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December- 2015 Vol . IV | No. 3

The Black Money and Imposition of Tax Act, 2015 & Foreign Account Tax Compliance Act-FATCA

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ALLIED LAWS COMMITTEE

Full Day Seminar on Charitable Trusts organised jointly with BCAS held on 7th November, 2015 at Walchand Hirachand Hall, IMC

CA Avinash Lalwani, President, CTC welcoming the faculties & delegates. Seen from L to R: S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Arvind Dalal, Chairman of the session, Shaily Jindal, CIT (Exemption), Guest Speaker and CA Chetan Shah, Vice President, BCAS

CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC welcoming the faculties & delegates. Seen from L to R : S/Shri CA Avinash Lalwani, President, CTC, S. B. Savale, Charity Commissioner (MH), Keynote Speaker, CA Arvind Dalal, Chairman of the session, Shaily Jindal, CIT (Exemption), Guest Speaker and CA Chetan Shah, Vice President, BCAS

Dignitaries during the inaugural lamp lighting at Full Day Seminar on Charitable Trusts

CA Arvind Dalal, Chairman of the session addressing the delegates. Seen from L to R : S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Avinash Lalwani, President, CTC, S. B. Savale, Charity Commissioner (MH), Keynote Speaker, Shaily Jindal, CIT (Exemption), Guest Speaker and CA Chetan Shah, Vice President, BCAS

Shri S. B. Savale, Charity Commissioner (MH) delivering Keynote address. Seen from L to R : S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Avinash Lalwani, President, CA Arvind Dalal, Chairman of the session, Shaily Jindal, CIT (Exemption), Guest Speaker and CA Chetan Shah, Vice President, BCAS

Shri Shaily Jindal, CIT (Exemption) addressing the delegates. Seen from L to R : S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Avinash Lalwani, President, CA Arvind Dalal, Chairman of the session, and CA Chetan Shah, Vice President, BCAS

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The Chamber of Tax Consultants

3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020

Phone : 2200 1787 / 2209 0423 • Fax : 2200 2455

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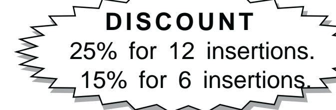

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Editorial

We have come to the end of year 2015 which has seen many natural calamities in the shape of earthquakes, floods etc., and acts of terrorism in the name of religion which has forced the western world to wake up to the faultlines created by themselves. The winter session of Parliament started on a positive note, with an expectation that both the lower and upper houses would witness lively debates on various issues being raised outside parliament like rising intolerance, governance through bans and of course serious and meaningful discussion on the GST bill which may reach its logical conclusion after an incubation period of a decade this despite wide consensus on the necessity of such law. But there are many slips between the cup and the lip. The elected representatives are really testing the tolerance levels of the common man. Anyway, we professionals, on our eternal path of 'wait and watch' should consider whether 'disruption' is a valid method of protest. If one analyses the concept of Satyagraha as propagated by Mahatma Gandhi, deliberate 'disruption' can never be a valid method of protest. Mahatma Gandhi in his statement made before the "Disorder Inquiry Committee on January 5, 1920 (the collected works of Mahatma Gandhi, Volume 19, page 206) stated that "…I have also called it love force or soul force. In the application of Satyagraha, I discovered in the earliest stages that pursuit of truth did not admit of violence being inflicted on one's opponent but that he must be weaned from error by patience and compassion. For what appears to be truth to the one may appear error to the other. Patience means self-suffering so that doctrine came to mean vindication of truth, not by inflicting suffering on the opponent but on oneself."

Here it may not be out of place to mention that "disruption" is a tool used by people with extreme ideological bent of mind or people with vested interest to disrupt the day-to-day life of the common man through various means. We Mumbaikar's have suffered this, time and again and with our resilience, have proved that they can't succeed through "disruptions". I am optimistic that better sense would prevail and Parliament would witness discussions rather than 'disruption'.

The special story of the December issue of Chamber's Journal is "The Black Money and Imposition of Tax Act, 2015 & Foreign Account Tax Compliance Act – FATCA". The world order is getting influenced by the oil price war and the developed countries are fast coming to the conclusion that peace can be given a chance and saved from the attacks from terrorists by sharing financial information. Thus, this is an appropriate time for the member's to have a keen look on the topics of the special story. In this special story, the statutory provisions of the Black Money Act are being analysed by eminent professionals.

Many countries have realised that their residents are not making honest disclosure of their income and wealth by locating wealth in foreign countries. US, has taken the lead in this direction to unearth the income earned by their residents on assets lying outside US by introducing FATCA. Keeping in mind the relevance of the US legislation where India is a signatory and Income-tax rules have already been amended, we thought to incorporate this subject along with provisions of Black Money Act as a special story. We sincerely appreciate the efforts put in by all the Authors in timely submission of articles and comprehensive coverage. I must make a special mention of senior professional Chartered Accountant Dilip J. Thakkar in providing guidance for this issue.

K. GOPAL
Editor

From the President

Dear Readers

We invite all of you to become a part of the CTC HALF YEARLY MEMBERSHIP DRIVE. "EACH ONE BRING ONE". Friends, Chamber has an option for half year membership. A person can become a member for half a year by paying half-yearly membership fee. The period of membership is Oct. to Mar. We have printed the content of half-yearly membership drive in CTC Dec. 2015 Newsletter. It is also available on the website. I request all of you to tell your Friends, Colleagues and Clients to become a part of the CHAMBER FAMILY.

Current issue is on Black Money & FATCA. I must compliment, Advocate, Mr. Rahul Hakani, CA Ramesh Iyer and CA Paresh Shah for creating a synopsis to provide excellent coverage to the current subject of Black Money & FATCA. I am sure it will be very useful to our members as a pre-reference material.

During November 2015, the Festival of Diwali was celebrated by all of us. Due to Diwali Vacation, there was slowdown in events for 20 days. During the month, Chairmen of various committees organised many successful Seminars, Lectures, Meetings, Study Circle Meetings and ISG.

Allied Law committee under the chairmanship of CA Kamal Dhanuka had organised an SC Meeting on Issues under Nomination and a Full day Seminar on Charitable Trusts (jointly with BCAS). The Seminar went very well. For the first time, Charity Commissioner of Mumbai, Shri S. B. Savale, along with his team and Director, Exemption, Shri Shaily Jindal, along with team, shared the same platform. The enrollment for the meeting was 130 people. All the speakers were fantastic and delivery of education was superb. My heartiest congratulations to CA Kamal Danuka and his team for organising such a successful event.

Direct Tax committee, under the Chairmanship of CA Ketan Vajani had organised an ISG meeting on Recent Important Decisions under Direct Taxes. The speaker for the same was Advocate, Rahul Sarda. A discussion on the recent laws was held at this meeting. For in depth study, I recommend you to attend ISG of CTC.

SC & SG Committees under the Chairmanship of CA Ashok Sharma is doing very well. In the month of November one SC and one SG meeting was organised by this committee. During the month, CA Kishore Karia completed his unfinished meeting of

SG. I would like to share Sharmaji's very creative thoughts and he knows how the best can be taken from the speakers for spreading education on tax laws in his Study Circles and Study Groups.

Membership and Public Relations committee under the Chairmanship of CA Hemant Parab had organised a "Documentary Film" on Nani Ardeshir Palkhivala at the CTC Conference Hall. I would like to thank the Director, Mr. Divakara of Forum of Free Enterprise for giving the Chamber the rights to show this Nani Palkhivala's movie.

Indirect Taxes Committee under the Chairmanship of CA Rajiv Luthiya had organised one SC on VAT issues in Works contract and Inter-State Works Contract. The issues were beautifully brought out by CA Kiran Garkar. It was chaired by Sujata Rangekar. The attendance to the SC has increased to more than 60. Rajiv has kept his promise to give quality issue based discussions to members.

International Taxation Committee, under the Chairmanship of CA Naresh Ajwani is doing very well. There were two study circle meetings, one was organised on FEMA and the second was organised on Transfer Pricing. Both the study circle meetings went very well. Now monthly meetings are regularly scheduled. I must thank Naresh for putting in his personal efforts to add the Chamber's name for a meeting organised by the Reserve Bank of India on 17-11-2015 with respect to the E-BIZ project of the Government of India. It was attended by 5 representatives of the Chamber. The e-Biz Scheme is very good. In my view Authorized Dealers should move from manual to e-era. All documents, objections and permissions will be routed through a computerised system. The RBI is in the process of designing an online e-Biz portal. It will help all of us in getting approvals/ permissions in minimum time.

Law and Representation committee under the Chairmanship of Advocates, Vipul Joshi again did great job. Chamber was invited by MOF, North Block on 23-11-2015 for a Pre-Budget meeting for the Union Budget 2016-17. A Chamber team consisting of 6 persons, Mr. Avinash Lalwani-President, Mr. Vipul Joshi, Chairman, L&R, Mr. Mahendra Sanghvi, Co-Chairman L&R, Mr. Naresh Ajwani, Chairman International Taxation, Mr. V.P. Verma, Advisor-Delhi CTC Chapter, Mr. Vijay Gupta, Hon. Sec. Delhi Chapter represented the Chamber at this meeting. From TPL Side, CBDT Chairman, Ms. Anita Kapoor along with her team, Mr. V Anandarajan (JS-TPL-1), Mr. Ashish Kumar (CIT-TPL), Mr. Sandeep Mishra (DCIT-TPL), Mr. Ram Tirath (CBEC-Member), Mr. Amitabh Kumar (JS-TRU2), Mr. Somesh Chandra, Director attended the meeting. The Chamber made suggestions in two areas, viz. Direct and Indirect Taxes. The discussions went well and the Chamber suggested an amendment in many sections of the Income-tax Act i.e. Income, Charitable Trust, Salary, Business Income/Expenditure, Capital Gain, Section 56(2), Section 68, Set off/Carry forward of Losses, Deduction, MAT, TDS, Assessment & Reassessment, Appeals/Revisions, International Taxation/TP, NBFC, 14A, Monetary Limits. In Indirect Taxes, the Chamber has suggested for Convert Credit of Cesses, Service Tax Scrutiny, Procedures in Appeals/ Stays, Interest U/s. 75, Time Limit for availing Convert Credit, Revision of Service Tax Returns, Service Tax Registration and late fees for delay in Filing Service Tax Returns.

Law and Representation committee has also sent a representation on 7-11-2015 for acceptance of common Power of Attorney by Income-tax authorities. In the December 2015, CTC Newsletter, L&R committee had asked suggestions from members for simplifying the provisions of Income -tax Act, 1961 and suggestions for implementation for ICDS issues. Please send your suggestions to CTC office by e-mail on office@ ctconline.org and/or president@ctconline.org. Please note that the Income tax Dept. has constituted a Local Committee to deal with the taxpayers' grievances on high pitched scrutiny assessment. For more details please read CTC newsletter CTC news letter is also available on our website.

I want to share with you that December is of full of activities. Our Chairmen have designed and announced the best quality seminars for all of you. Encourage them by registering for the seminars so our dream of making the "CHAMBER AS A DREAM CHAMBER" can be fulfilled. For Future activities, please check our CTC Website "ctconline.org" and/or CTC Monthly Newsletter and/or check our Facebook page.

As far as Indian Economy is concerned, the population of India's high net worth individuals is expected to grow faster than China's. It is projected to rise 94% in dollar terms between 2014 and 2020 versus 74% in China, says the Julius Baer Wealth Report – Asia 2015. The Indian HNI wealth figure reached $1.2 trillion this year and will rise to almost $1.4 trillion by next year. There will be a three-fold increase in HNI wealth over the decade — it is expected to touch $2.3 trillion in 2020 from $949 billion in 2010. India is witnessing "firming growth" even as most developed and developing economies are seeing mixed trends, according to Paris-based think tank OECD. The Organization for Economic Co-operation and Development (OECD) said that the US economy is showing a loss of growth momentum from relatively high levels. The conclusions are based on Composite Leading Indicators (CLIs) that are designed to anticipate turning points in economic activity relative to trend. In October, India's CLI inched up to 100.3 from 100.1 in September.

I was reading HBR-review so for the readers benefit, I would like to share this small article on Team Building:–

Talent:– A firm's most talented staffers can have meaningful effects across the business. But when burgeoning talent is misidentified, unchallenged, or unrewarded, these individuals become a drag on overall performance. Even worse, their disengagement and eventual derailment can lead to depleted leadership ranks and damage employee commitment and retention across the firm.

Senior executives need to reinforce the message that the "high potential" designation is not primarily an acknowledgment of past accomplishment but mainly an assessment of future contribution. Their talent-management initiatives must challenge and cultivate rising stars, not just celebrate today's high achievements. As the head of HR at one technology firm told us, "These are the people who will launch new businesses, find new ways to strip out costs, build better customer relationships, and drive innovation. Really, the future of our organisation is in their hands."

How to Keep Your Top Talent:– 10 Critical Components of a Talent-Development Programme

Following are a core set of best practices for identifying and managing emerging talent.

Explicitly test candidates in three dimensions: Ability, engagement, and aspiration.

Emphasise future competencies needed (derived from corporate-level growth plans) more heavily than current performance when you're choosing employees for development.

Manage the quantity and quality of high potentials at the corporate level, as a portfolio of scarce growth assets.

Forget rote functional or business-unit rotations: Place young leaders in intense assignments with precisely described development challenges.

Identify the riskiest, most challenging positions across the company, and assign them directly to rising stars.

Create individual development plans: Link personal objectives to the company's plans for growth, rather than to generic competency models.

Re-evaluate top talent annually for possible changes in ability, engagement and aspirations.

Offer significantly differentiated compensation and recognition to star employees.

Hold regular, open dialogues between high potentials and programme managers, to monitor star employees' development and satisfaction.

Replace broadcast communications about the company's strategy with individualised messages for emerging leaders—with an emphasis on how their development fits into the company's plans.

Season of winter has started. In many ways, winter is really just a build-up to that first really nice day of spring; which, no matter your life stage, lends itself to immense social obligation. The benefits of winter are that it brings Greater Appreciation of the Brighter Days, Is Less Hospitable for Disease-Carrying Bugs, can Reduce Inflammation, may Boost Your Body Image and Brings Us Closer to our family members. Nothing would be better than to utilise the cool mornings to exercise, give some sweet paint to our body for lasting strength and good physique. Winter, therefore, is a good period to contribute to ownselves (health) without making any excuse for our family and our own benefit.

I, on behalf of All Managing Council Members, wish all our readers "Merry Christmas" and "A Very Happy New Year". Let's joyfully welcome the Year, 2016.

With Personal Regards.

AVINASH LALWANI
President

Chairman's Communication

Friends,

This year Diwali was much quieter with less noise and celebration. After having a long Diwali week–end, the professionals are back to work with Income Tax Scrutiny Assessments and Transfer Pricing Audits.

The Government has brought new legislation to prohibit tax evasion that has been introduced to deal with undisclosed assets and income stashed abroad. The Black Money Act provides for strict penalties on tax evasion @ 300%, thereby discouraging evasion and parking money overseas. Under this Act, evasions of tax in relation to the foreign assets will have a punishment of up to 10 years of rigorous imprisonment and would be categorised as non-compoundable. It also required such undisclosed income from foreign assets to be taxable at maximum marginal rate and mandatory filing of return in respect of foreign assets. The Government had provided a limited window by way of one time compliance scheme. The Chamber thought fit to come out with a Special Story to create awareness and educate the members for their relevant compliances. I would like to thank Shri Rahul Hakani and Shri Ramesh Iyer for designing this Special Story.

This month there is another Special Story on important topic. The Foreign Account Tax Compliance Act (FATCA) is a US law aimed at Foreign Financial Institutions (FFIs) and other financial intermediaries to prevent tax evasion by US citizens and residents through use of offshore accounts. FATCA is having a far-reaching impact on US-based companies as well as foreign companies with US assets or clients. Under the new provisions, an FFI may enter into an agreement with US tax authorities requiring it, among other things, to report information on the FFI's US accounts. An FFI that enters into such an agreement becomes a "participating FFI." If an FFI does not enter into an agreement with the IRS, all relevant US-sourced payments, such as dividends and interest paid by US corporations, will be subject to withholding tax provisions. All FFIs must comply with FATCA or be subject to withholding. Given these provisions it will be the need of members to understand and comply with FATCA for their clients. I thank Shri Paresh Shah for not only designing this Special Story in a very short time but also co-ordinating with all the authors.

I thank all the authors for contributing to Special Story. I also thank our Respected Shri Dilipbhai Thakkar and Shri Paresh Shah for reviewing of the articles of the Special Story. I thank all contributors of Regular feature and Shri Ranjit Kumar Sinha, Adv for reviewing of some of the articles.

I wish all my members 'Merry Christmas' and a very Happy New Year – 2016.

CA HARESH KENIA
Chairman – Journal Committee

CA Anish M. Thacker

Introduction and Overview

1. Introduction

In common parlance, the term 'Black Money' is used to refer to funds on which income and other taxes imposed by Government have not been paid. Black Money represents assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession.

Generation of black money and its stashing abroad in tax havens and off shore financial cent res have dominated discussions and debates in public fora in the recent past. The Indian Government, the Supreme Court of India and the public at large, all have unequivocally expressed concern on this issue.

During the recent past, the Indian Government has taken steps to tackle the menace of black money. Illustratively, India, as part of global crusade against black money, has joined the Task Force on Financial Integrity and Economic Development in order to bring greater transparency and accountability in the financial system; has entered into agreements with various countries for Tax Information Exchange or re-negotiated Double Tax Avoidance Agreements (DTAA) for Exchange of Information (EOI) articles along the lines of international standards. Also, the Income-tax Act, 1961 (Act) has been amended from time to time to bring out specific anti-avoidance rules targeting to tackle the undisclosed income from foreign sources.

The Government also introduced the requirement of mandatory reporting of foreign assets held abroad by residents in the Return of Income (ROI) from the Assessment Year (AY) 2012 -13 and onwards. Further, the filing of a ROI by all resident taxpayers (other than not ordinary residents) has been made mandatory even if resident taxpayer has no taxable income where the resident holds any interest in a foreign asset.

During his Budget Speech for 2015, the Finance Minister (FM) reiterated his commitment to tracking down undisclosed money abroad. Recognising the limitations of the existing taxation laws in India, the Hon. Finance Minister (FM) announced the Government's decision to enact a comprehensive law to specifically deal with such undisclosed moneys. Accordingly, a bill – The Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 was introduced in the Lok Sabha on 20 March, 2015. The bill received approval of both Houses of Parliament in May 2015 and the President's assent on 26 May, 2015 and is now called The Black Money (Undisclosed Foreign Income and Assets) Imposition of Tax Act , 2015 ('Black Money Act ' or 'BMA'.

The Bill was supposed to take effect from 1 April, 2013 and was passed by the Parliament in May 2015. As the BMA was enacted and received assent from the President on 26 May 2015, an apprehension was raised on the interpretation of the 'date of commencement' of BMA particularly while giving effect to the provisions of Chapter VI dealing with the "one-time compliance" scheme for which period of declaration was notified to be from 1 July 2015 to 30 September 2015.

Accordingly, *vide* the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act (Removal of Difficulties) Order 2015 published in the Official Gazette on 1 July 2015, the Central Board of Direct Taxes (CBDT) notified that the provisions of BMA shall come into force on 1 July 2015.

Post enactment, vide notification dated 2 July 2015, the Government came out with valuation rules which prescribed the method for valuing of undisclosed Foreign assets. Notification also prescribes forms for procedural aspects. Concerns were raised to the effect that BMA provisions can have unintended consequences covering *bona fide* cases or extending its applicability even to the cases which may not be regarded as representing Black Money / Undisclosed tax evaded income which is sought to be covered as part of the new levy including in respect of limited period one time facility of declaration contemplated by Chapter VI of BMA. Although, there has been no statutory amendment to address concerns to protect *bona fide* cases, and other issues, in deference to various representations made by industry and stakeholders, CBDT came out with clarifications by way of Circulars[1] in connection with one time disclosure compliance scheme under Chapter VI in a Frequently Asked Questions (FAQ) format addressing many of these concerns

As the Circulars have been issued in terms of section ('s') 86 of the BMA [analogous to S.119 of the Income-tax Act, 1961 (Act)], the Circulars will be binding on the tax authorities[2] but not on the taxpayer.

Though the Circulars have been issued in the context of one time declaration scheme, same would be binding on the tax authority also on interpretation of other provisions under the BMA. Thus, the taxpayer may rely on the Circulars to the extent the same are beneficial since the tax authorities are bound by the mandate of the Circular.

2. Statement of 'Object and purpose' of the BMA

The following extracts from the objects and reasons as stated in the Bill are of relevance:

> *"1. Stashing away of black money abroad by some people with intent to evade taxes has been a matter of deep concern to the nation. 'Black Money' is a common expression used in reference to tax-evaded income. Evasion of tax robs the nation of critical resources necessary to undertake programs for social inclusion and economic development. It also puts a disproportionate burden on the honest taxpayers as they have to bear the brunt of higher taxes to make up for the revenue leakage caused by evasion. The money stashed away abroad by evading tax could also be used in ways which could threaten the national security.*
>
> *The Central Government is strongly committed to the task of tracking down and bringing back undisclosed foreign assets and income which legitimately belong to the nation. Recognising the limitations of the existing legislation, it is proposed to introduce a new legislation to deal with undisclosed assets and income stashed away abroad.*
>
> *The Supreme Court of India has also expressed concern over this issue. The Special*

1 Circular No. 13 dated 6 July 2015 (Circular 13) and Circular No. 15 dated 3 September 2015 (Circular 15)

2 Various decisions of the Supreme Court have now settled the position on the binding effect of CBDT Circulars.

Investigation Team constituted by the Central Government to implement the decision of the Supreme Court, has also expressed the views that measures may be taken to curb the menace of black money.

Internationally, a new regime for automatic exchange of financial information is fast taking shape and India is a leading force in this effort.

4 The new legislation will apply to all persons resident in India and holding undisclosed foreign income and assets…..

6. The enactment of the proposed new Bill will enable the Central Government to tax undisclosed foreign income and assets acquired from such undisclosed foreign income, and punish the persons indulging in illegitimate means of generating money causing loss to the revenue. It will also prevent such illegitimate income and assets kept outside the country from being utilised in ways which are detrimental to India's social, economic and strategic interests and its national security."

Generally, a statement of object and purpose is a descriptive component which is a useful guide to the intention of Parliament in that it may detail the mischief to which the Bill is directed, and explain the reason/purpose/object/scope. The Statement of object and purpose can be seen to have both a contextual and a constructive role in statutory interpretation. The contextual role is where the same assists in implementing the provisions in conformity with ordinary meaning of the enactment, and thus assists in resolving any ambiguity. The constructive role is where the statement of object and purpose is effectual in clarifying or modifying the meaning of ambiguous provision.

The Supreme Court of India (SC) has, in innumerable judgments, referred to the object and purpose in case of any inconsistencies amongst the substantive part of the enactment. In this context, one may illustratively refer to the following:

In the context of S. 52(2) of the Act, The SC[3] held that where the plain literal interpretation of a statutory provision produces as manifestly absurd and unjust result which could never have been intended by legislature, the Court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislation and produce a rational construction. SC further held that S. 52(2) was never intended to be applied to cases of honest and *bona fide* transactions where consideration has been correctly declared or disclosed.

Recently, the SC[4], in another decision, relied on the above in the context of erstwhile Section 143(1A) of the Income-tax Act, and held that considering the intention/object of the provision, the same should apply only to tax evaders, and honest taxpayers, who fall within the wide sweep of the provision should not be burdened.

A literal reading of the provisions of BMA may lead one to believe that seems to target any resident who has overseas assets/income and which may not fit within the description of 'black money' or what may otherwise be undisclosed having regard to ordinary meaning or canon of the concept. The literal approach may have unintended consequences.

CBDT has come out with clarifications by issuance of circulars (Circular 13 and Circular 15) on many such aspects. In absence of statutory amendments to BMA, one will have to rely on CBDT circulars to the extent it addresses above-mentioned concerns of the taxpayers. Reference can be made illustratively to FAQs 18, 24, 32 of Circular 13, FAQs 1, 6 of Circular 15. As aforesaid, circulars to the extent beneficial to taxpayers can be relied upon by the taxpayer as circular will be binding on the tax authority.

3 K P Varghese's case (131 ITR 597)

4 Sati Oil Udyog [TS-136-SC-201 5]

3. Who are the taxpayers covered within the ambit of the BMA?

S. 2(2) of BMA defines the term 'assessee" as under:

> "*Assessee" means a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, by whom tax in respect of undisclosed foreign income and assets, or any other sum of money, is payable under this Act and includes every person who is deemed to be an assessee in default under this Act."*

The definition is not happily worded and is prone to different interpretations.

One school of thought is that definition applies only to individuals and HUF taxpayers who are resident. This is on the basis of reference to s.6(6) which applies only to individual and HUF. By this interpretation, the other categories of persons such as company or partnership firm, etc. will not be covered by BMA provisions at all. However, this does not appear to be consistent with legislative objective and Courts may be unlikely to accept such a contention. Nevertheless, a taxpayer in litigation may wish to not completely discard this line of thinking.

The better view therefore seems to be that the definition covers all resident persons barring exceptions created for individual and HUF who are non-resident or not ordinarily resident in terms of s. 6(6) of the Act. Such intention is also revealed from certain clarifications[5] issued by the CBDT in Frequently Asked Questions (FAQ) form. Further, CBDT Circular No. 12 dated 2 July, 2015 issued as notes relating to the one time compliance window provides list of persons who are authorised to sign the declaration in Form 6. The list covers different taxpayers including company, firm, etc. which are enlisted in s. 140 of the Act.

As mentioned earlier, S. 2(1) specifically excludes from its ambit a person who is not ordinarily resident under s. 6(6) of the Act. Incidentally, the present reporting requirement under Schedule FA of the ITR Form are also Explanatory applicable to a resident to the exclusion of not ordinarily residents and non-residents. Refer, for instance, to the Instruction to Form ITR 2 for AY 2015-16.

After its amendment in the year 2003 (i.e. AY 2004-05), an individual who is a resident of India in the last two years (i.e. for FY 2012-13 to 2014 -15), is likely to be regarded as 'resident' for FY 2015-16 and hence within the net of the BMA.

As therefore suggested earlier, the BMA is wide enough to cover every resident taxpayer except a not ordinarily resident taxpayer as defined under the Act. A resident as per domestic law i.e. the Act, does not cease to be a resident under domestic law even if he may be treaty resident by virtue of the tie-breaker test. FAQ no. 6 of Circular 15 clarifies this.

As aforesaid, the taxpayer who is resident under the Act is covered by the BMA though such taxpayer may be treaty resident of another country. It is possible that in terms of the treaty, only India sourced income may be assessable under the Act. However, in the absence of provisions along the lines of S. 90(2) of the Act, if literally read, the BMA makes no distinction between income which is beyond the tax net of India, either on account of favourable treaty provisions or on account of a deliberate defiance on part of the taxpayer of the reporting requirements in the Act. FAQ 10 of Circular 15 however clarifies that foreign income where the treaty grants exclusive taxing rights to the other country will not be regarded to be undisclosed for the purposes of the BMA.

5 FAQ no. 2 of Circular 13 also clarifies, that in case of undisclosed foreign assets held by resident company, declaration under one time scheme under s. 59 is to be made in the name of the company. Similarly, FAQ no. 1 of Circular 13clarifies that partnership firms holding undisclosed foreign assets can declare them in its name. These clarifications in the Circulars suggest that scope of the term 'assessee' is broader to cover all taxpayer s who are resident.

An Illustrative list of persons who are “”residents” who may be covered within the definition of 'assessee' under the BMA:

(i) An expatriate who is seconded to India for a period of – say, 5 years, and his family members who may accompany him.

(ii) NRI who comes back for good may also have to, likewise, provide explanations with regard to income and assets outside India, and may trigger consequences if there is an allegation that the assets located outside India are not explained t o t he satisfaction of the t ax authorities.

(iii) A foreign company which becomes a resident by virtue of its POEM in India is within the coverage of BMA.

(iv) A non-corporate entity, including a trust, may be a resident even if part of its control or management is in India.

(v) Where parties may have come together to form a consortium and execute a project, the tax department may allege such consortium is an AOP. Since the threshold for trigger of residency for AOP is very low – i.e. it t riggers even if there is part control and management in India, it is possible that such AOP may be regarded as resident.

In addition t o a resident taxpayer, t he expression “assessee” also includes every person who is deemed to be an “assessee in default” (AID) under BMA. This is largely to cover cases of recovery of taxes and other sums from persons other than the taxpayer. Such other representative person need not be a resident. Likewise, S. 30(14) of BMA provides for recovery of arrears from debtor of the taxpayer and failure on debtor's part will make him an assessee in default and hence an 'assessee' for the purposes of the BMA.

4. What is t he scope of “undisclosed foreign income” under BMA?

The expression 'undisclosed foreign income' (“UFI”) is not defined. However, s. 2(12) of the BMA provides for the definition of the term 'undisclosed foreign income and asset' as comprising of following two elements:

a) the total amount of undisclosed income of an assessee from a source located out side India, referred to in s. 4 and computed in the manner laid down in s. 5 of the BMA.

b) the value of an undisclosed asset located outside India, referred to in s. 4 and computed in manner laid down in s. 5 of BMA

Further, in terms of s. 4(1) of the BMA, foreign income (being income from source located outside India) is considered undisclosed if the income is from a source located outside India and if –

a) The same is not disclosed in ROI for the relevant year filed under Ss. 139(1) / 139(4)/139(5) of the Act;

OR

b) In respect of which ROI was required to be filed but has not been filed under Ss. 139 (1)/ 139(4)/ 139(5) of the Act.

In relation to undisclosed foreign income, as per s. 3(1), the charge is in respect of foreign income of previous year commencing on or after 1 April 2015[6]. Hence, any foreign income which remains undisclosed in the prior years will continue to be governed by provisions of the Act- except , however, when the assessment whereof gets captured by assessment in respect of an undisclosed foreign asset located outside India.

If income which was not disclosed in the ROI furnished under S. 139(1) is eventually disclosed

6 This is subject, however, to transitional period ambiguity indicated earlier in the scope coverage of income pertaining to period from 1April 2015 to 30 June 2015 viz prior to the BMA coming into force from 1 July 2015.

in the revised ROI furnished under S. 139(5) or a belated return furnished under S. 139(4), the income is no more undisclosed. Accordingly, for income which is earned during FY 2015-16 , provisions of BMA can apply and action under BMA can be taken only after the period for filing belat ed/ revised ret urn is over (viz. after 31 March, 2018) and only if the following conditions are satisfied cumulatively:

a) Income is earned from a source located outside India - unlike certain other provisions of the Act, reference is to income from 'source located outside India' from the perspective of recipient of income as different from the deemed source of income in India, which refers to 'income from source outside India' [refer illustratively, to S. 9(1)(vi)(b)of the Act]. Thus, BMA specifically requires a source which is 'located outside India' and may not cover income which arises as an incident of source of income which is actually located within India.

b) In respect of FY 2015 -16 and onwards, the taxpayer having an obligation to file an ROI and who fails to disclose foreign sourced income in the ROI filed under S. Ss. 139(1)/ (4)/ (5) will be covered by BMA.

OR

c) In respect of a taxpayer who does not have obligation to file the ROI, BMA applies if, in the ROI filed voluntarily, foreign sourced income is not disclosed.

Consequences under S. 4 will follow if ROI is not furnished where a resident taxpayer was 'required to furnish the same'. Alternatively, it may trigger if return is furnished voluntarily. The consequences may not follow if there was no obligation on the resident to furnish ROI and he also does not voluntarily furnishes the same. (refer S.4(1)(b) of the BMA)

The requirement is 'disclosure' in the ROI. The term 'disclosure' is understood by dictionaries to man 'to reveal', 'divulge', 'unravel', 'bring to the notice' or 'make information known', etc.. It is not mndatory that the same is offered to taxation. It is possible that income may be disclosed but is claimed to be non-chargeable either on account of exempt ion or on account of the same being beyond the scope of Ss. 4 or 5 of the Act read with s.90(2) thereof.

Quantum of undisclosed foreign income will be determined only after excluding what is disclosed in the ROI. However, the way the provisions are drafted, the following *bona fide* cases may also get caught within the net of BMA as undisclosed income:

a) Technically, taxation under S. 3(1) will arise in respect of foreign source income if such income has not been disclosed in ROI. It may be noted that what is required is the disclosure of income and disclosure of the source of income may not be sufficient. A taxpayer who may have disclosed source but for some reason (may be by mistake) not returned/ disclosed the income, requirement of disclosure may not be fulfilled.

   To illustrate, disclosing that a taxpayer has rent income from property located outside India in respect of which the taxpayer triggers no t ax liability in India due to the applicability of a DTAA, may technically be treated as disclosure of income by the expatriate but, if he only disclosed information about property but not rent income technically, there is no disclosure of such rent income.

   Though not directly on issue of manner in which disclosure in ROI is to be made, FAQ No. 10 in Circular 15 clarifies that foreign income which is protected by treaty application due to the right being exclusively allocated to the other country will not be considered as undisclosed income/asset for BMA and value thereof is required to be excluded from valuation of the undisclosed asset.

b) Also, theoretically, there can be trigger of assessment under S. 3(1) of BMA if there is clear arithmetical error on the part of taxpayer where – say, foreign sourced income is reflected at INR 1 mn; however in reality what the taxpayer intended to report was $1mn or GBP 1 mn.

c) The foreign sourced income may have been offered to tax in the ROI of year 2 or year 3 – but, the tax authorities regard such amount to be income of year 1.

Arguably, in above cases and other *bona fide* cases taxpayer may be able to argue that there is disclosure & hence BMA does not apply but since the provisions are widely worded, litigation in this regard may not be ruled out, and there can be dispute if the tax authorities were to adopt a literalistic approach.

If the income is regarded as undisclosed and hence covered by S. 4(1) of BMA, the taxation under S. 5(1) can, read technically be on gross basis. For this purpose, no deduction will be granted in respect of any expenditure incurred or in respect of any loss which may otherwise be admissible in terms of provisions of ITL. Thus, if the taxpayer has positive income from foreign source 1 while he has incurred loss in respect of foreign source 2, taxation under S. 3(1) r/ w S. 5(1)(i) of BMA can be w.r.t. positive income of foreign source 1 without taking int o account loss which is incurred in respect of foreign source 2 while both the sources may be undisclosed. Also, it is possible that while earning income from foreign source 1, the taxpayer may have incurred significant expenditure. However, no cognizance will be taken in respect of such expenditure.

Also, the t ax rate will be applied at 30% on the entire gross income irrespective of what may be the nature of income and which may have qualified for concessional rate of t ax say, @20 % in respect of long-term capital gains.

5. How does BMA apply to a NR in respect of income which he earned as NR?

The NR may have income outside India. BMA extends to the whole of India. BMA may not apply to the income of NR during the period he was NR. No part of his income can be considered as undisclosed foreign income if he was neither required to furnish his ROI nor has he furnished a ROI during his tenure as a NR.

Even after he becomes resident, his income of past year may arguably be not treated as undisclosed foreign income u/ s. 4(1) since, while he was NR, he has neither furnished his ROI nor was he required to furnish ROI. It may be noted that foreign income can be assessed only in the respective year to which income belongs.

Further, FAQ Nos. 24 & 32 of Circular 13 has clarified that any foreign assets acquired out of income during the period when the taxpayer was non-resident and was not chargeable t o t ax in India will not be regarded as undisclosed foreign asset s under BMA.

But, he may still have to be watchful about consequences with which he may be visited with reference to value of an undisclosed asset located outside India after he becomes a resident and the asset is alleged to be undisclosed, on account of the taxpayer's failure to explain source of acquisition, and comes to the notice of the tax authorities after 30 June 2015. (Refer to Q No.16.)

6. Can levy under BMA be resisted on the ground that it derogates the obligation of India in terms of various tax treaties?

The subject matter is very ambiguous and is prone to more than one view.

View 1: Existing treaties do not apply to BMA

(i) In terms of S.84 of BMA, provisions of S. 90(1)(c)/(d) as also corresponding

provisions of S. 90A of the Act are applicable with necessary modifications to undisclosed foreign income and asset in the same manner in which it applies to income. Incorporating provisions of S. 90(1)(c)/(d) of the Act, the BMA seeks to leverage upon the existing treaties to ensure that there is power to exchange information with the jurisdiction as also GOI is able to ensure that there is recovery of taxes which are levied under BMA.

(ii) The fact that S.90 (1)(a)/(b) as also S.90(2) of the Act have not been incorporated under BMA supports that the intent is neither to provide relief of double taxation nor provide beneficial provisions of the treaty should there be an imposition of levy under BMA.

(iii) At the debate in Parliament stage, the Bill has been amended to exclude powers of GOI from entering into treaties for providing relief against double taxation. This indicates that the intention is not to provide benefit of the existing treaties, and to penalise the taxpayer for not disclosing it s overseas asset s/ income.

(iv) Beside this, t he t ax authorities may argue t hat the BMA will apply and t here can be taxation in respect of undisclosed foreign income or asset even assuming the same is in derogation of the distributive right allocated to India.

(v) Also, since the tax is not levied on income but is levied on gross receipts or on the value of the asset and since the object of BMA is to introduce levy which is for controlling cases of tax evasion which are detrimental to the national interest and are inherently penal in nature, the same can neither be regarded as tax on income nor be subservient to tax treaties.

(vi) It is not unusual for countries to introduce provisions which are intended to penalise tax defaulters and which may provide basis which is materially different compared to conventional basis adopted under the Act. Diverted profit tax recently introduced in UK is a illustration of this. The said levy seems not to be covered by the treaty.

(vii) Since this is a special levy applicable only to specified cases and is intended t o tackle tax evasion, it cannot be considered to be tax comparable to corporate or income-tax.

(viii) Refer, illustratively, the following

a. UK new levy in the form of diverted profit tax is largely considered to be beyond treaties

b. In Australia, new capital gains tax was held not covered by treaties

c. In UK, CFC was not held to be covered by treaties

(ix) In any case, if the scenario is that in the relevant AY, the taxpayer, being a resident under the Act is also a treaty resident of India, and is not entitled to treaty benefit then, he cannot resort to the treaty merely because, in the past year, when asset was acquired, he was entitled to the benefit of the treaty

View 2: The levy under BMA is tax on income and hence is covered by the treaties. Accordingly, any tax levy which is in derogation of the distributive right allocated in terms of the treaty will make the levy invalid

(x) The typical treaty covers taxes on income which are enumerated in the treaty. Additionally, it also covers those taxes which are identical or substantially similar to the taxes which are imposed after the date of signing of the treaty.

(xi) A literal reading of Article 2(1) and 2(2) of OECD MC which states that the Agreement shall apply to taxes on income and on capital implies that any t axes levied on income/capital should fall within its ambit. The commentary of Philip Baker also supports this proposition. Thus, any tax on income/capital which is substantially similar or identical to taxes envisaged within the ambit of the Act should be covered by treaties.

Needless to say, the provisions do not provide an easy reading and the subject is prone to serious debate and the taxpayers would be well advised to seek views of Counsel. The author's preference clearly tilts towards view 1 at present.

7. What is the relevance of beneficial ownership while applying the provisions of the BMA?

The question is interesting. To put it simplistically, if the assessee was a beneficiary of an overseas trust when he was resident in India and some income was earned by that trust which presuming it could have been said to be taxable in the hands of the assesse then, and now was not disclosed how would the tax authorities seek to apply the BMA?

From the FAQs released by the CBDT one may possibly infer that it may be the beneficiary that could be brought within the ambit of the BMA. There however could be some very specific inferences which may be drawn from given facts.

Therefore to give a general view one way or another ought to be in the author's view imprudent. As mentioned earlier, the CBDT appears to warrant disclosure by the beneficiary i.e., the beneficial owner and not the Trustee which would be the legal owner and as we would understand it for the purposes of the Act, be the ássessee' albeit in a representative capacity.

8. Would interest of a taxpayer in a foreign discretionary trust be required to be disclosed under the BMA?

The key question that one may need to consider here is that if an assessee is a beneficiary of a discretionary trust settled overseas where the trust property is overseas and where the Trustee(s) are overseas, does he really by virtue of the settlor naming him as one of the beneficiaries, acquire an asset'?

One would want to believe in the negative because, there is no certainty whatsoever that the naming of the assessee by the settlor as one of the beneficiaries results in a right being created which the assessee can enforce vis-a-vis either the Settlor or the Trustee(s).

One would therefore be reasonable while taking a view that the interest so long as it is discretionary ought not to be disclosed. Once however, the Trustees do exercise the discretion in favour of the assessee, the interest crystallizes and post that moment ought to become an asset that an assessee need to disclose for the purposes of the BMA.

9. In Summary

The subjects assigned in the scope of this article are quite large and do cover many significant aspects that a person who deals with the BMA ought to consider. Within the constraint of space, an attempt has been made to touch upon at least the basic issues which should help the readers in getting an overview of these concepts.

CA Parag S. Ved & CA Bhavik R. Shah

Valuation under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

The whole scheme of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter referred to as 'BMA') revolves around taxation of undisclosed foreign income and assets of an assessee which are located outside India. Section 3 is the charging section of the BMA which provides for charge of tax at the rate of thirty per cent on any undisclosed foreign income and asset of the previous year on the assessee. As per the proviso to section 3(1), an undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer (AO).

Thus valuation of asset is a very important aspect under the BMA. Section 3(2) of the BMA provides that the value of an undisclosed asset shall mean to be the fair market value of an asset determined in such manner as may be prescribed. The Board has consequently, prescribed the manner of determining the fair market value of the asset *vide* Rule 3 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 (hereinafter referred to as 'BMR').

The valuation date for determining the fair market value shall be the 1st day of April of the previous year. The manner of determining the fair market value (FMV) in respect of assets is provided under sub-rule 1 of Rule 3. The summary of assets is given in the table below:

Rule	*Nature of Asset*	*Manner of Determining Fair Market Value*
3(1)(a)	• Bullion • Jewellery • Precious Stones	Higher of: • Cost of Acquisition; and • Price that the assets would fetch ordinarily if sold in the open market on the valuation date for which a valuation report may be obtained. *
3(1)(b)	• Archaeological Collections • Drawings • Paintings • Sculptures • Any Work of Art	
3(1)(d)	Immovable Property	

Rule	*Nature of Asset*	*Manner of Determining Fair Market Value*
3(1)(c)(I)	Valuation of Quoted Shares and Securities	Higher of : • Cost of Acquisition; and • Average of the lowest and highest price of such shares quoted on any established securities market on: (i) The valuation date; or (ii) If the shares and securities are not traded on the valuation date, a date which immediately precedes the valuation date when such shares and securities were traded.
3(1)(c)(II)	Valuation of Unquoted Shares and Securities	Higher of: • Cost of Acquistion; and • The value as determined in the following manner: The FMV of unquoted equity shares = $\frac{(A+B-L)}{(PE)} \times (PV)$ Where, A = book value of all the assets (other than bullion, jewellery, precious stone, artistic work, shares, securities and immovable property) as reduced by: (i) Any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any, and (ii) Any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset B = FMV of bullion, jewellery, precious stone, artistic work, shares, securities and immovable property as determined in the manner provided above. L = book value of liabilities, but not including the following amounts, namely; (i) The paid-up capital in respect of equity shares; (ii) The amount set apart for payment of dividends on preference shares and equity shares; (iii) Reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation; (iv) Any amount representing provision for taxation, other than amount of income tax paid, if any, less the amount of income tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;

Rule	***Nature of Asset***	***Manner of Determining Fair Market Value***
		(v) Any amount representing provisions made for meeting liabilities, other than ascertained liabilities; (vi) Any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares PE = total amount of paid-up equity share capital as shown in the balance-sheet. PV = The paid-up value of such equity shares.
3(1)(c)(III)	Valuation of Unquoted Shares and Security other than equity share in a company	Higher of: • Cost of Acquisition; and • Price that the share or security would fetch ordinarily if sold in the open market on the valuation date for which a valuation report may be obtained.
3(1)(e)	Account with a Bank	The value of an account with a bank shall be: • Sum of all deposits made in the account since the date of opening of the account Note: The sum of deposits as mentioned above shall not include any deposit which is made from the proceeds of any withdrawal from the account.
3(1)(f)&(g)	Interest of a person in a partnership firm or in association of persons ('AOP') or a limited liability partnership ('LLP')	The value of interest should be calculated as per the following steps: Step 1- Determine the net asset of the firm/ AOP/LLP on the valuation date in the manner similar to as provided above by which the value of unquoted equity shares are determined as per Rule 3(1)(c)(II). Step 2- Allocate the portion of the net asset which is equal to the amount of capital of firm/AOP/LLP amongst its partners/members in the proportion of their capital contribution. Step 3- Allocate the residue of the net assets of the firm/ partnership/LLP amongst its partners/members in accordance with the agreement for distribution of assets in even of dissolution, or, in absence of any such agreement, in the proportion of their profit sharing. Value of Interest of a person in a partnership/AOP/LLP = Amounts allocated as per Step 2 & Step 3.
3(1)(h)	Any Other Asset	Higher of: • Cost of Acquisition; and • Price that it would fetch if sold in the open market on the valuation date in an arm's length transaction.

