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The Chamber's Journal

41 Year of Publication

Happy Independence Day

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

August- 2015 Vol . III | No. 11

TAX ISSUES IN LOGISTICS AND SUPPLY CHAIN MANAGEMENT ISSUES FROM DIRECT TAX PERSPECTIVE

Homage to Karmayogi
President of India

Confidence and Hard-work is the best medicine to kill the disease called failure. It will make u a successful person.
– Dr. Abdul Kalam

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INTERNATIONAL TAXATION COMMITTEE

Seminar on Law & Procedure Relating to Authority for Advance Ruling & Recent Controversies
Jointly with IMC, BCAS and IFA-India Branch held on 17th July, 2015 at Walchand Hirachand Hall, IMC

Hon'ble Chairman, AAR, Mr. Justice V. S. Sirpurkar inaugurating the seminar by lighting the lamp. Seen from L to R : CA Raman H. Jokhakar, President, BCAS, CA Avinash Lalawani, President, CTC, CA Gautam Nayak, Co-Chairman, Direct Taxation Committee, IMC, CA Ketan Dalal, Chairman, Direct Taxation Committee, IMC, Rajan Vora, Faculty, CA Pranav Sayta, Chairman, IFA-India Branch (WR) and CA Arvind Pradhan, Director General, IMC.

Hon'ble Chairman, AAR, Mr. Justice V. S. Sirpurkar delivering Keynote address. Seen from L to R : CA Arvind Pradhan, Director General, IMC, CA Gautam Nayak, Co-Chairman, Direct Taxation Committee, IMC and CA Naresh Ajwani, Chairman, International Taxation Committee, CTC.

Panellist

CA Gautam Nayak

Mr. Sunil Moti Lala, Advocate & Tax Counsel

Mr. Kanchan Kaushal, Partner, Tax Litigation Price Waterhouse & Co. LLP

Mr. V. K. Gupta, Commissioner of Income-tax & Member, Dispute Resolution Panel

CA Rajan Vora

Mr. Pravin Kumar

CA Sanjay Sanghvi

Mr. Girish Dave Advocate

Section of delegates

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The Chamber's Journal

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Editorial

Dr. Avul Pakir Jainalbdeen Abdul Kalam's death on 27th July, 2015 has brought about an outpouring of mourning from all across India; the mourning was real, intense and wide-spread something that has not been witnessed many times in free India. Unfortunately we have not seen leadership at the national level, that is characterised by intense sense of nationalism and cultural identity that was a seamless amalgamation of various religious identities and this has happened in times of intense political polarisation and stands as a testimony of the fact that even today, for the ordinary Indians, nationalism means cultural identity that transcends religious identity. Ordinary man values scientific and practical approach more than the petty religious polarisation that has been created by political parties with vested interests.

His declaration that he is "completely indigenous" is steeped in his absolute faith in the potential of the ordinary people that make India and their culture of non-violence. His passion for a powerful India that would be free from the fear of foreign invasions has made him a role model for generations of youth and a unifying figure that stood firm in the middle of intense storms of religious divides that have been created by vested interests. I hope the current youth which has witnessed him stand tall as a visionary, philosopher, leader, scientist and epitome of cultural identity that transcends religions would take him as an example to carry his dreams further, and build-developed and strong India that asserts as a "nation of a billion people". We the Chamber of Tax Consultants offer our homage to the people's president Dr. A.P.J. Abdul Kalam.

The special story of the Chamber's Journal's August 2015 issue is "Tax issues in Logistics and Supply Chain Management." The globalisation of the domestic markets and increasing volumes of the internet based commerce has thrown new challenges to the tax authorities as well as to professionals. Hence, we are coming out with a special story on this topic. I hope that this issue will be of help to the members while advising their clients.

I thank all the contributors to this issue for their efforts.

K. GOPAL
Editor

From the President

Dear Readers,

I, on behalf of all the Managing Council, Past Presidents, Core Committees and CTC Staff "WISH YOU ALL HAPPY 69th INDEPENDENCE DAY".

By the grace of Providence India enters the comity of free nations on 15th August, an equal among equals. It is an occasion for rejoicing not only for her people but also for all who value human freedom as an end in itself. For the freedom, We have won, the first thing all of us should learn is that it is not free. We will have to gird our loins and work as We have never worked before. Any number of paper plans will not usher us in the future if we go on interminably arguing our relative merits. The consensus of instructed opinion in the country is that our urgent need is to increase production. If we are to be true to our own best impulses, we should depend on education rather than legislation, on the catalytic action of creative thoughts and not on mass agitation and crude propaganda, to bring about those changes which may be necessary to eliminate poverty, wretchedness and strife and to enable every citizen of free India to fullness of life and that inner freedom which the Vedic seers termed Swaraj

I will quote a para of "Leon Shenandoah, (1915-1996) on Journey / Path

"Everything is laid out for you.
Your Path is straight ahead of you.
Sometimes it's invisible, but it's there.
You may not know where it's going,
But you have to follow that path.
It's the path to the creator.
It's the only path there is"

I have taken charge on 3-7-2015 and completed one month as President of the Chamber. We have formed 12 committees and appointed OBs for our Delhi Chapter. The major task completed held during this month were –

(1) Organised First committee meeting of 10 committees out of 12 committees – Each of the Chairman and the Core committee members are enthusiastic. Various innovative programmes are planned for the year 2015-16. The programmes planned continue with past traditions with addition of New Initiatives. With the support of New Team Chamber I see no goal difficult to achieve.

(2) Redesigning of CTC Newsletter – To need more space for contents. We have redesigned the newsletter for the members' benefit. We have restarted features like additions in library, Study facility for students, help desk, Publication for sale etc.

(3) For the next month's we have planned

  (a) Lecture meeting on Provision of Accounts and Audit under new Companies Act

  (b) Seminar on Black Money Law and Voluntary Compliance Window

(c) Seminar at Solapur on NRI Taxation & Amendments in CARO 2015

(d) Seminar on Audit under Various Laws

(e) Seminar on TDS under Section 195 on payment to Non-Residents

(f) Various Study Circle/Study Group/Sas are also planned.

I request all the members to take utmost benefit of the same.

We have taken a Group photographs of various committees, which were taken at the time of first meeting. We are publishing 10 committees' photos in this journal under the heading: KNOW YOUR COMMITTEE for the year 2015-16. Remaining committees' photographs will be published in the next Newsletter

The Government has extended the due date for filing of return till August 31,2015 from July 31, 2015. The new ITR Forms 1, 2 and 4S were initially notified for the Assessment year 2015-16 *vide* Notification No. 41/2015 dated 15-4-2015. However after representations received from various stakeholders, the CBDT withdrew the earlier forms and has issued simplified version of ITR Forms 1, 2, 2A and 4S. Now the CBDT has notified the remaining ITR Forms viz, ITR Forms 3, 4, 5, 6 and 7 also *vide* Notification No. 61/2015 dated 29-7-2015. However till 4-8-2015, Form 6 is not yet enabled for filing. Government has introduced Electronic Verification process of Income Tax Return. Taxpayers have appreciated the new initiative of EVC through Aadhaar Linkage and Net banking dispensing with the hassle of sending the paper copy of ITR V form to Bengaluru. This will also shorten the time taken for processing of the return and issue of refund.

The Chamber had organised lecture meeting on Revised Forms under Income tax on 4-8-2015. It was attended by 320 plus persons. Certain points came up during the deliberations which require representation. I request all readers to give your feedback on the new s EVC system so that proper representation can be made to CBDT. I also take this opportunity to appreciate efforts of Shri Ashok Sharma, Chairman SC&SG Committee for organising this timely meeting. I am requesting CTC Law and Representation committee to make representation for extension of time for Filing of ITR Return 5 and 6. CPC Bengaluru has been issuing notices u/s 245 to many assessees for adjustment of refund against arrears of earlier years' demand. These noticed are required to be responded online directly to CPC. Many of the arrears of demand are not correct and rectification applications are not resolved timely resulting in avoidable inconvenience to the taxpayers

First outstation seminar on Company Law was held at Nashik on 25-7-2015. It was jointly organised by Trimbak Study Circle of Nashik and Nashik Study Square. This was attended by more than one hundred persons. I must congratulate team members of both the Study Circles for successful seminar. Our special thanks to Mr. Pravin Kulkarni, Mr. Kishor Birari, Convenor Trimbak Study Circle of Nashik Mr. Makarand Mahadeokar, Convenor of Nashik Study Square Mr. Sanjeev Mutha. I wish to put on records my appreciation of efforts put in by Shri Hemant Parab, Chairman, Membership and Public Relations Committee for organising first outstation seminar.

Delhi Chapter had organised a seminar on EPC Contract. The registration crossed 103. I must congratulate our Delhi Chapter Chairman R. P. Garg, Vice Chairman Suhit Agarwal, Hon. Jt. Secretary: Vijay Gupta and Sapna Gupta, Hon Treasurer: Gurav Garg, Advisor V. P. Verma and Immediate Past Chairman C. S. Mathur.

We believe that education and sports are best allies to ensure social inclusion and integration. Through them we stimulate young people to achieve their goals, to experience the joy of breaking limits, to learn team work and respect for their competitors. Sports instill in us a culture of co-operation, of honouring ethics and hard work as a means to reach our goals and celebrate our achievements. Combining it with the natural joy and self-esteem of the hospitable and welcoming members will

produce the greatest legacy of the games. To maintain the spirit of sports The Student and IT Committee and Membership and Public Relations Committee has jointly organised 2nd Football Cup on 8-8-2015, we are waiting for you with open arms and hearts.

“Indian Financial Code "The RBI and the Finance Ministry have always had a challenging relationship on the issue of regulation of interest rates. The tension is due to the different perspective these institutions have. The RBI takes on a stability-based holistic medium-perspective view. The political executive, on the other hand, is traditionally in a hurry to rush into a moderate-to-low interest rate regime because of its populist appeal for business and consumer. Government typically favours a low interest regime as it reduces the interest costs in the budget of a prolific borrower (like GoI) and has direct impact on fiscal deficit. The recent draft of the Indian Financial Code (IFC) that recommends a seven-member Monetary Policy Committee (MPC),in which four members will be nominated by the government, has resulted in fears that this will result in the RBI losing the autonomy in regulating monetary policy. Bringing the bureaucracy into this sensitive area of financial sector regulation goes against the Government’s stated objective of strengthening independent regulators. For this government to build the blue print of a new economic architecture, which, in turn, will regulate investments, we need our regulators to be strengthened. We must steer clear of decisions that will weaken or compromise their independence.

GST Constitution Amendment Bill, 2014, placed in Lok Sabha on December 19, 2014. The same was passed by Lok Sabha on May 6, 2015. Thereafter GST Constitution Amendment Bill, 2014, was referred to Select Committee of Rajya Sabha on May 12, 2015. Report of Select Committee on GST Constitution Amendment Bill, 2014, was presented to Rajya Sabha on July 22, 2015. For clearing the road block, the Cabinet Committee on Economic Affairs has accepted demands of States and the Central Government has agreed to compensate the States for 100% of shortfall in revenue for 5 years. Cabinet has also agreed to exempt stock transfers within group companies from the 1% additional tax on interstate supplies. With these significant steps it seems the roll out of GST looks possible in April, 2016.

E-commerce is present all around. Since topic of e-commerce is very relevant Direct Tax committee is planning to have a seminar on E-commerce which will cover various issues relevant issues on this subject.

Under the new black money law, which has been passed by Parliament and has come into force from July 1, 2015, the penalty would be much higher at 90 per cent, in addition to a 30 per cent tax on undisclosed foreign assets, while such persons would also face criminal prosecution with a jail term of up to ten years. The Finance Ministry has notified a three-month compliance window under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 from 1st July till 30th September, 2015. Those making the disclosure during this period would have further three-months time till December 31 to pay the taxes and the penalty on the foreign income and assets disclosed during the window period. International Taxation Committee of Chamber is organising a programme on 20-8-2015 on the same subject. I request all readers to send their suggestions for representations on the Black Money law so that the same can be forwarded to the Government.

Former President Dr. A. P. J. Abdul Kalam, the ‘missile man’ who became popular as ‘People’s President’ passed away on 27-7-2015 (15-10-2015 – 27-7-2015). Let’s salute the pure soul that sacrificed its life for us. Let’s tribute the strong mind determined to do anything for us. Let’s show our joy for his great heart, Let’s honour for its values, Let’s shed tears for its love towards our country and finally Let’s strengthen our heart To bid farewell to the great soul SALUTE TO OUR FORMER PRESIDENT Dr. Abdul Kalam.

Special Story of this issue of the Chamber's Journal is on "Tax issues in Logistic and Supply Chain Management issues from Direct Tax Perspective “ which is designed by Shri Samir Kanabar, Shri

Kiran Nisar, Shri Rakesh Jain and Shri Chandresh Bhimani and they deserve all the compliments for the comprehensive coverage on logistic management.

Let me share my views on leadership.

There are only two types of people in this world – a leader and a follower. Yes all people want to become leaders, but there will be only one who will lead a bunch of followers. Earlier people used to say that a leader is born and cannot be trained, but such concepts have considerably changed in the recent past. A leader who may have reached great heights and can motivate people to achieve big goals has very likely been a follower himself at one point of time. Such People become leaders by closely planning, thinking and implementing the basic traits (like the ones mentioned below) which separate a leader from a follower.

1. **Courage:–** The courage you show to the team members will motivate and inspire them to work harder to achieve the objective. The leaders' courage is be based on knowledge of self, and of one's occupation.
2. **Self Control:–** The man who has no control on himself can never control others.
3. **A keen sense of justice and fairness: -** No leader can command and retain the respect of followers if he is unfair and has no sense of justice.
4. **Definiteness of plans:–** Have a definite plan of action. If you do not have the correct road map and plan how can you think of reaching the goal that you have set and which may not be visible to your followers?
5. **The habit of doing more than being paid for:–** If a leader is not putting his best efforts in his work, none of his followers will put in his best.
6. **A pleasing personality:–** People see the leader as their representative to the outside world, Leader must have pleasing personality.
7. **Sympathy and understanding:-** The interest of the leader has to take the back-seat if he desires his team member to perform better.
8. **Mastery of details:–** The followers look up at their leader for guidance and direction towards the goal. Therefore you are required to know the details of the work to be a true leader.
9. **Willingness to assume full responsibility:–** A leader is required to take up the responsibility for any mistakes of the subordinates.
10. **Co-operation:–** The creation of a conducive and co-operative environment is a must for an effective leadership

Past & Current team members of the Chamber have managed to build one of the most robust and open associations in the nation, thanks to their creative capacity, friendliness and solidarity.

Month of August/September are the months of festivals.

My best wishes to all the readers for Parsi New Year, Raksha Bandhan, Gokulashtami, Paryushan, Ganesh Chaturthi.

Jai Hind

Avinash Lalwani
President

Chairman's Communication

Dear Readers,

Bharat has lost its Ratna. Dr. A. P. J. Abdul Kalam was a man of impeccable character, indomitable spirit, profound knowledge and firm conviction. His death is an irreparable loss to this nation. He went from distributing newspapers after school during childhood to become the President of our country. He was awarded Padma Bhushan, Padma Vibhushan and Bharat Ratna – the highest civilian honour. He made every day of his life count for all it's worth, till his very last breath.

"May your soul Rest in Peace, Dr. Kalam. Besides all you have given to our country, you were a Guide, a Teacher and an inspiration to many. You will always remain immortal in our hearts and memories for generations to come".

Last month, we discussed the issues in the areas of Indirect taxes concerning logistics & SCM Industry. This month's special story deals with the direct tax issues concerning direct tax and SCM industry. The industry is facing various Direct Tax issues relating to tonnage tax, taxation of foreign shipping companies etc., apart from cross-border taxation issues specially in relation to applicability of withholding tax on payment made by Indian logistic companies to their foreign counterparts and permanent establishment implications for foreign companies by virtue of activities carried in India.

I thank the authors for this special story for giving their articles on time. I am thankful to the authors, of the articles S/Shri Sudhir Nayak, Sagar Joshi, Kiran Nisar, Nikhil Rohera, Faizan Nursumar, Chandresh Bhimani, Rakesh B. Jain, Jimit Devani, Hemal Zobalia, Pankaj Bagri, Shashidhar Upinkudru, Vishal Shah & Mehul Shah. I am thankful to Shri Samir Kanabar, Kiran Nisar, Rakesh Jain and Chandresh Bhimani for designing and giving their valuable inputs in structuring this direct tax part of special story. I am sure the contents of this journal will be very useful which will act as a ready reference on the subject.

The Hon'ble Commerce and Industry Minister has introduced the Foreign Trade Policy (FTP) 2015-2020 in April 2015 to boost foreign trade, increase trade facilitation and ease of doing business in India. There are many new features introduced in new FTP. It introduces two new schemes namely "Merchandise Export from India Scheme (MEIS)" and "Service Export from India Scheme (SEIS)". The Professional services, amongst others, have been included for the purpose of issuance of duty scrips. Professional services, which includes – legal services, taxation services, accounting, auditing & book-keeping services and engineering services. There are issues emanating from the new scheme, which could affect all IDT professionals, even though not practising in FTP laws. The attempt is made to briefly deal with it in this issue.

CA. HARESH KENIA
Chairman – Journal Committee


CA. Sudhir Nayak and CA. Sagar Joshi

Tonnage tax scheme in India

Indian shipping sector with 12 major ports and about 187 minor ports ranks 16th among the maritime countries. India is blessed with coastline of about 7,517 km. Almost 90% of the trades in India takes place through sea route. With a view to ply more and more ships to India and make India internally competitive in terms of shipping business lot of efforts were taken from Financial Year 2000-01 like providing 100% deduction to Indian shipping companies if the profits from the business were taken to reserves and then the said reserve is used for the purchase of new ships, increase in the rate of depreciation on the ship by 5% etc.

The then Finance Minister Mr. P Chidambaram introduced Tonnage Tax Scheme (TTS) in India in Budget 2004-05. A new Chapter XII-G containing 30 sections (i.e. from Section 115V to 115VZC) was introduced in the Income-tax Act, 1961 (the Act).

Chapter XII-G is divided into seven Parts.

- Part-A contains the meaning of certain expressions typically used in shipping business
- Part-B gives the method of computation of tonnage income
- Part-C specifies the procedure for option of tonnage tax scheme
- Part-D gives the conditions for the applicability of the scheme
- Part-E contains the provisions of amalgamation and demerger
- Part-F contains miscellaneous provisions and
- Part-G contains the provisions relating to avoidance and exclusion from the scheme

TTS is a presumptive method of payment of taxes available to Indian shipping companies.

Key features of TTS are as follows:

Who can avail TTS

- Qualifying company as defined under section 115VC can opt for TTS.

Conditions for opting TTS

- The qualifying company must have at least one qualifying ship having minimum 15 net tonnage.
- The qualifying company opting for TTS must have valid approval from the Joint Commissioner of Income-tax having jurisdiction over the company.
- The qualifying company will have to comply with the minimum training requirement in respect of trainee officers in accordance with guidelines framed by Director-General of Shipping.

Benefits

- TTS is effective from 1st April, 2005 and the scheme is optional;
- It provides for presumptive basis of taxation and Chapter XII-G overrides Sections 28 to 43C of the Act. Under the TTS a notional income will be taxed under the head "Profits and gains from business and profession" at the applicable corporate tax rate.
- Taxes are required to be paid even if there is loss.
- No depreciation or set off /carry forward under section 71 or 72 shall be allowed in computing the income under TTS. Depreciation will be treated as deemed to be allowed.
- The company opting for TTS can earn two types of income i.e. (i) income from core activities and (ii) income from activities incidental to the core activities.
- The income from core activities of the company opting for TTS mean income from:
    - o Operation of qualifying ships,
    - o Pooling arrangement,
    - o Freight income ;
    - o On-board or on-shore activities of passenger ship comprising of fares and food and beverages consumed on board
    - o Slot charter, space charters, joint charter, feeder services, container box leasing.
- If the income from incidental activities is not exceeding 0.25% of the turnover from the core activity then the same will be treated as income from operation of qualifying ship. Else, would be taxed under other provisions of the Act.
- Incidental income is defined under Rule 11T of the Income-tax Rules, 1961 as follows:
    - o Maritime consultancy charges;
    - o Income from loading or unloading cargo;
    - o Ship management fee or remuneration received for managed vessels; and
    - o Maritime education or recruitment fees
- The income from TTS is not liable for Minimum Alternate Tax. However, corresponding reference of this has not been provided in Section 115JB of the act.
- Tonnage income is separately calculated for each qualifying ship by multiplying (i) the number of days in the previous year or (ii) number of days in part of the previous year in case the ship is operated by company as a qualifying ship as the case may be with the daily tonnage income as per below mentioned slab rates:

Qualifying ship having net tonnage	Amount of daily tonnage income
Up to ` 1,000	` 70 for each 100 tons
Exceeding ` 1,000 but not more than ` 10,000	` 700 plus ` 53 for each 100 tons exceeding ` 1,000
exceeding ` 10,000 but not more than ` 25,000	` 5,470 plus ` 42 for each 100 tons exceeding ` 10,000 tons
exceeding ` 25,000	` 11,770 plus ` 29 for each 100 tons exceeding ` 25,000 tons.

Method for calculation of net tonnage

- One net tonnage means
  - o 19 cubic meter when loadable capacity is taken on volume basis
  - o 14 tons when loadable capacity is taken on weight basis
  - o 2.5 TEU (Twenty foot Equivalent Unit) when loadable capacity is taken on TEU basis.
- Tonnage for the purpose of calculation of taxes has to be rounded off to the nearest multiple of hundred tons. Any tonnage consist of kilograms shall be ignored.
- In case of temporary cessation of the operation of qualifying ship, for the purpose of TTS it will be presumed that the ship was in operation.
- In case of joint operation of qualifying ships and having joint interest then tonnage income will be shared amongst the owners as per their respective shares.

Procedures and compliances

- The Scheme is optional and once the option is exercised there is a lock in period of 10 years. If company opting for the scheme and wants to opt out then it is debarred for 10 years.
- The company opting for TTS is required to transfer not less than 20% of the book profits derived from core activity and other incidental activity to Tonnage Tax Reserve Account.
- The reserve so created has to be utilised by the company for either acquiring a new ship for the purpose of business or for the business of operating qualifying ship (other than for distribution of dividends or profits or for remittance outside India as profits or for creation of any asset outside India).
- The ship so acquired out of the reserve created is not allowed to be sold before the expiry of three years from the end of the previous year in which it was acquired.
- A business of operation of qualifying ship is to be considered as a separate business and separate accounts are to be maintained for such business. The said books of account needs to be audited and report in Form 66 is required to be filed with the income tax return.
- Assessee wanting to opt for this scheme will have to make an application to the joint commissioner and his approval is necessary.
- The said option of offering income under TTS granted can be renewed within one year from the end of the previous year in which the option ceases to have effect.

For the purpose of TTS a company is said to be a Qualifying Company if it is:

- An Indian company;
- the Place of Effective Management (PoEM) of the company is in India;
- It has at least one qualifying ship; and
- The main object of the company is to carry on the business of operating of ships.

As per the explanation provided to Section 115VC the company has PoEM in India when the board of directors or executive directors are in India. Alternatively, the company is said to have its PoEM in India when the routine decisions taken by executive directors or officers are approved by the board of directors who are based in India.

Income of foreign companies will continue to be taxed as per the provisions of Section 172 or Section 44B of the Act.

Meaning of Qualifying ship

Now, it is important to understand the meaning of Qualifying ship for the purpose of TTS. A qualifying ship means:

- A sea going ship or vessel of fifteen net tonnage
- Registered under Merchant Shipping Act, 1958 (MSA) or ship registered outside India having licence issued by Director-General of Shipping under MSA and
- Valid certificate indicating net tonnage is in force.

It does not include:

- Sea going ship or vessel if the main purpose for which the ship is used for provision of goods and services of a kind normally provided on land
- Fishing vessels,
- Factory ships,
- Pleasure crafts,
- Harbour and river ferries,
- Off shore installation and
- A qualifying ship used as fishing vessel for more than 30 days

Issues around Qualifying ship

In case of Buharia Holdings (P.)[1] Ltd, the Assessing Office (A.O.) had taken a view that the income of the assessee should not be eligible for TTS since it was holding partial ownership of the qualifying ship. The ITAT Chennai Bench in this case held that the requirement of section 115VA is to have at least one qualifying ship and it does not lay down the condition of full ownership of the ship. Accordingly, assessee was permitted to compute its income as per TTS.

The question before Delhi High Court in case of Jagson International Ltd.[2] was whether Deep Sea Matdrills is a qualifying ship or it should be treated as off Shore installation. In this case, the Delhi high Court held that Deep Sea Matdrills should be treated as qualifying ship since it is registered under MSA and used for offshore drilling and it should not be treated as an offshore installation (as excluded from the definition of qualifying ship). This issue is pending with Supreme Court now and we will have to wait till Supreme Court hears and disposes this matter.

In case of Trans Asian Shipping Services Private Limited[3], the A.O. took a view that in case of income from “slot charter” there is a need to check whether the ship on which the slot was hired is qualifying ship or not. Accordingly, the assessee was asked to submit the Valid certificates of each ship on which slot was hired. In case the ship is not a qualifying ship then income from slot charter has to be taxed as per the normal provisions and not as per TTS. The High court of Kerala at Ernakulum in this case held that "slot charter” ships eligible for tonnage tax scheme and there is no need to mention the name and certificate details in Form 66 as prescribed in Rule 11T of Income Tax Rules, 1962. Accordingly, there is no requirement of identifying the ship on which the slot was hired and to check whether that ship is a qualifying ship.

Whether failure to deduct tax at source can attract disallowance under tonnage tax scheme

The Charging Section under TTS is section 115VA of the Act which states that the net

1 [2011] 12 taxmann.com 192 (Chennai)
2 [2008] 214 CTR 227 (Del.)
3 [TS-22-HC-2015(Ker.)]

tonnage based income calculation will have no impact of section 28 to section 43C of the Act. In light of this it is pertinent to check whether there can be any disallowance under 40(a)(i)/(ia) of the Act in the hands of company opting for TTS for non-deduction of taxes while making payment?

In this regard a reference can be made to the ITAT Mumbai Bench ruling in case of Varun Shipping Co. Limited[4] wherein the A.O. had increased the income calculated under TTS by a disallowance under section 14A of the Act (since assessee had earned dividend income and no expense was disallowed). The ITAT Mumbai Bench in this case held that when the income of the assessee from the business of operating ships is computed as per the special provisions contained in Chapter XIIG, only the expenses incurred by the assessee for earning income of the said business are deemed to be allowed. It, therefore, cannot be said that when the income of the assessee from the business of operating ships is computed as per the special provisions of Chapter XIIG, any expenditure other than the expenditure incurred for the purpose of the said business has been allowed and consequently no addition to income so computed can be made by way of disallowance under section 14A of the act on account of expenditure incurred by the assessee in relation to earning of exempt dividend income.

Similar view was adopted by the ITAT Kolkata Bench in the case of Mark construction[5] wherein the assessee had offered its income under section 44AD (i.e. 8% of its gross receipts) and there were certain expenses on which the assessee had not deducted taxes at the time of payment. The A.O. in this case took a view that the income of the assessee should be further increased by disallowances under section 40(a)(ia). The ITAT held that the income of the assessee is taxable under presumptive scheme which overrides section 28 to section 43C of the Act. Accordingly, there should not be any further addition by way of disallowances under section 40(a)(i)/(ia) of the Act.

Based on the above discussion and rulings one can say that there should not be any disallowance under section 40(a)(i) /(ia) for non-deduction of taxes by the company offering its income under TTS. However, the assessee will be held responsible for the following consequence of non-deduction of taxes:

- Penal interest under Section 201(1A) at the rate of 1% p.m.
- The assessee can be treated as assessee in default and the penalty for non-deduction of taxes can also be levied (which will be maximum amount equal to the tax which was deductible).

Capital gains on sale of ship

As per section 115VN capital gains from transfer of tonnage tax assets will be taxed as per provisions of section 45 read with Section 50. section 50 of the Act deals with capital gains on transfer of assets on which depreciation has been claimed. The ship transferred by the company which had opted for TTS will be treated as depreciable assets (because depreciation was deemed to be allowed) and gains or loss arising on transfer will be treated as short terms gains or loss as per section 50 of the Act.

4 [2012] 17 taxmann.com 112 (Mum.)
5 [2012] 23 taxmann.com 398 (Kol.)

CA. Kiran J. Nisar

Foreign Shipping Companies – Tax provisions under the Income tax Act, 1961

Before discussing tax issues for a foreign shipping company (FSC), it is pertinent to understand the business model and nature of operations of a foreign shipping company.

1. What are the various income streams of a FSC who operates ship?

Foreign shipping company generally operates in the international water and moves the cargo between two ports, one being port of origin or load port and other being port of destination or discharge port. Now a days, majority of transportation happens in standardised containers (break bulk cargo is very rare).

Generally FSC has end to end contract with the customers (say for e.g., moving cargo from Texas in USA to Pune in India), which may include obligation to pick up the cargo/container from the warehouse or factory of the exporter (say at Texas in USA in our example), dealing with the terminals, at the place of origin (Houston Port in our example) and also at the place of destination (Nhava Sheva Port in our example), and ensuring delivery to the importer (say at Pune in our example). So invariably the amount collected by the FSC includes freight for sea transportation between the two ports, the charges payable for inland transportation of goods at the place of origin as well as destination, charges payable to terminals for handling the cargo at the place of origin as well as destination. The inland transportation of goods at both the places and terminal handling at both the terminals are handled by a separate company. The charges collected for inland transportation of cargo from customer's location (say warehouse/ factory) to Port and vice versa is known as "Inland Haulage Charges" (IHC) and charges collected for handling cargo at terminal is known as "Terminal Handling Charges" (THC) in shipping parlance. Many a time FSC also recovers detention and demurrage from the shippers/consignee, which is charge for the delay in clearance of goods or returning containers.

2. Taxation under Indian Income-tax Act for FSC engaged in the business of operation of ship

Under the Indian Income-tax Act, 1961, FSC could be subject to tax in India only if the income is either received or deemed to be received in India or accrues or arises or deemed to accrue or arise in India. As per provisions of section 9, only such part of income of FSC accrues or arises in India as is reasonably attributable to the operations carried out in India. Now in the case of FSC it would be difficult to determine as to how much of its income is attributable to the operations carried

out in India since most of the time ship is in the international waters. Hence, there was a need for a deeming provision to collect appropriate tax. Accordingly section 44B was inserted by Finance Act 1975[1], w.e.f. A.Y. 1976-77.

Section 44B contains special provisions for computing profits and gains of shipping business of a non-resident engaged in the business of operation of ship[2]. Such profits and gains will be taken at an amount equal to 7.5% (seven and a half per cent) of the amount paid or payable to the non-resident or to any other person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any Indian port (i.e., export from India) as also of the amount received or deemed to be received in India on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India (i.e., import in India). So in other words, for the transaction of export from India, the income accrues in India and hence entire amount payable to FSC, irrespective of place where such amount is paid, would be subject to tax under section 44B. Whereas in case of import to India, the income accrues outside India and hence the amounts would be subject to tax only if the same is received or deemed to be received in India. The explanation to section 44B, clarifies that demurrage charge, handling charge and other amount of similar nature are also covered under section 44B. In other words, income which is ancillary and inextricably linked to the business of operation of ship is also taxed u/s. 44B.

Section 44B and service tax

Under section 44B, profit is computed at 7.5% of amount paid or payable for carriage of goods. Hence the question arose whether such amount payable for carriage of goods should be inclusive of service tax? The tax authorities have taken a view that service tax should be considered as revenue for computing profit u/s. 44B. However, the Courts and Tribunal have held that the service tax cannot be included in the total receipt for determining presumptive income, since service tax is a statutory liability, would not involve any element of profits and service provider is collecting the same on behalf of Government.

- *Islamic Republic of Iran Shipping Lines vs. .DCIT, 11 Taxman.com 349 (Mum)*
- *Sedco Forex International Drilling Inc. vs. ADIT, 24 Taxman.com 390 (Del)*
- *DDIT vs. M/s Mitchell Drilling Int. Pty. Ltd. (I.T.A. No. 698/Del/2012)*
- *DIT vs. Schlumberger Asia Service Ltd., 317 ITR 156 (Utt)*
- *Hanjin Shipping Co. Ltd. vs. ADIT (ITA No. 8672/ Mum./2010)*

3. Special provision for occasional shipping business by non-resident

Section 172, which is a complete code in itself, contains provisions for taxation of occasional shipping business of non-residents. Here also, deemed profits and gains is taken at 7.5% (seven and half per cent) of the amount paid or payable on account of carriage of passengers, livestock, goods, etc. shipped at port in India. Such profits or gains shall be deemed to be income accruing in India to the owner or charterer of ship. However, for ease of administration, various obligations are casted on the master of a ship. Even taxes due if any will be recovered from the master of a ship {S. 172(4)}.

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1. Prior to s. 44B, the taxable profits of FSC were determined by suitably apportioning profits between Indian business and foreign business. CBDT Circular no. 7 dated 10-2-1942 allow British shipping company to assess on the basis of ratio certificates granted by UK authorities. Ref. Bombay High Court Decision in the case of Anchore Line Limited vs. ITO, (1984) 10 ITD 63 Mum dated 21 May 1984

2. If FSC do not operate ship then they are not covered u/s. 44B, as this section is applicable only to non-residents engaged in the business of operation of ship.

3.1 How does section 172 operate

A ship belonging to or chartered by a non-resident is not allowed to leave Indian Port unless Custom authorities are satisfied that the necessary tax, if applicable, has been paid or a satisfactory arrangement has been made for payment of tax[3]. Under section 172 the master of a ship has following obligation:

a) To file voyage return [u/s. 172(3)] before departure of ship from any Indian port, declaring the amounts received or receivable on account of carriage of passengers, goods, etc. with the tax office *(having jurisdiction over the concern port)*. In a given period if there are hundreds of voyages then he has file hundreds of voyage returns.

   - However, where it is not possible to file such return before departure of ship, then he has to provide an undertaking that such return will be filed within 30 days of departure of ship and taxes due if any will be paid by any other person on his behalf *[proviso to s. 172(3)]*.

b) To obtain NOC from the tax officer. Where Assessing Officer is satisfied that satisfactory arrangement has been made for filing of voyage return after departure of ship, he may issue NOC.

Such NOC from tax office is a precondition for obtaining the Port Clearance Certificate (PCC) from the Custom authorities and ship is allowed to leave India on the basis of such PCC from Custom authorities. Hence compliance u/s. 172 is very critical for smooth sailing of vessel from Indian Port.

Further each voyage return filed u/s. 172(3) will be assessed and an order will be passed u/s. 172(4). Such order u/s. 172(4) is required to be passed before the expiry of nine months from the end of the financial year in which voyage return is filed.

However sub-section (7) of section 172 provides an option to the owner or charterer of ship. They can opt for an assessment of their income in accordance with the other provision of the Act. Such option should be exercised before the end of assessment year relevant to the previous year in which the departure of ship falls. If such option is exercised then all the taxes paid u/s. 172 shall be treated as payment of advance tax and accordingly assessment should be completed in accordance with normal provisions of the Act [u/s. 143(3)].

3.2 Applicability of other provisions of the Act when return is filed u/s. 172

- Section 172 is a complete code in itself and hence other provisions of the Act will not apply while framing an assessment u/s. 172(4)
- Accordingly no interest or penalty can be levied if assessment is framed u/s. 172(4)
- Earlier, by its Circular No. 730 dated 14-7-1995, CBDT has taken a position that since taxes paid u/s. 172(4) cannot be considered as advance tax, assessee is not liable to pay interest u/s. 234B and 234C and also not entitled for interest on refund u/s. 244A, even when option is exercised u/s. 172(7) and assessment is completed u/s. 143(3) read with section 172(7). However, later Supreme Court, in the case of *Glittre D/5 I/S Garonne vs. CIT [1997[225 ITR 739*, has held that in case of regular assessment u/s. 172(7), the assesse is entitled to interest on refund. Accordingly, CBDT by its Circular No. 9 dated 9-7-2001 has withdrawn its earlier Circular No. 730.
- Hence, if assessee has exercised the option u/s. 172(7) and prefer to be assessed under the normal provisions of the Act and not u/s. 172, then there is no immunity from levy of interest and penalty.

3. Section 172(6)

3.3 Applicability of provisions of section 172 to non-resident into Regular shipping business

Where FSC has regular shipping operation in India, they have some form of presence in India. They operate through either branch office or agency or subsidiary in India. FSC having a regular shipping business is under obligation to file their tax return u/s. 139 of the Act and such return is assessed u/s. 143(3) of the Act. Hence they are exposed to multiple assessments, u/s. 172(4) for each voyages and u/s. 143(3) for annual return filed u/s. 139.

Recently some of tribunals[4] have taken a view that provisions of section 172 should not apply to a company who is not an occasional shipping company. Section 172 falls under Chapter XV, and part H of Chapter XV deals with "Profits of non-resident from occasional shipping business". Accordingly, the provisions of section 172 should apply to those who are in the occasional shipping business and not in the regular shipping business. Those who are under regular shipping business are covered by section 44B which contain "Special provision for computing profits and gains of shipping business in the case of non-residents". Accordingly Tribunal has quashed the assessment made u/s. 172(4) in those cases since non-resident was into Regular shipping business. This helps in avoiding multiple assessments.

However according to section 172(6), a Port Clearance certificate (PCC) cannot be granted by the Custom authorities unless provisions of section 172 are complied with and voyage return is filed. Hence, for obtaining PCC, FSC requires NOC from IT office, for which they are required to file multiple voyage return at different ports. At the same time, FSC into regular shipping business are filing their annual tax return u/s. 139. Hence, still there is duplication of tax compliances.

4. Where FSC do not operate vessel

There are mainly three different types of arrangements in shipping business, bareboat charter, time charter and voyage charter. In the case of voyage charter and in some case of time charter where FSC operates the vessel, the tax implication discussed in earlier para would be relevant and hence the same is not discussed in detail hereunder.

Bareboat Charter Agreement

Here vessel owner provide vessel on hire for a stipulated period of time. Generally charterer or lessee operates and controls the vessels by deploying its crew. This could be in the form of operating lease (where vessel goes back to owner) or finance lease (where lessee has an option to purchase the vessel at the end of lease period).

Tax implication under the Act for bareboat charter agreement

The consideration under bareboat charter agreement is not covered under presumptive scheme since section 44B applies to non-resident who operates the ship. However, such consideration or hire charges can be considered as royalty *(consideration for use or right to use any industrial commercial or scientific equipment – the Madras High Court in the case of Poompuhar Shipping Corporation and West Asia Maritime Ltd has held that ship is equipment).* Under section 9, royalty shall be deemed to accrue in India if it is payable by a person who is resident in India. Hence under the Income tax Act, hire charges receivable under bareboat charter agreement is taxable as royalty.

Time Charter Agreement

Here fully equipped vessel along with its crew is given on hire for a specific period. The owner of vessel manages and operates vessel while charterer identify the port of origin and port of destination. This is found commonly for vessel carrying liquid cargo such as oil, chemicals, etc.

Tax implication under the Act for time charter agreement

4, ITO vs. CMA CGM Agency (India) Pvt. Ltd., ITA NO. 151 to 190/ Rajkot/ 2012; ITO vs. IAL India Ltd., ITA No. 192/ Rjt/ 2012

The taxability under time charter agreement is contentious issue. Where in substance the agreement is for rendering transportation service then the consideration under such agreement can be covered under the presumptive scheme of section 44B. However in some cases, the Courts[5] have observed that agreement in substance is for use and hire of a ship and not for rendition of transportation service hence consideration was taxed as royalty.

Voyage Charter Agreement

A voyage charter is hiring transportation services (hiring of vessel and crew) for a voyage from a load port to a discharge port. The consideration under voyage charter agreement is covered under the presumptive scheme of section 44B, which is discussed earlier.

5. Conclusion

In summary there are various parameters which would be relevant for determining the tax implication under the Income-tax Act for a FSC. Whether FSC is the owner or charterer of vessel, whether it operates the vessel, whether in substance transaction is for use of vessel or for rendition of service, whether particular income is ancillary or linked to the business of operation of ship, etc.? Also under the Act, FSC has to undertake multiple tax compliances and implication of non-compliance for some of such provisions will adversely impact the business operation. Though the tax burden under the Act can be minimised by resorting to the provisions under the tax treaty between India and the country of resident of FSC, if any, such tax treaty cannot help to mitigate the compliance burden under the Act

Annexure I – Extract of the relevant provisions of the Income-tax Act

Special provision for computing profits and gains of shipping business in the case of non-residents

44B. (1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

(2) The amounts referred to in sub-section (1) shall be the following, namely :—

(i) The amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) The amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

Explanation.— For the purposes of this sub-section, the amount referred to in clause (i) or clause (ii) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature.

Shipping business of non-residents

172. (1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship,

5. Supreme Court in Gosalia Shipping Pvt. Ltd. 113 ITR 307; Madras High Court in the case of Poompuhar Shipping Corporation Ltd.

belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India.

(2) Where such a ship carries passengers, livestock, mail or goods shipped at a port in India, seven and a half per cent of the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India, shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.

(3) Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat:

Provided that where the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this sub-section before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Assessing Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this sub-section.

(4) On receipt of the return, the Assessing Officer shall assess the income referred to in sub-section (2) and determine the sum payable as tax thereon at the rate or rates in force applicable to the total income of a company which has not made the arrangements referred to in section 194 and such sum shall be payable by the master of the ship.

(4A) No order assessing the income and determining the sum of tax payable thereon shall be made under sub-section (4) after the expiry of nine months from the end of the financial year in which the return under sub-section (3) is furnished:

Provided that where the return under sub-section (3) has been furnished before the 1st day of April, 2007, such order shall be made on or before the 31st day of December, 2008.

(5) For the purpose of determining the tax payable under sub-section (4), the Assessing Officer may call for such accounts or documents as he may require.

(6) A port clearance shall not be granted to the ship until the Collector of Customs, or other officer duly authorised to grant the same, is satisfied that the tax assessable under this section has been duly paid or that satisfactory arrangements have been made for the payment thereof.

(7) Nothing in this section shall be deemed to prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment be made of his total income of the previous year and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, livestock, mail or goods shipped at Indian ports during that previous year shall be treated as a payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be.

(8) For the purposes of this section, the amount referred to in sub-section (2) shall include the amount paid or payable by way of demurrage charge or handling charge or any other amount of similar nature.

Annexure II – Extract of relevant CBDT Circular

913. Tax deduction at source from payment made to foreign shipping companies

1. Representations have been received regarding the scope of sections 172, 194C and 195 of the Income-tax Act, 1961, in connection with tax deduction at source from payments made to the foreign shipping companies or their agents.

2. Section 172 deals with shipping business of non-residents. Section 172(1) provides the mode of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India. An analysis of the provisions of section 172 would show that these provisions have to be applied to every journey a ship, belonging to or chartered by a non-resident, undertakes from any port in India. Section 172 is a self-contained code for the levy and recovery of the tax, ship-wise, and journey wise, and requires the filing of the return within a maximum time of thirty days from the date of departure of the ship.

3. The provisions of section 172 are to apply, notwithstanding anything contained in other provisions of the Act. Therefore, in such cases, the provisions of sections 194C and 195 relating to tax deduction at source are not applicable. The recovery of tax is to be regulated, for a voyage undertaken from any port in India by a ship under the provisions of section 172.

4. Section 194C deals with work contracts including carriage of goods and passengers by any mode of transport other than rail¬ways. This section applies to payments made by a person referred to in clauses (a) to (j) of sub-section (1) to any "resident" (termed as contractor). It is clear from the section that the area of operation of TDS is confined to payments made to any "resident". On the other hand, section 172 operates in the area of computation of profits from shipping business of non-resi¬dents. Thus, there is no overlapping in the areas of operation of these sections.

