foreign company or entity, which has the effect of transferring, directly or indirectly, the underlying assets located in India, as income accruing or arising in India. The declaration of dividend by such a foreign company outside India does not have the effect of transfer of any underlying assets located in India. It is therefore, clarified that the dividends declared and paid by a foreign company outside India in respect of shares which derive their value substantially from assets situated in India would not be deemed to be income: accruing or arising in India by virtue of the provisions of Explanation 5 to section 9(1) (i) of the Act.

(Circular 4/2015 – dated 26-3-2015)

INSTRUCTIONS

Section 139A of the Income-tax Act, 1961 – Permanent Account Number – Non-migration of PANs due to pending refund caging

Prior to implementation of cadre restructuring in Nov., 2014, a number of AST validations were executed at the time of migration of a PAN which restricted PAN migration, if any of the validation was pending. In these cases, the AO had to complete the action restricting such migration, to enable PAN migration. Now in view of the issues discussed above, necessary instructions have been issued. The complete procedure has been elaborated in the user manual for the functionality which is available on i-Taxnet. This instruction is to be brought to the knowledge of all field officers. For any system related issue, the officers may lodge a complaint at the Helpdesk for speedy resolution.

(AST Instruction No. 134 – dated 13-3-2015)

Section 143 of the Income-tax Act, 1961 – Assessment – Processing of Returns filed in F.Y. 2013-14 getting time barred on 31-3-2015 on online TMS in ITD application

Representations from field formations have been received intimating that owing to certain technical problems certain cases could not be processed in AST. The various reasons submitted by field formations have been broadly categorised. In order to facilitate the processing the CBDT approved the processing of such cases in Online TMS. The key features of the same have now been described *vide* said instructions. The complete procedure has been enumerated in the user manual available on i-Taxnet and ITO. The functionality was made available till 31-3-2015 for processing time barring returns only.

(AST Instruction No. 135 – dated 20-3-2015)

PRESS RELEASES

Introduction of Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015

The Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 has been introduced in the Parliament on 20-3-2015. The Bill provides for separate taxation of any undisclosed income in relation to foreign income and assets. Such income will henceforth not be taxed under the Income-tax Act but under the stringent provisions of the proposed new legislation. The salient features of the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 are: scope, penalties, prosecutions, safeguards, and also provides a onetime compliance opportunity for a limited period to persons who have any undisclosed foreign assets which have hitherto not been disclosed for the purposes of Income-tax. Such persons may file a declaration before the specified tax authority within a specified period, followed by payment of tax at the rate of 30 per cent and an equal amount by way of penalty. Such persons will not be prosecuted under the stringent provisions of the new Act. It is to be noted that this is not an amnesty scheme as no immunity from penalty is being offered. It is merely an opportunity for persons to come clean and become compliant before the stringent provisions of the new Act come into force.

The Bill also proposes to amend Prevention of Money Laundering Act (PMLA), 2002 to include offence of tax evasion under the proposed legislation as a scheduled offence under PMLA. The Government is confident that this new law will act as a strong deterrent and curb the menace of black money stashed abroad by Indians.

(CBDT Press Release, dated 20-3-2015)

List of Defaulters of Income/Corporate Tax

Government of India, Ministry of Finance Department of Revenue – Income Tax Department released List of defaulters of Income Tax/Corporate Tax *vide* this circular and advised them to pay tax arrears immediately. The list included Names, Date of Birth / Incorporation, PAN No., last known source of Income, Tax Arrears, the tax defaulter's address, Assessment Year and jurisdiction. It said that the entries in the list are specific to the Tax Arrear/Assessment Year mentioned. The tax defaulter's address, business, shareholding and management may have changed.

(Press Release dt. – 25-3-2015)

Section 92CC of the Income-tax Act, 1961 – Advance Pricing Agreement (APA) – Clarification on Applications and Agreements filed or entered into prior to 1-1-2015

The rules relating to Roll Back of an Advance Pricing Agreement (APA) were notified through notification No. SO 758 (E) dated 14th March, 2015. Representations received by CBDT stating that in respect of the applications and agreements which have been filed or entered into prior to 1-1-2015, the window provided up to 31-3-2015 is very short in light of the fact that the relevant rules have been notified only on 14-3-2015. Further, it has been represented that a reasonable period also needs to be provided in respect of the applications or agreements, as the case may be, filed or entered into up to 31-3-2015

Considering the above problems CBDT decided to amend the sub-rule (5) of rule 10MA to provide that in a case where an application has been filed prior to the 31st day of March, 2015, application for roll back in Form No. 3CEDA along with proof of payment of additional fee may be filed at any time on or before the 30th day of June, 2015 or the date of entering into the agreement whichever is earlier. Similarly, in a case where an agreement has been entered into before the 31st day of March, 2015, application for roll back in Form No. 3CEDA along with proof of payment of additional fee may be filed at any time on or before the 30th day of June, 2015.

(Press Release, dated 31-3-2015)

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A] SUPREME COURT JUDGMENTS

I. Services rendered in relation to preparation of scheme for raising requisite finances and tie up of loans for power project are nothing but consultancy services falling within the ambit of the term 'fees for technical services' as defined in Explanation 2 to section 9(1)(vii).

GVK Industries vs. ITO. (Civil Appeal No. 7796 of 1997) (Supreme Court)

Facts

1. The appellant, a company incorporated in India, was engaged in the business of generation and distribution of electricity. It engaged a non-resident company incorporated in Switzerland, for rendering advisory services, which *inter-alia* included financial structure and security package to be offered to the lender, making an assessment of export credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the appellant in loan negotiations and documentation with lenders and structuring, negotiating and closing the financing for the project in a co-ordinated and expeditious manner. For the said services the non-resident company was to receive success fee.

2. In order to make payment of the said fee, the appellant approached the ITO for issuance of 'No Objection Certificate'. The ITO, by his order, refused to issue the said certificate.

3. Being aggrieved, the appellant approached the CIT under section 264 of the Act to revise the order of the ITO. The CIT upheld the order of the ITO and directed the Appellant to deduct and pay tax at source as a condition precedent for issuance of a 'No Objection Certificate'.

4. Being aggrieved by the said order of CIT, the appellant approached the Hon'ble Delhi High Court. Hon'ble High Court held that rendition of the advisory services by the non-resident Company would not amount to Business Connection under section 9(1)(i) of the Act, however the same would fall within the ambit of section 9(1)(vii)(b) of the Act.

5. Aggrieved, the appellant approached the Hon'ble Supreme Court.

Judgment

1. The Hon'ble Supreme Court, firstly upheld the view of the Hon'ble High Court that the payment to the non-resident Company would not be taxable under section 9(1)(i), as there was no business connection in India and for this conclusion it derived support from the judgment of Hon'ble Supreme Court in case of *CIT vs. R.D. Agarwal and Company (56 ITR 20), CIT vs. TRC*

(166 ITR 1993) and *Birendra Prasad Rai vs. ITC (129 ITR 295).*

2. The Hon'ble Apex Court then analysed in detail the 'source based taxation' rule and held that section 9(1)(vii)(b) lays down the principle of 'source rule', that is the income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. Further, it held that the clause further mandates and requires that the services should be utilised in India.

3. The Hon'ble Court then examined the expression 'consultancy services', and held that since the said term has not been defined in the Act, therefore the said words have to be understood by its general and common usage. Further, it held that the finding of the Hon'ble AAR in In Re. (242 ITR 280) that the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it, would be applicable in the present case.

4. Further, the Hon'ble Supreme Court also profitably referred to the findings given by the Hon'ble Delhi High Court in case of *CIT vs. Bharti Cellular Limited and Ors. (319 ITR 139)* that consultancy services entails a professional advice or services in a specialised field.

5. After scrutinising the meaning of the term 'consultancy services' the Hon'ble Supreme Court, held that in the present case the non-resident Company had the skill, acumen and the knowledge in the specialised field i.e. preparation of a scheme for required finances and to tie-up required loans and therefore, it would come within the ambit and sweep of the term 'consultancy services'. Accordingly, it upheld the order of the Hon'ble High Court.

B] HIGH COURT JUDGMENTS

II. AMP expenses would be an 'international transaction' under section 92B. 'Bright Line Test' is not an appropriate method to identify the quantum of non-routine AMP expenses. Once the TPO shortlists comparables for benchmarking transactions on an aggregated basis, it is illogical and improper to treat AMP expenses as a separate international transaction.

Sony Ericsson Mobile Communications India Pvt. Ltd. & Ors. vs. CIT & Others (ITA No. 16/2014) (Delhi High Court) Assessment Year: 2008-09

Facts

1. The assessee, a subsidiary of the foreign AE, was engaged in importing/buying and selling, and distribution, promotion and marketing of mobile handsets under the brand name 'Sony Ericsson', and providing post sale support/warranty services in India. The assessee was primarily an importer performing distribution and marketing functions by reselling the imported handsets with its primary functions being sales, budgeting, inventory scheduling, marketing including advertisements and sale promotions, creating distribution channels, and servicing warranty claims.

2. In its transfer pricing study, the assessee had applied Transactional Net Margin Method ('TNMM') with the Profit Level Indication ('PLI') being net profit margin to benchmark its international transactions. It declared net profit margin of 2.5% which was higher than the average of 18 comparables.

3. The Transfer Pricing Officer ('TPO') observed that the AE, owned significant and valuable intellectual property rights in commercial or marketing intangibles in the form of brand-name, trademark, logos, etc. and the assessee on the other hand did not own any significant or valuable non-routine intangibles.

4. The TPO further observed that the ratio of Advertisement Marketing Promotion expenses

('AMP') to sales of the assessee was 7.06%. Further, he shortlisted 12 comparables, out of the assessee's 18 comparables, the ratio of AMP to sales of which was 3.35%. This figure was treated as the 'bright line' and accordingly the AMP expenditure, exceeding the said ratio was treated as non-routine or abnormal. This along with a mark-up of 15%, according to the TPO, was required to be recovered from the AE. The TPO accordingly made an addition of ₹ 69.95 crores.

5. The Hon'ble DRP while confirming the TP adjustment, reduced the mark up from 15% to 12.5%. The Assessing Officer accordingly passed the final assessment order.

6. Aggrieved, the assessee appealed to the Hon'ble Income Tax Appellate against the final assessment order. The Tribunal followed the Special Bench decision in the case of *L.G. Electronics India Pvt. Ltd. vs. ACIT (2013) 152 TTJ 273 (Del.)* and upheld the principle that an addition had to be made. For computation of the Arms' Length Price (ALP), the Hon'ble Tribunal remanded the matter to the file of the AO.

7. Aggrieved by the same the assessee appealed to the Hon'ble Delhi High Court.

Judgment

1. The Hon'ble High Court held that the ruling in the case of *L.G. Electronics India Pvt. Ltd. vs. ACIT (2013) 152 TTJ 273 (Del.)* was erroneous and laid down the following principles on the issue of benchmarking AMP expenses:

a. The AMP expenses incurred by assessee in India may be treated as an 'International Transaction' under section 92B.

b. In case of a distributor and marketing enterprise, the first step would be to ascertain and conduct detailed functional analysis, which would include AMP function/expenses.

c. The second step mandated ascertainment of comparable. This would have reference to the method adopted which matches the functions and obligations performed by the assessee including AMP expenses.

d. The economically relevant characteristics must be sufficiently comparable. This entailed and implied that the difference, if any, between controlled and uncontrolled transaction, should not materially affect the conditions being examined. When this was not possible, it should be ascertained whether reasonably accurate adjustments could be made to eliminate the effect of such differences.

e. The choice of the most appropriate method would depend upon the availability of potential comparable keeping in mind the comparability analysis including befitting adjustments which may be required.

f. The assessee must be compensated for the AMP expenses by the foreign AE. Such compensation may be included or subsumed in low purchase price or by not charging or charging lower royalty. Direct compensation can also be paid. The method selected and comparability analysis should be appropriated and reliable so as to include the AMP functions and costs.

g. Where the TPO accepts the comparables adopted by the assessee, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. In view of the High Court, it would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction.

h. The TPO could reject a method selected by the assessee for several reasons including want of reliability in the factual matrix or non-availability of comparables.

i. When the TPO rejects the method adopted by the assessee, he was entitled to select the most appropriate method, and undertake comparability analysis. Selection of the method and comparables be as per the command and directive of the Act and Rules and justified by giving reasons.

j. Distribution and marketing were inter-connected and intertwined functions. Bunching of inter-connected and continuous transactions was permissible, provided the said transactions could be evaluated and adequately compared on aggregate basis. This would depend on the method adopted and comparability analysis and the most reliable means of determining arm's length price.

k. The 'bright line' test had no statutory mandate and a broad-brush approach was not mandated or prescribed.

l. It could not be accepted that costs or compensation paid for AMP expenses would be nil, or at best would mean the amount or compensation expressly paid for AMP expenses. It would be conspicuously wrong and incorrect to treat the segregated transactional value as nil when in fact the two AEs had treated the international transactions as a package or a single one and contribution was attributed to the aggregate package.

m. The TPO for good and sufficient reasons could de-bundle inter-connected transactions, i.e., segregate distribution, marketing or AMP transactions. This would be necessary when bundled transactions could not be adequately compared on aggregate basis.

n. The TPO could segregate AMP expenses as an independent international transaction, but only after elucidating grounds and reasons for not accepting the bunching adopted by the assessee, and examining and giving benefit of set off.

III. Low turnover filter cannot be applied to exclude a comparable company if such company was otherwise comparable

CIT vs. Nortel Networks India A Pvt. Ltd. (ITA No. ITA 115/2015) (Delhi High Court) Assessment Years: 2007-08 & 2008-09

Facts

1. The Respondent Assessee during the subject years provided marketing and after sales support services to its Associated Enterprises ('AEs') in relation to sale of telecommunication equipments, software and other IT products to customers in India on cost plus mark-up basis. TNMM was selected as the most appropriate method and the assessee selected 7 comparables with mean margin of 11.5%.

2. During assessment, the TPO rejected 2 comparables – Cyber Media Events Private Limited and Capital Trust Limited. In respect of the former, the same was accepted by the assessee. Insofar as Capital Trust Limited, the TPO held it not to be a comparable on account of its low revenue and also the fact that the related party turnover exceeded 25%.

3. The DRP accepted the TPO's reasoning that the segment turnover of the excluded company, i.e. M/s. Capital Trust Ltd. was only ` 25 lakhs and constituted less than 2% of the total turnover of the company and, therefore, the assessee could not use its data.

4. Aggrieved, the assessee was in appeal before the Hon'ble Income Tax Appellate Tribunal ('ITAT').

5. The Hon'ble ITAT reversed the findings of the TPO that the company could not be rejected as comparable merely for the reason of having low turnover. It was also noted that turnover filter was not applied either by assessee or TPO and analysis needed to be carried out on the basis of functional profile and not on an arbitrary or *ad hoc* criteria. Accordingly, it held that the functional profile of Capital Trust Limited's consultancy segment was similar to that of the assessee and the same needed to be included in the final comparables for working the ALP.

6. Aggrieved, the Revenue preferred further appeal before Hon'ble Delhi High Court.

Judgment

1. The Hon'ble High Court, while dismissing the appeal, held that the Hon'ble ITAT's order did not raise a substantial question of law. It held that whether the turnover filter was an appropriate one and applicable could not be answered in the abstract and was entirely fact dependent.

2. It further observed that the TPO chose to apply that filter but used it to exclude the data pertaining to M/s. Capital Trust Ltd. It added that such inconsistency went unnoticed by the DRP and the ITAT corrected the position and noticed that not having applied the turnover filter at the initial stage, the Revenue could not take advantage when the turnover filter was not a test even in respect of the surviving comparable.