* **The assesse may obtain a valuation report from a valuer recognised by the Government of a country or specified territory outside India or any of its agencies for the purpose of valuation of such assets under any regulation or law.**

In all the above cases, one of the methods is cost of acquisition. If we are talking about undisclosed asset and that asset surfaces at some stage practically it will be difficult to find out cost of acquisition unless assessing officer has access to the other material on record, like, registration document for immovable property. In normal course if Cost of Acquisition would be higher then assessee would never disclose such higher cost.

Now let us look at how above assets can be valued.

Jewellery, Bullion & Precious Stones

In order to determine the value of Jewellery, Bullion & Precious Stones, if sold in the open market, the following factors may be considered:

- Determine the Type of Asset (Gold, Silver, Platinum, Precious Stone)
- Determine the purity of Asset
- Total Gross Weight of the Asset
- Net Weight of the Precious Stone if studded in the Asset
- Current Rate of the asset prevailing in the market on the valuation date

Case Study: Mr. X acquired a Jewellery from an undisclosed income outside India in the previous year 2009-10. The cost of acquisition of Jewellery is USD 1 million (including making charges of USD 0.1). The price that the Jewellery will fetch in the open market as on April 1, 2016 is INR 4 million. What would be the FMV of Jewellery? Also, whether the making charges of USD 0.1 million should be included in determining the FMV of Jewellery?

The FMV of the Jewellery shall be INR 4 Million (higher of the cost of acquisition or the price that it will fetch in open market).

The issue arises that whether making charges paid of USD 0.1 million shall be considered in arriving at the FMV. In our view, the same shall not be considered since no one in the open market shall pay for the 'making charges' incurred by the seller. The seller will fetch the amount exclusively attributable to the contents of the precious metal at the prevailing rates on that particular date and nothing more.

Valuation of Archaeological Collections, Drawings, Paintings, Sculptures or any Work of Art

Valuing art is the act of placing a value on a painting, sculpture, or other artistic work. Appraising is an art, not a science, and market trends can quickly cause fluctuations in prices. In order to determine the value of Archaeological Collections, Drawings, Paintings, Sculptures or any work of Art, if sold in the open market, the following factors may be considered:

- Investigate whether the artist is well-know or has a reputation
- Whether the piece of art was owned by someone who is renowned
- Find out if there are duplicates available of the piece of art
- Bigger work of arts are appraised higher than smaller ones
- Investigate the market demand, trends and liquidity
- Benchmarking the price to other similar work of art of same artist

Valuation of Immovable Property

In order to determine the value of immovable property, if sold in the open market, the following factors may be considered:

- Determine the type of land such as Agricultural, Rural, Urban
- Whether immovable property has a clear title

- Whether development on immovable property is permissible
- Whether there is proper approach area, fencing etc. done to protect encroachment of immovable property
- Locality and proximity to mode of public transport, markets, etc.
- Municipality Valuation of immovable property
- Any deal for a similar immovable property in nearby area to benchmark the value of property

Case Study: Mr. A. Khan, a resident individual of India holds a piece of land in United Kingdom. The Government of UK is planning to acquire this land under Land Acquisition Act for developing a public park. The cost of acquisition of the land is GBP 10 million. The compensation offered by the Government is GBP 12 million and the price that the land shall ordinarily fetch if sold in open market is GBP 15 million. What will be the FMV of Land?

The FMV of Land shall be higher of its cost of acquisition i.e. GBP 10 million or the price that the property shall ordinarily fetch if sold in the open market. However, in the above case since the land is to be compulsorily sold to the Government of UK in our view the price to be adopted shall be the compensation offered by the Government which is GBP 12 million and not the price that the land shall fetch if sold in open market of GBP 15 million.

Valuation of Quoted Shares & Securities

The following expressions are defined in explanation 1 to Rule 3

'Quoted share or security' means:

- The share or security which has a 'meaningful volume of trading on an on-going basis' on an established securities market; and
- Is regularly quoted by dealers where they actively do offer to, and in fact do, purchase the share from, and sell the share to, customers who are not related to the dealer in the ordinary course of a business

'Meaningful volume of trading on an on-going basis' with respect to each class of shares means:

- Trades in each such class are effected, other than in *de-minimis* quantities, on one or more established securities markets on at least sixty business days during the prior calendar year; and
- The aggregate number of shares in each such class that are traded on such market or markets during the prior year are at least 10% of the average number of shares outstanding in that class during the prior calendar year

'Established securities market' *means:*

- An exchange that is officially recognised and supervised by a Government entity in which the market is located; and
- Which has a 'meaningful annual value of shares traded on the exchange'

'Meaningful annual value of shares traded on the exchange' means that the exchange has an annual value of shares of 1 billion USD traded on the exchange during each of the 3 calendar years immediately preceding the calendar year in which the determination is being made.

Case Study

Mr. V. Jain, a resident individual in India holds 100 equity shares of Orange Inc., USA. The cost of acquisition in FY 2005-06 is USD 254 per share. The shares of Orange Inc. are listed on NASDAQ stock exchange. The NASDAQ stock exchange is regulated by Government of United States of America and the annual value of shares traded on the stock exchange in the calendar year (CY) 2009 to CY 2014 is as follows:

CY	Annual Value of shares traded (USD bn.)
2009	0.70
2010	0.75
2011	0.91
2012	1.05
2013	1.11
2014	1.13

The outstanding number of shares in Orange Inc. during CY 2014 are 50,00,000 shares and is regularly quoted by dealers. In CY 2014, the shares were traded for more than 60 days and the aggregate number of shares traded were 23,44,567.

As on April 1, 2015, the summary of prices of shares of Orange Inc. traded on NASDAQ are:

Date	Co. Name	Type	Open	Close	High	Low
April 1, 2015	Orange Inc.	Equity	270.50	269.00	269.00	265.00

Calculate the FMV of equity shares of Orange Inc. as on April 1, 2015?

To determine the value of shares of Orange Inc., one needs to consider the following aspect

- Orange Inc. is traded on NASDAQ and it is provided in the facts of the case study that NASDAQ is regulated by Government and the annual value of shares traded on the exchange for the previous 3 calendar years i.e. 2012, 2013 and 2014 is more than USD 1 billion during each year. Hence, it can be determined that Orange Inc. is listed on an established securities market.
- Orange Inc. is a quoted share or security since shares are regularly quoted by dealers and has meaningful volume of trading as the shares were traded in previous calendar year for more than 60 days and the aggregate volume of shares traded during the previous calendar year i.e. 2014 is more than 10 per cent of the average nos. of shares outstanding in calendar year 2014.
- As we have determined that Orange Inc. is traded on an established security market and quoted share or security as per explanation 1 to Rule 3, the FMV of share of Orange Inc shall be determined as per Rule 3(1)(c)(I) of BMR, which is higher of the following:
  - o Cost of Acquisition i.e. USD 254 and
  - o Average of lowest or highest price of Orange Inc. on April 1, 2015 i.e. USD 267 (average of USD 265 and USD 269)

Based on the above, the value of equity share of Orange Inc. as on April 1, 2015 is USD 267.

Suppose in the above example, the exchange is not officially recognised and supervised by a Government entity or does not have an annual value of shares of 1 billion USD traded on the exchange then the shares of Orange Inc. will not qualify as traded on the established security market and the same will have to be valued as per Rule 3(1)(c)(II) pertaining to valuation of Unquoted Shares & Securities.

Valuation of Unquoted shares & Securities

Case Study

Mr. A has investment in unquoted equity shares of XYZ Inc. Mr. A acquired 1 share at the cost of USD 10 in January 2010. The following is the balance sheet of XYZ Inc. as on March 31, 2015:

Particulars	***Amount (USD)***
LIABILITIES	
Shareholders' Funds	
Equity share capital (10,000 shares of USD 10 each)	1,00,000
Reserves and surplus	1,50,000
Total shareholders' funds (A)	**2,50,000**

Loan Funds (B)	**1,00,000**
Current liabilities	
Trade payables	20,000
Provision for taxation	30,000
Provision made for unascertained liabilities	50,000
Total current liabilities (C)	**1,00,000**
TOTAL LIABILITIES (A + B + C)	**4,50,000**
ASSETS	
Fixed assets (A)	**3,00,000**
Investment in bullion* (B)	**20,000**
Current assets	
Trade receivables	70,000
Loans and advances	20,000
Advance tax paid	25,000
Deferred revenue expenditure	15,000
Total current assets (C)	**1,30,000**
TOTAL (A + B + C)	**4,50,000**
* FMV of bullion as per Rule 3(1)(a) of BMR is USD 50,000	

Mr. A wants to determine the valuation in XYZ Inc. on April 01, 2015.

The equity shares of XYZ Inc. are unquoted shares and shall be valued as per Rule 3(1)(c)(II) of the BMR which is as follows:

FMV of unquoted equity shares = (A + B - L) / (PE) * (PV)

	Particulars	***Amount (USD)***
A	Book Value of assets as per Balance Sheet	4,50,000
	Less: Cost of Investment in Bullion	(20,000)
	Less: Advance Tax	(20,000)
	Less: Unamortised amount of deferred expenditure	(25,000)
	Total of A	**3,85,000**
B	**Fair Market Value of bullion**	**50,000**
L	Book value of liabilities as per Balance Sheet	4,50,000
	Less:	
i	Paid up capital of equity shares	(1,00,000)
ii	Reserves and Surplus	(1,50,000)
iii	Provision for taxation	(30,000)
iv	Provision for unascertained liabilities	(50,000)
	Total of L	**1,20,000**

Thus, FMV of share of XYZ Inc. (USD per share) = (3,85,000 + 50,000 - 1,20,000) / 1,00,000 * 10 = USD 31.5 per share

Valuation of Unquoted Shares & Securities Other than Equity Shares

Rule 3(1)(c)(III) will be applicable for valuation of Redeemable Preference Shares (RPS), Convertible Instruments such as Bonds, Debentures etc.

The formula prescribed for valuation of unquoted equity shares derives the book value of the unquoted equity shares. The Rules do not prescribe considering the arm's length price at which transfer of unquoted equity shares will take place between an informed buyer or the seller. In case of Unquoted securities other than equity, the Rules prescribe considering the price that the instrument would fetch in the open market i.e. arm's length price.

Normally equity shares or equity linked instruments (convertible bonds & debentures) are valued using income approach i.e. price to earnings multiple or EV to EBITDA multiple method. This is because any person acquiring an equity share would look at its earnings potential. The way valuation methodology is prescribed, a situation may arise where unquoted equity shares are valued at book value whereas other

securities which are linked to same equity share are valued at arm's length price which is linked to earnings multiple.

Valuation of Bank Account

Case Study 1: Mr. X, a residential individual of India has opened a bank account in Switzerland on 1-4-2008. The bank pass book till March 31, 2015 is reproduced as below:

(In CHF)

Date	Deposit	Withdrawal
1-4-2008	50,000	
1-9-2008		20,000
4-9-2008	2,00,000	
1-4-2014		50,000

The CHF 2,00,000 deposited by Mr. X includes CHF 20,000 that was withdrawn by him on September 1, 2008. What will be the value of bank account as per the Rule 3(1)(e) of BMR?

As per Rule 3(1)(e) of the BMR, the value of the bank account shall be the sum of all the deposits made in the account with the bank since the date of opening of the account. However, it is specifically provided that where any deposit is made from the proceeds of any withdrawal from the account, such deposit shall not be taken into consideration.

Hence, in our view the value of the bank account shall be CHF 2,30,000. The working for the same is given below:

Particulars		*Amount (In CHF)*	*Amount (In CHF)*
a)	Deposit on 1-4-2008		50,000
b)	Deposit on 31-5-2010	2,00,000	
c)	Less: Re-deposit from withdrawn money	(20,000)	
d)	Adjusted Deposit to be considered (b-c)		1,80,000
Value of Bank Account (a+d)			2,30,000

Case Study 2: Mr. A acquired a house property (H1) in USA in 1997 for USD 20 million. It was sold in 2001 for USD 25 million which was deposited in a bank account in USA. In 2002, he acquired another house property (H2) for USD 30 million. The investment in H2 was made through withdrawal from bank account. H2 has not been transferred before the valuation date and its value on the valuation date is USD 50 million. The value of Bank account as computed as per the rules is USD 70 million. Calculate the FMV of H1, Bank account and H2?

Where a new asset has been acquired or made out of consideration received on account of transfer of an old asset or withdrawal from a bank account, then the FMV of the old asset or the bank account shall be reduced by the amount of the consideration invested in the new asset.

The FMV of the assets shall be as below:

FMV of H1: (Higher of USD 20 million and 25 million)–USD 25 million (invested in bank account) = Nil

FMV of Bank Account: USD 70 million – USD 30 million (invested in H2) = USD 40 million

FMV of H2: (Higher of USD 30 million and 50 million) = USD 50 million.

Valuation of Interest in Partnership Firm or AOP or LLP

Case Study:

Mr. A, B and C have financial interest in XYZ & Partners. The Net Asset of XYZ & Partners as on March 31, 2015 is GBP 4,00,000.

The following points from the Partnership deed may be noted:

- The profits and losses of the firm shall be divided in the ratio of 3:3:4
- In the event of dissolution of the firm, the assets shall be distributed in the ratio of 4:4:2

- The initial capital contributed by the partners was:

Partner	Amount (GBP)
Mr. A	1,00,000
Mr. B	50,000
Mr. C	50,000

The interest of Mr. A, B and C in XYZ Partners will be determined based on the following:

The net asset of the firm is GBP 4,00,000. The capital of the firm i.e. GBP 2,00,000 shall be allocated in the proportion of the capital contribution and the residual i.e. GBP 2,00,000 among the partners in the dissolution ratio.

The following table determines the value of interest of Mr. A, B and C in XYZ Partners:

Particulars	**Mr. A**	**Mr. B**	**Mr. C**
Capital Contribution	1,00,000	50,000	50,000
Residual in the dissolution ratio of 4 : 4 : 2	80,000	80,000	40,000
Value of interest in XYZ Partners (GBP)	**1,80,000**	**1,30,000**	**90,000**

Valuation of Residual Assets

Some examples that may form of other assets for the purpose of valuation

- Machinery
- Ships
- Yachts
- Aircrafts

The above assets may be valued considering the age, condition, current replacement value, etc.

To summarise, while the rules prescribes the methodology to be adopted for valuation of assets, in practice there would be many challenges and one will have to wait and watch how these rules are actually implemented.

ERRATA

1. In the Chamber's Journal of November 2015 – The name and photo of the Author for the Article "GST – Challenges of Preparedness for Business and Taxpayers" **(Page 81)** has been incorrectly printed as CA Mandar Telang. The Article has been authored by CA Sagar Shah.
2. In the Chamber's Journal of November 2015 – The name and photo of the co-author Ms. Namrata Bhandarkar for the regular feature Article **"Best of the Rest" (Page 174)** has been missed out. The Article has been jointly authored by Shri Ajay Singh, Advocate and CA. Namrata Bhandarkar.

The errors are regretted.

CA Ashok D. Mehta

Tax Authority and Assessment – Service of Notice – Deemed Validity of Assessments, – Appearance

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (The BMA) was passed by Parliament under typical circumstances wherein a new Government had taken over the reins with a promise to the common man to bring back the black money of Indian citizens lying abroad and was therefore under immense pressure from all stakeholders which included the common man to the Supreme Court of the country to counter the menace of black money in India. The BMA therefore was drafted and passed within a very short span of time with neither any opposition from any political party nor any proper discussion at any forum thereby providing a helping hand to the Government to put through such a draconian legislation which provides for extremely harsh penalties and prosecution and imprisonment.

The BMA provides for taxation of not only income from foreign sources but also undisclosed assets acquired and held in a foreign country of "resident and ordinary residents" {as defined under section 6 of the Income-tax Act}. The BMA Act provides for monitoring through assessment under section 10. This section is a combination of section 131,133(6), 142, 143 and 144 of the Income-tax Act (IT Act). The BMA Act provides for only one section for assessment and reassessment and there are no separate sections for reassessment procedure. The thrust is to keep aside the niceties of procedure supporting and justifying the principle of natural justice to minimum and to give all pervading powers to the tax authorities under the guise of providing the mechanism to unearth the devil of "black money" which they have not been able to do for sixty years. The section 81 (like Section 292B of the IT Act) provides for a complete removal of any technical defect in no uncertain terms by stating that all acts and omissions of the department in making assessment are pardoned.

"If such assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."

In this background let us consider the sections 7-11 & 74-78 for assessment/reassessment under the BMA.

Who is the Assessing Officer ?

The BMA provides for the Income-tax officers under section 116 of the IT Act to be the tax authorities to monitor the BMA. (This would include the authorities of Income tax Department being 'inspector' to the 'Central Board of Direct Taxes'). The jurisdiction of the assessee is also decided in the same manner as provided under section 120 of the IT Act.

The CBDT has passed Notification No. 73/ 2015 dated 24 August 2015, providing that the Joint Commissioner or Additional Commissioner of Income Tax would be the Assessing Officers under the BMA Act thus not giving powers to officers below the rank of Additional Commissioners or Joint Commissioner of Income Tax to undertake assessment proceedings.

However the rules notified under Notification 58 /2015 dated 2nd July 2015 provide as follows:

Rule 4

"For the purposes of section 8, the tax authorities shall be the Assessing Officer, Joint Commissioner, Commissioner (Appeals), Commissioner or Principal Commissioner, Chief Commissioner or Principal Chief Commissioner."

However, the department would be at liberty to delegate assessment work to lower level officers if need arises.

Can the assessee challenge jurisdiction of the AO who has no jurisdiction on him as provided under the IT Act?

It appears that section 124 of the IT Act with regard to jurisdiction of the AO would apply to the BMA Act and the assessee could challenge the jurisdiction within the time provided in the section. *[CIT vs. Ramesh D. Patel 362 ITR 492, Dayaldas Kushiram vs CIT 8 DTR 139]*

Issue of Notice

The issue of notice is the triggering point whereby the assessee is intimated that an enquiry is initiated against him and that he is required to comply with the said notice at a particular date and time as specified in section 143(2) of the IT Act.

The BMA requires the AO to issue notice under section 10(1). The said notice has to be issued based on some information received by him either from any income tax authority or any other authority under some other act or from other sources. Thus, the triggering point for acquiring the jurisdiction and the issue of notice for the purpose of assessment by the AO is the receipt of information regarding undisclosed foreign income or asset. On the basis of the section it seems that the AO cannot go on a fishing expedition and issue notice without receipt of any information. Alternatively the source of information is irrelavent. The information may be received from whatever source whether legal or illegal, the AO has the power to issue notice. There is no time period within which the AO can issue such notice. Further such a notice can be issued to any person not necessarily being the assessee. Similar to section 143(2) of the IT Act, such notice may require any person to produce any information or books or any other material.

Thus, can it be said that the assessment under section 10(3) can be made based on information provided from third party without giving enough opportunity to the assessee to explain the facts in view of section 81?

The answer is in the negative, as section 10(3) specifically provides that the assessment order has to be passed on the basis of evidence produced by the assessee which suggest that notice has to be issued to the assessee also and the same is also associated with the limitation period to pass the order within two years from the date of issue of notice under section 10(1). The requirement is to serve on any person the notice and this being a requirement of law the same cannot be covered by exemption under section 81 if notice is not issued. The order would also be in violation of the grounds of natural justice. *(CIT vs. Micro Labs Limited 348 ITR 075).*

Service of Notice

The process of issue of notice has been provided under section 74. The section provides that the notice, summons, requisition, order and other communication can be served in any of the following manners.

1. Through Post or an approved courier service
2. In the manner provided under civil procedure code 1908 for summons.

3. Through electronic form as provided in Chapter IV of the Information technology Act 2000.
4. In any other means of transmission of documents, including fax message or electronic mail message, as may be prescribed.

The CBDT may make rules providing for the addresses including the address for electronic mail or electronic mail message to which the communication referred to in sub-section (1) may be delivered or transmitted to by the AO.

The department has been given further relief as to the authentication of notices and it is provided that the notice shall be deemed to be authenticated, if the name and office of a designated tax authority is printed, stamped or otherwise written thereon, thus paving the way for electronic service of notice without signature of the officer. These measures would lead to convenience both for the assessee and the Assessing Officer as would save time and would reduce if not remove disputes of non-service of notice (Section 75).

The notice is said to be served when it is presented to the person, the person may refuse to accept the notice but however it will be deemed to be properly served. The CPC provides for a process whereby a notice can be served by affixture if the person is not traceable and all reasonable efforts to find such a person has failed. O. V, r. 17, of CPC provides:

"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally work for gain, and shall then return the original to the Court (AO) from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

The BMA further provides (Section 76) that the assessee will not be able to dispute a defect in service of notice or other technical issues of improper service if he has participated or appeared in the proceedings under the Act or even helped in enquiry under the Act. However the dispute can be raised before the order is passed by the AO under sections 10(3)/10(4).

The citations of Supreme Court on service of notice which can be of use are as under

CIT vs. Thayaballi Mulla Jeevaj Kapasi (DECD) 66 ITR 0147 (SC)

CIT vs. Daulat Ram Khanna 65 ITR 0603 (SC)

CIT vs. Tiwari Jhumar Lal 132 ITR 0049 (Raj.)

However section 76 and section 81 cannot save an assessment in which the notice is not served on the assessee. There is a need to serve a notice on the assessee before assessment can be made under section 10(3) or section 10(4) can be made. The proper service of notice is paramount for the validity of assessment.

Power to call for information and make enquiry. (Section 8 to 10)

Powers. (Secs. 8 & 9)

The AO has been provided the powers of a Court under court of civil procedures for:-

(a) Discovery & Inspection
(b) Enforcing attendance of a person
(c) Compelling production of books and other documents
(d) Issuing commission

Generally a court would use its powers only for a matter pending before it. However sec. 8(2) provides that the AO can use the powers even if no matter is pending before it. Thus, the AO can

only verify details or investigate a matter, using the power of a civil court. The officer under the BMA can call for information for any number of years unlike in the case of IT Act, where the information can be called for three years prior to year of assessment.

Enquiry [Sec. 10(2)]

Further the AO can on its own motion further make such enquires as it deems fit. The AO is also allowed to use the information obtained from any other authority under any law. He further can on his own motion initiate action on information coming to its notice. Thus a news paper report or a letter from a whistleblower or stolen information as in the case of HSBC can also be used to initiate inquiry and call for information as he deems fit from any person. The CBDT has put in place a system whereby the AO can call for information from its foreign counterparts through proper channel.

The BMA does not provide for any safeguards for fishing expedition by the AO, or witch hunts by the Government. There is no process of taking permission from higher authorities before initiation of investigations or enquiries. Nobody can deny the need for law for taxation of black money, but it is equally important to keep safe guards to see that the common man is not put to unnecessary hardship and harassment, more so because of rising litigation cost and delayed justice from Courts.

Impounding of Books

Sec. 8(3) allows the AO to impound the books of Account or any other documents after recording reasons for such impounding. The AO cannot impound the Books of Account for a period of more than 30 days without the permission of the Principal CIT, CCIT. The Government is likely to make rules in this behalf.

Punishments

Section 45 provides that the AO can levy a penalty of ` 50,000/- to ` 200,000/- if any person refuses to answer any question or sign any statement or fail to produce any books of account or documents.

The BMA under section 9 provides that any proceedings before the AO is a judicial proceeding and therefore sec. 193 (providing for seven years imprisonment for giving false evidence) and sec. 228 (providing for 6 months jail for obstructing a AO on duty from doing his job) of Indian Penal Code shall be applicable.

The assessee will also have to bear in mind the penalty under section 52 for giving a false statement before an AO. This is important as the BMA has gone ahead and inserted section 54(2), which reads as under:-

"For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

This will lead to a situation where prosecution would be easy as the punishment can be meted out only on the basis of circumstantial evidence.

Assessment

Section 10(3) provides that the AO shall on the basis information collected under sections 10(1) and 10(2) pass an order in writing assessing the undisclosed income and asset of the assessee and the tax payable on the same.

Section 2(3) provides that "Assessment includes Reassessment". Therefore the AO can redo an assessment already completed based on any additional information received or any item missed by him in original assessment. The Act does not restrict the period and therefore the reopening of assessment can be done at any time after the assessment is complete. However the concept that the reopening cannot be done for change of opinion would prevail. (Kelvinator India Ltd (SC)).

If the assessee does not provide the details, then section 10(4) provides for best judgment assessment in absence of compliance by any person, subject to giving an opportunity to the assessee before making such assessment.

Change in Incumbent (Section 7)

It is possible that the Assessing Officer assessing the assessee may get transferred during the pendency of the assessment. The BMA under section 7 provides for such eventuality and states that the assessment will be completed by the new incumbent officer from the stage at which it is left by the previous officer. (The section is in line with section 129 of the IT Act). The assessee is allowed to ask for a personal hearing if he so wants by making an application in writing. However it is not mandatory on the AO to provide the assessee this opportunity *Hindustan Zinc Ltd. vs. CIT 211 ITR 733.*

Time for completing assessment (Section 11)

Section 11 of the BMA Act provides that no assessment order under section 10(3)/(4) shall be passed after two years from the end of the financial year in which the notice under section 10(1) is served by the Assessing Officer.

Where the assessment or reassessment is made giving effect to any finding or direction by the Commissioner (Appeals), ITAT, High Court or by The Supreme Court, then such assessment should be completed within two years from the end of financial year in which the order is received by the CIT or Principal CIT.

Where, under a finding or direction by the Commissioner (Appeals), the Tribunal, the High Court, any undisclosed foreign income or asset is excluded, and then an assessment of such undisclosed foreign income and asset for another assessment year shall be deemed to be one made in consequence of the finding given.

The explanation to the section provides that in the calculation of period of limitation the following period should be excluded.

1. The time taken in reopening the whole or any part of the proceeding.
2. The period during which the assessment is stayed by an order or injunction of Court.
3. The period during which a reference is made or the first of the references made for exchange of information under section 90 or section 90A of the Income-tax Act or under section 73 of the BMA to the period when the said information is received by the Pr. CIT/CIT or the period of one year whichever is less.

The Act further provides for extension of time for assessment if after removing the time from the limitation period as stated above the balance period left for completing the assessment is less then 60 days then the time will be extended to a minimum period of 60 days.

The section provides that no order will be passed after two years from the financial year in which notice under section 10(1) is issued. It is important to note that section 10 is the section under which the AO conducts investigation and therefore the AO will have to pass the order within two years from the first notice issued for the collection of information to any person. Therefore the Act provides for a time bound investigation and closure of cases.

Appearance by authorised representative

The assessee is allowed to appear through an authorised representative. The list of who can be an authorised representative has been provided under section 78. The section is on the same lines as the section 288 of the IT Act. The following persons can appear as authorised representative for the assessee

1. A person related to the assessee in any manner, or a person regularly employed by the assessee.
2. Any officer of a scheduled bank with which the assessee maintains a current account or has other regular dealings.
3. Any legal practitioner who is entitled to practice in any Civil court in India.
4. An Accountant; (means a Chartered Accountant).

5. Any person who has passed any accountancy examination recognised in this behalf by the board.

6. Any person who has acquired such educational qualifications as may be prescribed.

However the section provides that the assessee would not be allowed to appear through an authorised representative where the assessee is required to give a statement on oath or affirmation under section 8.

The section 78 further provides that the following persons cannot appear as authorised representatives.

a) A person who has been dismissed or removed from Government service.

b) A legal practitioner, or an accountant, who is found guilty of misconduct in his professional capacity by any authority entitled to institute disciplinary proceedings against him.

c) A person not being a legal practitioner or an accountant, who is found guilty of misconduct in any tax proceedings by such authority as may be prescribed.

The BMA provides under section 77 that in the matter relating to the valuation of any asset, assessee may attend through a valuer approved by the Principal Commissioner or by the Commissioner as per rules that may be framed in this behalf.

Voluntary Compliance Scheme

The BMA Act under sections 59 to 72 provide for the voluntary compliance scheme under which the assessee was given a window to pay tax and a concessional rate of penalty of 30% on the current value of the undisclosed asset or income before 30-9-2015.

The said scheme closed on 30-9-2015 and received a luke warm response from the assessees. The total declarations made on an all India basis were 638 totalling to ` 3,770 crores. (based on newspaper reports).

These declarations are likely to be taken up for assessments under the BMA Act as the scheme does not provide for acceptance of the declarations without verification as provided in the earlier schemes like the VDIS 1997. The assessee has therefore to be prepared with all the documents in support of the declaration made by him.

There were two clarification/ FAQ's issued by the department in order to clarify the issues which the assessee saw as a hindrance in making the declaration. Whereas majority of the questions answered were in the realm of clarification. Some of the answers given went beyond the provisions of the BMA. These benefits granted by the department are binding on the Assessing Officer while conducting the assessments.

The assessee's who have made the declarations have to take care and prepare themselves with the following details to substantiate their claims with regard to the declaration.

a) That the asset declared by the assessee has to be valued as prescribed by the rules as notified by the Government. The necessary document (valuation report) was not required at the time of declaration but the same will have to be produced to substantiate the value as declared, before the AO. The AO may question the valuation of the asset however the Act does not provide for any such process of rejecting the value as disclosed by the assessee. However one has to be vigilant about the fact that non-production of valuation report would lead to a situation where the assessee officer will be free to disbelieve the declared value and also in extreme circumstances take a view that the declaration is misrepresentation of facts under section 68 of BMA and hence the declaration is to be rejected and the penalty of 90% instead of 30% is to be levied and prosecution proceedings to follow.

b) The AO is entitled to make any enquiry which he deems fit as per section 10(2) and therefore he will most likely call for information from the foreign banks or other parties in relation to the declaration made. It would be in the interest of the assessee to make all efforts and see that the said confirmation is called by him voluntarily. The Assessing Officer could take a negative view if the confirmation is not received or the confirmation received is not as disclosed by the assessee.

c) The assessee should disclose at the earliest stage of assessment the fact that he had used estimation in certain figures which were not available with him if that be the case especially if the disclosure of this nature is not made with the declaration itself. The Circular 15 of 2015 in question No. 5 clarifies this fact.

d) The department in Circular 15 of 2015 on 3-9-2015 had stated that the assessee could in certain cases claim deduction of the amount already taxed as per section 5. However the necessary evidence to prove that the amount was not taxable at that point of time or that it has already been taxed is on the assessee. The inability of the assessee to produce this evidence could lead to the rejection of the declaration and also additional penalty, other penal and prosecution clauses would also be made applicable.

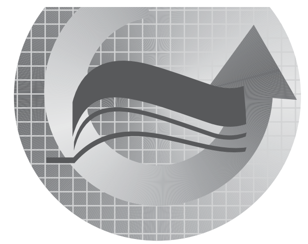
e) The question number 7 of the above referred circular provides clarification about how the value of asset (bank account) is to be computed if an account is used to buy an asset or to do business from that account. The assessee, like explained in the said question buys shares of a company and then sells the shares of a company (proceeds deposited in the same bank account) then the assessee can take deduction of cost of shares purchased. The whole process is explained in the circular, however what if the assessee has proof of purchase of shares in only a few cases and not in all cases for last fifteen years. The bank debit and the declaration being the only evidence, will the AO allow the deduction? The assessee would lose its claim completely if he does not have a single bill of such purchase. However if he has proof of some or substantial number of such purchases he would have a good case to convince the AO about his claim. The assessee would be advised to file a proper affidavit about the missing purchase bills or evidences. He should also try and provide as much circumstantial evidence (like the return filed in foreign country where such cost was shown in the return of income).

f) The assessee holding foreign assets is required to get the assets back in to India within six months as per the RBI circular, alternatively the assessee should apply for permission from RBI for the holding of asset abroad under FEMA.

The BMA provides for harsh measures to punish the assessee for default, however the act does not provide for any accountability or checks and balances which would be necessary where the assessee is likely to face serious punishments.

The Income-tax Act of 1961 has now completed more than fifty years and majority of jurisprudence is well laid. It would have really been of great help if the principal issue of show cause and confronting the assessee with the evidence collected by the department was incorporated in the Act itself to avoid unnecessary litigation and doing assessments again after it is set aside.

The Act also does not provide for any alternative remedies as provided for in section 144A of the Income-tax Act to approach a senior administrative personal where a wrong view or interpretation is being adopted by the AO.



Rahul R. Sarda, *Advocate*

Appeals and Bar of Suits under the Anti-Black Money Act – Procedure, Limitations and Substantive Law

I. Right to file an appeal

1. The right to file an appeal is not an inherent right. It is a creature of statute. In the case of *Smt. Ganga Bai vs. Vijay Kumar & Ors. AIR 1974 SC 1126,* the Supreme Court observed as follows:

"A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

2. The appeal provisions under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 [hereinafter referred to as the "Anti-Black Money Act"] are contained in sections 15 to 22. These provisions are *pari materia* with those in the Income-tax Act, 1961 (the "IT Act"). Therefore, judgments rendered by Courts and Tribunals under the IT Act may *mutatis mutandis* apply to the appeal provisions of the Anti-Black Money Act, unless a contrary provision is expressly enacted in the latter Act.

II. Appeal to the Commissioner (Appeals)

Appealable orders – Section 15(1)

3. As in the IT Act, the First Appellate authority under the Anti-Black Money Act is the Commissioner (Appeals) [the "CIT(A)"]. As per section 15(1), a person may object to before the CIT(A), (i) the amount of tax levied by the Assessing Officer (AO) on undisclosed foreign income and asset for which he is assessed; (ii) his liability to be assessed under the Anti-Black Money Act; (iii) the levy of penalty by the AO; (iv) the order of rectification having the effect of enhancing the assessment or reducing the refund; or (v) an order refusing to allow the claim made for a rectification. In other words, an assessee aggrieved by any order of the AO has been given a right to file an appeal before the CIT(A) which means all orders of the AO have been made appealable under the Anti-Black Money Act.

Form of appeal and payment of fees and admitted liability – Section 15(2) and Rule 6

4. As per section 15(2) read with Rule 6 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 [hereinafter referred to as the "Rules"], an appeal before CIT(A) is to be filed in Form No. 2 along with a fee of ` 10,000/-. The appeal fee does not depend on the amount of tax/penalty involved. Form No. 2 is almost identical to Form No. 35 prescribed under the IT Act wherein the assessee

is expected to file a detailed Statement of Facts and Grounds of Appeal.

5. Form No. 2 and the Grounds of Appeal must be signed and verified by the person who is authorised to sign the return of income under section 140 of the IT Act, as applicable to the assessee – Rule 6(2).

6. Section 249(4) of the IT Act, which prescribed for payment of admitted tax as a precondition for admission of appeal by the CIT(A), has been introduced *vide* Rule 6(4) of the Rules. This rule provides that the CIT(A) shall not admit the appeal under section 15(1) unless the tax along with penalty and interest thereon on the amount of liability which has not been objected to by the assessee has been paid by the assessee. While this Rule may appear innocuous, it appears that as a precondition for admission of appeal against an order passed under section 10 of the Anti-Black Money Act, the appellant is liable not only to pay the undisputed tax amount but also penalty thereon notwithstanding that the penalty order may not even have been passed under section 41. To this extent, in my view, this provision is unjust.

The CIT(A) also does not have the power to exempt an appellant from the rigours of Rule 6(4) unlike the position under the IT Act – Refer proviso to section 249(4) of the IT Act and the case of *CIT vs. Rama Body Builders [2001] 250 ITR 825 (Del.)* wherein it was held that an assessee paying the remaining amount before issuance of show-cause notice by CIT(A) was held to be sufficient compliance of section 249(4) of the IT Act.

Time limit for preferring an appeal and delay – Section 15(3)/(4)

7. As per section 15(3), an appeal must be filed within 30 days from date of service of notice of demand or date of service of order appealed against, as the case may be. However, the CIT(A) may condone the delay if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the prescribed period of 30 days. Another important aspect that needs to be kept in mind is that as per section 15(4)(b), the CIT(A) does not have power to condone a delay of more than one year. Such a provision does not find a place under the IT Act wherein the CIT(A) is empowered to condone a delay owing to the sufficiency of the cause of delay irrespective of the period involved. Section 15(4)(b) is somewhat similar to section 35(1) of the Central Excise Act, 1944 and section 128(1) of the Customs Act, 1962 wherein the Commissioner (Appeals) is empowered to condone a delay of only up to a certain period.

8. In the case of *Singh Enterprises vs. CCEx [2008] 12 STT 21 (SC),* the Supreme Court, in the context of Central Excise Act, 1944, held that the Commissioner (Appeals) was not empowered to condone a delay beyond the period prescribed in the statute.

9. The aforesaid decision can be applied to section 15(4)(b) of the Anti-Black Money Act, and hence, the CIT(A) cannot be said to have powers to condone delays of period exceeding one year notwithstanding the sufficiency of the cause thereof. Therefore, assessees must be diligent enough to ensure that under no circumstances should the delay in preferring an appeal before the CIT(A) exceed one year.

10. It is advisable that any delay in preferring an appeal be explained by way of an affidavit and appropriate evidence, if any, which should be filed along with the appeal itself. Reference may be made to the decision in the case of *Kunal Surana vs. ITO [2014] 144 ITD 195 (Mum.)* for points that need to be considered while drafting and filing an affidavit.

Points to be considered while drafting Statement of Facts and Grounds of Appeal

11. The following points must be kept in mind while drafting the Statement of Facts:

a. The same should be comprehensive and complete;

b. Statement of Facts must be used as an opportunity to bring additional facts on record if the same could not have been so brought before the AO;

c. All factual mistakes/errors/incorrect observations of AO must be specifically challenged and rebutted. If possible, the correct position should be mentioned;

d. Issues such as lack of proper opportunity of being heard or violation of any other principle of natural justice must be specifically brought out;

12. The following points must be kept in mind while drafting the Grounds of Appeal:

a. Separate ground for each addition/ issue must be taken;

b. Grounds should highlight all controversies involved in the appeal;

c. They should not be vague or general in nature;

d. Issues such as lack of proper opportunity of being heard or violation of any other principle of natural justice must be specifically taken in the Grounds of Appeal;

e. Statement of facts should not be mixed with Grounds of Appeal;

f. Alternative plea, without prejudice grounds must be taken, where the circumstances so require;

g. A prayer to add, amend, alter or withdraw any ground must be made in the end.

Procedure before CIT(A) and his powers – Sections 16 and 17

13. The procedure to be followed before the CIT(A) prescribed under section 16 of the Anti-Black Money Act is almost similar to the one provided under section 250 of the IT Act. The procedure before the CIT(A) is as follows:

a. After the receipt of Form no. 2, the CIT(A) will fix the date and place for hearing the appeal which will be communicated by way of notices to the appellant and to the AO against whose order appeal is preferred.

b. The appellant and the AO can either appear personally or can appear through an authorised representative. The CIT(A) would hear the appeal and may adjourn the appeal from time-to-time.

c. Before passing the order, the CIT(A) may make such further inquiries as he thinks fit, or may direct the AO to make further inquiry and report to him on the points arising out of any question of law or fact.

d. The order of the CIT(A) is expected to contain reasons for his decision.

14. CIT(A) cannot dismiss the appeal for non-prosecution simply because assessee had failed to put in an appearance. Section 250(6) provides that the appellate orders of CIT(A) are to state the points arising in appeal, the decision thereon and the reasons for such decision.

Gujarat Themis Biosyn Limited vs. JCIT [2000] 74 ITD 339 (Del.)

15. Section 16(6) empowers the CIT(A) to allow the appellant to go into additional grounds of appeal if the CIT(A) is satisfied that omission of these grounds from the form of appeal was not wilful or unreasonable.

CIT(A) can modify the assessment order on an additional ground even if not raised before the AO. In the absence of any statutory provision the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. While permitting the assessee to raise an additional ground, the CIT(A) should exercise his discretion in accordance with law and reason.

Jute Corporation of India vs. CIT & Anr. [1991] 187 ITR 688 (SC)

Once it is pleaded that omission to raise a ground of appeal was not wilful but was part of fraudulent scheme of officers of appellant-company, refusal of permission to raise such additional ground was not justified.

Manjushree Plantation Limited vs. CIT [1981] 131 ITR 307 (Mad.)

16. Section 17, like section 251 of the IT Act, empowers the CIT(A) to enhance the assessment after giving an opportunity of being heard to the appellant. Therefore, an assessee must be cautious while filing an appeal before the CIT(A). The CIT(A) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before him by the appellant.

The entire assessment proceedings are open before the CIT(A).

CIT vs. Sakseria Cotton Mills Limited [1980] 124 ITR 570 (Bom.)

Additional evidence before the CIT(A)

17. The rules pertaining to furnishing of additional evidence in appeals before CIT(A) under the IT Act are contained in Rule 46A of the Income-tax Rules, 1962. However, till date, no corresponding provision exists under the Anti-Black Money Act or under the Rules. However, that by itself should not mean that additional evidence cannot be produced before CIT(A). This view is supported by the decision of the Gauhati High Court in the case of *Hanutram Prasad vs. CIT [1978] 114 ITR 19 (Gau.),* wherein, relying on scope of section 250(4), additional evidence was held to be admissible for Assessment Year 1962-63 when Rule 46A was not in force.

18. Therefore, in my view, even in the absence of specific rules for furnishing of additional evidence, the same should be permitted to be produced before the CIT(A). Having said that, it is also important to note that the Anti-Black Money Act is still in its nascent stage and further rules may be prescribed in due course of time. Additional evidence application must be filed with a formal application for its admission.

19. Where assessee, under directions of CIT(A) files additional evidence before him, there is no requirement for confronting AO with documents/evidence entertained by CIT(A) at first appellate stage.

DDIT (IT) vs. Thoresen Chartering Singapore (Pte.) Ltd. [2009] 118 ITD 416 (Mum.)

Other miscellaneous aspects

20. Applications for stay of demand can be filed before the CIT(A).

Gera Realty Estates vs. CIT (Appeals) [2014] 368 ITR 366 (Bom.)/ Uttar Gujarat Vij Co. Limited vs. ACIT [2013] 216 Taxmann 48 (Guj.) (MAG)

21. Appeal once filed cannot be withdrawn by appellant as a matter of right, though the appellate authority in its discretion may allow withdrawal of appeal and dismiss the same as not pressed.

CIT vs. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC)

22. Circular No. 14 (XL-35) dated 11th April, 1955 which states that officers of the department must not take advantage of ignorance of an assessee as to his rights and that it is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs can be said to be applicable also to CIT(A).

DCIT vs. Suprint Textiles [2006] 100 TTJ 352 (Jp.) – View of CIT(A) accepting assessee's claim based, inter alia, on the said circular was affirmed by the Tribunal.

III. Appeal to the Appellate Tribunal

23. Just as in the IT Act, the Appellate Tribunal (the "Tribunal") is the second appellate authority and the final fact finding authority under the Anti-Black Money Act too. Both the assessee and the revenue can prefer an appeal to the Tribunal. In the case of *Ajay Gandhi vs. B. Singh [2004] 265 ITR 451 (SC),* the Supreme Court observed that the Tribunal exercised judicial functions and had

trappings of Court. As per section 6(1) of the Anti-Black Money Act read with section 116 of the IT Act, the Tribunal is not a tax authority for the purposes of the former Act.

Section 18 of the Anti-Black Money Act

24. As per section 18(1), an assessee can prefer an appeal before the Tribunal against orders of the CIT(A) under section 15 (orders of the First Appellate Authority) or against the orders of the Principal Commissioner/Commissioner (the "PCIT/CIT") under section 23 (Revision of orders prejudicial to Revenue).