5. There would, however, be cases where payments are made to shipping agents of non-resident ship-owners or charterers for carriage of passengers etc., shipped at a port in India. Since, the agent acts on behalf of the non-resident ship-owner or char¬terer, he steps into the shoes of the principal. Accordingly, provisions of section 172 shall apply and those of sections 194C and 195 will not apply.

Circular: No. 723, dated 19-9-1995.

914. Whether non-resident assessees engaged in business of carriage by shipping of passengers and goods, etc., shall neither be liable to pay interest under sections 234B and 234C nor entitled to interest under section 244A in respect of their income attributa¬ble only to business of such carriage of passengers and goods, etc.

1. Section 172 of the Income-tax Act, 1961, deals with shipping business of non-residents. The scheme of section 172 is that every time a ship belonging to or chartered by a non-resident makes a voyage from a port in India, carrying passengers, live stock, mail or goods, shipped at the airport, 7½ per cent of the amount paid or payable on account of the carriage of the passengers, etc., is taken as the income and tax levied on such income at the rate applicable to a foreign company. The rate, at present, is 55 per cent.

2. The assessment and the payment is to be made before the ship is granted the port clearance. The exception is that insuitable cases the ship may be allowed to leave, provided satisfactory arrangements are made to ensure that the return is filed within 30 days of the departure of the ship and for payment of taxes.

3. Under section 172(7), the non-resident owner or charterer is allowed to claim before the end of the relevant assessment year that he be assessed on his total income of the previous year and the

tax payable on the basis thereof be determined in accordance with other provisions of the Act. When such a claim is made and an assessment is made thereupon, the tax paid under section 172(4) by the non-resident owner or charterer would be treated as a payment in advance of the tax leviable for that assessment year before determining the amount of tax finally due. It may be noted that under section 172(7), the choice is entirely that of the non-resident tax-payer to be assessed under the other provisions of the Act.

4. The payments made under section 172(4) by a non-resident ship owner is a payment of tax on actual assessments under that sec¬tion and it is not a payment of advance tax within the meaning of the Income-tax Act there being no advance tax liability within the scheme of section 172.

5. The question that arises for consideration in such a regular assessment made under section 143(3), read with the provisions of section 172(7), is whether such an assessee is liable to levy of interest under sections 234B and 234C or not. As the payment of any tax under section 172(4) is not considered to be payment of advance-tax within the meaning of the Income-tax Act, the Board is of the view that the assessee who exercises his option under section 172(7) to get his total income assessed in the normal course, is not liable to pay advance tax under section 208 in respect of income of the nature referred to in sub-section (2) of section 172 of the Income-tax Act.

6. Hence the Board is of the opinion that non-resident assessees engaged in the business of carriage by shipping of passengers and goods, etc., shall neither be liable to pay interest under sections 234B and 234C nor entitled to interest under section 244A of the Income-tax Act, 1961 in respect of their income attributa¬ble only to the business of such carriage of passengers and goods, etc.

Circular : No. 730, dated 14-12-1995.

915. Whether in cases where no tax is payable in India, the Assessing Officer shall be competent to issue an annual 'No Objection Certificate', valid for a year, in respect of taxation of ship¬ping profits under section 172, after carefully verifying ap¬plicability of relevant provisions concerning taxation of ship¬ping profits in double taxation agreement with country of which owner or charterer is resident

1. Under the provisions of section 172 of the Income-tax Act, 1961 seven and a half per cent of the amount paid or payable to the owner or charterer of a ship on account of carriage of pas¬sengers, livestock, mail or goods shipped at a port in India, is deemed to be income accruing in India to the owner or the char¬terer. The port clearance is granted only after the return of the full amount to be paid is filed, evidence of payment of tax on such income is produced before the Customs authorities, or satis¬factory arrangements are made to file the return and pay the tax within thirty days of departure of the ship.

2. In cases *where such ships are owned by an enterprise belonging to a country with which India has entered into an agreement on avoidance of double taxation*, which provides for taxation of shipping profits only in the country of which the enterprise is a resident, no tax is payable by such ships at the Indian ports. Under such circumstances, a 'No Objection Certificate' is to be obtained by the master of the ship from the concerned income-tax authority.

3. It has been represented to the Board that in cases *where no tax is payable in India, the procedure of obtaining a 'No Objec¬tion Certificate' from the income-tax authorities before each voyage, should be done away with.*

4. The Board have considered the matter. It has been decided that in such cases, *the Assessing Officer shall be competent to issue an annual NOC, valid for a year, in respect of taxation of ship-ping profits under section 172 of the Income-tax Act, 1961 after carefully verifying the applicability of the relevant*

provisions concerning taxation of shipping profits in the DTAA with the country of which the owner or the charterer is a resident.

5. While examining the relevant Articles of the DTAA, the Assess¬ing Officer should ensure that the non-resident shipping company is engaged in 'international traffic', a term which is invariably defined in the DTAA itself. An undertaking from the non-resident company that during the period of the currency of the NOC, no ship belonging to it will be in any traffic other than 'interna¬tional traffic', shall be obtained before the issue of the NOC.

Circular: No. 732, dated 20-12-1995.

916. Clarification regarding treatment of tax paid under section 172(3)/(4) by a non-resident engaged in shipping business

1. The Board had earlier issued Circular No. 730 regarding treat¬ment of tax paid under section 172(3) by a non-resident engaged in the shipping business. Under the provisions of section 172, every time a ship belonging to or chartered by a non-resident makes a voyage from a port in India, carrying passengers, livestock, mail or goods shipped at a port in India, 7.5 per cent of the amount paid or payable on account of the carriage of the passengers etc. is deemed as the income and tax is levied on such income at a rate applicable to a foreign company. The assessment and the payment is to be made before the ship is granted the port clearance. The exception is that, in suitable cases the ship may be allowed to leave provided satisfactory arrangements are made to ensure that the return of income if filed and payment of tax is made within 30 days of the departure of the ship.

2. Under the provisions of section 172(7), the non-resident owner or charterer is allowed an option to be assessed on his total income of the previous year in accordance with other provisions of the Act. When such option is exercised and an assessment is made accurately, the tax already paid under the provisions of section 172(4) by the non-resident owner or charterer would be treated as tax paid in advance for that assessment year before determining the amount of tax finally due.

3. The question that arose for consideration of the Board at the time of issue of Circular No. 730 was that when a regular assess¬ment is made under section 143(3), read with the provisions of section 172(7), whether such an assessee would liable to levy of interest under sections 234B and 234C or not. On the other hand, in case of a refund, the question of entitlement of interest under section 244A would also rise. The Board, vide Circular No. 730, dated 14-12-1995 clarified that the assessee, who exercises his option under section 172(7) to get his total income assessed in accordance with the other provisions of the Act, is neither liable to pay interest under sections 234B and 234C, nor entitled to receive interest under section 244A of the Income-tax Act, 1961.

4. This issue has subsequently been discussed and decided by the Supreme Court in the case of A.S. Glittre D/5 I/S Garonne vs. CIT [1997] 225 ITR 739. It has been held that the payment of tax under section 172(3)/(4) is at par with advance tax instalments. Hence, in case of a regular assessment under section 172(7) the assessee is entitled to re¬fund, as well as interest on such refund.

5. The Circular No. 730 issued by the Central Board of Direct Taxes on this issue is, under the circumstances, no longer legal¬ly tenable and is, therefore, withdrawn. It is clarified that in case of a regular assessment under section 172(7), the non-resident assessee is liable to pay interest under sections 234B and 234C and also entitled to receive interest under section 244A of the Income-tax Act, 1961 as the case may be.

Circular : No. 9/2001, dated 9-7-2001.


CA. Nikhil Rohera & CA. Faizan Nursumar

Taxability under the provisions of the Double Taxation Avoidance Agreement between India and relevant countries

1. Background

1.1 Shipping is one of the world's oldest businesses and still considered as the lifeline of international trade. Around 90% of world trade is carried by the sea route. In India, around 95% of trade by volume and 70% by value takes place through the sea route, thanks to the vast coastline of 7,517 kms which India possesses. A large portion of India's export-import trade is handled by foreign shipping lines ('FSL').

1.2 With growth of trade and commerce and the dynamic business environment, in addition to providing ocean transportation services, FSL undertake many incidental activities viz. vessel chartering, loading and unloading, handling and storage, local transportation, etc.

1.3 The taxability of income earned by FSL from shipping and other related activities has faced some scrutiny in India. In this Article, we take a close look at the provisions relating to shipping and incidental income under Double Taxation Avoidance Agreement ('DTAA') entered into by India with other countries.

2. Key provisions of Article 8 – Income from Shipping Business

2.1 Under most Indian DTAAs, which are based on globally accepted Model Conventions, shipping income is taxable only in FSL's country of residence / effective management and the same is not taxable in the source country i.e. India. While most Articles provide for taxability on 'source' basis, Shipping Article is an exception to this norm and generally prescribes taxability on 'residence' basis.

2.2 Based on a plain reading of Article 8 (Shipping profits) of India's DTAAs with certain countries, following points emerge:

(i) For applying Article 8, certain conditions need to be satisfied viz.:

- enterprise should derive "profits"
- these profits should be from "operation of ships"
- such operation should be in "international traffic"

(ii) In some Indian DTAAs (e.g. Singapore, Malaysia, Brazil, etc.), term "profits from operation of ships" is explained therein to mean transportation by sea of passengers, goods, etc. carried on by owners or lessees or charterers whereas in other Indian DTAAs (e.g. UK, Denmark, Switzerland, etc.), this term is not defined.

(iii) In some Indian DTAAs (e.g. Singapore, Malaysia, etc.), incidental incomes like income from sale of tickets, rental of ships, use or maintenance of containers, etc. are expressly mentioned and considered as shipping income, whereas in some other cases (e.g. Switzerland, etc.), DTAA is silent on these aspects.

(iv) Scope of Article 8 also extends to profits from the participation in a pool, a joint business or an international operating agency

2.3 The meaning and scope of the terms "profits" and "operation of ships" has been a subject of intense litigation and a plethora of decisions have been rendered by the Indian judiciary in this context. The Commentary of the Organisation for Economic and co-operative Development ('OECD') on Model Convention as also Commentary by renowned International Tax Experts provide guidance on the interpretation of these important terms.

3. Applicability of Article 8 to Time Charter and Bare Boat Charter Agreements

3.1 A time charter is an agreement wherein the charterer agrees to charter-in a ship along with necessary crew and equipment for a particular time period (months/years) in consideration for time charter hire charges. In contrast, a 'bareboat charter' means a bare charter of ship, without crew and other equipment. The consideration receivable by owner under a bareboat charter is solely for use and hire of ship as distinct from a time charter where the essence of contract is provision of services by ship owner to charterer. The characteristics of a time charter, where ship owner is responsible for operation, maintenance and functioning of vessel, distinguish it from bareboat charter, which is a lease simpliciter.

3.2 An issue arises whether charter hire charges earned by ship-owner can be considered as "profits from operation of ships" so as to qualify for benefits of Article 8.

3.3 In some India DTAAs (e.g. with UAE, USA, Singapore, etc.), provision of Article 8 includes income from incidental charter, lease or rental of ships. In such cases, it may be possible to contend that both, time charter and bareboat charter hire charges are governed by the provisions of this Article, provided the charter is incidental to the main business of operation of ships.

3.4 In this context, recently **Cochin Tribunal** in case of **Mathewsons Exports & Imports Pvt. Ltd. (50 taxmann.com 378)** dealt with taxability of time charter hire charges under India-UAE DTAA. The Tribunal observed that a specific provision is made regarding shipping in Article 8 which provides that profit derived from operations of ships in international waters (including profit received on charter or rental of ships) shall be taxed only in the residence country. The Tribunal thus held that payments made by assessee company were for chartering ships on hire for doing business outside India and thus not taxable in India under Article 8. Accordingly, there was no obligation on the payer to deduct tax at source on payment of such charter hire charges.

3.5 In cases where Article 8 is silent, an issue often arises on the taxability of charter hire rentals under the DTAA.

3.6 Under the Income-tax Act, 1961 ('Act') and most India DTAAs (e.g. with Australia, Singapore, etc.), term 'royalty' has been defined to, *inter alia*, include, consideration for use or right to use any industrial, commercial or scientific equipment. As per this definition, payment for use or right to use any equipment is royalty. The term 'equipment' is not defined in the Act or under the Indian DTAAs.

3.7 The *Madras High Court in Poompuhar Shipping Corporation and West Asia Maritime Ltd. (360 ITR 257)* had the occasion to consider whether a ship is an equipment and whether time charter and bareboat charter hire charges constitute royalty as so defined in the Act and relevant DTAAs.

3.7.1 The High Court, after considering various decisions and commentaries, held that ship is equipment and when the use or right to use ship for an economic benefit is provided, the consideration for use of industrial, commercial and scientific equipment was royalty. Accordingly, time charter and bareboat charter hire payments for use and hire of ship constituted 'royalty'.

3.8 By holding so, the High Court has in effect held that there is no difference between a time charter and a bareboat charter of a ship for the purpose of taxability in India.

3.9 However, Cochin Tribunal in case of *Kin Ship Services (India) (P.) Ltd. (31 SOT 375)* held that payment of time charter hire charges did not constitute royalty paid for obtaining any right for the assessee for any purposes explained in the section. The Tribunal observed that assessee has not acquired any right on foreign ships. Likewise, it has not acquired any property in the ship by chartering it. The assessee simply hired ships following international chartering protocol for transporting.

3.10 Internationally, income arising out of time charter hire is treated at par with 'income from shipping business', since the predominant purpose of such arrangements is to provide transportation services. The OECD in its Commentary on Article 8(1) [Para 5] has clarified that income derived by a shipping company from wet lease (i.e. lease of duly manned and equipped ship) is ordinarily regarded as income from operation of ships. Even learned international tax expert, Prof. Klaus Vogel in his Commentary on Double Taxation Convention (Third Edition) in the context of Article 8 has opined that leasing a ship or aircraft on charter fully equipped, manned and supplied is also considered as a form of operating ships or aircraft.

3.11 To summarise, in case of time charter, while there are conflicting rulings given by Indian judiciary on taxability under DTAA, the international view seems to suggest that such charges would be income from shipping business governed by Article 8. In case of bare boat charter, Indian view is aligned with international view and bare boat charter hire charges are regarded as 'royalty'. Of course, one needs to carefully analyse provisions of Article 8 of relevant DTAA to see if charter or rental income from incidental lease of ships is considered as shipping income.

4. Applicability of Article 8 to income from Slot Charter and Feeder Operations

4.1 Shipping is a highly capital intensive industry. Further, ships need regular repair and maintenance, upkeep to maintain sea-worthiness, etc. which entail significant recurring cost. There are also limited infrastructure facilities at some Indian ports as a result of which mother vessels are unable to call Indian ports. To tide over these bottlenecks and to avail economies of scale, FSL enter into various forms of alliances viz. vessel sharing, joint service, slot charter, feeder arrangements, etc.

4.2 The issue regarding taxability of freight income earned from carriage of cargo/ containers on slot chartered and feeder vessels has been hotly contested in India. The key argument of tax authorities is that freight income earned by FSL by undertaking transportation on slot chartered vessels or feeder vessels does not tantamount to income from 'operation of ships' in the hands of mainline operator, and consequently outside the scope of Article 8.

4.3 Typically, in a feeder arrangement, feeder vessels connect to mother vessels at hub port and containers are thereafter transhipped onto mother vessel for onward carriage to port of ultimate discharge. In contrast, in a slot charter arrangement, slot charterer avails container (slot) space on ships of owner/ carrier and containers are transported on such ships from port of loading to port of ultimate discharge.

4.4 The **Bombay High Court** in case of *Balaji Shipping UK Ltd. (253 CTR 460)* was concerned with taxability of income from slot chartering arrangements in the context of India-UK DTAA.

4.4.1 The High Court, after referring to Commentary on Maritime Law (6th Edition) by Christopher Hill wherein the author has quoted an English decision in case of Tychy, observed that such agreements have been in use for decades.

4.4.2 The High Court discussed the following two types of situations:

- First type: Where goods are transhipped from a hub port to their final destination on a ship owned or chartered by assessee
- Second type: Where goods are transported by assessee from an Indian port directly to final destination by availing slot hire facility

4.4.3 The High Court held that a case of first type clearly falls within Article 9(1) of India-UK DTAA. In the second type, the High Court observed that while this can pose some difficulty, even such case squarely falls under Article 9(1). In holding so, the High Court drew support from commentaries of renowned authors on international taxation and also Commentary of OECD to conclude that slot hire agreements are indeed inextricably linked with and connected to the operation of ships. The High Court also noted the manner in which shipping industry operates globally and why slot charter arrangements are resorted to by FSL.

4.5 In the context of taxability of freight income from transportation of containers on feeder vessels, the *Mumbai Tribunal in APL Co. Pte. Ltd. (142 ITD 498)* held that 'charter' as per Article 8 of India-Singapore DTAA includes 'slot charter', and hence freight earned therefrom is also eligible for DTAA relief. In holding so, the Tribunal referred to decision of Balaji Shipping and various dictionary meanings on the term 'charter'. The Tribunal held that term 'operation of ships in international traffic', as provided under Article 8 includes within its ambit, income from slot chartering.

4.6 It may be recalled that the Mumbai Tribunal in *Hapag-Lloyd Container Line GmbH (51 SOT 299)* had initially denied benefit of Article 8 to slot-swap arrangements. However, on further appeal, the Bombay High Court set aside Tribunal's order and directed it to decide the case afresh in light of its observations given in Balaji Shipping's case.

4.7 In another case, the Mumbai Tribunal in *MISC Berhad (47 taxman.com 50)*, again dealt with Article 8 benefit to freight attributable to voyage performed on feeder vessels which are operated by third parties (and not by assessee/ FSL). In the India-Malaysia DTAA (similar to India-Singapore DTAA), term profits from operation of ships have been qualified by the words carried on by *"owner"* or *"lessee"* or *"charterer"*.

4.7.1 The Tribunal held that whole ratio laid down in Balaji Shipping's case cannot be applied in a blanket manner, as phrases used in Article 8 of India-Malaysia DTAA are differently worded (as compared to India-UK DTAA). However, the Tribunal held that certain relevant observations/interpretation of the words *"charterer"*, *"charter"* and *"slot charter"* by the High Court can be taken as guidance for understanding these terms.

4.7.2 The Tribunal held that transportation of cargo on container belonging to assessee from Indian port to hub port through feeder vessel by way of space charter/slot charter arrangement, falls within ambit of the word "charterer" and, therefore, it cannot be segregated Form scope of "*operation of ships*" as defined in Article 8(2) of India-Malaysia DTAA.

4.8 A contrary view was however taken subsequently by Mumbai Tribunal in case of *Simatech Shipping Forwarding LLC (146 ITD 48)*. The Tribunal held that its earlier decision in Balaji Shipping's case is not applicable simply because Article 8 of the India-UAE DTAA is differently worded as compared to India-UK DTAA. It is unclear from the judgment whether the Tribunal had the occasion to consider High Court's affirmation of Balaji Shipping's case as also decision in APL Co's case which held that slot charters are charters *per se*.

4.9 To conclude, the litigation on slot and feeder income seems far from over and to a large extent the complexity arises due to difference in the language of Article 8 of Indian DTAAs. It will be interesting to see how developments unfold before the higher Courts.

5. Applicability of Article 8 to ancillary activities

5.1 As mentioned earlier, FSL provide a variety of related services to customers for which a separate charge is recovered from them e.g. inland haulage, handling and storage, etc. The taxability of these items has been a bone of contention between taxpayers and tax authorities.

5.2 Some Indian DTAAs (e.g with Belgium, Singapore, Cyprus, etc.) define scope of Article 8 to include incidental incomes earned from certain specified activities e.g. sale of tickets, use, maintenance or rental of containers, etc. In cases where DTAAs do not define/explain the term 'profits from operation of ships', one may refer to international Commentaries to understand scope and coverage of Article 8.

5.3 The **Mumbai Tribunal** in case of *Delmas France (121 TTJ 501)* relying on its earlier decision held that inland haulage being negligible would be governed by Article 8 of India-France DTAA.

5.4 Similarly, the **Delhi High Court** in case of *KLM Royal Dutch Airlines (325 ITR 300)* held that rent received by foreign airline company from sub-lease of hangar at an Indian airport is part of its income from operation of aircraft under Article 8 of India-Netherlands DTAA.

6. Applicability of Article 8 to interest income

6.1 Some Indian DTAAs (e.g. with Belgium, France, Germany, Russia, etc.) categorically provide that interest on funds connected with operation of ships in international traffic will be regarded as income derived from operation of ships and hence covered under Article 8 (and not separately taxable under Article 11)

6.2 In some cases FSL make payment of freight tax at the time of sailing of vessel from Indian port. Additionally, tax may also be deducted at source by customers at time of payment of freight to FSL/Indian agents. Subsequently, based on beneficial provisions of the relevant DTAA, a claim for refund of tax is made, which if acknowledged by tax authorities, is granted along with interest under section 244A of the Act.

6.3 Here, an issue arises regarding taxability of such interest income under DTAA i.e. whether interest would be governed by Article 8 (considering the express provision contained therein) or Article 11 (which deals with all types of interest income).

6.4 The *Mumbai Tribunal in Hapag Lloyd (141 TTJ 169)* held that interest on income-tax refund earned by FSL is separately taxable under Article 11 and is not covered under Article 8 of India-Germany DTAA. According to the Tribunal, such interest does not have any relation with operation of ships in international traffic and hence, cannot be brought within purview of Article 8. Similar observations were made by the **Mumbai Tribunal** in a couple of decisions rendered subsequently on this issue. However, this issue is now pending at the High Court.

7. Relevance of Agency Permanent Establishment ('Agency PE')

7.1 Generally, concept of PE is not relevant where shipping income of FSL is governed by Article 8, since Article 8 of most Indian DTAAs confers the right to tax shipping income exclusively to country of residence / effective management (and not source country) even if a PE exists in source country. Therefore, only in cases where concerned income is not considered as governed by Article 8, existence of Agency PE would assume importance.

7.2 FSLs conduct their business through shipping agents who undertake agency functions like issuing documentation, assistance in clearance of cargoes, marketing, etc. At times, depending on nature of functions performed by agents, an Agency PE exposure may exist for the FSL in India.

7.3 In a handful of decisions, the tax authorities have held that where Article 8 does not apply and agent constitutes a dependent agent PE of the FSL in India, the shipping income is held to be taxable under Article 7 (dealing with business profits) read with sections 44B / 172 of the Act.

7.4 At this juncture, depending on facts, one may seek to contend that if an arm's length commission has been paid to the agent, there should be no further attribution of profits of FSL to the Agency PE in India and consequently, no further tax liability of FSL arises in India.

7.5 The *Mumbai Tribunal in Delmas France (49 SOT 719)* held that under India-France DTAA when activities of an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph if it is shown that transactions between agent and enterprise were not made under arm's length conditions.

7.5.1 The *Mumbai Tribunal in ANL Singapore Pte Ltd. (145 ITD 93)* observed that commission paid to Indian agent, who was the assessee's Associated Enterprise ('AE') and also its dependent Agent PE, was in respect of voyages performed from slot operations that had been considered as chargeable to tax under Article 7 of DTAA. Since commission had been received by Indian agent at arm's length, no further attribution was required to be made to the PE. Accordingly, income in respect of voyages performed on slot operations was held not chargeable to tax.

8. Conclusion

8.1 Overall, there has been good judicial development over the last few years on taxability of shipping and related incomes and several pronouncements have been made by the Courts. Having said this, it will be interesting to see if the Apex Court is able to expeditiously decide some of the above contentious issues so as to put the raging controversies at rest.


CA. Chandresh Bhimani and CA. Rakesh B. Jain

Tax issues for foreign airline companies

Indian airline sector overview

The Indian aviation industry is on a growth trajectory. This is largely on account of factors such as entry of low-cost carriers to the market, modernisation of airports, the flow of foreign direct investments ('FDI') within domestic airlines and information technology interventions. The Indian civil aviation industry is amongst the top 10 in the world and is worth around US$ 16 billion. More than 85 international airlines operate in India. The recent liberalisation of the FDI policy also saw various international players such as Etihad and Singapore Airlines forming strategic tie-ups with Indian partners. India's aviation market is expected to become the third largest in the world by 2020.

This article outlines the income-tax and tax treaty provisions applicable to international airlines operating in India and identifies the key tax issues therein.

3.1 Eligibility to claim the benefit of Article 8 – Profit from Air Transport

Before discussing the tax treaty provisions, we have briefly discussed the taxability of income from the operation of aircraft under the Income-tax Act, 1961 ('IT Act').

Taxability under the IT Act

Section 44BBA of the IT Act provides for deemed income regime applicable to a non-resident engaged in the business of operation of aircrafts. A sum equal to 5 per cent of following receipts is deemed to be the taxable income:

a) Amount paid / payable to the non-resident (whether in or out of India) in respect of carriage of passengers, livestock, mail or goods from any place in India,

b) Amount received / deemed to be received in India by the non-resident or on its behalf in respect of carriage of passengers, livestock, mail or goods from any place outside India.

An issue arises as to whether an assessee can claim lower profits or losses under the IT Act. Generally, presumptive tax provisions (e.g. section 44AD, section 44BB and section 44BBB of the IT Act) provide an option to claim lower profits. However, no such option has been provided under section 44BBA of the IT Act. Objective of introduction of said section as per the CBDT was *"Presently the income of a non-resident engaged in the business of operation of aircraft is computed after allowing deduction for certain expenses and statutory deductions. This involves complications in determining the income accruing or arising in India to such a person. With a view to simplify the existing provisions, the Amending Act has inserted a new section 44BBA which provides that the income from such business shall be computed at a flat rate of 5 per cent of the*

amount received or receivable by or on behalf of the taxpayer ……." ([Circular 495, dated 22 September 1987)].

The Delhi Tribunal in case of *Royal Jordanian Airlines vs. DDIT (126 ITD 289)* has held that even if provisions of section 44BBA are applicable, there is a built-in option in the scheme of the IT Act that if there are losses, the assessee has a right to compute its taxable income at a loss, subject to maintenance of books of account. This conclusion was guided by the principles arising from the Supreme Court judgments of *CIT vs. Hyundai Heavy Industries Co. Ltd. (291 ITR 482) and UOI vs. A. Sanyasi Rao (219 ITR 330).*

Taxability under tax treaties

For the purpose of this article, we will discuss Article 8 of Organisation for Economic Co-operation and Development Model Convention ('OECD MC'), commentary thereto and the relevant Article on taxation of profits from air transport in the tax treaties entered by India.

Article 8 of the OECD MC provides that profits from operation of aircrafts in international traffic are taxable only where Place of Effective Management ('POEM') is situated (para 1). Additionally, profits from participation in a pool, a joint business or an international operating agency are also regarded as airline profits (para 4).

In the context of tax treaties, the taxation of profits from air transport is covered under Article 8 or Article 9 of the comprehensive tax treaties between India and the respective country (e.g. USA, UK, France, Germany, etc.). India has also entered into limited tax treaties with certain countries, which cover profits from operation of aircraft (e.g. Afghanistan, UAE, etc.).

Broadly, tax treaties entered into by India provide for taxation of profits from air transport in the State:

a) Where the POEM is situated (e.g. Brazil, Denmark, Germany, Mauritius, Netherlands, etc.)

b) Of residence (e.g. USA, Canada, Singapore, etc.)

c) Where the assessee company is registered and has its headquarters (Cyprus, Mongolia, etc.)

Some of the key tax issues have been discussed below.

Is ownership of aircraft necessary?

As per OECD commentary, profits covered under Article 8 consist of those directly obtained from the transportation of passengers or cargo by ships or aircraft, whether owned, leased or otherwise at the disposal of the enterprise. While certain tax treaties entered into by India (e.g. with Canada, China, USA, etc.) specifically provide benefit of Article 8 to a lessee or charterer company as well, some other tax treaties (e.g. with Sri Lanka, etc.) do not expressly provide so.

Considering the nature of the industry and the international tax commentaries on this subject, a non-resident which is engaged in the operation of aircraft (either through own or leased aircrafts) can claim to be governed by Article 8.

Is the domestic leg of a journey considered 'International traffic'?

International traffic does not include transportation by an aircraft which operates solely within one country, wherein, the character of international traffic is lost and the transportation in such case becomes domestic traffic. E.g. in case of an aircraft flying from say Lucknow to Itanagar, if the aircraft passes over Nepal or Bhutan or both, but does not stop at any of these places, it would not be regarded as international traffic.

However, where a domestic leg of a journey is performed in conjunction with the international leg by the airline concerned, it can arguably be regarded as international traffic, e.g. if an aircraft flies from Nagpur to Dubai via

Mumbai, the entire journey can be regarded as international traffic. Regarding the carriage of goods, in the case of a US airline company, the Mumbai Tribunal held that inland transportation (which is directly connected with the operation of aircraft in international traffic) is covered by Article 8 of the India-USA tax treaty.

Meaning of the term 'pool' or 'joint business'

As per OECD commentary, various forms of international co-operation exist in the air transport industry. This international co-operation is secured through pooling agreements or other conventions of a similar kind, which lay down rules for apportioning the receipts for joint business.

The Delhi Tribunal in the case of *Lufthansa German Airlines vs. DCIT (90 ITD 310)*, observed that in the context of 'pool', reciprocity between member airline companies is an essential condition for allowing the Article 8 benefit. It was observed that the term 'pool' in the context of international aviation industry is understood as International Airlines Technical Pool wherein there is reciprocity between member airline companies and which is hence eligible for Article 8 benefits. Furthermore, the Tribunal observed that the term 'joint business' means activity of shipping or air transport carried on jointly.

3.2 Applicability of Article 8

Lease of aircraft - Dry and wet leases

Given the huge cash outlays and the delivery time involved in the purchase of aircrafts, leasing of an aircraft has emerged as a viable solution to run a vast business covering multiple countries and cities.

Typically there are two types of leases, wet lease (also known as time charter hire) and dry lease (also known as bareboat hire). A wet lease means lease of aircraft along with crew, maintenance, insurance, etc. A dry lease entails simply leasing the aircraft itself without accompaniments.

The common issue which arises is whether the income arising from the lease of aircrafts can be said to be earned from the 'operation of aircraft' and therefore eligible for Article 8 of the tax treaty. The OECD commentary provides that Article 7, and not Article 8, applies to profits from leasing a ship or aircraft on dry lease (except when it is an ancillary activity of an enterprise engaged in the international operation of ships or aircraft). As regards wet leases, OECD commentary as well as learned international tax expert Klaus Vogel is of the view that profits arising thereon should be treated as profits arising from the carriage of passengers and cargo, and hence covered under Article 8.

It may be noted that India's tax treaties with various countries (e.g. Belgium, Canada, China, Kuwait, Netherlands, etc.) cover income arising from the lease of aircraft under Article 8, provided such activity is incidental to the main activity of aircraft operation. Further, Indian tax treaty with Belgium expressly covers dry and wet leases within Article 8. Interestingly, India's tax treaty with Ireland specifically excludes income from leasing of aircraft from the Royalty definition (Article 12) and covers it within scope of Article 8. So, in case of an Irish tax resident company which earns income from dry lease of aircrafts and if does not have a Permanent Establishment in India for this purpose, Indian income-tax may possibly not apply on such transaction.

The Mumbai Tribunal in the case of *Caribjet Inc. vs. DCIT (4 SOT 18)*, considered a situation where the assessee had provided aircrafts on wet lease to Air India. The Tribunal noted that there is no difference between a dry and a wet lease and discharging of functions / responsibility for flying of an aircraft cannot be regarded as determinative factor for the purpose of 'operation of aircraft' test. Accordingly, it was held that section 44BBA

of the IT Act would not apply to the assessee. However, it should be noted that implications under the tax treaty was not discussed in this case since the assessee was from non-tax treaty country. In case of a parallel (shipping) industry, the Madras High Court in the case of *Poompuhar Shipping Corp. Ltd. & Others vs. ADIT (360 ITR 257),* held that the income from time charter operations (equivalent to wet lease) is taxable as Royalty. As per information in public domain, it is noted that this case has been appealed further before the Supreme Court.

While the aforementioned decisions do not directly deal with the taxability of wet leasing of aircraft under Article 8 of the tax treaty, the same appears to be in disagreement with the globally accepted principles. As such, based on the specific provisions of the India's tax treaties and related international commentaries / author views, one can evaluate the eligibility of Article 8 for income arising from dry and wet lease arrangements.

Code sharing / slot charter

In the airline industry, a code-share agreement is understood as an arrangement in which an airline shares the code of another airline for transportation of its passengers by selling tickets for that flight (generally this is for a portion of the journey where the first mentioned airline does not operate). The term slot charter is understood to mean the booking by one airline company of certain space / slot on the aircraft of another.

The Mumbai Tribunal in case of a US airline company held that as the assessee was not able to prove the inextricable link between the intermediary destinations (operated by a third party) and the final destination (operated by the assessee), the income derived under slot / space charter was not covered under Article 8. Similarly in the case of another US carrier, based on peculiar facts, it was noted by the Mumbai Tribunal that transport through a third party carrier is not regarded as own operation. However, whether such transport can be regarded as 'chartering' was not discussed in this case and it was remanded for fresh adjudication by the tax officer.

On the other hand, the OECD commentary provides as follows:

"Profits derived by an enterprise from the transportation of passengers or cargo otherwise than by ships or aircraft that it operates in international traffic are covered by the paragraph to the extent that such transportation is directly connected with the operation, by that enterprise, of ships or aircraft in international traffic or is an ancillary activity. One example would be that of an enterprise engaged in international transport that would have some of its passengers or cargo transported internationally by ships or aircraft operated by other enterprises, e.g. under code-sharing or slot-chartering arrangements or to take advantage of an earlier sailing."

Furthermore, one can also draw support upon the principles arising from the Bombay High Court decision in case of *DIT vs. Balaji Shipping UK Ltd. (253 CTR 460)* which was rendered in context of shipping industry. The High Court held that the benefits of Article 9(1) of the India-UK tax treaty should be available to slot hire agreements as they are indeed inextricably linked with and connected to the operation of ships. This principle has also been re-confirmed various other decisions.

Additionally, it is observed that certain other similar arrangements also exist such as special pro-rate agreements, etc. exist within the aviation industry. It would be appropriate to evaluate the transaction mechanics / agreement and the related facts in the backdrop of the international commentary / court decisions to avail benefits of Article 8.

Ancillary activities

In the airline industry, there are various indirect activities which are connected and

ancillary to the operation of aircraft. As per the OECD commentary, activities that make a minor contribution to the main operations of aircraft and are so closely related to such operations that they cannot be regarded as a separate business or source of income, should be considered as ancillary activities and entitled to be governed by the provisions of Article 8. Examples of ancillary activities provided by OECD / learned International author Klaus Vogel which are covered under Article 8 include:

- Ground handling services
- Technical support services under the International Airline Technical Pool ('IATP')
- Operation of bus service connecting a town with its airport
- Transporting goods by truck connecting a depot with a port or airport

It may be noted that India, as an observer to the OECD Commentary, has reserved its rights for covering income from ancillary activities within Article 8.

In the context of income earned from ancillary activities, the New Delhi Tribunal in the case of *British Airways Plc vs. DCIT (80 ITD 90)* had held that the words 'any other activity' (ancillary activities) as mentioned in Article 8 of the India-UK tax treaty has to be read in conjunction with 'transportation'. The Tax Tribunal in the specific facts of the case noted that engineering and ground-handling services did not aid in transportation services, it constituted a separate business activity and reciprocity (which is essential for a 'pool' arrangement) was not proved. Accordingly, it was held not to be eligible for exemption under Article 8 of the India-UK tax treaty.

This decision of the New Delhi Tribunal was factually distinguished by the co-ordinate Bench of the same Tax Tribunal in the case of *Lufthansa German Airlines vs. DCIT (90 ITD 310)* and in the case of *DDIT vs. KLM Royal Dutch Airlines (50 SOT 578)* wherein, it was held that the ground-handling services and technical services to other airlines are eligible for exemption under Article 8 of the relevant tax treaty since, such services are ancillary and incidental to the business of operation of aircraft. The Tribunal observed that the assessee in Lufthansa's case was a member of the IATP, which is an international organisation wherein each member extends certain reciprocal technical support at airports to other members throughout the world.

Subsequently, the Mumbai Tribunal in the case of an US airline in the context of security and scanning service has held that such services cannot be considered to be derived from the 'operation of aircraft' in international traffic by placing reliance in case of British Airways (supra).

Interest income

As per the OECD commentary, investment income of the airline company such as income from stocks, shares or bonds is to be subjected to the treatment ordinarily applied to this class of income (i.e. Article on interest or business income), except where the investment is made as an integral part of the carrying on of the business of operation of aircraft in international traffic. For instance, interest on bonds required as deposits under any law to carry on the business shall be said to be earned from the 'operation of aircraft' and hence, covered under Article 8. Consequently, interest earned on short term investments out of profits generated from local operations may not be covered under Article 8.

It may be noted here that India's tax treaties with Belgium, France, Germany, Russia, South Africa etc. specifically provide that interest earned on funds directly connected with the operation of aircraft is eligible for the same treatment as income from airline

operations. An example of such a transaction could be where an international airline is required to mandatorily provide fixed deposits as a security to an airport operator (e.g. the Airport Authority of India) for the purpose of accessing/using the airport and it earns interest thereon, can arguably be covered by Article 8 given the inextricable linkage with the airline operations.

On the other hand, interest earned from investment activities (e.g. subscription to debentures of an Indian company) may not qualify for Article 8 benefit. Similarly, whether other interest income (e.g. interest on income tax refund and interest earned on temporary deployment of funds) is covered by Article 8 is judicially disputed.

3.3 Deduction of tax at source on payment to clearing and forwarding ('C&F') agents (for cargo movement) and to ticketing agent (for passenger transport)

The provisions of section 194C of the IT Act cover payments for carrying out any work in pursuance of a contract. The term 'work' is defined to include the carriage of goods or passengers by any mode of transport other than by railways. In this context while direct payments to transporters are covered within the ambit of section 194C, an issue arises as to whether tax deduction at source ('TDS') applies on payments made to C&F/ticketing agent.

In this regard, one may refer to Circular 715 dated 8 August 1995 (Question 6 and Question 7), wherein it has been clarified that any payment made to a C&F agent for carriage of goods/cargo is subject to tax deduction at source. The Circular clarifies that the provisions apply because C&F agents act as independent contractors. In the shipping context, it has been clarified by Circular 723 dated 19 September 1995 that export freight payments made to the shipping agent of non-resident ship owners (which are governed by section 172) are not subject to section 194C of the IT Act. However, such clarification is not specifically available for payments made to agents of international airline companies.

Furthermore, there could be situations wherein the C&F agents incur certain expenses (e.g. transportation expenses, local duties, etc.) on behalf of the customers and the customers reimburse such expenses to the C&F agents. In such a case, certain courts have taken a view that reimbursement of expenses (backed by documentation) to C&F agents shall not be subjected to tax deduction at source. Amongst others, one may refer decision of Panaji Tribunal in the case of *ACIT vs. Coral Clinical Systems [ITA No. 322, 323 & 324/PNJ/2014]. A similar view has been upheld by several Tr*ibunals. It may however be noted that Circular 715 (supra, question 30 thereof) provides reimbursements cannot be excluded for the purpose of tax deduction at source. Given this circular, this question continues to be litigated.

With respect to payments made to ticketing agents for travel by individuals, Circular 713 dated 2 August 1995 and Circular 715 (supra, Question 6 thereof) clarify that tax deduction is not required under section 194C. Another issue which arises is the applicability of section 194C in case where a Company pays the ticketing agent for travel of its employees. Here, Circular 715 (supra, question 6 thereof) clarifies that the payments are not subject to deduction of tax at source, as the privity of contract is between the individual passenger and the ticketing agent.

Conclusion

The airline industry is unique in terms of its operations involving multiple jurisdictions, which poses challenges from a taxation perspective. It will be interesting to see how the Indian judiciary evolves on some of the above discussed subjects, especially in the context of internationally recognized tax principles.


CA. Hemal Zobalia and CA. Jimit Devani

International Tax issues for Freight forwarders and CHA

Logistics is the backbone of the Indian economy, providing the efficient and cost effective flow of goods, on which other commercial sectors depend. The logistic industry in India has evolved rapidly and is likely to grow continuously over next few years. Now you can witness the presence of foreign players of logistics industry in almost all parts of India. In their aim of reaching maximum locations, the foreign players have been growing organically or inorganically. They have been either setting up their own offices in second tier or third tier cities or acquiring stake in local players who have their own network. Along with this, some interesting tax issues related to logistics industry have come to the fore, especially in relation to applicability of withholding tax on payment made by Indian logistic company to their foreign entity and Permanent Establishment (PE) implications for foreign companies by virtue of activities carried in India. This chapter sets out the key mechanisms of the business model followed in the sector and throws light on the above-mentioned issues.

Business model

A multinational company may establish business presence in India in the form of a subsidiary company, Joint Venture Company or a branch office. The Indian entity contracts with the Indian customers in respect of consignment to be delivered within / outside India. Similarly, the foreign entity contracts with the respective foreign customers in respect of consignment to be delivered within the country or to India. In respect of consignments to be delivered by foreign entity within India, the foreign entity contacts the Indian entity for delivery of such consignment to the ultimate destination within India ('inbound consignment'). Further, in respect of consignment to be delivered outside India, the Indian entity contacts its foreign entity for delivery of such consignment to the ultimate destination outside India ('outbound consignment').

Overview of the functions performed in case of inbound assignments:

- The foreign entity picks up the consignment from the foreign customer for delivery to the intended destination in India;
- Subsequently, the foreign entity contracts with its Indian entity seeking assistance in delivering the consignment in India;
- The foreign entity sends the consignment to the relevant international hub or Indian hub from where the Indian entity takes over and finally delivers it to the intended destination in India.

- Normally, the foreign entity raises an invoice on foreign customer in respect of inbound consignment and in turn, makes a service fee payment to its Indian entity in respect of services rendered towards delivery of the consignment within India. In few cases, the instructions are given by the foreign customer that the amount has to be collected from end customer in India (typically called as Bill consignee).
- Normally, the contractual risk, risk of collection i.e. bad debts risk and risk of damage vis-a-vis the foreign customer remains with foreign entity.

Similarly, the functions performed by the Indian entity and the foreign entity in case of outbound assignment (i.e. goods originating in India and customer is outside India) gets reversed. Generally, the risk of the Indian entity is till the International hub. Typically, the Indian entity would retain the entire revenue and pay the service fees to foreign entity. Based on the above background, we discuss below the applicability of withholding tax on payment of service fee in light of the general taxation principles and related judicial precedents:

Applicability of withholding tax on payment made to foreign entity

Foremost, the Indian entity shall receive service fee from foreign entity in case of inbound consignment and will pay service fee to foreign entity in case of outbound consignments. Hence, the issue of applicability of withholding tax shall arise mainly in cases of outbound consignments. Section 195 of the Income-tax Act, 1961 ('Act') provides for deduction of tax at source from the payment made to non-resident, which is chargeable to tax under the provisions of the Act. It is not necessary that all remittances made outside India would be subject to withholding tax in India. The payer is bound to deduct tax only if the sum is chargeable to tax in India read with Sections 4, 5 and 9 of the Act.

A non-resident is chargeable to tax in India only on the income which is received / deemed to be received in India or accrued / deemed to accrue or arise in India, as per Section 5 of the Act.