C) Tribunal decisions

1. Consideration for sale of capacity in the undersea cable system – Whether taxable as royalty u/s 9(1)(vi) – Held: No; Held that the sale was concluded outside India on a principal to principal basis and therefore such business income is not taxable in India; Payment of Standby Maintenance Charges – Whether FTS u/s 9(1)(vii) – Held: No; in favour of the assessee

Flag Telecom Group Limited vs. DCIT; 2015-TII-17-ITAT-Mum-Intl. – Assessment Years: 1998-99, 1999-2000 and 2000-01

Facts

1. The assessee, a company incorporated in Bermuda, was set up to build a high capacity submarine fibre optic telecommunication link cable system i.e. undersea cable for providing telecommunication link. Such a telecommunication cable was known as 'Fibre Optic link around the Global Cable System' (Flag Cable System).

2. The assessee had entered into a memorandum of understanding (MOU) with various parties which were mostly national telecommunication companies belonging to different nations, for the purpose of planning and implementing of the 'Submarine Fabric Optic Telecommunication Link Cable System' linking Western Europe (starting from the U.K.), Middle East, South Asia, South East Asia and Far East (ending in Japan). The assessee has been termed as 'founding party', whereas the other parties to the MOU have been termed as 'landing parties'.

3. Most part of the cable has been laid down on the sea bed and for the purpose of connection in the terrestrial land, the cable comes ashore in certain countries, connecting with the domestic telecommunication system, which has been termed as 'landing stations'. In India, Videsh Sanchar Nigam Limited (VSNL) was one of the original landing parties to the MOU in the cable system and part of the consortium to the Flag Cable System.

4. For the purpose of selling the capacity in the cable system, the parties entered into a Cable Sales Agreement (CSA). On 31st March, 1995, the CSA was entered into between the assessee and VSNL, which was further amended on 29th April, 1998, by which time VSNL had bought the capacity in the said cable system.

5. The CSA provided for the ownership rights in the Flag Cable System with all the rights and obligations in the capacity were sold. VSNL can transfer, assign or sell the capacity.

6. The entire procedure for ownership of capacity in the cable system and all other terms and conditions has been contained in a separate agreement titled as 'Construction and Maintenance Agreement' (C&MA). As per the terms, once C&MA comes into force, the CSA will come to an end. The C&MA was for a period of 25 years, which coincides with the life of the cable.

7. The assessee received US D 28.94 million from VSNL towards sale of capacity in the cable system. The assessee also received separate consideration for standby maintenance activities. The assessee claimed that the receipt was on account of sale of goods, from a non-resident to a resident which cannot be taxed in India. CSA and C&MA with VSNL have been executed by the assessee outside India on a principal to principal basis and the payment for the sale of capacity has also been made outside India.

8. The Assessing Officer (AO) held that the payment was for 'right to use' the cable, hence, taxable as royalty in India under section 9(i)(vi) of the Act. Further, the AO held that income from standby maintenance activities, which was separately received was taxable as FTS, because the maintenance requires highly skilled and technical personnel.

Decision

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

A) Re: Sale of capacity in the cable system

1. Tax Management Foreign Income Portfolio US International Taxation of Telecom, for the treatment of tax in an undersea fibre optic cable system, clarified that the transfer of asset in the agreements must be somewhat metaphysically identified as an amount of digital capacity.

2. The cable has been identified in terms of its capacity to transmit, and not as an independent asset *de hors* its capacity. This entire concept of 'capacity' used in the agreement by the parties to a telecom network cable has to be understood from the terms of the contract and not solely on a scientific term or technical angle.

3. The main characteristic of the cable is transmission of capacity only for which rights or Indefeasible Right to Use (IRUs) are granted to the users of the telecom network.

4. As per clauses given in CSA and C&MA, VSNL had all the ownership rights and obligations in respect of the capacity purchased in the cable system. Further the management committee which included VSNL shall make all decisions on behalf of signatories to implement the purpose of the agreement. VSNL can transfer capacity to any other signatory or any other international telecommunication entity.

5. In case of termination of C&MA, the net asset of the entire cable system will be disposed of and any proceeds of cost will be distributed among signatories in proportion to each signatory's shares.

6. VSNL had all the risks and rewards of ownership which was unaffected by the assessee, inasmuch as VSNL not only had the exclusive domain on the rights to use but also right to resale or transfer its interest in the capacity in the cable system to the exclusion of the assessee.

7. The intention of the parties and their conduct can also be gauged by the accounting treatment given by the parties. The assessee recognised its revenue from sale of capacity on the date on which the risks and rewards of ownership have been transferred to the purchaser. The capacity has been treated as 'stock-in-trade' and the capacity which has been left or available in the balance sheet is a part of 'current asset' under the head 'capacity available for sale'. It has not been treated as a fixed asset. VSNL had also treated it as purchase of fixed assets and not as an item of expenditure.

8. The Tribunal agreed with the contention of the tax department that cable is only a medium, however, disagreed with the tax department's conclusion that capacity is not capable of sale. It is the capacity alone which is the subject matter of either 'agreement to sale', 'agreement for 'right to use' or 'indefeasible right to use', 'agreement for lease' or 'agreement for service', etc.

9. Either by looking at the form or looking through the substance, the only picture which emerges is that, parties intended to 'sell' and not to give or get 'right to use'.

10. In the present case, in all the agreements the word 'capacity' has been defined in terms of saleable units which can be sold/purchased amongst the parties. The asset is to be identified as an amount of digital capacity in the cable, which is the subject matter of transfer.

11. The capacity in a particular segment has an exclusive right *qua* the owner which can be used in the manner in which the owner proposes. There can be several owners of capacity in a particular length of the cable.

12. If VSNL had bought 51 Minimum Investment Units (MIUs) in the flag cable system, which was running across in all the segments, it had not only the exclusive ownership of 51 MIUs, but also the exclusive right to use the said capacity in the manner in which it likes i.e. it could assign or transfer or sell to any other party.

13. In case had there been only right to use to be given, then the ownership right to the exclusion of the assessee could not have been given to VSNL.

14. Based on the apparent terms and conditions of the agreement between the parties, there was no assignment of 'right to use' but 'sale of capacity' in the cable system.

15. The assessee right from the stage of entering the MOU with the parties, signing of capacity sales agreement and C&MA agreement, intended to sell the capacity with transfer of complete ownership, risks and rights. The entire agreement was for the period of 25 years which coincided with the life of the cable. Accordingly, the signatory becomes the owner of the capacity in the cable system after the purchase, that is, VSNL in the instant case. This fact further establishes that there was no payment for simply the use of the capacity.

16. In case of a 'royalty', agreement, the complete ownership is never transferred to the other party. The concept of transfer of ownership to the exclusion of the other party is denuded in the case of 'royalty'.

17. If the consideration has been received for transferring the ownership with all rights and obligations then such a consideration cannot be taxed under the head 'royalty'. Thus, the characterisation of the transfer, in the terms of the contract and agreement entered by the parties, is for sale and not for simple use.

18. The payment received by the assessee from VSNL was on account of sales and hence constitutes business income and not royalty under section 9(1)(vi) of the Act.

B) No business connection in India – Business income not taxable

1. The assessee does not have any capital asset or property in India, which has been transferred to VSNL. The sale of capacity in the cable system does not arise through and from business connection in India, because sale has been made to VSNL which is unconnected to the assessee. The landing station is owned by the landing parties of the respective countries.

2. The assessee was not earning income through any aid or assistance of VSNL as VSNL was not carrying out any business for the assessee in India and therefore, in this case there was no income accruing or arising from business connection in India.

3. Neither the landing station nor the capacity in the cable is an asset of the assessee in India, hence there is no income accruing or arising through or from an asset of the assessee in India. Regarding source from India, the source of income must lie in India so as to be deemed to be income in India. The source must flow from an asset, whereas in this case there is no asset belonging to the assessee through or from which the assessee is having income.

4. No income had accrued or arisen in India within the deeming provision of section 9(1)(i) of the Act, as the sale had concluded outside India on a principal to principal basis. CBDT Circular No. 23, dated 23rd July, 1969 which has subsequently been withdrawn by a Circular No. 7, dated 22nd October, 2009 and that the later Circular does not have a retrospective effect would be squarely applicable in the case of the assessee for the relevant year.

5. Further, as there is no deemed income accruing or arising to the assessee in India within the ambit of section 9(1)(i), there is no attribution of income to operations in India.

6. Consequently, the payment received by the assessee from sales of capacity made to VSNL was not taxable either as 'royalty' under section 9(1)(vi) of the Act or 'business income' accruing or arising in India within the deeming provision of section 9(1)(i) of the Act.

C) Taxability of standby maintenance charges and repair and maintenance charges

1. The entire cable system is to be operated and maintained by founding signatory in co-ordination with relevant landing party signatory. Flag Network Operation Centre (FNOC) has to provide overall network service surveillance and overall co-ordination of maintenance and repair operations of flag cable system.

2. The assessee has to co-ordinate the deployment of the vessels for repairs and maintenance operation in accordance with the procedure defined. The maintenance activities undertaken by the assessee for the purpose of standby maintenance was for the arrangement for standby cover and maintenance and operation of FNOC.

3. Standby maintenance charges were not in respect of any actual rendering of services but to maintain infrastructure for co-ordination and setting up conditions for efficient rendering of services in relation to maintenance and repairs of cable system.

4. There was a separate charge for repair and maintenance under the C&MA whereby, the assessee was actually required to undertake repair and maintenance. The standby maintenance was a fixed annual charge which was payable, not for providing services but for arranging standby maintenance arrangement which was required for a situation whenever some repair work in the undersea cable or terrestrial cable is actually performed.

5. In relation to the standby maintenance, the payment made by VSNL is not in the nature of 'managerial service' or 'consultancy services'.

6. If the assessee was providing some kind of repair services in the cable system, then it can be termed as 'technical services'. However, if there was no actual rendering of services, but mere collection of annual charge to recover the cost of standby facility, agreed by all the members of the consortium on proportionate cost basis, then the assessee was not providing any kind of 'technical services'.

7. In the present case, the standby maintenance charges were in the form of fixed annual charge which was in the nature of reimbursement. Only actual cost incurred had been recovered from VSNL in providing the standby maintenance services.

8. Accordingly, the receipts on account of standby maintenance charges cannot be taxed as FTS, under section 9(1)(vii) as there was no rendering of services However, whenever

payment is received on account of actual repair or maintenance carried out, then same would definitely fall within the ambit of FTS chargeable to tax under section 9(1)(vii) of the Act.

II) Whether payment made towards data link charges qualifies as fees for technical services and accordingly, tax is required to be deducted on the said payment under the provisions of section 194J of the Income-tax Act, 1961 ("the Act") – Held: No – in favour of the assessee.

iGATE Computer Systems Ltd. vs. DCIT – [2015] 53 taxmann.com 431 (Pune - Trib.) – Assessment Years : 2007-08 to 2010-11

Facts

1. iGate Computer System ('assessee') is a software company engaged in the business of software development and other allied activities. The assessee paid data link charges to various telecom service providers. The data link usage was for transmission of data from the server of the assessee to the designated client service.

2. Through the process of interconnection, one service provider establishes a link between its own network, services and equipment with the network, services and equipment of other services provider. For facilitating these arrangements, services provider uses the network element (for carrying the lines to their destination) of other service provider. Whenever network is jammed or data link is slow or bad, there is 24/7 customer support facility provided.

3. The assessee had not deducted tax at source on the data link charges paid.

Decision

1. Technical services as defined under section 9(1)(vii) of the Act involves rendering of any managerial, technical or consultancy services. In order to provide managerial, technical and consultancy services, the element of human intervention is necessary.

2. In the present case, there is provision for DATA link and interconnection facility and the user utilises the technical equipment for inter-connection purposes only through technical equipment or gadgets used in the transmission process but the same does not partake the nature of services of managerial, technical or consultancy nature. Merely because certain technical equipments or gadgets are made available for transmission of data does not establish that such services are technical services provided by the service provider to the assessee as per the provisions of section 9(1)(vii) of the Act.

3. Also merely because for maintenance purpose certain human intervention was provided, cannot lead to the surmise that the Data link charges paid to various telecom service providers were in the nature of technical services governed by the provisions of section 194J of the Act.

4. The data link charges were paid for utilising the standard services which were provided by the individual service provider by way of use of technical gadgets which were made available *vide* DATA link satellite link line established from on service provider to be carried forward to the other service provider.

In view of the above, the Tribunal relying on the decision of the Hon'ble Madras High Court in *Skycell Communications Ltd. vs. DCIT 251 ITR 53 (Madras),* decision of the Bangalore Tribunal in *Infosys Technologies Limited vs. DCIT (45 SOT 157)* and decision of the Delhi Bench Tribunal in *Global One India Private Limited vs. ACIT (31 ITR (Trib.) 722)* held that the payment made towards data link charges do not qualify as fees for technical services as provided in 9(1)(vii) of the Act and accordingly, no tax was required to be deducted in relation to the said payment under section 194J of the Act.

III) Payment of consideration towards purchase of plant, equipment and machinery which included consideration towards installation, commissioning and assembly services – Whether Fees for Technical Services – Held No: In favour of the assessee

Birla Corporation Ltd vs. ACIT 2015-TII-03-ITAT-JABALPUR-INTL – Assessment Years: 2010-11 and 2011-12

Facts

1. Birla Corporation Limited, an Indian company is engaged in the business of manufacturing and selling cement. The assessee made payments to foreign vendors located in seven different countries viz. Austria, Belgium, China, Germany, Switzerland, UK and USA for import of plant, equipment and machinery. Under the said contracts, a part of the payment for plant, equipment and machinery represented payment of consideration for services rendered in India as there was no separate consideration, save and except for nominal reimbursement of actual costs and allowances of technical personnel visiting the installation site, for services rendered in India. The taxpayer had duly deducted the taxes for the contracts specifically entered for installation, commission and supervision services.

2. The assessee claimed that the income for services embedded in the payments were not chargeable to tax in India as these payments were for imports of plant, equipment and machinery. The assessee also claimed that as the payments were made for purchases, which did not give rise to taxability of related income in India, there was no requirement to deduct withholding tax.

3. The tax officer held that the contract is a composite contract for supply of plant and machinery and also for ancillary services of installation, commission and erection of such plant and machinery and hence would fall under the category of 'works contracts'. A portion of foreign remittances for supply of plant and machinery must be held in respect of services to be rendered in India and thus "accruing in India". Accordingly, the assessee was required to deduct tax at source at 42.23% on gross basis from all payments. The Commissioner of Income Tax (Appeals) [CIT(A)] upheld the order of the tax officer issued under section 201 r. w. section 195 of the Income-tax Act, 1961 ("Act").

Decision

1. The tax officer before raising a vicarious withholding tax demand ought to have examined whether the non-residents vendors are liable to be taxed in India in respect of the income embedded in the payments under the respective DTAA.

2. Even if a part of the income embedded in the impugned payments can be attributed to the installation, assembly or commissioning activities of the plant, machinery or equipment purchased, such an income, on the facts of this case, cannot be brought to tax as business income under Article 7 read with Article 5 of the respective DTAAs.

3. FTS under the respective DTAAs describes the above services in a rather general manner whereas the expression 'construction, installation or assembly project or supervisory activities in connection therewith' find a specific mention in the PE clauses in all the related DTAAs.