25. The PCIT/CIT may direct the AO to file an appeal in the Tribunal against the order of the CIT(A) – Section 18(2). The respondent, though he may not have preferred an appeal to the Tribunal, may file a memorandum of cross-objection (hereinafter referred to as the "cross-objections") and the Tribunal shall dispose off the cross-objections as if it were a separate appeal. The cross-objections ought to be filed within 30 days of receipt of notice of the appeal being filed by the appellant.

26. The time limit for filing the appeal, both for the assessee as well as the Revenue, is 60 days from the date of receipt of the order appealed against. A delay of up to one year in filing the appeal or the cross-objections may be condoned by the Tribunal if it is satisfied that there was sufficient cause for not presenting the same within that period. It is important to note that even the Tribunal does not have power to condone a delay of a period exceeding one year. The Supreme Court judgment in the case of Singh Enterprises (supra) should equally apply to delay in preferring appeals or filing cross-objections to the Tribunal as well. Appellants before the Tribunal may be well advised to refer to Para 10 above in case of delays.

Form of appeal and payment of fees

27. The appeal to the Tribunal must be filed in Form No. 3. In appeals to the Tribunal, only grounds of appeal (and not Statement of Facts) are required to be filed. Where the appeal is preferred by the assessee, Form No. 3, the grounds of appeal and the verification form must be signed and verified by the person who is authorised to sign the return of income under section 140 of the IT Act, as applicable to the assessee – Rule 7(1).

28. The cross-objections to the Tribunal must be filed in Form No. 4. As is the case in the IT Act, there is no fee prescribed for appeals preferred by Revenue and for cross-objections preferred by any party. However, fee prescribed for appeals preferred by assessees is ` 25,000/- irrespective of the tax amount involved.

Procedure before Tribunal in filing appeals – Appellate Tribunal Rules, 1963 (ITAT Rules)

29. The memorandum of appeal should be in triplicate and be accompanied by two copies of order appealed against, assessment order, grounds of appeal and Statement of Facts before CIT(A), as may be applicable. In case of penalty order, copies of the assessment order should also be enclosed – Rule 9 of ITAT Rules.

30. The Tribunal may decide the appeal on grounds not mentioned in the memorandum of appeal after giving the affected party sufficient opportunity of being heard on that ground – Rule 11 of ITAT Rules.

31. In case of assessee appeal, the respondent would be the AO who passed the order – Rule 13 of ITAT Rules.

The Tribunal is competent to allow the appellant to raise an additional ground at the hearing of the appeal.

National Thermal Power Co. Ltd. vs. CIT [1998] 229 ITR 383 (SC)

Filing of paper book in Tribunal

32. The appellant or the respondent, as the case may be, may submit a paper book in duplicate containing documents or statements or other papers which it may wish to rely upon. The paper book shall be duly indexed and page numbered and filed at least a day before the

hearing of the appeal along with proof of service of copy of the same on the other side at least a week before. The Tribunal can also, on its own, direct preparation of paper book.

Powers of Tribunal

33. Tribunal has an inherent power to refix the case for hearing to prevent miscarriage of justice or to grant substantial justice, and only condition which is required to be satisfied is that aggrieved party must be given an opportunity of hearing.

Mafatlal Securities Limited vs. JCIT [2009] 119 ITD 444 (Mum.)

34. Tribunal has the power to remand the case to the CIT(A) or the AO – Rule 28 of ITAT Rules.

35. Tribunal can consider the alternative submission of the assessee. It is the duty of the Tribunal even in the absence of alternate argument of the assessee to make a direction *suo motu* so as to grant relief to which the assessee is entitled.

Ciba of India Limited vs. CIT [1993] 202 ITR 1 (Bom.)

36. Tribunal has the power to grant a stay on recovery of demand.

37. Tribunal does not have power of enhancement.

MCorp Global (P.) Limited v. CIT [2009] 309 ITR 434 (SC)

IV. Appeal to the High Court

38. An appeal shall lie to the High Court from every order passed in appeal by the Tribunal, if the High Court is satisfied that the case involves a substantial question of law – Section 19(1). A finding of fact can be challenged on the ground that it is perverse, as per the decision in the case of *CIT vs. Sunaero Ltd. [2012] 345 ITR 163 (Del.).* However, care must be taken while drafting appeals to the High Court to specifically allege perversity in the order of the Tribunal.

39. The fees shall be as may be specified in the relevant law of that High Court relating to the Court fees for filing the appeal to that High Court.

40. The appeal shall be heard by a Bench of not less than two Judges (Section 20) and is heard in two stages, viz. (i) Admission – to consider whether the issue involved in appeal is a substantial question of law or not; (ii) Final hearing – when the appeal is finally disposed of after admission. The High Court gives an opportunity to the respondent to oppose the admission of the appeal – Section 19(5).

41. High Court is empowered to frame substantial questions of law at the time of hearing of appeal, other than the questions of law already admitted subject to two conditions: (i) the Court must be satisfied that appeal involves a question of law; and (ii) the Court must record the reason for the same.

CIT vs. Mastek Limited [2013] 358 ITR 252 (SC)

42. The High Court, in an appropriate case where no dispute arises on factual ground but purely legal issue arises, may consider a substantial question of law even though it may not have been raised before/adjudicated by the Tribunal.

Dr. Raghuvendra Singh vs. CIT [2014] 267 CTR 376 (P&H)

43. The appeal can be filed within 120 days from the date of receipt of order of the Tribunal. The High Court has the power to condone the delay if it is satisfied that there was sufficient cause for not filing the appeal within the prescribed period. As per the decision in the case of *CICB-Chemicon P. Ltd. vs. CIT [2015] 371 ITR 78 (Karn.),* cross-objections are not maintainable under appeals to the High Court.

44. High Court may award such cost as it deems fit {See *CIT v. Larsen and Toubro Limited [2014] 366 ITR 502 (Bom.), CIT vs. Sairang Developers and Promoters Pvt. Ltd. [2014] 364 ITR 593 (Bom.) etc.*}.

45. High Court has power to grant stay subject to adequate security, during pendency of appeal before it.

General Electric Co. PLC v. CIT [2002] 257 ITR 418 (Cal.)

V. Appeal to the Supreme Court

46. As per section 21, against the judgment of the High Court, an appeal shall lie to the Supreme Court if the High Court certifies the case to be fit for appeal to the Supreme Court. The provisions of the CPC relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under section 21 as they apply in the case of appeals from decrees of a High Court. Special leave can also be granted by the Supreme Court under Article 136 of the Constitution of India against the order of the High Court.

47. The costs of the appeal shall be in the discretion of the Supreme Court. As per section 26, the High Court may, on petition made for the execution of the order in respect of the costs awarded by the Supreme Court, transmit such order for execution to any court subordinate to it.

VI. Other miscellaneous aspects

48. As per section 25, an assessee must pay the taxes as assessed notwithstanding any appeal preferred to the High Court or to the Supreme Court. This provision is similar to section 265 of the IT Act.

49. The AO shall give effect to the judgment of the High Court [section 19(10)] or the Supreme Court [section 22(3)], as the case may be.

50. The CIT(A) or the Tribunal, as the case may be, shall pass an order authorising the AO either to amend the assessment made or make a fresh assessment on any member of the body or association where as a result of an appeal under section 15 or section 18, any change is made in the assessment of a body of individuals or an association of persons or an order for new assessment of a body of individuals or an association of persons is made – Section 27.

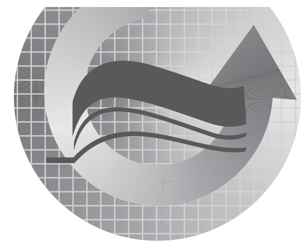
51. In computing the period of limitation prescribed for an appeal under this Act, the day on which the notice of the order was served upon the assessee without serving a copy of the order, the time taken for obtaining a copy of such order, shall be excluded – Section 28.

52. Section 29 gives the Board the power to fix monetary limits for the purpose of regulating the filing of Revenue appeals. However, the limit may not be applicable to appeals before the High Court and the Supreme Court due to the absence of words "or Court" in section 29(4) as against the use of these words in corresponding section 268A(4) of the IT Act. An assessee cannot contend that the Revenue has accepted the decision on the disputed issue by not filing an appeal if the appeal is not so filed owing to the monetary limit so fixed. If the monetary limit is breached for a different year, the Revenue can prefer an appeal for such year.

VII. To sum up

53. Sections 15 to 22 of the Anti-Black Money Act provide for an elaborate appellate mechanism for preferring appeals under this law up to the Supreme Court. It also prescribes certain conditions such as time limits, fees, pre-payment of taxes etc. subject to fulfillment of which, an assessee can prefer appeals.

54. While it is settled that a person can appeal only if such a power is given by statute, the statute can also circumscribe the right of appeal by conditions, as held in the case of *Vijay Prakash D. Mehta & Anr. vs. Collector of Customs [1989] 175 ITR 540 (SC),* which then would have to be fulfilled. It is trite that when a statute provides for the manner in which the right to prefer an appeal is to be exercised, the appellant must exercise the right in such manner and fulfil such conditions as may be prescribed.



CA Anil D. Doshi

Rectification and Revision

A. Section 12 – Rectification of Mistakes

The provisions of section 12 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 [the BMA] relating to rectification of mistakes, is summarised as under:

Sr. No.	*Particulars*	*Section 12 – Rectification of Mistakes*
1.	*Similar provisions of the **Income-tax Act, 961 [IT Act]***	Section 154
2.	*Rectification / Amendment Order at whose instance*	The tax authority concerned may make an amendment under this section — (a) On its own motion; or (b) On an application made to it by the assessee or, as the case may be, by the Assessing Officer [AO].
3.	*Who may pass the Rectification Order*	A tax authority may amend any order passed by it under this Act so as to rectify any mistake apparent from the record.
4.	*Opportunity of being heard regarding Rectification / Amendment Order*	The tax authority shall not make any amendment, which has the **effect of enhancing the undisclosed foreign income and asset or reducing a refund or otherwise** increasing the liability of the assessee, unless the authority concerned has given to the assessee an opportunity of being heard. [Section 12(3)]
5.	***Application Fee***	There is no application fee to be paid by any person.
6.	*Time limit for decision by the Tax authority*	Any application received by the tax authority for amendment of an order shall be decided within a period **of six months from the end of the month in which such application is received by it.** [Section 12(5)]

Sr. No.	***Particulars***	*Section 12 – Rectification of Mistakes*
		In the context of the provisions of the IT Act, in the Citizens Charter of 2010, the service delivery standard in respect of deciding rectification application has been fixed as 2 months. The CBDT Instruction no. 3/2013, also directs the concerned authorities to abide by this standard and ensure deciding on the application u/s 154 of the IT Act within 2 months from the end of the month in which application is received.
7.	*Time Limit for Amendment / Rectification*	No amendment under this section shall be made after a period of **four years from the end of the financial year** in which the **order sought to be amended was passed.** [Section 12(2)]
8.	*Restrictions on the matters for passing the Rectification / Amendment Order*	In a case where the **order has been made in an appeal or revision**, the power of the tax authority to amend the order shall be **restricted to matters other than those decided in appeal** or revision. [Section 12(6)]

Reasonable opportunity of being heard

Before making any rectification, which is prejudicial to the interest of the assessee, the concerned tax authority is required to give the assessee a reasonable opportunity of being heard, which is in line with the principle of natural justice.

Application for Rectification

Either the assessee or the AO can make an application before the tax authority to carry out rectification of mistake apparent from the records. Similar to IT Act, the form and manner of making such application has not been prescribed under the BMA. Therefore, a rectification application under the BMA can be made to the tax authority on a plain paper without payment of any fees.

Rectification for mistakes appearing in the declaration made by the assessee under Chapter VI

Provisions of section 12 shall not apply to the declaration made by the assessee under the provisions of Chapter VI. This section extends to all the orders passed under the BMA. Having regard to the provisions of Chapter VI, no order (or certificate of any kind) is issued by the AO in response to the declaration made by the assessee and thus, the question of making amendment to the same does not arise.

However, as per rule 9(2) of the Black Money Rules, the Principal Commissioner or the Commissioner shall grant an Acknowledgement in Form 7 to the declarant within 15 days of the submission of proof of payment of tax along with penalty by the declarant under sub-section (2) of section 63 of the BMA in respect of the undisclosed assets located outside India. It is not clear whether any mistake apparent from record in an Acknowledgement in Form 7, which is not an order, can be amended by the Principal Commissioner or the Commissioner.

Judicial precedents on 'Rectification of mistake' u/s 154 of the IT Act

Since the provisions of the section 12 of the BMA are *pari materia* with the provisions of section 154 of the IT Act, the relevant jurisprudence

evolved over the years under the 154 of the IT Act, should be applicable with equal force, and accordingly, some of the important issues discussed in decisions by Tribunal and Courts, are given below for ready reference.

a. A decision on a debatable point of law cannot be regarded as a **'mistake apparent from record'** *[Mepco Industries Ltd. vs. CIT (2009) 319 ITR 208 (SC)]*

b. Misreading a clear provision is a mistake *[CIT vs. Mcleod & Co. Ltd. (1982) 134 ITR 674 (Cal)].*

c. Reference to documents outside the record and the law is impermissible when applying the provisions of section 154 *[CIT vs. Keshri Metal (P.) Ltd. (1999) 237 ITR 165 (SC)].*

d. Deduction on account of any claim cannot be allowed if such a claim is not made in the original return or a revised return *[Goetze (India) Ltd. vs. CIT [2006] 284 ITR 323(SC)]*

e. Omission of assesse to claim deduction in return or during course of assessment proceedings is not a mistake apparent from record *[Punjab State Co-operative Supply & Marketing Federation Ltd. vs. DCIT (2008) 173 Taxman 15 (Punj & Har)].*

f. Over-looking a non-discretionary but mandatory provision is a mistake *[Addl CIT vs. India Tin Industries (P) Ltd. (1987) 166 ITR 454 (Kar)].*

g. Power to rectify is mandatory when a **mistake apparent from record is brought to the notice** of the concerned officer by a person concerned with or interested in the proceeding *[L. Hriday Narain vs. ITO (1970) 78 ITR 26 (SC)]*

h. An ITO cannot rectify mistake in the order of any higher authority *[Babulal & Bros vs. CIT (1989) 177 ITR 451 (MP)].* Similarly, rectification at the behest of superior officers is not permissible *[Rajputana Mining Agencies vs. ITO (1979) 118 ITR 585 (Raj)]*

i. Commissioner has the power to rectify any obvious mistake (either in fact or of law) in any order passed by him provided it is established that the mistake is the one apparent from record *[N. Rajamoni Amma vs. DCIT (1990) 86 CTR (Ker) 12].*

j. Matters considered or treated as considered by appellate authority cannot be reopened. *[P. Das & Co. vs. DCIT (1996) 217 ITR 29 (Gau)]*

k. High court cannot exercise power of rectification *[CIT vs. Globe Transport Corporation (1991) 93 CTR (Raj) 121]*

l. The word "order" in expression "from the date of the order sought to be amended", in section 154(7) includes amended or rectified order. Therefore, second application for rectification made within four years from the date of first rectificatory order is valid. *[Hind wire Industries Ltd. vs. CIT (1955) 212 ITR 639 (SC)].*

m. An assessing authority can pass order in respect of an application u/s 154 even after expiry of 6 months on merit in accordance with law *[Mac Charles (India) Ltd. vs. CIT (2014) 48 taxmann.com 184 (Kar)].*

B. Section 23 – Revision of Orders Prejudicial to Revenue and Section 24 – Revision of Other Orders

Comparative Analysis of Section 23 - Revision of Orders prejudicial to Revenue and Section 24 – Revision of Other Orders not prejudicial to the assessee

Sr. No.	*Particulars*	Section 23 - Revision of Orders prejudicial to Revenue	Section 24 – Revision of Other Orders
1.	*Similar provisions of the IT Act*	Section 263	Section 264
2.	*Who may pass the Revision Order*	The Principal Commissioner or the Commissioner may pass a revision order as the circumstances of case justify, if he is satisfied that the **order** sought to be revised is **erroneous in so far as it is prejudicial to the interest of the revenue.** [Section 23(2)]	The Principal Commissioner or the Commissioner may pass a revision **order**, as he considers necessary, **which is not prejudicial to the assessee.** [Section 24(2)]
3.	*Who has power to call for and examine all available records*	The Principal Commissioner or the Commissioner.	The Principal Commissioner or the Commissioner.
4.	*Call for and examine all available records at whose instance*	*Suo Motu* by the Principal Commissioner or the Commissioner.	*Suo Motu* by the Principal Commissioner or the Commissioner or on **an application made by the assessee.**
5.	*Power to make inquiry*	The Principal Commissioner or the Commissioner may make, or cause to be made, such inquiry as he considers necessary for the purposes of passing an order under sub-section (2).	No specific power to make inquiry is given in section 24.
6.	*Nature of revision Order*	The revision order passed by the Principal Commissioner or the Commissioner under sub-section (2) may have the effect of enhancing or modifying the assessment **but shall not be an order cancelling the assessment and directing a fresh assessment.**	There is no specific provision relating to Nature of revision Order in section 24.
7.	*Exceptions / **Exclusions***	The power of the Principal Commissioner or the Commissioner under sub-section (2) for revising an **order shall not extend to such matters as have been considered and decided in any appeal.**	The power of the Principal Commissioner or the Commissioner under sub-section (2) to revise an **order shall not extend to such order** — (a) Against which an appeal has not been filed but the time for filing an appeal before the

Sr. No.	*Particulars*	Section 23 - Revision of Orders prejudicial to Revenue	Section 24 – Revision of Other Orders
		[Section 23(5)]	Commissioner (Appeals) has not expired; (b) Against which an appeal is pending before the Commissioner (Appeals); or (c) which has been considered and decided in any appeal. [Section 24(3)]
8.	*Time Limit for making application for the Revision*	Not Applicable as there is no application to be made by any person.	The assessee shall make the application for revision of any order referred to in sub-section (1), within a period of one year from the date on which the order sought to be revised was communicated to him, or the date on which he otherwise came to know of it, whichever is earlier. The Principal Commissioner or the Commissioner **may**, if he is satisfied that the assessee was prevented by sufficient cause from making the application within the period of one year, **admit an application made after the expiry of one year but before expiry of two years** from the date referred to in sub-section (4). [Section 24(4)&(5)]
9.	***Application Fee***	Not Applicable, as there is no application to be made by any person.	Every application by an assessee for revision under this section shall be accompanied by such fees as may be prescribed. [Section 24(6)]
10.	*Time Limit for passing the Revision Order*	No order under sub-section (2) shall be made after the expiry of a **period of two years from the end of the financial year** in which the order sought to be revised was passed. [Section 23(6)]	No order under sub-section (2) shall be made after the expiry of — (a) A period of **one year** from the end of the financial year in which an **application is made by the assessee** under sub-section (4); or

Sr. No.	***Particulars***	**Section 23 - Revision of Orders prejudicial to Revenue**	**Section 24 – Revision of Other Orders**
		Notwithstanding anything in sub-section (6), an order in revision under section 23 may be passed **at any time** in respect of an **order which has been passed in consequence of, or to give effect to, any finding or direction** contained in an order of the Appellate Tribunal, the High Court or the Supreme Court. [Section 23(7)]	(b) A period of **one year** from the date of the order sought to be revised, if the order is revised ***suo motu*** **by the Commissioner.** [Section 24(7)]
11.	*Exclusions from the Time Limit for passing the Revision Order*	In computing the period of limitation under sub-section (6), the following shall not be included, namely:— (a) The time taken in giving an opportunity to the assessee to be reheard u/s 7; or (b) Any period during which any proceeding under section 23 is stayed by an order or injunction of any court. [Section 23(8)]	In computing the period of limitation under sub-section (7), the following shall not be included, namely:— (a) The time taken in giving an opportunity to the assessee to be reheard u/s 7; or (b) Any period during which any proceeding under section 24 is stayed by an order or injunction of any court. [Section 24(8)]
12.	*Deeming provisions regarding Orders*	Without prejudice to the generality of the provisions of sub section (1) to (8), an order passed by a tax authority shall be **deemed to be erroneous in so far as it is prejudicial to the interests of the revenue,** if in the opinion of the Principal Commissioner or the Commissioner— (a) The order is passed without making inquiries or verification which, should have been made; or (b) The order has not been made in accordance with any order, direction or instruction issued by the Board; or	An order by the Principal Commissioner or the Commissioner declining to interfere shall, for the purposes of this section, be **deemed not to be an order prejudicial to the assessee.** [Section 24(9)]

Sr. No.	*Particulars*	Section 23 - Revision of Orders prejudicial to Revenue	Section 24 – Revision of Other Orders
		(c) The order has not been passed in accordance with any decision, prejudicial to the assessee, rendered by the jurisdictional High Court or the Supreme Court in the case of the assessee or any other person under this Act or the Income-tax Act. [Section 23(9)]	
13.	*Meaning of the word 'record'*	In section 23, "record" shall **include all records** relating to any proceeding under the BMA **available at the time of examination** by the Principal Commissioner or the Commissioner. [Section 23(10)]	There is no specific provision relating to meaning of the word "record" in section 24 and hence the meaning given in section 23(10) should be equally applicable in case of section 24.

Orders prejudicial to the interest of the revenue

As mentioned above, section 23(9) of the BMA provides three circumstances, in which it would be deemed that an order passed by a tax authority shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue.

Similarly, *Explanation 2* to section 263 of the IT Act, inserted by the Finance Act, 2015 with effect from 1st June 2015 to provide clarity, provides four circumstances, in which it would be deemed that an order passed by a tax authority shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue.

Circumstances as provided in Clause (b) of the Explanation 2 to section 263 i.e. the order passed allowing any relief without inquiring into the claim, has not been included in section 23(9), as the same is not relevant for the purposes of BMA.

Application for revision u/s 24

The assessee can make an application u/s 24 for revision of orders before the Principal Commissioner or the Commissioner, for revising any order other than an order to which section 23 applies, passed by any authority subordinate to the Principal Commissioner/Commissioner. Similar to the provisions of section 264 IT Act, form of making such application has not been prescribed under the BMA. Therefore, an application for revision under the BMA can be made to the tax authority on a plain paper. However a fee of ` 500/- has been prescribed under the IT Act for making application u/s 264. No fees has been prescribed for application u/s 24, as mentioned in section 24(6), till date.

Revisionary orders u/s 23 & 24 - Appealable to the Tribunal

It is pertinent to note that the order passed u/s 264 of the IT Act is not appealable to the Tribunal u/s 253 and hence appeal does not lie

against such order to the High Court. However, in appropriate cases, judicial review by way of a petition for a writ of *'certiorari'* under Article 226 for quashing the orders of the Commissioner is maintainable primarily on the grounds of illegality, irrationality and impropriety.

The provisions u/s 24 of the BMA are similarly worded as corresponding provisions in section 264 of the IT Act. However, u/s 18 of the BMA Act provides that any assessee aggrieved by any order passed by Commissioner (Appeals) u/s 15 **or an order passed by the Principal Commissioner or Commissioner under any provisions of this Act may appeal to the Appellate Tribunal against such order.** Accordingly, the order passed by the Principal Commissioner or Commissioner u/s 23 or 24 of the BMA are appealable to the Tribunal.

Judicial precedents

Revision of orders u/s 263 of the IT Act

a. If the order is not erroneous but is prejudicial to interest of the revenue, the Commissioner cannot take action u/s 263(1) *[Malabar Industrial Co. Ltd. vs. CIT (2000) 109 Taxman 66 (SC)].*

b. If the order is erroneous but the same is not prejudicial to interest of the revenue, the Commissioner cannot take action u/s 263(1) *[HH Maharaja Raja Pawar Dewas vs. CIT (1982) 138 ITR 518 (MP)].*

c. Examination of record and recording of reasons is essential for making a valid order u/s 263 – *(CIT vs. Seshasayee Paper Boards Ltd. [(2000) 242 ITR 490 (Mad)].*

d. If the Commissioner revises an order on an entirely different ground other than those disclosed to assessee, that order cannot be sustained. *[Asia Resort Ltd. vs. CIT (2005) 143 Taxmann 9 (Chd.).*

e. Commissioner cannot travel beyond the reasons given by him for the revision in show cause notice *[Geometric Software Solutions Co. Ltd. vs. CIT (2009) 32 SOT 428 (Mum)].*

f. Period of limitation u/s 263 has to reckoned with reference to the date of assessment and not the date of order of rectification u/s 154 *[CIT vs. Shriram Engg. Construction Co. Ltd. (2011) 11 taxmann.com 151 (Mad)].*

g. Power of Revision is extended to all orders and not merely assessment orders *[CIT vs. Christian Mica Inds. Ltd. (1979) 120 ITR 627 (Cal)].*

h. Non-initiation of penalty proceedings u/s 271(1)(c) does not render the assessment, erroneous or prejudicial to the interest of the revenue *[CIT vs. C.R.K. Swamy (2002) 254 ITR 158 (Mad)]. Contrary view is given in CIT vs. Surendra Prasad Agrawal (2005) 142 Taxman 653 (All).*

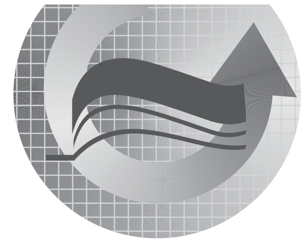
i. The revisionary power is a quasi-judicial power and hence the Commissioner must pass a speaking order *[CIT vs. Sunder Lal (1974) 96 ITR 310 (All)].*

j. Fresh claim of any deduction by the assessee in fresh assessment would be bound to be considered on merits by the AO *[CIT vs. GEO Industries & Insecticides (I) (Pvt.) Ltd. (1998) 234 ITR 541 (Mad)].*

Revision of orders u/s 264 of the IT Act

a. The assessee cannot claim the right of revision in respect of an earlier year on the basis of a finding of the Tribunal for a subsequent year *[Namdang Tea Co. Ltd. vs. CIT (1982) 138 ITR 326 (Cal)].*

b. If there are two errors in an order sought to be revised, one in favour of the assessee and the other against him and the assessee raises in revision, the error against him, the commissioner would be entitled to correct all the errors therein including the one against the assessee subject to limitation that his overall order should not be prejudicial to the assessee. *[K. C. Luckose vs. ITO [1973] 92 ITR 450 (Ker)]*



CA Ganesh Rajgopalan

Collection and Recovery of taxes under the Black Money Act[1]

A taxing statute is effective only if there exists robust provisions for collection and recovery of the taxes imposed by the statute. As it is necessary for charging and scope provisions to be clear and unambiguous in their meaning, provisions for collection and recovery should also have well-laid down powers for the collector to recover taxes due to the State. The provisions relating to collection and recovery of taxes in the Income-tax Act, 1961 ('Income-tax Act") have been in the law for more than half a century with the Courts interpreting the provisions to ensure that they are not only effective but their implementation is fair.

The provisions for collection and recovery in the BMA have been largely borrowed from the Income-tax Act. The following paragraphs give a synopsis of sections 13, 14 and 30 to 39 of the BMA that deals with collection and recovery of tax dues as well as highlight any differences between the two enactments.

Notice of Demand (Section 13):

The Assessing Officer is required to serve a notice of demand in Form 1 read with Rule 5 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 ("BMA Rules") on the assesse if any sum becomes payable consequent to any order passed under the BMA. The notice shall specify the tax, interest, penalty or any other sum payable under the BMA by the assessee. The assessee has a time of thirty days to pay the sum so demanded. Such a notice of demand is mandatory and a precondition for recovery of the sums due under the BMA. Since this section is similar to section 156 of the Income-tax Act, reference to the principles laid down in jurisprudence under the Income-tax law could be useful.

A notice of demand is not an order and cannot be subject of rectification proceedings but can be corrected by an administrative order. A defective notice of demand would not vitiate the assessment proceedings. Minor mistakes in the notice, like not striking off certain paragraphs therein, would not invalidate the notice. The burden of proving that a valid demand notice has been served will be on the revenue. However, if the noticee refuses to accept the notice or is untraceable, affixing a copy of the notice on the door of the residence or office with a report endorsed on the original notice the circumstances under which the notice was thus served in accordance with Civil Procedure Code, Order V, Rule 17 shall be adequate.

Section 13 of the BMA does not prescribe any time limit for issuing notice of demand though there are specific time limits for completion of assessment/ reassessment. However, the Assessing Officer should issue the demand notice within reasonable time in order to be able to collect the amount due under the Act and also to avoid causing any

1. Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015; for brevity, referred to as "BMA" in this article.

prejudice to the assessee's right to appeal due to the absence of the demand notice.

The effect on notice of demand of income-tax due to any variation in the amount demanded consequent to any appeal proceeding has been made subject to the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964. Under this Act, any reduction in tax demand does not require the Assessing Officer to serve a fresh notice upon the assessee while in the event the demand is enhanced in appeal, the Assessing Officer is required to serve upon the assessee another notice of demand only in respect of the amount by which the demand is enhanced. However, BMA is not one of the Scheduled Acts for this purpose because of which on any variation in the amount payable due to any appeal or other proceedings would require a fresh demand notice.

Direct Assessment or Recovery not Barred (Section 14)

The Assessing Officer has the option to directly assess the person on whose behalf undisclosed income or assets are held in a foreign country. The department can also recover the tax on such undisclosed income directly from the person holding such undisclosed income or assets.

Though the Assessing Officer is not barred from proceeding against the legal as well as the beneficial owner, he may not be able to recover amounts due under the BMA from both. The Assessing Officer is not prevented from pursuing the beneficial owner but a beneficial owner has to be a resident to fall within the definition of an 'assessee' contained in section 2 of the BMA and be subject to the charge under section 3 of the Act. Take a case where the legal owner of an asset located outside India is a resident though its beneficial owner is a non-resident. The Assessing Officer can charge the legal owner who is a resident but cannot charge the beneficial owner to tax since he is a non-resident. This section applies only to the provisions of Chapter III and does not extend to the charge and the scope sections contained in Chapter II so as to enable attaching a charge on non-resident.

On the other hand, if a non-resident is holding a property located outside India on behalf of a resident, the Assessing Officer is not prevented to make a direct assessment on the resident who is the beneficial owner of the asset located outside India nor is he barred from recovery of tax and other sums payable from such beneficial owner.

Recovery of tax dues by Assessing Officer (Section 30)

Any amount specified in a notice of demand issued under section 13 of the BMA is payable within thirty days of the service of the notice to the assessee. If the assessee is unable to make the payment within the period of 30 days, he may apply to the Assessing officer for extension of time. The assessee may also request payment in installments. However, this application has to be made within the expiry of the time frame for payment under sub section (1) or (2) or pendency of appeal with the Commissioner (Appeals). If the assessee does not settle the liability as mentioned in sub-section (1) or (2) or under the extended time under sub-section (3), he shall be deemed to be an assessee in default.

The Assessing Officer, with prior approval of the Joint Commissioner, has the power to reduce such period as he deems fit if he has reason to believe that it will be detrimental to the interests of the revenue to provide an extended period to the assessee to pay his dues. However, such reduced time allowed by the AO should be reasonable and should not be oppressive against the assesse[2], not to be based on mere assumptions or apprehension without any material or evidence[3] and justifiable only upon a reasonable belief that interests of revenue would suffer if full time was granted[4]. The words "reason to believe" suggest that belief must be that of an honest and reasonable person and any such order allowing a reduced period must be supported by cogent reasons[5]. The

2. *Smt. Achamma Kuriakose vs. State of Kerala & Anr. (1988) 171 ITR 494 (Ker)*
3. *Sony India Ltd. vs. CIT & Anr. (2005) 276 ITR 278 (Del)*
4. *Vinbros & Co. vs. ITO & Anr. (2006) 206 CTR (Mad) 371 : (2006) 286 ITR 439 (Mad)*
5. *Agricultural Produce Marketing Committee, Narela vs. Union of India (2006) 203 CTR (Del) 290*

Assessing Officer also has powers to stay the demand by extending the time for its payment which he has to exercise with responsibility by considering all the relevant circumstances and not merely summarily rejecting the stay application[6].

Where the assessor allows the assessee to pay the dues in installments, and the assessee defaults in making payment even for one installment then he shall be deemed to be an assessee in default for the whole amount then outstanding.

Provisions similar to section 220(2) of the Income-tax Act for levy of interest for delay in payment of taxes and other sums demanded and for reducing or waiving such interest are absent in the BMA. However, section 44 of the BMA which provides for levy of penalty equal to the tax arrears for an assessee in default could have been considered by the draftsman to have been a sufficient deterrent.

The Tax Recovery Officer is required to assume jurisdiction and draw up a certificate of tax arrears under section 31(1) of the BMA for recovery of dues. Where this certificate is not available, the Assessing Officer may recover the tax arrears under any of the methods in section 32 of the Act. However, the modes of recovery specified in Schedule 2 to the Income-tax Act are available only to the TRO.

Recovery of tax dues by Tax Recovery Officer (Section 31)

In the event an assessee does not pay the tax demanded within the time allowed as per section 30 and is deemed to be an assessee in default, the Tax Recovery Officer ("TRO") may draw up a statement of tax arrears ("certificate") under his signature to determine the amount of tax payable under sub-section (4) or (5) of section 30, in Form 5 read with Rule 8 of the BMA Rules. This certificate drawn by the TRO shall stand amended from time-to-time under the proceedings of the Act. The TRO has the power to rectify any mistake that is apparent from record as well as the power to extend the time for payment or allow payment by installments subject to such conditions as he may deem fit to impose in the circumstances of the case. The TRO may cancel the certificate if, for any reason, he thinks it is necessary to do so.

The assessee cannot dispute the correctness of a certificate drawn by the Tax Recovery Officer under section 31(6) of the BMA. Though there is no appeal lying against the issue of certificate by the TRO and resulting notice under section 31(1) of the BMA, a writ lies under Article 226 of the Constitution. When rectification application is pending disposal before the Assessing Officer, the TRO cannot proceed with the recovery till the disposal of such application[7].

The TRO shall recover tax arrears in any of the modes specified in Section 32 of the BMA as well as the modes contained in the Second Schedule to the Income-tax Act.

Modes of Recovery of tax dues by the Assessing Officer or the Tax Recovery Officer (Section 32)

This section provides for two modes of recovery apart from the modes available under Second Schedule to the Income-tax Act: (i) from the employer of the assessee and (ii) from debtor of the assessee.

The AO or TRO, as the case may be, may direct the employer of the assessee to deduct such amount as may be required to meet the tax arrears of the assessee. However, the deduction made by the employer cannot include part of the salary that is exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedures.

The AO or TRO, as the case may be, may serve a notice to the debtor of the assessee who owes an amount to the assessee to pay such an amount sufficient to meet the tax arrears of the assessee. However, this amount cannot exceed the debt of the person concerned. However, the debtor

6. M.L.M. Mahalingam Chettiar vs. Third ITO & Anr. (1967) 66 ITR 287 (Mad)
7. Sultan Leather Finishers (P) Ltd. (1991) 191 ITR 179 (All)

need not pay in respect of any amount that is not yet due by him to the assesee. As regards a debt which is time-barred, the same is not available for recovery.

Notice that is issued to the debtor must be forwarded to the assessee and the joint holders of the debts if any to the last known address of the assessee that is available with the TRO or AO. It shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry or endorsement before the payment is made by the debtor in case the notice is issued to any post office, insurer, banking company or any other person. Any claim in respect of property for which notice has been issued under section 30(4) arising after issue of notice shall be void. The AO or TRO shall issue a receipt to the debtor on payment which would discharge the debtor completely of his dues to the assessee.

The debtor receiving the said notice need not pay the tax arrears if he claims under oath that no money is due by him to the assessee. However, if the claims of the debtor are found to be false, then he has to pay the amount due by him to the assessee or the amount due by the assessee to the AO or TRO whichever is less. Further, if the debtor makes payment to assessee after receipt of notice under section 30(4), he is liable to the extent of his liability or the assessee's liability, whichever is lesser. A debtor receiving notice under section 30(4) would be deemed to be an assessee in default if he fails to make the payment of the amount due as specified in the notice under section 30(4) within the prescribed time but after the debt became due to the assessee.

The AO or TRO may apply to the Court, in whose custody there is money belonging to the assessee, for payment to him of the entire amount of share money or if it is more than the tax arrears, an amount sufficient to meet the tax arrears.

Under Second Schedule to the Income-tax Act, 1961, the TRO can also recover the tax arrears by attachment and sale of movable and immovable property, by arrest of the defaulter and his detention in prison and by appointing a receiver for the management of the defaulter's movable and immovable properties.

When during the pendency of any proceedings under the BMA or anytime thereafter before payment of tax or any amount demanded under the BMA, if the assessee creates any charge or parts with the possession of any of his assets by way of sale, mortgage, gift or exchange in favour of any other person, such charge or transfer shall be void based upon section 281 of the Income-tax Act and Rule 16 of Second Schedule to the Income-tax Act.

The Finance Act, 2015 has amended the Foreign Exchange Management Act, 1999 to empower the Authorised Officer prescribed by the Central Government, if he has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India is suspected to have been held in contravention of section 4 of FEMA, to seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property. This seizure is distinct from collection and recovery of any amount due under the BMA and both can take place simultaneously and cumulatively.

Tax Recovery Officer by whom recovery of tax dues is to be effected (Section 33):

Section 33 of the BMA, which is similar to section 223 of the Income-tax Act, specifies the Tax Recovery Officer (TRO) who shall be competent to take action against the assessee for recovery under section 31 of the Act. Accordingly the TRO within whose jurisdiction the assessee carries on his business, the principal place of business of the assessee is situated, the assessee resides or any movable or immovable property of the assessee is situated or the TRO who has been assigned jurisdiction under section 6 shall be the TRO who is competent to take action to recover the tax.

The TRO to whom a certificate has been issued may forward the certificate to another TRO within whose jurisdiction the assessee resides or has

property for realising the tax or part of the tax due, not only when he is himself unable to recover the entire amount but also when he considers that doing so would expedite or secure the recovery of the dues. A certificate of the TRO for tax arrears shall be in Form No. 5 of the BMA Rules.

Recovery of Tax dues in case of a company in liquidation (Section 34)

The provisions of section 34 of the BMA are similar to section 178 of the Income-tax Act. Under this section, the liquidator has to intimate the Assessing Officer within thirty days on becoming a liquidator of the company. Within three months from the date of receipt of notice from the liquidator, the Assessing Officer is required to intimate him of the amount which in his opinion would be sufficient to provide for any tax arrears or any amount which could become payable by the company thereafter under the BMA.

On receipt of intimation from the Assessing Officer, the amount intimated shall form the first charge on the assets of the company remaining after payment of workmen dues and debts due to secured creditors, notwithstanding anything contained in any other law. Notably, section 178 of the Income-tax Act being simultaneously applicable, any amount payable under the Income-tax Act as intimated by the Assessing Officer under that section would stand on equal footing with the amounts due under the BMA. If the liquidator fails to set aside such an amount, then he shall be personally liable for the amount due by the company.

Section 35 : Liabilty of Manager of a Company

Every person being a manager of a company at any time during the year shall be jointly and severally liable for the payment of any amount due under the BMA if the same cannot be recovered from the company. However, the manager would not be liable if he can prove that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part. A manager is defined to include a manager or a managing director as defined in the Companies Act, 2013. The BMA shall prevail over any provisions as regards the limited liability of shareholders and directors contained in the Companies Act, 2013. Liability for any amount due on the manager is only in respect of arrears of tax during the period in which the person held the position of manager. Section 35 uses the phrase 'any amount due' which would include any tax, interest, penalty or any other sum payable under the BMA. This provision will not cover a manager of a person other than a company. If a company defaults on the tax demanded, a manager liable under this section need not be served a fresh demand notice[8].

The Companies Act, 2013 defines manager *inter alia* to mean an individual who subject to the superintendence, control or direction of the Board of Directors has the management of the whole or substantially the whole of the affairs of the company and includes a director or any other person occupying the position of manager.

There is no analogous provision in the Income-tax Act except section 179 which provides that every director shall be jointly and severally liable for any tax due from a private company unless he proves that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part. A director would not be liable for the company's tax dues under the BMA unless he is a manager or managing director of the company in the relevant year. A separate notice of demand need not be served on the manager as the order is not appealable as held by some rulings in the context of section 179 of the Income-tax Act. However, the Assessing Officer may be required to hear the persons concerned and then pass an order to fix the amount due which is irrecoverable from the company and the amount for which a manager is liable and issue demand notice(s). Another interesting aspect is for a person to be not liable for tax dues of the company under the BMA is to prove absence of 'neglect'. This onus is heavier than that required under section 179 of the Income-tax Act where the director has to prove 'absence of 'gross neglect'.

8. S. Hardip Singh Sandhu vs. TRO (1987) 66 CTR (P&H) 87 : (1987) 166 ITR 759 (P&H)

Joint and several liabilty of participants (Section 36)

Section 36 provides that all participants in an unincorporated body, or the representative assessee of the deceased, shall be jointly and severally liable along with the unincorporated body, for payment of any amount payable by the unincorporated body under the BMA.

A partner of a limited liability partnership would not be liable if he can prove that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part. The BMA shall prevail over any provisions as regards the limited liability of partners contained in the Limited Liability Partnership Act, 2008. Similar provisions are contained in section 167C of the Income-tax Act. The BMA extends to participants of other unincorporated bodies; similar provision is absent in the Income-tax Act. Similar to the position for a manager under section 35, for a participant to be not liable for tax dues of the unincorporated body under the BMA is to prove absence of 'neglect'. This onus is heavier than that required under section 167C of the Income-tax Act where the partner has to prove only absence of 'gross neglect'.

Recovery through State Government (Section 37)

If the recovery of tax has been entrusted to a State Government pursuant to Article 258 of the Constitution, then this section provides that the tax shall be recovered as an addition to any municipal tax or local rate by the same person in the manner as the municipal tax or local rate is recovered. Similar provisions are contained in section 227 of the Income-tax Act, 1961. In practice, this provision is not much used though the power to recover tax through the State Government exists in the statute.

Recovery of tax dues in pursuance of agreements with foreign countries or specified territory (Section 38):

Where an assessee has any property outside India, the TRO may recover any tax arrears with the help of the tax authorities of foreign country or territory where the property is located if India has any agreement under section 90 or 90A of the Income-tax Act or section 73 of the BMA. The TRO may send a certificate of tax arrears to the Central Board of Direct Taxes (the "Board"). On receipt of the certificate, the Board may take such action as it may deem appropriate with regard to the terms of the agreement with such country or specified territory. This section is similar to the provisions of section 228A of the Income-tax Act. However, in the Black Money Act there is no power given to the TRO to recover foreign tax due under any corresponding law of that country which is available in section 228A.

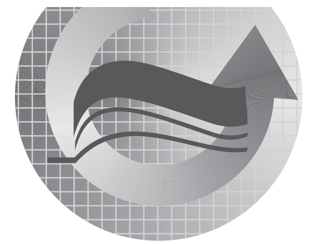
Some double tax agreements entered with countries under section 90 of the Income-tax Act contain provisions for assistance in collection of taxes (for e.g. Article 28-B of India-United Kingdom DTAA). These provisions are available for income-tax and any identical or substantially similar taxes which are taxes covered under that Treaty. It is debatable whether a tax under the BMA is one of the taxes to which a Treaty applies.

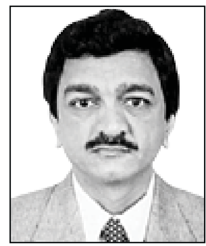
Recovery by suit or under other law not affected (section 39):

This section is similar to section 232 of the Income-tax Act and provides that the several modes of recovery mentioned under the BMA shall not affect any other law at the time being in force relating to the recovery of debts due to the Government.

These modes of recovery shall also not affect the right of the Government to institute a suit for the recovery of the tax arrears from the assessee notwithstanding that the tax arrears are being recovered from the assessee by any mode specified in the BMA. The tax assessed is a debt due to the Government who as a creditor has the ordinary right of suit against the assessee. This is a right under common law[9].

9. Inderchand v. Secretary Of State for India in Council (1941) 9 ITR 673 (Patna)





B. V. Jhaveri & S. Sriram, *Advocates*

Penalty and Interest under The Black Money and Imposition of Tax Act, 2015

Penalty & Interest – Rate, Charge and Levy – *Mens Rea* – Automatic Levy

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('the BMA') was legislated inter alia to provide for imposition of tax on any undisclosed foreign income and asset held outside India. Section 3 of the BMA provides for levy of tax on assessee's undisclosed foreign income and asset at the rate of 30%. This article deals with the interest and penal liability provided for by the BMA.