Based on the above-mentioned provisions, one needs to analyse whether service fees paid to foreign entity for the services rendered is chargeable to tax in India or not. This issue has been dealt with in some judicial pronouncements which are discussed below:

CIT vs. Elbee Services (P.) Ltd. (2001) 115 Taxman 618 (Bombay High Court)

In this case, the assessee was engaged in the business of providing courier services. The assessee made an application under section 195(2) of the Act, seeking directions from the Assessing Officer to decide as to what portion of remittance made to non-resident company, would constitute income chargeable to tax in India in the hands of the non-resident company. The Hon'ble Bombay Tribunal had come to the conclusion that since no operations were carried out by the non-resident company in India, no income accrued to non-resident company in India and hence no tax was required to be deducted on the same.

The Hon'ble High Court refused to admit the appeal on the basis that no substantial question of law arose. Similar judgment was passed by Hon'ble Mumbai Tribunal in case of *DHL Operations B.V. (2005) (142 taxman 1) (Mumbai)* as far as payment of service fees for outbound shipments were concerned.

UPS SCS (Asia) Ltd. vs. ADIT (IT) (2012) 18 taxmann.com 302 (Mumbai ITAT)

In this case, assessee, a foreign company entered into a contract with 'M' an Indian company for providing freight and logistics services to each other. As per this agreement, each party agreed to render services to the other in respect of import and export of consignments. The services performed by the foreign country outside India for "M" broadly

comprised of local loading and unloading, local ground transportation, local custom clearance, local documentation, etc. and earned international transportation fee, in return. Such amount was claimed by the assessee to be not chargeable to tax in India as per the provisions of Sections 5, r.w.s. 9. Held that the same cannot be charged to tax in India under Section 9 on the following basis:

- Only that part of the income from business operations can be said to be accruing or arising in India, as is relatable to the carrying on of operations in India, as per Explanation 1(a) to Section 9. In other words. Any income earned by a non-resident from India by means of operations carried on outside India shall not be considered as taxable income under Section 9(1)(i) as it did not have any business connection in India.
- The payment was not taxable as fees for technical services under 9(1)(vii) of the Act as well, as the services rendered cannot be construed as managerial, consultancy or technical in nature. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. Further, the word "consultancy" means rendering some advice or opinion etc. The word 'consultancy' excludes actual 'execution'. As regards technical services, if incidentally computer is used at any stage, which is otherwise not necessary for rendering such services, the payment for freight and logistics will not partake of the character of fees of 'technical services.'

Indair Carriers Pvt. Ltd. (I.T.A. No. 1605 (Del.) of 2010)

Similar to the above decision, in this case, assessee was engaged in the business of handling cargo. During the year under consideration, the assessee made certain payment on account of freight forwarding functions done by UTI Network Inc. outside India in respect of cargo exports from India to foreign destinations. During the assessment proceedings, the AO disallowed the amount paid to UTI Network Inc. for the reason that Indair had failed to withhold tax. The Hon'ble Tribunal held that the payment made to the freight forwarding agent was covered by Circular No. 715 which clarified that payment made to resident clearing and forwarding agents for carriage of goods were subject to withholding tax under Section 194C of the Act and not under Section 194J. Therefore, the payment could not be treated to be in respect of managerial services in case of non-resident, as well. Accordingly, it was held that the payment would not be taxable in India. In this case, of course the Hon'ble Tribunal did not go into the fact whether there was any permanent establishment or business connection of the UTI Network Inc. in India and whether it had any role to play.

On perusal of the above judicial precedents, it can be observed that the foreign entity did not carry on its operations in India and hence it was said that no income accrued to it in India. However, in case if the foreign entity carried on any operations in India then it should have been evaluated whether foreign entity has any business connection or PE in India. In that case the income attributable to the operations carried out in India would have been chargeable to tax in India and the payer of such income would have been liable to deduct tax at source.

PE Implications for foreign companies by virtue of activities carried out by Indian companies in India

With the globalisation of world economies, the concept of PE has gained significance in India and worldwide due to its direct impact on the tax revenue generated by a country. The PE concept is a tool to determine the right of a source country to tax the profits of any enterprise which is resident of another country. Under the Act, the term of business connection is very wide and hence reference to the term PE under the tax treaties is often referred which would narrow down the cases under which business income earned by the non-residents would be taxable in India.

In the context of freight forwarders, in case of inbound shipments or bill consignee shipments, the relevance of concept of Permanent Establishment assumes more relevance. Although tax department has been trying to attribute even part of income from outbound shipments to the PE.

In case, the inbound shipments are carried on by Indian subsidiary and the Indian subsidiary carries on the business independently, takes its own decisions, the contract with foreign entity is on principal to principal basis, etc. then Indian subsidiary may not be treated as a PE of foreign entity in India. However, there has been an interesting observation in Aramex's case discussed below.

In case the foreign entity has a branch office in India through which inbound shipments are delivered, then branch office is undoubtedly a PE. In case, the foreign entity delivers the inbound shipments through a third party in India, the question arises as to whether the foreign entity has a PE in India or not and whether any income is attributable to such PE or not.

Typically, the Indian third party entity enters into a principal to principal contract with the foreign entity but the actual conduct of the business, the extent of control of foreign entity, the dependency on the foreign entity, the nature of instructions given by the foreign entity, etc. will be the factors which will determine whether PE of the foreign entity exists in India or not.

The double taxation avoidance agreement ('tax treaty') recognises the certain types of PE for a foreign entity in India. Based on the above background, we have listed below few criteria in case of logistic industry which collectively with other factors, may attract PE of foreign entity in India.

- **Fixed Place PE**
  The premises of Indian entity is frequently made available to the foreign entity. The logo of the foreign entity is often displayed on the Indian entity office (with/ without any royalty payment) which depicts as if the foreign entity has virtual presence in India and hence a PE in India;

- **Agency PE**
  In case following conditions are satisfied, one needs to evaluate whether agency PE exists:
  - Although contractual the relationship is on principal to principal basis, for determining whether there is an agency PE, actual conduct will have to be seen. In case there is a principal-to-agent relationship between the Indian entity and the foreign entity, the chances of Agency PE increases.
  - The Indian entity is subject to detailed instructions or comprehensive control by foreign entity.
  - The Indian entity carries on such business activity only for or majority for foreign entity.
  - Indian entity secure/conclude contracts, binding on the foreign entity.

- **Service PE**
  Sometimes, the employees of the foreign entity are sent to India:
  - To supervise the activities of the Indian entity;
  - To train the employees of the Indian entity to carry out the business in a particular fashion
  - To provide any other services to Indian entity in India

  and exceeds the prescribed number of days under the relevant tax treaty, if any.

Determination of PE is a fact finding and a complex exercise. The documentation entered into by the party and various other factors as stated above and as laid down by judicial precedents will have to be taken into account while determining whether foreign entity has a PE in India or not.

In light of above discussion, we discuss below some of the judicial precedents on the same:

Aramex International Logistics Pvt. Ltd. (A.A.R. No. 1061/2011)

In this case, Aramex International Logistics ('the applicant') is an Aramex group company is incorporated in Singapore and is also tax resident of Singapore. The applicant entered into an agreement on a principal-to-principal basis for the movement of packages within India and outside India with Aramex India Pvt. Ltd. ('AIPL'), which is a wholly owned subsidiary of applicant. The tax authorities held that such wholly owned subsidiary created a PE of the applicant in India as Aramex group could not have successfully conducted its business in India without AIPL. The 100% subsidiary was created for the purpose of attending the business of the group in India. The business of the applicant in India is only carried on by AIPL and AIPL secures order in India only for Aramex group. It had right to conclude contracts for the group. Hence, AIPL was mere a camouflage to screen the fact that AIPL is really a PE of the applicant's group in India.

In above, case it is not clear, whether the AAR ignored the fact whether there was an independent subsidiary in India.

Indian JV Co., In re (A.A.R. No. 542 of 2001)(274 ITR 501)

In this case, the applicant, an Indian company, entered into an agreement of international transportation services with the American company for movement of parcel/packages. The Hon'ble AAR held that the American company has been party to the insurance contracts for inbound and outbound transactions which shows that the American company has a vested interest in the business of the applicant. Their business operations are inter-connected and ensure to the benefit of the American company and therefore the business carried out by it cannot be said to be its own but are for and on behalf of the American company. The terms of the transportation agreement also substantiate that the applicant was acting on behalf of the American company and constituted an Agency PE of the American company.

DHL Operations B.V. (2005) (142 Taxman 1) (Mumbai)

In this case, DHL Netherlands entered into an agreement with Airfreight Ltd., an Indian company, for utilising their services to carry out courier activities in India. In respect of Inbound shipments, the Hon'ble Tribunal held as under:

- DHL Netherlands carried on their business operations in India through Airfreight Ltd. The entire consignments for delivery in India were handled by Airfreight Ltd. on behalf of DHL Netherlands.
- The activity was carried on continuously with regularity.
- There was an intimate and real relationship of a business character of DHL Netherlands with Airfreight Ltd., in India which contributed to the earning of profits by DHL Netherlands in their business.

- As regards inbound shipments, it was the obligation of DHL Netherlands to deliver consignments in India. The activity of such delivery in India through Airfreight Ltd. mounts to their operations carried out in India in respect of which a reasonable estimate of income attributable to such operations is assessable to tax under Section 9(1)(i).
- Thus, Hon'ble Mumbai Tribunal held that with respect of inbound consignments, DHL Netherlands has a business connection in India through the agency of Airfreight Ltd.
- As regards constituting an agency PE in India, the Hon'ble Mumbai Tribunal held that Airfreight Ltd., is an agent of independent status but it has carried on activities of the DHL Netherlands wholly in India. DHL Netherlands having carried out its activities of business in regard to the inbound consignments through a PE in India and thus, profits attributable to such activity is liable to tax in India under Article 7 of the tax treaty.

Attribution of profits to the PE

Once it is concluded that the foreign entity constitute a PE in India in respect of inbound or outbound consignments, the next issue which would arise is attribution of profits to the PE in India. Profits could be attributed only to the extent to which they can be reasonably attributed to the operations of foreign entity in India. For example, if the foreign entity bears the risk and responsibility of the parcel until it reaches the gateway (which is situated in India) from where the Indian entity shall take over, in that case the profits attributable to the transaction from the point the vessel entered the Indian waters up to the gateway shall be liable to tax in India.

In respect of attribution of profits to PE in India, Central Board of Direct Taxes ('CBDT') had issued a circular (No. 23 dated 23rd July, 1969) wherein it was stated that when the Indian company was construed as agent of the foreign enterprise and the agent was remunerated at arm's length, then the income of the foreign company could not be held as taxable in India. The Hon'ble Supreme Court in the case of *DIT (IT) vs. Morgan Stanley & Co, Inc. (292 ITR 416)* had passed a judgment based on above circular.

However this circular was withdrawn *vide* CBDT Circular (No. 7 dated 22nd October, 2009). Considering that attribution of profits to the PE in itself is a complex issue, the withdrawal of the above circular shall only result into increased litigation.

Many Indian entities do not make a separate consideration payment, in addition to the service fee, to the foreign entities for accessing the integrated infrastructure, brand name, trademark, etc. Given this, the tax authorities have started apportioning percentage of the income earned by the foreign entities and taxing the same as fees for technical services or royalty under the relevant provisions of the Act/ tax treaty.

Conclusion

As can be observed above, taxability of freight forwarders would depend on the documentation entered into by the client and on the basis of actual conduct of business. Attribution to PE, being a subjective exercise is bound to attract litigation. Further, with the increase in e-commerce transactions, this sector is likely to increase rapidly and hence we can see more and more players entering this sector and adopting different models of operating in India.

ERRATA

In the Chamber's journal of July, 2015 – the name of the Author for the article "Issues faced by Shipping Companies" (page 17) has been incorrectly printed as CA Vishal Lahoti. The article has been authored by Shri Samir Shah & Burzin Dubash. The error is sincerely regretted.


CA Hemal Zobalia and CA. Pankaj Bagri

Tax issues for Truck operators

Aggregator

Introduction

With evolving regulatory policies, increasing investment, rising consumer demand and other development factors, the Indian economy is emerging as one of the largest growing economics of the world. The backbone of any healthy and growing economy can be ascertained by the development of its logistics infrastructure support. Indian logistics industry is at developing stage with technology usage at its minimum level. In this Chapter, we will discuss some of the critical direct tax issues for the second largest means of transport in India i.e. truck operators.

Deduction of tax at source under section 194C of the Income-tax Act, 1961 ('the Act') and issues related to exemption

Amendments in Section 194C vis-à-vis transport contracts

Before dealing with the current issues, let's just take a peek at the history of transport contracts subject to tax deduction at source ('TDS') and the amendments made in law in order to settle numerous disputes concerning TDS.

Section 194C was introduced way back in 1972 which was clarified by way of a circular that provisions of section 194C will not be applicable to transport contracts. Adding to that, this circular, *inter alia*, stated that a transport contract cannot ordinarily be regarded as a "contract for carrying out any work" and, as such, no deduction in respect of income tax would be required to be made from payments made under such a contract. This aspect was examined and re-examined by the Courts many a times and the provisions of section 194C were held to be not applicable to contracts for mere carriage of goods which did not include any other services like loading or unloading.

Subsequently, Honourable Supreme Court[1] in its landmark decision held that *there is nothing in the sub-section which could make us hold that the contract to carry out a work or the contract to supply labour to carry out a work should be confined to 'works contract'. Any work means 'any work' and not a 'work contract', which has a special connotation in the tax law.* The Supreme Court observed that 'work' envisaged in the sub-section, therefore, has a wide import and covers 'any work' which can get carried out through a contractor under a contract and it includes obtaining supply of labour under a contract with a contractor for carrying out its work which would have fallen outside the 'work' but for its specific inclusion in the sub-section.

Based on aforesaid landmark judgment, Central Board of Direct Taxes ('CBDT') issued a circular[2] to the effect authorising TDS on transport contracts. This straight away led to the controversy of legality of circular and Courts decided in favour of the

1. Associated Cement Co. Ltd. vs. CIT [1993] 201 ITR 435 (SC)
2. Circular No. 681 dated 8 March 1994

assessee. However, to overrule these favourable rulings, the law was amended by introducing an explanation to section 194C whereby the inclusive definition of 'work' was inserted to cover carriage of goods or passengers by any mode of transport other than railways.

As the Act stands prior to 2009, exemption from TDS was provided to an individual transporter who did not own more than two goods carriage at any time during the previous year. Subsequently with effect from 1-10-2009, Finance (No. 2) Act, 2009 substituted section 194C of the Act and provided exemption to the contractor during the course of plying, hiring and leasing goods carriage if the contractor furnishes his Permanent Account Number (PAN) to the payer. The memorandum explaining the provisions of Finance (No. 2) Bill, 2009 indicated the intention to exempt only small transport operators (as defined in section 44AE of the Act) from the purview of TDS on furnishing of PAN. The intention was to reduce the compliance burden on the small transporters who complained about delays in obtaining TDS certificate from the deductor on time. However, the language of section 194C(6) of the Act did not convey the same meaning and as a result of which all transporters, irrespective of their size, who were in the business of plying, hiring and leasing of goods, were claiming exemption from TDS under the section 194C(6) of the Act on furnishing of PAN.

In order to clearly spell out the intention of the Government, a specific amendment was again made in Finance Act, 2015 and memorandum to this effect, specifically provided as under:

As there is no rationale for exempting payment to all transporters, irrespective of their size, from the purview of TDS, it is proposed to amend the provisions of section 194C of the Act to expressly provide that the relaxation under sub-section (6) of section 194C of the Act from non-deduction of tax shall only be applicable to the payment in the nature of transport charges (whether paid by a person engaged in the business of transport or otherwise) made to an contractor who is engaged in the business of transport i.e. plying, hiring or leasing goods carriage and who is eligible to compute income as per the provisions of section 44AE of the Act (i.e. a person who is not owning more than 10 goods carriage at any time during the previous year) and who has also furnished a declaration to this effect along with his PAN.

Though the attempt *vide* the aforesaid amendment is to expressly clarify the exemption from TDS on small transporters, this could potentially lead to another round of disputes / litigations qua the bigger players who enjoyed the TDS exemption for earlier years until the above recent amendments in law was brought in.

To summarise, truck operators who are owning more than 10 vehicles, would not be allowed to take the benefit of the TDS exemption in view of new provisions of section 194C and would be subject to TDS under section 194C.

Apart from the above issues, taxpayers making payments to transporters / truck owners have contended that they are solely responsible for execution of transportation work and no part of such liability was fastened on the truck owners. Since taxpayer had not entered into a contract with truck owners for part performance of its works with joint liability but he had simply hired trucks, liability to deduct tax at source did not arise under section 194C. Dependent on the peculiar facts of the cases, the Courts have accepted the plea that in absence of relationship of a contractor and sub-contractor between taxpayer and transporter, the provisions of section 194C will not be applicable. However, this view needs to be supported by facts of the individual case and cannot be blindly followed in each and every case.

Hiring of vehicles – Conflicts between Section 194C or 194I

In this context, it would be worthwhile to refer to another TDS issue concerning truck operators – whether hiring of vehicle would fall within the ambit of section 194C or section 194I of the Act. Based on the facts of each case, the Courts[3]

3. Kranti Road Transport (P) Ltd. vs. ACIT (2012) 50 SOT 15 (Visakha.)(Trib.); Lokesh Duggal vs. ITO (2013) 55 SOT 78 (URO)(Kol.)(Trib.); CIT .vs. Mukesh Travels Co. (2014) 367 ITR 706 (Guj.)(HC); Ghosh & Chakraborty Transport vs. ITO (2014) 61 SOT 88(URO)(Kol.)(Trib.) ; Saiyad Saukatali Saiydamiya vs. ITO (2014) 61 SOT 110 (URO)(Ahd.)(Trib.)

have generally held that mere hiring of vehicle without any element of labour / service would not be covered under section 194C. However, in case where payment made for hire of vehicles to provide pick-up and drop facility and generally, all running and maintenance costs are incurred by owner of the vehicle, was not a case of hire of machinery but of service rendered to assessee, then, the Courts[4] have held that TDS under section 194C and not section 194I would be applicable.

On the other hand, section 194I of the Act is applicable to payments made for use of any machinery or plant or equipment in case such payment in a financial year exceeds INR 180,000. Depending on the terms and nature of contract entered into with transporters, the Courts[5] have held that mere hiring and use of vehicles would be covered under section 194I and would be subject to TDS at 2%.

It would be worthwhile to note that while the small transport operators (who are subject to the provisions of section 44AE) could perhaps claim TDS exemption due to aforesaid express amendment under section 194C of the Act, the same operators could be questioned / challenged by the Revenue authorities for non-deduction of TDS under section 194I of the Act on the premise that the transaction tantamount to mere hiring of the vehicle.

Tax Treatment of lease rentals under Finance Lease and Operating Lease

Before discussing the tax treatment on lease rentals, one has to determine the nature of lease and what constitutes Finance lease or Operating lease which has been matter of controversy in past and have been examined by Courts in India.

As per Accounting Standard ('AS') 19 - leases, based on the classification of lease, whether Operating or Finance lease, the asset is recognised and depreciation is claimed in the books of the accounts of lessor and lessee accordingly. If transaction is an Operating lease, the lessee will pay lease rentals and claim expense on straight line basis, whereas, lessor will capitalise the asset and would claim the depreciation thereon. However, if transaction is considered as Finance lease, it is lessee who capitalizes the asset in its books and provide for depreciation in its books.

Post introduction of AS 19, the CBDT came out with a Circular[6] in 2001 to clarify the broad principles of taxation in case of lease transactions and clarified that AS 19 by itself will have no implications on the allowance of depreciation under the Act, unless other conditions are satisfied. The Circular went on to clarify that in all leasing transactions, the owner of the asset is entitled to depreciation if the same is used in its business. As such, the Circular did not expressly clarify what type of lease would constitutes Operating lease or Finance lease and tax treatment thereon, but went on to suggest that the owner of the asset is determined by the terms of the contract between the lessor and the lessee.

Hence, it would be relevant to refer to the landmark decisions[7] over the last few years which have laid down following key conditions to be satisfied for a lease to classify as 'Finance lease' and, as such, lessee to be considered as 'owner' of such assets for the purpose of depreciation claim purposes:

- the lessor transfers the ownership of the asset to the lessee by the end of the lease term;
- the initial lease period is settled in such a way so as to fully recover the investment of the lessor together with interest thereon;
- the lessee has the option to purchase the asset at a price which is expected to be sufficiently

4. CIT vs. Freescale Semiconductor India (P.) Ltd. (2015) 229 Taxman 245 (All.)(HC); CIT (TDS) vs. Swayam Shipping services Ltd. (2011) 339 ITR 647 (Guj.)(HC); CIT (TDS) vs. Shree Mahalaxmi Transport Co. (2011) 339 ITR 484 (Guj.) ACIT (TDS) vs. Lotus Valley Education society (2014) 45 Taxmann.com 37 (All)(HC); ACIT (TDS) vs. Delhi Public School (2013) 144 ITD 670 (Delhi)(Trib.)

5. Three Star Granites (P.) Ltd v ACIT (2014) 41 Taxmann.com 91 (Ker); ITO v. Bharat Sanchar Nigam Ltd. (2014) 45 Taxmann.com 124 (Mum) (Trib.)

6. Circular no 2 of 2001 dated 9 Feb. 2001

7. I.C.D.S Ltd. (2013) 350 ITR 527 (SC); Area Brown Boveri Ltd. v. Industrial Finance Corpn. of India (IFCI) (2006) 154 Taxman 512 (SC) ; IndusInd Bank Ltd. (2012) 135 ITD 165 (Mum) (SB –Trib)

lower than the fair value at the date the option becomes exercisable such that, at the inception of the lease, it is reasonably certain that the option will be exercised;

– the lessor simply holds the title of asset as his security till his investment and interest thereon is recouped;

– the risks and rewards incidental to the ownership vest with the lessee etc.

As a corollary, a lease arrangement which would not satisfy the above conditions would typically be regarded as 'Operating lease' and lessor would be considered as 'owner' of the assets for tax depreciation purposes.

As regards the tax treatment is concerned, it is critical to evaluate the substance of the agreement / arrangement i.e. whether the transaction is financial planning transaction or indeed a leasing transaction and within the leasing transaction whether it is a Finance lease or Operating lease.

In this context, it would be worthwhile to refer to a recent decision of Mumbai Tribunal[8] wherein the Tribunal, in the context of deciding whether a particular transaction is financial planning or leasing transaction, held that once the tax officer has held that a transaction is a Finance lease by ignoring the lease agreement, he should not refer to the said agreement to decide the ownership. The assessee was allowed the depreciation benefit.

In another decision of Delhi Tribunal[9], the assessee was attempting to claim the principal amount paid under the Finance lease by placing reliance on the aforesaid CBDT Circular of 2001. The Tribunal after perusing the agreement / analyzing the substance of the transaction held that the payment of principal amount under the finance lease would not be allowable as revenue expenses. Further, as regards the alternative depreciation plea of the assessee, the Tribunal did not accept the alternative depreciation plea of the assessee solely by placing reliance on some of the restrictive covenants of the agreement.

Recently, CBDT issued a draft Income Computation Disclosure Standard ('ICDS') 2015 on Leases (which is not yet notified) which is broadly in line with AS 19 - Leases. To summarise, from tax perspective as suggested under the draft ICDS on Leases, if the essence of the transaction is indeed a Finance lease, then lessee would be regarded as the economical owner and entitled to claim depreciation on the leased assets. The finance cost / income component, both in case of lessee / lessor, would be apportioned over the lease term and claimed as deduction / offered for tax, as the case may be. The lessor should recognize the Finance lease as sale transaction. Whereas, under the Operating lease, income / expense be recognised on a straight line basis by the lessor / lessee, as the case may be and tax depreciation would be claimed by the lessor.

Hence, in light of the above discussions / legal precedents, it is critical to analyse the substance of the transaction before proceeding to ascertain the tax treatment, which, in turn, depends upon whether it is mere financing arrangement or indeed a lease transaction.

Payment of excessive cash to drivers and sub-contractors and implications under section 40(A)(3) of the Act

As this section stands today, section 40A(3) of the Act provides that where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, in cash exceeds INR 20,000, no deduction shall be allowed in respect of such expenditure. However, section 40A(3) will not be triggered in following cases:

– In prescribed cases under Rule 6DD having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors (such as payments to farmers, unbanked rural areas etc.)

– In the case of payment made for plying, hiring or leasing goods carriages, limit of INR 20,000 have been substituted for INR 35,000.

8. ACIT v M/s JBF Industries Ltd (ITA 4035/Mum/2006; ITA 1623 and 1624/Mum/2009).

9. RioTinto India P. Ltd v. ADCIT ITA No.363/ Mum/ 2012

The intention of increasing the limit from INR 20,000 to INR 35,000 was indicated in memorandum to Finance Act (No. 2) 2009 highlighting the special circumstances of transport operators for incurring expenditure on long haul journeys. The memorandum stated that as a large number of small truck owners / drivers have little working capital and do not have bank accounts outside their home cities, they insist on payment in cash for undertaking long haul journeys, as they need cash for incurring en-route expenses on diesel, food and repairs etc. and such expenses generally exceed INR 20,000. This causes operational problems to those who have to pay for their services. To address this problem, the limit of cash payment to such transport operators was raised to INR 35,000 from the existing limit of INR 20,000.

In view of provisions of section 40A(3), the Courts[10] have held that in case, payments exceeds the prescribed limits and the assessee paid hire charges in cash to truck operators, no deduction would be available in the year.

Another exception is provided to prescribed cases under Rule 6DD such as payments made to farmers; payment for the purchase of the products manufactured or processed without the aid of power in a cottage industry; payments made to RBI, payments made to recipient who resides in unbanked rural areas, payment made to agent who is required to make payment in cash for goods or services on behalf of such person etc.

One of the regular plea taken by the payer is that payments made to truck operators are covered under the category of special circumstances in Rule 6DD and not liable to disallowances under section 40A(3) at all. By taking aid to Rule 6DD(k) i.e. payment made to agents, the contractors made payments towards lorry freight in cash and claimed the expenditure as a deduction. The payer contended that the cash payments for goods and services were made through agents, viz., the lorry drivers and cash payment for lorry freight paid to the lorry drivers cannot be disallowed. After examining the case, the Court[11] observed that there was hardly any material to prove that the lorry drivers acted as agents of the assessee and held that the assessee's only claim before the authorities was that the driver acted in dual capacity, for which there is no evidence and hence the payments made to the lorry drivers of the supplier were not payments to agent of assessee and hence rule 6DD(k) could not be invoked. Thus, to include the payments made to truck drivers / operators in cash under the exceptions provided in Rule 6DD could be challenging and the same would depend upon the facts of each case.

In case where an allowance for an expenditure has been made in previous year and the assessee makes payment in respect thereof in subsequent year, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, then the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year.

It would be interesting to note that since the provisions contained in section 40(a)(ia) and 40A(3) are distinct and separate provisions operating in their own field. Therefore, the Court[12] has held that even if the payment has been disallowed under section 40(a)(ia) of the Act in any previous year, the addition to income can be made under section 40A(3) as well resulting to double disallowance.

In summary, it would not be incorrect to say that disallowance under section 40A(3) depends on various circumstances and cannot be invoked without examining each of the payments made keeping in view the circumstances as mentioned in Rule 6DD as well. Disallowance / addition under section 40A(3) would not depend on the disallowance under section 40(a)(ia) and may result into double disallowance in case of non-deduction of taxes and cash payment thereof in excess of the specified limit.

10. MRS Roadways vs. CIT (2014) 367 ITR 62 (Ker.)(HC)
11. P. K. Ramasamy Nadar & Bros. vs. ITO (2014) 221 Taxman 362 (Mad.)(HC)
12. ITO vs. Garlapati Chalapathi Reddy (2013) 142 ITD 683 (Hyd.)(Trib.)


CA. Shashidhar Upinkudru & CA. Vishal Shah

Container Freight Stations and Inland Container Depots – Tax holiday and challenges around it

A. Introduction

The genesis of Container Freight Station ('CFS') and Inland Container Depots ('ICDs') lies in the problems faced by the trading community in speedy export/import and loading/unloading of cargo. The cargo could not have been cleared for export or for import unless custom duties were paid and other customs formalities being complied with. This often resulted in logjams and congestion at the ports owing to limited storage capacity typically available at the ports. Thus, the ICDs and CFS was born with achieving the objective of reducing congestion at the ports and ensure ease of handling and faster evacuation of containers.

CFS/ ICDs can be understood to be common user facility with public authority status equipped with fixed installations, offering services for handling and temporary storage of import/export laden containers carried under customs control. CFS/ ICDs also aids in clearing goods for home use, warehousing, temporary admissions, re-export, temporary storage for onward transit and outright export. Transhipment of cargo can also take place from such stations.

Functionally, there is no distinction between a CFS/ ICDs, as both are transit facilities, which offer services for containerisation of break bulk cargo and vice versa. These could be served by rail and/or road transport.

An ICD is generally located in hinterland and away from the servicing ports. CFS, on the other hand, is an off dock facility located near the servicing ports which helps in decongesting the port by shifting cargo and Customs related activities outside the port area. CFSs are largely expected to deal with break-bulk cargo originating/terminating in the immediate hinterland of a port and may also deal with rail borne traffic to and from inland locations.

India perspective

The CFS and ICDs are amongst the most rapidly growing segments of logistics industry in India. The increasing container traffic at ports needs the support infrastructure which can accommodate the traffic volumes of the containers. Growth in containerised cargo and opening up of container rail transport boosted CFS and ICDs. Containerised cargo traffic is growing at brisk pace in India and it has grown dynamically in recent years across all ports with JNPT topping the list. CFS/ ICDs are also working as one stop point for the shippers for host of services viz. custom clearance, stuffing/ de-stuffing, packaging, inspection, consolidation of cargo, etc.

B. Tax holiday for infrastructure facility

With the objective of incentivising the setting up of infrastructure facility, a profit linked tax deduction has been provided under the provisions of section 80-IA of the Income-tax Act, 1961 ('the Act'). The provisions of section 80-IA of the Act, lays down the conditions which are required to be satisfied in order to claim deduction under section 80-IA of the Act.

The following conditions are required to be satisfied for claiming tax holiday under section 80-IA of the Act:

- Enterprise should carry out the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils the following conditions:

– Enterprise is owned by a company registered in India or owned by a consortium of companies registered in India;

– Enterprise has entered into an agreement with the Central Government or State Government or a local authority or any other statutory body for operating and maintaining an infrastructure facility; and

– The operations of the infrastructure facility should have commenced on or after 1st April, 1995.

An enterprise which is eligible to claim benefit under section 80-IA of the Act shall be able to claim deduction of 100% of profits and gains derived from such business for 10 consecutive A.Ys.

C. ICDs or CFS – An infrastructure facility for purpose of section 80-IA?

As stated earlier, an enterprise which is engaged in developing or operating or maintaining an 'Infrastructure facility' should be eligible to claim the tax holiday provided under the provisions of section 80-IA of the Act (subject to satisfaction of other conditions).

The thrust for the purpose of claiming deduction under section 80-IA of the Act, therefore, is on the term 'infrastructure facility'. However, the activities undertaken by CFS / ICDs have always been a subject matter of debate from an Income-tax perspective. The major debate is on whether deduction under section 80-IA of the Act available to any enterprise engaged in developing / operating / maintaining any infrastructure facility should be extended to CFS / ICDs operations.

Legislative history

At this juncture, a brief legislative history of section 80-IA of the Act, to the extent relevant for CFS / ICDs facility, is discussed hereunder:

Old section 80-IA

- The infrastructure facility was defined to include port and airport. Further, the Central Board of Direct Taxes ('CBDT') was granted powers to notify other public facility as infrastructure facility.

From 1st April, 1998 to 31st August, 1998

- Inland ports and Inland waterways were included in the definition of infrastructure facility.
- The legislative intent behind such inclusion was to encourage development of national waterways and thereby to improve the transport infrastructure of the country.

From 1st September, 1998 to 31st March, 1999

- CBDT notified CFS and ICDs as infrastructure facility provided the same are notified as ICD / CFS under the Customs Act, 1962.

New Section 80-IA – 1st April, 1999 to 27th May, 1999

- The infrastructure facility was defined to include port, airport, inland waterways and inland ports. Further, the CBDT was granted powers to notify other public facility and infrastructure facility.

From 28th May, 1999 to 31st March, 2001

- CBDT clarified its earlier notification and covered ICD including CFS in the definition of infrastructure facility.
- On 23rd June, 2000, CBDT issued circular to include structures at ports within the definition of port subject to certain conditions.

1st April, 2001 onwards

- CBDT's powers to notify facility as infrastructure facility were withdrawn.
- On 26th August, 2002, CBDT clarified that project, for which agreements were entered on or before 31st March, 2001 and which have been notified by CBDT, would continue to be exempt
- CBDT on 16th December 2005, by way of circular clarified that for and after assessment year 2002-03 onwards, structures at the ports for storage, loading and unloading etc. will be included in the definition of 'Port' for the purpose of section 80-IA of the Act, if the concerned port authority has issued a certificate that the said structures form part of the port.

Given the above legislative history, there has been a considerable amount of debate as to whether CFS / ICD qualify as infrastructure facility and whether tax holiday under section 80-IA of the Act should be extended to ICD and CFS. The Revenue authorities have been contesting the inclusion of CFS / ICD as 'infrastructure facility' on the premise that:

- The old provisions of section 80-IA defined 'infrastructure facility' to include *inter alia* public facility that may be notified by CBDT. Thus, CFS, which was notified by the CBDT as an infrastructure facility, qualified for the tax holiday under section 80-IA.
- However, the amended section 80-IA provides for an exhaustive definition of 'infrastructure facility' and does not empower CBDT to notify a facility as an infrastructure facility. ICD / CFS are not specifically included in the said definition.
- Further, subsequent to the new section 80-IA, Circular 7 / 2002 was issued by the CBDT on 26th August, 2002, clarifying that projects, for which agreements were entered into on or before 31st March, 2001 and which have been notified by CBDT, would only continue to enjoy the tax holiday benefits.
- Thus, in view of the same ICD / CFS having agreements after 31st March, 2001 would not qualify as an infrastructure facility for the purpose of section 80-IA.

Classification as inland ports

The term 'infrastructure facility' is defined under Explanation to section 80-IA(4)(i) of the Act to include port, airport, inland waterway, inland port or navigational channel in the sea.

Since the term CFS / ICD are not directly included under the definition of infrastructure facility it becomes necessary to further analyse each some of the aforesaid infrastructure facilities (viz. ports and inland ports) and determine whether CFS / ICD has been defined to be included in any of the same.

As can be noticed from above definition, port and inland port are considered as an infrastructure facility. However, the terms port / inland port are not defined in the Act. Thus, port / inland port will need to be understood having regard to the current international trade practices and the manner in which the business community understands these terms.

As per the standard industry definition, 'inland port' refers to:

"an inland port is a physical site located away from traditional land, air and coastal borders with the vision to facilitate and process international trade through strategic investment in multi-modal transportation assets and by promoting value-added services as goods move through the supply chain."

Accordingly, inland ports could be understood to mean ports located on land and in land-locked area, which are away from the coastal borders but linked to the sea ports and all the formalities relating to the customs, either for import of cargo or export of cargo are completed therein. Inland ports aid in multi-modal transportation of cargo.

Thus, inland port facilitate the transport infrastructure by taking care of the transport of the customs cleared goods meant for exports from seaport and the imported goods directly from seaport to the inland port where they are custom cleared.

Now let us consider the definition of ICD / CFS, as defined under the guidelines for setting up of ICDs / CFS, issued by the Ministry of Commerce and Industry, Government of India:

"A common user facility with public authority status equipped with fixed installations and offering services for handling and temporary storage of import/export laden and empty containers carried under customs control and with Customs and other agencies competent to clear goods for home use, warehousing, temporary admissions, re-export, temporary storage for onward transit and outright export, transhipment, take place from such stations."

Further, the said guidelines provide that the primary functions of CFS / ICDs are receipt and dispatch / delivery of cargo, stuffing and stripping of containers, transit operations by rail / road to and from serving ports, customs clearance, consolidation and desegregation of LCL cargo, temporary storage of cargo and containers, reworking of containers, maintenance and repair of container units, etc.

"CBEC in its Circular No. 18/2009-Customs Dated: June 08, 2009 tries to being out technical distinction between the functioning of Inland Container Depots (ICDs) and Container Freight Stations (CFSs) for the purposes of compliance of certain procedures in the para 4 states that "From the analysis of the aforesaid legal provisions it follows that a port, an airport, a Land Custom Station or an Inland Container Depot is a customs station and each facility has to be treated at par with the other.

ICDs are thus self sufficient customs stations and for all practical purposes a Custom House in the same way as any port or airport. On the other hand, a Container Freight Station is only a custom area located in the jurisdiction of a Commissioner of Customs exercising control over a specified custom port, airport, LCS / ICD. Container Freight Station by itself cannot have an independent existence; it has to be linked to a customs station within the jurisdiction of the Commissioner of Customs. It is an extension of a customs station set up with the main objective of decongesting the ports. It is a place where only a part of the customs process mainly the examination of goods is normally carried out by Customs and goods are stuffed into containers and de-stuffed therefrom and aggregation / segregation also takes place at such places. Given the aforesaid status of CFSs being extension of port/ airport / ICD / LCS, Custom's function relating to processing of manifest, import / export declarations that are filed by the carrier / Importer or exporter and assessment of bill of entry / shipping bill are performed in the Custom House / Custom Office that exercises jurisdiction over the parent port / airport / ICD / LCS to which the said CFS is attached. In the case of Customs Stations where automated processing of documents has been introduced, terminals have been provided at such CFSs for recording the result of examination, etc. In some CFSs, extension of service centers have also been made available for filing documents, amendments etc. However, the assessment of the documents etc. is carried out centrally. An ICD on the other hand would have an automated system of its own with a separate station code [such as INTKD 6, INSNF6 etc.] being allotted by the Directorate General of Systems and with the inbuilt capacity not only to enter examination reports but also to enable assessment of documents, processing of manifest, amendments, etc."

(Emphasis supplied)

In light of the above, it could be seen that the functions of a CFS / ICD are similar to that of an inland port. It functions for the benefits of exporters and importers located in industrial centres which are situated at a distance from seaport.

Accordingly, one would understand that the operation of CFS / ICD being akin to that of port / inland port and in absence of any definition under the Act, the same should be eligible for the tax holiday as an inland port.

This issue was debated and considered by the Honourable High Court of Delhi in the case of Container Corporation of India Ltd vs Assistant Commissioner of Income-tax (346 ITR 140) wherein the High Court expressed a favourable view on the matter. After perusing the legislative history, clarifications issued by CBDT / CBEC and the Ministry of Commerce & Industry and also having regard to the fact that customs clearance also takes place in the ICD, the Honourable High Court concluded that ICDs are Inland Ports.

Classification as ports/other infrastructure facility

As indicated earlier, infrastructure facility for the purpose of section 80-IA has been defined to inter alia mean ports.

As per Circular No. 10 / 2005 dated 16th December 2005 issued by the CBDT, structures at ports for storage, loading, unloading, etc. would be included in the definition of 'ports' for the purpose of section 80-IA if the concerned port authority has issued a certificate that the said structure forms part of the port. Thus, if a certificate is obtained that CFS / ICD forms part of the 'port', tax holiday should be allowed under the provisions of section 80-IA in respect of the profits from operation / maintenance / development of the CFS.

In absence of any certificate from the port authority, a view could be adopted that while the powers of CBDT to notify infrastructure facilities were withdrawn, in the amended section 80-IA, there was no amendment to the Act stating that the notification issued earlier (classifying ICD and CFS as infrastructure facility) would cease to have effect from 1st April, 2002. Thus, the notification notifying CFS / ICD as 'infrastructure facility' eligible for 80-IA deduction has neither been amended nor withdrawn. Accordingly, it could be contended that even agreements for ICDs / CFS on or after 1st April, 2001, continues to fall within the definition of infrastructure facility and is eligible for the tax holiday under section 80-IA. This view was also expressed by the Hon'ble Delhi High Court in the case of Container Corporation of India Ltd (supra). Further the said ruling was also relied upon by the Honourable Mumbai High Court in the case of *CIT vs. All Cargo Global Logistics Limited (Income Tax Appeal No. 523 of 2013)* wherein the benefit of the tax holiday under section 80-IA of the Act was extended to CFS by holding it to be an eligible infrastructure facility.

Agreement with Government / local authority for claiming tax holiday

One of the conditions for claiming tax holiday under section 80-IA of the Act is that the enterprise owning the infrastructure facility should have entered into agreement with the Central Government or State Government or a local authority or any other statutory body for operating and maintaining the infrastructure facility.

The Hon'ble Delhi High Court in the case of Container Corporation of India Ltd. while concluding that the ICDs are eligible for tax holiday under section 80-IA of the Act did not specifically make any observation or take into consideration the requirement to have an agreement with the Government for operating the ICDs. Accordingly, a question arose as to whether in absence of any specific agreement with the Government, would it be possible to claim exemption under section 80-IA of the Act.

The matter has been put to rest (albeit temporarily) by the decision of the Hon'ble High Court of Mumbai in the case of All Cargo Global Logistics Limited wherein it specifically dealt with the issue and held that when the proposal to set up a CFS has been accepted by the Government, there is no requirement of a specific agreement. Further, reliance can be placed on the CBDT Circular No. 10 of 2005 dated 16th December, 2005, wherein the requirement of having any such agreement has been specifically removed. The aforesaid view has also been supported by decisions of the Mumbai Tribunal in case of *United Liners Agencies of India (Private) Limited vs. JCIT (36 CCH 363).*

D. Deduction under section 35AD of the Act

The Act was amended by Finance Act, 2012 to introduce investment linked tax incentive for specified businesses under section 35AD of the Act. As per the said provisions a 100% deduction will be allowed in respect of capital expenditure (other than on land, goodwill and financial instrument) incurred on after first day of April 2012 wholly and exclusively for the purpose of setting up and operating of CFS/ ICDs, which is notified or approved under the Customs Act, 1962.

Further, the provisions of section 35AD provides that once the deduction is claimed under this section, no deduction under Chapter VI-A or section 10AA shall be allowed in relation to the specified business.

Accordingly, one would need to evaluate based on the facts of the case whether it would be beneficial to claim the deduction of capital expenses as per section 35AD or claim the tax holiday on profits under section 80-IA of the Act. One could contend that the taxpayer has the option to choose between the profit linked tax holiday under section 80-IA or investment linked deduction under section 35AD of the Act (subject to satisfaction of the conditions mentioned in the respective sections) as neither of the section contain any form of specific restrictive covenants/ conditions that debars the taxpayer from choosing either of the option.

However, the ongoing litigation on the eligibility of the tax holiday to the CFS/ICD, discussed in the article above needs to be kept in mind before opting for profit linked tax holiday under section 80-IA of the Act.

E. Concluding thoughts

The container traffic at major ports in India has almost doubled in the past 5-6 years. According to estimates, the world container throughput will reach 1 billion Twenty-foot Equivalent Units ('TEUs') by 2020, which is almost double of the current international container traffic. The emerging Asian and African countries are expected to be the prime movers in achieving this growth. Most of the shipyards are filled with orders for container ships of over 10,000 TEUs capacity. These container ships will form the major part of the world maritime fleet in the coming years. Given these statistics, CFS/ ICDs have been and will continue acting as key agents of the global logistics industry infrastructure.

With the launch of 'Make in India' Campaign, India is positioning itself to be the preferred destination for a global manufacturing hub. This presents many opportunities for the ports including ICD and CFS to be ready for the foreseen surge in demand. With the increasing importance of the CFS/ ICD for the growth of the logistic sector in India, the Government has been doing its best to incentivise the sector. Further Logistic Parks/ Transshipment Zones are being developed as part of the development of Western Dedicated Freight Corridor (DFC) between Delhi and Mumbai. However, it would be equally critical for the players to have clarity of the tax regime for ICDs and CFS and mitigate the undue litigation.