4. Construction, installation and assembly activities are *de facto* in the nature of technical services. There is indeed overlapping effect of Article 5 and Article 12 or Article 13, so far as such services are concerned. If there is an apparent conflict between two independent provisions of the law, the special provision must prevail. Refer *Union of India vs. India Fisheries (P) Ltd. (57 ITR 331) (SC)* and *ITO vs. Titagarh Steels Ltd. (79 ITD 532) (Kol. Tribunal).*

5. If the provisions of PE clause as also FTS clause are applied on the same activity and the

income is taxed as FTS even when the project fails PE test, not only the PE provisions will be rendered meaningless, but for gross versus net basis of taxation, it will also be contrary to the spirit of the observations in the UN Model Convention Commentary, which a co-ordinate bench had held in another case (Refer: ***Graphite India Ltd. vs. DCIT (6 ITD 384)*** are in the nature of 'contemporanea exposition.

6. If the provisions of PE clause as also FTS clause are applied on the same activity and the income is taxed as FTS even when the project fails PE test, not only the PE provisions will be rendered meaningless, but for gross versus net basis of taxation, it will also be contrary to the spirit of the observations in the UN Model Convention Commentary, which a co-ordinate bench had held in another case are in the nature of contemporanea exposition.

7. Where there is a specific PE clause in relation to a particular type of services which are covered in the general scope of services relating to FTS, the taxability of consideration for such services must remain confined to taxability of profits under the relevant specific PE clause.

8. The consideration received by the non-resident vendors for installation, commissioning and assembly of plant and machinery is also not taxable as business profits under Article 7(1) of the DTAA since the non-resident vendors does not have an 'installation PE' in India as the threshold limit specified under the DTAA to make these activities to be a PE were not breached.

9. As regards DTAA with UK and USA are concerned, the condition precedent for the taxability of FTS is that there should be a transfer of technology to the recipient of the service. By no stretch of logic, installation or assembly activities even involve transfer of technology and accordingly not in the nature of FTS.

10. As regards DTAA with Belgium, applying the most favoured nation (MFN) clause, by virtue of 'make available' clause in the India-UK DTAA, the installation, commissioning or assembly activities will not be in the nature of FTS.

11. The India-Switzerland DTAA specifically excludes amounts paid for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of a property from the definition of FTS. Therefore, the consideration for such activities cannot be taxed as FTS. As corresponding provisions also find place in the UK and USA DTAA, the consideration for installation, commissioning or assembly activities cannot be taxed as FTS.

12. Under the scheme of allocation of taxing rights under the related DTAAs, India does not have the right to tax income, if any, in respect of rendition of installation, commissioning or assembly services, embedded in the invoice value of the related equipment, plant or machinery.

However, the Tribunal remanded the matter back to the tax officer for examining the existence of PE of the non-resident vendors based on the facts. In case the tax officer can demonstrate that the non-resident vendors had a PE in India and the income embedded in the impugned payments was indeed liable to be taxed in India, the tax officer will be at liberty to raise the fresh demand.

Action is the real measure of intelligence.

Nikita Badheka, *Advocate & Notary*

INDIRECT TAXES
VAT Update

A. Draft Bill propositions

The State Finance Minister has presented a Bill to amend certain provisions of MVAT Act as announced in the State budget. The Maharashtra Tax Laws (Levy, Amendment and Validation) Act 2015 (LA Bill No. XVI of 2015 dt. 26-3-2015)

All the amendments are to be effective from 1st April, 2015 except where specifically stated hereinbelow .

A.1 Amendment to Maharashtra Purchase Tax on Sugarcane Act

Section 12B of this Act empowers State to issue Notification to assist the Sugar factories in Maharashtra. The addition of the year 2014-15 will empower the State to issue notification to give fair and remunerative price to the farmers.

A.2 Amendment to Profession Tax Act

As promised in the budget, the amendment is made in the schedule appended to the Act.

In Entry 1(b) is divided into two categories

i Male Employee salary exceeding ` 7,500 but not over ` 10,000 – Prof. tax payable is ` 175 per month

ii Female Employee salary not exceeding ` 10,000/-Prof. tax payable NIL

A.3 Amendments to Entry tax Act

Two new categories of goods are added to be subjected to levy of entry tax under Maharashtra Tax on Entry of Goods into Local Areas Act. This is the new levy effective from 1-4-2015 as serial No. 17 of the Schedule

The two categories of goods now added in the Schedule appended to this Act are as follows:

Schedule C-55 , sub-entries (iv) and (v) .. Entry tax rate is 5%

C-55(iv) – Steel Bars (rounds, rods, square, flats, octagons and hexagons, plain and ribbed or twisted in coil form as well as straight lengths)

C-55(v) – Steel Structural (angles, joints, channels, tees, sheet piling sections, Z sections or any other rolled sections)

B. Amendment to MVAT Act

All the amendments are to be effective from 1st April 2015 Except where specifically stated herein below

B.1 Service Tax not to be part of Purchase Price and Sales Price

Explanation 1A is added to definition of Purchase Price [Sec. 2(20)], and to definition of Sales Price Section 2(25).

To clarify that purchase price/sale price shall not include, the amount of service tax levied or leviable under the Finance Act, 1994 and collected separately by seller/from purchaser.

C. Amendment in Relation to Revised return

C.1 Proviso for section 20(4) is amended. For the words the aforesaid clauses, (clause (a) or, as the case may be clause (b)," is substituted. As a result of this substitution, the restriction to file one revised return will not apply to revised returns under section 20(4)(c) i.e. furnishing the revised returns as per any intimation u/s. 63. More than one revised return can be filed under this category.

C.2 Section 20(6) provided for mandatory late fee for late filing of returns. For the words '2000' the words '1000'. This subsection shall come into force from 1-5-2015 .

C.3 Section 23(5) is amended to substitute the words, 'during the course of any proceedings under this Act, if the prescribed authority is satisfied' by the words 'where the prescribed authority has reason to believe'.

The students of law would appreciate the substitution which will make it mandatory to record the reason to believe by the Assessing Officer, before taking action under this sub-section.

C.4 Another amendment is made in sec. 23(5) to provide time limit to the assessment under this sub section. The second proviso added to this sub-section reads as follows:

Provided further that, in case a notice is issued under this sub section, on or after the first April 2015, no order of Assessment under this Sub-section shall be made after the expiry of 6 years from the end of the year, containing the transaction or as the case may be claim.

C.5 Section 23(11) which refers to cancellation of order, will now be applicable to the orders passed under section 23(5). Accordingly amendments are made in section 23(12) to provide for fresh assessment order, after cancellation of order u/s. 23(5) within a period of 18 months.

D. Amendment to section 28 of MVAT Act

D.1 This section refers to classification of turnover. The entire section is substituted to enable the Sales Tax Authorities to pass the order in Appeal or review, if the order in Appeal or review has the effect that any tax assessed under the MVAT Act or any other Act, should have been assessed under the provisions of any Act other than that under which it was assessed or that the order in appeal or review has the effect of modifying the tax liability under the MVAT Act or any other Act. (For example CST Act)

D.2 In such an eventuality as a consequence of such an appeal or review order, the State Authorities are now empowered to assess such turnover or part thereof, or tax liability under the MVAT Act in accordance with such allowance or disallowance of such claims and the time limit for such action is provided as 5 years from the date of the order in appeal and review.

D.3 The proviso added to this substituted section states that if the assessment is already made, the assessment shall be modified after giving the dealer a reasonable opportunity of being heard, notwithstanding any provision regarding limitation applying to such Assessment period.

E. Amendment to Interest Provision Sec. 30

E.1 Second proviso is added to section 30(2) to provide for levy of interest if a dealer files annual revise returns, as per Section 20(4)(b) or section 20(4)(c) . The interest shall be payable on excess amount of tax, as per the annual revised return as per the table provided under this new proviso.

Table

	Registration status in the year for which annual revised return is filed	Interest to be computed from
	(1)	**(2)**
(a)	Dealer, holding certificate of registration for whole year	1st October of the year, to which the annual revised return relates
(b)	Certificate of registration granted, effective from any date up to the 30th September of the year to which revised return relates	1st October of the year, to which the annual revised return relates
(c)	Certificate of registration cancelled, effective on any date after the 30th September of the year to which revised return relates	1st October of the year, to which the annual revised return relates
(d)	Certificate of registration granted, effective from any date after the 30th September of the year to which revised return relates	Effective date of registration
(e)	Certificate of registration cancelled, effective on any date prior to the 30th September of the year to which revised return relates	Effective date of cancellation of registration.".

F. Special provisions for amalgamation / merger / demerger – Sec. 44

Sub-section 4(aA) is added to the section 44 relating to special provision regarding liability to pay tax in certain cases.

This subsection provides that in case of amalgamation , merger or demerger , the transfer of business shall be deemed to have taken effect from either of the following dates.

i. The date of the order of HC, Tribunal or the Central Government

Or

ii. The date on which the Registrar of Companies notifies the amalgamation, merger or demerger as opted by the Company.

iii. Corresponding amendments are made in Section 47 of the MVAT Act, by substituting the word, “Court “with the words Court, Tribunal.This section is further amended to give effect to the amendments by way of new subsection 44(4A) .

G. Amendment to Schedule Entries

G1. Sch C-4 is amended. An explanation is added w.e.f 1st April 2005, that for the purpose of this entry, Sewing thread, shall include embroidery thread. Therefore embroidery thread would be Subject to 4% upto 31-3-2010 and 5% thereafter.

G2. Sch C-91 refers to spices: An explanation is added w.e.f 1-4-2005 to clarify that spices shall include , spices in all forms, varieties and mixtures of any of the spices. Therefore the mixture of spices would be subject to 31-3-2010 and 5% thereafter.

G.3 An amendment is made to the Notification of Industrial Input, in the notification No VAT-

1505/CR-234/Taxation-1 dt. 1-9-2005 entry 2(5) is amended w.e.f. 1-9-2005, to include along with Desi Loni, White butter. Therefore White Butter would be subject to 4% upto 31-3-2010 and 5% thereafter.

H. Amendment by way of separate Notification

By notification No VAT. 1515/CR-39(1)/ Taxation-1 dt 27-3-2015 , further amendments are made to be effective from 1-4-2015.

H1. In Sch A Entry 6 as it stood originally is renumbered as Sub entry 6A, a new subentry is added. Graph book, laboratory note book, drawing book and workbook would be exempt from tax w.e.f. 1-4-2015. Accordingly these words are deleted from Schedule entry C32.

H2. Certain entries where the exemption was limited upto 31/3/15, the exemption is extended upto 31-3-2016. This exemption includes;

Entry 9A (Paddy Rice, wheat, pulses flour of wheat,pulses,etc .

Entry 51 relating to Papad, gur, chilles, turmeric, corrainder seeds, towels, wet dates, solapuri chaddar, coconut in shell and separated kernel, etc A-59 Raisins and Currants. H-3 A new Entry is included in Sch A, as 12A to exempt Drugs for treatment of cancer as may be notified from time to time by the State Government in the official gazette.

H3. Amendment to Sch C:

i) Cashew shell, would now be subject to 5% under new entry C-17A.

ii) Sch C-29, refers to drugs. Sub entry D is included to subject Guide wire for medical purposes at 5%.

iii) Entry C-70 refers to paper of various types, this entry is now substituted and paper as may be notified by State Govt would be subject to 5%. Accordingly a new notification No VAT.1515/CR-39(2)/ Taxation-1 dt. 27-3-2015 is introduced. Various types of papers are now related to the Excise Tariff. The Details of the notification may be seen on the website.

iv) C-107 is amended by inserting, new entry 7A, ladies hand bags and ladies purses would be subject to 5%.

v) The concession provided to entry C-108 is extended upto 31-3-2016. This entry included Tea in leaf or powder form , including instant tea .

vi) Entry C-108(3) which provided reduced rate of tax for pre laminated particle board, etc. is deleted.

vii) Sch C-111 Refers to compact florescent lamps. The word “LED bulbs” are inserted in this entry to make them subject to 5% tax.

To believe blindly is to degenerate the human soul. Be an atheist if you want, but do not believe in anything unquestioningly.

— *Swami Vivekananda*

CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

CBEC instructions for Aachhe Din for taxpayers

1. Timely disposal of registration application

Department to ensure all new application filed after 28-2-2015 to be disposed of within time limit of two days. Registrations pending on 28-2-2015 are to be disposed off latest by 15-3-2015 as per the guidelines provided in the circular dated 28-2-2015. Personal monitoring of the implementation of the new system of simplified registration is given utmost importance. The field formations are also requested to send a fortnightly report to the Commissioner (Central Excise) & Commissioner (Service Tax) of the applications pending for more than two days with detailed reasons for the pendencies. The report for the quarter ending 15th March must be sent by the next day.

(Letter D.O.F No. 201/24/2013 – CX dated 3rd March, 2015)

2. New Directorate on Taxpayer Services to be formed

The Central Board of Excise and Customs (CBEC) is celebrating the Year 2015 as 'the Year of Taxpayer Services' in recognition of the need to have 'customer focus' in our day-to-day functioning. The Tax Administration Reforms Commission (TARC) has devoted a full Chapter to 'Customer Focus' in its first Report.

In pursuance of the recommendations of TARC, the CBEC has decided to set up a Directorate of Taxpayer Services. For this purpose, a Committee has been set up to work out the modalities, including the mandate, organisational structure and the responsibilities of the new Directorate. The CBEC has invited suggestions from tax payers at the earliest which may be sent to Shri Yogendra Garg, Commissioner DPPR & Member Secretary of the Committee, latest by 31st March, 2015 (Tel: 011-23379331 Fax: 011-23370744 E-mail: commr.dppr-cbec@nic.in & y.garg@nic.in) with a copy to E-mail: p.mohanty@nic.in.

(Letter F.No. 503/56/2015 dated 20th March, 2015)

3. Instructions regarding adjudication of Central Excise and Service Tax cases booked by Director General of Central Excise Intelligence (DGCEI)

Circular 994/01/2015 – CX dated 10-2-2015 contained detailed instructions regarding adjudication of cases booked by DGCEI.

Pursuant to references from DGCEI regarding the difficulties in implementing the above referred instructions, said instructions are now modified *vide* Circular 1000/7/2015-CX dated 3-3-2015. This circular, being administrative in nature, is not being dealt in detail in this update. The readers are requested to refer the Chamber's website for detailed update on this matter.

(Circular 1000/7/2015 – CX dated 3-3-2015)

CA Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Paging Service

1.1 CST, Mumbai vs. Page Point Service (P) Ltd. 2015 (37) STR 938 (Bom.)

The High Court in this case held that, sale price of pager was restricted to hardware i.e. pager units and airtime charges and licence fees were not includible in it. The dealer did not do anything to radio pager at time of or before its delivery and they have merely collected airtime charges and *pro rata* license fees. Sale of pager was a standalone transaction, and activation of pager came subsequent to sale.

Management Consultancy Service

1.2 CST, Mumbai vs. Essel Corporate Services Pvt. Ltd. 2015 (37) STR 943 (Tri.-Mum.)

The assessee in this case engaged in liaison with various Government authorities, administrative support, banking and loan arrangement etc. The department sought to tax them under Management Consultancy Service. The Tribunal held that, in absence of agreement or invoice, it is difficult to understand the nature of service. Activities undertaken by assessee include advice and consultancy also and executory function connected with advisory function and not related routine or operational functions, and therefore services were covered under Management Consultants Service.

Club or Association Service

1.3 Green Environment Services Co-op. Society Ltd. vs. UOI 2015 (37) STR 961 (Guj.)

The appellant a co-op. society provided common effluent treatment services to itsmembers. The department sought to tax the said services under Club or Association Service. The High Court held that, provisions of section 65(25a) insofar pertains to service provided by a society to its members, came to be declared as unconstitutional by Division Bench of Gujarat High Court in the case of *Sport Club of Gujarat Ltd. 2013(31) STR 645 (Guj.)* and therefore impugned order is required to be set aside.