Levy of Interest

Section 40 of the BMA reads as under:

> "Interest for default in furnishing return and payment or deferment of advance tax.
>
> "(1) Where the assessee has any income from a source outside India which has not been disclosed in the return of income furnished under sub-section (1) of section 139 of the Income-tax Act or the return of income has not been furnished under the said sub-section, interest shall be chargeable in accordance with the provisions of section 234A of the Income-tax Act.
>
> "(2) Where the assessee has any undisclosed income from a source outside India and the advance tax on such income has not been paid in accordance with Part C of Chapter XVII of the Income-tax Act, interest shall be chargeable in accordance with the provisions of sections 234B and 234C of the Income-tax Act."

The section provides for levy of two types of interest. **Firstly**, section 40(1) of the BMA provides for levy of interest where the assessee (a) has failed to disclose any income from a source of income outside India; or (b) where the assessee has income from a source outside India in a particular year and for such a year return of income has not been furnished under section 139(1) of the Income-tax Act [as in section 234A of the IT Act]. **Secondly**, section 40(2) of the BMA provides for levy of interest for failure to pay advance tax in respect of any undisclosed income from a source outside India (as in sections 243B and 234C of the IT Act).

a. Interest on delayed filing of return – section 40(1) of the BMA

No separate form or manner of filing of a return has been prescribed in the BMA. The relevant disclosure has been incorporated in the return of income to be filed under the IT Act itself. It can, therefore, been inferred that the interest under section 40(1) of the BMA would be attracted for non-filing of a return u/s. 139(1) of the IT Act or for failure to disclose the required information in the return so filed. However, a closer reading of section 40(1) of the BMA would show the following aspect:

While interest liability arises for non-disclosure of income from a source outside India, no interest has been provided u/s. 40(1) of the BMA on tax

arising out of undisclosed asset located outside India (for failure to disclose foreign assets). In other words, interest under section 40(1) of the BMA can be charged only on the tax on an undisclosed income arising from a source outside India and not in respect of tax on an undisclosed assets outside India. A plain reading of section 9(1)(i) of the IT Act would show that 'source of income' is a class different from 'an asset' further buttresses this view.

Section 40(1) of the BMA provides that the quantum of interest chargeable under the section shall be in accordance with section 234A of the Act. While section 234A of the IT Act provides for computing the liability of interest on the amount of 'tax' as computed u/s. 143(1) or section 143(3) of the IT Act as reduced by the taxes already paid before the due date for filing a return, interest u/s. 40(1) of the BMA shall be computed on the amount of undisclosed income arising from a source outside India as determined under section 4 read with section 3 of the BMA.

b. Interest for default in payment of advance tax and deferment of advance tax

Section 40(2) of the Black Money Act provides for levy of interest as provided for in accordance with sections 234B and 234C of the IT Act for failure to pay advance tax in accordance with Part C of Chapter XVII of the IT Act. Part C of Chapter XVII of the IT Act *inter alia* provides for advance tax and self assessment tax on Income-tax payable by a person. The BMA however does not have a corresponding provision requiring an assessee to pay advance tax or self-assessment tax. It can be contended that the provisions of IT Act relating to advance tax would not apply to the BMA in the absence of any such mandate in the BMA.

The BMA is an independent statute by itself, providing for separate charge, manner of assessment and manner of collection. The reference to various procedural provisions of IT Act is solely for incorporation of the referred procedural requirements as provided in the IT Act. In the words of Justice G. P. Singh[1], such *"Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later".* The incorporation of sections 234B and 234C of the IT Act in the BMA would not *ipso facto* imply that the provisions of Part C of the Chapter XVII of the IT Act would also be incorporated in the BMA. Therefore, it can be contended interest u/s. 40(2) of the BMA cannot be charged without the BMA requiring payment of advance tax or self assessment Act. The authors are well aware of the principle laid down by the Supreme Court in the case of Bhagat Construction[2] that levy of interest is automatic upon determination of quantum of tax liability. However, to apply this principle, it is necessary to primarily establish that there was a failure on the part of the assessee to perform a statutory function devolved on it. When the BMA does not require payment of advance tax as required in Part C of Chapter XVII of the IT Act, an assessee cannot be charged interest for any such failure.

It is equally possible to contend that the levy under the BMA corresponds to sums that are otherwise chargeable to tax under the IT Act as unexplained investments/money under sections 69/69A of the IT Act or undisclosed income the source of which is outside India and hence the provisions of Chapter XVII of IT Act would apply for the purpose of computing interest under section 40(2) of the BMA. In this background, it is the humble view of the authors that the latter view is more appealing considering the object of the Statute.

Levy of penalty

Chapter IV of the BMA provides for levy of penalty on the following counts:

1. In his book 'Principles of Statutory Interpretation' (7th edition, 1999)
2. *CIT vs. Bhagat Construction Co. (P.) Ltd [2015] 279 CTR 185 (SC)*

Section	Offence	Quantum of penalty
41	Tax has been computed under section 10 of the BMA.	Three times the tax computed under section 10 of the BMA
42	Failure to furnish return of income.	` 10,00,000/-
43	Failure to furnish information or furnishing inaccurate particulars in the return of income.	` 10,00,000/-
44	Failure to pay tax arrears.	Sum equal to amount of tax arrears
45	Other penalties – failure to answer questions, failure to sign statements, failure to attend or produce books, etc.	A sum not less than Rs.50,000 but not exceeding ` 200,000/-

While section 45 provides for levy of penalty only when the offence was committed without any 'reasonable cause', all other sections in the Chapter do not use such a phrase. This raises a doubt as to whether penalty can be automatically imposed by the Assessing Officer whenever tax becomes payable under the BMA, without any intention of the assessee to avoid tax or where the demand arises due to a question of interpretation leading to additional tax liability.

General law on penalty

Existence of a guilty intent is an essential ingredient of a crime in common law, the principle is expressed in the maxim – *Actus non facti reum nisi mens sit rea*. When a statute consider any action or inaction as an offence the question whether the offence involves the existence of *mens rea* as an essential element of it, or, whether the statute dispenses with it and creates strict liability are questions which have to be answered on a true construction of the statute as whole.

For instance, in case of 'public welfare offences', i.e. statutes which are not merely meant to punish the vicious will, but to put pressure on the thoughtless and inefficient to do their whole duty in the interest of public morals, the requirement of mens rea can be dispensed with. The Supreme Court in the case of Indo-China Steam Navigation Co.[3] held that, when the Sea Customs Act, 1878 imposes a prohibition as to entry into India of any vessel fitted for the purpose of concealment of goods, penalty for any violation can be imposed even without any intention of the ship owner to cause any mischief. The strict prohibition in the statute coupled with difficulty of proving the existence of *mens rea* against the owners of the vessel lead the Supreme Court to hold so.

In the case of M. H. George[4], the Supreme Court held that the Foreign Exchange Regulation Act, 1947 imposing prohibition on import of gold was designed to safeguard and conserve foreign exchange essential to the economic life of a developing country and that its violation would be punishable without any intention of committing an offence. It was also observed that the FERA dealt with a grave social evil and that its purpose would be defeated if any further mental state were to be read as an essential element of the crime punishable under the FERA.

However, Courts have largely regarded it as a fundamental principle that an offence cannot be made out without existence of *mens rea*, unless from a consideration of the terms of the statute and other relevant circumstances, it clearly appears that it was the intention of the Parliament to provide for penalty consequents without *mens rea*[5]. This principle was further explained in *Brend vs. Wood*[6] in the following words:

3. Indo-China Steam Navigation Co vs. Jasjit Singh AIR 1964 SC 1140
4. State of Maharashtra vs. M. H. George AIR 1965 SC 722
5. Vane vs. Yiannopoullos (1963) 3 All ER 820
6. Brend vs. Wood (1946) 175 LT 306

> "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

In a series of cases, even in the absence of specific requirement of guilty mind in the statute, the Courts have held that imposition of penalty pre-supposes existence of *mens rea*.

In *Sherras vs. De Rutzen*[7], where the Licensing Act, 1872 did not expressly provide for existence of *mens rea* to make a person liable for penalty, the Court observed that *mens rea* is constant part of imposition of penalty. The court also emphasised that the presence of requirement of *mens rea* in one of the sub-sections and its absence in another sub-section would not make the provision in which the requirement of *mens rea* is absent an automatic levy of penalty.

In *Reynold vs. G. H. Austin*[8], where penalty was sought to be imposed on the defendant for the violation of the Road Traffic Act, 1930 by him due to some of his customers without his knowledge, even where the requirement of *mens rea* is absent in the statute as a requirement for imposing penalty, the Court observed that, when an offence was committed without the offender having any knowledge or intention of committing any offence, penalty cannot be imposed.

Penalty under Income-tax Act

Section 271(1)(c) of the IT Act provides for imposition of penalty where any income is concealed or inaccurate particulars are furnished.

The Larger Bench of the Supreme Court in the case of *Dharmendra Textile*[9] while reversing the Division Bench judgment in *Dilip N. Shroff*[10] held that the Explanations appended to section 271(1)(c) of the IT Act indicates the element of strict liability on the assessee for concealment or for furnishing inaccurate particulars while filing return and that the said section has been enacted to provide for a remedy for loss of revenue and hence, wilful concealment is not an essential ingredient for imposition of penalty under the section. The observations of the Supreme Court are as under;

> "25. The Explanations appended to section 271(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in *Dilip N. Shroff's case (supra)* has not considered the effect and relevance of section 276C of the I.T. Act. Object behind enactment of Section 271(1)(c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under section 276C of the I.T. Act."

These observations of the Supreme Court had caused an uncomfortable stir in tax law interpretation. On a closer reading of this judgment, it can be noted that it is only on the point of "mens rea" that the judgment in the case of *Dilip N. Shroff (supra)* has been overruled. The meaning of terms "conceal" and "inaccurate particulars" as explained in the case of *Dilip N. Shroff (supra)* to mean 'deliberate act or omission on behalf of the assessee' holds good as observed by the Supreme Court in its latter judgment in the case of Reliance Petroproducts.[11]

In any case, the penalty provisions of the BMA being worded distinctly and having a different

7. In Sherras vs. De Rutzen (1895-99) All ER Rep 1167
8. Reynold vs. G. H. Austin (1951) 1 Al ER 606
9. UOI vs. Dharmendra Textile Processors (2008) 306 ITR 277 (SC)
10. Dilip N Shroff vs. JCIT (2007) 291 ITR 519 (SC)
11. CIT vs.. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158 (SC)

objective than the IT Act, the judgments rendered in the context of IT Act cannot be *pari materia* made applicable to the BMA. The general guidance given in the context of imposition of penalty would have greater force than the judgments in the context of IT Act, where the penalty under section 271(1)(c) was introduced with a specific objective of being a remedy for loss of revenue, which is not the case in the BMA.

Penal provisions in the BMA

As noted in the various judgments quoted above, penal provisions of an Act have necessarily to be interpreted keeping in mind objects and purpose of the statute. The statement of objects and reasons of the BMA explicitly provide that the Act provides for imposition of three times of penalty only in case of a concealment of income, which clearly presupposes *mens rea*. As explained in a plethora of judgments, concealment itself contains with it, an intention to conceal. Further, the absence of requirement of *mens rea* in a section other than section 45 would not by itself result in the presumption that *mens rea* is not required to impose penalty. The Queen's Bench in the case of Sherras (supra) categorically held that the presence of 'knowingly' in one of the sections imposing penalties and its absence in the other section would not by itself mean that presence of *mens rea* is not essential in imposing penalty in cases covered under the section where the word does not exist. The Court further held that such an absence would effectively shift the proof of absence of guilt intent on the accused. This judgment would squarely apply to penal proceedings in the BMA.

It is also clear from the use of the expression 'may' in the sections that Parliament intends imposition of penalties only if there is a presence of guilty mind. This provision (section 41) could be in contrast with section 45 ('Penalty for other default'), which provides for a mandatory penalty in the absence of a sufficient cause. The only difference is that 'without reasonable cause' (section 45) has been replaced by 'AO may direct' in sections 41 to 43. It is thus submitted that the purpose of giving such a discretion to an AO is to ensure that only those cases where guilty mind is involved are punished and not those, where the non-disclosure is sans guilty mind. This position has also been explained by the Supreme Court in the case of *Dilip N. Shroff (supra)*. It can be noted that this part of the judgment has not been reversed by the Supreme Court in its latter judgment in the case of *Dharmendra Textiles (supra)*.

Section 45 of the BMA categorically provides that a hearing has to be provided to the assessee 'requiring him to show cause as to why the penalty should not be imposed on him.' Clearly, the provision of granting a hearing does not make any sense if the penalties had to be imposed on the assessee without the presence of guilty mind. Such a hearing which will provide for punishment without any 'guilty mind' will be a mere formality.

Further, the fact of monies or assets becoming taxable might arise not merely because of an assessee having the intention of evading tax, but also due to questions of interpretation like the following:

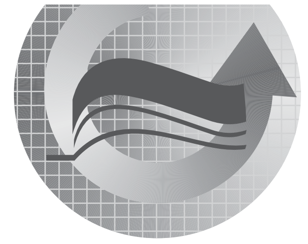
(a) Meaning of an asset located outside India, where the alleged asset is only an underlying asset (it can be noted that only financial interest in an entity has been specifically covered in the statute),

(b) Valuation of an asset (valuation is highly subjective and would differ with presumptions and assumption),

(c) Ownership of an asset – assets of foreign partnership firm with Indian partner can be regarded as the asset of the partner for the BMA.

These situations might result in payment of tax under the BMA, but would not have arisen for fault of an assessee. With such anomalies revolving around the scope and ambit of the BMA, it might be too harsh an interpretation to hold that penalty under the BMA can be imposed even without *mens rea*.

It can thus be concluded, though the Assessing Officer might not be required to prove guilty mind of the assessee to impose penalty, the assessee would be entitled to prove his innocence to get himself free from the imposition of penalty.



Vijay Garg, *Advocate*

Offences and Prosecution under Black Money Law

Black money stashed in foreign countries has always been a matter of grave concern. Black money means tax evaded income. To deal with menace of black money stashed abroad a new law namely 'Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015' (hereinafter referred to as "Act") was enacted on May 26, 2015 and notified in the Official Gazette on May 27, 2015. The Act has been made effective from April 1, 2016 save as otherwise provided in the Act. The provisions of the Act apply to residents other than not ordinarily resident in India within the meaning of Clause (6) of Section 6 of the Income-tax Act, 1961 ("IT Act") in respect of undisclosed foreign income and assets.

The Act inter alia provides for assessments, appeals, offences and prosecution thereof. Chapter V of the Act deals with offences and prosecution.

Chapter V of the Act inter alia provides for the following offences:

(i) Section 49 (Failure to furnish return in relation to foreign income and asset);

(ii) Section 50 (Failure to furnish information about an asset [including financial interest in any entity] located outside India in the return of income);

(iii) Section 51 (Wilful attempt to evade tax, penalty, interest or payment thereof);

(iv) Section 52 (False Statement in verification); and

(v) Section 53 (Abetment to make or deliver a false account, statement or declaration).

Some important aspects and procedure for prosecution of offences under the Act are discussed herein below.

Complaint

As per Section 55 of the Act, criminal proceedings for offences under Sections 49 to 53 (both inclusive) under the Act can be initiated only upon accord of a sanction by the Principal Commissioner or Commissioner or Commissioner (Appeals) as the case may be. This Section inter alia provides for filing of complaints.

Section 80 of the Act mandates that no Court inferior to that of Metropolitan Magistrate or a Magistrate of First Class shall try any offence under the Act. The Court of Magistrate of Second Class, being inferior to Metropolitan Magistrate and Magistrate of First Class is thus barred from trying the offences. All offences under the Act are thus triable by a court not inferior to that of Metropolitan Magistrate

or a Magistrate of First Class. This implies that a court superior to that of a Metropolitan Magistrate or a Magistrate of First Class can also try the case. Thus court of Chief Judicial Magistrate (**"CJM"**)/Additional CJM[1] or Chief Metropolitan Magistrate (**"CMM"**)/Additional CMM[2] would also be competent to try the cases under the Act. Whenever Section 51(1) of the Act is applied the case becomes triable by a Court of Sessions in view of Part II of First Schedule of the Code of Criminal Procedure, 1973 (**"Code"**) being an offence punishable with imprisonment with rigorous imprisonment which shall not be less than 3 years but may extend to ten years and with fine. The trial before a Magistrate's Court shall be governed by provisions of Chapter XIX, Part B of Code i.e. trial of warrant-cases by Magistrate instituted otherwise than on police report.

The trials before a Court of Sessions shall be governed by provisions of Chapter XVIII of the Code.

Cognizance

The word cognizance has not been defined in the Code. It can be construed to mean the process whereby the Magistrate peruses the complaint with a view to ascertain whether any offence has been committed or not. As the prosecution under the Act is by way of a complaint, the cognizance of the same can be taken under Section 190(1)(a) of the Code.

It has been observed by the Apex Court[3] that taking cognizance does not involve any formal action but occurs as soon as the Magistrate applies his mind to the suspected commission of the offence from the contents of the complaint. Cognizance therefore takes place when the Magistrate first takes judicial notice of an offence. This application of mind must be done with a view to proceed under Section 200 of the Code and the Sections following it.

While taking cognizance, if the Magistrate comes to a conclusion that no offence has been made out then he can dismiss the complaint under Section 203 of the Code. In case he decides that an offence has been committed then he can issue process against the accused under Section 204 of the Code by way of a summons or an arrest warrant, as the facts of the case may demand. The Apex Court has in *Manharibhai Muljibhai Kakadia and Anr. vs. Shaileshbhai Mohanbhai Patel and Ors.*[4] held that cognizance would mean taking notice of allegations made in complaint by applying judicial mind and that issuance of process is not concomitant.

A complaint must contain necessary averments and material so as to enable the Magistrate to make up his mind for issuing process. Section 204 of the Code begins with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding....". The words "sufficient ground for proceeding" suggests that ground should be made out in the complaint for proceeding against the accused. It is a settled law that at the time of issuing process the Magistrate is required to consider only the allegations in the complaint and when allegations in the complaint do not constitute an offence against a person, the complaint is liable to be dismissed.

Bail

Upon service of the summons accused is required to appear before the Court on a given date. He can put in his appearance through his advocate also on such date and seek exemption but he will have to appear before the court ultimately and seek bail. If the accused neither appears personally nor through an advocate and it is shown to the Court that summons were served, then the court may issue either a bailable warrant or a non-bailable warrant. In a case where the Magistrate has issued an arrest warrant (if non-bailable), the accused would be

1. Section 12 of the Code
2. Section 17 of the Code
3. Smt. Mona Panwar vs. Hon'ble High Court of Judicature at Allahabad through its Registrar and Others, [(2011) Cri LJ 1619]
4. 2013 Cri LJ 144

produced before the Court upon execution of such warrant and at that time the accused must apply for a bail.

Generally the Court should grant bail as prosecution is launched only upon collection of necessary evidence both documentary and oral. Parameters which usually weigh upon the court while refusing/granting bail or fixing the quantum of bail amount inter alia are the antecedents of the accused, nature of the crime, availability of the accused to face trial, likelihood of tampering with the evidence and intimidating the witnesses etc.

While dealing with a case under Section 498A of Indian Penal Code, 1860 ("**IPC**") and Dowry Prohibition Act, 1961, the Supreme Court[5] issued certain directions to ensure that the accused is not unnecessarily arrested by the police and the Magistrate should not authorise detention casually and mechanically. It has been further held that these directions shall be applicable to all such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

In another case[6] the Supreme Court inter alia observed that the object of the bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment unless it may be required to ensure that the accused person will stand trial when called upon. Every man is deemed to be innocent until duly tried and duly found guilty. Grant of bail is the rule and committal to jail an exception.

Upon grant of bail accused is required to execute a personal bond with or without sureties as directed by the Court.

Exemption from personal appearance during the proceedings

The accused can seek exemption from personal appearance before the Court either on the respective dates of the hearing or till further orders from the Court (sometimes also termed as permanent exemption) under Section 205 and/ or Section 317 of the Code. An accused cannot seek such exemption as a matter of right and it is the judicial discretion of the Court which depends upon facts and circumstances of each case. If trial can be held conveniently in absence of accused, it would be just and expedient to exercise discretion in favour of the accused. If the Court feels that personal attendance of the accused is not essential, the Court can dispense with the same. Exemptions are normally granted depending upon the place of residence of the accused, his business activities or on account of age and health reasons, etc. The Courts refuse such exemptions if it is sought with a view to delay the proceedings or is likely to cause prejudice to the complainant.

The normal rule is that the evidence shall be taken in the presence of the accused as provided in Section 273 of the Code unless he has been granted exemption from attending the Court. The exemptions can be granted to an accused if he is willing to give an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in Court during the proceedings and that he would not have any objection in recording of the evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

The accused can be directed to remain present personally by the Court at any stage of the proceedings notwithstanding the grant of such exemption earlier.

Doctrine of Double Jeopardy

Section 48 of the Act categorically states that the provisions of Chapter V of the Act (which contains the offences and prosecutions under

5. Arnesh Kumar vs. State of Bihar &Anr. (2014) 8 SCC 273
6. Sanjay Chandra vs. CBI [AIR 2012 SC 830]

the Act) are in addition to and not in derogation of provisions of any other law providing for prosecution for offences thereunder. Consequently, a person can be prosecuted under the provisions of the Act and also any other law if an offence is made out thereunder. Same set of facts can constitute offences under two different laws. There may be instances where a person is tried under the Act as well as any other law including the IT Act. The accused may in such a situation raise a plea of double jeopardy.

The Apex Court[7] has held that the doctrine of double jeopardy would arise only where ingredients of both offences are same. Burden is upon the accused to raise necessary plea and establish the same.

In another case, the Apex Court[8] has observed that the test to ascertain whether two offences are same is not identity of allegations but the identity of the ingredients of the offence. In order to attract provisions of Article 20(2) of the Constitution of India or Section 300 of the Code or Section 71 of IPC or Section 26 of the General Clauses Act, 1897 ingredients of the offences in the earlier case as well in the latter case must be the same and not different.

Concept of *Mens Rea*

It is a general principle of criminal jurisprudence that the prosecuting agency has to prove its case. The onus to prove the case lies squarely upon the prosecuting agency. The burden of proof keeps shifting as and when each party to the proceedings discharges its burden pertaining to the evidence. Whenever an offence requires mens rea, the prosecuting agency has to prove the same. However a statute can create exceptions by virtue of certain presumptions and in such a situation burden to prove that there was no such mens rea lies upon the accused. Section 54 of the Act lays down such presumption. But it is a rebuttable presumption. The said Section 54 of the Act is akin to Section 278E of the IT Act.

The Supreme Court followed the above principle in *Prakash Nath Khanna & Anr. vs. Commissioner of Income Tax & Anr.*[9] observing that the Court has to presume the existence of culpable mental state and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution.

The Supreme Court while interpreting application of provisions of Section 138-A of the Customs Act, 1962 akin to Section 278E of IT Act, which deals with presumption of culpable mental state has ruled that Section 138-A is an exception to the general criminal jurisprudence that onus never shifts on the accused[10]. The Supreme Court[11] while interpreting the application of provisions of Section 138-A of the Customs Act, 1962 ruled that the burden of proof lies on the accused to displace the presumption of culpable mental state.

The Apex Court has in *Sasi Enterprises vs. Assistant Commissioner of Income Tax*[12], while dealing with Section 278E with respect to presumption as to culpable mental state held that the *"…Court in a prosecution of offence, like Section 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary* and *that too beyond reasonable doubt…".*

Procedure for trial

Chapter XIX of the Code lays down the procedure for trial of warrant-cases by Magistrates. The complaints under the Act have to be dealt in accordance with the provisions for cases instituted otherwise than on police report beginning with Section 244 of the Code.

7. Monica Bedi vs. State of Andhra Pradesh [2011 Cri LJ 427]
8. Sangeetaben Mahendrabhai Patel vs. State of Gujarat [2012 Cri LJ 2432]
9. (2004) 9 SCC 686
10. BhanabhaiKhalpabhai vs. Collector of Customs and Anr., 1994 Supp (2) SCC 143
11. DevchandKalyanTandel vs. State of Gujarat and Anr., (1996) 6 SCC 255
12. (2014) 5 SCC 139

In a warrant-case, the Court shall proceed to hear the prosecution and take all such evidence as may be produced by it in its support. Upon taking all such evidence, if the Court comes to a conclusion that no case has been made out against the accused, which, if unrebutted would warrant his conviction, the Court shall discharge him. In the event of the accused not being discharged upon the evidence recorded and the Magistrate is of the opinion that the accused has committed an offence, then he shall frame the charge in writing against the accused. Thereupon, the charge shall be explained and read out to the accused and would be asked whether he pleads guilty or wants to be tried. If the accused pleads guilty, the Magistrate may record the plea and may convict him thereon. If the accused wants to be tried or he is not convicted even upon his pleading guilty, he would be given an opportunity to cross-examine all or any of the witnesses who have been earlier examined by the prosecution. In case the accused wishes to cross-examine any such witness, they would be called and offered for cross examination and re-examination, if necessary, by the prosecution. Thereafter, the evidence of the remaining witnesses of the prosecution shall be taken. After the evidence of prosecution witnesses is concluded, explanation of the accused is recorded under Section 313 of the Code. Thereafter the accused shall enter upon his defence and produce his evidence, if he so chooses. After hearing arguments of both sides and upon consideration of the evidence, the Magistrate will either convict the accused or order an acquittal under Section 248 of the Code.

An accused can however at any stage of the case make an application for discharge under Section 245(2) of the Code if the facts so justify. However an accused cannot be discharged once charges are framed.

Chapter XVIII of the Code deals with the procedure for a trial before a Court of Sessions.

Admissible Evidence

Section 57 of the Act provides that the entries in the records or other documents in the custody of tax authorities are made admissible in any proceeding for the prosecution of any person for an offence under the Act. Such entries can be proved upon production of the records or other documents as provided in the said Section. This Section has wide ramifications. However mere proof of such entries in every case may not necessarily conclusively prove the case against the accused person as other facts may have a bearing on such entries.

Punishment

Sections 49 to 53 (both inclusive) of the Act prescribe the punishment that could be passed against the accused. The maximum sentence that could be imposed under these Sections is either imprisonment for 7 (seven) years or 10 (ten) years [Section 51(1)] except Section 51(2) which provides for 3 (three) years. Section 58 of the Act provides for 10 (ten) years imprisonment as maximum sentence for every second and subsequent offences. As per Section 29 of the Code, a Magistrate of First Class or a Metropolitan Magistrate can pass a sentence of imprisonment for a term not exceeding 3 (three) years. Though a Magistrate of First Class or a Metropolitan Magistrate are competent to try any offence under the Act, they do not have the power to pass a sentence of imprisonment for more than 3 (three) years. The Act does not provide any enhanced powers to them with regard to sentencing. The courts of CJM/Additional CJM[13] or CMM/Additional CMM[14] are empowered under Section 29 of the Code to pass a sentence of maximum imprisonment up to 7 (seven) years.

It would therefore be appropriate for a Magistrate of First Class or a Metropolitan Magistrate to seek a remedy under Section 322 or Section 325 of the Code, as the case may be, for the accused to be tried/dealt with by a court of CJM/Additional CJM or CMM/Additional CMM. The ideal situation would be that the

13. Section 12 of the Code
14. Section 17 of the Code

case is filed before the CJM/Additional CJM or CMM/Additional CMM.

Whenever the offence is punishable with a period of more than seven years the Sessions Court gets the jurisdiction to try the case in view of Part II of First Schedule of the Code.

In *Pankajbhai Nagjibhai Patel vs. State of Gujarat*[15], the Apex Court held that if a Magistrate of First Class thinks that the fact situation in a particular case warrants imposition of a sentence more severe than the limit fixed under Section 29 of the Code, resort may be had to Section 325(1) of the Code and the accused may be forwarded to the Chief Judicial Magistrate.

Prosecution for offences by companies under the Act

Section 56 of the Act provides for offences by companies. It inter alia states that where an offence has been committed by a company, every person who, at the time the offence was committed, was in charge of and was responsible to the company for conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Under Section 56(4) of the Act even a company can be prosecuted despite a mandatory sentence of imprisonment and fine. This position is also now well-settled.[16]

The Supreme Court has in *National Small Industries Corp. Ltd. vs. Harmeet Singh Paintal and Anr.*[17] held that *"…there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable..." The Court has further held that "Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases".*

The above mentioned judgment has also been relied upon in *G. N. Verma vs. State of Jharkhand and Anr.*[18]

Prevention of Money-Laundering Act, 2002 ("PMLA")

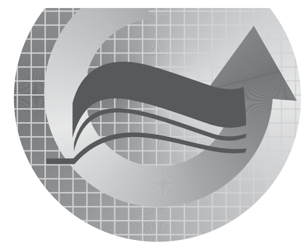
Pursuant to Section 88 of the Act, an offence of wilful attempt to evade any tax, penalty or interest referred to in Section 51 of the Act has been made a scheduled offence under PMLA. In view of this, Section 51(1) must be seen to be a Scheduled offence under PMLA. Therefore, whenever an offence under Section 51(1) is committed, proceedings under PMLA can also be initiated as provided under Section 88 of the Act.

In the eventuality of proceedings initiated under PMLA, the Special Court constituted under PMLA shall be the competent Court to try offences under Section 51(1) of the Act as well as PMLA in accordance with Section 44 of PMLA.

Conclusion

The one time compliance scheme under the Act elicited a muted response contrary to the expectations. Only an effective implementation of the various provisions of the Act after detection of cases and/or upon exchange of information under the relevant treaties or agreements with foreign countries will help India get back the black money stashed abroad and also prevent further loss to the nation.

15. 2001 Cri LJ 950 (Supreme Court)
16. Standard Chartered Bank & Ors. vs. Directorate of Enforcement & Ors. [(2005) 4 SCC 530]; Iridium India Telecom Ltd. vs. Motorola Incorporated & Ors. [(2011) 1 SCC 74]
17. (2010)3SCC330
18. (2014) 4 SCC 282



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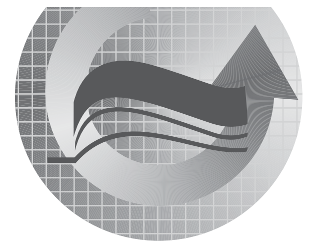
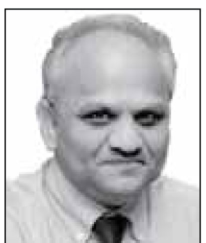




CA Paresh P. Shah

FATCA – An Indian Perspective

1. Background

1.1 Section 285BA was introduced in the Income-tax Act, 1961 w.e.f. 1st April, 2015. The Rules have been notified recently on 7th August, 2015 to enable the Government of India to provide certain information in respect of the Financial Accounts of the specified US persons (Taxpayers of the USA), to the Government of USA in order to co-operate with them for proper implementation of US Tax Laws.

In order to create a legal and binding obligation for the Indian Financial Institutions, an Agreement between the two Governments namely the Government of India and the Government of USA was signed, the effect of which is desired through the domestic law of India.

1.2 On March 18th, 2010, the Hiring Incentives to Restore Employment Act of 2010 added chapter 4 to Subtitle A of the Code (sections 1471–1474 (commonly known as "FATCA")). Chapter 4 generally requires withholding agents to withhold at a 30 per cent rate on certain payments to a foreign financial institution (FFI) unless the FFI has entered into an agreement (FFI agreement) to obtain status as a participating FFI and, among other things, to report certain information with respect to U.S. accounts. Chapter 4 also imposes on withholding agents withholding, documentation, and reporting requirements with respect to certain payments made to non-financial foreign entities (NFFEs). On January 17th, 2013, Treasury and the IRS published final regulations under chapter 4.

Thus origin of the Indian provision is the Internal Revenue code of the US (Income tax Act) Section 1471-74 which requires Foreign Financial Institution to observe certain compliances procedures and/or withholding obligations as mandated by the Internal Revenue Code.

It appears to be extraterritorial in nature, however, India has signed the agreement to the effect that the specified Indian Financial Institutions will observe these provisions through the mechanism of Article 28 of the India USA DTAA to exchange information between India and USA for the purposes of the Taxation read with Section 285BA of the Income-tax Act, 1961.

The CBDT has recently notified Rule 114F (Definitions), Rule 114G (Information to be maintained) and Rule 114H (Due Diligence process) through Notification No. 62/2015 dt. 7-8-2015.

Most of the terms defined in this article pertain to the FATCA Agreement which are either synonymous with those defined in the Rules laid down vide Notification 62 unless otherwise stated or they carry similar meaning as those of he Rules. This is so considered because, if there

is any discrepancy, the meaning of the FATCA Agreement shall prevail as per new Para 7 of Article 4 of the FATCA Agreement.

1.3 The relevant extract from the provision of the US Code is reproduced here.

Section 1471

In general

(a) In the case of any withholdable payment to a foreign financial institution which does not meet the requirements of sub-section (b), the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 per cent of the amount of such payment.

(b) Reporting requirements, etc.

(1) In general

The requirements of this sub-section are met with respect to any foreign financial institution if an agreement is in effect between such institution and the Secretary under which such institution agrees—

(A) To obtain such information regarding each holder of each account maintained by such institution as is necessary to determine which (if any) of such accounts are United States accounts,

(B) To comply with such verification and due diligence procedures as the Secretary may require with respect to the identification of United States accounts,

(C) In the case of any United States account maintained by such institution, to report on an annual basis the information described in subsection (c) with respect to such account,

(D) To deduct and withhold a tax equal to 30 per cent of—

(i) any passthru payment which is made by such institution to a recalcitrant account holder or another foreign financial institution which does not meet the requirements of this subsection, and

(ii) In the case of any passthru payment which is made by such institution to a foreign financial institution which has in effect an election under paragraph (3) with respect to such payment, so much of such payment as is allocable to accounts held by recalcitrant account holders or foreign financial institutions which do not meet the requirements of this subsection,

(E) To comply with requests by the Secretary for additional information with respect to any United States account maintained by such institution, and

(F) In any case in which any foreign law would (but for a waiver described in clause (i)) prevent the reporting of any information referred to in this sub-section or sub-section (c) with respect to any United States account maintained by such institution—

(i) To attempt to obtain a valid and effective waiver of such law from each holder of such account, and

(ii) If a waiver described in clause (i) is not obtained from each such holder within a reasonable period of time, to close such account.

Any agreement entered into under this sub-section may be terminated by the Secretary upon a determination by the Secretary that the foreign financial institution is out of compliance with such agreement.

(2) Financial institutions deemed to meet requirements in certain cases

A foreign financial institution may be treated by the Secretary as meeting the requirements of this sub-section if —

(A) Such institution—

(i) Complies with such procedures as the Secretary may prescribe to ensure that such institution does not maintain United States accounts, and

(ii) Meets such other requirements as the Secretary may prescribe with respect to accounts of other foreign financial institutions maintained by such institution, or

(B) Such institution is a member of a class of institutions with respect to which the Secretary has determined that the application of this section is not necessary to carry out the purposes of this section.

Thus it is a unique provision in the US Code which requires the Foreign Financial Institution, being a recipient of any Income from US Source to provide details about the beneficial owner, directly or indirectly, and who are US Persons or US Residents. Further the details about the Financial Accounts held by them (FFIs) of such US Persons are also required to be provided by such payee FFI to the Government of USA. If details are not provided then such FFI will be obligated to withhold tax @ 30% on the US sourced income.

In order to implement the provision of the information to Government of USA, GOI and USA has on 9th July, 2015 entered into an agreement known as FATCA.

Alternatively, USA may enter into Model II Agreement with the participating Financial Institution directly.

2. Salient features of the FATCA Agreement

The agreement has several articles as can be found in a typical Double Tax Avoidance Agreement. These are:

Article 1: Is the definition section from (a) to (z) and (aa) to (mm)

Article 2: Is about the obligation to obtain information and the depth and the details about the Reportable Accounts.

Article 3: Is about the time and the manner in which the information will be exchanged between India and USA.

Article 4: Application of FATCA to Indian Financial Institutions ('IFI'), Non-reporting IFI, Non-participating IFI, Exempt IFI, etc., overseas branch of IFI, local branch of a non-US Foreign Financial Institution, manner of reading definitions provided with the U.S. Treasury regulations, etc.

Article 5: Administration of Information Exchange by Collaboration on Compliance and Enforcement.

Article 6: Mutual commitments to enhance and continue the effectiveness of E.O.I.

Article 7: Consistency with India and other partner jurisdictions

Article 8: Consultations, Amendments, etc.

Article 9: Validity of Annexures – Annexure I: Due diligence for identification of accounts; Annexure II: Exempt Beneficial owner/s and entities.

Article 10: Termination

3. Important Concepts under FATCA

3.1 **"Financial institution"** means a:

a. Custodial Institution (i.e. holding, as a substantial portion of its business, financial assets for the account of others),

b. A Depository Institution (i.e. any entity that accepts deposits in the

ordinary course of a banking or similar business),

c. An Investment Entity (any Entity that conducts as a business one or more of activities or operations for or on behalf of a customer in nature of trading in money market instruments, foreign exchange, commodity futures, etc. or individual and collective portfolio management, or otherwise investing, administering, or managing funds or money on behalf of other persons), or

d. A Specified Insurance Company (any entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract.

3.2 **"Indian Financial Institution"** means (i) any Financial Institution resident in India, but excluding any branch of such Financial Institution that is located outside India, and (ii) any branch of a Financial Institution not resident in India, if such branch is located in India

3.3 **"Reporting Indian Financial Institution"** means any Indian Financial Institution that is not a Non-Reporting Indian Financial Institution

3.4 **"Non-Reporting Indian Financial Institution"** means any Indian Financial Institution, or other entity resident in India, that is described in Annex II of the FATCA Agreement as a Non-Reporting Indian Financial Institution or that otherwise qualifies as a deemed-compliant FFI or an exempt beneficial owner under relevant U.S. Treasury Regulations in effect on the date of signature of the Agreement

Note: A joint reading of Paras 3.2, 3.3 and 3.4 above indicates that not all financial institutions holding financial accounts are required to be reported.

3.5 **"Reportable Account"** means a U.S. Reportable Account or an Indian Reportable Account, as the context requires

As per the Indian Rules, it means a financial account which has been identified, pursuant to the due diligence procedures as prescribed, as held by, –

(i) A reportable person; or

(ii) An entity not based in United States of America with one or more controlling persons that is a specified U.S. person; or

a passive non-financial entity with one or more controlling persons that is a reportable person of a jurisdiction other than United States of America.

Note: Thus (a) an entity not based in USA could be established in another jurisdiction outside India, or (b) A passive Non-Financial Entity ('PNFE') may be outside India and is controlled by any person who need not be US person but is a reportable person.

Thus, if PNFE is controlled by any person other than US person, then in such a case, the Indian Financial Institution would be required to identify whether it is a reportable person or not.

This will further complicate the matter depending upon whether such a jurisdiction is a partner jurisdiction or not.

3.6 **"U.S. Reportable Account"** means a Financial Account maintained by a Reporting Indian Financial Institution and held by one or more Specified U.S. Persons or by a Non-U.S. Entity with one or more Controlling Persons that is a specified U.S. Person. Notwithstanding the foregoing, an account shall not be treated as a U.S. Reportable Account if such account is not identified as a U.S. Reportable Account after application of the due diligence procedures in Annex I of the FATCA Agreement.

3.7 **"U.S. person"** means, –

a. An individual, being a citizen or resident of the United States of America;

b. A partnership or corporation organised in the United States of America or under the laws of the United States of America or any State thereof;

c. A trust if, (i) a Court within the United States of America would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust; and (ii) one or more U.S. persons have the authority to control all substantial decisions of the trust;

d. An estate of a decedent who was a citizen or resident of the United States of America.

3.8 **"Specified U.S. person"** means a U.S. person, other than the persons referred to in sub-clauses (i) to (xiii) of clause (ff) of Article 1 of the FATCA agreement which are as under:

Exceptions:

(i) A corporation the stock of which is regularly traded on one or more established securities markets;

(ii) Any corporation that is a member of the same expanded affiliated group, as defined in section 1471(e)(2) of the U.S. Internal Revenue Code, as a corporation described in clause (i);

(iii) The United States or any wholly owned agency or instrumentality thereof;

(iv) Any State of the United States, any U.S. Territory, any political sub-division of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;

(v) Any organisation exempt from taxation under section 501(a) of the U.S. Internal Revenue Code or an individual retirement plan as defined in section 7701(a)(37) of the U.S. Internal Revenue Code;

(vi) Any bank as defined in section 581 of the U.S. Internal Revenue Code;

(vii) Any real estate investment trust as defined in section 856 of the U.S. Internal Revenue Code;

(viii) Any regulated investment company as defined in section 851 of the U.S. Internal Revenue Code or any entity registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-64);

(ix) Any common trust fund as defined in section 584(a) of the U.S. Internal Revenue Code;

(x) Any trust that is exempt from tax under section 664(c) of the U.S. Internal Revenue Code or that is described in section 4947(a)(1) of the U.S. Internal Revenue Code;

(xi) A dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State;

(xii) A broker as defined in section 6045(c) of the U.S. Internal Revenue Code; or

(xiii) Any tax-exempt trust under a plan that is described in section 403(b) or section 457(g) of the U.S. Internal Revenue Code.

Note: Analysis of each excluded person refers to a particular section of the Internal Revenue Code or Investment Company Act or other law. Therefore, it would be interesting to analyse each one of it for a comparative exclusion in India of such accounts.

3.9 **"Active NFE"** is not reportable and means any Non-Financial Entity which meets any of the following criteria, namely:

(i) Less than 50 per cent of the gross income is passive income and less than 50 per cent of the assets held are assets that produce/are held for the production of passive income; or

(ii) The stock of the entity/related entity is regularly traded on an established securities market

(iii) The entity is a Governmental Entity, an International Organization, a Central Bank, or an entity wholly owned by one or more of the foregoing; or

(iv) Non-financial group entities e.g. holding companies, certain treasury centers or certain captive finance companies.

Exception to (iv) – if it functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes;

or

(v) Non-financial start-up companies or companies entering a new line of business; or

(vi) Non-financial entities in liquidation or bankruptcy; or

(vii) The entity primarily engages in financing and hedging transactions with, or for, related entities that are not financial institutions, and does not provide financing or hedging services to any entity that is not a related entity; or

(viii) Certain organisations established and operated in India exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in India and it is a professional organisation, business league, chamber of commerce, labor organisation, agricultural or horticultural organisation, civic league or an organization operated exclusively for the promotion of social welfare that meet certain conditions.

3.10 **"Passive NFE"** with one or more controlling persons that is a reportable person is a Reportable account. Passive NFE means:

(a) Any non-financial entity which is not an active non-financial entity, or

(b) An investment entity, the gross income of which is primarily attributable to investing, reinvesting, or trading in financial assets, if the entity is managed by another entity that is a depository institution, a custodial institution, a specified insurance company, or an investment entity or

(c) A withholding foreign partnership or withholding foreign trust

3.11 **"Controlling person"** means the natural persons who exercise control over an entity and includes a beneficial owner as defined in Explanation to sub-rule (1A) of Rule 9 of Prevention of Money-laundering (Maintenance of Records of the Mature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005

4. Type of information to be obtained & exchanged

With respect to each U.S. Reportable Account of each Reporting Indian Financial Institution, the information to be obtained and exchanged is:

(1) The name, address, and U.S. TIN of each specified U.S. Person that is an Account Holder of such account and, in the case

of a Non-U.S. entity that, after application of the due diligence procedures set forth in Annex I, is identified as having one or more Controlling Persons that is a Specified U.S. Person, the name, address, and U.S. TIN (if any) of such entity and each such Specified U.S. Person;

(2) The account number (or functional equivalent in the absence of an account number);

(3) The name and identifying number of the Reporting Indian Financial Institution;

(4) The account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year, immediately before closure;

(5) In the case of any Custodial Account:

(A) The total gross amount of interest, the total gross amount of dividends, and the total gross amount of other income generated with respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period; and

(B) The total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Indian Financial Institution acted as a custodian, broker, nominee, or otherwise as an agent for the Account Holder;

(6) In the case of any Depository Account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period; and

(7) In the case of any account not described in sub-paragraphs (5) or (6) above, the total gross amount paid or credited to the Account Holder with respect to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Indian Financial Institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the Account Holder during the calendar year or other appropriate reporting period.