CA. Mehul Shah

Transfer Pricing Issues

"We often confuse with what we wish for what it is."

— Neil Gaiman, Mirror Mask

1. Applicability of Transfer pricing to shipping companies under presumptive taxation / tonnage tax regime

The shipping industry is global in scale and reflects the economic robustness of nations. The shipping sector plays a major role in the transport sector of an economy. It not only facilitates transportation of national and international cargo but also generates employment opportunities on account of various ancillary and incidental activities like cargo handling services, shipbuilding and ship repairing, ship management, freight forwarding etc.

Before we examine the applicability of the Indian Transfer Pricing Regulations ('Indian TPR') for shipping companies, it would be essential to understand the provision of Section 44B and Chapter XII-G of the Income-tax Act, 1961 ('Act'). Relevant extract of the same are reproduced as under:

Section 44B

Special provision for computing profits and gains of shipping business in the case of non-residents

44B. *(1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and Gains of business or profession".*

(2) The amounts referred to in sub-section (1) shall be the following, namely:—

(i) The amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) The amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

Chapter XII-G

Chapter XII-G was introduced as *vide* Finance (No. 2) Bill, 2004 which provides the special provisions relating to the taxation of the income of the shipping companies. Section 115VA states that

"Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of a company, the

income from the business of operating qualifying ships, may, at its option, be computed in accordance with the provisions of this Chapter and such income shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and Gains of business or profession".

The optional provisions of Chapter XII-G are applicable in case of the assessee being an Indian company having its place of effective management in India.

Based on plain reading of aforesaid provision, it can be said that section 44B and Chapter XII-G of the Act provides computation of income in a presumptive manner overriding general provisions of computation of income under specified circumstances.

Indian Transfer Pricing provisions

Now, in this context, it would be useful to discuss the basic intent of introducing the Indian TPR, which are described as under:

The Finance Act, 2001, introduced Chapter X in the Act which contains special provisions relating to avoidance of tax. The Indian TPR were enacted with a view to provide a statutory framework which can lead to computation of reasonable, fair and equitable profit and tax in India so that the profits chargeable to tax in India do not get diverted elsewhere by altering the prices charged and paid in intra-group transaction leading to erosion of tax revenues in India.

The purpose of the Indian TPR is to have a sanity that any income (including expenses or allowance for expenses) arising from an international transaction or specified domestic transaction is at arm's length price ('ALP'). In other words, the Indian TPR empathetically requires that dealing between related parties ought to be at the same price had it been with unrelated parties.

Accordingly, the applicability of Indian TPR being special provision embedded under Chapter X of the Act do not make any exception for companies governed by the presumptive provisions of the Act.

Analysis of the above provisions

On the plain reading of section 44B, it is evident that taxability is determined only on the basis of the 'Gross Receipts'. Hence, a position may be taken – that in a case where assessee is receiving its revenue from its Associated Enterprises ("AEs"), Transfer Pricing ('TP') provisions may be applicable on the revenue side of transaction. In such a case, the Transfer Pricing Officer may make an adjustment on the total amount received / receivable from AEs itself and hence, a consequent effect on the presumptive income.

Further, in case of the cost transactions with AEs, wherein, assessee has opted for presumptive taxation under section 44B a view may be taken that TP provision may not be applicable as an adjustment on the cost transactions would not affect the presumptive income of an assessee.

While analysing the provision of Chapter XII-G, an observation can be made that since it's the tonnage based tax and not transaction based tax, transfer pricing provisions may not be applicable.

However, in case of the income from **'non-qualifying ship'** or any other income earned by company which do not fall part of Chapter XII-G, TP provisions will be applicable.

2. Typical pricing models prevalent in the logistics industry for transactions between group entities

"Business logistics is defined as "having the right item in the right quantity at the right time at the right place for the right price in the right condition to the right customer". According to Council of Logistics Management, logistics is *"the process of planning, implementing, and controlling the efficient, effective flow and storage of goods, services, and related information from point of origin to point of consumption for the purpose of conforming to customer requirements."*[1]

Logistics activities fall broadly into three types of services:

1. http://www.asianclm.com/index.htm

(a) Warehousing;

(b) Freight forwarding; and

(c) Transportation.

Logistics companies manage movement of cargo from the country of origin ('OC') to the country of destination ('DC') through network of its group companies in various parts of the world.

In case where group has presence in both OC and DC, the movement of cargo is managed within the group and all the functions pertaining to freight forwarding activity are performed by OC and DC. If the OC collects the freight forwarding charges from customer then it compensates DC for its part of functions undertaken and *vice versa*. Thus remuneration for managing movement of cargo paid to the counter party (i.e. freight payment) is one of the significant cross border transactions in logistic company. In case of inbound transaction or where freight is collected by DC the cross border transaction for Indian logistic company will be that of freight receipt. Different logistics companies have adopted different model of remunerating OC or DC for its functions.

In order to understand various TP models existing under logistics industry, it is essential to touch base on the typical functions which are performed by the freight forwarding companies in case of export transaction.

We have summarised the functions performed by a Freight Forwarder ('FF') in case of **export transactions** as follows:

- ***Approaching the customer***

In case of export transactions, FF approaches the exporters for provision of freight forwarding services whereby the income is earned by FF.

- ***Booking***

FF, on behalf of exporter, books freight on aircraft/vessel few days before the departure. FF negotiate the rates charged for the freight with various airlines/shipping lines prior to booking space. Generally, FF first reserves space, then confirms and picks up the cargo from the exporter.

- ***Consolidation***

Once the freight is received by FF, it is consolidated with other shipments. It is stored in the warehouse of FF and wait cross docking, depending upon the priority of the goods.

- ***From the warehouse to the airlines/shipping lines***

In most instances, FF picks up the freight from the exporter's warehouse and brought to FF's warehouse. The cargo is then consolidated with the other cargo which is to be delivered to the same destination.

- ***Upon arrival at departing airport/port***

At the airlines/shipping lines, FF delivers the freight to the carrier for security checking.

Once airway bill is delivered, the freight is temporarily stored in a warehouse facility at the airport before loading. In case of sea, cargo is moved to the port on the basis of shipping bill.

- ***At the arriving destination***

At the destination airport/port, cargo gets re-consolidated, re-containerised, and is temporarily stored at a warehouse. From such warehouse, it is either transferred to a connecting flight/ship or is picked up by AEs for delivering to the customer. Further, on request of FF/customer, AEs will arrange for the customs clearance.

- ***Documentation***

Logistics being a document-intensive business, the OC does necessary documentation and dispatches the same to DC so that there is no problem in releasing goods.

The functions performed by a FF/AEs in case of import transactions as follows:

- ***Approaching the customer***

In case of **import transactions**, AEs approaches the exporters for delivering the cargo to its destination in India.

- ***Booking***

On request of FF, AEs book the freight on the aircraft / vessel based on the terms of each consignment. The AEs negotiates with various airlines/shipping lines prior to booking space.

- ***Consolidation***

Once the freight is received by AEs, it is consolidated with other shipments. It is stored in the warehouse of AEs and wait cross docking, depending upon the priority of the goods.

- ***From the warehouse to the airlines/shipping lines***

The AEs will arrange to pick up the cargo from its origin and custom clearance.

- ***Upon arrival at departing airport/port***

At the airlines/shipping lines, AEs delivers the freight to the carrier for security checking.

Once airway bill is delivered, the freight is temporarily stored in a warehouse facility at the airport before loading. In case of sea, cargo is moved to the port on the basis of shipping bill.

- ***At the arriving destination***

At the destination airport/port, cargo gets re-consolidated, re-containerized, and is temporarily stored at a warehouse. From such warehouse, it is either transferred to a connecting flight/ship or is picked up by FFs for delivering to the customer. Further, on request of AEs/customer, AEs will arrange for the customs clearance.

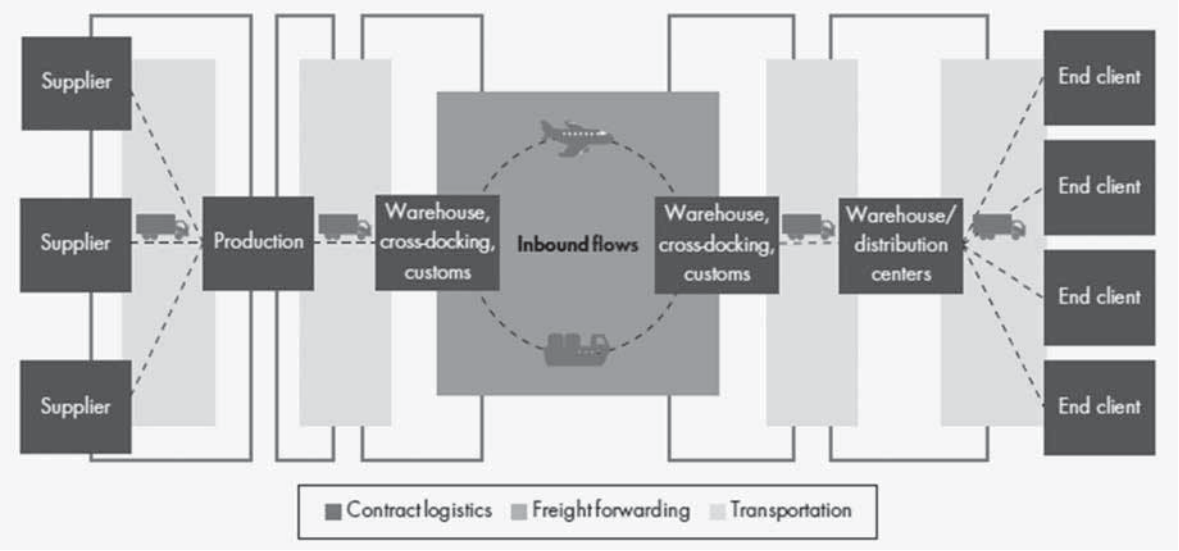
- ***Documentation***

Logistics being a document-intensive business, the OC does necessary documentation and dispatches the same to DC so that there is no problem in releasing goods.

Other functions performed by FFs

- Freight forwarding agents negotiate inland and ocean rates besides offering valuable ideas on optimal and the most cost-effective shipping alternatives
- FF makes recommendations regarding receiving payments for exports
- Forwarding agents provide custody and control of material in transit, etc.

A pictorial explanation of the FF is depicted as below:



Types of TP models under logistics industry

1) Net Revenue Split (most common practice in industry)

– Under this model, the net revenue received from the customer is split between OC and DC

– The revenue split ratio may vary depending on functional contribution

– Working of split under the net revenue model is given below:

Particulars	Amount
Amount collected from customer	100
Less: Payment to third party service providers	60
Residual net revenue to be split between OC and DC	**40 (50:50)**

– The best practice to defend revenue split model from TP perspective is to identify identical agreement with independent logistic company for freight forwarding services.

– In the case of *Agility Logistics P. Ltd. (53 SOT 21)*, the Hon'ble Mumbai Income-tax Tribunal has upheld the pricing policy of net revenue split in the ratio of 50:50 followed by the taxpayer.

– The Mumbai ITAT has made the following key observation on the revenue split method:

  • The terms and conditions in the agreements between related parties and the independent freight forwarders were substantially the same

  • Both the origin company and destination company were performing the similar functions, employing the similar assets and undertaking the similar risks

  • The revenue split information contained in all the agreements is same and is standard practice in the logistics industry and

  • Geographical differences are not material so far as it applies to the logistics industry.

In such scenario, the transaction may be benchmarked on the basis of the Comparable Uncontrolled Price ('CUP') method provided the similar arrangement exists between a related and non-related party. Generally, Transactional Net Margin Method ('TNMM') may also be used in the absence of the similar arrangement with the unrelated party.

2) Cost Plus Model

– Under this model, the ultimate parent company is considered as entrepreneur entity in the group and the other members of the group company located in different country are positioned as low risk service provider, which are compensated on cost plus basis.

– The Indian arm of the parent company will perform the India side of co-ordination functions (like custom clearance, pick of cargo from customer's warehouse through third party transport company, etc.) and also collect the freight forwarding charges from the customer.

– The freight charges so collected will be transferred to ultimate parent company and the Indian company will receive cost plus mark-up for its services.

Particulars	Amount
Amount collected from customer	100
Less: Operating cost of Indian company + Mark-up %	17
Amount paid to the parent company	**83**

In such scenario, the transaction may be generally benchmarked on the basis TNMM. Assessee may use operating profit / value added expenses as a Profit Level Indicator ('PLI').

3) Rate Card model

– Under this model each company in the group from a particular country has a different rate (per file, per kilogram, etc.) of transacting with another member of the group located in different countries

– Working of the profitability under the rate card model is given below:

Particulars	Amount
Amount collected from customer	100
Less: Own cost of OC (including third party cost – Pass through)	60
Less: Cost of Group entities – based on rate card (relevant for activity / function)	10
Operating profit of OC	**30**

In such scenario, the transaction may be benchmarked on the basis of CUP method as the rate card shall be available for both related and unrelated party. However, in the absence of the similar arrangements with related / unrelated parties, possibility of using TNMM may also be explored for benchmarking the international transactions.

3 Applicability of Specified Domestic Transactions in logistics industry

Background

The Government acted on the Supreme Court's observation in case of GlaxoSmithKline Asia Private Limited and *vide* the Finance Act, 2012, extended the Transfer Pricing regulations to certain Specified Domestic Transactions ('SDTs') as defined. SDTs are defined as transactions which are not international transactions and fall under any of the six criteria as per section 92BA of the Income-tax Act, 1961 with an aggregate value of more than five crores. The six categories of transactions are mainly payments to related parties covered as per section 40A(2)(b), transactions covered under Section 80IA(8) & Section 80-IA(10) and transactions to which the provisions of Section 80-IA(8) and Section 80-IA(10) apply.

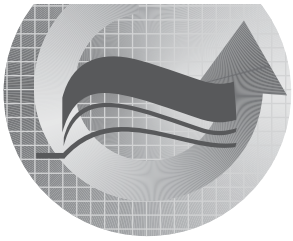
The only change or amendment in the Finance Act, 2015 (applicable for F.Y. 2015-16) from a Transfer Pricing perspective is the increase in the threshold limit for triggering the provisions of SDTs from INR 5 crores to INR 20 crores.

Applicability

The Income-tax Act provides for special rules for computation of income on presumptive basis for several classes of taxpayers engaged in specified businesses. Typically, income is computed as a specified percentage of a specified index applicable to such taxpayers. In case of businesses where presumptive tax is applicable like section 44B, being specific sections, override provisions contained in sections 28 to 43 of the Act. It can be observed that these sections start with a non-obstante clause excluding it from the purview of sections 28 to 43. Thus, the income of the same is computed under the relevant section using specific mechanism while there is no claim of allowance / deduction under the said sections. Since, section 40A(2)(b) is covered by this non-obstante clause SDT would not be applicable in case of related party transactions. Further, the activities which are subject to such presumptive basis of taxation are not eligible for profit linked tax holiday under section 10AA or Chapter VI-A. Accordingly, SDT would not be applicable in case where assessee has opted for presumptive sections.

However, a diverse view is possible that the transfer pricing provisions are special provisions introduced under the Act contained in Chapter X and hence the provisions of other related sections (pertaining to presumptive taxation) of the Act do not override the Transfer pricing provisions. Therefore, all the transactions entered into by the companies subject to presumptive taxation shall be computed having regards to ALP. Accordingly, all eligible transactions in such businesses need to be disclosed in Form 3CEB along with appropriate note about presumptive taxation in order to mitigate potential penal consequences. Transfer Pricing provisions will continue to apply to the companies which are opting out of the presumptive taxation scheme in a particular year.

The views expressed are personal.



Case Laws Index

CA. Vishal Lahoti

Tax Implication of Freight Forwarding Activities

Typically, as it is understood, service provider in India operates as freight forwarder for inbound & outbound air and ocean cargo. Also, the logistics services comprise of incidental/ancillary services (i.e. Terminal Handling Charges (THC)/Inland Haulage Charge (IHC) services). The service provider also provides customs clearance, storage and warehousing services and other value added services to its customers. Operational activities undertaken by Freight Forwarder in India with regard to International transportation of goods can be explained in detail as follows:

- **Air/Ocean freight**
  Freight Forwarder arranges international transportation for the customers for movement of goods from/to India. Freight Forwarder buys the freight from airlines/ shipping line and sells it to customers. Freight Forwarders earn freight rebate on account of purchase and sale of cargo. There are two kinds of shipments which are known as 'Direct shipments' and 'Routed shipments'. In case of direct shipments, airlines or shipping lines issue Master Air Waybill (MWAB) or Master Bill of Lading (MBL) directly to the customers and Freight Forwarder acts as an agent. In case of Routed shipments, the MWAB / MBL is issued by airlines to Freight Forwarder and in turn Freight Forwarder issues its own House Bill of Lading (HBL) / House Air Waybill (HAWB) to the end customer.

  Thus, Freight Forwarder recovers international freight from the customers. It is understood in common parlance that Freight Forwarders account international freight charged to customer as revenue. However, rebate is not accounted separately.

  Further, Freight Forwarder also receives a fixed percentage of commission/brokerage which is generally settled fortnightly while making the payment towards international freight to airlines. Based on the contractual arrangement, at times, Freight Forwarder also receives incentives which are determined on the basis of performance i.e. volume of business generated by Freight Forwarders for such shipping / airlines. The incentive is given after a defined period.

- **Customs clearance**
  At ports/airports, customs clearance activities are generally undertaken by registered 'Customs House Agent' ('CHA'). Generally, Freight Forwarders are not registered as CHA. Hence, the Freight Forwarders generally hire CHAs for undertaking the customs clearance activities. The CHAs recover the customs clearance charges with customs duty, if any, from Freight Forwarders who in turn, as per contractual terms, recover the customs clearance charges with certain mark up as well as other reimbursements from the end customers.

- **Handling of cargo at port or at warehouse**
  At ports / airports, Freight Forwarders support the customers for movement of goods after unloading the same from the airlines / shipping line till the same are warehoused or loaded on lorry for local transportation. In this connection, Freight Forwarders seek assistance from third parties ('sub-contractors') engaged in cargo handling activities. The sub-contractors recover considerations towards such cargo handling activities from Freight Forwarders and in turn Freight Forwarders recover considerations from the customers with mark up towards such support.

- **Transportation**
  Freight Forwarders undertake the local transportation of cargo as part of freight forwarding activities. The transport activity is not limited to movement of goods within port area but is also extended in respect of movement of cargo either from port to the factory or vice versa. Freight Forwarders in India outsource all local transportation activity to the third party vendor.

  With regards to export / import consignments, there are different Inco-terms which govern the contractual arrangements. The different Inco-terms are discussed as under:

- **Ex-works**
  The shipper fulfils his obligation to deliver when the goods are made available at his premises to the consignee i.e. the consignee arranges for transportation of the goods from the shippers premises.

- **Free On Board (FOB)**
  The shipper fulfils his obligation on delivery of the goods at the port of origin of shipment from where the consignee arranges for subsequent transportation.

- **Cost Insurance and Freight (CIF)**
  The shipper has to pay the costs and freight necessary to bring the goods to the destination port. The risk of loss or damage to the goods, any additional costs due to events occurring subsequent to the delivery of goods on board the vessel, is transferred from the shipper to the consignee when the goods pass the ship's rail in the port of shipment. Also, the shipper has to procure marine insurance against the consignee's risk of loss or damage to the goods during carriage. The consignee has to arrange for transportation from the destination port onwards.

- **Delivery Duty Paid (DDP)**
  The shipper fulfils his obligation by making available the goods at the place indicated by the consignee in the destination country. The shipper has to bear the risks and costs, including duties, taxes, transportation and other charges for delivery up to the specified place in the destination country.

- **Delivery Duty Unpaid (DDU)**
  This is similar to DDP except that the shipper does not bear the duties or taxes payable in the destination country.

In any terms of shipments, International transportation of goods can be categorised into the following three baskets:

- Ocean / air freight : Transportation of goods by sea / air
- Origin handling services: Terminal handling, transport from port / airport to Inland Container Depot (ICD), surveys etc.
- Destination handling services: Terminal handling, transport from port / airport to ICD, surveys etc.

It would also be important to understand that Freight Forwarders India ('FFI'), for all international transportation of goods, works with its network entities ('Freight Forwarders Network Entities' or 'FFNE') which support the Freight Forwarders by undertaking the local activities within its own country. Freight Forwarders support FFNEs by undertaking local activities within India in relation to inbound as well as

outbound consignments. In this connection, Freight Forwarders recover consideration for local support advanced to FFNEs, vis-a-vis Freight Forwarders pay the consideration towards assistance sought from FFNEs.

Based on the above contractual arrangement and different activities, the charges recovered either from customer or FFNE are depicted in the table in respect of outbound cargo:

a) Export Consignments (Outbound)

Type of shipment	Charges recovered from shipper by FFI	Charges recovered from consignee by FFNE	Remittance from FFI to FFNE	Remittance from FFNE to FFI
Ex-works	N.A.	Ocean / Air Freight, Origin Handling charges, Destination handling services	N.A.	Origin Handling Services
FOB	N.A.	Ocean / Air Freight, Destination handling services	N.A.	Origin Handling Services
DDP / DDU	Ocean / Air Freight, Origin Handling charges, Destination handling services	N.A.	Destination handling services	N.A.
CIF	Ocean / Air Freight, Destination handling services	N.A.	Destination handling services	N.A.

b) Import Consignments (Inbound)

Type of shipment	Charges recovered from shipper outside India by FFNE	Charges recovered from consignee in India by FFI	Remittance from FFNE to FFI	Remittance from FFI to FFNE
Ex-works	N.A.	Ocean / Air Freight, Origin Handling charges, Destination handling services	N.A.	Origin Handling Services
FOB	N.A.	Ocean / Air Freight, Destination handling services	N.A.	Origin Handling Services
DDP / DDU	Ocean / Air Freight, Origin Handling charges, Destination handling services	N.A.	Destination handling services	N.A.
CIF	Ocean / Air Freight, Destination handling services		Destination handling services	

Export / Import Consignments can further be classified as Prepaid Shipment or Collect Shipments.

Further, International transaction of goods is based on type of services offered, i.e., door to door, door to hub, door to port, hub to door, hub to hub, port to door, port to port.

Service Tax Implication on Freight Forwarding Activities

The Freight Forwarding activities as discussed in above para can be discussed from service tax perspective as under:

Export Consignment

In this transaction, the movement of goods will be from India either from factory of the customer or from inland container yard to a destination outside India either to a designated port / airport or customer identified location.

Freight Forwarder in India would provide transportation of goods by sea / air from one container yard located in India to another container yard located in another country. The consideration for such services would include charges on account of ocean / air freight and handling services performed in the origin country and destination country.

Service tax is generally applicable on the provision of services and the levy extends to the whole of India, except the State of Jammu and Kashmir. Up to the period ended 30th June, 2012, service tax was levied on a positive list basis, i.e. service tax was levied on specified service categories. Subsequent to 30th June, 2012, approximately 120 service categories were notified on which service tax was applicable.

However, with effect from 1st July, 2012, the Government shifted from the old system of taxation of service i.e. positive list of levying service tax to the new system of taxation of service i.e. negative list regime. The new regime of taxation of service has been a complete shift from the existing system whereby services only of specific description were subjected to service tax. In the new regime, the definition of service has been of much wider ambit allowing all the services subjected to levy of service tax except for services defined under the negative list. Thus, with effect from 1st July, 2012, the specified service categories were no longer relevant.

The definition of the term 'Service', which was not defined in earlier regime, has been introduced for the purpose of levy of service tax in the new regime of service tax. The word 'Service' has been defined under Section 65B (44) of the Finance Act, 1994 ('Service Tax Act'), and 'Service' now has a wider meaning and covers any activity of whatsoever nature carried out by a person for another person for a consideration. However, the above definition provides exclusion to certain activities which constitute transfer of goods / immovable property, or actionable claims or deemed sales.

Hence, the above activity of transportation of goods from India to outside India would be considered as service provided by Freight Forwarder for a consideration to its customer and hence, activity of transportation would qualify as Service.

Section 66C of the Service Tax Act provides that Central Government may, with regard to the nature and description of various services, by Rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.

Accordingly, the Central Government has framed 'Place of Provision of Services Rules, 2012' (POPS Rule) *vide* Notification No. 28/ 2012 – Service tax dated 20th June, 2012. Rule 10 of the POPS Rules states that place of provision of transportation of goods services shall be destination of goods. Accordingly, the place of destination of goods will determine the place of provision of service and applicability of service tax.

In the instant case, in the case of export consignment, the destination of goods is outside India. Hence, the above activities performed by Freight Forwarders in India in relation to goods transportation will not be subject to service tax.

However, the taxability of services would depend upon the nature of services provided by the service provider. The Freight Forwarder in India provides transportation of goods by sea / air from one

container yard located in one country to another container yard located in another country. Hence, consideration for services comprises the charges on account of handling services performed in the origin country, destination country in addition to charges related to ocean / air freight.

Hence, it would be important to understand whether origin handling services and destination handling services are part of the Ocean / Air Freight services and whether the whole transaction is the same transaction.

Section 66F of the Service Tax Act deals with the bundling of services and it states that where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description. Also, Section 66F of the Service Tax Act provides that in case various elements of services are bundled in the ordinary course of business, this shall be treated as the provision of a single service which gives such bundle its essential character.

It would be relevant to also refer to the clarification issued by CBEC through the Taxation of Services – An Education Guide dated 20th June, 2012 (Education Guide) also clarifies the nature of similar kind of services performed by Freight Forwarders. The relevant extract is as follows:

> **When the Freight Forwarder acts on his own account (say, for an export consignment)**
>
> A Freight Forwarder provides domestic transportation within taxable territory (say, from the exporter's factory located in Pune to Mumbai port) as well as international freight service (say, from Mumbai port to the international destination), under a single contract, on his own account (i.e. he buys-in and sells freight transport as a principal), and charges a consolidated amount to the exporter. This is a service of transportation of goods for which the place of supply is the destination of goods. Since the destination of goods is outside taxable territory, this service will not attract service tax. Here, it is presumed that ancillary freight services (i.e. services ancillary to transportation-loading, unloading, handling etc.) are "bundled" with the principal service owing to a single contract or a single price (consideration).
>
> **When the Freight Forwarder acts as an intermediary**
>
> Where the Freight Forwarder acts as an intermediary, the place of provision will be his location.Service tax will be payable on the services provided by him. However, when he provides a service to an exporter of goods, the exporter can claim refund of service tax paid under notification for this purpose.

A combined reading of Section 66F and clarification mentioned in Education Guide, it can be seen that if a contract is a single contract to provide all services such as Ocean / Air freight along with origin and destination handling charges, the activity would be treated as one transaction and Rule 10 of the POPS Rules would be applicable which states that place of provision of transportation of goods services shall be destination of goods. Hence, such a single contract of export consignment would not be subjected to service tax.

However, if the charges for the transaction is bifurcated resulting in a separate contract, then such transaction would not be covered by Rule 10 of POPS Rules. Each such transaction would be treated separately and would be required to be analysed separately under POPS Rules.

Import Consignment

In this transaction, the movement of goods will be from outside India either from overseas factory / container yard to a designated port / airport or customer identified location in India.

Freight Forwarder would provide transportation of goods by sea / air from one container yard located outside India to another container yard located in India. Further, the consideration for services would include charges on account of ocean / air freight

and handling services performed in the origin country and destination country.

As discussed above, the nature of activity provided by Freight Forwarder in the present case from the service tax perspective is 'transportation of goods by vessel / aircraft'. As per Rule 10 of POPS Rules, the place of performance of services in the case of goods transportation services will be the destination of the goods. In the present case of import consignment, the destination of goods is India.

However, Section 66D of the Service Tax Act provides for the negative list of services which are not subject to service tax. The negative list of services includes the entry pertaining to services by way of transportation of goods by an aircraft or a vessel from a place outside India up to the customs station of clearance. The negative list of services clearly and specifically provides that services by way of transportation of goods by vessel / aircraft (from a place outside India up to the customs station of clearance) will not be subject to service tax.

However as discussed earlier, the taxability of services would depend upon the nature of services provided by the service provider. The Freight Forwarder would provide transportation of goods by sea / air from one container yard located in outside India to a port / airport or consignee's location in India. Hence, consideration for services comprises the charges on account of handling services performed in the origin country, destination country in addition to charges related to ocean / air freight.

As discussed, exclusion provided under the negative list states that transportation of goods by vessel / aircraft from a place outside India would not be subject to service tax. The exclusion under the negative list simply states that the exclusion would be available from a place outside India. The term 'place outside India' is very wide and would include various activities performed at the overseas location. Hence, the various handling activities performed in relation to an integrated transaction of transportation of goods by sea / air services would be construed as part of the transportation of goods by sea / air services and the activities performed outside India in relation to handling of the cargo would not be subject to service tax.

However, it should be noted that various charges recovered for performing various activities after clearance of goods from a customs station in India would not be covered under the above negative list and hence would be subject to service tax.

It would be important to note that the above implication is applicable only when the contract is single integrated contract to provide all services related to handling at origin as well as destination alongwith air / ocean freight. If the above activity is bifurcated under various charges with multiple contract, then in such a case, the above said implication may not hold well. Moreso, each transaction or charge would be required to be considered and analysed separately under POPS Rules.

Taxability of margin / profit share of freight business by Freight Forwarder

Freight Forwarders are engaged in providing transportation of goods by sea / air services between two international ports / airports to its customers for export / import of goods from / to India. Typically, the consideration for provision of above services is termed as 'Freight Income'.

The Freight Forwarder avails international transportation of ocean / air sea services from Shipping / Air Lines at the rate provided by such Shipping / Air Lines. In turn, the Freight Forwarder sells such space to independent exporters at the rate as prevailing in market. Thereafter, Freight Forwarders consolidate the cargoes of various exporters into one container and export the cargo outside India from India.

There has always been an issue about the taxability of rate difference or margin or profit share earned by the Freight Forwarders and whether such earnings of Freight Forwarders is subject to service tax or not. Currently, the matter is under litigation at various judiciary levels.

To understand whether the above is subject to service tax, it is important to understand the

nature of activity being carried out in detail. Before examining the issue in detail, it would be imperative to understand the difference between the agent acting on behalf of principal service provider and a service provider on principal to principal basis. The important factors differentiating the transaction from principal to principal and agency transactions are summarised as follows:

Parameters	Agent-to-Principal Relationship with Shipping Lines / Airlines	Principal-to-Principal Relationship
Scope of work	Helps in marketing cargo space available with Shipping Lines / Airlines and acts as intermediary between customers and Shipping Lines / Airlines.	Directly purchases space on the vessels / aircraft of the Shipping Lines / Airlines in bulk and later the space is resold in retail
Responsibility Ends	On bringing business to the Shipping Lines / Airlines Responsibility for international transportation of goods rests with the Shipping Lines / Airlines	On delivery of cargo at the destination port
Risk	No risk is assumed by Agent	Risk to a certain extent is assumed by Freight Forwarder
Invoice	Invoice is raised only for the brokerage amount on shipping / airlines	Invoice is raised on customer for international transportation of goods recovering the charges of ocean / air freight etc. Shipping / Airlines raise invoice on Freight Forwarder

Otherwise than agency transaction, the transactions are executed under a principal-to-principal basis in which Freight Forwarder does not act as an agent of the Shipping Lines / Airlines. In this regard, it would be imperative to understand the modus operandi of the transaction and the same is summarised below:

- For the international transportation of goods, the Shipping Lines / Airlines issue a Bill of Lading / Master Airway Bill (MBL / MAWB) in the name of the Freight Forwarder for the total cargo (in bulk) to be transported from one place to another.
- The Freight Forwarder issues House Bill of Lading / Airway Bill (HBL / HAWB) to its customers. The HBL / HAWB is a document of title, which states that in case there is any deficiency in provision of ocean / air freight services, the Freight Forwarder would be responsible for the same.

Further, from the above it can be clearly seen that there are two separate mechanisms available or being followed for the execution of international transport of goods. In the case of agency transactions with Shipping Lines / Airlines, the Shipping Lines / Airlines pay commission to agents, which is subject to service tax.

With respect to a transaction between principal-to-principal, the transaction is required to be treated as trading of service. However, there is lack of clarity in relation to trading of service activity, whether the same should be subject to service tax or not. But it would be important to note that the trading in the instant case is related to ocean / air freight and since, international air freight or ocean freight is not subjected to service tax, the trading of ocean / air freight should also be not subjected to service tax. Since the matter is pending before courts, it would be important to wait for the verdict.



CA. Heetesh Veera, CA. Sanket Desai &
CA. Amar Manda

HOT SPOT

Highlights of Foreign Trade Policy, 2015-20

The Foreign Trade Policy (FTP) 2015–20 released by the Ministry of Industry and Commerce seeks to provide a stable and sustainable policy environment for export of goods and services. The Policy has been formulated to promote 'Make in India', 'Digital India' and 'Skills India' initiatives of the Government of India.

The Policy aims to enable India to respond to the challenges of the external environment, keeping in step with a rapidly evolving international trading architecture and make trade a major contributor to the country's economic growth and development.

The Policy revamped various export incentives available for export of goods and services under Chapter 3 of FTP and merged various schemes mainly into two schemes namely 'Merchandise Exports from India Scheme' for export of specified goods to specified markets and 'Services Exports from India Scheme' for exports of notified services, in place of the schemes issued earlier.

The key benefits under the new FTP 2015-20 have been summarised below:

Service Exports from India Scheme (SEIS)

- The existing Served from India Scheme (SFIS) has been replaced with a new scheme called "Service Exports from India Scheme". SEIS shall apply to "service providers located in India" instead of "Indian service providers", regardless of the constitution or profile of the service provider. This step has been taken to overcome the position taken by authorities that benefit under SFIS was available only to Indian origin based company.
- The duty credit scrip and goods imported under SEIS scheme would no longer be with 'actual user condition'. It will be freely transferable and there will be no restriction on the nature of goods that can be imported under the scheme, other than the prohibited goods.
- The significant benefit to service industry is that SEIS scrip can be used for payment of customs duty, excise duty and service tax. Earlier, under SFIS, duty credit scrips could be utilised towards payment of excise duty and customs duty only.
- Further, service tax and excise duty (including CVD) paid through SEIS scrip will also be eligible as CENVAT credit to service provider. Thus, the service industry will now enjoy the tangible benefit under SEIS scheme, as opposed to the SFIS scheme, under which the benefit were only theoretically available to service industry.
- However, the entitlement under this scheme has been reduced from existing 10% to 3%-5% of Net Foreign Exchange earned (NFE),

which may impact the service industry. Moreover, it will have larger impact on infrastructure related capital intensive service sector.

Merchandise Export from India Scheme (MEIS)

- Five earlier schemes for rewarding merchandise exports namely, Focus Product Scheme, Market Linked Focus Product Scheme, Focus Market Scheme, Agriculture Infrastructure Incentive Scrip, Vishesh Krishi and Gram Udyog Yojana (VKGUY) have been merged into a single scheme i.e. MEIS.
- No conditionality is to be attached to the scrips issued under MEIS. Further, the rewards under MEIS shall be payable for export of notified goods to notified markets, based on a percentage of realised Free on Board (FOB) value of exports.
- The debits towards Basic Customs duty in the duty credit scrips would also be allowed adjustment as duty drawback. Earlier, only the additional duty of customs / excise duty / service tax was allowed adjustment as CENVAT credit or drawback.
- Higher levels of reward under MEIS proposed for export items with high domestic content and value addition as compared to products with high import content and less value addition.
- Removal of restrictions on benefit of CENVAT credit / drawback and free transferability of MEIS and SEIS credit scrips and the goods imported against these scrips, will go a long way to facilitate export trade.

Larger benefits under EPCG scheme for domestic capital goods manufacturing industry

- As a boost to domestic capital goods industry, the FTP has reduced the export obligation under EPCG Scheme in cases where the capital goods are procured domestically. In such cases, the export obligation reduces by 25%, though without any change in time to fulfil such export obligation.

Reviving the SEZ scheme

- Although exports from SEZs had seen phenomenal growth, significantly higher than the overall export growth of the country, in recent times they had been facing several challenges. In order to give a boost to exports from SEZs, government has now decided to extend benefits of both the reward schemes (MEIS and SEIS) to units located in SEZs. It is hoped that this measure will give a new impetus to development and growth of SEZs in the country.

Initiatives for EOUs /EHTP/STP/ BTP

- A number of steps have been taken for encouraging manufacturing and exports under 100% EOU / EHTP / STPI / BTP Schemes. The steps include a fast track clearance facility for these units, permitting them to share infrastructure facilities, permitting inter unit transfer of goods and services, permitting them to set up warehouses near the port of export and to use duty free equipment for training purposes.

Trade Facilitation and Ease of Doing Business

- The major focus area of the new FTP is trade facilitation and ease of doing business. One of the major objectives of the new FTP is to move towards 24x7 paperless working environment
- Accordingly, a number of trade facilitation measures to reduce transaction costs and document handling have been introduced in terms of online application filing, online inter-ministerial consultation, physical record maintenance, submission of multiple documents, etc.

- To achieve the ambitious target set out in the policy, Government is relying on improved quality – zero defects in manufacturing, better branding, simplified procedures, unified approach, wider and deeper participation, better utilisation of trade agreements etc.

- Continuous monitoring of global developments on trade agreements and their possible impact has resulted in government taking calibrated steps of entering quickly into regional agreements and continue to work on increasing the competitiveness of Indian products by bringing extra focus on quality and branding.

Resolution of practical hardships and challenges in claiming benefits under FTP

Various measures for trade facilitation and ease of doing business introduced under the new FTP, which should go a long way in resolving the practical hardships faced by applicants earlier in claiming benefits under the FTP.

Seriousness of focus on quality is reflected in the dedicated chapter on 'Quality Complaints and Trade Disputes' incorporated in the FTP in an endeavour to resolve quality complaints and trade disputes. For resolving such disputes at a faster pace, Committee on Quality Complaints and Trade Disputes is also being constituted.

Impact on other indirect taxes (Customs duty/Excise duty/Service tax/VAT)

1. Whether duty credit scrip utilised towards payment of service tax / excise duty / custom duty liability would be available as CENVAT credit or drawback?

Additional customs duty / excise duty / service tax paid in cash or through debit under duty credit scrip shall be adjusted as CENVAT credit or Duty Drawback. Basic Custom duty paid in cash or through debit under duty credit scrip shall be adjusted for Duty Drawback.

2. Whether duty credit scrip could be utilised for payment of service tax under reverse charge mechanism?

Service tax under reverse charge mechanism is mandatorily required to be paid in cash only. Hence, it would not be possible to utilise duty credit scrips towards payment of service tax under reverse charge mechanism.

3. Whether VAT is applicable on sale / transfer of duty credit scrips? If yes, whether input tax credit of VAT paid is available to the buyer?

Sale / transfer of duty credit scrip along with right to use would be liable to VAT / sales tax. VAT rates would vary from State to State. Typically, the VAT rates could range from 4% to 5%. Eligibility of VAT credit to the buyer would also vary from State to State and would depend on the State specific provisions.

On an overall basis, the Policy is a reason to cheer for the industry. The Policy statement puts India on an ambitious growth path in International trade of goods and services. The Policy aims to increase India's exports of goods and services from USD 465.9 billion in 2013-14 to approximately USD 900 billion by 2019-20 and to raise India's share in world exports from 2 per cent to 3.5 per cent.

The focus of the new FTP is on simplicity and stability. The Policy on one hand seeks to realign multiple schemes with the objective of reducing the complexities and on the other hand it wants to promote increased use of technology to reduce the transaction cost and manual compliances.

It can be said that the FTP 2015-20 is a forward looking policy, providing much needed clarity about the export incentive schemes and clearly lays out India's aim of being an important player in global trade of goods and services. While the measures proposed in the policy are not radical, they appear to be in the right direction.

Anshul Yadav

Judicial Activism : A Boon or Bane

Contents

1. Introduction to Judicial Activism

The edifice of any democratic Government rests on three pillars – the executive, the legislature and the judiciary. These three pillars constitute the three organs of the Government machinery. The powers and functions of these organs are defined in the Constitution, which constitutes the supreme law of a democratic Government. Under the Constitution, the primary function of the legislature is to make law, that of the executive is to execute law and that of the judiciary is to enforce the law. In the enforcement of law, the Constitution assigns three roles to the highest judiciary – (1) firstly, as an interpreter of the Constitution to solve any ambiguity in the language of any provision of the Constitution; (2) secondly, as the protector of fundamental rights which are guaranteed by the Constitution to its people; and (3) thirdly, to resolve the disputes which have come by way of appeals from the lower judiciary.[1]

In playing its assigned roles, the judiciary reviews the actions of the other two organs – the legislature and the executive as to whether they have exceeded the limits set by the Constitution or whether they have encroached the rights of the people through arbitrary laws and arbitrary actions. This is where judicial activism comes into play. Through judicial activism the judiciary plays an activist role in performing the tasks assigned to it by the Constitution. In recent times, there has been a criticism of judicial activism becoming judicial overreach and thereby violating the separation of powers between the three organs. According

1 Retrieved from: http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/20809/9/09_chapter%201.pdf on February 20, 2015 at 10:10.

to the doctrine of Separation of Power the three principal pillars of a democratic regime, i.e., the Legislature, the Executive and the Judiciary are provided with their respective functional parameters so that they do not run afoul of each other and work in tandem in order to ensure smooth and stable governance. But the concept of judicial activism is what hits at the very foundation of this doctrine and disbalances the systematic machinery of a democracy established in furtherance of this doctrine.

As a corollary to this doctrine, a judge has to merely apply the law (by interpreting it) that it gets from the legislature. This view on the role of a judge has prevailed in conventional jurisprudence but is changing in recent times. In the recent times, questions have been raised over the role of judiciary acting as a legislative body in certain circumstances and whether or not such diversion from the interpreting the law to governance through legal decisions is permissible or not. The interpretive discretion that a Judge gets in the process of adjudication and decision making has led to the expansion of the parlance of the judicial review. The global contemporary thrust over individual liberties and the expansion of human rights is what has made the courts expand their reach to vindicate human freedoms. And to be honest many a times it has helped in achieving the same.

But in their pursuit of securing the sanctity of human rights, the courts have time and again gone out of their respective realm of interpreting the law into the realm of making the law by taking the defence of ensuring greater public interest which may not seem to be of immediate concern to the masses struggling for Justice in short run, but a serious concern it must remain for 'We the People of India'.[2]

Thus, the role of courts in recent years have become quite controversial and has given rise to several questions like to what extent can the courts be allowed to encroach upon the respective realms of the other organs in the name of securing larger public interest? Does the concept of judicial activism in itself possess an inherent sense of something being committed *ultra vires* to the spirit of the Constitution or is it a necessary tool in the hands of the Judiciary to protect the Constitution and help in the expansion of the principles of Constitutionalism. If there has been judicial transgression what are the reasons because of which the judiciary has exceeded its limits and what should be the remedy or future course of action for the judiciary in discharging its duties by remaining within the limits assigned by the Constitution? Thus, by the help of this project an attempt would be made for finding the answers to these questions.

2. Definition of Judicial Activism

The term 'Judicial Activism' not being a legal term acquires quite a diverse range of meanings and carries more than one connotation amongst legal as well as non-legal domains of the society. Many are critical of judicial activism as an exercise of judicial power, which displaces existing law or creates more legal uncertainty than is necessary, whether or not the ruling has some Constitutional, historical or other basis. Yet others argue that it actually helps the Constitution and Constitutional values grow in their ambit thereby ensuring public welfare through Constitutional mandate. Some scholars have suggested that in its present state, "judicial activism" is a virtually empty term.[3] They rightly point out that by itself, the label carries little more than a pejorative connotation. In absence of substantial context, assigning a meaning to this term becomes really difficult as for some the term 'activist' means doing someone's work actively with conviction but for

2 Sathe, S.P., Judicial Activism in India: Transgressing Borders and Enforcing Limits, Oxford University Press, 2007 edition, at p. 251.