1.4 NASSCOM vs. CST Delhi 2015 (37) STR 1041 (Tri.-Del.)

The appellant, an apex body of software companies who together contribute subscription amount for achievement of various objectives of public, industry and national importance including awareness/education/exports/intellectual capital growth etc. The department sought to demand tax on subscriptions received from members under club or association service. The Tribunal held that subscription charged by the appellant was not liable to service tax. Further, the option of reduced penalty under section 78 is extended to the appellant since said option was not given in adjudication order.

Port Service

1.5 CST, Mumbai vs. Traffic Manager, Mumbai Port Trust 2015 (37) STR 993 (Tri-Mumbai)

The department in this case sought to demand service tax on compensation received from ONGC for providing permission to lay their pipelines through port limits. The said compensation has been calculated @ 50%of wharfage charges paid. The Tribunal held that, assessee did not extend any facility, service or personnel in relation to pipeline or goods flowing through such pipelines and amount received cannot be considered as amount paid towards any service rendered. The payment is received for permission and not for any port service. It is also held that, mere erection of wharfage by itself does not amount to rendering of port service and term 'wharfage' used for merely determining compensation and not to determine nature of service rendered.

Erection, Commissioning and Installation Service

1.6 UB Engineering Ltd. vs. CCE, Pune-III 2015 (37) STR 999 (Tri-Mumbai)

The Tribunal in this case held that, the appellant is not allowed to change classification of contract from ECI to WCS as service tax is paid under ECI service at full rate on abated value of 33% from April, 2008 onwards. Further, once credit availed on inputs have been reversed then benefit of Notification No. 1/2006-ST is admissible.

Commercial or Industrial Construction Service

1.7 Hindustan Steel Works Construction Ltd. vs. CCE, Raipur 2015 (37) STR 1022 (Tri-Del)

The Tribunal in this case held that, the issue whether value of free supplies made by recipient of CIC service required to be disclosed as part of gross consideration received for rendition of taxable service, to be entitled to the benefits of Notification No. 1/2006-ST is no longer res integra and covered by larger bench decision in *Bhayana Builders (P) Ltd. 2013 (32) STR 49 (Tri-LB).*

Banking & Other Financial Service

1.8 Inox Air Products Ltd. vs. CCE, Nagpur 2015 (37) STR 1024 (Tri.-Mumbai)

The appellant in this case supplied storage tank to their customers for fixed term and charged consideration on monthly basis. The Tribunal held that, as per agreement the property in tank always remained the property of appellant and the same was only loaned for use to their customers and the customers are not entitled to sell or offer for sale mortgage and pledge the tanks. Further, the appellant is not a banking company or financial institution including NBFC etc. hence not liable under BFS.

Tour Operator's Service

1.9 Capricon Transways Pvt. Ltd. vs. CCE, Raigad 2015 (37) STR 1027 (Tri.-Mumbai)

The appellant in this case provided bus services to companies for transportation of their employees from designated spots to company and back on contract basis and used only contract carriage buses. The Tribunal held that, for the period prior to 10-9-2004, tours operated by appellant under contract carriage permit were not operated in tourist vehicle, hence not liable to service tax. It is further held that, extended period of limitation is not applicable as there are contrary decisions of Tribunal on this issue.

Commercial Coaching & Training Service

1.10 Ulhas Vasant Bapat vs. CCE, Pune-III 2015 (37) STR 1034 (Tri.-Mumbai)

The appellant in this case conducted training in spoken English for duration of only two weeks and claimed exemption as vocational institute. The Tribunal held that, when even after undergoing training in English language for years together both in School and Colleges, it is

difficult to attain proficiency, it is inconceivable that in a matter of two weeks, any proficiency or skill can be imparted or achieved by undergoing training for a mere two weeks. Further, training in languages, whether Indian or foreign has not been prescribed as vocational training by Government of India. Therefore, appellant is not eligible for benefit of Notification No. 9/2003-ST or its successor Notification No. 24/2004-ST.

Mandap Keeper Service

1.11 CCE, Pune-II vs. Central Panchayat 2015 (37) STR 1038 (Tri.-Mumbai)

The Tribunal in this case held that, marriage as a social function existed much before the religions came into being and therefore, it is futile to argue that marriage is religious function. The mode of conducting the marriage either by following religious rituals or otherwise does not make marriage a religious function. In view thereof, the appellant is liable to pay service tax under Mandap Keeper Service.

Cargo Handling Service

1.12 Shreem Coal Carriers (P) Ltd. vs. CCE, Nagpur 2015 (37) STR 1038 (Tri.-Mumbai)

The Tribunal in this case held that, loading/unloading of coal by engaging tippers come within the purview of Cargo Handling Service. It is further held that, mining of sand from riverbed comes within the Mining Service and not under scope of Cargo Handling Service. Extended period of limitation is not invoked in view of conflicting decisions of Tribunal and others.

1.13 United Shippers Ltd. vs. CCE, Thane-II 2015 (37) STR 1043 (Tri.-Mumbai)

The appellant in this case collected Barge (shipping) charges towards transportation of imported goods from mother vessel to jetty. The department sought to tax these charges under cargo handling service. The Tribunal held that, such transportation activity is a part of import transportation of bringing goods into India and liable for import duty and cannot be made liable to tax under cargo handling service.

Transport of Goods through pipeline or conduit Service

1.14 Gujarat State Fertilizers & Chemicals Ltd. vs. CCE, Vadodara 2015 (37) STR 1076 (Tri.-Ahmd.)

The appellant in this case provided transportation of waste effluent material through pipeline for disposal. The Tribunal held that, waste effluent is not goods as per section 2(7) of Sale of Goods Act, 1930 therefore services cannot be made taxable under transportation of goods through pipeline or conduit service.

Business Auxiliary Service

1.15 Jayakrishna Flour Mills (P) Ltd. vs. CCE, Madurai 2015 (37) STR 1079 (Tri.-Chennai)

The appellant in this case, engaged in grinding of wheat into wheat products such as maida, atta, suji and bran and contended that, conversion of wheat into wheat products involves several processes, such as cleaning of impurities, grinding, milling etc. by machines and labour and therefore amounts to manufacture. The Tribunal held that, in view of CBEC Instruction No. 11/01/2012-CX-1 dated 9-7-2013 the above process amounts to manufacture and therefore no service tax is leviable thereon.

2. Interest/Penalties/Others

2.1 CCE, Mumbai-II vs. Hincon Technoconsult Ltd. 2015 (37) STR 956 (Tri-Mumbai)

The Tribunal in this case held that, export of service not exigible to tax under rule 4 of ESR, 2005, whereas rule 5 of ESR, 2005 provides for rebate where tax is paid mistakenly or by way of abundant caution and therefore amount paid by the assessee in the present case is in the nature of deposit as per the said rules. Since section 11B of CEA, 1944 is applicable to duty/tax only, limitation of time bar not applicable to refund of impugned deposit.

2.2 Monarch Catalyst Pvt. Ltd. vs. CCE, Thane-I 2015 (37) STR 1021 (Tri.-Mumbai)

The appellant in this case filed refund claim under notification no. 17/2009-ST instead of notification no. 18/2009-ST. The Tribunal observed that, before rejecting the refund claim, no SCN was issued to the appellant and even before Commissioner (A) the appellant have stated correct notification. The Tribunal remanded back the matter to original authority to examine the claim under Notification No. 18/2009-ST. Further, since the appellant have not claimed the refund under correct notification they will not be eligible to claim interest for intervening period.

3. CENVAT Credit

3.1 CCE&C vs. Panchmahal Steel Ltd. 2015 (37) STR 965 (Guj.)

The High Court in this case held that combined reading of rule 3(1) & (4) of CCR, 2004 indicates that there was no legal restriction for utilisation of CENVAT credit for payment of services as recipient of service, which was not output service of assessee.

Also refer to decision in *UOI vs. Mohini Industries 2015 (37) STR 979 (chattisgarh)*

3.2 UOI vs. Raiput Rotocast Ltd. 2015 (37) STR 978 (Chattisgarh)

The High Court in this case held that, insurance premium in respect of a transit insurance of induction furnace and transformers, group personal accident policy and group health guard policy of staff is indirectly in relation to manufacture of final product and is included in the definition of inputs service.

3.3 Nash Industries vs. CC&ST, Bengaluru 2015 (37) STR 1060 (Tri.-Bang.)

The Tribunal in this case allowed CENVAT credit of service tax paid on Rent-a-cab service used for transportation facility to the customers and air travel service used for travel of partners and employees of the company for business purpose and rent of office premises as each action is directly connected to the business of manufacture.

3.4 Binani Cement Ltd. vs. CCE&ST, Jaipur-II 2015 (37) STR 1071 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on manpower supply services hired for maintaining occupational health centre at factory in terms of Rajasthan Factory Rules, 1951 and also at project office and corporate office.

3.5 RSWM Ltd. (Fabric Division) vs. CCE, Jaipur-II 2015 (37) STR 1074 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of services availed for construction of railway sidings for purpose of transportation of coal to captive power plant in factory as transportation of coal is necessary for generation of electricity in capital power plant and hence connected with business of manufacturing of final product.

Any change, even change for the better, is always accompanied by drawbacks and discomforts.

The mind is not a vessel to be filled but a fire to be kindled.

ML-444

Janak C. Pandya, Company Secretary

CORPORATE LAWS
Company Law Update

[2015] 189 Comp Cas 38 (CLB)

[Before the Company Law Board – Mumbai Bench]

Chandrakant Shankar Pathak vs. Indigo Hotels P. Ltd and Others.

Conducting board meetings without serving the proper notice or increase in share capital, appointment and removal of directors and allotment of shares, where powers are used by the majority merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company cannot be upheld.

Brief facts

The present petition has been filed under section 397 and 398 of the Companies Act, 1956. The petition is for the act of oppression and mis-management carried out by the respondents.

Petitioner along with the respondent No. 2 ("R2") had acquired the entire share capital of the Indigo Hotels P. Ltd. ("Co"), having properties at Panchgani for a certain amounts from other respondents. The share capital was in to class. Class A, Class B. Class A share has 10 vote and Class B share has only 1 vote. Besides the payment for shares, they have also paid debts of the Co. to its directors and certain repairs and maintenance of the hotel. The petitioner and R2 had agreed to acquire equal number of shares for which other respondents who were original shareholders had executed the power of attorney in the favour of petitioner and R2 to carry out the transactions.

R2 pursued petitioner to buy 50% of Class A shares as it has voting power of 10 and thus indirectly it has total voting power of 40%. Petition had agreed to it in a good faith.

It was also agreed as follows.

a. Shareholding of the Co. will not change and that shares shall not be alienated transferred or disposed-of unless same is first offered to the petitioner.

b. All the directors shall be from family members of petitioner and R2.

The charges made by the petitioner are as follows.

a. R2 has refused to transfer the Class A shares as agreed in favour of the petitioner, even though from first day he has paid full amount of consideration as agreed.

b. In the annual return of the Co., only part of shares were shown as owned by the petitioner.

c. Illegal appointments of directors without following procedure.

d. Increasing authorised share capital without proper notice to the petitioner.

e. Transfer of shares and alteration of Articles of Association without valid and proper notice to the petitioner.

f. Siphoning and misuse of funds.

g. Removal of petitioner as director through extraordinary general meeting when trial was going on.

h. Denial of taking inspection of documents.

In their reply R2 and others had filed their response as follows.

a. Petitioner has not paid full consideration amount as he claims.

b. He is only a nominee on behalf of R2 and thus some shares were transferred to him.

c. He has committed fraud and forgery and theft of some of the shares which were owned by other respondents and for which FIR was filed.

d. Other charges against the petitioner for act of misconduct on the part of petitioner.

Judgments and reasoning

CLB has allowed the petition. It has concluded that the series of acts of oppression and mismanagement alleged by the petitioner are burdensome, harsh, and inequitable and demonstrated the misconduct and lack of probity on the part of the respondents. CLB has also looked at each and every relief sought by the petitioner and granted the same as mentioned below.

a. On transfer of shares, CLB after verifying the documents has concluded that certain shares, which R2 and other claims as theft and were transferred by way of forgery in fact actually transferred. The signature on transfer deed is original and that filing FIR after one year is nothing but after thought. CLB also observed the huge amount paid to the Company by petitioner and which as per respondents claimed as secured loan to the company is nothing but payment made by the petitioner for the consideration for purchase of shares.

b. On balance shares, which petitioner has claimed that same is being held by R2 is trust is not proved as nothing on record.

c. On the appointment of additional directors on the Board, CLB observed that same is null and void as no notice were given, petitioner has been shown as absent in the said board meetings, no proof of dispatch of notices to petitioner has been shown on record. CLB held that holding board meeting without complying the requirements of section 286 of the Act, the resolutions passed at the board meeting without issuing valid notice is invalid. CLB has referred the judgments in (1) *Mst. L. M. S. Ummu Saleema vs. B. B. Gujral MANU/SC/0072/1981; [1981] 3 SCR 67.* (2) *M. S. Madhusoodhanan vs. Kerala Kaumudi P. Ltd. [2003] 117 Comp Cas 19 (SC); MANU / SC / 0553/2003 (3) Dankha Devi Agarwal vs. Tara Properties P. Ltd [2006] 133 Comp Cas 236 (SC),* where Supreme Court has held that a decision taken in a meeting without due notice of such meeting for

removal or induction would be instance of oppression and mismanagement. (4) *Zora Singh vs. Amrik Singh Hayer [2009] 149 Comp Cas 328 (P & H),* it has been held that when the receipt of all the notices were denied then mere production of such certificates do not satisfy the requirement of law.

d. On the appointments of some more additional directors, petitioner has proved that the notice of board meeting where the above additional directors were appointed was dispatched after the date of board meeting. It also observed that immediately upon receipt of notice, petitioner has sent a letter objecting such appointments. Thus CLB, has also set aside the another appointment of additional directors.

e. On increase of authorised capital, alteration of AoA and removal of petitioner as director in EGM, CLB has perused the letter sent by petitioner to the respondents on non-receipt of notice of board meetings and alleged EGM and appointment of various acts of oppression mentioned therein. CLB also observed that no proof of dispatch of notice to the petitioner was shown by the respondents.

f. CLB also set aside the issue and allotment of additional shares by respondents to themselves as no proper notice was served on petitioner and that no shares were offered to the petitioner as existing shareholders as required by the AoA thereby playing a fraud on petitioner. The judgments in the case of *Dale and Carrington Invt. P. Ltd vs. P. K. Prathapan [2004] 122 Comp Cas 161 (SC) (2) Needle Industries (India) Ltd. vs. Needle Industries Newey (India) Holding Ltd. [1981] 51 Comp Cas 743 (SC); [1981] 3 SCC 333 and (3) Hogg vs. Cramphorn Ltd.; [1967] 37 Comp Cas 157 (Ch D);* were referred. Thus, CLB has concluded that principle deduced from these cases is that when powers are used merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company, same cannot be upheld.

g. On removal of petitioner as director, CLB has observed that all due process as required under section 284 read with section 173 were followed. However, CLB has questioned that whether petitioner was subject to such oppressive act as retaliation by the respondents on filing this petition. CLB also questioned whether the respondents by misusing their predominant position on the basis of unfounded allegations have removed petitioner as director. CLB also observed that Bench has restrained the respondents to do so in spite of that petitioner is removed, which is an act of oppression CLB has directed the Co. to reinstate the petitioner and file necessary forms.

h. CLB has appointed a special auditor for the verifying company's accounts for mismanagement. If any loss incurred, should be recovered from respondents.

i. If, petitioner wishes to part with the company, he after receiving fair value may transfer the shares.

High expectations are the key to everything.

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

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

1. External Commercial Borrowing (ECB) Policy – Review of all-in-cost ceiling

Vide A.P. (DIR Series) Circular No. 17 dated July 28, 2014 all-in-cost ceiling for ECB were prescribed by RBI.