5. Non-reporting or exempt financial institutions

Annexure – II of the FATCA Agreement specifies the entities that shall be treated as exempt 'beneficial owners' or 'deemed-compliant FFIs' and excluded from the definition of Financial Accounts. These are:

(a) A Governmental entity, International Organization or Central Bank, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution

(b) A Treaty Qualified Retirement Fund; a Broad Participation Retirement Fund; a Narrow Participation Retirement Fund; or a Pension Fund of a Governmental Entity, international Organization or Central Bank;

(c) A non-public fund of the armed forces, an employees' state insurance fund, a gratuity fund or a provident fund;

(d) An entity that is an Indian financial institution solely because it is an investment entity, provided that each

direct holder of an equity interest in the entity is a financial institution referred to in sub-clauses (a) to (c), and each direct holder of a debt interest in such entity is either a depository institution (with respect to a loan made to such entity) or a financial institution referred to in sub-clauses (a) to (c);

(e) A qualified credit card issuer;

(f) An investment entity established in India that is a financial institution solely because it, —

(1) Renders investment advice to, and acts on behalf of, or

(2) Manages portfolios for, and acts on behalf of, or

(3) Executes trades on behalf of

a customer for the purposes of investing, managing, or administering funds or securities deposited in the name of the customer with a financial institution other than a non-participating financial institution;

(g) An exempt collective investment vehicle;

(h) A trust established under the laws of India to the extent that the trustee of the trust is a reporting financial institution and reports all information required to be reported with respect to all reportable accounts of the trust;

(i) A financial institution with a local client base;

(j) A local bank;

(k) A financial institution with only low-value accounts;

(l) Sponsored investment entity and controlled foreign corporation, in case of any U.S. reportable account; or

(m) Sponsored closely held investment vehicle, in case of any U.S. reportable account.

6. Indicia of reportable status, due diligence & threshold

6.1 Annexure I to the FATCA Agreement specifies the due diligence procedures and obligations on Reporting Indian Financial Institutions for identifying based on indicia searches and reporting on U.S. Reportable accounts and on payments to certain non-participating financial institutions.

6.2 The Rules lists the following indicia of reportable persons to be searched:

(i) Tax resident of any jurisdiction outside India;

(ii) A US birthplace;

(iii) Current mailing or residence address (including a P.O. box) in any jurisdiction outside India;

(iv) One or more telephone numbers in a jurisdiction outside India and no telephone number in India

(v) Standing instructions (other than with respect to a depository account) to transfer funds to an account maintained in a jurisdiction outside India; or

(vi) Currently effective power of attorney or signatory authority granted to a person with an address in a jurisdiction outside India; or

(vii) A "hold mail" instruction or "in-care-of" address in a jurisdiction outside India if the reporting financial institution does not have any other address on file for the account holder.

Having one of these indicia does not mean that the account is owned by a reportable person; only that it must be given closer scrutiny and self-certification is required to be obtained.

6.3 The threshold, process and timeline for completion of due diligence process for US Reportable accounts are as under:

	Type of Account	Threshold	Process & Timeline
1.	Preexisting Individual Accounts as of June 30, 2014	a. Balance or value not exceeding US$ 50,000; b. Cash Value Insurance Contract or an Annuity Contract with a balance or value of $ 250,000 c. A Depository Account with a balance of $ 50,000 or less	Not required to be reviewed, identified, or reported as U.S. Reportable Accounts (unless the account balance or value subsequently exceeds the limits as per monitoring at every year end).
2.	Preexisting Individual Accounts as of June 30th, 2014 ("Lower Value Accounts")	If thresholds given in (1) above are exceeded but do not exceed $1,000,000	Electronic Record search to be conducted. Further conditions & exemptions are specified in Annexure - I. Review to be completed by June 30th 2016
3.	Preexisting Individual Accounts as of June 30, 2014, or December 31st of 2015 or any subsequent year ("High Value Accounts")	A balance or value that exceeds $1,000,000	Annexure - I lists out the procedures including: Electronic Record search; Paper Record search; Exceptions; Lower Value becoming High Value Review to be completed by December 31st 2015. If identified as a US Reportable Account in a review carried out in CY 2015, the account is not to be included for 2014 report. It becomes reportable annually from the year in which it is identified
4.	New Individual Accounts opened on or after July 1, 2014	Cash Value Insurance Contract with Cash Value not exceeding $ 50,000 at the end of any calendar year or other appropriate reporting period Depository Account with balance not exceeding $50,000 at the end of any calendar year or other appropriate reporting period	Not required to be reviewed, identified, or reported as U.S. Reportable Accounts

	Type of Account	Threshold	Process & Timeline
5.	New Individual Accounts opened on or after July 1, 2014 other than those specified in (4) above		Self-certification to be obtained at time of account opening. If the self-certification establishes that the Account Holder is resident in the United States for tax purposes, the Reporting Indian Financial Institution must treat the account as a U.S. Reportable Account and obtain a self-certification that includes the Account Holder's U.S. TIN (which may be an IRS Form W-9 or other similar agreed form). If the Reporting Indian Financial Institution is unable to obtain a valid self-certification, the Reporting Indian Financial Institution must treat the account as a U.S. Reportable Account
6.	Preexisting Entity Accounts as of June 30th, 2014	If account balance or value does not exceed US$ 250,000	Not required to be reviewed, identified, or reported as a U.S. Reportable Account until the account balance or value exceeds US$ 1,000,000
7.	Preexisting Entity Accounts as of June 30th, 2014	Balance or value exceeds $250,000 as of June 30, 2014 Balance or value does not exceed US$ 250,000 as of June 30, 2014 but the account balance or value of which exceeds US$ 1,000,000 as of the last day of 2015 or any subsequent calendar year	Review to be completed by June 30h, 2016 Review to be completed by December 31st, 2015 or, in case of any subsequent year, it must be completed within six months after the last day of the calendar year in which the account balance or value exceeds US$ 1,000,000
8.	New Entity Accounts opened on or after July 1st, 2014	Credit Card or Revolving Credit facility not exceeding US$ 50,000	Not required to be reviewed, identified, or reported, provided that the Reporting Indian Financial Institution maintaining such account implements policies and procedures to prevent an account balance from exceeding US$ 50,000.

	Type of Account	Threshold	Process & Timeline
9.	New Entity Accounts opened on or after July 1st, 2014 other than those specified in (8) above		Reporting Indian Financial Institution must determine whether the Account Holder is: (i) A Specified U.S. Person; (ii) An Indian Financial Institution or other Partner Jurisdiction Financial Institution; (iii) A participating FFI, a deemed-compliant FFI, or an exempt beneficial owner, as those terms are defined in relevant U.S. Treasury Regulations; or (iv) An Active NFFE or Passive NFFE In all other cases, a Reporting Indian Financial Institution must obtain a self-certification from the Account Holder to establish the Account Holder's status. Due Diligence procedures and whether account is US Reportable or not are specified in Annexure - I

7. Procedure for registration of financial institution and submission of statement of reportable accounts

7.1 An FFI is required to register on the "FATCA Registration Website" of the Internal Revenue Service of USA. The website is a secure online web-based system that FFIs can use to register under FATCA from anywhere in the world. Upon approval, the FFI and its branches will receive a Global Intermediary Identification Number (GIIN) from the IRS.

7.2 Thereafter, as stipulated by CBDT in Rule 114G(7) of Notification 62, the statement of reportable account required to be furnished under clause (k) of sub section (1) of section 285BA of the Income-tax Act, 1961 shall be furnished by a reporting financial institution in respect of each account which has been identified, pursuant to due diligence procedure specified in rule 114H, as a reportable account.

7.3 Thus, 'Reporting Financial Institution' [Rule 114 F(7)] shall make a search on 'Reportable Account' [Rule 114 F(6)].

Definition of 'Reportable Account' as aforesaid includes amongst PNFE and an entity, a 'Reportable Person' [Rule 114 F(8)].

7.3.1 Thus, a Reportable Financial Account held by:

a) A reportable person,

b) A non-US entity controlled by specified US person

c) A passive non-financial entity controlled by one or more persons other then US persons but resident outside India

will be covered for due diligence.

Again, it may be noted that (a) above includes,

i. One or more specified US persons or

ii. One or more persons that is resident of the country or territory outside India under the respective tax laws of those countries.

7.3.2 Thus in all, search of reportable account held by Financial Institution would cover:

a) One or more specified US persons [holding accounts or interest in Indian Financial Institution]

b) A non-US entity controlled by specified US person [holding accounts or interest in Indian Financial Institution]

c) A passive non-financial entity controlled by non-US persons who are not a resident of India [holding accounts or interest in Indian Financial Institution]

d) One or more persons (presumably other than specified US persons) who or which are Resident of any other country outside India [holding accounts or interest in Indian Financial Institution]

7.3.3 It may be interesting to note that item (b) above in Para 7.3.2 possibly would include Indian as well as foreign entity/ies being controlled by one or more persons who are specified US persons. However, item (d) above in Para 7.3.2 may be controlled only by non-US non-resident of India. Hence, there was no necessity to have item category (c) above as that would be included in item (d) above in any case.

7.4 In case pursuant to such due diligence procedures no account is identified as a reportable account, a nil statement shall nevertheless be furnished by the reporting financial institution.

7.5 The statement referred to above has to be furnished in Form No. 61B for every calendar year by the 31st day of May following that year. The statement pertaining to calendar year 2014 was to be furnished by the 31st day of August, 2015.

7.6 The aforesaid statement in Form No. 61B is required to be furnished to the Director of Income-tax (Intelligence and Criminal Investigation) or the Joint Director of Income-tax (Intelligence and Criminal Investigation) through online transmission of electronic data to a server designated for this purpose under the digital signature in accordance with the data structure specified in this regard by the Principal Director General of Income-tax (Systems).

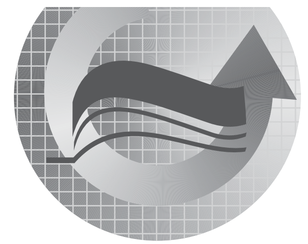
8. Conclusion

The Indian provisions relating to FATCA flow from the Internal Revenue Code of USA. Various US laws such as the Internal Revenue Code, Investment Company Act, etc. are very comprehensive and complex in character unlike their Indian counterparts. Further, Article 4(7) of the FATCA Agreement provides that, in implementing the FATCA Agreement, India may use, and may permit Indian Financial Institutions to use, a definition in relevant U.S. Treasury Regulations in lieu of a corresponding definition in the FATCA Agreement, provided that such application would not frustrate the purposes of the FATCA Agreement.

The CBDT has, nevertheless, specified extensive definitions in Rule 114F notified *vide* Notification 62 dt. 7-8-2015. Most of these definitions are similar and / or synonymous with those specified either in FATCA Agreement or the Internal Revenue Code. However, care has to be taken to ensure that in case of conflict of provisions or if the application of Indian rules lead to ambiguity, the aforesaid US laws would finally apply.

References

1. FATCA Agreement between India and USA at: http:// www.incometaxindia.gov.in / Lists / Press%20Releases / Attachments /375 / india_iga_final-_india_english.pdf
2. Annexures to FATCA Agreement referred to in this Article may be accessed from the above link
3. Wikipedia: https://en.wikipedia.org/wiki/Foreign_Account_Tax_Compliance_Act
4. US IRS: https://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-FATCA



CA Vaibhav Manek & CA Kartik Mehta

FATCA – Frequently Asked Questions, an Indian Perspective

1. What is FATCA?

The Foreign Account Tax Compliance Act was enacted in 2010 in USA to target non-compliance by US taxpayers using offshore or foreign accounts. FATCA requires Foreign Financial Institutions (FFIs) to identify and to report information about such accounts held by US taxpayers or by foreign entities in which US taxpayers hold a substantial ownership interest.

The objective of FATCA is sought to be achieved by punitively providing for 30% withholding tax on US source payments made to FFIs unless they enter into an agreement with the Internal Revenue Service (IRS) to provide information about accounts held with them by USA persons or entities (firms/companies/trusts) controlled by USA persons. Since domestic laws of sovereign countries, may not permit sharing of client confidential information by FIs directly with USA, USA has entered into Inter-Governmental Agreement (IGA) with various countries.

2. What are the International Initiatives around FATCA?

The G20 Summit held in St- Petersburg on September 7th to 8th, 2013 committed to start by end of 2015 the automatic exchange of tax information, in accordance with the rules set up by the OECD, and finally adopted the automatic exchange of tax information as the new international standard of tax cooperation.

The OECD issued on February 12th, 2014 a single new "Standard for Automatic Exchange of Financial Account Information" including the text of the Model Competent Authority Agreement (CAA) and the Common Reporting and Due Diligence Standard (CRS). The G20 Finance Minister endorsed the Standard presented by the OECD during the February 22-23 2014 meeting in Sydney (Australia).

The OECD annual ministerial council meeting held in Paris on May 6th 2014 endorsed the Declaration on Automatic Exchange of Information in Tax Matters by all 34 member countries along with Argentina, Brazil, China, Colombia, Costa Rica, India, Indonesia, Latvia, Lithuania, Malaysia, Saudi Arabia, Singapore and South Africa.

On July 21st, 2014, the OECD released a full version of global standard for automatic exchange of information. The new consolidated version includes commentary and guidance for implementation by Governments and financial institutions, detailed model agreements, as well as standards for harmonised technical and information technology solutions, notably a standard format and requirements for secure transmission of data.

The G20 meeting held in Austria in September 2014 formally endorsed the new standard.

At the Global Forum held in Germany the October 29th 2014, 50 countries agreed to start the automatic tax information exchange in 2017 and about 90 countries agreed to ban bank secrecy in tax matters.

3. What are the different kinds of IGA entered into by USA with other countries?

The US Treasury department has issued two model inter Governmental agreements ("IGAs"). The first agreement—known as the Model 1 IGA—would require FFIs to report all FATCA-related information to their own governmental agencies, which would then report the FATCA-related information to the IRS. Some Model 1 IGAs are reciprocal, requiring the U.S. to provide certain information about residents of the Model 1 country to the Model 1 country in exchange for the information that country provides to the U.S. An FFI covered by a Model 1 IGA will not need to sign an FFI agreement, but it will need to register on the IRS's FATCA Registration Portal or file Form 8957. India and USA have signed Model 1 IGA on July 9th, 2015 for implementation of FATCA in India and for reciprocal exchange of information.

The second version of the IGA—the Model 2 IGA—would require FFIs to report information directly to the IRS. Under such IGA, FFIs will need to register with the IRS, and certain FFIs will sign a version of the FFI agreement modified to reflect the IGA.

4. What entities does it concern or affect?

The starting point of the FATCA Rules is the definition of a 'Financial Institution' ('FI') and the enquiry of whether an Indian entity in question falls within the definition or not is the cornerstone. Another important concept in the FATCA regime is the definition of a 'financial account' ('FA'), which is defined as, *inter alia,* any equity or debt interest in an FI.

Further, Financial Institutions which are classified as 'Reporting Financial Institution' are concerned with the reporting requirements under FATCA of 'US Reportable Persons'.

The FATCA Rules further identify 'specified US persons', which essentially means US residents, partnerships, certain trusts and corporations (subject to a long list of exceptions). Non-US entities which are controlled or beneficially owned by specified US persons, though not specifically mentioned in the Rules, are also important from a reporting perspective. Financial Accounts held by such specified US entities and non-US entities controlled by them are called 'US Reportable Accounts'.

'Passive non-financial entities' controlled by persons resident outside India and the US for tax purposes ('PNFEs'), are also relevant in the context of FATCA.

5. Which accounts of Indians may be treated as reportable under FATCA?

- An Indian by birth but holding an American passport is a US person. Even if he has lived in India for most of his life, FATCA becomes applicable in his case.
- A green card holder even if he lives in India or elsewhere
- A Non-resident Indian ('NRI') with a US Resident status i.e. an NRI who either lives in the USA or qualifies as living there based on the number of days he has lived there in the last few years
- A person who has given his house address as a US address or gave a US telephone number to the bank/mutual fund/ brokerage
- A person who has given a power of attorney to a US person
- A company "controlled" by above US persons (one or more)

6. Who is required to report information under FATCA?

Rule 114G(1) casts an obligation on "Reporting Financial Institutions" to maintain and report certain information in respect of each "Reportable Account". "Reporting Financial Institution" is defined in Rule 114F (7) to mean:

(a) A financial institution (other than a non-reporting financial institution) which is resident in India, but excludes any branch of such institution that is located outside India; and

(b) Any branch of a financial institution (other than a non-reporting financial institution) which is not resident in India, if that branch is located in India.

7. Who is a Financial Institution for purposes of FATCA?

The definition of Financial Institution is very wide and includes custodial institutions, depository institutions, investment entities and specified insurance companies. Detailed definitions are covered separately in this publication.

In general, Custodial Institutions includes entities that safe keep Financial Assets for the account of others, such as custodian banks, brokers and central securities depositories.

Savings banks, commercial banks, savings and loan associations, and credit unions would generally be considered Depository Institutions

Investment Entity as per Explanation (c) to Rule 114F(3) is primarily of two types: (i) Entities which primarily conducts a business of one or more of the activities or operations for or on behalf of a customer in the nature of trading in money market instruments, foreign exchange, derivatives, commodity futures or individual and collective portfolio management or otherwise investing, administering, or managing financial assets or money on behalf of other persons; (ii) Entities whose gross income is primarily attributable to investing, reinvesting, or trading in financial assets, if the said entity is managed by another entity that is a depository institution, a custodial institution, an investment entity or a specified insurance company.

Specified Insurance Company means any entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract value of which is greater than US$ 50,000. A single premium life insurance contract which does not permit an amount to be paid on surrender or termination of the contract and which does not allow amounts to be borrowed under or with regard to the contract, shall not constitute a cash value insurance contract.

8. Are all Indian Financial Institutions under an obligation to report?

Rule 114F(5) specifies a number of entities as "Non-reporting Financial Institutions" and these entities are not required to maintain or report the information. The following kinds of FIs qualify as 'Non-reporting FIs' and are deemed compliant or exempt beneficial owner :

(a) A Governmental entity, International Organisation or Central Bank;

(b) A Treaty Qualified Retirement Fund; a Broad Participation Retirement Fund; a Narrow Participation Retirement Fund; or a Pension Fund of a Governmental entity, International Organisation or Central Bank;

(c) A non-public fund of the armed forces, Employees' State Insurance Fund, a gratuity fund or a provident fund;

(d) An entity that is an Indian financial institution only because it is an investment entity, provided that each direct holder of an equity interest in the entity is a financial institution referred to in sub-clauses (a) to (c);

(e) A qualified credit card issuer;

(f) An investment entity established in India that is a financial institution only because it (i) renders investment advice to, and acts on behalf of; or (ii) manages portfolios for, and acts on behalf of; or (iii) executes trades on behalf of, a customer for the purposes of investing, managing, or administering funds or securities deposited in the name of the customer with a financial institution other than a non-participating financial institution;

(g) An exempt collective investment vehicle;

(h) A trust established under any law for the time being in force to the extent that the trustee of the trust is a reporting financial institution and reports all information required to be reported under Rule 114G with respect to all reportable accounts of the trust;

(i) A financial institution with a local client base;

(j) A local bank;

(k) A financial institution with only low-value accounts;

(l) Sponsored investment entity and controlled foreign corporation, in case of any U.S. reportable account;

(m) Sponsored closely held investment vehicle, in case of any U.S. reportable account.

Explanation to Rule 114F(5) provides further details of the above categories of non-reporting financial institutions.

9. Which Financial Accounts are excluded from review?

Certain types of Financial Accounts which carry low risk of being used to evade tax are excluded from needing to be reviewed or reported and are called Excluded Accounts. These accounts have been enumerated in Explanation (h) to Rule 114F(1) subject to certain conditions and are as under:

(i) Retirement or pension accounts

(ii) Non-retirement tax-favoured accounts

(iii) Account established under the Senior Citizens Savings Scheme

(iv) Certain Term Life Insurance contracts

(v) Accounts held by Estates

(vi) Escrow Accounts established in connection with Court judgments etc.

(vii) Depository accounts due to non-returned overpayments in case of credit card and other accounts

10. What are Reportable Accounts?

In general terms, a Reportable Account means an account, which has been identified pursuant to the due diligence procedure prescribed in Rule 114H, as held by one or more Reportable Persons or by a Passive Non-Financial Entity with one or more Controlling Persons that is a Reportable Person. Thus, an account can be Reportable Account by virtue of the Account Holder or by virtue of the Account Holders' Controlling Persons.

The following Account Holders are included in Reportable Person as defined in Rule 114F(8):

(a) One or more specified U.S. persons

(b) One or more persons other than prescribed entities that are resident of any country or territory outside India under the tax laws of such country or territory. Prescribed entities are listed corporations and its related entities, Government organisation, an International organisation, a Central Bank and a Financial Institution.

The U.S. person includes an individual being a citizen or resident of USA, a partnership or corporation organised in the USA, US trusts etc. In case of USA, an individual account holder who is a citizen or resident of USA is a US reportable account and the account of a US

entity which is a specified US person is a US reportable account. In case of other reportable accounts, the accounts held by residents (for tax purposes) of countries/territories outside India, whether individuals or specified entities, would be reportable accounts.

Regardless of whether the Financial Account is a Reportable Account by virtue of the Account Holder, a second test in relation to the Controlling Persons of certain Entity Account Holders needs to be applied to ascertain whether the Controlling Persons of such Entities are residents of countries/territories outside India. If this test is satisfied, the accounts would be Reportable Account. In case of USA, these reportable accounts by virtue of Rule 114F(6)(b) would be accounts held by an entity, not based in USA, with one or more controlling person that is a specified U.S. person.

It may also be noted that 'reportable person' does not connote 'Financial Institution' as 'Reporting Financial Institution' is also separately defined.

11. What is the Due Diligence Procedure? Are there any threshold levels and timelines for completion of review?

The Reporting FIs need to identify the Reportable Accounts (financial accounts less excluded accounts) by carrying out due diligence procedures. There are different rules for accounts held by individuals and Entities as well as for Preexisting and New Accounts, reflecting the differing characteristics between the types of accounts depending upon its holder. The rules also leverage on existing processes such as those for Anti Money Laundering purposes.

The date from which the procedure for New Accounts would be applicable is:

- July 1st, 2014 in case of U.S. Reportable Accounts. For accounts opened from July 1st, 2014 to the date of entry into force of the IGA between India and USA, i.e., August, 31st 2015, self-certification required for New Accounts should be obtained within one year of entry into force of the IGA, i.e., by August 31st, 2016 and if it is not obtained, the accounts need to be closed.
- January, 1st 2016 in case of other Reportable Accounts

For accounts opened prior to this date, Financial Institutions will generally be allowed to rely on the information they hold on file.

Details of threshold levels for pre-existing lower value, higher value accounts held by individuals and entities, new accounts, etc. and timelines are covered separately in this publication.

12. What is the search procedure for Pre-existing Individual accounts?

Lower Value Accounts: The due diligence procedure for lower value pre-existing individual accounts is prescribed in Rule 114H(3)(b) which provides that the Reporting Financial Institutions must review electronically searchable data maintained on the following indicia:

- Identification of the account holder as a resident of any country or territory outside India for tax purposes or unambiguous indication of a place of birth in USA
- Current mailing or residence address (including a post office box) in any country or territory outside India; or
- One or more telephone numbers in a country or territory outside India and no telephone number in India; or
- Standing instructions (other than with respect to a depository account) to transfer funds to an account maintained in a country or territory outside India; or
- Currently effective power of attorney or signatory authority granted to a person with an address in a country or territory outside India; or

- A "hold mail" instruction or "in-care-of" address in a country or territory outside India if the reporting financial institution does not have any other address on file for the account holder

If none of the indicia are discovered in the electronic search, no further action is required unless there is a change in circumstances which results in one or more indicia being associated with the account, or the account becomes a high value account.

However, irrespective of the findings above, it would not be reportable if the Reporting Financial Institution obtains and maintains a record of:

- A self-certification from the account holder that it is not resident of a country/territory outside India
- Documentary evidence establishing the account holder's non-reportable status

Higher Value Accounts: The due diligence procedure for high value pre-existing individual accounts is prescribed in Rule 114H(3)(c) which provides for enhanced review procedures described below:

(a) If the electronic searchable information in case of a customer includes the following information, no paper record search is required:

  - The account holder's residence status for tax purposes;
  - The account holder's residence address and mailing address currently on file with the reporting financial institution;
  - The account holder's telephone number or numbers currently on file, if any, with the reporting financial institution;
  - Tn the case of financial accounts other than depository accounts, whether there are standing instructions to transfer funds in the account to another account (including an account at another branch of the reporting financial institution or another financial institution);
  - Whether there is a current "in-care-of" address or "hold mail" instruction for the account holder; and
  - Whether there is any power of attorney or signatory authority for the account.

(b) If the electronic searchable data does not contain all of the above information, the Reporting Financial Institution needs to review the current customer master file and the documents obtained during the last five years for identification of any of the indicia.

(c) The high value accounts assigned to a relationship manager will be treated as reportable account if the relationship manager has actual knowledge that the account holder is a reportable person.

(d) If after application of review procedures:

  - None of the indicia are discovered and the account is not identified as held by reportable persons, then no further action is required until there is change of circumstances;
  - Any of the indicia are discovered or there is change of circumstances, then the RFI shall treat the account as a reportable account with respect to each country or territory outside India for which the indicia is identified unless it obtains a self-certification to establish its residence
  - The only indicia found is a "hold mail" or "in-care" address, special

procedures are applied and the RFIs need to complete paper record search or obtain from the account holder a self-certification or documentary evidence to establish the residence.

(e) In respect of pre-existing individual account, if self-certification or documentary evidence is not obtained from the account holder (till the deadline of completing the due diligence procedures as laid down in the rules) in remediation of any of the indicia found in electronic search, paper record search or RM's search, the account will be an undocumented reportable account.

13. What is the search procedure for Pre-existing Entity accounts?

For entity accounts in excess of the threshold levels, to determine whether the entity is a reportable person, the Reporting Financial Institution needs to review information maintained for regulatory or customer relationship purposes (including information collected in accordance with the rules made under the Prevention of Money-laundering Act, 2002). However, the account may not be treated as a "reportable account", if a self-certification is obtained from the account holder, or if the financial institution reasonably determines based on information in its possession or that is publicly available, that the account holder is not a reportable person.

14. What is the search procedure for Passive Non-Financial Entity accounts?

To determine whether the account holder is a Passive NFE and whether its controlling persons are residents of countries/territories outside India, the following procedure is specified:

- For purposes of determining whether the account holder is a passive NFE, the reporting financial institution shall obtain a self-certification from the account holder to establish its status, unless it has information in its possession or which is publicly available, based on which it can reasonably determine that the account holder is an active NFE (not a reportable person) or a financial institution other than an investment entity
- For purposes of determining the controlling persons of an account holder, a reporting financial institution may rely on information collected and maintained in accordance with the rules made under the Prevention of Money-laundering Act, 2002 if the balance does not exceed USD 1,000,000. If it exceeds USD 1,000,000, self-certification from the account holder or such controlling person(s) will be required.

If any controlling person of a passive NFE is a resident of any country or territory outside India for tax purposes, the account of the passive NFE shall be treated as a reportable account. If the entity is controlled by non-residents from different countries, then in such a case, account will be reportable in all such countries as well as in the country of which the person controlling the entity is tax resident.

15. How is the value of financial accounts held by an entity determined?

For purposes of determining the aggregate balance or value of financial accounts held by an entity, a reporting financial institution shall be required to take into account all financial accounts which are maintained by it, or by a related entity, but only to the extent that the computerized systems of that reporting financial institution links the financial accounts by reference to a data element such as client number or taxpayer identification number, and allows account balances or values to be aggregated.

16. What are the Reporting requirements and due-dates?

Rule 114G(1) provides and specifies the kind of information that the Reporting FI needs to maintain and report in case of each Reportable Account. This has been covered separately in this publication.

Due-dates for furnishing the report in Form 61B:	
Relating to calendar year 2014	For only US reportable accounts and the statement should be furnished by August 31st, 2015, which has been extended to September ,10th, 2015, by an order issued by CBDT on August, 25th,2015.
Relating to calendar year 2015	For only US reportable accounts and the statement should be furnished by May 31st, 2016.
Relating to calendar year 2016 onwards	All the above information in case of both US and other reportable accounts need to be reported by 30th September of the following year.

In case when no account is identified as reportable account, a Nil statement needs to be furnished. A Nil statement can also be furnished if the RFI has not completed the due diligence procedures.

17. What is the procedure for furnishing the Report?

The Reporting FI has to register on FATCA Registration website of the Internal Revenue Service of USA in order to obtain a Global Intermediary Identification Number (GIIN).

Thereafter, in order to file Form 61B, the following procedures, data structure and standards have been specified by the Principal Director General of Income Tax (Systems) through Notification No. 3/2015 dated August 25th, 2015:

(a) The RFIs are required to get registered with the Income Tax Department by logging in to the e-filing website with the login ID used for the purpose of filing the Income Tax Return. A link to register reporting financial institution has been provided under "My Account". The RFI is required to submit registration details on the screen. A RFI may submit different registration information under different reporting financial institution categories.

(b) After registration, the RFIs are required to submit the Form 61B or Nil statement under "e-file" menu. The prescribed schema for the report under Form 61B can be downloaded from the e-filing website. The RFI will be required to submit the calendar year for which report is to be submitted and the reporting entity category for which the report is to be submitted. The reporting financial institution will then be provided the options to upload the Form 61B. The form is required to be submitted using a Digital Signature Certificate.

(c) In case nil statement has to be submitted by the RFI, the option to submit Nil statement is required to be selected. The reporting financial institution will then be required to submit a declaration with respect to pre-existing accounts and new accounts. The declaration is required to be submitted using a Digital Signature Certificate.

(d) In case if the designated director (as reported in registration details submitted by the RFI) is same as the person authorised to verify the return of income of the reporting financial institution as per the provisions of section 140 of the Income-tax Act, 1961, the Form 61B or Nil statement is required to be submitted with the digital signature certificate of the person authorized to sign the return of income of the RFI. In other cases, the necessary facilities are being developed to enable filing of statement by designated directors who are not authorised to sign the return of income.

CA Shishir Lagu

FATCA – A USA Perspective

1. Origin of FATCA

In 2008, Senate Finance Committee Chairman Max Baucus introduced draft legislation to combat tax evasion. In 2009, the Obama administration's budget proposals for fiscal year 2010 included proposals related to increased information reporting. Following the 2009 House Ways and Means Committee hearing on offshore tax evasion, Finance Committee Chairman Baucus and House of Representatives Ways and Means Committee Chairman Charles Rangel introduced the Foreign Account Tax Compliance Act of 2009. The bill was passed by the House as part of the Tax Extenders Act of 2009, but was not enacted into law. It was then included as part of the Hiring Incentives to Restore Employment (HIRE) Act, as a revenue offset, and President Obama signed it to be enacted as law on March 18, 2010, with an effective date of January 1, 2013.

The most significant provision enacted as part of FATCA is a new chapter 4 of the Internal Revenue Code. Chapter 4, consisting of sections 1471 – section 1474, is intended to detect and deter the evasion of U.S. tax by U.S. persons who hide money either by directly investing in accounts outside the United States or by using non-U.S. entities to indirectly invest in accounts inside or outside the United States.

FATCA is primarily used by Government personnel to detect U.S. persons and their assets and to enable cross-checking of whether assets have been self-reported by individuals. FATCA data is used to cross-check a U.S. person's self-reported data at the Financial Crimes Enforcement Network (FINCEN). U.S. persons, regardless of residence location and regardless of dual citizenships, are required to self-report their non-U.S. financial assets to FINCEN on an annual basis. Although not intended FATCA will also be used to help identify non-U.S. person family members and business partners who share accounts with U.S. persons. Another benefit of FATCA is that U.S.-persons who are signatories of the non-US corporate accounts will be identified.

The IRS previously instituted a qualified intermediary (QI) programme under Internal Revenue Code section 1441which required participating foreign financial institutions to maintain records of the U.S. or foreign status of their account holders and to report income and withhold taxes. One report included a statement of a finding that participation in the QI programme was too low to have a substantive impact as an enforcement measure and was prone to abuse.

An illustration of the weakness in the QI programme was that UBS, a Swiss bank, which had registered as a QI with the IRS in 2001 and was later forced to pay to the U.S. Government $780 million in 2009 to settle charges that it helped wealthy

Americans evade taxes by concealing their account information.. Non-resident U.S. citizens' required self-reporting of their local assets was also found to be relatively ineffective.

There were various information reports about U.S. Treasury losing as much as 100 billion USD annually to "offshore tax non-compliance". Another source stated 40-70 billion USD however accurate figures on unreported income are neither available nor have been supported.

2. Impact analysis of FATCA

a) **Foreign Investment in USA:** The primary mechanism for enforcing the compliance of foreign financial institutions is a punitive withholding levy on U.S. assets (US source income on their US assets). This may create a strong incentive for foreign financial institutions to divest (or not invest) in U.S. assets, resulting in capital flight.

b) **Foreign relations:** Forcing foreign financial institutions and foreign Governments to collect data on U.S. persons at their own expense and transmit it to the IRS has been called divisive, far reaching and extraterritorial".

c) **Impact for US persons residing abroad:** There are also reports of many foreign banks refusing to open accounts for Americans, making it harder for Americans to live and work abroad and also of residents which are suspected to be U.S. citizens being separated out at their financial institutions for differential treatment.

The Guardian reported that Americans living abroad feel financially terrorized by FATCA requirements. Between June 18 and July 15, 2014 Democrats Abroad carried out a survey of overseas Americans to examine their experiences related to the FATCA. There were 6,552 responses from Americans from all 50 states and the District of Columbia and living in locations across six continents. This survey results show the intense impact FATCA is having on overseas Americans. Their financial accounts are being closed, their relationships with their non-American spouses are under strain, some Americans are being denied promotion or partnership in business because of FATCA reporting requirements and some are planning or contemplating renouncing their U.S. citizenship.

d) **Cost benefit analysis:** The estimates of the costs to be incurred in the private sector, by the IRS, and by foreign revenue authorities are not the precise one and varying estimates have been made. The compliance cost to financial institutions has been roughly estimated by Forbes at US$8 billion a year. A chapter of the Chamber of Commerce estimated FATCA global implementation costs to be 1-2 trillion USD. Whether incurring of such huge costs provide corresponding benefits is a question? The intention of locating U.S. persons and their non-U.S. financial accounts would be to increase tax revenues from the interest, dividends, and gains of those assets. Given the good network of tax treaties US as also the tax credit mechanism present under the US domestic tax regime, the majority of that income which is already attributable to the country where it resides and taxed in may be eligible for foreign tax credit.

e) **The FATCA IGA Bilateral Arrangement:** The agreements which are essentially a treaty in nature requires two thirds consent in the U.S, Senate in order to become applicable in U.S. law. The applicability of IGA's is being challenged

in U.S. court. The plaintiffs state that the IGA's are not valid Executive Agreements.

f) **Complexity and Related Administration:** According to The New York Times, it is unclear whether the IRS is ready to handle millions of new complicated filings per year. On May 2, 2014, the IRS issued Notice 2014-33 providing that 2014 and 2015 will be regarded as a transition period for purposes of enforcement and administration relating to entity but not individual investors. Doubts have been expressed as to workability of FATCA due to its complexity, and the legislative timetable for implementation has already been pushed back twice.

3. FATCA provisions affecting Citizens/ Residents of USA

For decades, every U.S. person with a financial interest in, or signature or other authority over, one or more foreign financial accounts has been required to report such accounts to the Treasury Department if the aggregate value of such accounts exceeded $10,000 at any time during the calendar year. The report is made on TD F 90-22.1 (Report of Foreign Bank and Financial Accounts), commonly referred to as the “FBAR,” and must be received by Treasury on or before June 30 of the following year.

United States person includes U.S. citizens; U.S. residents; entities, including but not limited to, corporations, partnerships, or limited liability companies, created or organised in the United States or under the laws of the United States; and trusts or estates formed under the laws of the United States.

FATCA added section 6038D under the Internal Revenue Code which requires the reporting of any interest in specified foreign financial assets (SFFA) effective for tax years beginning after March 18, 2010. For this purpose, a specified foreign financial asset generally includes the following:

- Any financial account maintained by a foreign financial institution.
- Any stock or security issued by a person other than a U.S. person.
- Any financial instrument or contract held for investment that has an issuer or counterparty that is other than a U.S. person.
- Any interest in a foreign entity.

The Required Information generally includes the following:

- In the case of an account, the name and address of the financial institution at which an account is maintained and the number of the account.
- In the case of any stock or security, the name and address of the issuer, and such information as is necessary to identify the class or issue of which the stock or security is a part.
- In the case of any other instrument, contract, or interest, (i) such information as is necessary to identify the foreign instrument, contract or interest, and (ii) the names and addresses of all issuers and counterparties with respect to such instrument, contract, or interest.
- The maximum value of the asset during the tax year.

Detailed guidance regarding the Code Sec. 6038D reporting requirement is set forth in Treasury Regulations that were issued on December 19, 2011 and IRS Form 8938, with instructions. Reporting under section 6038D is made on Form 8938, Statement of Specified Foreign Financial Assets, but this filing obligation only applies to a “specified person,” and only if the aggregate value of the SFFAs in which such specified person has an interest exceeds a specified reporting threshold. A specified person is defined as either (1) a

specified individual, or (2) a specified domestic entity. The reporting by such specified person is applicable if the aggregate value of the SFFAs in which such person has an interest exceeds (1) $50,000 as of the last day of the tax year, or (2) $75,000 at any time during the tax year. If two specified individuals are married and file a joint return, then they generally must file Form 8938 (jointly) only if the aggregate value of the SFFAs in which either spouse has an interest exceeds (1) $100,000 as of the last day of the tax year, or (2) $150,000 at any time during the tax year.

4. FATCA provisions affecting International Organisations

Effective July 1, 2014, a withholding agent (any person, U.S. or foreign, in whatever capacity acting, that has the control, receipt, custody, disposal, or payment of a withholdable payment or foreign pass thru payment) that makes any withholdable payment to a FFI or NFEE will be required to withhold and remit 30% of the payment to the IRS, unless the payee can provide the documentation to certify that it is FATCA compliant. Withholding under chapter 4 applies to withholdable payments. A withholdable payment is a payment that is U.S. source FDAP income and a payment of gross proceeds from the sale or disposition of property that can produce U.S. source interest or dividends. When considering what a withholdable payment is, the concepts that define income are a fair starting point. The Code provides many exceptions to what is generally treated as ordinary income; and chapter 4 has its own set of rules that narrow the scope of withholdable payments. Withholding agents have the responsibility to know what types of payments they are making. In the absence of knowledge of the character or source of a payment, chapter 4 imposes a presumption rule that requires an undetermined payment to be treated as a withholdable payment.

The FFI was required to register with the IRS on or before May 5, 2014 in order to obtain a Global Intermediary Identification Number (GIIN). In June 2014, the IRS began publishing a monthly online list of registered FFIs, intended to allow withholding agents to verify the GIINs of their payees in order to establish that withholding is not required on payments to those payees.

Payments to an FFI:

What is an FFI?

A Foreign Financial Institution (FFI) is any non-U.S. entity that is one of the following types:

1. Depository Institution

This is an entity that accepts deposits or other similar fund investments in the ordinary course of a banking or similar business.

2. Custodial Institution

This is an entity that holds financial assets for third parties as a substantial portion of its business. This is defined as earning over 20 per cent of its gross income from such activities during the last three years ending on December 31 of the preceding year.

3. Investment Entity (Can fall under any one of the below three categories)

i. Entity primarily conducts as a business one or more of the following activities for or on behalf of a customer:

   a. Trading in Financial Instruments

   b. Individual or Collective Portfolio Management

   c. Investing, administering or managing funds, money or financial assets on behalf of other persons

ii. Entity's gross income is primarily attributable to investing, reinvesting, or trading in financial assets, and the entity is managed by a depository institution, custodial institution, or an insurance company.

iii. Entity functions as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets.

4. *Specified Insurance Company*

A specified insurance company is an insurance company whereby the company issues or is obligated to make payments with respect to cash value insurance or annuity contracts. This also includes a holding company with an insurance company in its expanded affiliated group.

5. Holding Company or Treasury Centre

As per the regulations, a holding company is defined as an entity primarily involved in directly or indirectly holding all or part of the outstanding stock of one or more members of its expanded affiliated group.

Additionally, to fall under the definition of an FFI-

i. The holding company must either be part of an expanded affiliated group that includes a depository Institution, custodial institution, insurance company or an investment entity (classified as such because it is a professionally managed entity primarily engaged in investing, reinvesting or trading in financial assets or because it functions or holds itself out to be an investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets);

OR

ii. Be formed in connection with or availed by an investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets.

A treasury centre is an entity primarily involved in entering into investment, hedging and financing transactions with or for members of its expanded affiliated group to manage risk of price changes or currency fluctuations with respect to property for its expanded affiliated group.

Starting July 1, 2014, the U.S. entity is required to verify whether the FFI is FATCA compliant prior to making the payment. The FFI is required to submit Form W-8BEN-E wherein the FFI certifies its status and provides it GIIN. The withholding agent is required to verify this GIIN on the IRS website prior to making the payment to the FFI. After the GIIN has been verified, the withholding agent can withhold the amount based on the prevailing tax rate or the lower rate provided by the DTAA, if applicable.

If the FFI is unable to provide the W-8BEN-E or the GIIN, or the GIIN is not available on the IRS website within 90 days of the receipt of the W-8BEN-E, then the withholding agent will be required to withhold 30% of the payment and remit the same to the IRS.

Payments to an NFFE

What is an NFFE?

A non-financial foreign entity (NFFE) means any foreign entity which is not a financial institution. An NFFE may be one of the below types:

1. *Publicly Traded NFFE or an NFFE affiliate of a* ***publicly traded corporation***

A publicly traded NFFE is not subject to the 30% withholding requirement, so long as

it provides the withholding agent with the Form W-8BEN-E certifying that it is a publicly traded NFFE on or before the date of payment.

2. Active NFFE

An NFFE is an active NFFE if:

- Less than 50% of its gross income for the preceding calendar year is passive income, or
- Less than 50% of the weighted average percentage of assets (tested quarterly) held by the NFFE are assets that produce or are held for the production of passive income.

An active NFFE is not subject to the 30% withholding requirement, so long as it provides the withholding agent with the Form W-8BEN-E certifying that it is an active NFFE on or before the date of payment.

3. Passive NFFE

A passive NFFE is an NFFE that is not an "excepted" NFFE; e.g., a publicly traded entity or affiliate, an exempt beneficial owner, or an active NFFE.

A passive NFFE is required to provide a W-8BEN-E to the withholding agent certifying one of the below two conditions:

- The passive NFFE has no substantial U.S. owners (A substantial U.S. owner is a U.S. person with more than 10% ownership), or
- The passive NFFE has substantial U.S. owners, and lists the substantial U.S. owners on Part XXX of the W-8BEN-E.

If the passive NFFE fails to provide the W-8BEN-E along with this information, then the withholding agent will be required to withhold 30% of the payment.

5. FATCA provisions affecting U.S. Financial Institutions and Entities

U.S. financial institutions (USFIs) and other types of U.S. withholding agents are required to withhold 30% on certain U.S. source payments made to foreign entities, if they are unable to document such entities for purposes of FATCA.

USFIs and U.S. withholding agents must also report to the IRS information about certain non-financial foreign entities with substantial U.S. owners.

USFIs are also eligible to submit a FATCA Registration application via the FATCA Registration website for the following reasons:

- A USFI with a foreign branch in a Model 1 IGA jurisdiction to obtain a GIIN for the branch.
- A USFI with a foreign branch that is a qualifying intermediary (QI) to renew the branch's QI agreement.
- A USFI may register as a sponsoring entity for FFIs and agree to perform, on behalf of the FFI, all the FATCA activities that the FFI otherwise would have to do.
- A USFI may register as a Lead FI to manage the FATCA registration process for members of its Expanded Affiliated Group of FFIs.