3 Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism", California Law Review, Vol. 92, No. 5 (Oct., 2004), pp. 1441-1477 retrieved from: http://www.jstor.org/stable/3481421 on February 20, 2015 at 10:10

some other it might also mean doing one's job vigorously while disregarding the law. Thus, it becomes really essential to try and find out what meaning is assigned to this term under different dictionaries and by different jurists.

Black's Law Dictionary defines the term "Judicial Activism" in the following words: *"A philosophy of judicial law-making whereby judges allow their personal views about public policy among other factors to guide their decisions; usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."*[4]

According to Merriam – Webster's Dictionary of Law: *"Judicial activism is the practice in the judiciary of protecting or expanding individual rights through decisions that depart from the established precedent or are independent of or in opposition to supposed constitutional or legislative intent"*[5]

Apart from these dictionary definitions, different Indian judges and jurists have also made an attempt to define the term 'Judicial Activism'.

In the words of Justice J. S. Verma:

"Judicial activism must necessarily mean the active process of implementation of the rule of law essential for the preservation of a functional democracy."[6] For Justice Verma, thus, Judicial Activism rather than being a superficial exercise, is an active process of ensuring the effective implementation of rule of law and preservation of the functioning of the Democracy.

According to Prof. Upendra Baxi:

"Judicial activism is an ascriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc. Others have criticised the term by describing it as judicial extremism, judicial terrorism, judicial transgression into the domains of the other two organs of the state negating the constitutional spirit."[7] Prof. Baxi's definition is thus quite apt and laudable in the sense that it recognises the dynamic nature of the term "Judicial Activism".

Thus, from the above definitions it is quite clear that 'Judicial Activism' in itself is a dynamic term to which meanings are assigned according to the context in which it is being used and that is the reason why it carries with itself such a diverse range of definitions.

3. Instances of Judicial Activism in India

The Supreme Court is the Apex Court of India. The Constitution of India confers wide jurisdiction on the Supreme Court.[8] It also confers on the Supreme Court the power of judicial review[9], the power to enforce its decrees and orders[10] and to some extent the power of law making[11]. The High Courts of India are also conferred the power of judicial review[12]. The conferment of such wide jurisdiction and wide powers provides enough scope for judicial

4 Black's Law Dictionary, 10th edition.

5 Merriam-Webster's Dictionary of Law, 11th edition.

6 supra note 1.

7 Ibid.

8 Articles 131 to 136 of the Constitution of India confers wide jurisdiction upon the Supreme Court of India.

9 Article 13 of the Constitution of India confers the power of judicial review to the Supreme Court of India.

10 Articles 142 and 144 of the Constitution of India confers such power to the Supreme Court.

11 Article 141 of the Constitution of India confers such power to the Supreme Court.

12 Article 13 also confers the power of judicial review to the High Courts of India.

activism in India. "*The judiciary in a democratic nation like India has a very important role to perform. It is not only responsible to administer justice by resolving various disputes arising between the citizens interests and sometimes between the citizen and the State, but also has to ensure that the elected representative of the people in different capacities conduct themselves individually and collectively within Constitutional limitations prescribed in the written Constitution.*"[13]

But even though acting 'actively', the Indian Judiciary has played a very commendable role owing to the responsibility conferred on it under the constitutional provisions. On several occasions it has proved a savior for retention of Constitutional framework intact in its present form. In doing so many a times it had to lock horns with other democratic organs of the State like Parliament and the Executive, but the Supreme Court of India in all those turmoils held its position strong and still in favour of the Constitution and its cardinal values. It has always held that the Constitution is supreme and no act performed by whatsoever organ shall be upheld which denies Constitution this position of respect and command.

There are many such instances wherein the courts have stepped out from their traditional and orthodox role of decision-making and have entered into prohibited grounds belonging to the other two organs of the State for the protection of the downtrodden and upholding the sanctity of their fundamental rights provided to them by the Constitution of India. One such example is that of the establishment of the "Basic Structure Doctrine" by the SC of India in the case of *Kesavananda Bharati vs. State of Kerala*[14]. This judgment is one of a kind for it is assigned with the tag 'The Case that saved Indian Democracy'[15].

It came into being when six writ petitions were filed challenging the Twenty fourth, Twenty fifth and the Twenty ninth amendments to the Constitution. All the Judges of the bench opined that by virtue of Article 368 as amended by the Twenty-fourth Amendment, the Parliament had the power to amend any or all provisions of Constitution, including those relating to fundamental rights. The majority in this case was of the view that the power of amendment under Article 368 was subject to certain implied and inherent limitations.

It was held that in the exercise of amending power, the Parliament *cannot* amend the *basic structure or framework of the Constitution*. It was also held that individual freedom secured to citizens was a basic feature of Constitution, and could not be altered, the basic features of the Constitution being: (i) Supremacy of the Constitution; (ii) Republican and Democratic form of government; (iii) Secularism; (iv) Separation of powers between the legislature, the executive and the judiciary; and (v) Federal character of the Constitution. Supremacy and permanency of the Constitution have thus been ensured by the pronouncement of the apex court of the country with the result that the basic features of the Constitution are now beyond the reach of Parliament.

This case was actually in response to the 24th amendment brought by the Government of the day in order to nullify the effect of the Golak Nath case[16] (another great instance of courts acting actively) where the Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part III of the Constitution are immutable and beyond the reach of the amendatory process. The power of Parliament to amend any provision in Part-III of the Constitution was taken away and in

13 Mahajan, V. D., Jurisprudence and Legal Theory, Eastern Book Company, 5th Edition at p. 128.

14 AIR 1973 SC 1461, retrieved from: http://www.frontline.in/static/html/fl1809/18090950.htm on March 8, 2015 at 06:20.

15 The Hindu, April 24, 2013: accessed on March 1, 2015 at 07:00.

16 AIR 1967 SC 1643, retrieved from: http://www.frontline.in/static/html/fl1809/18090950.htm on March 8, 2015 at 06:20.

order to keep their powers above the reach of Judicial Review, the government brought the amendment, which distinguished the Constituent power from Ordinary legislating power and provided the Parliament with immense power to amend any part of the Constitution by using the constituent power vested in it by the Constitution of India. But it was for the case of *Kesavananda*[17] that the court saved the sanctity of some of the most basic features of the Constitution from being amended by the Parliament without any limitations whatsoever. If the majority of the Supreme Court would have held (as six judges indeed did) that Parliament could alter any part of the Constitution, India would most certainly have degenerated into a totalitarian State or had one-party rule. At any rate, the Constitution would have lost its supremacy. It was the basic structure theory, which preserved the Indian democracy. But coming up with this doctrine was not an easy task for the court were necessarily required to go into scrutinising the Government actions on the touchstone of the powers vested upon it by the Constitution.

Another magnificent product of judicial activism in India was the advent of Public Interest Litigation (PIL), which consequently liberalised the locus standi rule according to which only the aggrieved himself could take his case before the court. By virtue of the PIL, now, any public-spirited citizen can move/approach the court for the public cause (in the interests of the public or public welfare) by filing a petition. It was Justice Bhagwati and Justice Krishna Iyer who prepared the groundwork from mid-1970s to early 1980s, for the birth of PIL in India. This included modifying the traditional requirements of locus standi, liberalising the procedure to file writ petitions, creating or expanding FRs, overcoming evidentiary problems, and evolving innovative remedies.

Modification of the traditional requirement of standing was essential for the evolution of PIL and any public participation in justice administration. The need was more pressing in a country like India where a great majority of people were either ignorant of their rights or were too poor to approach the court. Realising this need, the Court held that any member of public acting *bona fide* and having sufficient interest has a right to approach the court for redressal of a legal wrong, especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stake. This step of the court helped a large section of community who were earlier not able to take recourse to the courts for infringement of any of their rights.

This in fact led to a wave of cases being taken to court by public spirited people for the protection of the people of the downtrodden communities and others who were unable to move to the courts for the enforcement of their rights. In a series of path-breaking pronouncements, for instance, *S.P. Gupta vs. Union of India*[18], the Supreme Court of India, through public interest litigation, has granted access to persons inspired by public interest to invite judicial intervention against abuse of power or misuse of power or inaction of the Government. Not only was the requirement of *locus standi* liberalised to facilitate access but also the concept of justiciability was widened to include within judicial purview actions or inactions that were not considered to be capable of resolution through judicial process according to traditional notions of justiciability. Most of these cases had witnessed gross and callous failure or neglect on the part of public functionaries or administrative authorities in the discharge of their public duties. *The Supreme Court of India has come to the rescue of grossly under-paid workers, bonded labourers, prisoners, pavement dwellers, under-trial detenues, inmates of*

17 supra note 14.

18 AIR 1982 SC 149, retrieved from: Manika, "Judicial Activism: A means for Attaining Good Governance", Nyaya Deep, NALSA, Vol. VII, Issue 3, July 2006, pp. 117-132, p. 120.

protection homes, victims of Bhopal gas disaster and so on and so forth.[19]

The Apex Court by the help of the Public Interest Litigation has activated the administrative machinery when they failed to perform their legal obligation. This activist thrust of the Supreme Court for ensuring good governance and probity in public life is brought to light by the advent of PIL, which was necessarily a product of some judges acting actively. The above decisions indicate a demonstration of *ad hocism* due to the deficiency of the institutions (the Legislature and Executive).

The Courts by taking resort to judicial activism are encroaching upon the exclusive domain of the other instrumentalities inasmuch as the goal of the Court is to render justice. But what is discernable of these instances mentioned above is that the judicial power or activism is inversely proportional to the political process. The weaker the political process, stronger is the judicial power; the reverse is true in part. By means of judicial activism, the Judiciary merely assists in the process of governance; it does not take over the functions of the Executive wing of the Government.

The inactivity of the other two organs of the State is sometimes the reason for judicial intervention of the courts into the matters exclusive to those organs. Sometimes the courts even legislate in the sense that they come up with a law for the purposes of dealing with certain contingencies for which the legislature has been unable to come up with a law. The most prominent example of the courts legislating is the case of *Vishaka vs State of Rajasthan*[20] wherein the Supreme Court of India took serious stance on the sexual harassment of women in the work place and stated that: "Each Incident of sexual harassment of woman at workplace results in violation of the fundamental rights of Gender Equality and the Right to Life and Liberty."

The Supreme Court lamented that the legislature had not brought in comprehensive legislation to deal with sexual harassment of women in the workplace, and declared the law as follows: *"In view of the above, and in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms are hereby laid down for strict observance. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution of India."*

This is a clear case of judicial legislation and usurpation of the power of the legislature, but ultimately it benefits the people. When the legislature slumbers, judicial usurpation obtains legitimacy and approval from the general public, which makes the task of Judicial Legislation even more popular. But what should be kept in mind while analysing situations like these is that though instances like this were and will continue to be desirable, it will be against the scheme and philosophy of the Constitution if the judiciary oversteps and dons the mantle of the executive and the legislature.

In some cases judiciary has even gone to the extent of directing the administrative bodies in

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19 People's Union for Democratic Rights vs. Union of India, AIR 1982 SC 1473, Bandhua Mukti Morcha vs. Union of India, AIR 1984 SC 802, Sunil Batra vs. Delhi Administration, AIR 1978 SC 1675, Olga Tellis vs. Bombay Municipal Corporation, (1985) 3 SCC 545, Hussainara Khatoon vs. State of Bihar, AIR 1979 SC 1360, Upendra Baxi vs. State of U.P., (1983) 2 SCC 308 : (1986) 4 SCC 106, Union Carbide Corporation vs. Union of India, (1991) 4 SCC 584, retrieved from: Manika, "Judicial Activism: A means for Attaining Good Governance", Nyaya Deep, NALSA, Vol. VII, Issue 3, July 2006, pp. 117-132, p. 120.

20 AIR 1997 SC 3011, retrieved from: https://indialawyers.wordpress.com/2012/08/06/disturbing-trends-in-judicial-activism/on March 5, 2015 at 05:30.

the exercise of their powers and has sometimes even entered into the forbidden arena of policy-making (for that exclusively belongs to the Executive). For example – In the 2G Licences case, the Court held that all public resources and assets are a matter of public trust and they can only be disposed of in a transparent manner by a public auction to the highest bidder. This has led to the President making a Reference to the Court for the Court's legal advice under Article 143 of the Constitution. In the same case, the Court set aside the expert opinion of the Telecom Regulatory Authority of India (TRAI) to sell 2G spectrum without auction to create greater tele-density in India.[21] In recent orders, the Supreme Court has directed the most complex engineering of interlinking rivers in India. The Court has passed orders banning the pasting of black film on automobile windows. On its own, the Court has taken notice of Baba Ramdev being forcibly evicted from the Ramlila grounds by the Delhi Administration and censured it. The Court has ordered the exclusion of tourists in the core area of tiger reserves.

On several occasions the courts, in their pursuit of delivering Justice to all the sections of the society, have enforced the Part IV of the Indian Constitution by reading it within the rights under Part III of the Constitution. On the other hand in its activist and controversial interpretation of the Constitution, the Supreme Court took away the constitutionally conferred power of the President of India to appoint judges after consultation with the Chief Justice, and appropriated this power in the Chief Justice of India and a collegium of four judges.[22] In no Constitution in the world is the power to select and appoint judges conferred on the judges themselves. All these administrative exercises by the Court are hung on the dubious jurisdictional peg of enforcing fundamental rights under Article 32 of the Constitution. In these cases it would not be wrong to say that the court has clearly transcended the limits of the judicial function and has undertaken functions that really belonged to either the legislature or the executive. Its decisions clearly violated the limits that the doctrine of separation of powers had imposed on it.

A court is not equipped with the skills and competence to discharge functions that essentially belong to the other co-ordinate organs of the Government. Its institutional equipment is not adequate for undertaking legislation or administrative functions. Its actions in these areas are bound to be symbolic.[23]

Thus, from the above discussion it can be said that the activist role of the Judiciary is implicit in its power of Judicial Review. Judicial activism is a *sine qua non* of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell. But at the same time it must be remembered that the Courts are essentially meant for adjudication and certainly not for administration. Judicial activism is no substitute for good governance. The court in its quest of delivering justice should respect the boundaries that have been conformed upon it by the Constitution.

4. Judicial activism: A boon or a bane

".....the judiciary should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate. Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial 'ad hocism' nor judicial tyranny."

These words of Justice J.S. Verma quite aptly

21 Retrieved from: https://indialawyers.wordpress.com/2012/08/06/disturbing-trends-in-judicial-activism/ on March 5, 2015 at 05:30.

22 In the case of Supreme Court Advocates on Record Association vs. Union of India, AIR 1994 SC 268, retrieved from: https://indialawyers.wordpress.com/2012/08/06/disturbing-trends-in-judicial-activism/ on March 5, 2015 at 05:30.

23 supra note 2.

represent the boundaries and limitations of the judicial activism, which is an inevitable product of the court's power of 'Judicial Review'. As seen in the previous chapter of this project, the prevalence of the phenomenon of Judges acting 'actively' is widespread and rampant in our Judiciary. And though the term 'judicial activism' denotes a negative connotation in itself because of diluting the separation of power amongst the different wings of the State yet it won't be wrong to say that it has also acquired quite a positive appraisal from different people over the time for its dynamism owing to which the rights of powerless minorities and the downtrodden strata of the society have been preserved numerous times. But that is not to say that the judicial activism is a warranted facet of the Judiciary. The law ought to have stability and predictability. The burst of judicial activism in some cases might often lead to mind boggling judicial decisions which are definitely not what the purpose of having an 'active' judges is.

No doubt, the phenomenon of judicial activism is definitely repudiation of the doctrine of Separation of Power and tampers the wheel of balance between the different wings a democracy. The main thrust of the criticism is that the Judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and is running the country, and according to some, even ruining it. What these critics of the judiciary overlook is that it is the tardiness of the legislatures and the indifference of the executive to address itself to the complaints of the citizens about violations of their human rights and unfair treatment which provides the necessity for judicial intervention.[24]

Thus, what we need to appreciate is that the reason for this judicial transformation of the original scheme of the Constitution has been facilitated because of the dysfunctionality and ineffectiveness of the other two branches of government both at the Centre and in the States, and on account of widespread corruption in the politics. The judiciary, no doubt, on several occasions tend to overstep into the parlance of the other two wings of the State, but what is discernable of these instances is that the judicial power or activism is inversely proportional to the political process. The weaker the political process stronger is the judicial power; and vice versa. By means of judicial activism, the Judiciary merely assists in the process of governance; it does not take over the functions of the other wings of the Government.

It is, of course, true that our Constitution comprehends three co-equal branches of the Government. No democracy and no constitution gives absolute powers to the judiciary. In fact, it must be acknowledged that the consolidation of power by any one branch of government is anathematic to the very idea of democracy. Consequently, judicial creativity ought not to result in subverting the Constitution. Any attempt made by the judiciary to re-write the Constitution, particularly in light of the Court's own creation of the basic structure doctrine, ought to be regarded as unconstitutional as that won't be 'Judicial Activism' but rather 'Judicial Overreach' or 'Judicial Tyranny'. An act of the judiciary that is motivated purely by goals other than those enshrined in the Constitution must be considered constitutionally illegitimate, and such an act must be curbed in its infancy. Nevertheless, we must appreciate that in embracing the phenomenon of judicial activism the courts haven't done away with the principle of separation of powers altogether. They have in fact breathed new life into it by filling up the lacuna created in the democratic governance by the inactivity of other two organs and not to usurp their functions.

24 Dua, B. D., M.P. Singh, Rekha Saxena, Indian Judiciary and Politics: The Changing Landscape, Lordson Publishers, 2008 edition, at p. 25.

Thus, in as much as the courts have used the *'judicial activism'* for ensuring social justice and delivering relief to the sufferings of the entire community, it can certainly be considered to be a boon for without it the spirit of the Constitution would be a dead corpse rather than being an organic entity which grows with the society's needs.

Conclusion

The concept of 'judicial activism' is always seen with prejudice for the reason that it hits at the foundation of the doctrine of the Separation of Powers, which is a vital characteristic of our Constitution. The court in the exercise of this 'judicial activism' has time and again clearly transcended the limits of the judicial functions and has taken upon itself the functions that lie in the parlance of the other organs of the State. Also what is important to notice here is that a court is not equipped with the dexterities and competence to perform the functions that essentially belong to the other co-ordinate organs of the Government. But what if the other organs of the State clearly fail on their part to perform their respective constitutional duties? What if there is no law to deal with a peculiar circumstance that needs immediate attention? What if there is a clear violation of human rights in enforcement of certain policies by the executive? The only remedy that lies in the hands of the common society is to move to the courts and ask for the enforcement of their rights. The courts unlike the other two branches do not possess a representative character arising out of the popular mandate and are thus placed at a different pedestal. The judiciary, unlike the other two branches is neither elected by the people nor does it have any power over the purse or the sword. What it has is the constitutional duty of preserving the rights of the citizens against the arbitrary action of the state and by the virtue of this duty it possesses the power of reviewing all legislative and executive actions as to whether they are in conformity with the constitutional law of the land. It is the guardian of the fundamental rights, customary or written in charter, and the repository of justice.[25]

It has valiantly fulfilled its primary responsibility of upholding the Constitutional goals. It is the Court's constitutionally mandated duty to enforce the law, not for each minor violation but for those violations that result in grave consequences for the public at large. In such cases, no criticism of such acts as 'judicial activism' is sustainable in our constitutional framework. Despite being inspired by the constitutional objective of socio-economic justice, the Court has been rather cautious in its activism. It is only when both the legislature and the executive have failed to provide legislation in an area, that the Court has found it to be the duty of the judiciary to intervene and, that too, only until the Parliament enacts proper legislation covering the area. In a manner of speaking, the Court has invited the legislature to pass laws in the very areas where it has passed directions to fill the legislative vacuum. Being pragmatic and prudent, the court has withstood the test of time and proved to be an illustrious example of an active judiciary in a democratic setup.

Thus, the aforesaid cases clearly reveal that the courts in India have not violated the mandatory Constitution, rather they have only issued certain directions. Some of them are admittedly legislative in nature, but the same have been issued only to fill up the existing vacuum, till the legislature enacts a particular law to deal with the situation. Therefore, there cannot be any justification for anyone to say that judiciary has become judocracy, and has taken over the role of the executive and legislature.

But it is not to say that the courts should intentionally transgress from the defined

25 Id., at p. 20.

boundaries of its functioning. Such circumstances should not provide courts with a blank cheque. Courts are not allowed to pursue their own agenda and they should act in a way that is both necessary and proper to restoring the balance. They should in every circumstance respect the Constitutional limitations and act within the four walls of the Constitutional Law.

Thus, I would like to conclude by saying that with its activism, the Supreme Court has only protected the citizenry, particularly the weak and the downtrodden sections against the tyrannous and arbitrary acts of the legislature and the executive. Thus, 'judicial activism' has served as an invaluable tool, a boon indeed, for the court in strengthening our democracy and by employing it strategically and cautiously, the courts can very profoundly enrich our fundamental rights jurisprudence and the spirit of our Constitution.

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The Soul is not composed of any materials. It is unity indivisible. Therefore it must be indestructible.

– Swami Vivekananda

B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

S. 194-I: In deciding whether a payment is for "use of land", the substance of the transaction has to be seen. If the payment is for a variety of services and the use of land is minor, the payment cannot be treated as "rent"

M/s. Japan Airlines Co. Ltd. vs. Commissioner of Income Tax

[Civil Appeal No. 9875 of 2013, dated 4th August, 2015] [2015] 60 taxmann.com 71 (SC)

The Supreme Court had to consider the conflict of judicial opinion between the Delhi High Court in *CIT vs. Japan Airlines Co. 325 ITR 298 (Del.)* and that of the Madras High Court in *CIT vs. Singapore Airlines Ltd 358 ITR 237 (Mad.)* on the question whether landing/parking charges paid by an airline company to the AAI were payments for a contract of work under Section 194-C and not in the nature of 'rent' as defined in Section 194-I. The Delhi High Court decided the issue in favour of the department following its earlier decision in the case of *United Airlines vs. CIT 287 ITR 281*. It took the view that the term 'rent' as defined in Section 194-I had a wider meaning than 'rent' in the common parlance as it included any agreement or arrangement for use of land. The High Court further observed that the use of land began when the wheels of an aircraft touched the surface of the airfield and similarly, there was use of land when the aircraft was parked at the airport. However, the Madras High Court dissented from the view of the Delhi High Court. The Supreme Court reversing the Delhi High Court and affirming the Madras High Court has held as under:

"(i) From the bare reading of s. 194-I, it becomes clear that TDS is to be made on the 'rent'. The expression 'rent' is given much wider meaning under this provision than what is normally known in common parlance. In the first instance, it means any payment which is made under any lease, sub-lease, tenancy. Once the payment is made under lease, sub-lease or tenancy, the nomenclature which is given is inconsequential. Such payment under lease, sub-lease and/or tenancy would be treated as 'rent'. In the second place, such a payment made even under any other 'agreement or arrangement for the use of any land or any building' would also be treated as 'rent'. Whether or not such building is owned by the payee is not relevant. The expressions 'any payment', by whatever name called and 'any other agreement or arrangement' have the widest import. Likewise, payment made for the 'use of

any land or any building' widens the scope of the proviso;

(ii) The charges which are fixed by the AAI for landing and take-off services as well as for parking of aircraft are not for the 'use of the land'. That would be too simplistic an approach, ignoring other relevant details which would amply demonstrate that these charges are for services and facilities offered in connection with the aircraft operation at the airport. There are various international protocols which mandate all such authorities manning and managing these airports to construct the airports of desired standards which are stipulated in the protocols. The services which are required to be provided by these authorities, like AAI, are aimed at passengers' safety as well as on safe landing and parking of the aircraft. Therefore, it is not mere 'use of the land'. On the contrary, it is the facilities, that are to be compulsorily offered by the AAI in tune with the requirements of the protocol, which is the primary focus;

(iii) When the airlines pay for these charges, treating such charges as charges for 'use of land' would be adopting a totally naïve and simplistic approach which is far away from the reality. We have to keep in mind the substance behind such charges. When matter is looked into from this angle, keeping in view the full and larger picture in mind, it becomes very clear that the charges are not for use of land *per se* and, therefore, it cannot be treated as 'rent' within the meaning of Section 194-I of the Act;

(iv) However, the reason given by the Madras High Court that the words 'any other agreement or arrangement for the use of any land or any building' have to be read *ejusdem generic* and it should take its colour from the earlier portion of the definition namely "lease, sub-lease and tenancy" and to thereby, limit the ambit of words 'any other agreement or arrangement' is clearly fallacious. A bare reading of the definition of 'rent' contained in Explanation to Section 194-I would make it clear that in the first place, the payment, by whatever name called, under any lease, sub-lease, tenancy which is to be treated as 'rent'. That is rent in traditional sense. However, second part is independent of the first part which gives much wider scope to the term 'rent'. As per this whenever payment is made for use of any land or any building by any other agreement or arrangement, that is also to be treated as 'rent'. Once such a payment is made for use of land or building under any other agreement or arrangement, such agreement or arrangement gives the definition of rent of very wide connotation. To that extent, High Court of Delhi appears to be correct that the scope of definition of rent under this definition is very wide and not limited to what is understood as rent in common parlance. It is a different matter that the High Court of Delhi did not apply this definition correctly to the present case as it failed to notice that in substance the charges paid by these airlines are not for 'use of land' but for other facilities and services wherein use of the land was only minor and insignificant aspect. Thus it did not correctly appreciate the nature of charges that are paid by the airlines for landing and parking charges which is not, in substance, for use of land but for various other facilities extended by the AAI to the airlines. Use of land, in the process, become incidental. Once it is held that these charges are not covered by Section 194-I of the Act, it is not necessary to go into the scope of Section 194-C of the Act.



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Advocates

DIRECT TAXES
High Court

REPORTED

1. Section 28 – Business loss – Write off of slow moving items pertaining to stores and spares due to deterioration – Change in accounting system – Followed in earlier years – Allowable.

CIT vs. Indian Rare Earths Ltd. (2015) 121 DTR (Bom.) 151

Assessee wrote off 95 per cent of the value of stores and spares which had not been utilised for more than three years, and the same had deteriorated. The AO disallowed the same as the assessee had changed its accounting system. The Hon'ble High Court held that write off of slow moving items was on account of deterioration of spares and the same was followed in earlier years, further held that just because there is a change in accounting system the write off cannot be disallowed. *CIT vs. Heredilla Chemicals 225 ITR 532 (Bom.)* distinguished.

2. Sec. 80-IB(10) – Car Parking not includible in build-up area of residential unit for determining built up area for the purpose of deduction u/s 80-IB – A.Y. 2004-05

CIT vs. Subba Reddy (HUF) (2015)121 DTR (Mad.) 115

The AO had disallowed the claim of the assessee for the reason that if the area of the car park is included in the area of the flat, the area would exceed 1,500 sq. ft., and the reasoning being car park is allotted to the buyer of flat with a clear demarcation of the location and the fixed cost of the same is included in the flat. The High Court held that for the relevant year there was no definition of build up area, the same was defined from A.Y. 2005-06 onwards, u/s. 80-IB (14)(a), and reference was also drawn from Tamil Nadu Apartment Ownership Act, 1994, the High Court held that car park area is not includible in the build-up area of the residential unit for the purpose of determining maximum build-up area u/s. 80-IB(10).

3. Sections 148, 147 – Reassessment – Reasons to believe

Madhukar Khosla vs. ACIT (2014) 90 CCH 0023 Del HC

Reopening of assessment after expiry of four years. Full and true disclosure of material facts. Assessee/petitioner filed return for A.Y. 2006-07. Return was selected for scrutiny and a notice was issued u/s. 142(1) along with a questionnaire. Required details were furnished by assessee and AO, accepting explanations completed assessment u/s. 143(3). Subsequently after expiry of four years AO reopened assessment on ground that assessee had

added certain amount to capital account of his proprietorship concern and during course of assessment proceedings assessee offered no explanation to addition of amount to capital account, and same was required to be taxed u/s. 68. Assessee's objections were dismissed by AO. On Writ in High Court, the High Court allowed the Writ Petition and held that foundation of AO's jurisdiction and *raison d'etre* of a reassessment notice are "reasons to believe". Same should have a relation or a link with an objective fact, in form of information or facts external to materials on record. Such external facts or material constitute driver, or key which enables authority to legitimately re-open the completed assessment. If there were no "reasons to believe" based on new, "tangible materials", then reopening amounts to an impermissible review. In instant case, no details were provided as to what such information is which excited AO's notice and attention. Reasons must indicate specifically what such objective and new material facts are, on basis of which a reopening is initiated under s. 148. Reassessment was not made on basis of new (or "tangible") information or facts that which Revenue came by. It was in effect a re-appreciation or review of facts that were provided along with original return filed by assessee.

4. Section 80P – Providing Credit Facilities to members – S/80P(2)(a)(i) & 80P(4) of IT Act

Quepem Urban Co-operative Credit Society Ltd. vs. ACIT (2015) 120 DTR (Bom.) 153

The assessee was a co-operative society registered under the Goa Co-operative Societies Act, 2001. The appellant filed its return of Income declaring total Loss claiming exemption u/s 80P(2)(a)(i) of IT Act. The AO disallowed assessee's claim on the ground that the appellant was a primary co-operative bank and therefore, hit by the provisions of S.80P(4) of the Act which excluded the benefit of S. 80P of the Act to co-operative banks. On appeal in CIT(A), the CIT(A) allowed the appellant's appeal holding that the appellant is not a co-operative bank but a co-operative credit society. Thus, not hit by the exclusion provided under S. 80(P)(2)(i) of the Act. On appeal in Tribunal, Tribunal allowed the appeal of the Revenue to the extent that it held that the appellant was a co-operative bank and therefore, not entitled to the benefit of S. 80P(2)(a)(i) of the Act in view of the exclusion provided in S.80P(4) of the Act. On revenue's appeal in Tribunal, Tribunal allowed appeal and held that appellant is a co-operative bank and therefore not entitled to the benefit of S. 80(P)(4) of the Act. On assesses appeal in HC, Hon'ble HC allowed the appeal of the assessee and held that assessee being co-operative society's principal business was not accepting deposits from public and there was no byelaws specifically prohibiting admission of any other co-operative bank for the purposes of S.80(P)(4), thus, the assessee was entitled to the benefit of deduction u/s. 80P(2)(a)(i) of the Act.

5. Section 271(1) (c) – Assessee furnishes inaccurate particulars coupled with absence of satisfactory – 27(1)(C) of Act justified

Commissioner of Income Tax vs. Balarampur Chini Mills Ltd. (2015) 93 CCH 0127 Kol HC

Assessee filed return showing total income of ` 9,63,48,819/. Book-Profit was shown at ` 65,49,20,882/- u/s. 115JB. It was observed that assessee had disclosed additional amount of ` 3,40,00,000.Assessment was, reopened and notice was issued on 18-4-2006 and served on assessee. Assessee replied on 22nd April, 2006 to consider return filed on 3-4-2006 as return filed u/s. 148. It appeared that in previous year relating to assessment year, assessee had made payments of ` 3,40,00,000/- to U.P. Distillers Association. Search was conducted u/s 132, in office of U.P. Distillers' Association and payment of ` 3,40,00,000/- was found, made by assessee. Since assessee offered additional income due to search operation u/s. 132 in

the premises of UP Distillers Association, penalty proceedings u/s. 271(1)(c) was initiated separately. CIT(A) deleted penalty imposed on assessee and the same was confirmed by the Tribunal. On Revenues appeal, the Hon'ble HC allowed appeal of Revenue and held the court held that, from letter addressed by assessee to Joint Director of Income Tax, it appeared that assessee was informed that summons had been issued with regard to payments appearing to have been made by assessee to U.P. Distilleries Association. Provisions of sub-section 1 of Section 271 suggests that if assessee furnishes inaccurate particulars coupled with absence of satisfactory explanation, that would *per se* make assessee liable to pay penalty. The court further held that concealment of income in that case should be presumed provided assessment and that lead to addition or disallowance of any amount in computing his total income. Assessee on his own showing had furnished inaccurate particulars and has futher admitted that return originally filed by him included expenditure disallowable u/s. 37(1) which occasioned revised return filed by him by which a sum of ` 3.40 crores was added by assessee himself to his total income originally returned. The court also held that penalty u/s. 271(1)(c) is civil liability and wilful concealment is not essential ingredient. Assessee's case was that there was no deliberate concealment. Clause (c) of Section 271(1) originally qualified act of concealment of income or furnishing of inaccurate particulars with expression 'deliberately' which was omitted by the Finance Act, 1964 w.e.f. 1-4-1964 as result concealment of income or inaccurate particulars need not originally have been furnished deliberately. Use of expression 'deliberately' was pointer to show that mens rea was necessary element. With omission of expression 'deliberately', mens rea was no longer a pre-requisite for imposition of penalty. Explanation to Section 271(1) raises a presumption of concealment when difference was noticed by AO between return and assessed income. Burden was then on assessee to show otherwise, by cogent and reliable evidence. Revenue's appeal was confirmed by HC.

UNREPORTED

6. Section 40(a)(ia) – Disallowance for failure to deduct tax at source – Expenditure in the nature of reimbursement

CIT vs. DLF Commercial Project Corporation Income Tax Appeal Nos. 627 of 2012 & 507 of 2013 decided on 15th July 2015{Delhi High Court}

The provisions of TDS do not apply to reimbursement of expenses since there is no income element in reimbursement of expenses. In arriving at the aforesaid conclusion, the Hon'ble Court derived support from the Gujarat High Court's decision in *CIT vs. Gujarat Narmada Valley Fertilizers Co. Ltd. 217 Taxman 114 (Guj.).* A special leave petition (SLP) preferred by the revenue against the High Court's decision was dismissed by the Supreme Court on 17-1-2014 (in SLC CC No. 175 of 2014). The court is also stressed on the text of Section 194C and Section 194J. It was observed that neither provision obliges the person making the payment to deduct anything from contractual payments such as those made for reimbursement of expenses, other than what is defined as "income". The law thus obliges only amounts which fulfil the character of "income" to be subject to TDS.

7. Sec. 28(iii)(c) – Excise Duty refund – Whether taxable where the refund relates to a capital asset

CIT vs. Maithon Power Ltd. Income Tax Appeal No. 5 of 2015 dated 21st July, 2015. [Delhi High Court}

The assessee in the relevant A.Y. 2009-10 was in the process of setting up a thermal power generation plant at Maithon, Jharkhand. The project was at the stage of construction and installation of power plants. The assessee was required to pay excise and customs duty on goods and materials wherever applicable. Accordingly, the assessee paid excise duty of ` 2606.45 lakhs to its vendors. It lodged a claim

for ` 1246.29 lakhs with the DGFT under para 8.2(g) of the Foreign Trade Policy as "deemed export benefits". The DGFT admitted the claim of the assessee to the extent of ` 1059.35 lakhs but had not yet reimbursed the said amount to the assessee in the A.Y. in question. The assessee claimed that, being a part of the equipment cost, the excise duty had been accounted for as part of the project cost and the amount refunded will be reduced from the project cost and hence would not be taxable in the hands of the assessee. The AO treated the excise duty drawback claimed by the assessee as income of the assessee in the year of the claim itself. The AO referred to Section 28(iii) (c) which refers to "any duty of customs or excise repaid or repayable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971". The project was not operational during the A.Y. in question i.e 2009-10. The unchallenged finding of the lower authorities was that the business of the assessee had yet not been set up during the A.Y. 2009-10 and that all the costs incurred by it would have to be taken as capital work-in-progress and where there is a refund of excise duty it would go to reduce the project cost/ capital work in progress since it is relatable only to the capital assets. It was therefore held that for the purpose of Section 28(iiic) of the Act, the excise duty repaid to the assessee as drawback would have to relate to the business income of the assessee in order to be chargeable to tax under the head of "Profits and gains of business". In the case of the assesse, it related to the cost of acquisition of a capital asset which forms part of the overall project cost incurred in the pre-commissioning phase of the project. The duty drawback would therefore to that extent reduce the project cost and therefore cannot, in the A.Y. in question, be treated as business income. The Hon'ble Court referred to *Challapalli Sugars Ltd. vs. CIT [1975] 98 ITR 167 (SC)*, and *CIT vs. Bokaro Steel Ltd [1999] 236 ITR 315.*


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DIRECT TAXES
Tribunal

REPORTED

1. Charitable Trust – Registration under section 12A of the Income-tax Act, 1961 – Denial of registration for the reason that the trust not registered under Haryana Registration & regulation of Societies Registration Act, 2012 – not justified

Paramount Education Charitable Trust vs. CIT (2015) 120 DTR (Chd.) (Trib.) 461

The assessee trust created on 28th May, 2007 and has been registered with the Jt./ Dy. Registrar, Naraingarh. The assessee filed an application for registration under section 12A of the Act. The CIT on the basis of materials available and report received from A.O. observed that the assessee trust is not registered under the new Haryana Registration & Regulation of Societies Registration Act, 2012 and accordingly rejected the application for registration. The appellant being aggrieved by the order passed by CIT preferred an appeal before the Hon'ble Chandigarh Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee and held that assessee being a registered trust existing for aims and objects of general public utility as well as provision of education which are covered by the provisions of section 2(15), CIT was not justified in refusing the registration under section 12A for the sole reason that the trust is not registered under the Haryana Registration & Regulation of Societies Registration Act, 2012. Assessee is entitled for registration under section 12A of the Act.

2. Free Trade Zone – Exemption under section 10A of the Income-tax Act, 1961 – Deduction under section 10A is allowable on business income enhanced on account of disallowance under section 40(a)(ia) and section 43B of the Act. (A.Y.: 2007-08).

John Deere India (P) Ltd vs. Asst. CIT (2015) 121 DTR (Pune) (Trib) 203

The A.O. while finalising the assessment restricted the claim of deduction under section 10A of the Act on the disallowance made by him under section 40(a)(ia) and section 43B of the Act. The assessee carried the matter before the Hon'ble Pune Appellate Tribunal. The Appellate Tribunal allowed the claim of the assessee by observing that the

deduction under section 10A is allowable on business income enhanced on account of disallowance made under section 40(a)(ia) and section 43B of the Act.

Note: The Appellate Tribunal while allowing the claim of the assessee relied upon the decision of Hon'ble Bombay High Court in the case of *CIT vs. Gem Plus Jewellery India (P) Ltd. reported at (2011) 330 ITR 175 (Bom.)*

3. Free Trade Zone – Exemption under section 10A of the Income-tax Act, 1961 – Brought forward unabsorbed losses and depreciation of earlier years canot be set off while exemption under section 10A for the current year. (A.Y. 2006-07)

Safron Aerospace India (P) Ltd. vs. Dy. CIT (2015) 121 DTR (Bang.) (Trib.) 334

The assessee company is engaged in the business of software development. The assessee in its return of income claimed deduction under section 10A amounting to ` 4,60,96,559/-. The A.O. while finalising the assessment order observed that the assessee has not set off the brought forward losses and depreciation of earlier assessment years. The A.O. accordingly restricted the exemption under section 10A after considering the brought forward losses and depreciation of earlier assessment years. On appeal the First Appellate Authority upheld the action of the A.O. The appellant being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Bangalore Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee and held that exemption under section 10A has to be allowed without setting off brought forward unabsorbed losses and depreciation from earlier assessment year.

4. Business expenditure – section 37(1) of the Income-tax Act, 1961 – Expenditure on shuttering, centering, scaffolding, etc. – Expenditure incurred in accordance with the guidelines of the office circular issued by the concerned department – Allowable as business expenditure. (A.Ys.: 2006-07, 2007-08, 2009-10 & 2010-11)

U.P. State Bridge Corporation Ltd vs. Dy. CIT – (2015) 121 DTR (Lucknow) (Trib) 266

The A.O. while finalising the assessment made addition on account of shuttering, centering and scaffolding etc. by observing that the shuttering is a part of plant and machinery and as per section 32 of the Act, 100 per cent depreciation cannot be allowed on any plant and machinery. On appeal the First Appellate Authority partly allowed the claim of the assessee by allowing depreciation at 15 per cent. The assessee as well as department being aggrieved by the order passed by the Learned. CIT(A) preferred appeal before the Hon'ble Lucknow Appellate Tribunal. The Appellate Tribunal allowed the claim of the assessee and held that claim of expenses on shuttering, centering, scaffolding etc. made by the assessee, a construction company, in accordance with the guidelines laid down in an office circular is allowable as deduction, more so as no disallowance has been made on this account in the earlier year.

UNREPORTED

5. Anonymous donations – Section 115BBC of the Income-tax Act, 1961 – Donation received in donation boxes from numerous devotees – Is not taxable under section 115BBC of the Act. A.Ys. 2007-08 & 2008-09

Gurudev Siddha Peeth vs. ITO – [I.T.A. Nos. 3466 & 3467/ Mum. / 2012; Order dated 22-7-2015; Mumbai Bench]

The assessee trust was established by the renowned sage Swami Muktanand Paramhamsa in the year 1962 for study and practice of Siddha Yoga. The assessee trust during the relevant assessment years received donation / offering in the donation box at the Samadhi Shrine of Swami Muktanand and at Bhagwan Nityanand temple and paduka. The A.O. taxed the same under section 115BBC of the Act as anonymous donation. On appeal the first Appellate Authority partly allowed the appeal of the assessee and deleted the addition after observing that the assessee has maintained complete record from the persons from whom the donations has been received. The learned CIT(A) however upheld the action of the A.O. in taxing the offerings in the Samadhi Shrine of Swami Muktanand and Nityanand Dhyan Mandir as anonymous donation. The assessee being aggrieved by the order of the learned. CIT(A) preferred an appeal before the Hon'ble Mumbai Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee and held that the provisions of section 115BBC(1) will not apply to the donations like that has been received by the assessee in donation boxes from numerous devotees who have offered the offerings on account of respect, esteem, regard, reference and their prayer for the deity / siddha peeth. Such type of offerings are made / put into the donation box by numerous visitors and it's generally not possible for any such type of institutions to make and keep record of each of the donor with his name, address etc.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

NOTIFICATIONS

Section 35CCC of the Income-tax Act, 1961 – Expenditure on agricultural extension project – Notified eligible agricultural extension project

In the exercise of the powers conferred by section 35CCC of the Income-tax Act, 1961 the CBDT notified the following projects for the purpose of the above-mentioned section:

'Project Sugar Manufacturing & Co. generation of Power' of M/s. DCM Shriram Consolidated Limited, New Delhi to improve sugarcane productivity by educating farmers of best practices and adopting new/advanced technologies in area of sugar units at Ajbapur, Rupapur, Hariawan & Loni in the State of UP from date of formal issue of Notification till 31-3-2016 under the conditions specified in the notification.

'Safflower Agricultural Extension Project' of M/s. Marico Limited, Mumbai to improve the yield as well as increase the area under cultivation of safflower crops from date of formal issue of Notification till A.Y. 2018-19 under the conditions specified in the notification.

'Agriculture Extension Education Programme – Total Agri Solution Provider' of M/s. Aditya Birla Nuva Limited, Mumbai to provide value added services to help farmers to achieve higher yield, quality and profit; and to promote sustainable agriculture by introducing various techniques such as watershed management, organic farming from date of formal issue of Notification till A.Y. 2018-19 under the conditions specified in the notification.

'Avanti Aqua Culture Training and Development Centre' of M/s. Avanti Feeds Limited, Hyderabad to educate farmers about increasing Feed Conversion Ratio (FCR) and have better Average Daily Growth (ADG); to educate them on good pond practices so as to increase survival rate and ensure more income; and to educate farmers on advantages of mechanisation and latest developments of shrimp farming across the globe from date of formal issue of Notification till 31-3-2018 under the conditions specified in the notification.