Further, *vide* A.P. (DIR Series) Circular No. 99 dated March 30, 2012 RBI extended the time period for all-in-cost ceiling as prescribed as above till December 31, 2014. RBI has now further extended time period till 31st March, 2015.

(A.P. (DIR Series) Circular No. 80 dated 3rd March, 2015)

(Comments: In case of all-in-cost of ECBs, the all-in-costs include rate of interest, other fees and expenses in foreign currency except commitment fee, pre-payment fee and fees payable in Indian rupees. The payment of withholding tax in Indian rupees is excluded for calculating the all-in-cost. The all-in-cost can be used to explain the total fees and interest included in a financial transaction such as a loan. By comparing all-in-costs, investors and borrowers can more easily compare net gain potential. The all-in-cost ceiling limit for ECB expired in December 2014. The ceiling for ECBs with average maturity of three and up to five years was enhanced in 2011 and has been extended from time to time considering the global financial markets situation. Therefore the following all-in-cost ceiling for ECBs shall continue to apply till March 31, 2015[1]:

a. ***The all-in-cost ceiling for ECBs with average maturity of three and up to five years is at 6 months London interbank offer rate (LIBOR) plus 350 basis points (3.5 per cent).***

b. *For ECB of more than five years, it is 6 months* ***LIBOR plus 500 basis points (5 per cent).***

Illustration:

[2]The six month USD LIBOR Interest Rate as on 2nd April, 2015 is 0.40115%. Therefore, the maximum rate (all-in-cost ceiling) permitted for 3 to 5 years maturity of ECB is 3.9% and for ECB over 5 years is 5.4%.

However, it should be noted that, in the *case of fixed rate loans, the swap cost plus* ***the margin should be the equivalent of the*** *floating rate plus the applicable margin)*

1. Extension beyond 31st March 2015 is yet to be reviewed by RBI.
2. http://www.global-rates.com/interest-rates/libor/american-dollar/usd-libor-interest-rate-6-months.aspx

2. Trade Credits for Imports into India – Review of all-in-cost ceiling

A.P. (DIR Series) Circular No. 16 dated July 28, 2014 deals with regulations relating to the all-in-cost ceiling of Trade Credits for imports into India.

Further, *vide* A.P. (DIR Series) Circular No.28 dated September 11, 2012 the RBI extended the time period for all-in-cost ceiling till December 31, 2014. RBI has now further extended time period till 31st March, 2015.

(A.P. (DIR Series) Circular No. 81 dated 3rd March, 2015)

(Comments: The "all-in-cost ceiling" in case of Trade Credits for Imports into India include arranger fee, upfront fee, management fee, handling/ processing charges, out of pocket and legal expenses, if any. Consequently the all-in-cost ceiling for Trade Credits for Imports into India for imports for a maturity period from one year to five year is 6 months LIBOR plus 350 basis points which shall continue to apply till March 31, 2015)

3. Acquisition/transfer of immovable property – Prohibition on citizens of certain countries

RBI, in consultation with the Government of India has amended Regulation 7 of Notification No. FEMA 21/2000-RB dated 3rd May, 2000 by adding Hong Kong and Macau, two Special Administrative Regions of China in the list of countries which are prohibited to acquire/transfer immovable property in India. Accordingly, citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau are not allowed to acquire/transfer immovable property in India without prior permission of Reserve Bank other than lease, not exceeding five years.

(A.P. (DIR Series) Circular No. 83 dated 11th March, 2015)/(Notification No. FEMA.335/2015-RB dated February 4)

(Comments: This decision by the RBI is in line with prohibiting citizens of neighbouring countries/ regions from acquiring immovable properties in India. Regulation 7 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 was already applicable to China but did not include Hong Kong and Macau though they *are notified regions of China.)*

4. Risk Management and Inter – bank Dealings: Revised Guidelines relating to participation of Residents in the Exchange Traded Currency Derivatives (ETCD) market

The following guidelines as provided in Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 dated May 3, 2000 (Notification No. FEMA. 25/RB-2000 dated May 3, 2000), as amended from time to time and A.P. (DIR Series) Circular No. 147 dated June 20, 2014 relating to participation of Residents in the Exchange Traded Currency Derivatives (ETCD) market have been revised:

1. **Increase in position limits not requiring establishment of underlying exposure**

   Presently, domestic participants are allowed to take a long (bought) as well as short (sold) position up to USD 10 million per exchange. As a measure of further liberalisation, RBI has decided to increase the limit (long as well as short) in USD-INR pair up to USD 15 million per exchange. Additionally, domestic participants shall be allowed to take long as well as short positions in EUR-INR, GBP-INR and JPY-INR pairs, all put together, up to USD 5 million equivalent per exchange. These limits shall be monitored by the exchanges and any breaches may be reported.

2. Rationalisation of documentation requirements for both Importers and Exporters

At present, in terms of paragraphs (2)(b)(iii) and (2)(b)(v) respectively of A.P. (DIR Series) Circular No. 147 dated June 20, 2014, market participants have to produce a certificate from the statutory auditors as indicated therein. As a measure of liberalisation in the ETCD market, RBI has decided that, instead of the statutory auditor's certificate, a signed undertaking to the same effect from the Chief Financial Officer (CFO) or the senior most personnel responsible for company's finance and accounts and the Company Secretary (CS) may be produced. In the absence of a CS, the Chief Executive Officer (CEO) or the Chief Operating Officer (COO) shall co-sign the undertaking along with the CFO.

3. Increase in eligible limit for Importers hedging contracted exposure

At present, importers are permitted to hedge their contracted exposures in the ETCD market up to 50 per cent of their eligible limit as defined in para (2)(b)(i) of A.P. (DIR Series) Circular No. 147 dated June 20, 2014. With a view to bringing at par both exporters and importers, it has now been decided to allow importers to take appropriate hedging positions up to 100 per cent of the eligible limit.

All other operational guidelines, terms and conditions including the requirement of certificate(s) from the Statutory Auditor regarding the eligible limit up to which domestic participants can take appropriate hedging positions in the ETCD market and the necessary undertaking from the CFO or senior most functionary responsible for company's finance and accounts as indicated in para (2)(b)(ii) of the above circular remain unchanged.

(A.P. (DIR Series) Circular No. 90 dated 31st March, 2015)

(Comments: Through the above Circular, RBI has raised the position limit applicable to domestic participants in the ETDC markets not requiring establishment of underlying exposure. The earlier consolidated USD 10 million limit for all currency swaps has now been increased to USD 15 million for USD-INR pair swap and now additionally a limit of USD 5 million equivalent per exchange has been allowed for the EUR-INR, GBP-INR and JPY-INR pairs, all put together. These enhancement in limits, is welcomed by all and brings hope to see further enhancement in the future.

RBI has also provided the domestic participants with relaxation with respect to documentation and other administrative requirements. As a rationalisation measure in the ETCD market, the RBI has allowed that instead of the statutory auditor's certificate, a sign from the Chief Financial Officer (CFO) or the senior most functionary responsible for the company's *finance and accounts and the Company Secretary* ***(CS) may be produced. In the absence of a CS, the Chief Executive Officer (CEO) or the*** *Chief Operating Officer (COO) can co-sign the* ***undertaking along with the CFO.***

Also, in order to bring at par both exporters and importers, RBI has also allowed importers to take appropriate hedging positions up to 100 per cent of the eligible limit. At present, importers are permitted to hedge their contracted exposures in the ETCD market only up to 50 per cent of the higher of the average of their last three years' imports turnover or the previous year's turnover.

Based on the experience, the Reserve Bank will decide on participation of Non-Resident Indians (NRIs) in the ETCD markets in future.)

5. Risk Management and Inter-bank Dealings: Revised Position Limits for Foreign Portfolio Investors (FPIs) in the Exchange Traded Currency Derivatives (ETCD) market

Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 dated May 3, 2000 (Notification No.

FEMA. 25/RB-2000 dated May 3, 2000), as amended from time to time and A.P. (DIR Series) Circular No. 148 dated June 20, 2014 relate to participation of Foreign Portfolio Investors (FPIs) in the ETCD market.

Presently, FPIs can take position – both long (bought) as well as short (sold) – in foreign currency up to USD 10 million or equivalent per exchange . As a measure of further liberalisation, RBI has decided to increase the limit (long as well as short) for FPIs in USD-INR pair up to USD 15 million per exchange. In addition, FPIs shall be allowed to take long (bought) as well as short (sold) positions in EUR-INR, GBP-INR and JPY-INR pairs, all put together, up to USD 5 million equivalent per exchange. These limits shall be monitored by the exchanges and any breaches may be reported.

All other operational guidelines, terms and conditions shall remain unchanged.

(A.P. (DIR Series) Circular No. 91 dated 31st March, 2015)

(Comments: Similar to above Circular No. 90 above, RBI has raised the position limit applicable to FPIs in the ETDC markets not requiring establishment of underlying exposure. The earlier consolidated USD 10 million limit for all currency swaps has now been increased to USD 15 million for USD-INR pair swap (being the most-traded among four pairs available in the exchange traded derivatives in India) and now additionally a limit of USD 5 million equivalent per exchange has been allowed for the EUR-INR, GBP-INR and JPY-INR pairs, all put together. However, the move may not be very useful for FPIs, which mostly hedge their currency exposures in non-deliverable offshore forward and futures markets as the size needs to be much larger in order to attract FPIs in India's futures markets.)

6. Operational guidelines on International Financial Services Centre (IFSC)

Recently, the Foreign Exchange Management (International Financial Services Centre) Regulations, 2015 dated March 2, 2015, were notified in the Official Gazette. The regulations were issued by the Reserve Bank of India notified *vide* Notification No. FEMA.339/2015-RB dated March 2, 2015, *vide* G.S.R. No. 218(E) dated March 23, 2015.

In terms of the above Regulations, a financial institution or a branch of a financial institution set up in the IFSC and permitted/recognised as such by the Government or a Regulatory Authority shall be treated as person resident outside India. Therefore, their transaction with a person resident in India shall be treated as a transaction between a resident and non-resident and shall be subject to the provisions of Foreign Exchange Management Act, 1999 and the Rules/ Regulations/Directions issued thereunder.

The 'financial transaction' in this context has been defined as making or receiving payment, drawing, issuing or negotiating any bills of exchange or promissory note, transferring any security or acknowledging any debt. Similarly, 'financial service' shall mean any activity which a financial institution is permitted to carry on by the Respective Act of the Parliament or Government of India or any Regulatory Authority empowered to regulate the concerned financial institution.

It may be noted that subject to the provisions of section 1 (3) of Foreign Exchange Management Act, 1999, nothing contained in any other Regulations shall apply to a financial institution or a branch of a financial institution set up in an IFSC unless there is some express and specific provision to that effect in the Foreign Exchange Management (International Financial Services Centre) Regulations, 2015 or the other Regulations.

(A.P. (DIR Series) Circular No. 92 dated 31st March, 2015)/ (Notification No. FEMA.339/2015-RB dated March 2, 2015)

Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Will – Execution – Validity – Cumulative effect of all suspicious/ unnatural circumstances – Exclusion of sons from Will – Not suspicious circumstance when exclusion is stated in Will to be made as they were settled Succession Act, 1925, S. 63

The issue is related to the validity and legality of a Will executed by mother of the Appellant and the first respondent. The Trial Court dismissed the probate proceedings instituted by the first respondent by holding that the execution of the Will is surrounded by a host of suspicious circumstances rendering the same legally unacceptable. The High Court set aside the view of the Trial Court.

The Supreme Court observed that a Will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a Will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the Court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the Court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution or registration.

In the present case, a close reading of the Will indicates its clear language, and its unambiguous purport and effect. The mind of the testator is clearly discernible and the reasons for exclusion of the sons is apparent from the Will itself. The stand of the plaintiff that the original Will has lost while in the custody of her mother and her knowledge of such loss on the day of her mother's death cannot be disbelieved merely because no report in this regard was lodged before the police. The Court further observed that an appeal to Supreme Court can be lodged only upon grant of special leave to appeal would indicate the highly circumscribed nature of the jurisdiction of the Supreme Court. In contrast to an statutory appeal, an appeal lodged upon grant of special leave pursuant to a provision of the Constitution would call for highly economic exercise of the power which though wide to strike at injustice wherever it occurs must display highly judicious application thereof. Determination of facts made by

the High Court sitting as a first appellate court or even while concurring as a second appellate court would not be reopened unless the same give rise to question of law that require a serious debate or discloses wholly unacceptable conclusions of fact which plainly demonstrate a travesty of justice. Appreciation or re-appreciation of evidence must come to a halt at some stage of the judicial proceedings and cannot percolate to the constitutional court exercising jurisdiction under Article 136.

The Supreme Court affirmed the view of the High Court and dismissed the appeal.

Leela Rajagopal & Ors. vs. Kamala Menon Cocharan & Ors. AIR 2015 Supreme Court 107

2. Ex parte proceedings – Application for setting aside of – It would not lie after final arguments have been heard and reserved – Civil P. C., 1908, O. 9 R. 7

The issue raised in this petition is whether an application for setting aside ex parte proceedings would lie and ex parte proceedings can be set aside after final arguments in a suit have been heard and judgment reserved?

The facts of the case are that the petition was filed by the wife under Section 13(2) of Hindu Marriage Act against her husband. The husband appeared on some dates of hearing but the matter was proceeded ex parte. The trial court recorded wife's evidence ex parte, closed her evidence and listed the case for final arguments. Final arguments were heard and concluded and the judgment was reserved. However, immediately after the conclusion of the arguments and reserving the judgment an Advocate appeared on behalf of the husband and filed an application for setting aside the ex parte proceedings against the husband. The wife filed objections to the said application, the trial court allowed the application subject to payment of cost and adjourn the case. The wife moved the High Court and invokes supervisory jurisdiction for setting aside order of trial court whereby stating to set aside the ex parte proceedings.

The High Court observed that the question arising in the petition is no more *res integra* as far as the High Court is concerned. An application by the defendant setting aside ex parte proceedings, which lies under Order 9, Rule 7, CPC can be moved during the course of hearing of the suit, that is, after the defendant is set ex parte till hearing of final arguments in the suit. However, neither an application under Order 9, Rule 7, CPC would lie nor ex parte proceedings can be set aside after final arguments in the case are heard and order reserved. Remedy available to the defendant in that case is only to file an application for setting aside the ex parte judgment and decree against him. This view is ascertainable from the judgment of the Supreme Court in *Arjun Singh vs. Mohindra Kumar AIR 1964 SC 993.* Thus the High Court set aside the order of the trial court and directed to pronounce the final judgment in the petition.

Jyoti Devi vs. Learned Munsiff, Basohli & Anr. AIR 2015 Jammu and Kashmir 6.

3. Devolution of property – Property of female Hindu which she inherited from her parents on her death – Would devolve simultaneously on her husband and her issue(s). Hindu Succession Act, 1956, Ss. 15 (1), 16

The appeal involves the questions as under:

When the admitted facts are that the deceased wife died leaving behind one son and her husband and the property

was inherited by her parents, whether the courts can give finding that the property will not devolve upon her husband simultaneously with her son under Section 15(1)(a) of the Hindu Succession Act but it shall devolve upon her son only?

And if the property will devolve simultaneously on father and son, whether Section 8 of the Hindu Minority and Guardianship Act, 1956 will operate against the transfer of the property made by the father?