6. FATCA provisions affecting Foreign withholding Partnerships & Trusts

The IRS issued updated procedures in Rev. Proc. 2014-47 (released and effective August 8, 2014) for "withholding foreign partnerships" (WPs) and "withholding foreign trusts" (WTs) that elect to assume certain U.S. withholding tax responsibilities under chapters 3 and 4 of the Code for payments of U.S. source income (such as interest, dividends, and

royalties) made to its partners, beneficiaries, or owners, and in some cases, persons holding interests in the WP or WT through one or more foreign intermediaries or flow-through entities. The revised agreements co-ordinate the existing rules for WPs and WTs with FATCA withholding under Secs. 1471 and 1472.

7. Inter-Governmental agreements

Treasury has pursued a policy of negotiating bilateral FATCA agreements, known as inter-Governmental agreements, or IGAs, with a number of countries. The primary reason that Treasury first pursued this policy is that some of the obligations placed on PFFIs and some deemed-compliant FFIs conflict with local laws. For example, many countries' laws place restrictions on the circumstances in which private customer information may be provided to third parties, including non-U.S. Governments. Section 1471(b)(1)(F) requires PFFIs to attempt to obtain waivers of any such legal restrictions from U.S. accounts. However, such waivers may not be permitted under the local law or may not be valid. Accordingly, FFIs resident in or organised in such countries may be prohibited under local law from complying with the terms of an FFI agreement. Thus, FFIs could be faced with a choice between breaking local laws in order to comply with FATCA or not breaking local laws and being non-compliant with FATCA.

Because FATCA's goal is for the IRS to obtain information regarding U.S. accounts, Treasury believed that it was within FATCA's policy goals to find a way in which the IRS would receive information about U.S. accounts but would not require FFIs to violate local laws to be FATCA compliant. IGAs provide an alternative means for FFIs in FATCA partner countries to comply with FATCA without violating local law.

Treasury has published two IGA model

- **Model 1 IGAs**

This model would require FFIs to report all FATCA-related information to their own Governmental agencies, which would then report the FATCA-related information to the IRS. Some Model 1 IGAs are reciprocal, requiring the U.S. to provide certain information about residents of the Model 1 country to the Model 1 country in exchange for the information that country provides to the U.S. Reporting Model 1 FFIs are treated as registered deemed-compliant FFIs and need to register on the IRS's FATCA Registration Portal to obtain the GIIN. A concession was made available from withholdable payments made prior to January 1, 2015, where verification of a GIIN is not required with respect to payees that are reporting Model 1 FFIs. As a result, reporting Model 1 FFIs were given an additional time beyond July 1, 2014 to register and obtain a GIIN in order to ensure that they are included on the IRS FFI list before January 1, 2015. US signed a Model 1 IGA with India on 9th July, 2015. The examples of other countries with which US has entered into Model 1 IGA agreement are UK, France, Germany, Netherlands, Australia, etc.

- **Model 2 IGAs**

Model 2 IGAs, on the other hand, require the FATCA partner to direct FFIs resident in or organized in the FATCA partner jurisdiction (other than FFIs that are similarly excepted from reporting) to comply with chapter 4, to enter into FFI agreements with the IRS, and to report to the IRS with respect to their U.S. accounts. Accordingly, reporting Model 2 FFIs are considered PFFIs. The examples of countries with which US has entered into Model 2 IGA agreement are Austria, Hong Kong, Japan, Switzerland, etc.

8. New Reporting Requirements for Form 1042-S (foreign person withholding) to reflect FATCA changes

There are many changes to Form 1042-S of year 2014; most of the changes are to accommodate the reporting of payments and amounts withheld under the foreign Account Tax Compliance Act (FATCA) provisions that went into effect on July 1, 2014.

The form has been modified to accommodate reporting of payments and amounts withheld under FATCA in addition to those amounts required to be reported under Chapter 3. Form 1042-S requires the reporting of an applicable exemption to the extent withholding under Chapter 4 did not apply to a payment of U.S. source fixed or of FDAP income (including deposit interest) that is reportable on Form 1042-S. When a financial institution reports a payment made to its financial account, Form 1042-S also requires the reporting of additional information about a recipient of the payment, such as the recipient's account number, date of birth, and foreign taxpayer identification number, if any. For withholding agents, intermediaries, flow-through entities, and recipients, Form 1042-S requires that the Chapter 3 status (or classification) and, when the payment reported is a withholdable payment, the Chapter 4 status, be reported on the form according to codes provided in these instructions.

Important considerations for corporations with payments to foreign persons

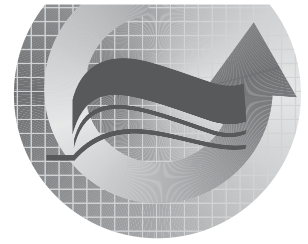
Payment made to a U.S. Branch of a Foreign Financial Institution (FFI): Payments made to a U.S. branch of an FFI, is generally considered effectively connected with the conduct of a trade or business in the United States. Such payments are not subject to tax withholding, provided the taxpayer obtains a form W-8ECI, "Certificate of Foreign Person's Claim that Income is effectively connected with the Conduct of a Trade or Business in the United States", from the U.S. branch of the FFI. A properly completed Form W-8ECI exonerates the withholding agents requirement to withhold tax, however such payments are required to be reported on Form 1042-S with the correct tax exemption code.

Grandfathered Obligations: Debt obligations that are entered into prior to July 1st, 2014 are called 'grandfathered obligations', and are exempt from the FATCA Chapter 4 withholding requirements. In such a case, Form W-8BEN that was previously provided by the FFI will continue to be effective until the time the debt continues to be a grandfathered obligation. However, if there are any material modifications to the terms of the debt on or after July 1st, 2014, then the grandfathered status is permanently lost and the modified obligation will be subject to FATCA requirements. In such cases, a new W-8BEN-E will be required to be obtained from the FFI in order avoid the 30% FATCA withholding.

Financial payments: Prior to the new FATCA provisions, Chapter 3 reporting requirements did not cover certain payments such as bank fees, guarantee fees that are not US source income, investment advisory fees etc. and accordingly no Form 1042-S was required to report these payments. Such payments are now specifically included as withholdable payments under the new Chapter 4 FATCA withholding and reporting requirements, since these payments are considered financial in nature. Beginning calendar year 2014, financial payments to foreign persons described under Chapter 4 withholdable payments will now be required to be reported on Form 1042-S clearly identifying the correct Chapter 3 and Chapter 4 exemption codes.

9. Conclusion

FATCA seems to be the beginning of increased global harmonisation of identifying and reporting global sources of income.



CA Khozema Anajwalla

FAQs on FATCA – A US Perspective

1. Can you explain to us what were the main reasons for which FATCA has been introduced?

The Foreign Account Tax Compliance Act (FATCA) is a U.S. law enacted on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act of 2010, the primary focus of which is to identify non-compliance by U.S. taxpayers using offshore accounts. In a press release, Treasury described the law and its purpose as follows:

> [FATCA is] a provision that targets the illicit activities of some wealthy individuals who use offshore accounts to evade millions of dollars in taxes. International tax evasion is illegal, adds to the federal debt, and contributes to the perception that the tax system is unfair because the wealthy can avoid the taxes other Americans pay.

To achieve its goal, FATCA requires foreign financial institutions (FFIs) (a broadly defined term which includes both traditional banks and a broad array of non-bank financial institutions including hedge funds) to disclose annually information about accounts held by U.S. individuals, or foreign companies in which U.S. individuals hold a substantial ownership interest. FFIs which refuse to provide such information about their customers to the United States will face a stringent penalty: withholding of 30% of all US-source payments of interest, dividends, and the like. The withholding rules are essentially a mechanism to enforce new reporting requirements, and not a revenue-raising mechanism. While FATCA is technically a voluntary reporting regime, the threat of withholding on US-source payments of funds essentially forces foreign banks to cooperate if they wish to have access to US capital markets, and substantially penalises those that refuse to participate.

FATCA became fully effective on July 1, 2014. As of that date, over 80,000 foreign financial institutions had registered with the IRS and indicated their agreement to report information to the IRS pursuant to FATCA, and nearly 100 foreign countries had either formally signed treaties with the United States, or were actively negotiating such agreements, in order to implement FATCA's information sharing requirements.

2. What is the policy motive from the taxpayers' perspective behind FATCA?

It is important to understand that despite its withholding provisions, FATCA is not intended to be a revenue-generating law. Instead, FATCA is primarily an information reporting regime, imposing reporting obligations on foreign financial institutions in order to provide the

IRS with additional data regarding the foreign activities of US taxpayers. To that end, the preamble to final regulations issued by Treasury and IRS states as follows:

> U.S. taxpayers' investments have become increasingly global in scope. FFIs now provide a significant proportion of the investment opportunities for, and act as intermediaries with respect to the investments of, U.S. taxpayers. Like U.S. financial institutions, FFIs are generally in the best position to identify and report with respect to their U.S. customers. Absent such reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts. To prevent this abuse of the U.S. voluntary tax compliance system and address the use of offshore accounts to facilitate tax evasion, it is essential in today's global investment climate that reporting be available with respect to both the onshore and offshore accounts of U.S. taxpayers. This information reporting strengthens the integrity of the U.S. voluntary tax compliance system by placing U.S. taxpayers that have access to international investment opportunities on an equal footing with U.S. taxpayers that do not have such access or otherwise choose to invest within the United States.

3. What are the reporting obligations for taxpayers with offshore bank accounts?

Since the 1970s, U.S. taxpayers with foreign banks accounts have been required to report annually their foreign bank account information to the Department of Treasury on a form titled "Report of Foreign Bank and Financial Accounts" (commonly known as the "FBAR" form). In addition to requiring the filing of an FBAR, the United States, unlike many other jurisdictions in the world, taxes worldwide income, meaning that a U.S. taxpayer's income is subject to tax regardless of where it is earned and regardless of whether the taxpayer lives in the United States or abroad. The failure to file an FBAR can subject a taxpayer to significant civil, and even criminal, penalties.

Any taxpayer having such an account is also required to report on his or her personal income tax return all income (interest, dividends, and capital gains) earned in that account and answer "yes" to a question on Schedule B of the return which asks whether the taxpayer maintained a foreign bank account during the year.

Requirement of FBAR has no direct nexus with the income, however information in the tax return is essentially to check the accuracy of the income declared in the return.

4. When is a U.S. taxpayer required to file the FBAR form?

Any U.S. taxpayer with a financial interest in, or signature or other authority over, a foreign bank account (which includes bank, security, and other types of financial accounts, including certain foreign life insurance policies) is required to file the FinCEN Form 114, Report of Foreign Bank and Financial Accounts (commonly known as the "FBAR" form), if the aggregate value of the account (or accounts) exceeded $10,000 at any time during the calendar year, subject to certain exceptions. The FBAR filing requirements apply to all types of taxpayers with offshore bank accounts, including individuals, corporations, partnerships, LLCs, trusts, and estates (with some exceptions). Corporate officers with signature authority over corporate bank accounts located in a foreign country must also file the FBAR form in their individual capacity.

The FBAR filing deadline is June 30 of each year. Starting in 2014, all FBARs are required to be filed electronically through the Treasury Department's BSA E-Filing System, which can be accessed at http://bsaefiling.fincen.treas.gov/main.html.

5. Whether is a U.S. taxpayer required to report the existence of foreign assets in addition to requirement of FBAR and to disclose in the tax return?

Since 2011, U.S. taxpayers with foreign assets valued in excess of certain dollar thresholds are also required to file a new reporting form called Form 8938, Statement of Foreign Financial Assets along with their personal tax returns. Civil and criminal penalties also apply to the failure to file this form, and the failure to file extends indefinitely the civil statute of limitations to assess taxes for the tax return that failed to report the foreign assets.

6. What led the United States to enact FATCA and what could be the impact of such a law to the US taxpayer and global taxpayer?

Since 2009, the U.S. Government has waged an unprecedented global campaign to crack down on the use of secret, offshore bank accounts by U.S. taxpayers to evade taxes. Since 2009, over 45,000 U.S. taxpayers have come forward under special IRS voluntary disclosure programmes to reveal that they have unreported bank accounts in countries such as Switzerland, India, Israel, and many others. During the same time period, the U.S. Department of Justice has brought criminal charges.

As part of the process to crack down on the offshore assets of the US person, UBS admitted that it helped U.S. citizens hide money using undisclosed accounts, offshore corporations, family foundations, and other mechanisms designed to conceal the true identity of account holders. The U.S. also discovered that the sheer number of accounts held by Americans was staggering: in court filings, the Justice Department estimated that over 52,000 Americans held accounts at UBS alone.

Between 2008 and April 2013, the Justice Department's Tax Division criminally charged over thirty banking professionals and sixty account holders, resulting in five convictions after trial and fifty-five guilty pleas, including two trial convictions and sixteen guilty pleas in the first four months of 2013 alone.

Despite the large numbers of individuals who have participated in various IRS voluntary disclosure programs over the past four years, it is nonetheless widely believed that many more U.S. taxpayers holding foreign accounts in countries around the world have failed to "come in from the cold." The refusal of certain U.S. taxpayers to comply is presumably due to their belief that the U.S. government would never discover the existence of their accounts due to the bank secrecy laws of the countries where they maintain accounts or that those jurisdictions would never willingly give up the names of account depositors.

Thus, the US Government thought of a law which:

a) Could discover such offshore accounts in the jurisdiction with Bank Secrecy Laws

b) To compel statutory authorities / governments to support initiative which may bilaterally assist each other in unearthing tax evasion

c) Act as a deterrent to any such tax evasion scheme either in USA or outside USA

and hence introduced FATCA.

7. What are the FATCA statutory provisions contained in the Internal Revenue Code ("Code")?

The enactment of FATCA added Chapter 4 of Subtitle A of the Code, and new Code sections 1471 through 1474. Chapter 4 generally requires U.S. withholding agents to withhold tax on certain payments to FFIs that do not agree to report certain information to the IRS regarding their U.S. accounts, and on certain payments to certain non-financial foreign entities (referred

to as "NFFEs") that do not provide information on their substantial U.S. owners to withholding agents.

8. What is the function of Section 1471?

Section 1471(a) requires any withholding agent to withhold 30% of any "withholdable payment" to an FFI that does not meet the requirements of section 1471(b). A withholdable payment generally includes (i) any payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income (referred to generally as "FDAP" income), if such payment is from sources within the United States; and (ii) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States.

Section 1471(b) provides that FFI is deemed to have observed the conditions of Section 1471(b) if it either enters into an FFI agreement with the IRS to perform certain obligations or meets requirements prescribed by the Treasury Department and the IRS to be deemed to comply with the requirements of section 1471(b).

FATCA requires a participating FFI to report certain information on an annual basis to the IRS with respect to each U.S. account maintained at its institution.

FATCA further requires a participating FFI to withhold 30% of any "passthru payment" to a "recalcitrant account holder" or to an FFI that does not meet the requirements of section 1471(b) (referred to as a "non-participating FFI"). A "passthru payment" is defined as any withholdable payment or other payment to the extent attributable to a withholdable payment. A "recalcitrant account holder" refers to any account holder that fails to provide the information required to determine whether the account is a U.S. account, or the information required to be reported by the FFI, or that fails to provide a waiver of a foreign law that would prevent reporting.

9. What is the function of Section 1472?

Section 1472 deals with any U.S.-source payments made to non-financial foreign entities (NFFEs), which are defined as any foreign entity that is not a financial institution. FATCA requires a payer of income (withholding agent) to withhold 30% if the payment is beneficially owned by the NFFE or another NFFE, unless the requirements of section 1472(b) are met with respect to the beneficial owner of the payment. The requirements of section 1472(b) are met with respect to the beneficial owner of a payment if: (i) The beneficial owner or payee provides the withholding agent with either a certification that such beneficial owner does not have any substantial U.S. owners, or the name, address, and TIN of each substantial U.S. owner; (ii) The withholding agent does not know or have reason to know that any information provided by the beneficial owner or payee is incorrect; and (iii) the withholding agent reports the information provided to the IRS.

10. What does Section 1473 require? What does Section 1474 provide?

Section 1473 deals with defining various terms used in the provision of law.

Section 1474 provides a series of special rules applicable under FATCA, including liability for withheld tax, credit and refund procedures for withheld tax, confidentiality of information disclosed to the IRS, coordination with other withholding provisions in the Internal Revenue Code, and the treatment of tax withheld under an FFI agreement. This is a very important Section which defines relationship with various other provisions of the law to avoid duplication, maintain consistency in withholding and other related provision for compliance of the law.

11. What regulatory guidance regarding FATCA has been issued by Treasury and the IRS since enactment of the law in 2010?

Date	Description
15-2-2012	Released proposed regulation for implementation of FATCA
15-5-2012	A Public hearing was held for suggestions on draft regulations
24-10-2012	Announcements (press release) notice 2012-42 that suggestions will be implemented and certain provisions are temporary until final regulations are issued.
17-1-2013	Press Release: Final Regulations containing 543 pages with announcement of message that: 'In attempting to address compliance concerns expressed by stakeholders, the final regulations state that Treasury and IRS "carefully considered these comments and established three avenues for addressing the principal concerns regarding burdens, legal impediments, and technical implementation." First, the regulations utilise a risk-based approach to implementing FATCA. Second, the regulations allow for collaboration with foreign Governments to develop an alternative inter Governmental approach to streamline FATCA implementation and compliance. Third, the regulations attempt to simplify the process for registering and entering into an FFI agreement with the IRS in order to minimise operational costs associated with collecting and reporting FATCA information' FATCA guidance notice 2013-43 incorporating revised timeline, treatment of FFI located in a jurisdiction that have signed inter-Governmental agreements but not yet brought in force will be treated as compliant FFIs.
	FFI - may enter in to IGA agreement as draft is issued and elect to be a PFFI.
	IGA revised draft - Notice 2013-69
	Revenue procedure Notice 2014-13 release D of final IGA agreement among other relief announcements.
20-2-2014	(a) Chapter 4 temporary regulations released with revised timeline for withholding a withholdable payments effective from 1-7-2014 unless circumstances suggest otherwise then withholding will apply. (b) Temporary regulations were also released for: Chapter 3 (dealing with reporting and withholding rules relating to payment of certain US source income to non-US persons) Chapter 61 Section 3406 Dealing with reporting and withholding rules relating to payment of certain US source income to non-US persons, to co-ordinate with Chapter 4 regulations (c) Co-ordination was required with pre-FATCA existing rules of Chapter 3, 61 and Section 3406 which were not consistent with FATCA's Chapter 4 regulations and to (d) Avoid duplication of reporting as well as withholding that payment will not be subject to withholding under Chapter 3 and FATCA or under both Section 3406 and FATCA and to (e) Avoid duplication and co-ordinate the reporting requirements of Chapter 61 and FATCA due to similar reporting requirements by FFI under Chapter 61 and FATCA. An option of election to provide this information under one of the two was essential for FFIs. However there was no option for US withholding agent/payers.

Date	Description
22-4-2014	Correction to temporary & final regulations were made
30-6-2014	Correction to temporary & final regulations were made
2-5-2014	Notice 2014-33 announced 2014 and 2015 as transition period due to request from various quarters.
18-11-2014	Corrections regarding pre-existing US accounts maintained by an FFI.
1-12-2014	Announcement Notice 2014-38 - Relief for those countries which have reached FATCA IGAs in substance. If agreement in substance is not brought in force than such countries can still be regarded as such compliant IGA if the jurisdiction 'continues to demonstrate firm resolve' and sign the IGA before 30-6-2014. Announcement Notice 2014-47 to the effect that IGAs must be signed before 31-12-2014 if not signed so far, removal of the jurisdiction from the list and the consequences.

12. How many countries have signed the IGA and what type of IGA have been signed by them?

A The following jurisdictions are treated as having an inter-Governmental agreement in effect.

Model 1 IGA

- Algeria (10-13-2015)
- Angola (11-9-2015)
- Australia (4-28-2014)
- Azerbaijan (9-9-2015)
- Bahamas (11-3-2014)
- Barbados (11-17-2014)
- Belarus (3-18-2015)
- Belgium (4-23-2014)
- Brazil (9-23-2014)
- British Virgin Islands (6-30-2014)
- Bulgaria (12-5-2014)
- Cambodia (9-14-2015)
- Canada (2-5-2014)
- Cayman Islands (11-29-2013)
- Colombia (5-20-2015)
- Costa Rica (11-26-2013)
- Croatia (3-20-2015)
- Curaçao (12-16-2014)
- Cyprus (12-2-2014)
- Czech Republic (8-4-2014)
- Denmark (11-19-2012)
- Estonia (4-11-2014)
- Finland (3-5-2014)
- France (11-14-2013)
- Georgia (7-10-2015)
- Germany (5-31-2013)
- Gibraltar (5-8-2014)
- Guernsey (12-13-2013)
- Holy See (6-10-2015)
- Honduras (3-31-2014)
- Hungary (2-4-2014)
- Iceland (5-26-2015)
- India (7-9-2015)
- Ireland (1-23-2013)
- Isle of Man (12-13-2013)
- Israel (6-30-2014)
- Italy (1-10-2014)
- Jamaica (5-1-2014)
- Jersey (12-13-2013)
- Kosovo (2-26-2015)
- Kuwait (4-29-2015)
- Latvia (6-27-2014)
- Liechtenstein (5-19-2014)
- Lithuania (8-26-2014)
- Luxembourg (3-28-2014)
- Malta (12-16-2013)
- Mauritius (12-27-2013)
- Mexico (4-9-2014)
- Montserrat (9-8-2015)
- Netherlands (12-18-2013)
- New Zealand (6-12-2014)
- Norway (4-15-2013)
- Philippines (7-13-2015)

- Poland (10-7-2014)
- Portugal (8-6-2015)
- Qatar (1-7-2015)
- Romania (5-28-2015)
- St. Kitts and Nevis (8-31-2015)
- St. Vincent and the Grenadines (8-18-2015)
- Singapore (12-9-2014)
- Slovak Republic (7-31-2015)
- Slovenia (6-2-2014)
- Spain (5-14-2013)
- South Africa (6-9-2014)
- South Korea (6-10-2015)
- Sweden (8-8-2014)
- Turkey (7-29-2015)
- Turks and Caicos Islands (12-1-2014)
- United Arab Emirates (6-17-2015)
- United Kingdom (9-12-2012)
- Uzbekistan (4-3-2015)

Model 2 IGA

- Austria (4-29-2014)
- Bermuda (12-19-2013)
- Chile (3-5-2014)
- Hong Kong (11-13-2014)
- Japan (6-11-2013)
- Moldova (11-26-2014)
- San Marino (10-28-2015)
- Switzerland (2-14-2013)

B. Jurisdictions that have reached agreements in substance as of June 30, 2014 and have consented to being included on this list (beginning on the date indicated in parenthesis):

Model 1 IGA

- Anguilla (6-30-2014)
- Antigua and Barbuda (6-3-2014)
- Bahrain (6-30-2014)
- Cabo Verde (6-30-2014)
- China (6-26-2014)
- Dominica (6-19-2014)
- Dominican Republic (6-30-2014)
- Greenland (6-29-2014)
- Grenada (6-16-2014)
- Guyana (6-24-2014)
- Haiti (6-30-2014)
- Indonesia (5-4-2014)
- Malaysia (6-30-2014)
- Montenegro (6-30-2014)
- Panama (5-1-2014)
- Peru (5-1-2014)
- St. Lucia (6-12-2014)
- Saudi Arabia (6-24-2014)
- Serbia (6-30-2014)
- Seychelles (5-28-2014)
- Thailand (6-24-2014)
- Turkmenistan (6-3-2014)
- Ukraine (6-26-2014)

Model 2 IGA

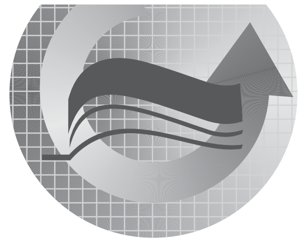
- Armenia (5-8-2014)
- Iraq (6-30-2014)
- Nicaragua (6-30-2014)
- Paraguay (6-6-2014)
- Taiwan (6-23-2014)

13. What information will US give to India?

US will give information about Indian reportable Account which means a Financial Account maintained by a Reporting US Financial Institution if: (i) in case of a Depository Account, the account is held by an individual resident in India and more than $ 10 of interest is paid to such account in any given calendar year; or (ii) in the case of a Financial Account other than a Depository Account, the Account Holder is a resident of India, including an entity that certifies that it is resident in India for tax purposes, with respect to which US source income that is subject to reporting under Chapter 3 of Subtitle A or Chapter 61 of Subtitle F of the US Internal Revenue Code is paid or credited.

14. When will US report to India?

US shall report to India within 9 months from the end of the calendar year for which the information relates. The first report was expected by 30th September 2015 for the year 2014.



Agreement between the Government of the United States of America and the Government of the Republic of India to Improve International Tax Compliance and to Implement FATCA

Whereas, the Government of the United States of America and the Government of the Republic of India (each, a "Party," and together, the "Parties") desire to conclude an agreement to improve international tax compliance through mutual assistance in tax matters based on an effective infrastructure for the automatic exchange of information;

Whereas, Article 28 of the Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, together with a related protocol (the "Convention"), done at New Delhi on September 12, 1989 authorizes the exchange of information for tax purposes, including on an automatic basis;

Whereas, the United States of America enacted provisions commonly known as the Foreign Account Tax Compliance Act ("FATCA"), which introduce a reporting regime for financial institutions with respect to certain accounts;

Whereas, the Government of India is supportive of the underlying policy goal of FATCA to improve tax compliance;

Whereas, FATCA has raised a number of issues, including that Indian financial institutions may not be able to comply with certain aspects of FATCA due to domestic legal impediments;

Whereas, the Government of the United States of America collects information regarding certain accounts maintained by U.S. financial institutions held by residents of India and is committed to exchanging such information with the Government of India and pursuing equivalent levels of exchange;

Whereas, the Parties are committed to working together over the longer term towards achieving common reporting and due diligence standards for financial institutions;

Whereas, the Government of the United States of America acknowledges the need to co-ordinate the reporting obligations under FATCA with other U.S. tax reporting obligations of Indian financial institutions to avoid duplicative reporting;

Whereas, an inter-governmental approach to FATCA implementation would address legal impediments and reduce burdens for Indian financial institutions;

Whereas, the Parties desire to conclude an agreement to improve international tax compliance and provide for the implementation of FATCA based on domestic reporting and reciprocal automatic exchange pursuant to the Convention, and subject to the confidentiality and other protections provided for therein, including the provisions limiting the use of the information exchanged under the Convention;

Now, therefore, the Parties have agreed as follows:

Article 1
Definitions

1. For purposes of this agreement and any annexes thereto ("Agreement"), the following terms shall have the meanings set forth below:

a) The term **"United States"** means the United States of America, including the States thereof, and, when used in a geographical sense, means the territory of the United States of America, including inland waters, the air space, the territorial sea thereof and any maritime area beyond the territorial sea within which the United States may exercise sovereign rights or jurisdiction in accordance with international law; the term, however, does not include the U.S. Territories. Any reference to a **"State"** of the United States includes the District of Columbia.

b) The term **"U.S. Territory"** means American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the Commonwealth of Puerto Rico, or the U.S. Virgin Islands.

c) The term **"IRS"** means the U.S. Internal Revenue Service.

d) The term **"India"** means the Republic of India, and when used in a geographical sense, means the territory of India and includes the territorial sea and airspace above it, as well as any other maritime zone in which India has sovereign rights, other rights and jurisdiction, according to the Indian law and in accordance with international law, including the U.N. Convention on the Law of the Sea.

e) The term **"Partner Jurisdiction"** means a jurisdiction that has in effect an agreement with the United States to facilitate the implementation of FATCA. The IRS shall publish a list identifying all Partner Jurisdictions.

f) The term **"Competent Authority"** means:

(1) in the case of the United States, the Secretary of the Treasury or his delegate; and

(2) in the case of India, the Central Government in the Ministry of Finance (Department of Revenue) or their authorised representative.

g) The term **"Financial Institution"** means a Custodial Institution, a Depository Institution, an Investment Entity, or a Specified Insurance Company.

h) The term **"Custodial Institution"** means any Entity that holds, as a substantial portion of its business, financial assets for the account of others. An entity holds financial assets for the account of others as a substantial portion of its business if the entity's gross income attributable to the holding of financial assets and related financial services equals or exceeds 20 per cent of the entity's gross income during the shorter of: (i) the three-year period that

ends on December 31 (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or (ii) the period during which the entity has been in existence.

i) The term **"Depository Institution"** means any Entity that accepts deposits in the ordinary course of a banking or similar business.

j) The term **"Investment Entity"** means any Entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer:

(1) Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;

(2) Individual and collective portfolio management; or

(3) Otherwise investing, administering, or managing funds or money on behalf of other persons.

This sub-paragraph 1(j) shall be interpreted in a manner consistent with similar language set forth in the definition of "financial institution" in the Financial Action Task Force Recommendations.

k) The term **"Specified Insurance Company"** means any Entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract.

l) The term **"Indian Financial Institution"** means (i) any Financial Institution resident in India, but excluding any branch of such Financial Institution that is located outside India, and (ii) any branch of a Financial Institution not resident in India, if such branch is located in India.

m) The term **"Partner Jurisdiction Financial Institution"** means (i) any Financial Institution established in a Partner Jurisdiction, but excluding any branch of such Financial Institution that is located outside the Partner Jurisdiction, and (ii) any branch of a Financial Institution not established in the Partner Jurisdiction, if such branch is located in the Partner Jurisdiction.

n) The term **"Reporting Financial Institution"** means a Reporting Indian Financial Institution or a Reporting U.S. Financial Institution, as the context requires.

o) The term **"Reporting Indian Financial Institution"** means any Indian Financial Institution that is not a Non-Reporting Indian Financial Institution.

p) The term **"Reporting U.S. Financial Institution"** means (i) any Financial Institution that is resident in the United States, but excluding any branch of such Financial Institution that is located outside the United States, and (ii) any branch of a Financial Institution not resident in the United States, if such branch is located in the United States, provided that the Financial Institution or branch has control, receipt, or custody of income with respect to which information is required to be exchanged under subparagraph (2)(b) of Article 2 of this Agreement.

q) The term **"Non-Reporting Indian Financial Institution"** means any Indian Financial Institution, or other Entity resident in India, that is described in Annex II as a Non-Reporting

Indian Financial Institution or that otherwise qualifies as a deemed-compliant FFI or an exempt beneficial owner under relevant U.S. Treasury Regulations in effect on the date of signature of this Agreement.

r) The term **"Non-participating Financial Institution"** means a non-participating FFI, as that term is defined in relevant U.S. Treasury Regulations, but does not include an Indian Financial Institution or other Partner Jurisdiction Financial Institution other than a Financial Institution treated as a Non-participating Financial Institution pursuant to subparagraph 2(b) of Article 5 of this Agreement or the corresponding provision in an agreement between the United States and a Partner Jurisdiction.

s) The term **"Financial Account"** means an account maintained by a Financial Institution, and includes:

(1) In the case of an Entity that is a Financial Institution solely because it is an Investment Entity, any equity or debt interest (other than interests that are regularly traded on an established securities market) in the Financial Institution;

(2) In the case of a Financial Institution not described in sub-paragraph 1(s)(1) of this Article, any equity or debt interest in the Financial Institution (other than interests that are regularly traded on an established securities market), if (i) the value of the debt or equity interest is determined, directly or indirectly, primarily by reference to assets that give rise to U.S. Source Withholdable Payments, and (ii) the class of interests was established with a purpose of avoiding reporting in accordance with this Agreement; and

(3) Any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a non-investment-linked, non-transferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account that is excluded from the definition of Financial Account in Annex II.

Notwithstanding the foregoing, the term "Financial Account" does not include any account that is excluded from the definition of Financial Account in Annex II. For purposes of this Agreement, interests are "regularly traded" if there is a meaningful volume of trading with respect to the interests on an ongoing basis, and an "established securities market" means an exchange that is officially recognized and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange. For purposes of this subparagraph 1(s), an interest in a Financial Institution is not "regularly traded" and shall be treated as a Financial Account if the holder of the interest (other than a Financial Institution acting as an intermediary) is registered on the books of such Financial Institution. The preceding sentence will not apply to interests first registered on the books of such Financial Institution prior to July 1, 2014, and with respect to interests first registered on the books of such Financial Institution on or after July 1, 2014, a Financial Institution is not required to apply the preceding sentence prior to January 1, 2016.

t) The term **"Depository Account"** includes any commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained by a Financial Institution in the ordinary course of a banking or similar business. A Depository Account also includes an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest thereon.

u) The term **"Custodial Account"** means an account (other than an Insurance Contract or Annuity Contract) for the benefit of another person that holds any financial instrument or contract held for investment (including, but not limited to, a share or stock in a corporation, a note, bond, debenture, or other evidence of indebtedness, a currency or commodity transaction, a credit default swap, a swap based upon a nonfinancial index, a notional principal contract, an Insurance Contract or Annuity Contract, and any option or other derivative instrument).

v) The term **"Equity Interest"** means, in the case of a partnership that is a Financial Institution, either a capital or profits interest in the partnership. In the case of a trust that is a Financial Institution, an Equity Interest is considered to be held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. A Specified U.S. Person shall be treated as being a beneficiary of a foreign trust if such Specified U.S. Person has the right to receive directly or indirectly (for example, through a nominee) a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust.

w) The term **"Insurance Contract"** means a contract (other than an Annuity Contract) under which the issuer agrees to pay an amount upon the occurrence of a specified contingency involving mortality, morbidity, accident, liability, or property risk.

x) The term **"Annuity Contract"** means a contract under which the issuer agrees to make payments for a period of time determined in whole or in part by reference to the life expectancy of one or more individuals. The term also includes a contract that is considered to be an Annuity Contract in accordance with the law, regulation, or practice of the jurisdiction in which the contract was issued, and under which the issuer agrees to make payments for a term of years.

y) The term **"Cash Value Insurance Contract"** means an Insurance Contract (other than an indemnity reinsurance contract between two insurance companies) that has a Cash Value greater than $50,000.

z) The term **"Cash Value"** means the greater of (i) the amount that the policyholder is entitled to receive upon surrender or termination of the contract (determined without reduction for any surrender charge or policy loan), and (ii) the amount the policyholder can borrow under or with regard to the contract. Notwithstanding the foregoing, the term "Cash Value" does not include an amount payable under an Insurance Contract as:

(1) A personal injury or sickness benefit or other benefit providing indemnification of an economic loss incurred upon the occurrence of the event insured against;

(2) A refund to the policyholder of a previously paid premium under an Insurance Contract (other than under a life insurance contract) due to policy cancellation or termination, decrease in risk exposure during the effective period of the Insurance Contract, or arising from a redetermination of the premium due to correction of posting or other similar error; or

(3) A policyholder dividend based upon the underwriting experience of the contract or group involved.

aa) The term **"Reportable Account"** means a U.S. Reportable Account or an Indian Reportable Account, as the context requires.

bb) The term **"Indian Reportable Account"** means a Financial Account maintained by a Reporting U.S. Financial Institution if: (i) in the case of a Depository Account, the account is held by an individual resident in India and more than $10 of interest is paid to such account in any given calendar year; or (ii) in the case of a Financial Account other than a Depository Account, the Account Holder is a resident of India, including an Entity that certifies that it is resident in India for tax purposes, with respect to which U.S. source income that is subject to reporting under chapter 3 of subtitle A or chapter 61 of subtitle F of the U.S. Internal Revenue Code is paid or credited.

cc) The term **"U.S. Reportable Account"** means a Financial Account maintained by a Reporting Indian Financial Institution and held by one or more Specified U.S. Persons or by a Non-U.S. Entity with one or more Controlling Persons that is a Specified U.S. Person. Notwithstanding the foregoing, an account shall not be treated as a U.S. Reportable Account if such account is not identified as a U.S. Reportable Account after application of the due diligence procedures in Annex I.

dd) The term **"Account Holder"** means the person listed or identified as the holder of a Financial Account by the Financial Institution that maintains the account. A person, other than a Financial Institution, holding a Financial Account for the benefit or account of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for purposes of this Agreement, and such other person is treated as holding the account. For purposes of the immediately preceding sentence, the term "Financial Institution" does not include a Financial Institution organised or incorporated in a U.S. Territory. In the case of a Cash Value Insurance Contract or an Annuity Contract, the Account Holder is any person entitled to access the Cash Value or change the beneficiary of the contract. If no person can access the Cash Value or change the beneficiary, the Account Holder is any person named as the owner in the contract and any person with a vested entitlement to payment under the terms of the contract. Upon the maturity of a Cash Value Insurance Contract or an Annuity Contract, each person entitled to receive a payment under the contract is treated as an Account Holder.

ee) The term **"U.S. Person"** means a U.S. citizen or resident individual, a partnership or corporation organized in the United States or under the laws of the United States or any State thereof, a trust if (i) a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust, and (ii) one or more U.S. persons have the authority to control all substantial decisions of the trust, or an estate of a decedent that is a citizen or resident of the United States. This sub-paragraph 1(ee) shall be interpreted in accordance with the U.S. Internal Revenue Code.

ff) The term **"Specified U.S. Person"** means a U.S. Person, other than: (i) a corporation the stock of which is regularly traded on one or more established securities markets; (ii) any corporation that is a member of the same expanded affiliated group, as defined in section 1471(e)(2) of the U.S. Internal Revenue Code, as a corporation described in clause (i); (iii) the United States or any wholly owned agency or instrumentality thereof; (iv) any State of the United States, any U.S. Territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing; (v) any organisation exempt from taxation under section 501(a) of the U.S. Internal Revenue Code or an individual retirement

plan as defined in section 7701(a)(37) of the U.S. Internal Revenue Code; (vi) any bank as defined in section 581 of the U.S. Internal Revenue Code; (vii) any real estate investment trust as defined in section 856 of the U.S. Internal Revenue Code; (viii) any regulated investment company as defined in section 851 of the U.S. Internal Revenue Code or any entity registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-64); (ix) any common trust fund as defined in section 584(a) of the U.S. Internal Revenue Code; (x) any trust that is exempt from tax under section 664(c) of the U.S. Internal Revenue Code or that is described in section 4947(a)(1) of the U.S. Internal Revenue Code; (xi) a dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State; (xii) a broker as defined in section 6045(c) of the U.S. Internal Revenue Code; or (xiii) any tax-exempt trust under a plan that is described in section 403(b) or section 457(g) of the U.S. Internal Revenue Code.

gg) The term **"Entity"** means a legal person or a legal arrangement such as a trust.

hh) The term **"Non-U.S. Entity"** means an Entity that is not a U.S. Person.

ii) The term **"U.S. Source Withholdable Payment"** means any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States. Notwithstanding the foregoing, a U.S. Source Withholdable Payment does not include any payment that is not treated as a withholdable payment in relevant U.S. Treasury Regulations.

jj) An Entity is a **"Related Entity"** of another Entity if either Entity controls the other Entity, or the two Entities are under common control. For this purpose control includes direct or indirect ownership of more than 50 per cent of the vote or value in an Entity. Notwithstanding the foregoing, India may treat an Entity as not a Related Entity of another Entity if the two Entities are not members of the same expanded affiliated group as defined in section 1471(e)(2) of the U.S. Internal Revenue Code.

kk) The term **"U.S. TIN"** means a U.S. federal taxpayer identifying number.

ll) The term **"Indian TIN"** means an Indian taxpayer identifying number.

mm) The term **"Controlling Persons"** means the natural persons who exercise control over an Entity. In the case of a trust, such term means the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions. The term "Controlling Persons" shall be interpreted in a manner consistent with the Financial Action Task Force Recommendations.

2. Any term not otherwise defined in this Agreement shall, unless the context otherwise requires or the Competent Authorities agree to a common meaning (as permitted by domestic law), have the meaning that it has at that time under the law of the Party applying this Agreement, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 2
Obligations to Obtain and Exchange Information with Respect to Reportable Accounts

1. Subject to the provisions of Article 3 of this Agreement, each Party shall obtain the information specified in paragraph 2 of this Article with respect to all Reportable Accounts and shall annually exchange this information with the other Party on an automatic basis pursuant to the provisions of Article 28 of the Convention.

2. The information to be obtained and exchanged is:

a) In the case of India with respect to each U.S. Reportable Account of each Reporting Indian Financial Institution:

   (1) The name, address, and U.S. TIN of each Specified U.S. Person that is an Account Holder of such account and, in the case of a Non-U.S. Entity that, after application of the due diligence procedures set forth in Annex I, is identified as having one or more Controlling Persons that is a Specified U.S. Person, the name, address, and U.S. TIN (if any) of such entity and each such Specified U.S. Person;

   (2) The account number (or functional equivalent in the absence of an account number);

   (3) The name and identifying number of the Reporting Indian Financial Institution;

   (4) The account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year, immediately before closure;

   (5) In the case of any Custodial Account:

      (A) the total gross amount of interest, the total gross amount of dividends, and the total gross amount of other income generated with respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period; and

      (B) the total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Indian Financial Institution acted as a custodian, broker, nominee, or otherwise as an agent for the Account Holder;

   (6) In the case of any Depository Account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period; and

   (7) In the case of any account not described in subparagraph 2(a)(5) or 2(a)(6) of this Article, the total gross amount paid or credited to the Account Holder with respect to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Indian Financial Institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the Account Holder during the calendar year or other appropriate reporting period.

b) In the case of the United States, with respect to each Indian Reportable Account of each Reporting U.S. Financial Institution:

   (1) The name, address, and Indian TIN of any person that is a resident of India and is an Account Holder of the account;

(2) The account number (or the functional equivalent in the absence of an account number);

(3) The name and identifying number of the Reporting U.S. Financial Institution;

(4) The gross amount of interest paid on a Depository Account;

(5) The gross amount of U.S. source dividends paid or credited to the account; and

(6) The gross amount of other U.S. source income paid or credited to the account, to the extent subject to reporting under chapter 3 of sub-title A or chapter 61 of sub-title F of the U.S. Internal Revenue Code.

Article 3
Time and Manner of Exchange of Information

1. For purposes of the exchange obligation in Article 2 of this Agreement, the amount and characterisation of payments made with respect to a U.S. Reportable Account may be determined in accordance with the principles of the tax laws of India, and the amount and characterisation of payments made with respect to an Indian Reportable Account may be determined in accordance with principles of U.S. federal income tax law.

2. For purposes of the exchange obligation in Article 2 of this Agreement, the information exchanged shall identify the currency in which each relevant amount is denominated.

3. With respect to paragraph 2 of Article 2 of this Agreement, information is to be obtained and exchanged with respect to 2014 and all subsequent years, except that:

a) In the case of India:

(1) The information to be obtained and exchanged with respect to 2014 is only the information described in subparagraphs 2(a)(1) through 2(a)(4) of Article 2 of this Agreement;

(2) The information to be obtained and exchanged with respect to 2015 is the information described in subparagraphs 2(a)(1) through 2(a)(7) of Article 2 of this Agreement, except for gross proceeds described in subparagraph 2(a)(5)(B) of Article 2 of this Agreement; and

(3) The information to be obtained and exchanged with respect to 2016 and subsequent years is the information described in subparagraphs 2(a)(1) through 2(a)(7) of Article 2 of this Agreement;

b) In the case of the United States, the information to be obtained and exchanged with respect to 2014 and subsequent years is all of the information identified in subparagraph 2(b) of Article 2 of this Agreement.

4. Notwithstanding paragraph 3 of this Article, with respect to each Reportable Account that is maintained by a Reporting Financial Institution as of June 30, 2014, and subject to paragraph 4 of Article 6 of this Agreement, the Parties are not required to obtain and include in the exchanged information the Indian TIN or the U.S. TIN, as applicable, of any relevant person if such taxpayer identifying number is not in the records of the Reporting Financial Institution. In such a case, the Parties shall obtain and include in the exchanged information the date of birth of the relevant person, if the Reporting Financial Institution has such date of birth in its records.

5. Subject to paragraphs 3 and 4 of this Article, the information described in Article 2 of this Agreement shall be exchanged within nine months after the end of the calendar year to which the information relates.

6. The Competent Authorities of India and the United States shall enter into an agreement or arrangement under the mutual agreement procedure provided for in Article 27 of the Convention, which shall:

a) Establish the procedures for the automatic exchange obligations described in Article 2 of this Agreement;

b) Prescribe rules and procedures as may be necessary to implement Article 5 of this Agreement; and

c) Establish as necessary procedures for the exchange of the information reported under subparagraph 1(b) of Article 4 of this Agreement.

7. All information exchanged shall be subject to the confidentiality and other protections provided for in the Convention, including the provisions limiting the use of the information exchanged.