(Notification No. 52/2015, 53/2015, 54/2015, 55/2015 dated 26-6-2015, 26-5-2015, 25-6-2015 and 30-6-2015 respectively)

Black Money (Undisclosed Foreign Income and Assets) and imposition of Tax Act (Removal of Difficulties) Order, 2015 – Amendment in section 1 of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

As per the order named the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act (Removal of Difficulties) Order, 2015.], in sub-section (3) of section 1 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015), for the words, figures and letters "the 1st day of April, 2016", the words, figures and letters "the 1st day of July, 2015" shall be substituted. This order shall come into force on the date of its publication in the Official Gazette.

(Notification No. 56/2015 dated 1-7-2015)

Section 59, read with section 63, of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 – Declaration of undisclosed foreign asset and time of payment of tax – Notified time limits

In exercise of the powers conferred by section 59 and sub-section (1) of section 63 of the [Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015] (22 of 2015), the Central Government appointed— (i) the 30th day of September, 2015 as the date on or before which a person may make a declaration in respect of an undisclosed asset located outside India; (ii) the 31st day of December, 2015 as the date on or before which a person shall pay the tax and penalty in respect of the undisclosed asset located outside India so declared, under the provisions of section 59 of the said Act.

(Notification No. 57/2015 dated 1-7-2015)

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015

In exercise of the powers conferred by sub-sections (1) and (2) of section 85 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015), the Central Board of Direct Taxes with the approval of the Central Government made the rules called the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 that shall come into force on the date of their publication in the Official Gazette.

(Notification No. 58/2015 dated 2-7-2015)

Section 10(15), item (h) of sub-clause (iv) of the Income-tax Act, 1961 – Exemptions – Interest on bonds/ debentures – Notified bonds

In exercise of the powers conferred by item (h) of sub-clause (iv) of clause (15) of section 10 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby authorised the entities mentioned in the notification, to issue, tax-free, secured, redeemable, non-convertible bonds during the financial year 2015-16, aggregating to amounts mentioned in the notification, subject to the conditions mentioned in the notification.

(Notification No. 59/2015 dated 6-7-2015)

Section 139D of the Income-tax Act, 1961 – Return of Income – E-returns – Extension of time limit for submitting ITR-V for electronically filed returns for A.Y. 2013-14 and A.Y. 2014-15

In exercise of the powers under clause (ii) of Para 14 read with clause (7) of Para 4 of the Centralised Processing of Returns Scheme, 2011 issued as per CBDT Notification No. SO.16(E) dated 4-1-2012 [2/2012], the DGIT (System) extended the time limit for submitting ITR-V forms relating to Income Tax Returns filed electronically (without digital signature certificate) for A.Y. 2013-14 (filed on or after 1st April, 2014 till 31st March, 2015) and for A.Y. 2014-15 (filed on or after 1st April, 2014 till 30th June, 2015). These ITR-V forms can now be submitted up to 31st October, 2015 or within a period of 120 days from the date of uploading of the electronic return data whichever is later.

(Notification No. 1/2015 dated 10-7-2015)

Section 139D of the Income-tax Act, 1961 – Return of Income – E-returns – Electronic Verification Code (EVC) for electronically filed Income Rax Return

In exercise of the powers delegated by the CBDT under Explanation to sub-rule 3 and sub-rule 4 of rule 12 of the Income-tax Rules 1962, the Principal Director General of Income-tax (Systems) laid down the procedures, data structure and standards for Electronic Verification Code. The mode and process for generation and validation of EVC and its use can be modified, deleted or added by the Principal DGIT (System) / DGIT (System).

(Notification No. 2/2015 dated 13-7-2015)

Section 119 of the Income-tax Act, 1961 – Income-tax authorities – Instructions to subordinate authorities – Validation of tax returns through electronic verification code

In case of returns of income pertaining to Assessment Years 2013-14 and 2014-15 filed electronically (without digital signature certificate) between 1-4-2014 and 31-3-2015, time-limit for submission of ITR-V to the CPC Bengaluru was extended till 31-10-2015 *vide* Notification No. 1 / 2015 dated 10-7-2015 issued by the Pr. DGIT (Systems), CBDT. In order to facilitate the process of validation of such returns, CBDT, in exercise of the powers conferred under sub-section (1) of section 119 of the Income-tax Act, 1961, directed that the taxpayer can validate such returns of income within the said extended time through EVC also.

(Order [F.No.225/141/2015/ITA.II], dated 20-7-2015)

Section 48 of the Income-tax Act, 1961 – Capital Gains

In exercise of the powers conferred by clause (v) of Explanation to section 48 of the Income -tax Act, 1961, the Central Government made further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), Central Board of Direct Taxes, published in the Gazette of India, Extraordinary, *vide* number S.O. 709(E), dated the 20th August, 1998. Accordingly the Cost Inflation Index for the Financial Year 2015-16 is 10817.

(Notification No. 60/2015 dated 24-7-2015)

CIRCULARS

Collection of Direct Taxes – Oltas

The Reserve Bank of India revised and updated the master circular which consolidates important instructions on the collection of direct taxes issued by Reserve Bank of India till June 30, 2015. A copy of the revised Master Circular RBI / 2014-15 / 108 dated July 1, 2014 can be downloaded from the website www.mastercirculars.rbi.org.in.

(Master Circular DGBA.GAD. No. 3/42.01.034/2015-16, dated 1-7-2015)

Nomination facility for Relief/Savings Bonds

In order to facilitate availability of all the current operative instructions on the subject at one place, a Master Circular incorporating instructions issued up to June 30, 2015 was issued by RBI. A sole holder or all the joint holders (investors) of a Relief / Savings bond, other than in the form of promissory note or bearer bond, may nominate one or more persons who in the event of death of the sole holder / all the joint holders, as the case may be, would be entitled to the Relief / Savings bond and to the payment thereon, provided that the person or each of the persons nominated is himself / herself competent to hold a similar bond. When nomination has been made in favour of a Non-Resident Indian, remittance of interest payment and / or maturity value, as the case may be, will be governed by the regulations as applicable to NRIs.

(Master Circular IDMD.CDD.No. 5983/13.01.299 /2015-16, dated 1-7-2015)

Appointment and delisting of brokers and payment of brokerage on relief/ savings bonds

In order to facilitate availability of all the current operative instructions on the subject at one place, a Master Circular incorporating instructions issued up to June 30, 2015 was issued by RBI. This circular has also been placed on RBI website www.rbi.org.in .

(Master Circular IDMD.CDD.No. 5984/13.01.299/ 2015-16, dated 1-7-2015)

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 – Explanatory Notes on provisions relating to tax compliance for undisclosed foreign income and assets as provided in Chapter VI of said Act

The circular explains the substance of the provisions of the compliance window provided for in the said Chapter VI of the Act. It gives information about Scope of compliance window, Rate of tax and penalty, Time limits for declaration and making payment, Form for declaration, Declaration not eligible in certain cases, Circumstances where declaration shall be invalid, Effect of valid declaration.

(Circular No. 12 of 2015 [F.No. 142/18/2015-TPL], dated 2-7-2015)

Kisan Vikas Patra, 2014 and Sukanya Samriddhi Account – Expeditious implementation of said schemes

Authorised banks will be paid commission for handling the work relating to the above two schemes as per the extant rates advised by our circular DGBA.GAD.No. 7575/31.12.011/2011-12 dated May 22, 2012. The Government of India has desired to have a bank-wise and region-wise weekly progress report on implementation of Sukanya Samriddhi Account. Accordingly, all agency banks implementing the scheme were advised to furnish region-wise weekly progress report indicating the number of Sukanya Samriddhi Accounts opened to Budget Division, Department of Economic Affairs.

(Circular DGBA.GAD.No. 14/15.02.003/2015-16, dated 2-7-2015)

Filing of Appeals on Merits – Observation of Courts – Instructions to it department to ensure optimal utilisation of available resources to obtain maximum benefit out of litigation

The apathy of the Department Officers is evident in another shocking incident where in a sensitive search case, appeal was filed by the Department in High Court. The Registry pointed out certain defects in filing of appeal and the Court granted time to remove the defects. This relates to the year 2009. From 2009 till 2014, no follow-up action was taken and the case was dismissed due to default on part of the Department in curing procedural defects. The Courts are taking a stern and inclement view as far as Department's actions in litigation matters is concerned. The significance of filing appeal and pursuing litigation only in deserving cases cannot be over-emphasised, more so in the backdrop of the fact that Department is facing shortage of officers at all levels. It is imperative that the available resources are optimally utilised to obtain maximum benefit out of litigation.

(Letter D.O. No. 279/M-88/2014-ITJ, dated 3-7-2015)

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 – Clarifications on tax compliance for undisclosed foreign income and assets

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015) had introduced a tax compliance provision under Chapter VI of the Act. The Black Money (Undisclosed Foreign Income and Assets) and

Imposition of Tax Rules, 2015 were notified. In regard to the scheme queries were received from the public about the scope of the scheme and the procedure to be followed. The Board has considered the same and decided to clarify the points raised in the form of questions and answers by issue of the circular.

(Circular No. 13 of 2015 [F.No. 142/18/2015-TPL], dated 6-7-2015)

Section 139A of the Income-tax Act, 1961 – Permanent Account Number (PAN) – Migration of PAN lying in old/ orphan/defunct jurisdiction

AIS instruction Nos. 80, AST instruction Nos. 97 and 134 relates to procedure for migration of PAN lying in old / orphan / defunct Jurisdiction to the Jurisdictional A.Os through the Nodal officer / jurisdiction. Presence of PAN in old / orphan / defunct jurisdiction leads to problem in timely processing of returns and also raises problems consequent to selection of PAN in CASS. Therefore it is advised that the work of migration of PAN from old / orphan / defunct jurisdiction should be completed before 31-7-2015 well before running of next CASS cycle.

(Letter F. No. DGIT(S)/DIT(S)-I/AIS MISC./0010/ 2015, dated 16-7-2015)

Updating of All India *inter se* seniority list of ITOs due to revision in compliance to Supreme Court judgment dated 27-11-2012 in case of *N.R. Parmar & Others vs. UOI & Others [2012] 28 taxmann.com 249 (SC)*

Consequent upon the decision of the Hon'ble Supreme Court in the case of N.R. Parmar has been implemented by Ahmedabad, Lucknow and Guwahati charge, CBDT is receiving representations from officers of these Regions for revision of their seniorities in the All India *Inter-se* Seniority List of ITOs. The Hon'ble CAT *vide* its Interim Order dated 11-6-2015 have directed the UOI not to make any further promotion based on the Final All India Seniority List of ITOs as on 1-1-2009.

(Letter F. No.A-23012/04/2012-AD.VI, dated 16-7-2015)

PRESS RELEASES

Section 139D of the Income-tax Act, 1961 – Filing of return in electronic form – Commencement of electronic filing of Income Tax Returns for A.Y. 2015-16

The Income Tax Department released the software for preparing the Income Tax Return forms 1-SAHAJ, 2, 2A and 4S- SUGAM for A.Y. 2015-16. The e-filing of these return forms is enabled on the e-filing website-https://incometaxindiaefiling.gov.in. ITR 1-SAHAJ, 2 and 2A can be used by an individual or HUF whose income does not include income from business. ITR 4S-SUGAM can be used by an individual or HUF whose income includes business income assessable on presumptive basis.

(Press Release, dated 1-7-2015)

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 – Notification of dates for compliance window under said Act

The Central Government notified the 30th day of September, 2015, as the date on or before which a person may make a declaration in respect of an undisclosed asset located outside India under the compliance provisions of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('Black Money Act'). The last date by which a person must pay the tax and penalty in respect of the undisclosed foreign assets so declared shall be the 31st day of December, 2015.

(Press Release, dated 1-7-2015)

Section 11, read with section 12AA, of the Income-tax Act, 1961 – Charitable or religious trust – Exemption of income from property held under – Standard Operating Procedure (SOP) for making application for claim of tax exemption under section 11(1)(c) in respect of remittance of money/relief articles by Indian NGOs/charitable organisations for earthquake hit people in nepal

In order to standardise the manner of seeking approval for tax exemption under the section 11(1)(c) of the Income-tax Act, 1961 and to streamline the process of remittance of money or relief-articles to Nepal, SOP have been outlined for the guidance of NGOs / Charitable Organisations. They are requested to adopt these procedures while participating in relief and rehabilitation operations at Nepal.

(Press Release, dated 8-7-2015)

India and USA signs Inter Governmental Agreement (IGA) to implement Foreign Account Tax Compliance Act (FATCA) to promote transparency in tax matters

Mr. Shaktikanta Das, Revenue Secretary of India and Mr. Richard Verma, U.S. Ambassador to India signed here today, an Inter Governmental Agreement (IGA) to implement the Foreign Account Tax Compliance Act (FATCA) to promote transparency between the two nations on tax matters. The agreement underscores growing international co-operation to end tax evasion everywhere. The United States enacted FATCA in 2010 to obtain information on accounts held by U.S. taxpayers in other countries. As per the IGA, FFIs in India will be required to report tax information about U.S. account holders directly to the Indian Government which will, in turn, relay that information to the IRS. The IRS will provide similar information about Indian account holders in the United States. This automatic exchange of information is scheduled to begin on 30th September, 2015.

(Press Release, dated 9-7-2015)

Clarification on reports appearing on Black Money Act

The CBDT has already issued an Explanatory Circular No. 12 dated 2-7-2015 and another Circular No. 13 dated 6-7-2015 containing a set of 'Frequently Asked Questions' (FAQs) clarifying various aspects of the Act. Any further issues and concerns that need clarification may be brought to the notice of the CBDT as mentioned in the Press Release.

(Press Release, dated 14-7-2015)

Section 139D of the Income-tax Act, 1961 – Return of Income – E-returns – Commencement of electronic verification of Income Tax Returns for A.Y. 2015-16

To facilitate the taxpayers and to provide end-to-end e-enabled services, the Income Tax Return for A.Y. 2015-16 can now be verified electronically. A taxpayer may verify his return through Internet Banking or through Aadhar based authentication process. Persons using this facility will not be required to submit a signed paper copy of ITR-Verification Form (ITR-V) to CPC Bengaluru. For the convenience of small taxpayers having total income of ` 5 lakhs or below without any claim of refund, facility for generating Electronic Verification Code (EVC) has also been provided on the E-filing website of the Department. In such cases EVC will be sent to the Registered E-mail ID and Mobile Number of person to enable him to thereafter use this code to verify the return. In case a taxpayer is unable to electronically verify the ITR using the EVC for any reason, then, the signed copy of ITR-V may be sent within the specified time of 120 days to CPC Bengaluru by Ordinary post or Speed post.

(Press Release, dated 14-7-2015)

Standard Operating Procedure (SOP) for making application for claim of tax exemption u/s. 11(1)(c) of the Income-tax Act, 1961 in respect of remittance of money/relief article by Indian NGOs/ charitable organisations for earthquake hit people in Nepal

The Press Release contains Note received from Ministry of External Affairs, Government of India on the routes available for Indian NGOs to work in Nepal as per guidelines of the Government of Nepal along with prescribed forms. In addition to the requirements conveyed through the earlier SOP (dated 8-7-2015), the Indian NGOs are further requested to furnish copies of 'letter of support' as well as copies of approval granted by SWC (Social Welfare Council, Ministry of Women, Children and Social Welfare, Government of Nepal) to the local NGOs of Nepal with whom Indian NGOs desire a tie-up, as the case may be, while submitting applications before CBDT seeking approval u/s 11(1) (c).

(Press Release, dated 21-7-2015)

INSTRUCTIONS

Section 119 of the Income-tax Act, 1961 – Income-tax Authorities – Instructions to subordinate authorities – Information security guidelines

Maintaining the confidentiality of taxpayers' information has assumed a greater significance in view of increased availability of information regarding offshore tax evasion and tax avoidance and stashing of unaccounted money abroad. Accordingly, an Information Security Committee (ISC) has been constituted in the Central Board of Direct Taxes (CBDT) under the Chairmanship of Member (IT) with a view to pulling in place a robust Information Security Mechanism in the Department. The ISC shall consist of a Chief Information Security Officer (CISO) and six other members. The responsibilities of the ISC and CI SO are enclosed at Annexure A. The Information classification guidelines (based on existing classification as per Manual of Departmental Security Instructions issued by the Ministry of Home Affairs in 1994) are enclosed at Annexure B. Information security guidelines in respect of (a) Physical and environmental security, (b) Personnel security, (c) Identity, access and privilege management, and (d) Security monitoring and incident management are enclosed at Annexure C.

(CISO Instruction No. 1 [F.No.500/62/2015-FTTR-III], dated 10-7-2015)

Section 143, read with section 154, of the Income-tax Act, 1961 – Assessment – Restriction on issuance of manual refunds by Assessing Officer

The CBDT has repeatedly instructed that in all cases orders must be passed on the system. This is also stressed in the Central Action Plan for each year. However, the CBDT has noticed the instances where the Assessing Officers have issued manual refunds even in cases which have been processed on AST. CBDT therefore decided that no manual refund should be issued in a case which has been processed on AST.

For monitoring by supervisory officers, the data of refunds issued manually and entered by the AOs in the screen will be matched with the data of such refunds encashed as per OLTAS database regularly to identify cases that have not been entered by AOs through MIS feature to be will be launched shortly. This process would continue till a separate functionality is developed in ITBA.

(AST Instruction No. 136 [F.No. DGIT(S)/DIT(S)-3/ ast/manual refunds/85-2015-16, dated 10-7-2015)


CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. SUPREME COURT JUDGMENTS

1. Payment made to a non-resident if inextricably connected with prospecting, extraction or production of mineral oil – taxable under section 44BB and not section 44D of the Income-tax Act, 1961

Oil & Natural Gas Corporation Limited vs. CIT – 121 DTR (SC) 289 – A.Ys. 1985-86 and 1986-87

Facts

i) The assessee entered into an agreement with M/s Foramer. France, a non-resident company, whereby Foramer France agreed to make available supervisory staff and personnel having experience and expertise for operation and management of drilling rigs. The assessee claimed that the amounts received in pursuance of the above activity was taxable under section 44BB of the Income-tax Act, 1961 ('the Act') (dealing with profits and gains in connection with the business of exploration etc. of mineral oils for non-residents). The Assessing Officer ('AO') took the view that the amount received by the non-resident was taxable under section 44D read with section 9(1)(vii) of the Act (dealing with income from royalty and fees for technical services in the case of foreign companies) and not under section 44BB of the Act.

ii) On further appeal to the Commissioner of Income-tax (Appeals) ['CIT(A)'] and the Income-tax Appellate Tribunal ('ITAT'), it was held by both the authorities that the amount received by the non-residents was in fact taxable under section 44BB of the Act. Aggrieved by the order of the ITAT, revenue preferred an appeal before the High Court.

iii) The High Court overturned the view taken by the ITAT and held that the payments made to the non-resident was liable to tax under section 44D read with section 9(1)(vii) of the Act. After considering the contract, the High Court was of the view that the contract clearly contemplated rendering of technical services by personnel of the non-resident company and that it did not mention that the personnel were also carrying out the work of drilling of wells. The High Court had also considered Circular No. 1862 dated October 22, 1990 issued by the Central Board of Direct Taxes ('CBDT') wherein the Attorney General had opined that the term 'mining project' or 'like project' contained in the exclusionary explanation to section 9(1)(vii) of the Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation of oil and natural gas. Aggrieved by the order of the High Court, the assessee approached the Supreme Court.

Judgment

i) The Supreme Court referred to the meaning of 'mines' and 'minerals' from the Mines Act, 1952 and Oil Fields (Development and Regulation) Act 1948 and concluded that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation.

ii) The Court observed that the circular issued by the CBDT was important as it clarified that the words 'mining projects' and 'like projects' contained in section 9(1)(vii) of the Act covered rendering of services like imparting of training and carrying out of drilling operations.

iii) The Court examined the agreements and concluded that the dominant purpose of each agreement was for prospecting, extraction or production of mineral oils though there may be certain ancillary work contemplated.

iv) Therefore it held that the payments to the non-resident were squarely covered by section 44B of the Act and stated that no other view could be taken if the works or services mentioned under an agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil.

B. HIGH COURT JUDGMENTS

2. Rate of commission paid to Non – Associated Enterprise ('Non AE') agents not comparable to rate of commission paid to AE agents where scope of activity carried on by the agents were not comparable

CIT–8 vs. M/s. Garware Polyster Ltd. – (Bombay High Court) – ITA Nos. 1434 of 2013, 1371 of 2013 & 1526 of 2013 – A.Ys. 2003-04, 2005-06 & 2006-07

Facts

i) The assessee was engaged in the manufacture and sale of a variety of polyester and sun control films which could be classified into Consumer Products and Industrial Products. For the purpose of selling its products to customers located in countries such as Iran, Egypt, Argentina, Sri Lanka, Philippines, South Africa, Turkey etc., the assessee appointed Non-Associated Enterprise ('Non AE') agents who were responsible for canvassing the orders and ensuring timely delivery of products. For countries such as the UK and the USA, the assessee had set up wholly owned subsidiaries in the capacity of sole selling agents to undertake marketing, promotion, business development and distribution of its products in the said countries.

ii) Pursuant to the agency services received, the assessee paid its Non-AE agents commission at an average rate of 5 per cent and paid a commission of 12.5 per cent to its AE's in the UK and USA.

iii) The Transfer Pricing Officer ('TPO') was of the view that the commission paid to the AEs were excessive in nature and arrived at such conclusion by using the average rate of commission paid to its Non-AE agents.

iv) The assessee filed an appeal before the CIT(A) who held that the approach adopted by the TPO was incorrect as the commission paid to the Non-AE agents and AE agents could not be compared. The CIT(A) made a detailed analysis highlighting the difference between the two, which is summarised below:

a. The AE agents were appointed as sole selling agents who were entrusted with additional duties of market development, advertising and sales promotion on its own cost. The Non-AE agents being indenting agents only engaged in canvassing orders with limited risks not obligated to perform any sort of marketing functions.

b. The nature of products covered under the agreement with AE agents included both Consumer Products and Industrial Products whereas the agreement with Non-AEs was confined to Industrial

Products. The Consumer Products were of a large variety and had substitute products as well, requiring greater effort on the part of the AE agents in developing the market.

c. The AE agents were located in the UK and USA where the cost of operations were considerably higher as compared to the countries in which the Non-AE agents were located.

d. The competition and customer awareness in the UK and USA markets were far greater than the other markets requiring extensive sales and marketing efforts on the part of the AE agents.

Resultantly, the CIT(A) used the commission paid by the assessee to one non-AE agent with limited risk i.e. 8 per cent as a benchmark and provided an additional 2 per cent benefit on account of additional risk attached to the full-fledged AE agent and arrived at an arm's length price of 10 per cent. Since the commission of 12.5 per cent paid by the assessee fell within the 5 per cent adjustment of arm's length price, no addition was made.

v) The Revenue filed an appeal before the ITAT against the order passed by the CIT(A). The ITAT upheld the order of the CIT(A) thereby ruling in favour of the assessee. The Revenue preferred an appeal before the High Court.

Judgment

i) The Hon'ble High Court, upheld the order of the ITAT and ruled in favour of the assessee on the grounds that the view taken by the ITAT was a reasonable and possible view, particularly in view of the fact that the scope of activity involved in respect of the agency work done by the AE agent was much wider than that done by the Non-AE agent.

ii) Comparable companies selected should be functionally comparable and need not be identical – Also negative net worth of a comparable in succeeding year – not relevant.

CIT–1 vs. M/s. DSM Anti Infectives India Ltd. (Punjab and Haryana High Court) – ITA No 116 of 2014 – A.Y. 2005-06

Facts

i) During the year under review, the assessee entered into various international transactions with its associated enterprises for the purchase of raw materials and finished goods, export of finished goods, purchase of capital goods, reimbursement of expenses and for corporate services.

ii) For the purposes of benchmarking the international transactions, the assessee used the transactional net margin method as the most appropriate method and selected six companies as comparable including Torrent Gujarat Biotech Limited ('Torrent Gujarat').

iii) Pursuant to the transfer pricing scrutiny proceedings, the TPO rejected the companies selected by the assessee amongst which Torrent Gujarat was rejected on the ground that it used a negligible amount of Penicillin G as a raw material. The TPO applied his own filters one of them being that only companies using Penicillin G as a raw material were to be considered and accordingly proceeded to select his own comparable companies and arrived at three companies, namely Aurobindo Pharma Ltd, Nectar Life Sciences Ltd. and Standard Pharmaceuticals Ltd. even though Standard Pharmaceuticals used even lesser Penicillin G, as raw material as compared to Torrent Gujarat.

iv) Aggrieved by the order of the TPO, the assessee filed an appeal before the CIT(A) for the inclusion of Torrent Gujarat. The CIT(A) held only one company to be comparable, namely Nectar Life Sciences Ltd.

v) Against the order of the CIT(A), both the revenue and the assessee filed appeals before the ITAT. The ITAT held that Torrent Gujarat, Aurobindo Pharma Limited, Nectar Life Sciences Limited and Standard Pharmaceuticals Ltd. were appropriate comparable companies. In

doing so the Tribunal accepted the contention of the assessee that Torrent Gujarat was not to be rejected as a comparable on the ground that in the filter applied by the TPO, the extent of use of Penicillin G was not specified and the filter only contemplated use of Penicillin G. Additionally, the ITAT noted that the TPO himself had not considered his filter as he had selected Standard Pharmaceuticals Ltd. even though the consumption of Penicillin was lower than that of Torrent Gujarat.

vi) The Revenue preferred an appeal before the Hon'ble High Court and also contended via an additional ground raised during the hearing that Torrent Gujarat had negative net worth in A.Y. 2006-07 which therefore did not satisfy the filters proposed by the TPO.

Judgment

i) The Honourable High Court held that the ITAT's conclusion that the said companies would be appropriate comparables irrespective of the percentage of use of Penicillin G since the companies selected should be functionally comparable and not identical could not be considered perverse or absurd.

ii) With regard to the additional contention raised by the Revenue, the High Court held that since the question was being raised for the first time it would be unfair to the assessee to permit the Revenue to proceed with it. However, the High Court held that since the year under review was A.Y. 2005-06, the fact that Torrent Gujarat was a negative net worth company in A.Y. 2006-07 was not relevant and accordingly rejected the contention of the Revenue.

C. Tribunal Decisions

3. Taxability of off-shore supply of equipment and design and drawings – Held, on facts of the case, not taxable in India under the provisions of the Tax Treaty and the Income-tax Act, 1961

Outotec GmbH vs. DDIT – TS-349-ITAT-2015 (Kol.)] / 2015-TII-106-ITAT-KOL-INTL– Assessment Year: 2010-11

Facts

i) The assessee was a tax resident of Germany engaged in the business of providing innovative and environmentally sound solutions for a variety of customers in metal and mining processing industries. The assessee, earned revenue from Indian customers through sale of equipment, supply of designs and drawings, and provision of supervisory services.

ii) It had supervisory Permanent Establishment (PE) for certain projects in India in terms of the tax treaty. In the income tax return filed, the assessee attributed 17.93% of the gross revenue earned from supervisory activities to the Indian supervisory PE. The income earned from sale of equipment and from supply of designs and drawings was not offered to tax in its return.

iii) The Tax Officer (TO), in his draft assessment order, proposed to tax part of the income earned from sales of equipment to Indian customers. Further, the income earned from supply of designs and drawings was considered as taxable as royalty. In relation to income from supervisory services, the attribution percentage was enhanced to 27.5% of the gross revenue, from the 17.93% offered by the assessee. Additionally, interest under sections 234A and 234B were also proposed to be levied.

iv) The assessee filed objections before the Dispute Resolution Panel (DRP) against the draft assessment order. The DRP confirmed the additions made by the TO on all issues, and the final assessment order was passed accordingly.

Aggrieved by the final assessment order, the assessee filed an appeal before the Tribunal.

Issues before the Tribunal

i) Whether a part of the income earned from supply of equipment accrued or arose in India, and thus was taxable in India under the provisions of the Act read with the provisions of the tax treaty?

ii) Whether the net profit rate of 27.5% determined by the TO for attributing profits to Supervisory PE was justified, compared to the rate of 17.93% adopted by the assessee?

iii) Whether the supply of designs and drawings constituted outright sale and did not come within the meaning of royalty as per Article 12(3) of the tax treaty as well as Explanation 2 to section 9(1)(vi) of the Act?

iv) Levy of interest under sections 234A and 234B of the Act.

Decision

The Appellate Tribunal held in favour of the assessee as follows:

Re: Sale of Equipment

i) The Tribunal concluded that the sale of equipment took place outside India, and hence no portion of the receipts from the sale could be taxed in India. This conclusion was reached based on the following facts:

a) All activities relating to design, fabrication and manufacturing of equipment took place outside India.

b) Sale of Equipment to unrelated Indian customers was done from outside India on a principal-to-principal basis at arm's length, and consideration was also received outside India.

c) The documents and clauses of the agreement clearly stated that the equipment was sold directly by the assessee on an export sale basis, and the title/ ownership of equipment was transferred outside India.

d) The Tribunal accepted the principle laid down in *Ishikawajima-Harima Heavy Industries Ltd vs. DIT [2007] 288 ITR 408 (SC)* that if title was transferred outside India, no profit arose in India.

e) In connection with various acceptance tests, the Tribunal held that if the test failed, it could result only in payment of liquidated damages by the assessee, and hence the clause could be considered as a warranty provision. Reliance was placed on the decisions of Delhi HC in *DIT vs. LG Cable Ltd [2011] 237 CTR 438 (Delhi)*, Delhi Special Bench in *Motorola Inc. vs DCIT [2005] 95 ITD 269 (Delhi)(SB)* and of the AAR in Hyosung Corporation. In re (*AAR) [2009] 314 ITR 343 (AAR)*. Deferred payment relating to an acceptance test did not have any impact on sale of goods, which was supported by the definition of "sale" mentioned under section 2(g) of the Central Sales-tax Act, 1956.

f) Department's contention that the contract was a composite contract, and taxability could not be split into separate parts, was not accepted by the Tribunal based on the SC decision in *Ishikawajima-Harima Heavy Industries Ltd vs. DIT [2007] 288 ITR 408 (SC)*.

g) Revenue's reliance on the AAR decision in Alstom Transport SA, In re [2012] 251 CTR 193 (AAR was no longer valid as it had been overruled by the Delhi HC in *Linde AG, Engineering Division vs. DDIT [2014] 365 ITR 1(Delhi)*.

h) No PE of the assessee was created by sale of equipment. Income earned from supervisory activities had been attributed to supervisory PE in India and had been considered taxable. Thus, income earned from sale of equipment was not taxable as per tax treaty provisions.

Re: Income from Supervisory Activities

The ITSC, in the assessee's own case for earlier years, had held a profit rate of 27.5% applicable for attributing income from supervisory services. As no reason was provided by the assessee to deviate from this decision, the Tribunal had confirmed the rate of 27.5%.

Re: Income from Supply of Design and Drawings

i) Basic engineering packages sold by the assessee were largely designed on the basis of standard technologies available with it, and hence the consideration was for sale of products which were embedded in plants set up by Indian customers. Principles emerging from the decisions in *Scientific Engineering House Pvt. Ltd. vs. CIT [1986] 157 ITR 86 (SC)* and by the *Jaipur Tribunal in Modern Threads (I) Limited vs. DCIT [1999] 69 ITD 115* were accepted by the Tribunal and it was held that income from sale of designs and drawings would be considered as business income, and not royalty.

ii) The designs and drawings were used by Indian customers for internal business purposes and not for commercial exploitation. Thus, payments made by the Indian customers were for use of copyrighted articles rather than use of copyright. Hence the assessee's income could only be considered as business income and not as royalty.

iii) Retaining intellectual property in designs and drawings sold by the assessee was similar in nature to retaining patent rights in any goods / machinery; it did not change the character of a transaction from sale of product to licence / know-how.

iv) As the entire work in relation to designs and drawings was done outside India, sales were effected outside India, and consideration was also received outside India, the assessee's business income from sale of designs and drawings was not liable to tax in India under both, the Act and the tax treaty.

Note:

The Tribunal has delivered this judgment based on specific sets of facts and the decision cannot be uniformly applied to determine taxability of all offshore supply and designs and drawings in India. Before applying the decision, the facts of each case need to be carefully analysed. Further, the principle enunciated in the decision should not be construed as final as the chances of the Department appealing to the HC cannot be ruled out

4. Mumbai Tribunal Ruling – Whether the meaning of expression "associated enterprise (AEs)" as per the provisions of section 92A(1) is subject to the provisions of section 92A(2) under the Act

Kaybee Private Limited vs. ITO 2015-TII-204-ITAT-MUM-TP Assessment Year: 2008-09

Facts

i) Kaybee Private Limited ('the assessee') was engaged in the business of running business centre by providing amenities. During the financial year 2007-08, the assessee received service charges / commission charges for making purchase of textiles, yarns etc. on behalf of Kaybee Exim Pte Limited, Singapore. ('Kaybee Singapore').

ii) The Assessing Officer ('A.O.') observed that as per the website of Kaybee group, Kaybee Singapore is based in Singapore and as per their various locations and one of the locations is shown in India and the assessee is a representative company of Kaybee group. Among other things, the A.O. observed that Mr. Govind Karunakaran was a Chief Operating Officer and director of Kaybee Singapore and was also one of the directors of the assessee company holding 99.9% of the shares.

iii) Further, after considering the list of directors / promoters since its inception and the above facts, the A.O. held that the assessee company and Kaybee Singapore are associated enterprises ('AEs') as per section 92A of the Income-tax Act, 1961, ('the Act'). Further, the CIT(A) also confirmed the view of the A.O. by holding that the assessee company and Kaybee Singapore are AEs as per the provisions of section 92A of the Act.

Assessee's Contentions
The assessee contended that

i) In order to hold the two enterprises as AEs, the conditions prescribed under section 92A(2) are to be satisfied. Thus an enterprise can be an AE of the other as per the provisions of section 92A(1) only when any of the conditions prescribed under clauses (a) to (m) of section 92A(2) are satisfied i.e. the condition stipulated under clauses (a) & (b) of section 92A(1) have to be read in conjecture with the criteria prescribed in clauses (a) to (m) of section 92A(2).

ii) The assessee referred to the Memorandum of explanation of the Finance Bill, 2002 and submitted that it was clarified that "mere fact of participation by one enterprise in the management or control or capital of other enterprise or the participation of one or more person in the management or control or capital of both enterprises shall not make them AEs, unless the criteria specified in sub-section (2) are fulfilled."

iii) None of the enterprises hold direct or indirect share carrying not less than 26% of voting power in the other enterprise. Further, there is no loan, advance or any guarantee furnished by either of the enterprises to the other enterprise.

iv) One Director i.e., Mr. Govind Karunakaran is common in both the companies; but the requirement of clause (e) of section 92A(2) i.e. more than half of the Board of Directors or members of the governing board or one more Executive Director or Executive Member of the governing board of one enterprise has been appointed by the other enterprises is not fulfilled.

v) The condition in clause (j) of section 92A(2) applied by the authorities is incorrect as control of both the companies was not in the hands of one individual or his relative or jointly by such individual and relative.

vi) There is no criteria prescribed in section 92A(1) as to how one enterprise would be treated as participating directly or indirectly or through one or more intermediary in the management or control or capital of the other enterprise. In order to understand the correct meaning of the term "participation" directly or indirectly in the management or control or capital of the enterprise, the criteria prescribed in section 92A(2) has to be taken into consideration.

Department's Contentions
Section 92A(2) expands the scope of AEs and therefore, if the criteria prescribed under section 92A(2) are satisfied then, the two enterprises which may not be the AEs as per the provisions of section 92A(1) shall be deemed to be AEs. Reliance was placed on the decision of the Coordinate Bench of this Tribunal in the case of *Diageo India (P) Ltd. vs. DCIT 47 SOT 252 (Mumbai)* as well as in the case of *Sanchez Capital Services P. Ltd. vs. ITO [2012] 19 ITR (Trib.) 312 (Mumbai).*

Decision
The Appellate Tribunal observed and held as under:

i) The language of section 92A(1) is unambiguous and does not leave any scope of importing any meaning of expression 'AE'. Further, section 92A(1) does not begin with the subjective clause i.e. "subject to sub-sections (2)"

ii) Section 92A(2) is a deeming fiction and therefore, it enlarges the scope and meaning of expression 'AE' provided under section 92A(1). Section 92A(2) can be applied only in the specific facts of the case where any of the conditions stipulated in the clauses of section 92A(2) are fulfilled.

iii) The Tribunal has placed reliance on the decision of Co-ordinate Bench of Mumbai Tribunal in the case of Diageo (supra) where the Tribunal had the occasion to consider the meaning of 'AE' as per section 92A(1) and section 92A(2). The Tribunal in the case of Diageo (supra) was of the view that, 'all the clauses of deeming fictions set out in section 92A(2) are only illustration of the manner in which this *de facto* control on decision making exists'.

iv) The Tribunal observed that Mr. Govind Karunakaran was a director and 99.9% shareholder of the assessee company and was also a director and Chief Operating Officer of Kaybee Singapore. Therefore, Mr. Govind Karunakaran not only participated in the management of both the companies but he also held the key position in the management of Kaybee Singapore and was a part of decision making process of the said company since 1996.

v) Thus, according to the Tribunal, the condition of one enterprise participates directly or indirectly or through one or more intermediaries in its management or control or capital as prescribed under clauses (a) & (b) of section 92A(1) was satisfied. Hence, the Tribunal concluded that the assessee company and Kaybee Singapore fall within the meaning of AEs as per the provisions of section 92A.

(Note: Whether in a given case participation in control or management exists, or whether common person participates in the management or control of two enterprises is always a question of fact. The Tribunal after examining the facts came to a conclusion that common person participates in the management and control of two enterprises and hence, the same are associated enterprises.)

5. Transfer Pricing – Adjustment on account of location savings – Tribunal deleted location savings adjustment holding that the assessee had no unique advantage, operated in 'perfect competition', and was benchmarked against local comparables – In favour of the assessee

M/s. Watson Pharma Pvt Ltd. vs. DCIT 2015-TII-09-ITAT-MUM-TP – Assessment Year: 2009-10

Facts

i) Watson Pharma Private Limited (assessee) was engaged in contract manufacturing for its associated enterprises (AEs) and provided contract research and development services to its AEs. For these transactions, the assessee was compensated by its AEs on a total operating cost plus arm's length mark-up basis.

ii) The transactions with AEs, i.e., contract manufacturing for AEs and provision of contract research and development services, were benchmarked separately taking local comparables. Transactional net margin method was adopted as the most appropriate method.

iii) The primary adjustment made by the TPO was on account of locations savings owing to the transfer of activities from USA to India, which, as per the TPO, accrued to AEs on both the above mentioned transactions. The TPO made the adjustment on the basis of articles available in public domain, which contained an analysis of costs undertaken in different jurisdictions. The TPO concluded that there was a significant reduction in costs in India *vis-à-vis* those in the USA. Based on this, location savings were computed and thereafter allocated equal*ly between Watson Pharma Pvt. Ltd. vs. DCIT [TS-3-ITAT-2015(Mumbai)-TP]* and the AE, because in the TPO's view, the assessee and the AE had similar bargaining power owing to their individual strengths. In doing so, the TPO relied on certain international judicial precedents, and on the Indian tax administration's position articulated in the UN TP Manual.

iv) Certain information was sought by the Revenue authorities from the assessee relating to cost of production in USA, AE's competitors in USA (i.e., whether they had similar facilities in India for costs savings), selling prices of AEs *vis-à-vis* selling prices of assessee to AEs, etc., which the assessee partly submitted. Revenue authorities alleged lack of details submitted by assessee, and assumed that the impact of savings was not passed on to the ultimate consumers / distributors.

Decision

The Tribunal held in favour of the assessee as follows –

i) Revenue authorities were unable to substantiate their adjustments from any authenticated/global material. Further, non-submission of records could not form the basis of making adjustments in arm's length price (ALP) on bald assertions. Reliance placed on decision in case of *UCB India Pvt. Ltd. vs. ACIT [2009] 124 TTJ 289 (Mumbai-Tribunal).* Therefore, one of the reasons for making the ALP adjustment was without any basis.

ii) The assessee as well as AEs operated in a perfectly competitive market, and the assessee did not have exclusive access to factors leading to location-specific advantages. As a result, no super profits arose in the entire supply chain. Thus, there was no unique advantage to the assessee over competitors.

iii) Comparables selected by the assessee were local Indian comparables operating in similar economic circumstances as the assessee. Where local market comparables were available, specific adjustment for location savings was not required. Reliance placed on ruling in case of *GAP International Sourcing (India) Pvt. Ltd. vs. ACIT [2012] 149 TTJ 437 (Delhi-Tribunal)* and OECD Guidance on Transfer Pricing Aspects of Intangibles (released pursuant to Action 8 of OECD/ G20 BEPS Project). Tribunal noted that G-20 countries had given their concurrence to this position, and India was a part of G-20.

iv) The articles relied upon by the TPO were web articles and not accepted by any forum, and reliance on them could thus not be treated as acceptable. Further, these articles were published in 2012 whereas the assessee's case related to Financial Year 2008-09, and thus interpolation could not be taken into consideration, unless specified.

v) The TPO arrived at the cost savings to AEs on the basis of articles which provided an analysis of costs undertaken in different jurisdictions. If at all this aspect was to be considered, it had to be in the context of the assessee, and not the AE. This was because the assessee was the tested party, and the international transaction had to be tested by comparing the same with uncontrolled comparable transactions, and not in the context of the AE. Therefore, financial results of the AE were not relevant, and any benefit/advantage to the AE was irrelevant if the PLI of the assessee was within the range of comparables Reliance placed on decision in case of *Syscom Corporation Ltd vs. ACIT [2013] 35 taxmann.com 600 (Mumbai-Tribunal).*

vi) International judicial precedents (case law) relied upon by the TPO related to fiscal years 1970 and 1980 when the economic scenario was completely different (primitive) as compared to the current economic scenario. Further, in those cases, assessees were not operating in a perfectly competitive market, unlike the assessee in the instant case. Those assessees instead operated in monopolistic economic situations and there were intangibles held by, or transferred to them.

vii) Incorrect reliance was placed by the TPO on the UN TP manual, which was a view of the Indian tax administration and was not binding on appellate authorities.

viii) Facts remaining the same, no adjustment was made in the preceding assessment year on account of location savings, and therefore, the TPO's approach was inconsistent. The Tribunal cited the decisions in cases of *McCann Erickson India Pvt Ltd vs. ACIT [2012] 24 taxmann.com 21 (Delhi-Tribunal)* and *Brintons Carpets Asia Pvt Ltd. vs. DCIT [2011] 12 taxmann.com 148 (Pune-Tribunal),* which the assessee had relied upon in this context.

ix) Method followed by the TPO in making the adjustment was not prescribed by the provisions of the Act, and hence his computation was based on an incorrect method.

6. India-Sweden DTAA – Taxability of management Fees – Whether taxable as Fees for Technical Services – Application of the Concept of Make

Available – Invocation of MFN Clause to import the "Make Available" condition from India – Portugal DTAA – Tribunal upholds invocation of MFN clause to bring the "Make Available" condition into the India–Sweden Tax Treaty – In favour of the assessee

Sandvik AB vs. Dy. DIT [2014] 52 taxmann.com 211 (Pune-Trib.) / 2014-TII-183-ITAT-PUNE-INTL – Assessment Year: 2007-08

Facts

i) The assessee was a tax resident of Sweden. During the year, the assessee received a management fee from its group companies for rendering commercial, management and marketing related support services.

ii) The assessee filed its return of income stating that such receipts were not taxable in India. The assessee claimed that fees for technical services (FTS) under Article 12 of the India-Sweden tax treaty read with the protocol thereto enabled the invocation of the MFN clause. With reference to the MFN clause, a restricted definition of FTS under the India-Portuguese tax treaty could be imported into the India-Sweden tax treaty.

iii) During the course of assessment, the tax officer (TO)/ dispute resolution panel (DRP) held that such receipts were taxable in India as FTS.