The High Court observed that Section 15 has to be read in conjunction with Section 16 which evolves a new and uniform order of succession to her property and regulates the manner of its distribution. The order of succession in case of property inherited by her from her father or mother, its operation is confined to the case of dying without leaving son, a daughter or children of any predeceased son or daughter. Sub-Section (2) of Section 15 craves out an exception in case of a female dying intestate without leaving son, daughter or children of a predeceased son or daughter. In such a case, the rule prescribed is to find out the source from which she has inherited the property. If it is inherited from her father or mother, it would devolve as prescribed under Section 15(2)(a). If it is inherited by her from her husband or father-in-law, it would devolve upon the heirs of her husband under Section 15(2)(b). If there is no son or daughter including the children of any predeceased son or daughter, then the property would devolve upon the heirs of her father. It was further observed that "basic aim of Section 15(2) is to ensure that inherited property of an issueless female Hindu dying intestate goes back to the source. It was enacted to prevent inherited property falling into the hands of strangers." While Section 15(1) lays down the ordinary rule of succession, sub-section (2) which starts with a non-obstante clause carves out two exceptions: (i) if the female dies without leaving any issue, then the property inherited by her from her father or mother would devolve not according to the general rule laid down in sub-section (1) but upon the heirs of her father, and (ii) if the female dies without leaving an issue, the property inherited by her from her husband or from her in-laws would devolve not according to the general rule laid down in sub-section (1) but upon the heirs of the husband. In case of *Radhika vs. Aghnu Ram, (1995) 2 East LJ 13 (SC)* it was held that for the property inherited by a female Hindu from her father or mother, in the absence of her son or daughter, the succession opens to heirs of the father or mother and not to Class–I heirs in the order specified in sub-section (1) of Section 15 and in the order of Section 16 of the Act.

Thus the High Court held as regards first question that in the presence of any issue the Hindu female's property which she inherited from her parents would devolve simultaneously on her husband and her issue (s) in accordance with Section 15(1) read with Section 16 of the Act. And about the second question on the applicability of Section 8 of the Hindu Minority and Guardianship Act, 1956, the law is settled that the interest of a minor in the joint family property is kept outside the ambit of Sections 6 and 12 of the Hindu Minority and Guardianship Act. In respect of minor's undivided interest in joint family property the natural guardian of the minor can deal with it in accordance with the Hindu Law.

Laxmindhar Sahoo & another v. Batakrushna Sahoo AIR 2015 ORISSA 1

4. Forfeiture of earnest money – Contract not concluded – No work order issued – Terms of contract cannot bind tenderer. Contract Act, 1872, Ss. 5, 10, 74 –

There was tender but same having not been successful, the petitioner was called upon for negotiation and in such negotiation certain amount was settled. Accordingly petitioner deposited the said amount. But the Board wanted to have further negotiation for enhancement of the bid amount and finally settled certain amount which the petitioner was required to be deposited within certain period pursuant to the acceptance order. In compliance with the said acceptance order, admittedly the petitioner neither deposited the balance amount nor executed any agreement or any work order was issued in his favour. On the contrary the petitioner expressed his desire not to proceed with the contract. Admittedly no agreement was executed between the parties nor the petitioner had deposited the balance amount and as a consequence thereof no work order was issued in his favour. Thereby the basic norms of the contract were not complied with. Without entering into an agreement, its terms and conditions cannot bind the petitioner and any action taken pursuant to such agreement cannot have effect as the parties had not entered into any contract by signing agreement. Before entering into an agreement as a token of acceptance of the tender, the tenderer can also express his view not to accept the tender what has exactly happened in this case. As per the provisions of the Contract Act there must be an acceptance and that acceptance has to be made by executing an agreement between the parties. When the parties enter into agreement the same is binding on them. In absence of such agreement and expression of willingness to accept the tender by way of acceptance order, the amount deposited by the tenderer cannot be/could not have been forfeited by the opposite party.

Dibakar Swain vs. Cashew Development Corporation, Odisha & Another AIR 2015 Odisha 6.

5. Bamboo sticks used in Agarbattis – Are not forest produce. Forest Act, 1927, Ss. 2(4)(b)(i), 2(7)

The question arose in writ petition as to whether bamboo sticks which are used to make Agarbattis are forest produce or not.

The High Court held that a bamboo stick is not a distinct article. The only manufacturing process is that the bamboo is cut down into smaller pieces. It retains the essential character of being a bamboo. Once the bamboo has been split into sticks, it is very difficult to find out whether it was found or brought from a forest or not. At this stage, it cannot be said that the bamboo which the petitioners used had come from the forest. Therefore, though bamboo sticks used for making Agarbattis can be treated to be forest produce, the State must also prove that either they were produced out of bamboo which was growing in a forest. If the Agarbatti sticks have been fashioned out of bamboo growing in homestead or private land which is not forest, then it cannot be treated to be forest produce. As per definition of "forest produce", clause (b) will apply when the goods are shown to have been either found in, or brought from a forest. The goods falling in Clause (b) of sub-section (4) of Section 2 can be treated to be forest produce only if they are found in the forest or if they are found to have been brought from a forest.

The High Court further observed that State can lay down certain guidelines and procedure whereby the maker of the bamboo sticks will have to show from where they procured the bamboo and the transportation of bamboo being a forest produce must be kept strictly in control as has been laid down by Apex Court in case of *T. N. Godavarman's case 2001 AIR SCW 4590.*

The State of Tripura & Others vs. All Tripura Bamboo Sticks Merchants and Suppliers Association, Kumarghat & Others. AIR 2015 Tripura 4.

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Topic	Author	Magazine	Volume	Page
'A'				
Assessment/Reassessment				
Sec. 142A – Caught in the web	Minu Agarwal	CTR	273	1
Power of AO to reject books of account – An inside into Accountancy & Audit	Ram Avatar Bajaj	Taxman	229	15
Provisions Regarding Secretarial Audit in Companies Act, 2013	S. S. Agrawal	TTR	141	118
Expectations of Central Statutory Auditor from Bank Branch Auditors	Shriniwas Y Joshi	CAJ	63 / No. 9	1267
Conducting Bank Branch Audit in CBS Environment	Nitant Trilokekar	CAJ	63 / No. 9	1270
Audit of Advances	I. B. Sonawalla	CAJ	63 / No. 9	1282
Audit of NPA with Special Reference to Prudential Norms	Vipul K. Choksi	CAJ	63 / No. 9	1290
Alternate Investment Funds				
Taxation of alternate investment funds : Unsettling stand of CBDT	A. Krishna Thej	ITR (Tribunal)	36	1
Agricultural Income				
Income from sale of agricultural land situated beyond specified distance from local municipality is agricultural income	Manoj Gupta	TTR	141	305

Topic	Author	Magazine	Volume	Page
Auditing Standards				
Audit Materiality – A Precision Cast in Stone or A Subjective Variable Measure ....Continued	Bhavesh Dhupelia & Shabbir Readymadewala	BCAJ	46-B/Part 5	75
Is internal audit function relevant in a financial statement audit ?	Bhavesh Dhupelia & Shabbir Readymadewala	BCAJ	46-B/Part 6	81
Accounting Standards				
Supplier' Credit – Whether Debt or Trade Payable?	Dolphy D'Souza	BCAJ	46-B/Part 5	73
Contingent consideration from seller's perspective	Dolphy D'Souza	BCAJ	46-B/Part 6	79
Income-tax Department's Lackluster approach while examing computerised accounts	Meenakshi Subramaniam	Taxman	229	1
Accounting for derivatives contracts – Analysis of the recently issued exposure draft	S. Ramachandran	CTR	274	41
Draft income computation and disclosure standards compared with draft tax accounting standards	S. Ramachandran	CTR	274	5
'B'				
BIFR				
Dead BIFR, unborn NCLAT : Where do we go from here?	T. C. A. Ramanujam & T. C. A. Sangeetha	Company Cases	188	63
Business Reorganisation				
Carry Forward and set-off of losses, etc. following business reorganisation – provisions regarding	Arundhati Kulshreshtha	TTR	141	529
Business Deduction				
Section 57(iii) – Whether nexus between the expenditure incurred and income derived is essential for claiming deduction?	Rajeev Babel	Taxman	228	1
Permissibility of secret commission and illegal income	Minu Agarwal	CTR	274	1
Black Money				
New Revelaions Concerning Black Money : How for credible and useful ?	T. N. Pandey	Taxman	229	19
'C'				
Company / Corporate Law				
Can a private company accept unsecured loan ?	Rajat Mohan	Company Cases	188	34
Composition of board of directors and board process	K. S. Ravichandran	Company Cases	188	49
Loan to directors of the company	Rajat Mohan	Company Cases	188	57
Loan to Directors	Dhaval Vussonji	CAJ	63 / No. 8	1136

Topic	Author	Magazine	Volume	Page
Duties and Liabilities of Directors and Shareholders of a Company Under the Provisions of Companies Act, 2013	S. S. Agrawal	TTR	142	41
CAG Report				
Salient observations of CAG concerning general working of the I T Department and non-corporate assessees	T. N. Pandey	CTR	273	20
CAG's audit of allowance of depreciation and amortisation in income tax assessments – Report no. 20 of 2014	T. N. Pandey	ITR	371	1
Grievance redressal mechanism in the income-tax department during 2013-14 – Review by the C & AG	T. N. Pandey	ITR	370	17
CBDT				
Board – Caught in trap	Minu Agarwal	CTR	273	17
Corporate Social Responsibility (CSR)				
The concept of Corporate Social Responsibility (CSR) under the Companies and Income tax legislations	T. N. Pandey	Taxman	228	225
Charitable Institutions				
Charitable Institutions – Constant risk of withdrawal of exemption	Gopal Nathani	ITR	371	8
Clubbing				
Act of lending to spouse for acquisition of 'asset' does not attract clubbing provisions	V. K. Subramani	Taxman	229	4
Capital Gains				
Amendment in sections 54/54F restricting exemption to one residential house is applicable prospectively	Manoj Gupta	TTR	141	440
Capital Gains issues concerning mortgage of assets	Arundhati Kulshreshtha	TTR	141	316
Sections 54 & 54F – Single Residential House Property	Shruti R.	Taxman	228	73
Sections 54 / 54F & time limit for deposit / reinvestment of capital gain	Vinay V. Kawdia	Taxman	228	237
Is the amount paid for booking a flat amounts 'construction' or 'acquisition' for the purpose of section 54 ?	V. K. Subramani	Taxman	228	292
Taking over of possession by secured creditor does not amount to transfer for the purposes of capital gain tax	Manoj Gupta	TTR	142	18
Assets without cost	T. C. A. Ramanujam	CTR	274	55
'D'				
Deduction				
Drawing of wires from wire rod amount to manufacture for purposes of section 80-IC	R. S. Kohli	TTR	141	517
Incentive for housing projects : The developer's story	T. C. A. Sangeetha	CTR	273	4

Topic	Author	Magazine	Volume	Page
Tax Saving schemes	T. C. A. Ramanujam	CTR	273	33
Due Date				
Due date' for deduction of PF contribution under Income-tax Act, 1961	Raghav Kumar Bajaj	Taxman	228	151
Domestic Transfer Pricing				
Domestic Transfer Pricing	Yogesh Thar & Anjali Agarwal	BCAJ	46-B/Part 6	10
Deemed Accrued or Arisal of Income				
Income deemed to accrue or arise in india under section 9(1) (i) relating to business conection, issues regarding	Kedar Nath Bohra	TTR	142	71
Double Taxation				
Prohibition against double taxation : A wavering principle in Indian tax jurisprudence	Tarun Jain	ITR (Tribunal)	36	49
'E'				
Estate Duty				
Will threre be a return of estate duty?	T. C. A. Ramanujam & T. C. A. Sangeetha	ITR	370	1
Exemption				
Exemption for educational and medical institutions under s. 10	N. M. Ranka	CTR	274	30
'F'				
Finance Bill, 2015				
Moves to curb black money can boost tax – GDP Ratio	Ashok Wadhwa	Economic Times	02/03/2015	14
Lowering corp tax to lead to a stable regime	Motilal Oswal	Economic Times	02/03/2015	14
Service tax hike likely to hit overall consumption	Ratna Bhushan & Sagar Malviya	Economic Times	02/03/2015	10
The budget beyond economics	Santosh Desai	Times of India	02/03/2015	7
No capital gains tax on merged MFs	Allirajan M.	Times of India	02/03/2015	15
NPS gets budget boost with tax sops	Partha Sinha	Times of India	03/03/2015	23
MFs still best for wealth creation	Sumit Jhamb & Dhiraj Mittal	Times of India	03/03/2015	23
Corp Tax cut to be in tandem with renoval of exemptions	Shaktikant Das	Economic Times	03/03/2015	13
Budget 2015 : A step forward toward an inclusive & stable regime	Girish Vanvari	Economic Times	03/03/2015	13

Topic	Author	Magazine	Volume	Page
Many hits in budget, but fixing fiscal deficult is a miss	C. Rangarajan	Times of India	01/03/2015	17
Holi comes early for FIIs	Sachin Dave & Nishanth Vasudevan	Economic Times	01/03/2015	2
Permanent establishment googly for PEs to make buyouts cumbersome	Arijit Barman & Sneha Shah	Economic Times	01/03/2015	2
Govt willing to walk the talk through higher public investments	Anil Agarwal	Economic Times	01/03/2015	4
Big boost for manufacturing companies	Baba Kalyani	Economic Times	01/03/2015	15
No room to hide : Defaulters will not be able to shall leaders now	Shilpy Sinha & Maulik Vyas	Economic Times	01/03/2015	7
More options to save though tax slabs stay the same	Kuldip Kumar	Economic Times	01/03/2015	8
Why service tax hike is justified	Harishankar Subramanium	Economic Times	01/03/2015	11
Don't worry about TDS on RDs	Bindisha Sarang	Economic Times	01/03/2015	18
Finance Bill, 2015 – An overview	Jayant Gokhale	C J	III / No. 6	9
Rates of Taxes	Usha Kadam	C J	III / No. 6	13
Proposals relating to Charitable Institutions	R. S. Kadakia & Aditya Bhatt	C J	III / No. 6	15
Proposals relating to Business Trusts	Anish Thakkar & Subramaniam Krishnan	C J	III / No. 6	24
Taxation of Individuals – Amendments proposed by Finance Bill, 2015	Ketan Vajani	C J	III / No. 6	29
Proposals relating to Business Deductions	Kishore Phadke	C J	III / No. 6	35
Proposals relating to MAT	Ajay S Agashe	C J	III / No. 6	37
Proposals relating to Indirect Transfers	N. C. Hegde	C J	III / No. 6	44
Proposals relating to International Taxation	Manoj Shah	C J	III / No. 6	47
Proposals relating to TDS	Atul Suraiya	C J	III / No. 6	56
Proposals relating to TDS / TCS Procedures	Hitesh R Shah	C J	III / No. 6	59
Proposals relating to Transactions in Cash	Natasha Mangat	C J	III / No. 6	67
Proposals relating to Search and Seizure Provisions	Pramod Shingte	C J	III / No. 6	70
Proposals relating to cases before Settlement Commission	Haresh Kenia	C J	III / No. 6	74
Proposed Amendments to Revision and Reopening Provisions	Mihir Naniwadekar	C J	III / No. 6	89
Proposals relating to Definition of Accountant in Section 288	H. N. Motiwalla	C J	III / No. 6	92