8. Following entry into force of this Agreement, each Competent Authority shall provide written notification to the other Competent Authority when it is satisfied that the jurisdiction of the other Competent Authority has in place (i) appropriate safeguards to ensure that the information received pursuant to this Agreement shall remain confidential and be used solely for tax purposes, and (ii) the infrastructure for an effective exchange relationship (including established processes for ensuring timely, accurate, and confidential information exchanges, effective and reliable communications, and demonstrated capabilities to promptly resolve questions and concerns about exchanges or requests for exchanges and to administer the provisions of Article 5 of this Agreement). The Competent Authorities shall endeavour in good faith to meet, prior to September 2015, to establish that each jurisdiction has such safeguards and infrastructure in place.

9. The obligations of the Parties to obtain and exchange information under Article 2 of this Agreement shall take effect on the date of the later of the written notifications described in paragraph 8 of this Article.

10. This Agreement shall terminate on September 30, 2015, if Article 2 of this Agreement is not in effect pursuant to paragraph 9 of this Article by that date.

Article 4
Application of FATCA to Indian Financial Institutions

1. **Treatment of Reporting Indian Financial Institutions:** Each Reporting Indian Financial Institution shall be treated as complying with, and not subject to withholding under, section 1471 of the U.S. Internal Revenue Code if India complies with its obligations under Articles 2 and 3 of this Agreement with respect to such Reporting Indian Financial Institution, and the Reporting Indian Financial Institution:

a) Identifies U.S. Reportable Accounts and reports annually to the Indian Competent Authority the information required to be reported in subparagraph 2(a) of Article 2 of this Agreement in the time and manner described in Article 3 of this Agreement;

b) For each of 2015 and 2016, reports annually to the Indian Competent Authority the name of each Nonparticipating Financial Institution to which it has made payments and the aggregate amount of such payments;

c) Complies with the applicable registration requirements on the IRS FATCA registration website;

d) To the extent that a Reporting Indian Financial Institution is (i) acting as a qualified intermediary (for purposes of section 1441 of the U.S. Internal Revenue Code) that has elected

to assume primary withholding responsibility under chapter 3 of subtitle A of the U.S. Internal Revenue Code, (ii) a foreign partnership that has elected to act as a withholding foreign partnership (for purposes of both sections 1441 and 1471 of the U.S. Internal Revenue Code), or (iii) a foreign trust that has elected to act as a withholding foreign trust (for purposes of both sections 1441 and 1471 of the U.S. Internal Revenue Code), withholds 30 per cent of any U.S. Source Withholdable Payment to any Nonparticipating Financial Institution; and

e) In the case of a Reporting Indian Financial Institution that is not described in subparagraph 1(d) of this Article and that makes a payment of, or acts as an intermediary with respect to, a U.S. Source Withholdable Payment to any Nonparticipating Financial Institution, the Reporting Indian Financial Institution provides to any immediate payor of such U.S. Source Withholdable Payment the information required for withholding and reporting to occur with respect to such payment.

Notwithstanding the foregoing, a Reporting Indian Financial Institution with respect to which the conditions of this paragraph 1 are not satisfied shall not be subject to withholding under section 1471 of the U.S. Internal Revenue Code unless such Reporting Indian Financial Institution is treated by the IRS as a Non-participating Financial Institution pursuant to subparagraph 2(b) of Article 5 of this Agreement.

2. **Suspension of Rules Relating to Recalcitrant Accounts:** The United States shall not require a Reporting Indian Financial Institution to withhold tax under section 1471 or 1472 of the U.S. Internal Revenue Code with respect to an account held by a recalcitrant account holder (as defined in section 1471(d)(6) of the U.S. Internal Revenue Code), or to close such account, if the U.S. Competent Authority receives the information set forth in subparagraph 2(a) of Article 2 of this Agreement, subject to the provisions of Article 3 of this Agreement, with respect to such account.

3. **Specific Treatment of Indian Retirement Plans:** The United States shall treat as deemed-compliant FFIs or exempt beneficial owners, as appropriate, for purposes of sections 1471 and 1472 of the U.S. Internal Revenue Code, Indian retirement plans described in Annex II. For this purpose, an Indian retirement plan includes an Entity established or located in, and regulated by, India, or a predetermined contractual or legal arrangement, operated to provide pension or retirement benefits or earn income for providing such benefits under the laws of India and regulated with respect to contributions, distributions, reporting, sponsorship, and taxation.

4. **Identification and Treatment of Other Deemed-Compliant FFIs and Exempt Beneficial Owners:** The United States shall treat each Non-Reporting Indian Financial Institution as a deemed-compliant FFI or as an exempt beneficial owner, as appropriate, for purposes of section 1471 of the U.S. Internal Revenue Code.

5. **Special Rules Regarding Related Entities and Branches That Are Non-participating Financial Institutions:** If an Indian Financial Institution, that otherwise meets the requirements described in paragraph 1 of this Article or is described in paragraph 3 or 4 of this Article, has a Related Entity or branch that operates in a jurisdiction that prevents such Related Entity or branch from fulfilling the requirements of a participating FFI or deemed-compliant FFI for purposes of section 1471 of the U.S. Internal Revenue Code or has a Related Entity or branch that is treated as a Nonparticipating Financial Institution solely due to the expiration of the transitional rule for limited FFIs and limited branches under relevant U.S. Treasury Regulations, such Indian Financial Institution shall continue to be in compliance with the terms of this Agreement and shall continue to be treated as a deemed-compliant FFI or exempt beneficial owner, as appropriate, for purposes of section 1471 of the U.S. Internal Revenue Code, provided that:

a) The Indian Financial Institution treats each such Related Entity or branch as a separate Nonparticipating Financial Institution for purposes of all the reporting and withholding requirements of this Agreement and each such Related Entity or branch identifies itself to withholding agents as a Non-participating Financial Institution;

b) Each such Related Entity or branch identifies its U.S. accounts and reports the information with respect to those accounts as required under section 1471 of the U.S. Internal Revenue Code to the extent permitted under the relevant laws pertaining to the Related Entity or branch; and

c) Such Related Entity or branch does not specifically solicit U.S. accounts held by persons that are not resident in the jurisdiction where such Related Entity or branch is located or accounts held by Nonparticipating Financial Institutions that are not established in the jurisdiction where such Related Entity or branch is located, and such Related Entity or branch is not used by the Indian Financial Institution or any other Related Entity to circumvent the obligations under this Agreement or under section 1471 of the U.S. Internal Revenue Code, as appropriate.

6. **Co-ordination of Timing:** Notwithstanding paragraphs 3 and 5 of Article 3 of this Agreement:

a) India shall not be obligated to obtain and exchange information with respect to a calendar year that is prior to the calendar year with respect to which similar information is required to be reported to the IRS by participating FFIs pursuant to relevant U.S. Treasury Regulations;

b) India shall not be obligated to begin exchanging information prior to the date by which participating FFIs are required to report similar information to the IRS under relevant U.S. Treasury Regulations;

c) The United States shall not be obligated to obtain and exchange information with respect to a calendar year that is prior to the first calendar year with respect to which India is required to obtain and exchange information; and

d) The United States shall not be obligated to begin exchanging information prior to the date by which India is required to begin exchanging information.

7. **Co-ordination of Definitions with U.S. Treasury Regulations:** Notwithstanding Article 1 of this Agreement and the definitions provided in the Annexes to this Agreement, in implementing this Agreement, India may use, and may permit Indian Financial Institutions to use, a definition in relevant U.S. Treasury Regulations in lieu of a corresponding definition in this Agreement, provided that such application would not frustrate the purposes of this Agreement.

Article 5
Collaboration on Compliance and Enforcement

1. **Minor and Administrative Errors:** A Competent Authority shall notify the Competent Authority of the other Party when the first-mentioned Competent Authority has reason to believe that administrative errors or other minor errors may have led to incorrect or incomplete information reporting or resulted in other infringements of this Agreement. The Competent Authority of such other Party shall apply its domestic law (including applicable penalties) to obtain corrected and/or complete information or to resolve other infringements of this Agreement.

2. **Significant Non-Compliance**

a) A Competent Authority shall notify the Competent Authority of the other Party when the first-mentioned Competent Authority has determined that there is significant non-compliance with the obligations under this Agreement with respect to a Reporting Financial Institution in

the other jurisdiction. The Competent Authority of such other Party shall apply its domestic law (including applicable penalties) to address the significant non-compliance described in the notice.

b) If, in the case of a Reporting Indian Financial Institution, such enforcement actions do not resolve the non-compliance within a period of 18 months after notification of significant non-compliance is first provided, the United States shall treat the Reporting Indian Financial Institution as a Non-participating Financial Institution pursuant to this sub-paragraph 2(b).

3. **Reliance on Third Party Service Providers:** Each Party may allow Reporting Financial Institutions to use third party service providers to fulfill the obligations imposed on such Reporting Financial Institutions by a Party, as contemplated in this Agreement, but these obligations shall remain the responsibility of the Reporting Financial Institutions.

4. **Prevention of Avoidance:** The Parties shall implement as necessary requirements to prevent Financial Institutions from adopting practices intended to circumvent the reporting required under this Agreement.

Article 6
Mutual Commitment to Continue to Enhance the Effectiveness of Information Exchange and Transparency

1. **Reciprocity:** The Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with India. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with India by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange.

2. **Treatment of Passthru Payments and Gross Proceeds:** The Parties are committed to work together, along with Partner Jurisdictions, to develop a practical and effective alternative approach to achieve the policy objectives of foreign passthru payment and gross proceeds withholding that minimises burden.

3. **Development of Common Reporting and Exchange Model:** The Parties are committed to working with Partner Jurisdictions and the Organisation for Economic Co-operation and Development on adapting the terms of this Agreement and other agreements between the United States and Partner Jurisdictions to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions.

4. **Documentation of Accounts maintained as of June 30, 2014:** With respect to Reportable Accounts maintained by a Reporting Financial Institution as of June 30, 2014:

a) The United States commits to establish, by January 1, 2017, for reporting with respect to 2017 and subsequent years, rules requiring Reporting U.S. Financial Institutions to obtain and report the Indian TIN of each Account Holder of an Indian Reportable Account as required pursuant to subparagraph 2(b)(1) of Article 2 of this Agreement; and

b) India commits to establish, by January 1, 2017, for reporting with respect to 2017 and subsequent years, rules requiring Reporting Indian Financial Institutions to obtain the U.S. TIN of each Specified U.S. Person as required pursuant to subparagraph 2(a)(1) of Article 2 of this Agreement.

Article 7
Consistency in the Application of FATCA to Partner Jurisdictions

1. India shall be granted the benefit of any more favourable terms under Article 4 or Annex I of this Agreement relating to the application of FATCA to Indian Financial Institutions afforded to another Partner Jurisdiction under a signed bilateral agreement pursuant to which the other Partner Jurisdiction commits to undertake the same obligations as India described in Articles 2 and 3 of this Agreement, and subject to the same terms and conditions as described therein and in Articles 5 through 9 of this Agreement.

2. The United States shall notify India of any such more favourable terms, and such more favourable terms shall apply automatically under this Agreement as if such terms were specified in this Agreement and effective as of the date of signing of the agreement incorporating the more favourable terms, unless India declines in writing the application thereof.

Article 8
Consultations and Amendments

1. In case any difficulties in the implementation of this Agreement arise, either Party may request consultations to develop appropriate measures to ensure the fulfilment of this Agreement.

2. This Agreement may be amended by written mutual agreement of the Parties. Unless otherwise agreed upon, such an amendment shall enter into force through the same procedures as set forth in paragraph 1 of Article 10 of this Agreement.

Article 9
Annexes

The Annexes form an integral part of this Agreement.

Article 10
Term of Agreement

1. This Agreement shall enter into force on the date of India's written notification to the United States that India has completed its necessary internal procedures for entry into force of this Agreement.

2. Either Party may terminate this Agreement by giving notice of termination in writing to the other Party. Such termination shall become effective on the first day of the month following the expiration of a period of 12 months after the date of the notice of termination.

3. The Parties shall, prior to December 31, 2016, consult in good faith to amend this Agreement as necessary to reflect progress on the commitments set forth in Article 6 of this Agreement.

In witness whereof, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

Done at the Government of the Republic of India Ministry of Finance, North Block, New Delhi, India, in duplicate, this 9th day of July, 2015, in the English and Hindi languages, both texts being equally authentic. In case of divergence between the two texts, the English text shall be the operative one.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:	FOR THE GOVERNMENT OF THE REPUBLIC OF INDIA:

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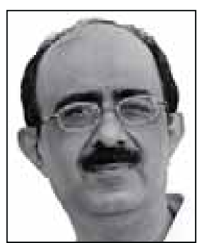


CA Dinesh Kumar Tejwani & Mr. Rajat Gandhi*

DIGITAL INDIA SERIES
Peer-to-Peer Lending

Traditionally loans are given by a bank or a finance organisation. Peer-to-Peer lending (P2PL) is money lent by an individual to other unrelated individuals without involving a bank or financial intermediary. Hence P2PL removes the financial intermediary from lending and borrowing process.

In India, there is a vast practice of lending and borrowing among communities, family members, friends and business associates. It is estimated that India may be one of the biggest offline peer-to-peer lending markets in the world, as nearly 50 per cent of all credit is circulated amongst friends, families, and communities.

Peer-to-peer lending is now being driven by technology enabled platforms. These market places offer opportunity to any individual to lend and borrow through their web platforms.

The first company to offer P2P loans in the world was UK based ZOPA and has currently 5 lakh customers. Another prominent company in the UK is Funding Circle. Some more examples:

- Propser, Lending Club and Upstart in the USA
- WeLab Holdings in Hong Kong
- Society One and Direct Money in Australia

** Rajat Gandhi is CEO and founder of Faircent.com*

Zidisha started in the USA in 2009 became the first peer-to-peer lending service to operate across international borders without local intermediaries

In India, prominent sites include Faircent, RangDe and Milaap.

Benefits and Challenges

One of the main advantages of P2P lending is better rates for borrowers than what a traditional bank can offer, speed of disbursal and transparency

For the lender the benefit is high returns than traditional bank deposits, but with associated risks. The lenders can choose whether to earn low interest rates for comparatively safer loans for high interest rates for riskier loans.

The biggest risk for the lender is default in repayment by borrower. More so, as most of the loans are not backed by any security. The P2P platforms are managing this problem by proper credit verification, strict listing criteria and legal support in case of defaults.

Current Scene in India

Alternative lending start-ups in the peer-to-peer lending and crowdfunding space have become increasingly popular in the country. According to Tracxn about $ 27 million has been invested

across alternative lending companies in just the last 18 months and there are about 30 companies across P2P lending & SME lending verticals, with more than half founded in just the last 18 months. The promise of cheaper, faster and hassle free finance has made these start-ups hugely popular among people.

Typical Borrower profile

There are three sets of customers on a P2P platform.

1. The first is the bargain hunter who gets a loan from every bank, but come to P2P platforms to drive down the interest rates as P2P platforms offer reverse auction.

2. The second type of customers is whom banks typically give loans, but with great difficulty. This is not because of any adverse credit profile, but because of factors like the locality they live in or the company they work for.

3. The third and the last type of borrower that can be seen are the high delinquent borrowers who are shopping for loans after being refused by banks and other financial institutes. This type of borrower gets rejected outright on any good P2P platform and in all cases is never able to raise a rupee.

Borrowing Purposes

A vast majority of borrowers raise money to fund their business. These are micro SMEs and in most cases, SMEs that are neglected by the banking channels. These SMEs are from diverse sectors and also include many professionals wanting to enhance their business. Since P2P loans do not need any collateral, it has emerged to be a favourite among borrowers

People looking to consolidate their debt form shape the next significant reason for someone to tap into the P2P system. A popular reason among debt consolidation is to pay off credit card outstanding or any other high interest loan. The third category of borrowers are personal loans.

Interest rate, which is one of the key attractions for a P2P site has stayed around 12-14% for borrowers with minimal risk and about 30% for borrowers with high risk. The average size of a loan stands at ` 1.5 lakhs.

Borrower verification

The P2P platforms depend heavily on technology. A modern P2P site uses complicated underwriting engines to assess hundreds of data points. While a bank takes days to do it and often only relies on bank statements, salary statements and credit reports, a good P2P site will look at many more sources of information.

For example, Faircent scans hundreds of data points to evaluate the risk profile of borrowers on platforms, which includes their social data from LinkedIn & Facebook, financial data from their bank statements, credit card, etc.

Faircent has taken it a step further by integrating this with Yodlee (an account aggregation service that allows users to see their credit card, bank, investment, email, travel reward accounts, etc. on one screen), which reduces a significant amount of time spent on processing loans to minutes. This means when banks take days to carry out borrower verification, on Faircent it can be done within minutes.

This, however, does not mean that only technology plays a role in the verification process. Most P2P websites have a strict listing criteria for evaluating each and every borrower before they are allowed to be on the P2P platform, which also includes physically checking their office and residential addresses. Other standard criteria include being a resident of India and a minimum gross income.

Most P2P loans are not secured or backed by any collateral, and are very similar to personal loans offered by banks. In case the EMI is not paid by the due date by borrower(s), additional

penal interest applicable as per the platform will be applied to the due amount for the duration of delay which borrowers will be liable to pay to their lender(s).

In the worst case scenario some platforms facilitate the collections through empanelled agencies. These are reputed collection agencies which are empanelled by banks and financial institutions. This also includes a legal process for recovery of funds if required

Regulatory scenario

The nature of regulation in different countries of the world can be broadly of the following types

1. Unregulated: Lack of regulation or classified as exempt. Example: Brazil, China
2. Intermediary Regulation: This requires registration of intermediary with appropriate authority. Example: Australia, New Zeland
3. Banking Regulations: This requires the lending platform to get banking license. Example: France, Germany
4. US Model: Two Tier model. Registration with SEC and licence from each State
5. Prohibited: Banned under legislation . Example: Japan

In India, SEBI came up with a Consultation Paper on Crowdfunding in India in June 2014. But since then there has been no further action.

However, of late the Reserve Bank of India has stepped in with an aim to come up with the policies and guidelines and it is expected that we will hear about something concrete very soon. Currently, the sector is self-regulated and follows current Indian laws regarding Income Tax.

Future of P2P

P2P as a system was born from people's angst around banks and their lack of trust in their dealings. As technology enabled people to bypass banks all together, they realised things can get better, faster, cheaper and more efficient. People today are not at the mercy of banks and this has led to a paradigm shift in the financial landscape of nations.

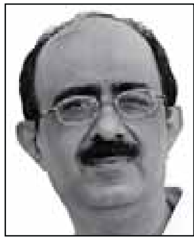
In India, where huge investment in infrastructure is required, P2P lending can improve access to capital and at the same time reduce costs.

There is absolutely no doubt that P2P will continue to grow and become stronger. While there is no formal number on the size of P2P industry in the country, it is fair to say that it can no longer be ignored.

By 2016, the Indian loan market is expected to reach a size of ` 21,980.6 billion, with a CAGR of 18.7 per cent. According to a PwC report published last year, total revenues for the five most prominent sharing economy sectors – peer-to-peer (P2P) finance, online staffing, P2P accommodation, car sharing and music/video streaming globally, could hit $ 335 billion by 2025, up from just $ 15 billion today.

The current regulatory scenario, or the lack of it, is the biggest spanner for the nascent P2P industry. While the P2P scene in India started a couple of years back, it has suddenly started galloping and this has caught everyone's attention. There is a growing clamour to come up with laws and policies to safeguard and regulate this essential, lucrative and hugely democratic set-up as people around the country realise that P2P can usher in a new form of financial inclusion.

(Data Courtesy : Faircent.com)



Mr. Deepak Gupta* & CA Dinesh Kumar Tejwani

DIGITAL INDIA SERIES
Crowdfunding

Crowdfunding is raising money from a large number of people for a project, cause or venture utilising an internet based platform or portal. The amounts can vary from few hundred rupees to few lakhs of rupees per person where the money is being raised in lieu of a financial interest.

Crowdfunding can be financial outcome based on non-financial outcome based and can generally be classified into the following four categories:

Type	Description	Example
Donation	Donations for social or philanthropic causes.	KickStarter Indiegogo
Reward	Funding in return for a future tangible reward e.g. a product or membership	Rockethub
Peer-to-Peer Lending	Lending money in return for interest	Lending Club
Equity Crowd-funding	Investment in equity capital of a company	Angelist

Crowdfunding is an emerging sector in India and evolving. Lending is by far the biggest category in the US contributing to ~$5B of the estimated $7.5B crowdfunding total for 2014. While equity based crowdfunding is much talked about, the next categories after lending are real estate ($1B) and rewards ($800M). Equity-based is only about $300M in the US and a much smaller number in India- though it is a key segment in the very nascent stage of crowdfunding in India at the moment

We will dwell on equity-based crowdfunding for the rest of this article.

Equity-based Crowdfunding

Equity-based crowdfunding is now an established and growing model across the world and also in India. The pioneering company in this segment is Angelist. It is instructive to understand the story and evolution of Angelist as we look at the space.

Angelist was founded by entreprenuers Naval Ravikant and Babak Nivi in 2010. It has grown to a scale wherein it has funded 650 start-ups with $205M over the last 2 years and has 4,400 investors. It also runs 165 syndicates at present, each led by seasoned angel investors.

So how did Angelist come about? Naval fought a lawsuit with VCs of one of his previous companies and post that a lot of start-ups were coming to him for advice on how to deal with VCs. Towards 2009, the small-ticket funding of start-ups began to get traction as the costs of setting up a technology start-up came down due to the availability of cloud-based infrastructure. Naval and Babak were driven to make this early-staging more egalitarian and loosen the influence of the "club" of VCs on the funding eco-system. They evolved their advisory blog/service into a deal-funding platform Angelist.

Angelist and the other equity crowd-funding sites that followed, such as Gust and Circleup, have collectively made it easier for founders to raise seed funding (typically < $1M) faster and with very little cost. This has led to the emergence of what are called Super-Angels: angel investors with

** Deepak Gupta is co-founder of Equity Crest and an active angel investor*

track records who are followed by other investors, who actively lead investments at platforms such as Angelist.

Over the past year or so, there has been an important development in the United States, wherein angels can lead syndicates where other angels commit to a deal and invest through a pooled vehicle created specifically for the deal with share of profits from the deal being shared with the lead-investor and the platform. Angelist already has 165 syndicates running, and this model which is triggered by enabling legislation in the US, is now providing a real business model to platforms like Angelist and also a VC like "carry" structure to the lead angels, enabling them to further enhance their reputation and track-record and legitimising a "proper" substitute to VC funding at the seed stage.

Equity-based Crowdfunding in India

In its true sense of the term, equity-based crowdfunding is a relatively recent phenomenon, its really been happening over the last two years or so.

An earlier quasi-crowdfunding avatar originated in India through the traditional "Angel Networks" such as Indian Angel Network and the Mumbai Angels, which became active towards the end of the last decade. These networks would not be pure crowdfunding platforms but serve a similar purpose as far as companies desirous of fund-raising may view them. The main differences are that these networks are: a) member driven- i.e. one has to be recommended by an existing member to become a member,(b) they are not using online methods extensively and (c) the deal-vetting is driven by individual members and not by the platform alone.

They play an important role in the seed-stage funding eco-system and have also grown over the years. As per a report by Innoven Capital based on the activity of the traditional Angel Networks, during FY 2015 they invested in 47 deals for a total of approximately ` 70 crores, versus an FY 2013 total of 32 deals for ` 35 crores.

The prominent crowdfunding sites in India are Letsventure, Equity Crest and Termsheet.io. These are more web-driven where the matchmaking between investors and companies is driven through an online platform. Letsventure is the oldest of these – having been in business for more than 2 years. They have helped fund 50 transactions aggregating more than $10M. An estimate of the ongoing run-rate of crowdfunding platforms (excluding the traditional networks) in India is less than ` 200 crore a year. So this has a long way to go.

Regulatory Framework

The regulations behind equity-based crowdfunding are catching up with the growth in the activity, and are still at an evolutionary stage in many jurisdictions. Crowd-funding is generally deemed as an activity beneficial to the growth of SMEs and young companies and consequently important to overall economic growth. Most advanced countries have exempted crowd-funding from the "general solicitation" prohibitions that typically apply to public issues, with different regimes on the type of investor (whether "accredited" or not) and consequent limitations in the amount such investors might invest in this activity.

- **United States :** Jumpstart Our Business Startups Act, 2012, popularly known as JOBS Act came into force in April 2012. The part of the Act dealing with equity crowdfunding is slated to come into force on May 16, 2016. These rules
  - Sets limits of amount that a company can raise. It is $ 1 Million in a 12 month period
  - Sets limits upto which an individual investor can invest in each an all such offerings. Overall an individual can invest upto $ 100,000 in all such offerings in a 12 month period
  - Prescribe disclosure to be made by such companies
  - Prescribe registration and rules for crowdfunding platforms
- **United Kingdom :** Rules in place for crowdfunding. One of the conditions is that offer can only be made to certain types of investors e.g. retail investors who are certified or self certify that they are sophisticated investors.

- **New Zealand :** Crowdfunding platforms needs to register. A company can raise up to $ 2M from 20 investors without issuing a prospectus.
- **Australia :** A company can raise upto $ 2M from 20 investors "who are presumed not to need disclosure because of their financial capacity, experience, or wholesale status"
- **Canada :** Six provinces in Canada have rules in place for equity fund raising through crowdfunding websites, which, *inter alia,* restricts individual contribution to $ 1500.

Regulatory Framework in India

Raising of funds by a company are currently regulated by the Companies Act 2013, SEBI Act 1992, Securities Contracts (Regulation) Act, 1956 and Depositories Act, 1996.

Private placement by companies is also regulated by the Companies Act, 2013 and put a number of restrictions on such placement like :

- Offer to not more than 200 persons in a financial year
- Names of such persons to be recorded by the company prior to offer
- No publicity of such offer in any media

In addition, there are separate provisions regarding SME Funding

- SME Segment on recognised stock exchanges for companies having post issue paid-up capital of up to ` 10 crore
- Institutional Trading Platform : Start-ups and SMEs can list on this platform and is primarily meant for providing liquidity to Venture Capital and Alernative investment funds for their investment in equity of start-ups
- Alternative Investment Funds : SEBI (Alternative Investment Funds) Regulations, 2012 cover all privately pooled investment vehicles including Venture Funds, SME Funds, Private equity / debt funds, social venture funds and hedge funds.

Need for separate rules

SEBI floated a consultation paper on the overall subject of crowdfunding in 2014 and we may possibly see some regulations articulated in the next few months.

The key elements around which regulation is constructed are:

a. Who can invest in crowd-funded entities and whether there needs to be a limitation on amounts invested per company and overall per year?

b. What kind of entities can raise equity money via a crowd-funding platform?

c. What kind of entities can own and operate a crowd-funding platform. Related to this is the question of whether they are simply matchmaking investors and companies, and provide the deal transaction based services through a third party entity or whether they do this themselves (which might put them into a broker-dealer licence regime).

The primary concerns of regulators would be: prevention of fraud by companies to less sophisticated retail investors, concentration of risk by investors (by exposing more of their networth into just one company or overall into this risky asset class), the risk to an investment due to a failure of the crowdfunding platform itself.

Future of Equity Crowdfunding

One of the visible impediments to crowd-funding in India is the lack of enabling regulation to quick form pools of capital between investors. As per current law this would fall under AIF regulations which have significant procedural implications and costs and cannot be done on a deal-by-deal basis.

Regulatory changes which would allow a convenient pooled syndicate model, enabled quickly through online platforms, would allow various stakeholders (lead investors, crowd-funding platforms) to realise a value accretive business model based on outcomes without resorting to relying on match-making fees as the primary driver of their revenues. This would further bring down the costs of raising funds, and accelerate the eco-system in the right direction.

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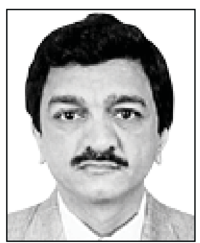


B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Sec. 143(1)/147: As intimation u/s. 143(1) is not an assessment, there is no question of "change of opinion" by the AO

DCIT vs. Zuari Estate Development & Investment Co. Ltd. – [Civil Appeal No. 6758 of 2004, 17th April, 2015] – [(2015) 373 ITR 661 (SC)]

1. For the A.Y. 1991-92, the return of income filed by the respondent assessee was accepted u/s. 143(1) of the I.T. Act, 1961. After some time, the A.O. came across the agreement dated 19th June, 1984 entered into between the respondent and Bank of Maharashtra to sell a building for ` 85,40,800/- on the condition that the sale would be completed only after five years of the agreement but before the expiration of the 6th year at the option of the purchaser. After the bank had paid to the assessee company on 20th June, 1984, a sum of ` 84,47,111/- being 90% of the consideration, the assessee had put and handed over possession in part performance of the agreement of sale to the bank on 20th June, 1984.

By letter dated 12th June, 1990, in terms of Clause 5, the bank called upon the assessee to complete the transaction and convey the property to the bank. By letter dated 16th June, 1993 the assessee confirmed that it had put premises in possession of the bank and it would take all necessary steps for transfer on or before 30th September, 1993. Even after the said date, the assessee was unable to complete the transaction on the pretext that certain dispute had arisen owing to which the assessee did not complete the transaction. The assessee's accounts for the year 1991 had disclosed a current liability of ` 84,47,112/- under the head "Advance against deferred sale of building".

The A.O. had raised query in A.Y. 1994-95 as to why the capital gains should not be taxed in the A.Y. 1991-92. On this basis, a notice u/s. 148 was sent on 4th December, 1996 which was challenged in Writ Petition before the High Court at Bombay and the same was allowed.

In the meantime, the A.O. completed the assessment and taxed the long-term capital gains in A.Y. 1991-92. The appeal of the assessee company was dismissed by the CIT(A) whereas the appeal to the Tribunal was allowed in view of the order of the High Court quashing the reopening proceedings.

Allowing the appeal of the Revenue and setting aside the judgment of the High Court, the Supreme Court remitted the matter back to the Income-tax Appellate Tribunal to decide the appeal of the respondent assessee on merits observing as under:

"After going through the detailed order passed by the High Court *(Zuari Estate Development vs. J. R. Kanekar 271 ITR 269 (Bom))*, we find that the main issue which is involved in this case is not at all addressed by the High Court. A contention was taken by the appellant-Department to the effect that since the assessee's return was accepted under section 143(1) of the Income-tax Act, there was no question of "change of opinion" in-as-much as while accepting the return under the aforesaid

provision no opinion was formed and therefore, on this basis, the notice issued was valid. We find that this aspect is squarely covered by the judgment of this Court in *Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Private Limited [2008 (14) SCC 208]* in the following manner:

"15. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(1)(a) as it stood prior to 1-4-1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the legislature i.e., to minimise the departmental work to scrutinise each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain, J.) in *Apogee International Ltd. vs. Union of India.*

"16. It may be noted above that under first proviso to the newly substituted section 143(1), with effect from 1-6-1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them? The reply is an emphatic "no". The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise."

"The offshoot of the aforesaid discussion is to hold that judgment of the High Court is erroneous and warrants to be set aside. We allow this appeal setting aside the impugned judgment of the High Court."

Note: Section 2(47) of the I.T. Act, 1961, is amended with effect from 1-4-1988 inserting clause (v) whereby "transfer" includes transaction involving the allowing of the possession of any immovable property to be taken in part performance of a contract in the nature referred to in section 53A of the Transfer of Property Act, 1882.

In view of the aforesaid amendment the capital gains were taxable in A.Y.1985-86 when the company had handed over the possession of the property and received major consideration.

S.36(1)(iii): When interest expenditure on loans given to sister concerns and directors can be allowed as business expenditure – explained

Hero Cycles (P) Ltd. vs. CIT (Central), Ludhiana – [Civil Appeal No. 514 of 2008, dated 5th November, 2015]

1. During the previous year relevant to A.Y. 1988-89, the assessee company had advanced a sum of ` 1,16,26,128/- to its subsidiary company, M/s. Hero Fibres Limited, without charging interest. In addition, the assessee company had given advance to its directors to the tune of ` 34,00,000/- on interest @ 10% whereas the assessee company had paid interest on its borrowings from the bank @ 18%.

In view of these facts, the A.O. disallowed interest to the extent of ` 16,39,010/- out of interest deduction claimed by the assessee company of ` 20,53,120/-.

Before the A.O. it was contended that the assessee company is a promoter and it has controlling share in M/s. Hero Fibres Limited and therefore, it had given an undertaking to the financial institutions to provide M/s. Hero Fibres Limited the additional margin to meet the working capital for meeting any cash losses. The amount was, therefore, advanced in compliance of the stipulation recorded in the loan agreement entered into between M/s. Hero Fibres Limited and the financial

institutions. In these circumstances, interest was not charged by the assessee company and accordingly, it was argued that the amount was advanced by way of business expediency.

2. The CIT(A), allowing the appeal held that the interest paid by the assessee company was for the business purposes and therefore, the entire interest paid should be allowed as business expenditure.

3. In respect of the loans given to the directors @ 10%, it was submitted that the loans were given out of own funds in as much as there was a credit balance in the bank account of the assessee from where the loan was given. The aforesaid explanation was accepted by the CIT(A) and the finding was recorded that the loan given to the directors was not from the borrowed funds.

4. The Tribunal upheld the order of the CIT(A) and dismissed the appeal of the Revenue.

5. The appeal of the Revenue u/s. 260A of the Act was allowed by the High Court which was challenged in the Special Leave Petition filed by the assessee company in which the leave was granted.

The Supreme Court observed that the High Court had not at all discussed the facts which were established on record pertaining to the interest free advance given to M/s. Hero Fibres Limited as well as the loans given to its own directors @ 10%. The High Court had simply quoted its own judgement in the case of *CIT vs. Abhishek Industries Limited dated 4th August, 2006.* This approach of the High Court was disapproved by the Supreme Court.

6. Allowing the appeal and setting aside the order of the High Court and restoring the order of the Appellate Tribunal their Lordships held as under:

"(i) In so far as loans to the sister concern / subsidiary company are concerned, law in this behalf is recapitulated by this Court in the case of *'S.A. Builders Ltd. vs. Commissioner of Income Tax (Appeals) and Another' [2007 (288) ITR 1 (SC)].* Once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. It further held that no businessman can be compelled to maximise his profit and that the income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman.

"(ii) Applying the aforesaid ratio to the facts of this case as already noted above, it is manifest that the advance to M/s. Hero Fibres Limited became imperative as a business expediency in view of the undertaking given to the financial institutions by the assessee to the effect that it would provide additional margin to M/s. Hero Fibres Limited to meet the working capital for meeting any cash losses. It would also be significant to mention at this stage that, subsequently, the assessee company had off-loaded its share holding in the said M/s. Hero Fibres Limited to various companies of Oswal Group and at that time, the assessee company not only was refunded back the entire loan given to M/s. Hero Fibres Limited by the assessee but this was refunded with interest. In the year in which the aforesaid interest was received, same was shown as income and offered for tax.

"(iii) In so far as the loans to Directors are concerned, it could not be disputed by the Revenue that the assessee had a credit balance in the Bank account when the said advance of ` 34 lakhs was given. Remarkably, as observed by the CIT (Appeal) in his order, the company had reserve/surplus to the tune of almost ` 15 crores and, therefore, the assessee company could in any case, utilise those funds for giving advance to its Directors.

"(CIT vs. Dalmia Cement (B.) Ltd. [2002 (254) ITR 377] referred)."

Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

REPORTED

1. Reopening of assessment – Section 147 of the Income-tax Act, 1961 – Assessee claimed deduction under section 80-IC of the Act at the rate of 100% – Assessment completed under section 143(1) of the Act – Notice under section 148 issued on allowance of 100% deduction under section 80-IC instead of 25% – Reasons recorded for reassessment did not reveal any tangible material coming into possession – Reopening of assessment is not as per law and is to be quashed. A.Y.: 2011-12

Amit Engineers vs. ACIT [2015] 63 taxmann.com 246 (Chandigarh – Trib.) [ITA 828/CHD/2014]

The assessee firm is engaged in manufacturing of rail coach components and railway electronic components. The assessee filed its return of income for the Assessment Year 2011-12, claiming deduction under section 80-IC. The assessment was completed under section 143(1) of the Act and the assessee was allowed the claim of deduction at 100% under section 80-IC. The Assessing Officer issued a notice under section 148 to reopen the assessment on the ground that for the initial five assessment years, i.e., 2006-07 to 2010-11, the assessee was allowed deduction under section 80-IC to the extent of 100 per cent of eligible profits. However, for the assessment year in consideration, it was eligible to get deduction under section 80-IC at the rate of 25 per cent instead of 100 per cent as claimed by the assessee. The Assessing Officer, therefore, finalised the re-assessment order and allowed deduction at the rate of 25 per cent instead of 100 per cent as claimed by the assessee. On appeal, the first Appellate Authority upheld the reopening under section 147 and confirmed the action of the Ld. A.O.

The assessee being aggrieved by the Appellate Order preferred an appeal before the Hon'ble Appellate Tribunal, Chandigarh. The Hon'ble Appellate Tribunal observed that from the perusal of the reasons recorded and material available on record, it is found that no tangible material coming in the notice of the Assessing Officer for formation of belief. The words used in the reasons recorded are 'it is noticed that'. No reference to any other material is given. Even at the time of hearing no such material could be brought to the notice. Therefore, admittedly, what triggered the Assessing Officer to reopen the case after issuing intimation under section 143(1) is not coming out of records. Thus, the reassessment proceedings initiated by the Assessing Officer is quashed.

2. Penalty – Section 271(1)(c) of the Income-tax Act, 1961 – *Bona fide* mistake in claiming depreciation corrected by filing revised return before completion of assessment – It cannot be held that the assessee intended to evade tax – Penalty not leviable

Penalty under section 271(1)(c) of the Act can be imposed only for a specific charge – Explanation-1 to section 271(1)(c) of the Act is a deeming provision and is applicable when an amount is added or disallowed in computation which is deemed to represent the income in respect of which particulars have been concealed – It cannot be applied in case where the assessee has furnish inaccurate particulars of income. A.Y.: 2006-07

Tristar Intech P. Ltd. vs. Asstt. CIT – (2015) 127 DTR 33 (Del.) (Trib.)

During the course of assessment the A.O. pointed out to the assessee certain discrepancies / mistakes committed by it while computing depreciation on plant and machinery and excess claim of custom duty and shipping expenses. The assessee immediately revised the claim of depreciation and also added the excess claim of custom duty and shipping expenses. The A.O. completed the assessment making the above disallowances and also disallowed unpaid statutory liabilities under section 43 B of the Act. No appeal was preferred by the assessee before the appellate authorities against the assessment order passed. The A.O. initiated and levied penalty under section 271(1)(c) of the Act. The CIT(A) confirmed the order of the A.O.

On appeal the Tribunal held that as the assessee had merely corrected the *bona fide* error in claiming depreciation and other discrepancies in the original return by filing revised return during the assessment proceedings. Penalty under section 271(1)(c) of the Act was not leviable in the assessee's case as there was no conclusive evidence of concealment.

Further, the Tribunal observed that the A.O. had initiated penalty proceedings under section 271(1)(c) of the Act on the basis that the assessee had concealed particulars of its income but, ultimately he levied penalty for furnishing inaccurate particulars of income by invoking Explanation 1 to section 271(1)(c) of the Act. On this count also the Tribunal held that it was not a fit case for levy of penalty under section 271(1)(c) of the Act. The Tribunal on this issue held there are two different charges under section 271(1)(c) of the Act that is, concealment of particulars of income and furnishing inaccurate particulars of income. Penalty under section can be imposed only for a specific charge. Furnishing inaccurate particulars of income means that the assessee has not disclosed the particulars of his income correctly or the particulars disclosed by the assessee are found to be incorrect, whereas, concealment of particulars of income means when the assessee has concealed the income and has not shown the income in its return or books. Explanation 1 to the section is a deeming provision and cannot be applied in a case where the assessee furnishes inaccurate particulars of income.

UNREPORTED

3. Capital Gain – Section 45 of the Income-tax Act, 1961 – Chargeable – Pursuant to a family arrangement arrived at between parties, family properties were divided between the assessee, his mother and wife – However, property document remained in name of assessee and was not transferred in name of his mother and wife in land records – During the year properties given to assessee's mother and wife were sold – As the properties were not transferred in the name of assessee's mother and wife, assessee executed the

sale deed – Assessing Officer added entire capital gain arising from sale of property to assessee's income – Held, merely because the property documents were not transferred in name of assessee's mother and wife pursuant to family settlement, due to which the sale deed was executed by assessee and he received sale proceeds and deposited in his bank account would not make him liable for capital gains tax by conferring upon him the ownership of property – More so, when the Revenue authorities had accepted family settlement in earlier years and taxed the rental income derived from said property in hands of assessee's mother and wife. A.Y.: 2006-07

Kamal Bhandari vs. ITO – [I.T.A. No.: 675 / Kol / 2013; Order dated: 7-9-2015; Kolkata Tribunal]

Pursuant to a family arrangement arrived at between the parties, certain immovable properties were given to the mother and wife of the assessee. The said property was leased out by the mother and wife of the assessee to a third party and rental income derived therefrom was duly reflected in their returns of income. However, the property documents remained in the name of the assessee and were not transferred in the name of assessee's mother and wife in the land records, pursuant to the family settlement. During year under consideration, the said property was sold. As the property documents were in the name of the assessee in the land records the assessee executed the sale deed, in his own name and in the representative capacity, also received the sale proceeds and deposited the same in his bank account. The A.O. added the entire long-term capital gain on sale of the property in the hands of the assessee. The action of the A.O. was confirmed by the CIT(A).

On appeal Tribunal held that according to the family arrangement, the assessee apart from other assets had handed over the possession of the said immovable property to his mother and wife. This fact is evident from the fact that said land and building is not reflected in the balance sheet of the assessee, but, the same was reflected in the balance sheet of the mother and wife of the assessee since 31-3-2002. Further, the rental income derived from the said property for earlier years and capital gain on sale of property was offered by the mother and wife for taxation in their hands and the position was accepted by the Revenue Authorities. Thus, no capital gains tax could be levied on the assessee just because the property documents were not transferred in name of wife pursuant to family settlement.

4. Search – Section 153A read with Section 68 of the Income-tax Act, 1961 – A search under section 132 is carried on upon assessee – Assessing Officer while framing assessment under section 143(3) read with section 153A, treated the gifts received by assessee from two individuals as unexplained cash credit and added same to the income of the assessee – Held as no incriminating material was found during the course of search which would demonstrate that the impugned gifts received were non-genuine – Addition was liable to be set aside as the same was beyond the scope of an assessment as envisaged under section 153A of the Act. A.Y.: 2004-05

Parag M. Sanghvi vs. Asstt. CIT – [I.T.A. Nos.: 8027 / Mum / 2010 & 5139 / Mum / 2013; Order dated: 30-9-2015; Mumbai Tribunal]

A search action under section 132 of the Act was carried out in the assessee's case. Thereafter, the A.O. issued a notice under section 153A of the

Act calling upon the assessee to file his return of income. In response to the notice, the assessee filed his return of income. The A.O. invoking the provision of section 68 of the Act added the amount received on account of gift by the assessee from two Non-Resident Indians, as unexplained cash credits. The addition made by the A.O. was confirmed by CIT(A).

On second appeal the Tribunal following the Jurisdictional High Court decision in the case of, ***CIT vs. Continental Warehousing Corpn. (Nhava-Sheva) – [(2015) 374 ITR 645(Bom.)]*** held that there was nothing on record to suggest that any incriminating material was found during the course of search which would show that the impugned gifts received from the two Non-Resident individuals were non-genuine. Thus, there was no justification for the AO to make the impugned addition in an assessment finalised under section 153A of the Act in the absence of any incriminating material having been found during the course of search, with respect to the impugned gifts received from the Non-Resident individuals. Therefore, impugned addition was liable to be set aside as the same was beyond the scope and ambit of an assessment envisaged under section 153A of the Act.

5. Business Income – Section 28 (va) of the Income-tax Act, 1961 – Clause (va) of section 28 of the Act taxes a sum received for a restrictive covenant in relation to a business, but not a profession. A.Y.: 2010-11

Satya Sheel Khosla vs. ITO – [ITA No.: 882 / Del / 2015; Order dated: 10-11-2015; Delhi Tribunal]

The assessee was a managing director of a company. In March, 2010, the assessee decided to terminate his relationship and, consequently, stepped down as managing director of the Company. Accordingly, the assessee and the Company entered into an agreement where under the Company agreed to pay a certain sum of money to the assessee, in consideration of the assessee not providing, the benefit of his knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person in India in the two wheeler segment for a period of two years from the date of the agreement. In the return of income filed for the year under consideration, the assessee claimed exemption in respect of the amount received by him from the Company. The assessee contended that the amount was not chargeable to income-tax under section 28(va) of the Act or any other section of the Act.