Issues before the Tribunal

i) Whether reference could be made to the India-Portugal tax treaty in view of the MFN clause appended to the India-Sweden tax treaty?

ii) Whether the services rendered by the assessee satisfy the 'make available' condition to be taxed as FTS?

Decision

The Tribunal held in favour of the assessee as under –

i) The Tribunal held that reference to the India-Portugal tax treaty, which allowed a restricted definition of FTS, was valid in light of the MFN clause attached to the India-Sweden tax treaty.

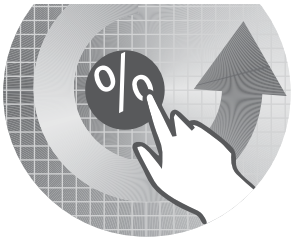
ii) A protocol is an integral part of the tax treaty and has the same binding force. The Tribunal placed reliance on the Delhi Tribunal decision in the case of *4 Maruti Udyog Ltd. vs. ADIT [2009] 34 SOT 480 (Delhi-Trib.)* and the AAR's order in the case of *Poonawalla Aviation Pvt Ltd., In re [2012] 343 ITR 202 (AAR-New Delhi).*

iii) In tax treaties, the MFN clause finds a place when countries were reluctant to forego their right to tax some elements of the income. An MFN clause can direct more favourable treatment available in other treaties only in regard to the same subject matter, the same category of matter, or the "same clause of the matter".

iv) Furthermore, the Tribunal stated that the expression 'making available' was important for deciding in which contracting state the amount received for rendering the services relating to the technical know-how was to be taxed. The expression 'make available' was used in the context of supplying or transferring technical knowledge or technology to another. It was different from the mere obligation of the person rendering the services by using their own technical knowledge in performance of the services. The technology would be considered as 'made available' when the person receiving the services was able to apply the technology by himself / herself.

v) The Tribunal relied on the decisions of its Co-ordinate Bench in the case of *Sandvik Australia Pty Ltd. vs. Dy. DIT [2013] 141 ITD 598 (Pune-Trib.)* and Karnataka HC in case of *CIT vs. De Beers India Minerals Pvt Ltd. [2012] 346 ITR 467 (Karnataka HC).*

CA. Hasmukh Kamdar



INDIRECT TAXES
Central Excise and Customs – Case Law Update

Valuation

[Mahindra & Mahindra Ltd. vs. Commissioner of Central Excise, Nashik 2015 (321) ELT 513 (Tri. Mumbai)]

1. The assessee in this case was engaged in the manufacture of motor vehicles i.e. Jeep and motor vehicle's part falling under Chapter 87 of the Central Excise Tariff Act, 1985. They received a supply order from Police departments of various States for supply of Bullet Proof Jeep. They cleared base vehicles on payments of appropriate duty to a job-worker where the process of bullet-proofing was undertaken. From there the Bullet Proof Jeep was cleared to the Police Department. The Revenue is demanding duty after adding the bullet-proofing charges to the assessable value of the Jeep on the ground that the order received for Bullet Proof Jeep and the Appellants supplied the same. The assessee relied upon the decision of the Tribunal in their own case i.e. *Commissioner of Central Excise, Nashik vs. Mahindra & Mahindra Ltd. reported in 2010 (262) E.L.T. 366 (Tri.-Mum.) = (2010-TIOL-29-CESTAT-Mum.)* where the demand was made in respect of Bullet Proof Jeep supplied to J&K Police. The contention is that as on the same issue in their own case, the decision is their favour; therefore, the present impugned order is not sustainable

2. The Revenue relied upon the Hon'ble Supreme Court's decision in the case of *Siddhartha Tubes Ltd. vs. Commissioner of Central Excise, Indore 2006 (193) E.L.T. 6 (S.C.)* to submit that as there is a addition to the base vehicle, therefore, the appellants are liable to pay the duty after taking into consideration the cost of value of bullet-proofing. It was also submitted that the assessee received the order of Bullet Proof Jeep and supplied the vehicle as per order; therefore, the duty is to be paid on the Bullet Proof Jeep and not on the base vehicle. When the base vehicle is supplied to job-worker, the responsibility of supply of Bullet Proof Jeep to the police departments remained with M/s. Mahindra & Mahindra Ltd. Hence the demand is rightly made.

3. The Bench observed that the Tribunal in the assessee's own case where the Bullet Proof Jeep was supplied to J&K Police and the process of bullet proofing was undertaken by the job-worker, referred to the Board's Circular No. 139/08/2000-CX, dated 4-1-2001 which clarified that the Revenue had obtained the Opinion of the Law Ministry in respect of the

ratio of the decision of Hon'ble Supreme Court in the case of Siddharth Tubes Ltd. (supra) and it has been clarified that the judgment of Siddharth Tubes Ltd. does not enable the department to charge duty on value addition outside the factory of clearance on account of certain processes not amounting to manufacture of manufactured goods in a separate/ other unit of the same group or by any independent job worker. The Tribunal has accordingly held in favour of the assessee i.e. *CC Nashik v. Mahindra & Mahindra (supra).*

4. The Bench thereafter quoted the following paragraphs from the order of the Tribunal in the case of *Commissioner of Central Excise, Nashik vs. Mahindra & Mahindra Ltd. reported in 2010 (262) E.L.T. 366 (Tri.-Mum.)*

> 4. We have considered the rival submissions and relevant records. The moot point is what the transaction value is in this case. Department's contention is that since MML is a single entity and order is placed on one of their divisions, the value to be adopted is for the vehicle supplied to the customer and not the value of the base vehicle removed from the respondent. It would be appropriate to consider the relevant legal provisions and consider this submission.
>
> 5. Factory as defined under Section 2(e) of the Act means :–
>
> "Factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on".
>
> Rule 174 of erstwhile Central Excise Rules, 1944 and Rule 9 of Central Excise Rules, 2002 required every manufacturer to be registered and C.B.E. & C. is empowered to specify conditions and limitation. The Board *vide* Notification No. 35/2001-C.E. (N.T), dated 26-6-2001 as amended has prescribed conditions. According to the Notification, if a registered person has more than one premise, he shall obtain separate registration certificate for each premises. The fact that each premise should have a registration emerges from the provisions of Section 4 of the Act which requires determination of value at the place of removal. Naturally, place of removal has to be one place. What follows from the provisions relating to registration is that each factory or premises of a manufacturer is required to be registered except those who are covered by exemption.
>
> 6 In terms of the legal provisions discussed above, it is quite clear that goods have to be assessed at the place of removal and if the value cannot be determined under main provisions of Section 4(1) of the Act, rules for valuation have to be resorted.

5. A hypothetical example makes the position clear. Let us take an assessee that has divisions in different parts of the country, each making plastic granules, plastic films, plastic bags and printed bags. For the finished product of one division, the finished product of another division is the aw material. If a purchase order is placed on the division for printed plastic bags.

Question arises whether the division clearing the granule can be asked to do so. If the product undergoes a process which does not amount to manufacture, departments cannot demand duty include cost of each process just because the unit making raw material belongs to the same company. Legal provisions remain the same irrespective of who takes up the process. If there is no sale or if value cannot be determined under Section 4(1) (a) value has to be determined under Section 4(1) (a).

6. The Bench further observed that that Commissioner (Appeals) in her order has considered this aspect in detail before setting aside the order. Her observations relevant are reproduces below for better appreciation.

"15. Now the question as to under these types of transaction and circumstances, whether the value of processing carried out by the independent contractor can be included in the assessable value of goods cleared, without carrying out such process from the appellant's premises. In this regard the appellants have referred to the C.B.E. & C. Circular No. 139/08/2000-CX, dated 4-1-2001 on the subject, in which while dealing with similar circumstances, the Board has clarified as under:

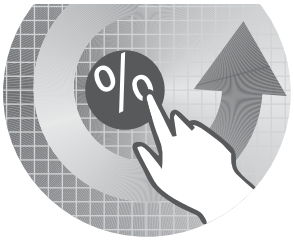
In view of the Supreme Court judgment in the case of *M/s. Siddharth Tubes Ltd. [2000 (115) E.L.T. 32 (S.C.)* and in J.G. case *[1998 (97) E.L.T. 5 (S.C.)* Ministry of Law was requested to advise as regards to duty liability on value addition where the duty paid goods are cleared to other units for carrying further processes not amounting to manufacture and the other unit belongs to same group or is that of the job workers who merely processes the goods without owning them and collects job charges and return or cleared the goods on behalf of the supplier of the goods. The Law Ministry has advised that the judgment of the Siddharth Tubes Ltd. does not enable the department to charge duty on value addition outside the factory of clearance on account of certain processes not amounting to manufacture of manufactured goods in a separate / other unit of the same group or by any independent job worker.

16. Now as per the above clarification, the duty cannot be charged on the value addition carried out outside the factory of clearances on account of certain processes not amounting to manufacture of manufactured goods by an independent job worker. I am inclined to agree with the appellants contention that the above clarification squarely applies in their case where the bare vehicles were cleared from their factory on payment of duty and the value addition on account of bullet proofing was carried out by the independent job worker viz. M/s. Metaltech Motor Bodies, in the premises of the job worker.

7. Further the Bench referred to the following observation in the case of *Castrol India Ltd. vs. CCE New Delhi [2000 (118) ELT 35(Tri.)]*-

"In the case of removal of goods from the depot the time of removal shall be the time at which such goods were cleared from the factory as per definition of 'time of removal' provided by sub-clause (b)(a) to clause (iv) of Section 4 of the Act".

In view of the above facts and legal provisions the impugned order was set aside and appeal was allowed.



CA. Janak Vaghani

INDIRECT TAXES
VAT Update

1) Trade Circulars

a) No. 10T of 2015, dated 7-7-2015
Corrigendum to Trade Circular No. 7T of 2015, dated 19-5-2015
Online Grant of Registration

The Commissioner of Sales Tax has issued above circular to amend the earlier Trade Circular No. 7T of 2015, dated 19-5-2015 clarifying the revised procedure for the registration under the MVAT and CST Acts. Point No. ix (a) of the earlier circular providing for verifications associated with the registration application and grant of registration is replaced by new para stated in new circular for grant of registration. Accordingly it is clarified that after examining the scan documents, photo etc. if the registering authority finds that the application is correct and complete, scan documents are properly uploaded and payment of applicable fees and deposit is received then the registering authority will grant the registration within a day of allocation of application.

b) No. 11T of 2015, dated 13-7-2015
Bombay High Court Judgment in case of Tata Sons Ltd., Writ petition No. 2818 decided on 20-1-2015 – Liability to pay VAT on Transfer of Right to Use Intangible Goods to Multiple Users

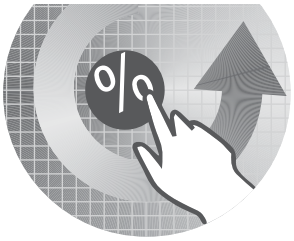
The Commissioner of Sales Tax has issued above circular to clarify liability to pay VAT on transfer of right to use the intangible goods to multiple users in view of the judgment of Bombay High Court in case of Tata Sons Ltd., Writ Petition No. 2818, decided on 20-1-2015 upholding levy of tax on transfer of non-exclusive right to use incorporeal goods. Accordingly, it was clarified that law is therefore settled that VAT can be levied on transfer of right to use goods of intangible nature, i.e. trade mark, technical knowhow, copyright and other intangibles etc., even if it is transferred to multiple users.

2) Web site Up date

Minutes of Service Cell Meeting held on 10-7-2015
The Minutes of the Service Cell meeting is hoisted on the web site. Gist of Important decisions included in the said minutes are as under:

Grievance in brief	Remarks
E-registration application is rejected by giving non logical reasons such as signature is not legible etc. Suggestion : Defect memo should be issued in 7 days time be given to the dealer to comply for uploading requirements.	Circular No. 7T of 2015 is self explanatory. Dealer can upload fresh application by resolving defect.
1. Hearing opportunity and at least one chance to comply the defects as per defect memo must be given 2. Date of effect of registration should be given from the first date of online application	Not accepted, should copy the defect on reupload, effect of RC will be considered in ADM Relief.
Sometimes 'C' forms declaration for the quarter ending transactions are received in the next quarter. However, templates do not allow to put the date of corresponding bill, as it pertains to earlier quarter.	Such applications can be processed after overriding by controlling officer.
In case of online application for C-form, defects which are solved are emerging once again at the time of second applications.	This will appear but be solved by reply to defect memo.
If dealer has filed Annual Return and paid taxes according to that, his all short filing periods for that year should be closed.	Accepted. It will be examined.
LED blubs are taxed @5% & all other LED products are taxed @12.5%.	Concessional rate of 5% is applicable to LED bulbs only.
While filing Annexure J2, we have mentioned purchases of computers. We have not claimed set off on these purchases. However, CDA is showing the amount due on this issue. Does it mean that Annexure J2 should contain the purchases against which set off is claimed. Please clarify.	If input is not taken then that issue is not covered in CDA. If any specific case please bring to notice. 704 cell 1, 2 and 3
One cannot reload the annexure J-1 and J-2 for the same dealer for 2nd time if any mistake has done while uploading by oversight or typing mistake. Dealer should be allowed at least one more time to correct J1 & J2 filed by him.	Revision not allowed.
Total of net sales and tax figures are correct in audit report (F-704) filed for 2011-12. But the TIN wise details of sales and tax are incorrect. Annexure J1 filed with e F-704 can not be revised. Because of this our customers are not getting proper credit. Kindly give solution.	Revision of J1 is not allowed. The dealer who is not getting proper credit can use ledger confirmation.
Disallowing of set- off in case of non filing of form 704 by the Vendor.	Such instructions are not given. Specific case may be informed.

CA Bharat Shemlani



INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Business Auxiliary Service

1.1 ATE Enterprises Pvt. Ltd. vs. CST, Mumbai 2015 (39) STR 81 (Tri.-Mumbai)

The appellant in this case engaged in procuring orders on behalf of overseas manufacturers who were responsible for execution of order and received payment directly from the persons placing the order. The Tribunal held that, entire transaction of only procurement of orders and rendering of services if any towards foreign or overseas manufacturers and activity though culminate in supplies to Indian company, cannot be considered as services provided in India. The impugned order denying export of services is unsustainable and therefore liable to be set aside.

Intellectual Property Right Service

1.2 Rochem Separation Systems (India) P. Ltd. vs. CST, Mumbai-I 2015 (39) STR 112 (Tri.-Mumbai)

The appellant in this case entered in to two agreements namely, transfer of technology and transfer of IPR. The department sought to demand tax on both the agreements considering transfer of technology is inextricably linked to transfer of IPR. The Tribunal held that, the order in appeal failed to analyse agreements in detail and came to a hasty conclusion that entire amount of royalty is towards transfer of IPR. However, only rights which are registered with trademark / patent authorities to be considered as IPR. It is also held that order in appeal holding tax must be paid even if situation of revenue neutrality is unsustainable. It is further held that, since the issue of charging service tax as reverse charge under section 66A of FA, 1994 was under litigation before various Courts, the extended period of limitation cannot be invoked.

Management Service

1.3 J. C. Electricals vs. CCE, Mangalore 2015 (39) STR 131(Tri.-Bang.)

The Tribunal in this case held that, all services relating to transmission and distribution of power are exempted under Notification No. 45 / 2010-ST for the period prior to 26-2-2010, hence demand raised under impugned order is unsustainable.

Banking & Other Financial Service

1.4 Jaylaxmi Credit Company Ltd. vs. CCE&ST, Daman 2015 (39) STR 164 (Tri.-Ahmd.)

The Tribunal in this case held as under:

- As per explanation 1(viii) to Section 67 of FA, 1994 read with CBEC Circular No. 80 / 10 / 2004-ST dated 17-9-2004, interest amount is not includible in gross value of services provided during period involved.

- In view of Tribunal decision in *ART Leasing Ltd. 2007 (8) STR 162 (Tri.-Bang.)* rate of service tax prevailing on date on which contract entered is applicable.

1.5 SBI Commercial Branch vs. CCE, Jaipur 2015 (39) STR 307 (Tri.-Del.)

The department in this case sought to raise demand of service tax on margin of profit of Bank arising out of foreign currency deals. The Tribunal held that, only gross value of taxable services are taxable under FA, 1994 and margin of profit is a subject matter for Income Tax department hence, demand is not sustainable.

Commercial Training or Coaching Service

1.6 Darshan English Classes vs. CCE&ST, Rajkot 2015 (39) STR 167 (Tri.-Ahmd.)

The Tribunal in this case held that, coaching in English language enables trainee to seek employment or undertake self employment and therefore entitled for benefit of Notification No. 9/2003-ST dated 20-6-2003. Further, there is no mention of any foreign or Indian language in the said notification. It also held that, fees collected and services rendered up to 1-7-2003 do not attract service tax.

Mandap Keeper Service

1.7 Shri Chatushringi Seva Samittee vs. CCE, Pune-III 2015 (39) STR 169 (Tri.-Mumbai)

The Tribunal in this case held that, stalls allotted to different persons for selling toys, garlands, flowers, foods etc. is not covered under the scope of mandap keeper's service.

Sale of space for advertisement service

1.8 CCE, Nagpur vs. Media World Enterprise 2015 (39) STR 258 (Tri.-Mumbai)

The Tribunal held that, Kaldarshika consists of sheets of printed materials with table/charts therein, can be brought within the meaning of the term 'book' under inclusive definition of section 1(1) of Press and Registration of Books Act, 1867 and hence covered by the term "Print Media". Thus, definition of "Sale of space for advertisement" would not cover the product published by appellant, as the said publication cannot be considered as a calendar, but an Almanac which gives reader a host of information in respect of religious, cultural and historical events as also the panchang.

2. Interest/Penalties/Others

2.1 Bharat Sanchar Nigam Ltd. vs. CCE 2015 (39) STR 5 (All.)

The High Court in this case held that, when plea was not raised before adjudicating authority, then it is not open to raise it for the first time in appeal before Appellate Tribunal.

2.2 CST, Goa vs. Ratio Pharma India Pvt. Ltd. 2015 (39) STR 31 (Tri.-LB.)

The Larger Bench of Tribunal in this case held that, the relevant date for determining limitation period for refund of CENVAT credit on export of service is date of receipt of foreign exchange, hence limitation period should start from that date.

2.3 Metro Motors vs. CCE, Daman 2015 (39) STR 77 (Tri.-Ahmd.)

The appellant in this case paid certain amount during investigation. The Adjudicating Authority appropriated the same against demand however Commissioner (A) reduced the demand and accordingly granted refund of excess deposit. The Tribunal held that, the refund of excess amount paid during investigation is not hit by limitation under section 11B of CEA, 1944 as there is no issue of unjust enrichment.

2.4 Torrent Pharmaceuticals Ltd. vs. CST, Ahmedabad 2015 (39) STR 97 (Tri-Ahmd.)

The Tribunal in this case held as under:

- Reimbursement of certain expenses to overseas branches for activities viz. registration, staff related expenses

employed by distributor abroad, cost of promotional expense incurred by distributor abroad, VAT/GST paid by distributor/branches are towards services deemed to have been received and consumed by appellant in India and therefore liable for service tax under RCM.

- New plea not raised in show cause notice or before adjudicating authority cannot be entertained at appellate stage.
- Appellant is eligible for CENVAT credit of service tax paid under RCM.

2.5 Abyss (The Hutch Shop) vs. CST, Ahmedabad 2015 (39) STR 125 (Tri.-Ahmd.)

The Tribunal in this case observed that, majority of demand has been paid along with interest before issue of SCN and the appellant has not recovered service tax and retained the same. It is held that, no specific facts disclosed in SCN as to how there was wilful misstatement/suppression on part of appellant with intention to evade service tax and therefore it is fit case to invoke section 80 of FA, 1994.

2.6 CCE&ST, Tirupati vs. Gimpex Ltd. 2015 (39) STR 143 (Tri.-Bang.)

The Tribunal in this case held that, date of filing refund before wrong authority to be taken as date of filing for determining period of limitation.

2.7 Ganesh Yadav vs. UOI 2015 (39) STR 177 (All.)

The High Court in this case held that, mandatory pre-deposit under amended section 35F of CEA, 1944 is applicable only to appeal filed on or after 6-8-2014 even if SCN was issued prior to 6-8-2014. The second proviso to this section clearly indicates that the requirement of mandatory pre-deposit shall not apply to stay application and appeals which were pending prior 6-8-2014. It is further held that, High Court can dispense with the requirement of pre-deposit under the new section 35F, since powers of the High Courts under Article 226 of Constitution of India are not ousted.

2.8 CCE, Coimbatore vs. Pricol Ltd. 2015 (39) STR 190 (Mad.)

The High Court in this case held that, any amount deposited during the pendency of adjudication proceeding or investigation is in the nature of deposit made under protest and therefore, the principles of unjust enrichment does not apply in such cases.

2.9 Quality BPO Services Pvt. Ltd vs. CST, Ahmedabad 2015 (39) STR 230 (Tri.-Ahmd.)

The Tribunal in this case held that, EOU can file quarterly refunds under Notification No. 5/2006-CE(NT). It is also held that, the said Notification is issued under Rule 5 of CCR, 2004 and not linked to refund procedure under section 11B of CEA, 1944, hence no time limit is applicable.

2.10 Associated Aluminium Industries Pvt. Ltd. vs. CST, Mumbai-I 2015 (39) STR 234 (Tri.-Mumbai)

The Tribunal in this case held that, time limit for filing refund claim extended to one year by Notification No. 17/2009-ST is applicable only to refund claims filed after 7-7-2009 and for refund claim filed prior to that date old time limit of six month will be applicable.

2.11 CCE, Panchkula vs. Goel International Pvt. Ltd. 2015 (39) STR 330 (Tri.-Del.)

The Tribunal in this case held that, language used in section 85(4) of FA, 1994 has wider connotation and not restrictive as used in section 35A(3) of CEA, 1944 and therefore Commissioner (A) has powers to pass such orders as he thinks fit which includes the power of remand.

3. CENVAT Credit

3.1 CCE&ST, LTU, Chennai vs. Rane TRW Steering Systems Ltd. 2015 (39) STR 13 (Mad.)

The High Court in this case held that, housekeeping and gardening services where an employer spends money to maintain their factory premises in an eco-friendly manner, tax paid on such services would form part of the cost of final products and the same would fall within the ambit of input services and therefore the assessee is entitled to claim the benefit.

3.2 Bajaj Motors Ltd. vs. CCE, Delhi-III 2015 (39) STR 85 (Tri.-Del.)

The Tribunal in this case held as under:

- The credit cannot be denied on the ground that wrong classification of service mentioned in the invoice.
- Outdoor catering service is excluded from the definition w.e.f. 1-4-2011, hence the appellant is not entitled for input credit availed during 2011-12.
- Provision for exclusion of service from definition of Input Service is introduced w.e.f. 1-4-2011, hence penalty is not imposable for the period prior to 2011-12.

3.3 Jodhani Papers Ltd. vs. CCE, Bangalore-II 2015 (39) STR 126 (Tri.-Bang.)

The Tribunal in this case held as under;

- As per CBEC Circular 943/4/2011-CX dated 29-4-2011 CENVAT credit is admissible on services of sale of dutiable goods on commission basis.
- The SCN alleged that service rendered was not an input service used directly or indirectly in the manufacture of final product however, Adjudicating Authority travelled beyond SCN in holding that activity undertaken by the commission agent was not sale promotion.
- In the definition of Input Service expression "up to the place of removal" has been used only in respect of transportation and storage of goods and therefore this restrictive clause cannot be applied to all cases.

3.4 Nuware Systems Pvt. Ltd. vs. CST, Bangalore 2015 (39) STR 134 (Tri.-Bang.)

The Tribunal in this case held as under;

- Car parking area charges and maintenance charges are paid for utilisation of premises for rendering output service hence credit thereon is admissible.
- Non-inclusion of ground floor address in centralised registration certificate is most curable defect, which was cured subsequently, cannot be ground for disallowance of CENVAT credit.

3.5 Nirma Limited vs. CCE&ST, Vadodara 2015 (39) STR 145 (Tri.-Ahmd.)

The Tribunal in this case allowed CENVAT credit of service tax paid on maintenance and repair of Xerox machine as the same is activity in relation to business of the appellant.

3.6 Pranav Vikas (India) Ltd. vs. CCE, Delhi-IV 2015 (39) STR 153 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on construction services used for expansion of factory building and insurance premium for factory building as the said services are covered by definition of input service.

3.7 Owens Corning (India) Pvt. Ltd vs. CCE, Belapur 2015 (39) STR 158 (Tri.-Mumbai)

The Tribunal in this case held that, the condition of capital goods should be in possession of the

manufacturer in the subsequent financial year is not applicable to components and hence, appellant is entitled to claim 50% CENVAT credit in the subsequent financial year for component of bushing used in manufacture of glass fibre.

3.8 Nuance Transcription Services India Pvt. Ltd. vs. CST, Bengaluru 2015 (39) STR 241 (Tri.-Bang.)

The department in this case denied credit of service tax paid for renting of immovable property received by branches and taken in Bengaluru Office. The Tribunal held that, in view of *mPortal India Wireless Solutions Pvt. Ltd. 2012 (27) STR 134 (Kar.)* credit not to be denied to unregistered branches. Service tax is paid on the basis of centralised registration therefore credit could be taken in centrally registered office.

3.9 Lupin Ltd. vs. CCE&ST (LTU) 2015 (39) STR 249 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of service tax paid on service provided by foreign banks of collection and remittance of sale proceeds and commission paid to agent for export order and promotional activities outsourced abroad as the department has not brought any evidence that services were not in relation to goods manufactured and exported.

3.10 CCE&ST, LTU, Chennai vs. Axles India Ltd. 2015 (39) STR 281 (Tri.-Chennai)

The Tribunal in this case held that, service tax paid on overseas service provider under RCM to carry out activities such as removing rust developed during transit, deburring of certain machined area of axles and cross checking of dimensions at buyers premises at USA is in relation to business and is rightly covered in inclusive definition of Input Service.

3.11 CCE, Nashik vs. Mahindra & Mahindra Ltd. 2015 (39) STR 298 (Tri.-Mumbai)

The Tribunal in this case allowed the CENVAT credit of service tax paid on catering service as the same was mandatory and having nexus or integral connection with manufacture of final product. However, proportionate service tax credit in respect of service tax borne by employees is to be reversed along with interest. It is further held that, guest house services not being connected to manufacturing activities in any way hence not an eligible input service.

3.12 Dalmia Chini Mills vs. CCE, LTU, New Delhi 2015 (39) STR 310 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on pandal & shamiana services utilised to safeguard machines lying in open for installation.

3.13 Memories Photography Studio vs. CCE&ST, Vadodara 2015 (39) STR 331 (Tri.-Ahmd.)

The department in this case denied credit to appellant on the ground of non-payment of service tax by service provider. The Tribunal held that, there is no evidence on record that when credit was taken, service recipient was aware of non-payment of service tax by service provider and service recipient was only required to see Cenvatable documents showing tax paid / payable.

"You have to grow from the inside out. None can teach you, none can make you spiritual. There is no other teacher but your own soul."

– Swami Vivekananda

Janak C. Pandya, Company Secretary

CORPORATE LAWS
Company Law Update

[2015] 191 Comp Cas 52 (Bom.)
[In the Bombay High Court]
Darius Rutton Kavasmaneck vs. Gharda Chemicals Ltd. And Others.

To bring derivative action on behalf of the company by any shareholder, it should be on his behalf as well as on behalf of all other shareholders except the wrong doers. Further, the derivative action should be *bona fide* and in the interest of the company and plaintiff should not have any ulterior motive and should fall under the doctrine of clean hands.

Brief Facts

The plaintiff has filed this derivative action as a right of a minority shareholder. The submission made by the plaintiff is as follows.

a. The notice of motion should not be treated as suit at this stage as it has to show a *prima facie* case for the grant of reliefs and seek injunction.

b. It has been filed for the benefit of the Company, which is defendant Number 1 ("D1") and whose shares held by him.

c. The case is against Defendant No. 2 ("D2"), who is the Chairman & Managing Director and majority shareholder of the Company.

d. D1 has a state of the art research department and spends substantial amount in R&D every year. During 2001 to 2010, D1 has spent around ` 186 crores in R&D.

e. D2 has used the R&D facility of D1 to develop patent.

f. The main point for this derivative action is that D2 has applied/obtained several patents in his name, which should have been applied or obtained in the name of the Company.

g. Even assuming that D2 has not used R&D facilities of D1 for development of patent, but as a Managing Director his fiduciary duty is towards D1. Thus, he should have applied/ obtained patents in the name of D1.

h. D1 has sent notice to all shareholders wherein it was mentioned that D1 has entered in to an agreement with D2, by which D1 has acknowledged that D2 owns and continues to own any invention that he has invented/ conceptualised in future also. This is nothing but distribution of assets of D1 without obtaining permission of 100% shareholders.

i. D2 shall grant licence / permission to D1 for use of such patents without any payment towards Royalty.

j. Company could not file the case in its own name, as the D2 is a majority shareholder and also controls the management of the Company.

k. The application is to obtain relief from the court to restrain D2 from selling or transferring or assigning or licensing or exploiting or encumbering or creating any third party rights or interest or otherwise

dealing with the patents which D2 has obtained in his individual name.

l. That D2 may transfer the patents in favour of section 25 charitable company in the name of "Gharda Medical and Advanced Technologies Foundation " ("GMATF").

m. In support of his claim as above for grating reliefs and injunctions, plaintiff has referred the well-recognised principles accepted in the case of (1) *Wander Ltd. vs. Antox India P. Ltd. [1990] (Supp), SCC 727;* (2) *Colgate Palmolive (India) Ltd. vs. Hindustan Lever Ltd. [1997] 7 SCC 1;* and (3) *Zenit Metaplast P. Ltd vs. State of Maharashtra [2009] 10 SCC 388.*

n. Under section 88 of the Indian Trusts Act, 1882 a director of a company is bound in fiduciary character to protect the interests of the Company. He should hold any gains arising out of pecuniary advantage for the benefit of the company. In his support some of the cases are referred as (1) *Ultraframe UK Ltd. vs. Fielding [2004] RPC 24*, (2) *Narayandas Shreeram Somani vs. Sangli Bank Ltd. [1965] 35 Comp Cas 596 (SC); AIR 1966 SC 170* and (3) *Dale and Carrington Invt. P. Ltd. vs. P.K. Prathapan [2004] Comp Cas 161 SC; [2005] 1 SCC 212.*

In his submission, D2 has mentioned as follows.

a. Plaintiff has no locus.

b. The issue is already decided in earlier litigation and this is 3rd litigation.

c. By order in *Dr. Percy Rutton Kavasmaneck vs. Gharda Chemicals Ltd. [2011] 166 Comp Cas 292 (Bom.)*, the court has dismissed the petition for oppression and mis-management filed by the plaintiff.

d. In another judgment in *Jer Rutton Kavasmaneck vs. Gharda Chemicals Ltd. [2011] 166 Comp Cas 377 (Bom.).*

e. A derivative suit is an exception to the normal rule and that Company has an independent existence and shall sue in its own name and protect its own property.

f. A shareholder cannot file derivative suit for his own personal interest and has to demonstrate that he is proper person and come with clean hands.

g. D2 is an inventor and is entitled to apply for the patents.

h. There are no provisions in the law which provides that the employee generated patent should belong to the employer.

i. As per the contract with the D1, D2 is only entrusted with the power of management and he is not required to do any research and development or make inventions.

j. D2 has not used R&D facility of D1 except for consolidation/verification of patents.

k. As per section 64(1)(b) of the Patent Act, if the patent was granted on the application of a person not entitled, then any person may apply for revocation of the patent. Thus, in given situation, if D2 has wrongfully applied for patent and obtained, then any person including D1 or D2 or competitors may apply for revocation/cancellation of the patent. This can never be in the interest of the D1.

l. Plaintiff is not come with clean hands. His continuous litigation and he is not a well-wisher for the D1.

m. Plaintiff through a company called Western Chemical Industries P. Ltd. (WCIPL) carries on a competing business. The process developed by D2 and used by D1 without royalty payment is superior to that of WCIPL product which affects plaintiff business and same is already acknowledged by him in his affidavit.

n. Plaintiff has suppressed the fact that he has agreed to sell his shares in D1 to Godrej, who is a competitor.

o. Plaintiff could use alternative remedies under section 397 and 398 of the Companies Act, 1956 or under Patent Act 1970. Plaintiff has used the same under sections 397 and 398. Under Patent Act, same has to be determined by the Patent Office. The process under the Patent Act provides various opportunities at various stages for determination of

ownership. Thus, when specialised office is there, court should not interfere in the same.

p. Even Article of D1 allows any director to initiate legal action on its behalf and no need for board resolution. The other defendants are independent directors and they could have done this. Thus, plaintiff has failed to demonstrate that D1 has failed.

Judgments and reasoning

The Court has dismissed the motion without cost. Court also refused to give stay of the order.

The observations of the Court is as follows.

a. As per Palmer's Company Law 25th edition, derivative action is explained where plaintiff is seeking to enforce not his own right of action but right of action vested in or derived from the company. He has to sue on his behalf as well as on behalf of all other shareholders except the wrong doers. Court observed that in this case, except plaintiff no other shareholders including his own relatives have agreed for the suit. In fact, his relatives have disassociated themselves. Even in their affidavits his relatives have stated that this application is not *bona fide*. Court has also referred the judgments in *Smith vs. Croft (No 2) [1988] 1 Ch D 114*, *Dr. Satya Charan Law vs. Rameshwar Prosad Bajoria [1950] 20 Comp Cas 39 (FC); AIR 1950 FC 133*. In the above cases, court has recognised the collective decision making for derivative action instead of decision of a single shareholder.

b. As per Palmer's Company Law 24th edition as relied by D2, "the derivative action is subject, however, to the doctrine of clean hands. …".

c. Whether derivative action is *bona fide* in nature and in the best interest of the company, Court has observed that by virtue of section 64(1)(b) of the Patents Act, 1970, this action will not be in the interest of the Company. As per the Court, if the "order is passed as per plaintiff" application, then, there is a risk of the patents itself being lost. In such situation, any person or plaintiff himself who is also a competitor can apply for revocation of patents. This will result in the tremendous loss to the D1.

d. As per unreported judgment in the matter of *Anil Madhavdas Ahuja vs. Marvel Fragrances P. Ltd. (N.M.S No 767 of 2011* in suit no 566 of 2011, this court has held "… that derivative action by a party contrary to the interest of the company and for his personal interest should not be encouraged".

e. The plaintiff has ulterior motives in filing this application, as he has entered in to MoU with Godrej Soaps Ltd., which is a competitor of the D1 to sell his shares. The judgment of Court of Chancery in the matter of *Forrest vs. Manchester, Sheffield and Lincolnshire Railways Co. (45 ER 1131)* has been referred. The principle laid down in the decision of the Court of Appeal in England in *Barrett vs. Duckett [1995] 1 BCLC 243 (CA)* also referred which mentioned that "…if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed….. ".

f. Court has rejected the reliance placed by plaintiff on certain judgments to support his claim that because D2 is working as a managing director, he has fiduciary duty to register the patents in the name of D1. These judgments are in the case of (1) *Triplex Safety Glass Co. Ltd vs. Scorah (55 RPC 21)*, (2) *Fine Industrial Commodities Ltd. vs. Powling [1954] 71 RPC 253* and (3) *Patchett vs. Sterling Engineering Co. Ltd. [1955] 72 RPC 50*. Court has observed that the facts of all the above referred cases are different than facts of the present case.

g. The plaintiff's reliance of Section 88 of the Indian Trusts Act, 1982 related to fiduciary duty of D2 for applying / obtaining patents in the name of D1 is also not relevant in the given case. Court has observed that the contract with D2 does not require him to devise any invention.

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Notifications and Circulars issued by RBI & DIPP Press notes/ clarifications:

A. RBI CIRCULARS

1. Re-export of unsold rough diamonds from Special Notified Zone of Customs without Export Declaration Form (EDF) formality

Presently every exporter of goods/software, to any place outside India, other than Nepal and Bhutan, is required to submit declaration in EDF /SOFTEX. Also, as per sub-regulation (g) of Regulation 4 of the Export of Goods and Services Notification, exemption from furnishing declaration has been provided for export of goods imported free of cost on re-export basis. Subsequently, the Customs Authority of Government of India issued Circular No. 17/2015- Customs, i.e., F. No. 451/13/2015 Cus V dated May 26, 2015, stipulating guidelines on manner of operation of the Special Notified Zone (SNZ) to enable and permit the trading of rough diamonds in India by the diamond mining companies as permitted in terms of A.P. (DIR Series) Circular No. 116 of April 1, 2014.

In order to facilitate re-export of unsold rough diamonds imported on free of cost basis at the SNZ, RBI has clarified that the unsold rough diamonds, when re-exported from the SNZ (being an area within the Customs) without entering the Domestic Tariff Area (DTA), do not require any EDF formality as required in Regulation 3 of the Notification No. FEMA 23/2000-RB dated May 3, 2000.

However, entry of consignment containing different lots of rough diamonds into the SNZ should be accompanied by a declaration of notional value by way of an invoice and a packing list indicating the free cost nature of the consignment. RBI has also clarified that, under no circumstance, entry of such rough diamonds is permitted into DTA.

For the lot/lots cleared at the Precious Cargo Customs Clearance Centre, Mumbai, Bill of Entry is to be filed by the buyer. AD bank will permit such import payments after being satis fied with the *bona fides* of the transaction. Further, AD bank shall also maintain a record of such transactions.

(A.P. (DIR Series) Circular No. 1 dated 1st July, 2015)

(Comments: This is a welcome clarification by RBI as Regulation 4 in its current form did not specifically exclude Special Notified Zone (SNZ) from furnishing declarations. This amendment is in line with the circular issued by Customs Authority and will promote ease of doing business in India.)

2. Investment in companies engaged in tobacco related activities

At present the RBI Notification relating to Inbound Investments states that foreign direct investment is prohibited in manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.

RBI has now clarified that the prohibition applies only to manufacturing of the products mentioned therein and foreign direct investment in other activities relating to these products including wholesale cash and carry, retail trading etc. shall be governed by the sectoral restrictions as laid down in the FDI policy framed by the Department of Industrial Policy & Promotion and in Schedule 1 of the Inbound Investment Regulations.

(A.P. (DIR Series) Circular No. 2 dated 3rd July, 2015)

(Comments: This is a welcome clarification which will help companies engaged in marketing and distribution of tobacco related products)

3. Issue of shares under Employees' Stock Options Scheme and/or sweat equity shares to persons resident outside India

Presently, as per the extant Regulation 8 of the RBI Notification relating to Inbound Investment, an Indian company can issue shares under Employees' Stock Option (ESOP) Scheme, by whatever name called, to its employees or employees of its joint venture or wholly owned overseas subsidiary / subsidiaries who are resident outside India, directly or through a Trust, provided that the scheme has been drawn in terms of regulations issued under the SEBI Act, 1992 and face value of the shares to be allotted under the scheme to non-resident employees does not exceed 5 per cent of the paid-up capital of the issuing company. The Trust or Indian company has to ensure compliance with the above conditions and comply with the reporting requirement.

RBI has reviewed the above regulation and permitted an Indian company to issue "employees' stock option" and / or "sweat equity shares" to its employees / directors or employees / directors of its holding company or joint venture or wholly owned overseas subsidiary / subsidiaries who are resident outside India, subject to the following conditions:

1. The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act, 2013, as the case may be.
2. The "employees' stock option" / "sweat equity shares" issued to non-resident employees / directors under the applicable rules / regulations are in compliance with the sectoral cap applicable to the said company.
3. Issue of "employees' stock option" / "sweat equity shares" in a company where foreign investment is under the approval route shall require prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India.
4. Issue of "employees' stock option" / "sweat equity shares" under the applicable rules / regulations to an employee / director who is a citizen of Bangladesh / Pakistan shall require prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India.

The issuing company is now required to furnish a return as per the Form ESOP to the Regional Office concerned of the Reserve Bank of India under whose jurisdiction the registered office of the company operates, within 30 days from the date of issue of employees' stock option or sweat equity shares.

(A.P. (DIR Series) Circular No. 4 dated 16th July, 2015)/ (Notification No. FEMA. 344/2015-RB dated June 11, 2015, vide *G.S.R. No. 484 (E) dated June 11, 2015)*

(Comments: This is a welcome relaxation by RBI through substitution of Regulation 8 to extend the scheme to non-resident employee directors

and holding companies and also covering sweat equity. This will result in considerable clarity in the regulations governing issue of ESOPs/ Sweat Equity to non-residents)

4. Export factoring on non-recourse basis

In order to facilitate exports, RBI had permitted AD Category–I banks to provide 'export factoring' services to exporters on 'with recourse' basis by entering into arrangements with overseas institutions for this purpose without prior approval from the Reserve Bank of India subject to compliance with guidelines issued by the Department of Banking Regulation in this regard.

After taking into account the recommendation made by the Technical Committee on Facilities and Services to the Exporters chaired by Shri G. Padmanabhan, RBI has now permitted AD banks to factor the export receivables on a "non-recourse basis", so as to enable the exporters to improve their cash flow and meet their working capital requirements, subject to the following conditions:

1. AD banks may take their own business decision to enter into export factoring arrangement on non-recourse basis. They should ensure that their client is not over-financed. Accordingly, they may determine the working capital requirement of their clients taking into account the value of the invoices purchased for factoring. The invoices purchased should represent genuine trade invoices.
2. In case the export financing has not been done by the Export Factor, the Export Factor may pass on the net value to the financing bank / institution after realising the export proceeds.
3. AD bank, being the Export Factor, should have an arrangement with the Import Factor for credit evaluation & collection of payment.
4. Notation should be made on the invoice that importer has to make payment to the Import Factor.
5. After factoring, the Export Factor may close the export bills and report the same in the Export Data Processing and Monitoring System (EDPMS) of the Reserve Bank of India.
6. In case of single factor, not involving Import Factor overseas, the Export Factor may obtain credit evaluation details from the correspondent bank abroad.
7. KYC and due diligence on the exporter shall be ensured by the Export Factor.

(A.P. (DIR Series) Circular No. 5 dated 16th July, 2015)

(Comments: This is a welcome relaxation by RBI allowing permitted AD banks to enter into export factoring on non-recourse basis promoting ease of doing business. This relaxation would help exporters to improve their cash flow for working capital requirements)

5. Foreign Investment in India by Foreign Portfolio Investors

As per Schedule 5 of the Inbound Investment Regulations, all future investments by an FPI within the limit for investment in corporate bonds is required to be made in corporate bonds with a minimum residual maturity of three years.

The RBI had been receiving enquiries about the applicability of the aforesaid directions on investment by FPIs in security receipts (SRs) issued by the Asset Reconstruction Companies (ARCs). RBI has therefore now clarified that the restriction on investments with less than three years residual maturity shall not be applicable to investment by FPIs in SRs issued by ARCs. However, investment in SRs shall be within the overall limit prescribed for corporate debt from time to time. These directions have been brought into force with immediate effect. Further operational guidelines, if any, will be issued

by SEBI. All other existing conditions for investment by FPIs in the debt market remain unchanged.