Topic	Author	Magazine	Volume	Page
Miscellaneous Proposals in Finance Bill, 2015	Kinjal Bhuta	C J	III / No. 6	97
Budget 2015 – Overview of Indirect Tax Proposals	Bhavna Doshi	C J	III / No. 6	99
Service Tax proposals and Amendments	Rajkamal Shah & Naresh Sheth	C J	III / No. 6	101
Changes in the Central Excise Act, 1944	Hasmukh Kamdar	C J	III / No. 6	117
Amendments in Customs	Udayan Choksi	C J	III / No. 6	125
No sixer, but many boundaries !	Ninad Karpe	C J	III / No. 6	126
Preparing India for long haul	Vijai Mantri	C J	III / No. 6	128
Finance Bill, 2015 vis-à-vis Service Tax	Satyadev Purohit	TTR	142	46
Charities – Before and after the Finance Bill, 2015	S. Rajaratnam	ITR	371	1
Highights of changes proposed in Direct Taxes	V. K. Subramani	TTR	142	244
Hopes and fears	T. C. A. Ramanujam & T. C. A. Sangeetha	ITR	372	14
Budget provides much needed pass – through clarity for REITs	Nidhi Bothra & Saurav Malpani	Taxman	229	25
Finance Bill, 2015 – Charitable Purpose	Manzoor Ahmed Bakhshi	AIFTP Journal	17/ No. 12	9
Charitable Trust, Additional Depreciation & Investment Allowance, Transaction not regarded as Transfer, MAT and Venture Capital Fund	H. N. Motiwalla	AIFTP Journal	17/ No. 12	12
Assessment of Income of any other person	Ajay R Singh	AIFTP Journal	17/ No. 12	18
Finance Bill, 2015 – Tax Deduction at Source	V. P. Gupta	AIFTP Journal	17/ No. 12	22
Revision and reassessment	Rahul R. Sarda	AIFTP Journal	17/ No. 12	26
Income-tax Settlement Commission	S. R. Wadhwa	AIFTP Journal	17/ No. 12	31
Penalties	Rahul K. Hakani	AIFTP Journal	17/ No. 12	35
Budget, 2015 – Service Tax	Mukul Gupta & Naveen Garg	AIFTP Journal	17/ No. 12	48
Budget, 2015 – Central Excise	Jayesh P. Gogri	AIFTP Journal	17/ No. 12	53
Budget, 2015 – Customs Laws	Prerana (Payal) Shah	AIFTP Journal	17/ No. 12	60
Budget, 2015 – The Foreign Exchange Management Act, 1999, and The Prevention of Money Laundering Act, 2002	Sujeet S. Karkala	AIFTP Journal	17/ No. 12	62
Foreign Account Tax Compliance Act				
Foreign Account Tax Compliance Act	Sunil Kothare	BCAJ	46-B/Part 6	23
'G'				
GST				
The GST Council : A Policy Maker TOP COP of GST Regime	Dnyanesh V. Retharekar	STR	61 / No. 12	30

Topic	Author	Magazine	Volume	Page
'I'				
International Taxation				
Indian perspective on dispute resolution mechanism	Justice Vineet Kothari	CTR	273	40
Transfer Pricing Documentation	Sanjay Kapadia & Kartik Beldi & Ruchi Agarwal	BCAJ	46-B/Part 5	13
Authority for Advance Rulings – Important aspects and issues	Mayur Nayak & Tarunkumar G. Singhal	BCAJ	46-B/Part 6	43
	& Anil D. Doshi			
Ind AS				
Ind AS : A Reality Now	Amarjit Chopra & Sanjeev Singhal	C J	III / No. 6	131
'J'				
Jewellery & Ornaments				
Jewellery & Ornaments – Acceptable Holdings	Pradip Kapasi & Gautam Nayak	BCAJ	46-B/Part 6	49
'M'				
Money Laundering				
Abuse of share premium for money laundering	Dindayal Dhandaria	ITR	36	7
'P'				
Penalty				
Search Assessments – Penalty Provisions Analysed – A Word of Caution vis-à-vis applicability of section 271AAB	M. V. Purushottama Rao	TTR	141	292
Concealment Penalty in Agreed Additions	Deepa Khare	C J	III / No. 5	71
Professional Service Firms				
Aligning Human Capital for Sustained Growth of Professional Service Firms	Vaibhav Manek	BCAJ	46-B/Part 5	10
Prosecution				
Prosecution "by default" – Nothing to defend	Dindayal Dhandaria	Taxman	228	9
Prosecution under sections 276B and 276BB of the Income-tax Act, 1961	B. L. Purohit	ITR (Tribunal)	36	42
'Q'				
Question of Law				
Concession on question of law not binding either on the assessee or on the income-tax department	S. Krishnan	Taxman	229	7
'R'				
Royalty				
Payment for live telecast of horse race does not constitute royalty	Manoj Gupta	TTR	141	507

Topic	Author	Magazine	Volume	Page
'S'				
Securitisation Act				
Valuation and reserve price with reference to the Securitisation Act	G. S. Dubey	Company Cases	188	43
Service Tax				
Know Your Taxable Service – Real Estate Agent Service	P. Sadanandan	TTR	141	121
Mandatory Pre-deposit for Appeals	Puloma D. Dalal & Bakul Mody	BCAJ	46-B/Part 5	43
Search and Seizure				
Time limit for completion of assessment under section 153A – Law Regarding	Arundhati Kulshreshtha	TTR	141	457
Search and survey parties need not concerning taxpayers to admit undisclosed/unaccounted income	T. N. Pandey	CTR	273	36
Securities Laws				
SEBI uncovers massive Tax Evasion in Certain Stock Market Transactions	Jayant M. Thakur	BCAJ	46-B/Part 5	65
The new insider trading regulations – relevance to CAs as Auditors, advisors, CFOs, etc	Jayant M. Thakur	BCAJ	46-B/Part 6	67
Sales Tax				
Taxable amount under Sales Tax and Service Tax Law	Deepak K. Bapat	STR	61 / No. 12	17
'T'				
TDS				
Stake money paid by horse racing club to horse owner won't attract TDS under section 194B	Krishan Malhotra and Gouri Puri	Taxman	228	277
Trusts				
Registration of Trust cannot be cancelled on flimsy grounds	Pawan Prakash	TTR	141	450
Amendment in section 11 restricting depreciation				
Allowance on assets cost of which allowed as application of income is prospective in nature	Arundhati Kulshreshtha	TTR	142	29
'V'				
VAT				
Interpretation of entries and role of Hon. Tribunal	G. G. Goyal & C. B. Thakar	BCAJ	46-B/Part 5	51
Nature of lease transaction, contradictions	G. G. Goyal & C. B. Thakar	BCAJ	46-B/Part 6	53
'W'				
Works Contract				
Important issues vis-à-vis payment of service tax under works contract composition scheme	Satyadev Purohit	TTR	141	104

ML-464

CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

DEVELOPING EQUATIONS

The budget delivered by the Finance Minister on 28th February, 2015 was hailed by many. It was encouraging for the Foreign Institutional Investors (FIIs) too. Aided by this budget, the Indian economy was expected to progress at high speed. The businesses were to improve and corporate earnings were projected to increase. It was expected that the liquidity in the hands of the consumers would increase, resulting in a larger demand and an increase in economic activities. The stock markets were predicted to continue their upward trend on the back of the reforms undertaken by the Government. Nifty, which was at around 8,850 at the time of budget, soon galloped above the 9,000 mark and everything was looking hunky dory. However, things changed suddenly thereafter. The exuberance of confidence suddenly started tapering off. A whisper gathered momentum that things have not improved adequately on the ground level. Some people started feeling that though the reforms are on track, their effects cannot be seen immediately and it will take at least one year to feel the positive effects at the ground level. That resulted in the reversal of the trend in the stock markets during the month. The Indian stock markets collapsed by about 7% from their peak in the month and that gave quite a bit of a shock to the investors in equity markets. Many of them were caught off guard.

Since the new Government has come to power about ten months back, the public expectations are continuously on the rise. Though efforts are being made to improve the economy as well as governance by senior leaders, the ground realities might not have changed adequately as of now. The bureaucracy is the primary vehicle of implementation of a change but it takes its own time to change. The Government has been managing its public relations well but in the process of improving the sentiments of the people, the expectations of performance have automatically risen. Of late, in India, the gap between expectation and reality is continuously increasing resulting into restlessness and unhappiness among certain sections of the public. For improving the economic environment, some hard decisions are required to be taken. Reforms are not necessarily beneficial to every segment of society at a given time. There are gainers but there are losers too. Liberalisation of the economy may make goods and services cheaper but it may also result in competition, thereby clouding the sunny days of domestic manufacturers. The opening up of investments for foreigners can make the domestic industry less competitive and may even result in closure of some units. When a country is progressing, such situations keep on emerging which causes pain and unhappiness to some but they are inevitable outcomes of progress.

The falling crude oil prices in the recent months continue to give benefit to the Indian economy. Falling petroleum product imports in US Dollar terms are giving support to the Indian currency

even though the Dollar has become stronger across the major currencies of the world. Unfortunately, the Indian imports have also become sluggish in the recent months, which is a cause of concern. Though the net trade deficit has reduced in the recent months, the composition of the same is not very encouraging as both, imports and exports, have fallen in the month of February. Lower international trade means lesser economic activities in a country. Slowing of exports has created a cause of concern for India and it is not a good sign. The trend will be clear over the next few months and it is hoped that the exports will pick up. However, if it does not happen, India will need to take the required steps to improve the situation.

The domestic production of goods and services has improved a bit though the numbers are far from being robust. Still, there is an expectation of overall improvement of the economy. One of the reasons for the slow-down is reduction in Government spending in the last few months for maintaining budgeted physical deficit. This constraint will not be there in the initial months of the new fiscal year and the economic activities may pick up in the months to come. The benefit of reduction of Interest rates announced by RBI is yet to percolate to the trade and industry. A further rate cut by RBI may be required to trigger the same. However, RBI may not oblige immediately, as inflation has started rising its ugly head up in the recent days. If inflation is not under control, the ability of a central bank to reduce the interest rate gets considerably hampered.

The efforts of the Government to pass some of the legislations, which are reformative for India, are being marred by non co-operation by opposition parties, especially in the Upper House. This situation is affecting the speed of the reforms process, which may result in increase of lead time for getting the desired results. This problem may continue for a couple of years. Till then, the reforms process may continue to suffer and its implementation may happen at a slower pace.

Considering the current political as well as economic environment in India, there seems to be a possibility of a short-term pain in the economy. In the recent months, the weather God has been a bit unkind to many parts of the country. Due to unseasonal climatic changes and occurrence of rainfall and hail storms, the standing crops in many regions in the country have suffered. It has caused huge losses to the farmers as well as to the agrarian part of the Indian economy. As an after effect, the estimated production of food grains may get affected and it may also force India to import certain commodities over the next year. The destruction of crops and resultant lower yields may affect the Indian farmers financially. Their disposable income may be less, reducing their spending ability. At the same time, the prices of agricultural commodities and the derivative products may rise. This may affect the domestic demand and many businesses. The profits of agri based industries may get negatively affected.

The month of March was overall positive for the global economies. The US economy continued its upward march. Europe gained on the back of improved expectations and weakening of Euro against the US Dollar. Japanese economy has started showing some improvement. Yen has weakened against the US Dollar thereby creating competitive advantage for the Japanese exports. Chinese slowdown continues but it may not drag the global economies. The pain in the Middle East persists and now it is Yemen and Saudi Arabia having issues. Fortunately, the petroleum prices have become less volatile and they may be about to stabilise. Less volatile petroleum prices can give stability to the economies and not disturb the global economic equilibrium. The old geopolitical issues, which were weighing heavy on the world economy, have eased to an extent. The stability is likely to return in Eastern Europe. Hopefully, the recent issues emerging in Yemen may get controlled and may not affect the region. There is a possibility of Iran easing its stance on nuclear issues resulting in cancellation of sanctions against it. It may bring that country back in the economic main stream and its markets may open out resulting in increase in the global trade. It may also result in easing out the tension in the Middle East region to an extent and pave a way forward to harmony. Such a situation can aid global economic pickup.

A risk of a slowdown still exists in the world. In many countries, inflation is not rising as expected

or targeted. There is a talk of China heading for deflation and similar can be the case for some countries in Europe. New Geo-political issues may erupt at various locations. Oil is looking stable as of now but there exist contrasting opinions about its future movement. A set of experts are expecting oil to stabilise between 60$ and 80$ within a year but some others are expecting it to fall below 40$. Volatility is very high and economies across the world are not moving in the same direction. In the last global economic crisis, most of the central banks have acted cohesively but if a new crisis emerges, it is not certain that they will show the same solidarity. Interests of every country and the central bank are becoming more and more specific and therefore, in a situation of crisis things may not work out as it happened during the last recession. Quantitative easing by many countries has lifted their economies out of recession and some of the countries have already discontinued the same. Recently, Europe has started with a massive quantitative easing and soon repercussions of the same will be felt by the world. Though such an easing gives a boost in a gloomy economic environment, economists are not sure about its ability as a long-term weapon to correct economic slowdown. It pumps in a lot of credit and currency in an economy, which also percolates to other parts of the world. Such a percolation may create asset bubbles. If such bubbles are created in a different country than the country embracing the easing, it can turn out to be more dangerous as the country facing the bubble may not have any control over the fund flows, which are primarily responsible for the bubble. If such funds move out suddenly in large quantities from a country, there can be a major repercussion on the economy, which will be difficult to control. It is essential for such countries, which are the unintended beneficiaries of quantitative easing, to develop a mechanism to deal with such a situation.

Peaking after the budget, the Indian stock markets have reacted in the month of March. The expectation of muted corporate results has dampened the sentiments to an extent. However, a section of investment advisors are of the opinion that the worst of the current correction is over. Though there can be a volatility, the long-term uptrend in the markets may gain momentum. The annual results season starts now and the trend of the markets will be decided by the trend of these results. The expectations of a good monsoon may also be a contributor to the trend. Many are of the opinion that possibility of the Indian stock markets going down substantially from the current levels does not exist in the near future. The stock markets have become safer and cheaper than at the time of budget. The euphoria seems to be over and the fundamentals may start playing a bigger role in the movement of the individual stocks. Investors may reinvest their funds which were released on profit booking over the last couple of months in equity or equity based mutual fund scheme units. However, the investment needs to be done gradually in periodic intervals. No fireworks are expected from equities. In light of high raw material costs, it may be advisable to stay away from the stocks of agri based industry.

The property market remains sluggish and may continue to do so for some more time. There are some positive movements in some pockets but currently there is oversupply as compared to demand. High interest rates may continue to dampen the demand of properties in India. Once the interest rates starts easing, the demand for properties may pick up. The rental yields are sluggish and may not improve much in the near future. The scope of appreciation also remains muted at the current levels.

RBI may seek a better control on inflation before further easing of interest rates. The rupee may gradually depreciate due to higher inflation in India as compared to many other developed countries in the world. Fixed deposit rates may hold steady for the time being but bond yields may continue to gradually drop.

There may not be much of fireworks in any asset class over the forthcoming year. The investors are expected to get steady returns on their investments. Investors need to stick to their asset allocation and remain watchful about the political developments in the country. The immediate trigger for markets remains political developments in India and Geo-political development in rest of the world.

CA Hinesh R. Doshi, Ajay Singh, *Advocate*
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th March, 2015 to 8th April, 2015 are being reported as under.

I. ADMISSION OF NEW MEMBERS

1) The following new members were admitted in the Managing Council Meeting held on 25th March, 2015.

LIFE MEMBERSHIP

1	Mr. Jain Uttamchand Parasmal	FCA	Chennai
2	Mr. Kanakia Krupal Ramesh	CA	Mumbai
3	Mr. Thosar Mayank Vilas	CA	Mumbai
4	Mr. Shah Hiren Virendra	CA	Mumbai
5	Mr. Shah Charudatta Suresh	Advocate	Pune

ORDINARY MEMBERSHIP

1	Mr. Mittal Sandeep D.	CA	Delhi
2	Mr. Sisodia Sandeep Singh	CA	Mumbai
3	Mr. Aggarwal Manoj Kumar	CA	New Delhi
4	Mr. Ghadiali Murtaza Quresh	CA	Mumbai
5	Mr. Gupta Prateek Pradeep	CA	Ghaziabad
6	Mr. Nagesh Raveendranath Kaushik	ICWAI	Bengaluru

STUDENTS MEMBERSHIP

1	Mr. S. Anantharam	CA Student	Chennai

II. PAST PROGRAMMES

Sr. No.	*Programme Name / Committee/Venue*	*Dates / Subjects*	*Chairmen / Speakers*
1.	**Direct Taxes Committee**		
	Intensive Study Group on Direct Taxes Venue : CTC Conference Room	**17th March, 2015** Subject : Panel Discussion on Finance Bill 2015 Direct Taxes Provisions	CA Ganesh Rajgopalan CA Ketan Vajani

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairmen / Speakers
2.	International Taxation Committee		
A.	**Intensive Study Group on International Taxation** Venue : CTC Conference Room.	**10th March, 2015** Subject : Discussion on International Tax Amendments of Union Budget 2015	
B.	**5th Intensive Study Course on Transfer Pricing (Including Domestic Transfer Pricing) – 24 Sessions-6 Days** Venue : Hotel West End, New Marine Lines, Opp. Bombay Hospital, Mumbai.	**14th and 20th March, 2015** Subjects :	
		1.Inauguration & Lighting of Lamp	Chief Guest Shri C.S. Gulati, DIT - Int. Taxation
		2. Introduction, Brief History, General Philosophy of Transfer Pricing, Comparison between Indian & OECD Regulations, Associated Enterprise and International Transaction and other nuances in Indian Transfer Pricing.	CA Vispi Patel
		3. FAR Analysis, Comparability Principles, Search of uncontrolled transactions, tested party concept, general principles of documentation	CA Vaishali Mane
		4. Methods of determining ALP Transaction based Methods – CUP, The new other method as prescribed by Rule 10AB, RPM, CPM, Meaning with examples	CA Vishwanath Kane
		5. Methods of determining ALP, Profit based Methods – PSM, TNMM, Concept of Most Appropriate Method, ALP determination, +/-5%, Meaning with examples.	CA Sanjay Kapadia

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairmen / Speakers
		6. Industry Specific Sessions Financial Services – banks, private equity investment, brokerage, etc., and Information Technology / Information Technology Enabled Services	CA Darpan Mehta
		7. Domestic Transfer Pricing Definition, Different nuances between specified domestic transaction and international transaction, Understanding the different transactions covered under section 40A(2) with case studies	CA Ameya Kunte
		8. Benchmarking Search on database with case studies, includes benchmarking analysis and documentation	CA Jiger Saiya
		9. Benchmarking Live example of carrying out search analysis on database with practical approach	Mr. Stephen Rajkumar / Mr. N. Nagarajan
3.	**Students Committee**		
	Student Study Circle Meeting Venue : CTC Conference Room, 3 Rewa Chamber, Ground Floor, 31, New Marine Lines, Mumbai – 400 020	9th March, 2015 Subjects : Mechanics of Essay Writing	Ms. Indira Gopal, Advocate
4.	**Study Circle & Study Group Committee**		
	Study Circle Meeting Venue : A. V. Room, 4th Floor, Jaihind College, A Road, Churchgate, Mumbai – 400 020	13th March, 2015 Subject : Finance Bill 2015 (Direct Tax Provisions)	CA Praful Poladia

III. FUTURE PROGRAMMES

Sr. No.	*Programme Name / Committee/Venue*	*Day & Date*	
1.	**Allied Laws Committee**		
	Allied Laws Study Circle Meetings (Only for ALC SC Members) Venue : A. V. Room, 4th Floor, Jaihind College (Only for ALC SC Members)	**20th April & 22nd April, 2015** Subject :Indian Accounting Standard (IND AS) – understanding it conceptually 1) Roadmap to IND AS 2) Steps to adopt IND AS 3) New Concepts in IND AS	CA Anand J. Banka
2.	**Corporate Members Committee**		
	Study Course on Valuation Venue : Babubhai Chinai Hall, IMC, Churchgate, Mumbai.	**5th & 12th June, 2015** **6th & 13th June, 2015** Subject :	
		1. Keynote Address	Eminent Faculty
		2. Overview of Valuation Methods and Other Important Points	CA Parag Ved
		3. Case Study on Valuation	Eminent Faculty
		4. Valuation of Intangibles	CA Ravishu Shah
		5. (i) Engagement Letter, Management Representation Letter and Valuation Reports (ii) Important Judicial Decisions Concerning Valuation	Eminent Faculty
		6. Technical Valuations	Eminent Faculty
		7. Valuation Issues in International M & A	CA Niraj Sanghvi (TCS)
		8. Valedictory Address	Eminent Faculty
3.	**Direct Taxes Committee**		
A.	**Direct Tax Update Series Lecture** Venue: Walchand Hirachand Hall, 4th Floor, IMC, Churchgate, Mumbai – 400 020.	**17th April, 2015** Subject: Difference in Transaction value and Stamp Duty Value of Immovable Properties – Some Issues under Income Tax Act – [Covering sections 43CA, 50C, 56(2) (vii)].	Mr. Vipul Joshi, Advocate

Sr. No.	*Programme Name / Committee/Venue*	*Day & Date*	
B.	**Full Day Seminar on Non-Banking Finance Companies** (Jointly with Allied Laws Committee) Venue : M. C. Ghia Hall, Rampart Row, Kala Ghoda, Fort, Mumbai.	**18th April, 2015** Subject : 1) NBFC Regulatory Outlook 2) Compliances Pertaining to Non-Deposit accepting NBFCs and important aspects of Deposit accepting NBFCs. 3) Regulations pertaining to Core Investment Companies (CICs) 4) NBFCs – Auditors' Responsibility 5) Taxation of NBFCs - issues	Shri S. M. N. Swamy General Manager DNBS, RBI CA Bhavesh Vora CA Jayant Thakur CA Kalpesh Mehta CA Radhakishan Rawal
C.	**Full Day Seminar Income Computation & Disclosure Standards** Venue: Mysore Association Auditorium, Matunga.	**18th April, 2015** Subject: Income Computation & Disclosure Standards.	Key Note Address: Eminent Senior Professional Faculties: CA Nihar Jambusaria CA Sunil Kothare CA Yogesh Thar
D.	**Intensive Study Group on (Direct Taxes) Meeting** (Only for ISG (DT) Members) Venue : CTC Conference Room, 3, Rewa Chambers, Ground Floor, 31, New Marines Lines, Mumbai – 400 020.	**23rd April, 2015** Subject : Recent Important Decisions under Direct Taxes	CA Nimesh Chothani
4.	**Indirect Taxes Committee**		
A.	**Workshop on MVAT Act, Service Tax & Allied Laws** (Jointly with AIFTP (WZ), BCAS, MCTC, STPAM & WIRC of ICAI)	Commencing on 18th April, 2015 till 4th July, 2015 (All Saturdays)	Kindly visit chamber's website www.ctconline.org for further details

Sr. No.	Programme Name / Committee/Venue	Day & Date	
B.	**Indirect Tax Study Circle Meeting** (Only for IDT SC Members) Venue : Babubhai Chinai Committee Room, 2nd Floor, IMC, Churchgate	**10th April, 2015** Subject : Determination of CENVAT Credit under Rule 6(3)	Chairman : CA Sunil Gabhawalla Group Leader: CA Mandar Telang
5.	**International Taxation Committee**		
A.	**Advanced Topics of 5th Intensive Study Course on Transfer Pricing** 16 Session - 4 Days Venue : Hotel West End, New Marine Lines, Opp. Bombay Hospital, Mumbai.	**10th and 11th April, 2015** **24th and 25th April, 2015** Subjects :	
		1. Industry Focused Sessions	CA Karishma Phatarphekar
		2. Key Controversy Areas – Recent TP Audit experience	CA Waman Kale Mr. Freddy Daruwala, Advocate CA Samir Gandhi
		3. Practice Areas	CA Maulik Doshi
		4. Other areas having TP implications	CA Arun Saripalli CA Sudhir Nayak CA Milind Kothari
		5. Domestic Transfer Pricing	CA Dr. Hasnain Shroff
		6. The Road Ahead – 7. Attribution issues, experiences, recent rulings and Revenue's perspective	Ms. Alpana Saxena CA Manisha Gupta CA Manisha Jain Ms. Malathi Sridharan, DIT (TP)-I Shri Suhas Kulkarni, TPO, Pune CA Sanjay Tolia Moderator : CA Vispi Patel Panellists: Shri Ajit Korde, CIT (A),Pune Shri Ajit Kumar Jain
		8. Closing Session	CA Rohan Phatarphekar

Sr. No.	*Programme Name / Committee/Venue*	*Day & Date*	
B.	**9th Residential Conference on International Taxation, 2015** Venue : Radisson Blu Resort, Goa.	**18th to 21st June, 2015** ***Group Discussion Papers*** • Royal & FTS – Case Studies Analysis of different sectors • Deputation of personnel – Tax issues from an employer's perspective (including PE risks) • Inbound and Outbound Investment structuring – impact of specific anti-avoidance rules including Indirect Transfer and Place of Effective Management Provisions. ***Papers for Presentations*** • BEPS and Exchange of Information – Global Developments & Government Initiatives • Tax Implications in case of trusts used for estate protection of cross–border assets • Multi dimensional tax issues (Direct & Indirect Taxes) in respect of cross–border Transactions ***Panel Discussion*** • Case studies on International Taxation & Transfer Pricing	CA Himanshu Parekh CA Paresh Parekh CA H. Padamchand Khincha Mr. Akhilesh Ranjan, Joint Secretary (FT & TR-I) with Director (FT & TR) **Chairman** – CA Dilip Thakkar **Paper Writer** – CA Bijal Ajinkya Mr. V. Sridharan, Senior Advocate **Panellists** **Chairman** – CA T. P. Ostwal **Panellists** – CA Anish Thacker & CA Sanjay Tolia
C.	**Lecture Meeting on Attack on Black Money** (Jointly with Indian Merchants Chamber) Venue :Walchand Hirachand Hall, 4th Floor, IMC, Churchgate, Mumbai.	**28th April, 2015** Subject : Attack on Black Money	**Chairman :** Mr. Nishith Desai, Advocate **Speaker :** Mr. Sanjay Sanghvi, Advocate

Sr. No.	*Programme Name / Committee/Venue*	*Day & Date*	
D.	**Intensive Study Group on International Taxation** (Only for ISG on Int. Taxation Members) Venue : CTC Conference Room, 3, Rewa chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020.	**22nd April, 2015** Subject: Discussion on the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015	
E.	**Transfer Pricing Study Circle Meeting**	**April to June, 2015** Subject : Proposed to be discussed: • Transfer Pricing experience in latest assessment year • Marketing Intangibles in India – Where do we stand in anticipation of the Delhi High Court Verdict • Intra-group services and management fees – India approach vis-à-vis global TP best practices • OECD project on BEPS – An India TP Perspective	Kindly visit Chamber's website for further details www.ctconline.org
6.	**Membership & EOP Committee**		
A.	**The CTC Musical Evening** Singing by the CTC Members, Family & Students (Jointly with RRC & PR Committee) Venue : Ramwadi, Chandawarkar Road, Opp. Matunga Station (CR), Mumbai.	**18th April, 2015**	The Members are requested to enrol for this unique Musical Programme.
B.	**Self Awareness Series** (only for SAS members) Venue : CTC Conference Room	**13th April, 2015** Subject : Secularism in our Scriptures and other religious texts	Dr. Naresh Ved, PhD in Philosophy

Sr. No.	*Programme Name / Committee/Venue*	*Day & Date*	
7.	**RRC & Public Relation Committee**		
	4th International Study Tour to Mauritius Venue : Mauritius	22nd to 28th May, 2015 Subject : **Papers for Discussion : Proposed** A. Recent issues on investing in India through Mauritius B. Interaction with local professionals C. Presentation by local professional for investing on Europe, USA, Africa through Mauritius.	
8.	**Study Circle & Study Group Committee**		
A.	**Study Group Meeting** (Only for Study Group Members) Venue : Babubhai Chinai Committee Room, 2nd Floor, IMC, Churchgate, Mumbai	**9th April, 2015** Subject : Recent Judgments under Direct Taxes	Shri Keshav Bhujle, Advocate
B.	**Study Circle Meeting** (Only for Study Circle Meeting) Venue : Conference Room, 20 Down Town, Churchgate, Mumbai – 400 020	16th April, 2015 Subject : Appellate Proceedings- 1st Appeal & 2nd Appeal.	Shri Ajay Singh, Advocate
C.	**Study Circle on International Taxation Meeting** (Only for SC on Int. Tax Members) Venue : 2nd floor, Kilachand Hall, Indian Merchant's Chamber, Mumbai – 400 020	**27th April, 2015** Subject : Attribution of Profits of Permanent Establishment	Mr. Abhay Sharma

For Further details of the future events, kindly visit our website www.ctconline.org.

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DIRECT TAXES COMMITTEE

Intensive Study Group on Direct Taxes Meeting held on 17th March, 2015 on the subject "Recent Important Decisions under Direct Tax" at CTC Conference Room.

CA Ganesh Rajgoplan addressing the members.

CA Ketan Vajani addressing the members.

STUDENTS COMMITTEE

The Dastur Essay Competition Meeting held on 9th March, 2015 on the subject "Mechanics of Essay Writing" at CTC Conference Room.

Ms. Indira Gopal, Advocate addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting held on 13th March, 2015 on the subject "Finance Bill, 2015 (Direct Tax Provisions)" at Jaihind College, Churchgate.

CA Praful Poladia addressing the members.

MEMBERSHIP & EOP COMMITTEE

The Union Budget 2015-16 jointly with The Western Maharashtra Tax Practitioners' Association, Pune held on 7th March, 2015 at WMTPA Association Hall, Pune.

Dignitaries during the Lecture meeting on Union Budget 2015-16.

CA Mehul Shah addressing the members.

CA Manish Gadia addressing the members.

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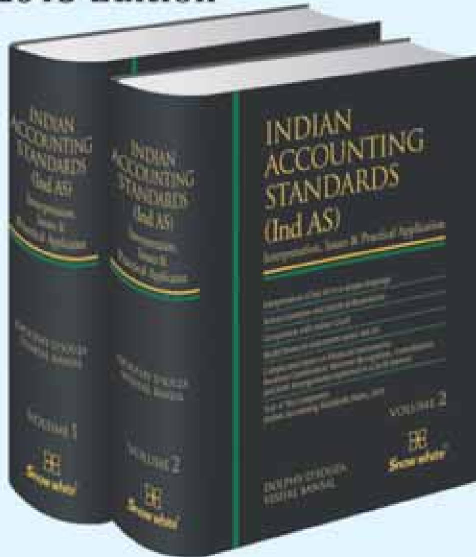

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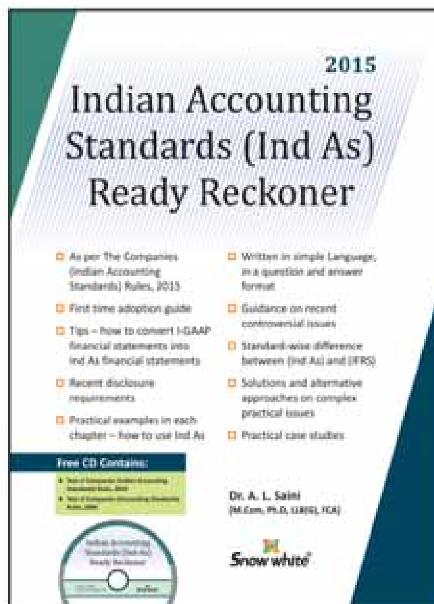

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