(A.P. (DIR Series) Circular No. 6 dated 16th July, 2015)

(Comments: This is a welcome clarification as a doubt had arisen about the applicability of the three year residual maturity period conditions to security receipts (SRs) issued by SRCs. This clarification will benefit ARCS)

B. DIPP PRESS NOTES/ CLARIFICATIONS

The following press note / clarification has been issued by the Department of Industrial Policy and Promotion (DIPP):

6. Introduction of Composite Caps for Simplification of Foreign Direct Investment (FDI) policy to attract foreign investments

The GOI has reviewed the extant FDI policy for various sectors and made amendments in the Consolidated FDI Policy Circular of 2015. The amendments have been made effective from 12th May, 2015. DIPP has brought about uniformity and simplicity by introducing composite cap across the sectors in FDI policy for attracting foreign investments.

(Press Note No. 8 dated 30th July, 2015)

(Comments: The Press Note has thereby brought in the following Amendments/Clarifications in the FDI Policy:

- ***The sectoral cap viz. the maximum amount up to which foreign investors can make investment in an entity is now made composite and therefore, includes all types of foreign investments (direct and indirect) regardless of whether the said investments have been made under Schedule 1 (FDI), 2 (FII), 2A(FPI), 3 (NRI), 6 (FVCI), 8 (QFI), 9 (LLPs) and 10 (DRs) of FEMA (Transfer or Issue of Security by Person Resident Outside India) Regulations)***
- ***Total foreign investment (composite), direct and indirect, in an entity should not exceed the sectoral/statutory cap prescribed for a particular sector. Accordingly, the aggregate FII/FPI/QFI investment, individually or in conjunction with other kinds of foreign investment, should not exceed the sectoral/ statutory cap***
- ***Portfolio investment, up to aggregate foreign investment level of 49% or sectoral/ statutory cap, whichever is lower, will not be subject to either government approval or compliance of sectoral conditions, provided such investment does not result in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities. Therefore, for sectors which are under Government approval route and where foreign investment results in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities will be subject to Government approval. However, such transfer of ownership and/ or control of Indian entities which are operating in sectors under automatic route but with additional conditionalities will be subject to compliance of such additionl conditionalities and no government approval will be required.***
- ***The onus of compliance with the above conditions/provisions will be on the investee company***

The following Sector Specific Clarifications/ Amendments have been provided in the Press Note 8

- ***It is specifically clarified that there are no sub-limits of portfolio investment and other kinds of foreign investments in commodity exchanges, credit information companies, infrastructure companies in the securities market and power exchanges.***

- *In Defence sector where sectoral cap of 49% is prescribed, portfolio investment by FPI/ FIIs/NRIs/QFIs and investments by FVCIs **together will continue to be restricted to** 24% of the total equity of the investee/joint **venture company***
- *In Banking-Private sector, where sectoral cap is 74%, FII/FPI/QFI investment limits will continue to be within 49% of the total **paid-up capital of the company***

7. Clarification on FDI Policy on Single Brand Retail Trading

The DIPP has provided the following clarifications relating to Single Brand Retail Trading:

1. **Issue:** Can the brand owner or non-resident entity / entities undertake single brand retail trading of the specific brand through more than one company in India?

   Clarification: A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking single brand product retail trading. Such non-resident entity or entities can undertake single brand retail trading business through one or more wholly owned subsidiaries or joint ventures.

2. **Issue:** Does the FDI policy on single brand retail trading apply to Indian brands seeking foreign investment?

   Clarification: FDI policy on single brand retail trading as contained in para 6.2.16.3 of Consolidated FDI Policy Circular of 2015 equally applies to Indian brands.

(DIPP website: www.dipp.nic.in, "What's New Section" dated 7th July, 2015)

Ajay Singh, *Advocate*

BEST OF THE REST

1. Company Law – Corporate criminal liability – When company is the accused, its directors can be roped in only if there is sufficient incriminating evidence against them coupled with criminal intent or if there the statutory regime attracts the doctrine of vicarious liability: Companies Act, 1956, Sec. 34 & Criminal Procedure Code, 1973 Ss. 200-204 :

During the tenure of the then Minister of Telecommunications in 2008, Unified Access Services Licences ("UASL") were granted. Later information was disclosed to the Central Bureau of Investigation (CBI) alleging various forms of irregularities committed in connection with the grant of the said UASL which resulted in huge losses to the public exchequer and then CBI registered a case widely known as "2G Spectrum Scam Case". The case was registered against unknown officers of the Department of Telecommunications (DOT) as well as unknown private persons and companies.

In the present case the magistrate issued summons against Directors (present two appellants) without ascribing any incriminatory role to them, but solely on the basis that their companies were accused and they being alter ego were vicariously liable without invoking any applicable statutory scheme.

On appeal the Hon'ble Supreme Court observed that the if any person or group of persons who can control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are “alter ego” of the company. In the present case however this principle is applied in an exactly reverse scenario. Here the company is the accused person and the Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind of the company and therefore on this premise, acts of the company are attributed and imputed to the appellants which is difficult to accept it as correct principle of law. This proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a Director of company can be held liable.

It was also held that a undoubtedly a corporate entity is an artificial person which acts through its officers, directors, Managing Directors, Chairman etc. If the company commits any offence involving mens rea it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so when the criminal act is that of conspiracy. However there is a cardinal principle of criminal jurisprudence that there

is no vicarious liability unless the statute specifically provides so. Thus an individual who has perpetrated the commission of an offence on behalf of a company can be made accused along with the company, if there is sufficient evidence of his active role coupled with criminal intent.

Second situation in which he can be implicated is in those cases when the statutory regime itself attracts the doctrine of vicarious liability, by specifically invoking such a provision. When the company is the offender, vicarious liability of the Director cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example of vicarious liability of Director is section 141 of the NI Act.

In the present case, while issuing summons against the appellants, the Special Magistrate has taken shelter under a so-called legal principle of alter ego in the reverse situation, which is incorrect in law.

Sunil Bharati Mittal vs. Central Bureau of Investigation (2015) 4 Supreme Court Cases 609

2. Sale of minor's property – By mother – Without any legal necessity and without obtaining prior permission from District Court – Voidable at instance of minors – Minors entitled to recover possession of property: Hindu Minority and Guardianship Act, 1956 Sec. 8(2)

The property in dispute belonged to minors father and after his death, it was inherited to his widow named Chanda Bai and his sons jointly and subsequently mother sold the suit property to vendee named Radhe Shyam by registered sale deed who in return sold it to another person. The widow without obtaining prior permission from the District Court sold the suit property and the said sale so made was in contravention of Section 8(2) of Hindu Minority and Guardian Act, 1956 (henceforth "HMGA, 1956").

The suit was filed for declaration that sale deed executed is null and void as the mother has sold the suit property without legal necessity.

The Trial Court by its judgment decreed that the suit holding *inter alia* that sale made by the Chanda Bai (the mother) in favour of defendant No. 2 Radhe Shyam (the vendee) was without legal necessity and as such the sale made by Radhe Shyam to defendant No. 3 is null and void and decreed the suit of the plaintiffs. On further appeal the Appellate Court affirmed the Trial Court judgment thereby holding that sale made by Chanda Bai was without the legal necessity.

Questioning the legality and validity of impugned judgment and decree, the defendants preferred the Second Appeal wherein the learned counsel for the appellant submitted that the section 8(2) are not attracted and that the Trial Court placed its reliance upon the Will allegedly executed by Late Bharat Lal Awadhiya in favour of plaintiffs which is neither filed nor it has been proved in accordance with law.

The substantial question of law arose for consideration as to whether in the absence of proof of Will the property could be held to be the exclusive ownership of plaintiff and whether the previous permission was necessary to sell the subject suit property.

The Hon'ble Court observed that section 8(2) of the said Act states that no immovable property of minor can be transferred by way of sale, gift, exchange or otherwise without previous permission of the Court and any transfer in contravention of the sections 8(1) and 8(2) is voidable at the instance of minor or any person claiming under him. In the present case though it is stated that the property has been sold for the proper benefit of the minors, their protection, education and marriage there is nothing on record to suggest that previous permission of the Court was obtained by the natural guardian before by sale in question.

When suit property was originally held by minor's father and after his death, it was inherited by his widow and his sons jointly and subsequently mother sold suit property to vendee by registered sale deed, without legal necessity and without obtaining prior permission from the District Court, sale so made in contravention of S. 8(2) would be voidable and minors thus would be entitled to recover possession of property.

In view of the above, the Second Appeal was dismissed.

Smt. Agra Bai vs. Rajendra Kumar Awadhiya and others AIR 2015 Chhattisgarh 98

3. Registered Gift Deed – Proof of execution – Gift deed signed by one attesting witness and not by two attesting witnesses – Identity and deposition of Attesting witness mandatorily required – Held gift deed invalid: Transfer of Property Act, 1882 Ss. 123, 3 and Evidence Act S. 68

The issue is related to the validity of the gift deed executed by Late Rashram Borah in the favour of the Defendant who is one of his son. The land in question belonged to Rashram Borah form a part and parcel of land and property owned and possessed by him. On 24-6-1962 Late Rashram had effected a partition of his movable and immovable properties amongst his three whereby the entire property was divided into four parts. One part each went to his sons and Rashram Borah retained the fourth part for himself. However while the plaintiffs were enjoying the possession of their share of land, the defendant No. 1 without knowledge of the plaintiffs had attempted to get his name mutated in respect of the land being the land falling in the share of Rashram Borah. Defendant No. 1 had disclosed that on 12-4-1975 Rashram Borah had executed a gift deed in his favour gifting his share in favour of the defendant. Asserting that Late Rashram Borah had never executed any gift deed in favour of the defendant No. 1, the plaintiffs had instituted suits praying for decree declaring right title and interest of the land in question and also prayed for cancellation of registered gift deed on the ground that the same was invalid, void and inoperative in the eye of the law.

The Trial Court dismissed the suit. The first Appellate court was of the view that the execution had been duly approved by the defendant counter claimant himself by identifying the signature of Rashram Borah. It was further held that the plaintiff's side did not raise any objection while exhibiting the signature of the donor. Aggrieved by this order the plaintiffs filed a further appeal.

A reading of the provisions of section 123 of the Transfer of Property goes to show that gift of immobile property can be effected by (1) a registered instrument signed by or on behalf of the donor and (2) attested by at least two witnesses. The usage of the term "at least" in section 123 makes the attestation of the registered instrument by minimum two witnesses as mandatory.

The Hon'ble Guwahati High Court observed that, from a perusal of the gift deed, it is apparent on the face of the record that the said gift deed although a registered document, has not been attested by two witnesses as per the requirement of section 123 of the Transfer of Property Act. Only one person by the name 'Bogamal Das' who had purportedly signed in the column of attesting witness.

The fact that the plaintiffs had not raised any objection when the document was marked as exhibit cannot dispense with the requirement of proof of Exhibit G a deed in accordance with law particularly when its execution has been categorically denied by the plaintiff side in their pleadings.

The Hon'ble High Court thus observed that in case of a registered deed of gift within the meaning of section 123 of the Transfer

of Property Act, the same is required to be compulsorily attested by at least two witnesses. When the execution of the gift deed is denied by taking a plea that the same had not been executed, the due execution was of the same will have to be proved in accordance with section 68 of Evidence Act, 1872, failing which the document itself cannot be used as evidence. The donee must also prove and establish the fact that the attesting witness had signed the document *animo attestendi*. For the purpose of compliance of section 68 if no attesting witness is found to be alive or even if alive is found to be incapable of giving evidence then the donee will be mandatorily required proving the execution of the gift deed as per section 69 of the Evidence Act. Unless the requirements of section 68 or section 69 of the Evidence Act is complied with the gift deed itself will be inadmissible in evidence.

Since in the present case, the defendant has failed to prove and establish the due execution of the gift deed in accordance with law, such being the position, it was held that the judgment passed in the title appeal is not sustainable and the same was set aside.

Golap Borah & Another vs. Korneswar Borah alias Karneswar & Others AIR 2015 Guwahati 99

4. Registered document will take effect from the date of execution – Proof of document thirty years old or more – Invocation of presumption: Evidence Act Sec. 90 r.w. Sec. 47 of the Registration Act, 1908

The sole point in this issue is the due execution and attestation of the gift deed. In this case the two possible dates for considering 30 years for the purpose of invocation of presumption under sec. 90 which were (1) 14-10-1999, when the defendant himself tendered gift deed in question as evidence in his examination and on that date only 29 years and 5 months had elapsed from the date of execution of deed (15-5-1970) and (ii) 21-7-2000, the date of testimony of DW 5, Registration clerk from office of Sub-Registrar, by when 30 years had elapsed from the date of execution of deed.

The Hon'ble Supreme Court observed that the appellant has rested his case on the favourable presumption contained in section 90 of the Evidence Act, i.e. that the gift deed being thirty years old should be taken as having been duly executed and attested. The appellant made no endeavour to prove the gift deed without the advantage of this presumption. Under section 90, before any question of presuming a document's valid execution can emerge the document must purport and be proved to be thirty years old. The law surrounding the date of computation of the elapse of thirty years stands long settled since the verdict of Privy Council in *Surendra Krishna Roy vs. Mirza Mahammad Syed Ali Matwali AIR 1936 PC 15*, which held that the period of thirty years is to be reckoned not from the date upon which deed is filed in court but from the date on which is having been tendered in evidence its genuineness or otherwise become the province of proof. Section 47 adumbrated that the registered document will take effect from the date of its execution.

The first and stumbling block on the appellant case, was that at the time of tendering of the gift deed before the Trial Court the thirty period maturation period provided by section 90 was not satisfied, the gift deed having been tendered in evidence after around 29 and one-half years since he had alluded to it in the course of the appellant examining himself unlike the stage of pleading this incontrovertibly partook the nature of evidence. The time prerequisite to even essay availing discretionary power sec. 90 had not been met. Being a statutory requirement, courts cannot alter the operation of the statute by reading into as following a document aged 29 and one half years to be open to the laws presumption. The Judgment of the High Court below as conceded the issue of this document's eligibility of sec. 90, and repudiated this submission, the documents not even, echoing

the words of sec. 90 "purporting" to be thirty years at the time of tendering. The Court further observed that even if the document purported or is proved to be thirty years old, the appellant would not axiomatically receive a favourable presumption, sec. 90 presumption being a discretionary one.

Since the gift deed in question was tendered in evidence five months prior to becoming thirty years old, the appeal was held to be devoid of merits. Hence the appeal was dismissed by the Hon'ble Apex Court.

Om Prakash (dead) through his legal representatives vs. Shanti Devi and Others 2015 4 Supreme Court Case 601

5. Contempt of Court – Freedom of Speech/Expression only permits reasoned and temperate criticism of a judgment, not use of abusive and pejorative language against the author judges: Contempt of Court Act, 1971

The High Court of Kerala had, by the orders dated 23-6-2010 banned the holding of meetings on public roads and road margins in the State with the object of ensuring accident free and uninterrupted traffic along such public roads. Meanwhile, on 26-6-2010, the appellant delivered a speech in a public meeting at Kannur, Kerala allegedly convened in connection with a hartal organised to protest against the hike in petroleum prices, which was widely reported by the media.

A translation of the speech as appearing in the local city news etc. revealed that the appellant had referred the Hon'ble Judges as fool/idiot. The appellant was convicted for contempt.

The Hon'ble Court observed that one can indubitably exercise the freedom of speech but it is not open to appellant or any person to employ abusive and pejorative language in respect of authors of a judgment and call upon them to resign and step down from their office if they have any self respect. Right to freedom of speech and expression postulates a temperate and reasoned criticism and not a vitriolic, slanderous or abusive one. Right to free speech certainly does not extend to inciting public directly or insidiously to disobey Court Orders.

Further Supreme Court dismissed the appeal and held that meaning sought to be given to the words used cannot be accepted since words as used are pejorative or insulting epithets/abuses akin to calling a person fool or an idiot.

In the case under consideration, the appellant had his remedy against the judgment concerned in the form of 'Appeal to the Regional bench of High Court' and then 'Special Leave Petition to the Supreme Court' which the appellant has exercised albeit without success. The speech was made within couple of days of passing of the *ad interim* injunction; no empirical was referred to by the appellant, nor has any been presented thereafter to support his utterance that the order was being opposed by the public at large. Hence, these parts of speech of appellants clearly scandalise and lower the dignity of Courts and are intentional and calculated obstruction in the administration of justice. This requires to be roundly reused and combated.

Having perused the translation of the speech and conduct of the appellant, the appellant intended to lower the dignity of the Court, to obstruct and impede its functioning and not just to criticise the pronouncements and he shown no remorse or contrition for his conduct. Hence, it is not petitioner's province, in exercising his freedom of speech, to advise that "if those judges have any self respect, they should resign and quit their offices". It had conveyed strong abuse and a slang connotation especially to rural and rustic persons he was addressing to. Therefore, the Hon'ble High Court upheld the conviction of the appellant for committing Contempt of Court and ordered appellant's incarceration".

M. V. Jayarajan vs. High Court of Kerala and Another (2015) 4 SCC 81.

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TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxman, Current Tax Report (CTR), The Tax Referencer (TTR), Income Tax Report (ITR), ITR's Tribunal Tax Reports (ITR (Tribunal), Sales Tax Review (S. T. Review), The Bombay Chartered Accountant Journal (BCAJ), The Chamber's Journal (CJ), The Chartered Accountant (CAJ), All India Federation of Tax Practitioners Journal (AIFTPJ), Company Case, Times of India and Economic Times for the period June, 2015 to July, 2015 has been arranged and indexed topic-wise.

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CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

RISING VOLATILITY

The month of July was quite eventful for the world. Uncertainties surfaced in a number of economies and volatility increased across the board. Initially, a major tension was of that of a default in payment by Greece to its lenders. The country was quite adamant regarding implementation of austerity measures suggested by its creditors. The country conducted a referendum that gave a negative vote which added to the uncertainty and risk of default. However, as the politicians in the Euro Zone made last ditch efforts, the Greek leaders reciprocated to close a deal which has at least averted a default for the time being. The problem has not ended but has simply subsided and can raise its ugly head again after about a year or so. The crisis was defused and that gave a respite to the jittery Euro Zone as well as global economy. It made the markers rise across the world for a while and the sentiments improved.

One more positive development was that of the arriving of the nuclear settlement between Iran and a group of countries led by the US. The dispute was long drawn and had resulted in severe sanctions on Iran. It was apprehended that Iran was closing in to make nuclear arms which was creating a risk to the world. To deter it from continuing nuclear technology development, the sanctions were slapped but Iranian government did not budge for many years. It had resulted in the slowing down of the Iranian economy but the political leadership remained adamant. Fortunately, after a long time, better sense prevailed and after protracted negotiations, a settlement could be reached, which has resulted in the agreement for lifting of sanctions on the country. Apart from having a sentimental value for the world, the opening up of the economy to the global players can create new opportunities for many countries including India, by way of new investment or trade possibilities. It will give opportunities to many developed countries to sell technologies to Iran as the economy will need a lot of support to cover the lost years. The crude oil supply from Iran can add to the oil pool offered for sale in the world thereby easing supply pressure on various petroleum products. The increased supply can reduce their pricing and substantially benefit many economies like India which import large quantities of crude oil and petroleum derivatives in absence of adequate hydrocarbon reserves in their home land. Historically, India was one of the preferred allies of Iran and the current situation in that country can create great opportunities for India.

The US economy continues its forward march and the data emerging from it remains encouraging. The reasonably good economic growth of the country can be very positive for the world economies and trade in the world of goods and

services. The only hitch remains is the imminent hike in interest rates by FED which is considered as negative by many developing economies like India as the event will turn the tide of the funds to the US, which may happen at the cost of many developing countries. However, such interest rate hike is inevitable. The US economy continued its super cheap money policy for a long time. It kept the interest rate at very low levels to bring the economy out of recession and low growth. The objective seems to have been achieved to an extent. The US will increase its interest rates and the world economy will have to bite the bullet. Whenever it happens for the first time, it will give pain to many developing economies but they need to be prepared for the same. The pain may keep on increasing as interest rates in the US may increase in small doses. The effects of the rate hike will be felt globally with varied intensity. Every country needs to guard its economy as well as the monetary policy to bear the impact of the same. Some economies will be more impacted and some economies will be more resilient to the event but it is very likely that a new economic equilibrium will emerge after each such rate hike.

However, all may not be well for the world. The Chinese stock market had an extreme turbulence in the last couple of months wherein markets moved more than 5% in a matter of a single day. Trillions of Dollars in market capitalisation were lost and substantial economic risk was created in the economy. Over a period of last one year till June 2015, the Chinese stock market appreciated more than 100% which was quite phenomenal. This boom was created by large participation of retail investors in the market due to availability of easy credit. However, the bull run mainly created by availability of credit and boost of sentiments due to surging stock markets, created substantial risk. Before the crisis emerged, over the last year or so, the Chinese stock market more than doubled but the economic scenario in the country did not improve much. The phenomenon was more of a result of money chasing stocks which made the markets expensive and the result was increase in vulnerability. Then came a day when some smart investors started realising that markets have gone up too far too fast without adequate backing of fundamentals. Selling emerged and it resulted in a sudden collapse of the stock markets. The Government of China tried to salvage the situation by allowing certain suspensions of trading and similar measures but the impact of the same was temporary and the rout could not be prevented. The Chinese Government has still kept the pressure on and the stock markets in China have stabilised as of now but how far they can sustain the levels or manage a pull back is a big question not only for the Chinese investors but for the whole world. A credit bubble has been created over the past one year in the Chinese stocks and to make matters worse, stress is gradually emerging in the Chinese economy. If the Government is able to diffuse the stress, the stock markets may stabilise but if their efforts do not yield the required result, there can be a big blow not only to the stock markets but even to the economy of the country. The Chinese economy has become the 2nd largest economy in the world and it was a major growth engine of the world over the last few years especially when the US and Europe were struggling. As of now, trillions of Dollars worth of market capitalisation has eroded in the Chinese stock markets and if the fall cannot be controlled, trillions of Dollars of worth of market capitalisation can still get eroded, which does not auger well, not only for that country, but even rest of the world. Little can be done by other countries to save the situation and everything depends upon how the Chinese Government can handle the diffusion of the risk so created but the task is not going to be easy. Any mishandling can create as big a crisis as was created in the US economy in the year 2008, which pushed the world to a big recession.

The activities of Muslim fundamentalist continue to rise. The emerging risk therefrom is getting spread not only in the local area of their influence but the shadow of their terrorism is getting casted across the world. If any major act of terrorism happens in a developed country, it will become very detrimental to the economic stability of the world, which is struggling to grow out of the

pains of the last recession. The terrorist activities have more of economic targets with the agenda of destabilisation of their target economies. Many of these targets are developed economies and the threat can create a major hurdle to the sustained economic growth of the world. In current times, the world has got so economically integrated that such events can create substantial miseries in many parts of the world. The problem does not seem to be easily resolvable and its solution can be very complicated. The risk is likely to create uncertainty for the stability of the world for years to come.

Though things have not been bad for India, especially in light of plummeting prices of petroleum products, in absence of the required reforms, the economy is not taking the expected traction. Add to that, what is happening in the Indian Parliament is leading the country nowhere and the current session of the Parliament can be a washout. It may further delay the reforms process, which is so essential for the elimination of poverty in the country. If the petroleum prices continue to remain weak, a great potential for the Indian economy will emerge, which needs to be taken advantage of by aggressive measures and by making right investments. The Government of India is one of the major investors in the country and it is taking efforts to make front end investments in the current financial year, thereby giving a push to the economy. In the first three months, 38% of the budgeted allocation has already been spent, which is expected to give the desired push to the Indian economy. However, private investors are not doing enough as their concerns are not being addressed, either by the Government or by the bureaucracy. There is a feeling that the ease of doing business is not materialising as expected and more and more restrictions and formalities are getting added to make life more complicated. Government is making efforts but the measures taken are note adequate to convince the investors. The golden times are beckoning the Indian economy and India needs to play its cards well, as quickly as possible.

The RBI policy, which has been announced on 4th August, 2015 does not harbour any changes but has been consistent with the stand taken by its Governor. It appears that the RBI is following its own objectives of controlling inflation in a systematic manner and its efforts have yielded reasonable results so far. If the rain God does not give surprises in the next couple of months, then inflation in the economy will remain in control. Aided by a reduction in the global commodities prices, which has reduced the cost of production of many goods and even certain services, the rate of inflation in India can come down further. This will pave a way for the RBI to reduce the interest rates over the next year in a systematic fashion, without losing its grip on inflation.

The current investment climate in India is not conducive for investment in immovable properties. The precious metals do not look attractive due to their fall in prices in the international markets. Interest rates are somewhat steady but they are likely to come down gradually. Tax free bonds seem to be an interesting emerging asset class for investors as they can give more than 7% tax free returns per annum. However, care should be taken to only invest in those bonds which can be traded on the stock markets and will have adequate liquidity. Purchases of Tax Free bonds can even be made from secondary markets after ascertaining the liquidity profile of the bonds. The Indian stock markets remain attractive on medium as well as long-term basis but a reaction cannot be ruled out, especially in the month of August or September. The investors should spread out their purchases during the months but if NIFTY reacts to 8,200 level or lower, aggressive buying may be advantageous.

The short-term future looks volatile but opportunities are available for long-term investors in stocks as well as in bonds. Angel investing is emerging as a new trend but investing in funds having the objective of angel investing should be done with caution as it is laden with high risk. Care should also be exercised before committing to any e-commerce investments. Indian markets will rise as and when reforms get implemented.

CA. Ninad Karpe

The Lighter Side

POEM OR PROSE?

Just when I thought that Direct Tax laws were boring, I was surprised to see "POEM" in the current year's amendment. Being a failed part-time poet, I was initially thrilled that the tax laws would now not be only in prose, but also in poetry.

Only when I read the fine print, did I realise that "POEM" refers to "place of effective management"!

My dream of tax laws being written in poetry were immediately quashed.

While presenting the Budgets, our Finance Ministers have, intermittently, indulged in poetry, quoting some famous poets – invariably from the region where the Finance Minister hails from.

There is possibly a huge opportunity for a future Finance Minister to create a global record and get the attention of the world by presenting a Budget entirely in poetry. If the famous poet, Vikram Seth can write an entire book of 300 pages, "Golden Gate", in poetry; surely, in future, a Finance Minister, could present an entire Budget in the form of a poem. And till that happens, taxpayers and tax consultants have to figure out how to deal with this new concept of "POEM" in the tax laws.

The months of July and August are busy months for tax consultants, as they need to deal with the last minute rush of blood for filing tax returns. In the good old days, there were serpentine queues outside the tax department to file these returns. With everything going digital, filing of tax returns has also now become a digital skill. Long physical queues are now replaced by waiting on the Internet to ensure that the network is robust enough to handle the pressure of the workload of tax returns.

But the most interesting part is the linkages of all possible identities – Aadhar, Passport etc. in the current tax returns. The tax return will now become the "mother" of all documents with details of all possible numbers which the taxpayer may have. Whilst the department will have its own method of linking all this information to complete the tax assessment, the taxpayer also should be happy. Should the taxpayer lose all this information due to some hazard, he has to merely retrieve his tax records and all his numbers will be known to him.

And the manner in which the tax environment is going digital, you will soon have to read the Lighter Side in a digital format !


Ajay Singh, *Advocate,* CA. Ashok M. Manghnani
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th July, 2015 and 8th August, 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 24th July, 2015.

LIFE MEMBERSHIP

1	Mr. Parekh Mayur Rajnikant	CA	Mumbai
2	Mr. Poojary Sadashiva Chandaya (Ord. to Life)	ITP	Mumbai
3	Mr. Rajagiri Ashok Bhumaiah	CA	Mumbai
4	Mr. Shingala Nitin Prabhudas (Ord. to Life)	CA	Mumbai
5	Mr. Chawla Rajesh Hariram (Ord. to Life)	Advocate	Mumbai
6	Mr. Panjwani Vishal Anand	CA	Mumbai
7	Mr. Chheda Sanjay Visanji (Ord. to Life)	CA	Mumbai
8	Mr. Ahuja Lalitkumar	FCA	New Delhi
9	Mr. Parab Hemant (Ord. to Life)	CA	Mumbai

Ordinary Membership

1	Mr. Lalwani Suresh Ainshiram	CA	Nagpur
2	Mr. Sanghvi Sanjay Jayantilal	Advocate	Mumbai
3	Mr. Jadhav Akash Gajanan	CA	Mumbai
4	Mr. Chhugani Haresh Thakur	STP	Mumbai
5	Mr. Gala Bhavik Manilal	ICSI	Mumbai
6	Mr. Hemani Shailesh Kumar	CA	Mumbai
7	Mr. Jain Divyesh Prafulchandra	CA	Mumbai
8	Mr. Kumar Harish	Advocate	Delhi
9	Mr. Kukreja Sunil H.	CA	Mumbai

10	Mr. Marda Sumit Kishor	CA	Solapur
11	Mr. Modi Mehul Mukundrai	CA	Mumbai
12	Mr. Shah Bhavin Suresh	CA	Mumbai
13	Mr. Shah Mehul Kirtikumar	CA	Mumbai
14	Mr. Thakar Rahul Chandrakant	Advocate	Mumbai
15	Mr. Thacker Prashant Jagdish	CA	Mumbai
16	Mr. Vitnani Jai Moti	CA	Mumbai
17	Mr. Vichare Vilas Vijay	STP	Mumbai
18	Ms. Bhandakar Namrata N.	CA	Mumbai
19	Ms. Devendra Mallika Paneer	CA	Mumbai
20	Mr. Shroff Deep Nautam	CA	Mumbai
21	Ms. Mulla Shabana Roshan	CA	Mumbai
22	Mr. Gandhi Nishit Madhukar	Advocate	Mumbai
23	Mr. Kothari Milind Subhash	CA	Mumbai
24	Mr. Sharma Abhay Nirbhay	Advocate	Mumbai
25	Mr. Gokhale Shreekant Madhusudan	STP	Pune
26	Mr. K. Venkatachalam	CA	Pune
27	Mr. Pandhare Suresh Baburao	CA	Solapur
28	Mr. Vakharia Paresh Vinodchandra	CA	Mumbai
29	Mr. Gupta Sushil R.	CA	Delhi
30	Mr. Banka Anand Jagdish	CA	Mumbai
31	Mr. Aggarwal Manish M.	CA	Ghaziabad
32	Mr. Dhavale Amit Balkrishna	CA	Thane

Student Membership

1	Mr. Kothari Rishikesh	CA Appear	Thane
2	Ms. Poojari Susmita Sadashiv	IPC (CA)	Mumbai
3	Mr. Kumar Bharat	CA Appear	Mumbai
4	Mr. Poladia Rohan	CA Appear	Mumbai

II. PAST PROGRAMMES

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
1.	**ALLIED LAWS COMMITTEE**		
	Allied Law Study Circle Meeting Venue : Kilachand Hall, IMC	***31st July, 2015*** Subject : Audit Report and related documentation under the Companies Act, 2013	CA Chandrika Sridhar

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
2.	**DIRECT TAXES COMMITTEE**		
A.	**Intensive Study Group on Direct Tax Meeting** Venue : CTC Office	**28th July, 2015** Subject : Recent Important Decisions under Direct Taxes	CA Ashok Sharma Mr. K. Gopal, Advocate
B.	**Two Day Seminar on Real Estate Development** Venue : West End Hotel	**7th & 8th August, 2015** Subject : 1. Basic Concepts of Transfer of Property (Involving Transfer of Property Act, Easement Act, Rent Act), Provisions of MOFA 2. Concept of FSI, TDR, etc. (involving relevant provisions of BMC Act, DCR, etc.) 3. Legal issues in Redevelopment of Properties 4. Drafting of Redevelopment Agreement & related documents 5. Relevant provisions of Maharashtra Stamp Duty Act & Indian Registration Act 6. Accounting Aspects (Including Accounting Standards, Guidance Note, etc.) 7. Issues under VAT 8. Issues under Service Tax 9. Taxation of Builders and Developers (including section 43CA, ICDS, etc.) 10. Issues under Income tax from the perspective of land owner / flat purchaser /seller (including sections 50C, 194-IA, 56(2), 54, 54F etc.)	 Mr. Parimal Shroff, Solicitor Mr. Manoj Dahisariya, Architect Mr. P. A. Jani, Solicitor Mr. Pravin Veera, Solicitor Mr. Pradip Kapadia, Solicitor CA Yogendra Kabra Mr. Vinayak Patkar, Advocate Mr. Bharat Raichandani, Advocate CA Pradip Kapasi CA Jagdish Punjabi

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
3.	**INDIRECT TAXES COMMITTEE**		
A.	**GST Study Group Meeting** Venue : Jaihind College	27th July, 2015 Subject : Constitution Amendment Bill	Chairman Mr. P. C. Joshi, Advocate Speaker CA Amitab Khemka
B.	**Indirect Tax Study Circle Meeting** Venue : Babubhai Chinai Committee Room, IMC	**29th July, 2015** Subject : Recent Decisions under Service Tax	Chairman Mr. Bharat Raichandani, Advocate Group Leader Mr. Vinay Jain, Advocate
4.	**INTERNATIONAL TAXATION COMMITTEE**		
A.	**Intensive Study Group on International Taxation Meeting** Venue : CTC Office	**3rd August, 2015** Subject : Black Money Law – Rules and FAQs	CA Ramesh Iyer
B.	**FEMA Study Circle Meeting** Venue : CTC Office	**5th August, 2015** Subject : Foreign Exchange Regulations in relation to External Commercial Borrowings	CA Gaurav Tanna
5.	**MEMBERSHIP & PUBLIC RELATIONS COMMITTEE**		
A.	**Self Awareness Series** Venue : CTC office	29th July, 2015 Subject : Management Lesson from Ramayana	CA Hitendra Gandhi
B.	**Half Day Seminar on Company Law** **(Jointly with Trimbak Study Circle of Nashik)** Venue : Institute of Engineers Hall, PWD Campus, Bharat Ratna Sir Visvesvarya, Nashik.	25th July, 2015 Subject: Schedule II, Cash Flow and exemption accorded to private Ltd. & other companies	CA Abhay Mehta
6.	**STUDENTS & IT CONNECT COMMITTEE**		
	2nd Football Cup **Jointly with Membership & Public Relations Committee** Venue : Indian Football School, Cooperage Football Ground – Mini Ground Colaba	**8th August, 2015** 2nd Football Cup	

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
7.	**STUDY CIRCLE & STUDY GROUP COMMITTEE**		
A.	**Study Group Meeting** Venue : Babubhai Chinai Committee Room	30th July, 2015 Subject : Some Important judgments under Transfer Pricing	Mr. Sunil Moti Lala, Advocate & Tax Counsel
B.	**Lecture Meeting** Venue : Jai Hind College	**4th August, 2015** Subject : Revised Income Tax Return Forms	CA Ameet Patel

III. FUTURE PROGRAMMES

Sr. No.	Programme Name / Committee/Venue	Day & Date	
1.	**ALLIED LAWS COMMITTEE**		
A.	**Lecture Meeting on Provisions of Accounts and Audit under New Companies Act** **(Jointly with Corporate Members Committee, CTC & JB Nagar Study Circle of WIRC, Andheri East)** Venue : All India Local Self Govt. Institute Mayor Hall, Jain School, Juhu Lane, Andheri (W), Mumbai – 58.	**12th August, 2015** Subjects : 1. Auditor's Reporting Requirement as per New Companies Act as well Standard of Auditing 2. Provisions of Accounts & Audit under New Companies Act	CA Himanshu Kishnadwala CA Nilesh Vikamsey
B.	**Allied Laws Study Circle Meeting** Venue : 2nd Flr, Kilachand Hall, IMC, Mumbai	**13th August, 2015** Subject : Importance of Drafting Wills 9th September, 2015 Subject : Provisions of RTI	Mr. P. A. Jani, Advocate Mr. Bhaskar Prabhu
2.	**CORPORATE MEMBERS COMMITTEE**		
	Full Day Seminar on "Audit under Various Laws" **(Jointly with Allied Laws, Direct Taxes and Indirect Taxes Committee)** Venue: Terrace Hall, West End Hotel, Churchgate, Mumbai-20.	**5th September, 2015** Subject : 1) Implications of New Companies Act on Finance Statements 2) Commonly observed non compliances in Accounting Standard 3) Issues in Tax Audit 4) Audit under Indirect Tax	CA Jayesh Gandhi CA Sanjeev Maheshwari CA Mahendra Sanghvi CA Sunil Gabhawalla

Sr. No.	Programme Name / Committee/Venue	Day & Date	
3.	**DIRECT TAXES COMMITTEE**		
	Intensive Study Group (Direct Tax) Meeting Venue: CTC Conference Room	19th August, 2015 Subject : Recent Important Decisions under Direct Taxes	CA Dharan Gandhi
4.	**INDIRECT TAXES COMMITTEE**		
A.	**Indirect Taxes Study Circle Meeting (Only for IDT SC Members)** Venue: 2nd Floor, Babubhai Chinai Committee Room, IMC	11th August, 2015 Subject : Issues in Service Tax Refund	Chairman : CA Naresh Sheth Group Leader : CA Keval Shah
B.	**GST Study Group Meeting** (Only for GST SG Members) Venue : Audio Visual Centre, 4th Floor, Jaihind College, Churchgate	20th August, 2015 Subject : Inter-State supply of goods and services	Mr. Rohit Jain, Partner, ELP
5.	**INTERNATIONAL TAXATION COMMITTEE**		
A.	**Seminar on Black Money Law and Voluntary Compliance Window** Venue : Dahanukar Hall, Maharashtra Chamber of Commerce, Industry & Agriculture Oricon House, 6th Flr, 12, K. Dubhash Marg, Fort, Mumbai	**20th August, 2015** Subject : 1. Key issues under Black Money Law and Voluntary Declaration Window 2. Special session in Q and A format	CA Nihar Jambusaria CA T. P. Ostwal (Interview by CA Nilesh Kapadia and CA Mayur Nayak)
B.	**Half Day Seminar on TDS under Section 195 on Payment on Non-Residents** Venue : Dahanukar Hall, Maharashtra Chamber of Commerce, Industry & Agriculture Oricon House, 6th Flr, 12, K. Dubhash Marg, Fort, Mumbai	**12th September, 2015** Subject : 1. Issues under Section 195 with reference to amendments in Section 195(6) 2. Panel discussion on practical case studies and issues	CA Sushil Lakhani Chairman : CA Kishor Karia Panelists : CA Gautam Nayak and CA N. C. Hegde

Sr. No.	Programme Name / Committee/Venue	Day & Date	
6.	**MEMBERSHIP & PUBLIC RELATIONS COMMITTEE**		
A.	**NRI Taxation & Amendments in CARO 2015** **(Jointly with Solapur Branch of WIRC of ICAI)** Venue : Kamla Hall, Hotel Tripursundary, Sath Rasta, Gandhi Nagar, Solapur	**16th August, 2015** Subject : 1. Basic Concepts of NRI & Resident but not ordinarily resident under IT Act, FEMA Act, RBI Act & treatment of various income, various types of accounts that can be kept & their treatment including certificates to be issued if any. 2. Amendments in CARO 2015, Depreciation (Sch. II) with examples & Audit report drafting & consideration to be given with respect to S. 143 of Companies Act & Privileges relating to Private Companies 3. Unfold of GST 4. Representation before Service Tax Authorities & also appearing for Scrutiny	 CA Manoj Shah CA Abhay Arolkar CA Dhiraj Baldota CA Manish Gadia
B.	**Self Awareness Series** (Only for SAS Members) Venue : CTC Conference Room, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 20.	11th September, 2015 Subject : Effective Communication & Personality Development	Mr. Rohan Mehta

7. PUBLICATION FOR SALE

A.	Transfer Pricing	` 1250/-	Edition 2014
B.	Study Material of 9th Residential Conference on International Taxation held at Goa	` 600/-	Edition 2015

For Further details of the Future Events, kindly visit our website www.ctconline.org.

ALLIED LAWS COMMITTEE

Allied Laws Study Circle Meeting on the subject
"Audit Report and related documentation under the Companies Act, 2013" held on 31st July, 2015
at Khilachand Hall, IMC.

CA Chandrika Sridhar addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Group Meeting on the subject "Some Important Judgments under Transfer Pricing"
held on 30th July, 2015 at Consultair Investments Pvt. Ltd., Churchgate

Mr. Sunil Moti Lala Advocate & Tax Counsel addressing the members. Seen from L to R: CA Dinesh R. Shah Convenor, Mr. Sanjay Choksey, Convenor, CA Avinash Lalwani, President, CA Ashok Sharma, Chairman and CA Dilip Sanghvi, Vice Chairman.

TEAM CHAMBER – 2015-16

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(**Not in the picture:** S/Shri Hitesh R. Shah, K. K. Ramani, Yatin Desai, Jayant Gokhale, A. R. Jani, Anand Banka, Durgesh Kabra, Girish Utangale, Jagdish Punjabi, Kishor Birari, Manilal Simaria, Manish Choksi, Ms. Priti Shukla, Ramesh Prabhu, Ms. Richa Agarwal, Ms. Shaishavi Kadakia, V. R. Ghelani, Vijay Kewalramani, Prayas Jain.)

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TEAM CHAMBER – 2015-16

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TEAM CHAMBER – 2015-16

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Third Row: Prakash Sinha, G. S. Ahuja, Harish Kumar

(**Not in the picture:** S/Shri Manoj Shah, Jayant Gokhale, Hinesh Doshi, Aseem Chawla, Rajat Chawla)

DIRECT TAXES COMMITTEE

Intensive Study Group on Direct Tax Meeting on the subject
"Recent Important Decisions under Direct Taxes" held on 28th July, 2015 at CTC Office.

CA. Ashok L. Sharma addressing the members. Seen from L to R: CA. Dinesh Poddar, Convenor, Mr. Ajay Singh, Hon. Jt. Secretary, CA. Hitesh Shah, Vice President and CA. Ketan Vajani, Chairman.

Mr. K. Gopal, Advocate addressing the members.

DELHI CHAPTER

Full Day Programme on EPC Contracts (Direct Tax, Indirect Tax, Regulatory and other related issues) held on 18th July, 2015 at India International Centre (Kamladevi Complex) at Lodhi Road, New Delhi – 110 003.

Dignitaries on the Dais. Seen from L to R: S/Shri Sudipta Bhattacharjee, Faculty, Nabin Ballodia, Faculty, CA. C. S. Mathur, Chairman, Delhi Chapter, CA. Avinash Lalwani, President, R. P. Garg, Vice Chairman, Delhi Chapter, V. P. Verma, Advisor, Delhi Chapter and CA. Hitesh R. Shah, Vice President.

Faculties

Mr. Nabin Ballodia

Mr. Sudipta Bhattacharjee

Mr. S. P. Singh

Mr. V. Lakshmikumaran

Section of delegates

Section of delegates

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Half Day Seminar on Company Law jointly with Trimbak Study Circle of Nashik held on 25th July, 2015 at Institute of Engineers Hall, Nashik.

CA Abhay Mehta addressing the delegates. Seen from L to R: S/Shri Natwar Trivedi, Convenor, Membership & Public Relations Committee, CTC, CA Avinash Lalwani, President, CTC and CA Hemant Parab, Chairman, Membership & Public Relations Committee, CTC.

Section of delegates.

Self Awareness Series on the subject "Management Lesson from Ramayana" held on 29th July, 2015 at CTC Office.

CA Hitendra Gandhi addressing the members.

INDIRECT TAXES COMMITTEE

GST Study Group Meeting on the subject "Constitution Amendment Bill" held on 27th July, 2015 at Audio Visual Centre, Jaihind College, Mumbai.

Mr. P. C. Joshi, Advocate Chairman.

CA Amitab Khemka addressing the members.

Indirect Tax Study Circle Meeting on the subject "Recent Decisions under Service Tax" held on 29th July, 2015 at Babubhai Chinai Committee Room, IMC.

Mr. Bharat Raichandani, Advocate, Chairman.

Mr. Vinay Jain, Advocate addressing the members.

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