Before the Tribunal it was contended that the expressions 'business' and 'profession' have been used in the Act in a mutually exclusive sense. The activity of providing the benefit of one's knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person would be regarded as an activity in relation to a profession, and not an activity in relation to a business. Thus, the amount paid to him for carrying on any professional activity will not fall within the ambit of the words for, 'not carrying out any activity in relation to any business' used in section 28(va) of the Act.

The Tribunal held that the sum was paid by Company to the assessee in consideration of not providing, the benefit of his knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person in India in the two wheeler segment which it cannot be regarded as non-competition fee because it has not been paid for not competing with the payer, but for not providing the benefit of his knowledge, expertise, skills, etc. to any other person in the two wheeler segment. Clause (va) of section 28 of the Act, taxes a sum received for a restrictive covenant in relation to a business, but not a profession, therefore, the sum received by the assessee which does not fall within the ambit and scope of section 28(va) of the Act, was accordingly, not chargeable to tax as it constitutes a capital receipt.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

NOTIFICATIONS

Income-tax (Seventeenth Amendment) Rules, 2015 – Amendment in Rule 2F

In regard to clause (47) of section 10 of the Income-tax Act, the Central Board of Direct Taxes made income-tax Rules which shall come into force from 14th day of May 2015 wherein Rule 2F, for sub-rules (1) and (2), the following sub-rules have been substituted:

"(1) The Infrastructure Debt Fund shall be set up as a Non-Banking Financial Company conforming to and satisfying the conditions provided by the Reserve Bank of India in the Infrastructure-Debt Fund – Non-Banking Financial Companies (Reserve Bank) Directions, 2011.

(2) The funds of the Infrastructure Debt Fund shall be invested only in Post Commencement Operation Date Infrastructure Projects which have completed at least one year of satisfactory commercial operations that are —

(i) Public Private Partnership Projects and are a party to tripartite agreement with the concessionaire and the project authority for ensuring compulsory buy out and termination payment;

(ii) Non-Public Private Partnership Projects and Public Private Partnership Projects without a project authority, in sectors where there is no project authority".

(Notification No. 84/2015 [F. No.133/43/2015-TPL]/ SO 2877(E), dated 20-10-2015)

Section 92C of the Income-tax Act, 1961 – Transfer Pricing – Computation of Arm's Length Price – Notified tolerance limit under third proviso to sub-section (2) of Section 92C

In regard to the third proviso to sub-section (2) of section 92C of the Income-tax Act read with proviso to sub-rule (7) of Rule 10CA of the Income-tax Rules, 1962, the Central Government notified that where the variation between the arm's length price determined under section 92C and the price of which the international transaction or specified domestic transaction has actually been undertaken does not exceed, one per cent, of the latter. In respect of wholesale trading, three per cent of the latter In all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for Assessment Year 2015-2016.

(Notification No. 86/2015 [F.No.500/1/2014-APA-II]/ SO 2942(E), dated 29-10-2015)

Sovereign Gold Bonds Scheme, 2015

With reference to clause (iii) of section 3 of the Government Securities Act, 2006, the Central Government made the Sovereign Gold Bonds Scheme, 2015 with regard to the following provisions : Definition of Form, Receiving Office, Stock Certificate, Eligibility for Investment, Form of subscription and pricing, Procedure for making application for subscription to Gold Bonds, Date and form of issue of Gold Bonds, Period of subscription, Interest, Receiving Offices, Payment Options, Redemption, Eligibility for Statutory Liquidity Ratio, Loan against Bonds, Tax Treatment, Nomination, Transfer of Gold Bonds, Trade of Gold Bonds and Commission for distribution.

(Notification No. GSR 827(E) [F.No. 4(19) – W&M/2014], dated 30-10-2015)

Sovereign Gold Bond Scheme, 2015 – Notified designated post offices for said scheme

In terms of para 9 read with para 2(b) of Sovereign Gold Bonds Scheme, 2015, the designated post offices authorised to receive the applications either directly or through agents are given in the mentioned notification.

(Notification No. GSR 834(E) [F.No.4(19)-W&M/2014], dated 3-11-2015)

Section 35AC of the Income-tax Act, 1961 – Eligible projects or schemes, expenditure on – Notified eligible projects or schemes

The Central Government, with reference to sub-section (1) read with clause (b) of the Explanation to section 35AC of the Income-tax Act, after prior satisfaction of all the necessary provisions notified the scheme(s) / project(s) as eligible for a further period of three years commencing with the financial year 2015-16 i.e 2015-16, 2016-17 & 2017-18.

(Notification Nos. 221/2015, 222/2015, 223/2015, 224/2015, 225/2015, 226/2015, 227/2015, 228/2015, 229/2015, 230/2015, 231/2015, 232/2015, 233/2015, 234/2015, 235/2015, 236/2015, 237/2015, 238/2015, 239/2015, 240/2015 all dated 10-11-2015 respectively)

CIRCULARS

Sovereign Gold Bonds, 2015-16

The Government of India stated the terms and conditions for the issuance of the Sovereign Gold Bonds which are as follows: The Bonds under this Scheme may be held by a person resident in India (defined under section 2(v) read with section 2(u) of the Foreign Exchange Management Act, 1999), being an individual, in his capacity as such individual, or on behalf of minor child, or jointly with any other individual. The Bonds shall be issued in the form of Government of India Stock in accordance with section 3 of the Government Securities Act, 2006 and will be eligible for conversion into demat form. The investors can apply for the Bonds in receiving offices from November 2005, 2015 to November 20, 2015. The issuance can be closed by Government of India earlier than November 20, 2015 with a prior notice. Date of issuance shall be November 26, 2015. Minimum investment in the Bonds shall be 2 grams with a maximum subscription of 500 grams per person per fiscal year (April – March). In case of joint holding, the limit applies to the first applicant. The Bonds shall bear interest at the rate of 2.75 per cent (fixed rate) per annum payable half yearly on the amount of initial investment. The Bonds shall be repayable on the expiration of eight years from the date of issue. Pre-mature redemption of the Bond is allowed from fifth year of the date of issue on the interest payment dates. The investment in the Bonds shall be eligible for SLR. The Bonds may be used as collateral for loans. Interest on the Bonds shall be taxable as per the provisions of the Income-tax Act, 1961. Capital gains tax treatment will be the same as that for physical gold. Commission for

distribution shall be paid at the rate of rupee one per hundred of the total subscription received by the receiving offices on the applications received and receiving offices shall share at least 50% of the commission so received with the agents or sub-agents for the business procured through them.

(Circular IDMD.CDD. No.939/14.04.050/2015-16, dated 30-10-2015)

Section 80P of the Income-tax Act, 1961 – Deduction – Income of Co-operative Societies – Interest from non-SLR securities of banks

In the case of Banks, field officers were of the view that, "'expenses relatable to investment in non-SLR securities need to be disallowed u/s. 57(i) of the Act as interest on non-SLR securities is income from other sources." Whereas the Clause (id) of sub-section (1) of Section 56 of the Act provides that income by way of interest on securities shall be chargeable to income-tax under the head "Income from Other Sources", if the income is not chargeable to income-tax under the head "Profits and Gains of Business and Profession". The matter was examined in light of the judicial decisions on this issue in the case of *CIT vs. Nawanshahar Central Co-operative Bank Ltd. [2007] 160 Taxman 48(SC).* The Apex Court held that the investments made by a banking concern are part of the business of banking. Therefore, the income arising from such investments is attributable to the business of banking falling under the head "Profits and Gains of Business and Profession". Even though the decision was in the context of co-operative societies/Banks claiming deduction under section 80P(2)(a)(i) of the Act, the principle is equally applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies

(Circular No.18/2015 [F. No.279/Misc./140/2015/ ITJ], dated 2-11-2015)

Gold Monetisation Scheme, 2015 – Amendment in sub-paragraph 2.1.2(i) of master direction No.DBR.IBD.No. 45/23.67.003/2015-16, dated 22-10-2015

In regards to Section 35A of the Banking Regulation Act, 1949, the Reserve Bank of India directed that the Reserve Bank of India (Gold Monetisation Scheme, 2015) Master Direction No.DBR.IBD.No.45/23.67.003 2015-16 dated October 22, 2015 be modified as under: The existing sub paragraph 2.1.2 (i) shall be amended as follows:

> *"The minimum deposit at any one time shall be 30 grams of raw gold (bars, coins, jewellery excluding stones and other metals). There is no maximum limit for deposit under the scheme."*

Interest rate: The Central Government notified that the terms of Section 2.2.2 (iv) of the above mentioned Master Direction, the rate of interest on Medium and Long Term Government Deposit (MLTGD) under the GMS (i) On medium term deposit – 2.25% p.a. and (ii) On long term deposit – 2.50% p.a. The list of the Collection and Purity Testing Centres (CPTCs) and the Refiners participating in the GMS, as notified by the Government of India are annexed to the said circular.

(Circular DBR.IBD.BC.53/23.67.003/2015-16, dated 3-11-2015)

Sovereign Gold Bonds, 2015-16 – Operational Guidelines

With reference to the Government of India Notification F.No.4(19)-W&M/2014 and RBI circular IDMD.CDD.No.939/14.04.050/2015-16 dated October 30, 2015 on the Sovereign Gold Bonds, 2015-16 Operational guidelines with regard to this scheme in respect of Application, Joint holding and nomination, Interest on application money, Cancellation, Lien marking, Agency arrangement, Processing through RBI's e-kuber system, Printing of Holding Certificate, and Servicing and follow up have been given in the mentioned circular.

(Circular IDMD.CDD. No.968/14.04.050/2015-16, dated 4-11-2015)

INSTRUCTIONS

Section 12AA of the Income-tax Act, 1961 – Charitable or Religious Trust – Registration Procedure – Strict Adherence of prescribed time limit in passing order under Section 12AA

Sub-section (2) of section 12AA of the Income-tax Act, 1961 prescribes that every order granting or refusing registration under clause (b) of sub-section (1) of that section shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) or clause (aa) of the sub-section (1) thereof. CBDT noticed that the time period was not adhered to in some cases. Thus while processing the application under section 12AA of the Act, the time limit of six months has to be strictly adhered to by the Commissioner of Income Tax (Exemptions).

(Instruction No.16/2015 [F.NO.197/38/2015-ITA.1], dated 6-11-2015)

Section 143 of the Income-tax Act, 1961 – Assessment – General – Constitution of local committees to deal with taxpayers grievances from high-pitched scrutiny assessment

CBDT noticed the tendency of the filed officers to frame high-pitched and unreasonable assessment orders is still persisting due to which grievances are being raised by the taxpayers. Such grievances not only reflect harassment of taxpayers but also lead to generation of unproductive work for Department as well as Appellate Authorities. In view of the above, a need was felt to lay down an institutional mechanism to quickly resolve the taxpayers' grievances arising on account of high-pitched and unreasonable additions made by the Assessing Officers. CBDT decided the measures to be taken in the field formation for handling taxpayers' grievances arising from high-pitched scrutiny assessment orders as mentioned in the mentioned instruction.

(Instruction No.17/2015 [F.No.225/290/2015-ITA-II], dated 9-11-2015)

PRESS RELEASES

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries – Protocol amending convention between India and turkmenistan

The Union Cabinet gave its approval today for amending the Double Taxation Avoidance Convention (DTAC) signed between India and Turkmenistan in 1997 for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income and on capital, through a Protocol. The Protocol provides for internationally accepted standards for effective exchange of information on tax matters including bank information and information without domestic tax interest. It is further provided that the information received from Turkmenistan in respect of a resident of India can be shared with other law enforcement agencies with authorisation of the Competent Authority of Turkmenistan and *vice versa*.

(Press Release, dated 5-11-2015)

Tenure of High Level Committee (HLC) to interact with trade & industry on tax laws extended by one year beyond 25-11-2015

The tenure of the High Level Committee (HLC) constituted to interact with Trade & Industry on Tax Laws, has been extended by one year beyond 25th November, 2015. The High Level Committee (HLC) will continue to interact with the trade and industry on regular basis and ascertain the areas where clarity in tax laws

is required and will give recommendations to the CBDT/CBEC for issuance of appropriate clarifications by way of circulars, instructions etc. The CBDT/CBEC will issue the required clarifications, circulars and instructions etc. within a period of 2 months from the date of receipt of recommendations of the HLC.

(Press Release, dated 12-11-2015)

Clarification on unauthenticated reports on conciliation in Vodafone case

There were some unauthenticated stories in media about offer of conciliation of Vodafone case outside arbitration. Vodafone has in a written communication expressed its desire to go for conciliation for its tax disputes with India. In response, the Government had held a preliminary meeting to explore terms of reference of such conciliation on 10th October. It did not finalize contours of Terms of Reference. There would be more follow up meetings required. Media was advised to refrain from publishing unauthenticated stories on this.

(Press Release, dated 18-11-2015)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries – Kuwait – Protocol amending said agreement

The Union Cabinet gave its approval for the protocol amending the Agreement between India and Kuwait for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. The Protocol provides for internationally accepted standards for effective exchange of information on tax matters including bank information and information without domestic tax interest. It was further provided that the information received from Kuwait in respect of a resident of India can be shared with other law enforcement agencies with authorisation of the competent authority of Kuwait and *vice versa*. India and Kuwait signed the Double Taxation Avoidance Agreement (DTAA) signed in 2006 for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income, through the Protocol.

(Press Release, dated 18-11-2015)

Budget Announcement – Phasing out plan of deductions under the Income-tax Act

The Finance Minister in his Budget Speech, 2015 has indicated that the rate of corporate tax will be reduced from 30% to 25% over the next four years along with corresponding phasing out of exemptions and deductions. This is a step towards simplification of tax laws, which is expected to bring about transparency and clarity. The Government proposes to implement this decision in the following manner: (a) Profit linked, investment linked and area based deductions will be phased out for both corporate and non-corporate taxpayers. (b) The provisions having a sunset date will not be modified to advance the sunset date. Similarly the sunset dates provided in the Act will not be extended. (c) In case of tax incentives with no terminal date, a sunset date of 31-3-2017 will be provided either for commencement of the activity or for claim of benefit depending upon the structure of the relevant provisions of the Act. (d) There will be no weighted deduction with effect from 1-4-2017. The details of proposed phasing out of deductions are available on the website of the Department at Income Tax. Comments on this proposal may be sent within 15 days to Director (TPL-III) on mail or by post.

(Press Release, dated 20-11-2015)

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT JUDGMENTS

1) Once receipts from software were taxed as royalty @ 15 per cent during regular assessment proceedings under the Income-tax Act, 1961 ('the Act'), the AO could not reopen assessment seeking to tax it as profits attributable to a Permanent Establishment @ 20 per cent, as it would constitute a change of opinion

Oracle Systems Corporation vs. ADIT (IT) – (2015) 94 CCH 0058 Del – AY 2002-03 and 2003-04

Facts

1. The petitioner, a company incorporated in the USA was engaged in the business of supplying and replication of software. It received royalty from its Indian subsidiary on account of software provided, which was taxed at 15 per cent as per Article 12 of the Double Tax Avoidance Agreement ('DTAA) between India the USA, by the AO during regular assessment proceedings. Further, it was established that the petitioner has a permanent establishment in India under Article 5 of the DTAA as well as business connection under section 9(1)(i) of the Act.

2. Subsequently, the AO sought to reopen assessment proceedings in view of the fact that the petitioner had a PE in India and the receipts from software, classified as royalty, were attributable to the PE by virtue of the 'force of attraction' rule and therefore taxable at 20 per cent as opposed to 15 per cent.

3. Accordingly, the petitioner filed a Writ Petition before the High Court challenging the notice under section 148 of the Act and the order disposing off objections issued by the AO on the ground that the reopening constituted a mere change of opinion and that the preconditions stipulated in section 147 of the Act were not satisfied in the given case.

Judgment

1. The Hon'ble High Court held that when the AO had accepted the petitioners contention that the royalty was to be taxed at the rate of 15 per cent as per Article 12 of the DTAA, it had to be presumed that the AO had considered the entire Article applicable. Since Article 12(6) of the DTAA clearly provided an exclusionary clause providing for the attribution of profits to a PE, it held that the contention of the Revenue that the AO had not applied his mind to this aspect could not be accepted. It held that when the AO was examining the entire issue of royalty and its taxability, he must have examined Article 12 of the DTAA in its entirety which also contained the exception provided for in clause (6) and therefore what the AO was seeking to do

via the reassessment amounted to a clear change of opinion which was not permissible.

2. Further, it held that the Revenue failed to point out what material facts had not been disclosed by the petitioners and noted that the same facts were before the AO during original assessment. Therefore it held that no new material fact had been relied upon.

3. Accordingly, the Court quashed the notice issued under section 148 of the Act and all proceedings pursuant to such notices.

2) Income exempt under section 10A is 'chargeable' to tax in India as section 10A merely suspends collection for a period of 10 years. Where the provisions of the DTAA provide for relief on tax chargeable to tax in India, payment of tax in India is not a *sine qua non* – However, the India-Canada DTAA provides for credit only on tax doubly paid, explicitly requiring the payment in each country

M/s. Wipro Limited v DCIT – TS-565-HC-2015 (Kar.)

Facts

1. The assessee was engaged in the business of export of computer software, including services for on-site development of software through its permanent establishments in various foreign countries and was eligible to deduction under section 10A of the Act. It paid foreign income tax on profits attributable to its PEs and claimed credit for taxes paid outside Inida in relation to income eligible for deduction under section 10A of the Act. The assessee also claimed credit for state taxes paid in USA and Canada.

2. The AO denied the said claim on the grounds that foreign tax credit could not be allowed as the income was claimed as exempt under section 10A of the Act. With regard to the credit claimed on state taxes paid, the AO was of the view that credit could only be allowed for Federal Tax in USA and Canada. Aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee based on earlier years ruling in the assessee's own case.

3. On further appeal, the Tribunal held that since the assessee was claiming exemption under section 10A of the Act no tax had been actually paid and therefore the assesee was not eligible to foreign tax credit.

4. Aggrieved, the assessee filed an appeal before the Honourable High Court.

Judgment

1. The Hon'ble High Court referred to section 90 of the Act dealing with double tax avoidance agreements and took note of section 90(1)(a)(ii) which provides for granting of relief in respect of income chargeable under the Act or in the other country for the purposes of promoting mutual economic relations, trade and investment. It noted that the words used were chargeable to tax and therefore the payment of tax was not a condition precedent for granting relief under section 90 of the Act.

2. Further, it held even though the income of the assessee was exempt under section 10A of the Act, it was still chargeable to tax under the Act as these incomes were first to be included in the taxable income of the assessee and later exempted on satisfaction of certain prescribed conditions subject to a maximum of 10 years and but for the exemption the income was chargeable to tax in India. It held that section 10A does not make the said income not leviable to income tax but merely suspends the collection of income tax for a period of 10 years.

3. Referring to the India US-DTAA, the Court held that Article 25 of the DTAA was in conformity with section 90(1)(a)(ii) of the Act as it does not stipulate the payment of tax in India and therefore, the assessee was entitled to tax credit in respect of the income which was taxed in the US.

4. The Court held that Article 23 of the India-Canada DTAA stipulates the payment of taxes in both countries i.e., India and Canada and therefore held that if the entire income of the assessee was exempt under section 10A of the Act then no credit could be claimed and in case any portion of income falling under section 10A of the Act was subjected to tax in India, then the assessee was eligible for credit only on such residuary income.

5. With regards to the credit claimed on foreign state taxes paid, the Court held that as per section 91 of the Act, even though India has not entered into any agreement with the State of a country, the assessee shall be eligible to credit in India on the income tax paid to such State.

3) ISO certification services not Fees for Technical Services under India-Germany Treaty as they were neither technical nor managerial nor consultancy services

DIT vs. TUV Bayren (India) Ltd. - ITA No. 1304 of 2013 (Bom.)

Facts

1. The assessee was a German company having a branch in India which was engaged in the business of conducting audit and procedure of norms for ISO certification such as ISO 9000 quality system certification. The AO contended that the services rendered by the assessee were in the nature of technical, managerial, consultancy services taxable as fees for technical services per Article 12 of the DTAA between India and Germany.

2. The Tribunal held that the services provided by the assessee was in the nature of audit work which could not be classified as providing technical, managerial or consultancy services and that even though it entailed advice at the time of evaluation it could not be termed as pure consultancy services. It held that the services provided by the assessee was within the realm of professional services and not fees for technical services as per Article 12 of the DTAA.

3. Aggrieved, the Revenue preferred an appeal before the Honourable High Court.

Judgment

1. The Honourable High Court observed that the assessee issued standard certificates which was after a process of evaluation in the form of audit activities carried out by the audit parties of the assessee and that no advice was rendered in so far as this activity was concerned. Accordingly it held that the audit services could not come within the realm of fees for technical services under the DTAA.

4) Where international transactions constituted merely 23.38 per cent of the total costs, only a proportionate TP adjustment to the extent of international transactions could be made

CIT vs. Keihin Panalfa Ltd – ITA Nos 11 &12 / 2015 (Del.)

Facts

1. The assessee was engaged in the manufacture and sale of air-conditioners for cars manufactured by Honda Siel Cars India Ltd. During the year under review, it had entered into international transactions for purchase of parts and components, payment of royalty, guidance fee and fees for technical know-how and used the TNMM method to determine the ALP of the said transactions using the operating profit to capital employed as the PLI.

2. The TPO accepted TNMM as the most appropriate method but adopted the operating profit to total cost as the PLI. The margin of comparable companies was computed at 8.29 per cent as opposed to the assessee's PLI of 6.22 percent. Accordingly, the TPO made an addition on account of difference in the actual operating cost (which was computed taking into

account AE as well as Non-AE transactions) of the assessee and the arm's length operating cost computed by him. Additionally, he computed the ALP of the royalty paid at Nil on the ground that the assessee was functioning as a contract manufacturer for its group companies, manufacturing products specifically designed for its group companies for which the technical designs and intellectual property were held by the said group companies, rendering the payment of royalty on sales unreasonable.

3. Aggrieved, the assessee preferred an appeal before the CIT(A) contending that the addition made by the TPO was flawed as it attributed TP adjustments to uncontrolled third party transactions as well since the international transactions constituted merely 23.38 per cent of its total expenses which would fall within the 5 per cent margin contemplated by the second proviso to section 92CA of the Act. The CIT(A) accepted the assessee's contention and deleted the addition and further held that the TPO was incorrect in determining the ALP of the royalty payment as Nil as the assessee could not be considered as a mere contract manufacturer.

4. On further appeal by the Revenue, the Tribunal upheld the order of the CIT(A). Accordingly, the Revenue preferred an appeal before the Honourable High Court.

Judgment

1. The Honourable High Court upheld the order of the Tribunal and stated that since the international transactions only constituted 23.38 per cent of the total expenses, a TP adjustment proportionate only to that extent could be made.

2. Further, it held that the assessee could not be considered as a contract manufacturer as it performed other functions such as procurement and inventory management, production and manufacturing planning, co-ordination of production and sales etc. and that therefore royalty on sales was not unreasonable. Accordingly, the adjustment on account of royalty was deleted.

5) TP adjustments are to be made only with respect to international transactions

CIT vs. M/s Tara Jewels Exports Pvt Ltd. – ITA No. 1814 of 2013 (Bom.)

Facts

1. The assessee is engaged in the manufacture and export of studded precious jewelery. It had entered into sale and export transactions with its AEs for which it used the Cost Plus Method to determine the ALP.

2. The TPO rejected the application of the Cost Plus Method and adopted TNMM method as the most appropriate method and arrived at an upward adjustment of 4.79 per cent on the transaction value and applied the same on the total sales of the assessee (AE sales as well as non-AE sales).

3. Aggrieved, the assessee filed objections before the DRP wherein the DRP upheld the order of the TPO. Further appeal was filed before the Tribunal wherein it was held that the transfer pricing adjustment was to be done only in respect of transactions entered into between the assessee with its AEs and not those transactions entered into with non-AEs.

4. Pursuant to the order of the Tribunal, the Revenue preferred appeal before the Honourable High Court.

Judgment

The Honourable High Court held that as per the provisions of Chapter X of the Act, the adjustment to be made to arrive at ALP was only in respect of transactions with AEs and therefore dismissed the appeal filed by the Revenue.

6) Companies operating in foreign markets could not be compared with companies in the Indian markets due to the fundamental differences in the markets

CIT vs. M/s. Tara Jewels Exports Pvt. Ltd. – ITA No 1814 of 2013 (Bom.)

Facts

1. The assessee, a private limited company, was engaged in the business of providing software development and related services to it AEs for which it received remuneration at cost plus 10 per cent. During the year under review, it provided software development services to its AE and used TNMM as the most appropriate method arriving at 59 comparables with an average PLI of 6.95 per cent as opposed to its PLI of 10.67 per cent of the assessee company.

2. The TPO rejected many of comparable companies selected by the assessee and added his own comparables one of them being Goldstone Technologies, a USA based company having a PLI of 51.08 per cent. The assessee objected to the inclusion of the said comparable on the ground that the said company had only reported geographical segments and that it was not clear whether the profits of the comparable were from software operations or included other activities, which was dismissed by the TPO. Aggrieved, the assessee filed objections before the DRP wherein the objections were dismissed.

3. The assessee preferred an appeal before the Tribunal wherein the assessee further contended that the basis of allocation of costs and computing of segmental profits was not clear. The Tribunal observed that it was not clear whether the US profits of the comparable were from software operations or included other activities and held that a local software service provider in the US market could not be compared with a software service provider in India due to the fundamental differences in the markets. It also held that the basis of allocation of costs were not clear from the material available and that the working of profits was not transparent. Accordingly, the Tribunal allowed the appeal of the assessee and excluded the said company as comparable.

4. Aggrieved, the Revenue filed an appeal before the Honourable High Court.

Judgment

The Honourable High Court upheld the order of the Tribunal and dismissed the Revenue's appeal. It held that the markets in the US and India were fundamentally different and that the results of the Indian segment of the US operation of the comparable constituted an inappropriate comparable. Further, it held that order of the Tribunal could not be considered as perverse since the basis of allocation of costs and consequently the working of profits were not clear.

B) Tribunal Decisions

1. Transfer Pricing – Issue of Equity Shares at a premium - Whether the definition of 'income' include within its scope capital receipts arising out capital account transaction unless so specified in section 2(24) as income – Held: No. Whether share premium transactions give rise to income in an international transaction, which can be benchmarked under the provisions of Chapter X, even if the same arises out of capital accounts transaction – Held: No, in favour of the assessee

Supergems India Pvt. Ltd. vs. ACIT – 2015-TII-489-ITAT-MUM-TP – Assessment Year: 2008-2009

Facts

1. The assessee is engaged in the business of cutting and polishing of rough diamonds and Fabula Holdings, Mauritius (AE) has subscribed to ` 9,41,497/- shares of the assessee at a premium of ` 95 each share with a face value of ` 10.

2. The TPO benchmarked these transactions and held that the fair value per share is

` 176.50 paisa against ` 105/-. Accordingly, TPO suggested adjustments to the tune of ` 6.73 Crores On appeal, CIT(A) confirmed the same.

3. During the proceedings AR brought to attention that the core issue involved in the grounds, which was the subject matter of the appeal, relates to "the validity of the TP adjustments made to the share capital issued at premium" and the other issues raised in this appeal were argumentative in nature.

4. In connection with the said main issue of the appeal, AR submitted that this was a legal issue and the same stands covered in favour of the assessee by the ratio of the jurisdictional High Court in the case of *Vodafone India Services (P.) Ltd. vs. Union of India 2014-TII-19-HC-MUM-TP; Vodafone India Services (P.) Ltd. vs. Union of India 2014-TII-21-HC-MUM-TP and Shell India Markets (P.) Ltd. vs. ACIT 2014-TII-25-HC-MUM-TP.* The said judgments are relevant the legal proposition that "no income can be benchmarked as per the TP studies that will arise out of the share premium transactions which actually falls in the capital field. However, it will be otherwise open to the AO to pass assessment order u/s. 143(3) in accordance with law". It was also brought to our notice that the CBDT issued Instruction No.2/2015 stating that the Board has accepted the said judgment of the jurisdictional HC. Consequently, the above ratio of the judgment must be adhered by the Department where similar issue is involved.

Decision

On appeal, the Tribunal decided the issue in assessee's favour as follows:

1. We have perused the judgment in the case of *Vodafone India Services (P) Ltd., 2014-TII-21-HC- HC-MUM-TP,* where it was held that the *sine-qua-non* to apply Chapter X would be arising of income under the Act out of an International Transaction. This income should be chargeable under the Act, before Chapter X can be applied. The definition of 'income' does not include within its scope capital receipts arising out capital account transaction unless so specified in section 2(24) as income. There is no change in the Act to tax amounts received and / or arising on account of issue of shares by an Indian entity to a non-resident entity in sections 4, 5, 15, 22, 28, 45, and 56. This is as it arises out of capital accounts transaction and, therefore, is not income.

2. Chapter X does not contain any charging provision but is a machinery provision to arrive at ALP of a transaction between AEs. Chapter X does not change the character of the receipts but only permits re-quantification of income uninfluenced by the relationship between the AEs. The above extract provides logical reasoning in support of the ratio that such share premium transactions do not give rise to income in an international transaction, which can be benchmarked under the provisions of Chapter X.

3. Similar view was taken by HC in the case of Shell India Markets (P) Ltd. which is relevant for the proposition that "on issuance of shares by an Indian entity to its non-resident AEs, no income arises; hence, TP provisions under Chapter X would not be applicable.

4. We have also perused the CBDT Instruction No. 2/2015, dated 29th January, 2015, as per which it was directed by the Board to the Officers of the Revenue that it is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition (WP No. 871/2014). In view of the acceptance of the above judgment, it is directed that the *ratio decidendi* of the judgment must be adhered to by the field officers in all the cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs and CsIT (A).

5. Considering the above-settled nature of the issue, we are of the opinion that the issuance

of shares of the Indian company to the non-resident AE does not give rise to any 'income', and therefore, the provisions of Chapter X do not apply. In the result, appeal of the assessee is allowed.

2. India-Netherlands DTAA - Article 12 – Taxation of Fees for technical services – Interlinked services – Application of Make Available clause – Whether the provisions of the Indo-US DTAA can be denied to be read into the provisions of Indo-Dutch DTAA, when it is clear that the MoU to the Indo-US DTAA stands incorporated in the Indo-Dutch DTAA as well by the virtue of MFN clause – Held : No

Whether consultancy services which are not of a technical nature can be treated as technical services and the fees received for the same can be treated as covered by the scope of 'FTS' – Held : No

Whether the mere fact that commercial or managerial services are linked with the technical services, would change the character of said commercial or managerial services – Held : No

Whether the mere fact that the overall package is considered as a whole and the services to be provided within the package are interlinked, cannot be an excuse for not apportioning the consideration received for the same – Held : Yes

Whether the AO can conclude that the non-taxable consideration component is less than fifty per cent of the overall consideration paid by the assessee for basic refinery package, only if he he can demonstrate the same after collecting necessary details from assessee – Held : Yes

Shell Global Solutions International BV vs. ITO – 2015-TII-190-ITAT-AHM-INTL – Assessment Year: 2004-05

Facts

1. The assessee is engaged in providing business and operational consultancy, technical, and research and development services in areas of exploration and production, refining and gas & LNG, in the Netherlands and internationally. During scrutiny, the AO noticed that while the assessee had duly accepted taxability of its receipts aggregating to ` 65,21,62,165/- as FTS, it had claimed receipts aggregating to Euros 16,75,781, i.e. ` 17,26,50,194, as non-taxable in nature.

2. The non-taxable receipts included reimbursement of expenses, aggregating to ` 1,78,40,156/-, received from *Hazira Port Pvt. Ltd., Hazira LNG Pvt. Ltd. and Welspun Gujarat Stahl Rohren Limited,* in addition to fees for commercial services aggregating to ` 7,69,29,360/- received from Reliance Industries Limited. So far as the reimbursements receipts were concerned, the matter was decided in favour of the assessee, by the CIT(A) and the matter rests there.

3. As far as receipts for commercial services is concerned, the AO required the assessee to show cause as to why this receipt was not offered to tax in his hands. In response, the assessee explained that the related "services rendered by the assessee were not technical services in nature and did not fall within the purview of FTS as defined under Article 12 of India Netherlands DTAA", as they did not 'make available' any technical knowledge, experience,

know-how, or process, or consist of the transfer of technical plan as per the definition under the DTAA.

4. The AO took note of the Article 12 of the India-Netherlands DTAA as also of the nature of services provided by the assessee to its Indian client, and concluded that "the services which were being provided by the assessee to the companies in India were technical in nature and it had made the expertise and technical experiences available with it to these companies. Accordingly, these services were technical or consultancy services and, therefore, taxable @ 10% as per Indo-Dutch DTAA.

v. On appeal, the CIT(A) upheld the stand of the AO by observing that assessee's claim to seek non-taxability of 50% of its receipts from the sale of Basic Refinery Package as exempt from taxation deserves to be rejected as its attempt to bifurcate its service into technical and non-technical part was devoid of any basis, logic and is self-contradictory. The argument of "make available" either did not apply to the assessee.

Decision

The Tribunal held as under:

1. The fundamental question that comes up for our consideration is the scope of 'fees for technical services' which can be brought to tax under Article 12 of the Indo-Dutch DTAA. Article 12(5), as it stood in the original text of the treaty, was on the pattern of the traditional model which represented broadly definition of technical services as given in the Indian Income-tax Act. The "make available" clause being read into this treaty is a result of the most favoured nation clauses embedded in the treaty and the subsequent Indian tax treaties with OECD countries on the 'make available clause' pattern.

2. *Vide* agreement and protocol dated 12th September 1989, Indo-US DTAA introduced a much narrower definition of fees for technical services. This definition, set out in Article 12(4) of the Indo-US tax treaty, referred to the fees for technical services as 'fees for included services'.

3. It is important to note that the MFN clause set out in the Indo-Dutch DTAA is a clause which does not need anything other than a greater relief, *vis-à-vis* the scope and rate of 'FTA' in the Indo-Dutch DTAA, being given in any other tax treaty with another OECD country. Any such relief being extended automatically incorporates such beneficial arrangement being read into the Indo-Dutch DTAA as well. This MFN clauses clearly stipulates that in the event of India extending any benefits to another OECD country, *inter alia*, directly by reducing the rate or "indirectly, by reducing the rate or the scope of the Indian tax allowed under the Convention in question on payments as meant in Article 12 of this Convention with the levy, either in full or in part" then, as from the date on which the relevant Indian tax treaty enters into force, "such relief as provided for in that Convention or Agreement shall also apply under this Convention".

4. Therefore, whatever benefit is extended under Indo-US tax treaty is, by virtue of MFN clause, stands incorporated in Indo-Dutch tax treaty as well. In other words, to decide the scope of 'fees for technical services', one has to see the scope of taxability of similar payments in the Indo-US Tax treaty and unless that India-Netherlands treaty is more beneficial to the assessee, the provisions of the Indo-US tax treaty will apply here as well.

5. The CIT(A) was thus clearly in error in holding that the provisions of the Indo-US tax treaty cannot be read into the provisions of Indo-Dutch tax treaty. As clearly stated in the MoU to the Indo-US tax treaty, which stands incorporated in the Indo-utch tax treaty as well by the virtue of MFN clause, "under paragraph 4(b), consultancy services which are

not of a technical nature" cannot be treated as technical services. Accordingly, fees for non technical consultancy services cannot be treated as covered by the scope of 'fees for technical services'. As long as the services rendered by the assessee are managerial or consultancy services in nature, which do not involve or transmit the technology, the same cannot be brought to tax as fees for technical services.

6. As a matter of fact, the CIT(A) has not even seriously disputed the above position. His primary objection, however, is that these services cannot be segregated as these services are given as a package and are interlinked anyway, and as the assessee has not set out an acceptable basis for division of consideration for these services. As for the fact that these services are interlinked, the mere fact that commercial or managerial services are linked with the technical services does not change the character of commercial or managerial services. That's what the MoU to Indo-US tax treaty, also states. Clearly, therefore, the consideration for basic refinery package is to be apportioned between the various deliverables under the overall package. The mere fact that the overall package is considered as a whole and the services are interlinked cannot be excuse enough for not apportioning the consideration.

7. It is noted that the AO, at the time of issuing order u/s. 195(2) in respect of the remittances of consideration under the basic refinery package to the assessee, had held that fifty per cent of consideration for basic refinery package can be treated as attributable to the services which are not taxable as 'FTS'. However, during assessment, this aspect of the matter was not examined at all. In the course of the appellate proceedings, the CIT(A) has rejected the apportionment on the ground that it is not possible to do so. He has observed that "the underlying purpose of the package is operationalising the refinery" and "obviously in such a scenario the various services are interdependent and complementary and cannot be segregated".

8. This Tribunal, for the detailed reasons set out above, is unable to see any merits in this approach. We have also noted that there is no specific discussion about the values to be assigned to the consultancy services which are non-technical in nature and to the physical deliverables. We have also noted that in the 195(2) order, the AO has categorically observed that "only a part of the total services under the agreement are taxable on account of its being a composite contract and also because the commercial services rendered by the assessee are saved from taxation in view of Article 12 of the Indo-Dutch DTAA read with protocol to DTAA between India and USA" and then proceeded to adopt 50% of total payment under basic refinery package as non-taxable, on a best judgment basis.

9. No doubt this order does not bind the AO but then it cannot be open to him to simply brush it aside, without any cogent material, to come to a conclusion directly opposed to the stand taken therein. As long as the AO can demonstrate, after collecting necessary details from the assessee, that the non-taxable consideration component is less than fifty perc ent of the assessee, that the non-taxable consideration component is less than fifty per cent of that conclusion. It is, therefore, necessary that all the requisite details, as may be available to the assessee and as may be requisitioned by the AO, must be taken into account to facilitate this apportionment. The matter is therefore, remitted back to the file of AO after directing him to apportion the consideration for basic refinery package on the above lines.

(Also refer to Shell Global Solutions International BV vs. ITO - 2015-TII-187-ITAT-AHM-INTL - Assessment Year: 2005-06)

3. Section 44BB – Whether reimbursement received by the assessee of the customs duty paid on equipment imported by it for rendering services would not form part of the gross receipts for the purposes of Section 44BB – Held: Yes – Whether service tax collected by the assessee does not have any element of income, and therefore cannot form part of the gross receipts for the purposes of computing the 'presumptive income' of the assessee under Section 44BB – Held : Yes, In favour of the assessee

Oceaneering International GmbH vs. DCIT 2015-TII-188-ITAT-MUM-INTL Assessment Year: 2010-11

Facts

The assessee provides engineered services and hardware to customers who operate in marine, space and other environments. The issue in the appeal filed by the assessee was with regard to inclusion of service tax in computation of presumptive income under section 44BB. The AO had included service tax in computation of income under section 44BB. The DRP had confirmed the same.

Decision

The Tribunal held in favour of the assessee as follows:

1. In *CIT vs. Lakshmi Machine Works,* the Supreme Court approved the decision of the Bombay High Court in *CIT vs. Sudarshan Chemicals Industries Ltd.* which in turn considered the decision of the Supreme Court in George Oakes (P) Ltd.. In the considered view of the Court, the decision of the Supreme Court in Lakshmi Machine Works is sufficient to answer the question framed in the present appeal in favour of the assessee. The service tax collected by the assessee does not have any element of income and therefore cannot form part of the gross receipts for the purposes of computing the 'presumptive income' of the assessee under Section 44BB;

2. The Court concurs with the decision of the *High Court of Uttarakhand in DIT vs. Schlumberger Asia Services Ltd.* which held that the reimbursement received by the assessee of the customs duty paid on equipment imported by it for rendering services would not form part of the gross receipts for the purposes of Section 44BB. The Court accordingly holds that for the purposes of computing the 'presumptive income' of the assessee for the purposes of Section 44BB, the service tax collected by the Assessee on the amount paid it for rendering services is not to be included in the gross receipts in terms of Section 44BB(2) read with Section 44BB(1). The service tax is not an amount paid or payable, or received or deemed to be received by the assessee for the services rendered by it. The assessee is only collecting the service tax for passing it on to the Government.

4. India-USA DTAA – Articles 5 & 12 – Whether the amount received from sale of software product cannot be considered as royalty but is the business income of the assessee and it is not taxable in absence of a PE – Held : Yes, in favour of the assessee

Novell Inc vs. DDIT 2015-TII-184-ITAT-MUM-INTL Assessment Years : 2006–07 & 2008–09

Facts

The assessee is engaged in the business of providing information solution, through its subsidiaries globally. During assessment, the AO found that for the purpose of sales made by the Indian Company on account of replicated software, the assessee receives royalty as per the distribution agreement. However, as far as sale of software directly imported from the assessee and sold to the customers in India, it was claimed by the assessee that the receipt from

sale of such software was not taxable in India as the assessee did not have a P.E. in India. The AO therefore, formed an opinion that what was received by the assessee was towards the right to use the intellectual property by the purchaser in India and treated the amount as royalty as against assessee's claim of business income. The DRP confirmed the same.

Decision

The Tribunal held in favour of the assessee as follows:

1. On a perusal of the material on record, it is seen that identical dispute came up for consideration before the Co-ordinate Bench of the Tribunal in assessee's own case for the Assessment Year 2007-08. The Tribunal, after considering the terms of both the agreements as well as other relevant facts came to conclude that the receipts from sale of computer software products is not royalty but business income.

2. On a careful reading of the aforesaid order of the Co-ordinate Bench, it is very much relevant to observe that in the assessment year 2007-08 also, the Departmental Authorities treated the receipt from sale of software product as royalty solely relying upon the nomenclature of the product given in the invoice as "intellectual" value which is also the case in the impugned assessment year. However, the Tribunal, taking into consideration such fact has given a categorical finding that the amount received by the assessee towards sale of software products cannot be treated as royalty and thereby accepted assessee's claim of business income. As there is no material difference in the facts considered by the Tribunal in assessment year 2007-08 and the impugned assessment year, respectfully following the aforesaid order of the co-ordinate Bench, we accept assessee's claim that the amount received from sale of software product cannot be considered as royalty but is the business income of the assessee, hence, as per the provisions of *India–USA* treaty it is not taxable in absence of a P.E.. We, therefore, delete the addition.

5. Transfer Pricing – Whether companies providing engineering design services and information technology services which are KPO services, can be compared to a BPO/ITES service provider – Held: No.Whether company owning substantial intellectual property on software products can be compared to a low end service provider having no IPR of its own – Held: No; in favour of the assessee

DCIT vs. E4E Business Solutions India Pvt. Ltd. 2015-TII-506-ITAT-BANG-TP Assessment Year: 2008-09

Facts

1. The assessee is engaged in the business of providing customer relationship management services and related BPO service. For A.Y. 2008-09, the assessee filed its return declaring total income of ` 1,42,99,895/-. The said return was processed u/s. 143(1) and the case was subsequently taken up for scrutiny, wherein the AO observed that the assessee had reported international transactions. He accordingly made a reference u/s. 92CA to the TPO to examine and compute the ALP of the assessee's international transactions with its AE.

2. In its TP Study, the assessee had adopted TNMM as the MAM and selected 13 comparables whose average profit margin on cost was 13.65%. As the margin of the assessee was higher at 15.26%, the assessee held its international transactions in the ITES segment to be at arm's length.

3. The TPO after examining the assessee's T.P. Study, rejected the same and proceeded to carry out a fresh search for comparables.

He accepted the assessee's adoption of TNMM as the MAM and selected 20 companies as comparables to the assessee. The average profit margin of the comparables selected by the TPO was 24.75%. After granting working capital adjustment of 0.07% the TPO computed out the ALP of the assessee's international transactions with its AEs at ` 84,81,59,579/-, and resultant shortfall of ` 6,40,54,571/- was proposed as TP adjustment. After receipt of the TPO's order u/s 92CA, the AO completed the assessment u/s 143(3) r/w/s 144C determining the assessee's income at ` 8,23,14,946/-.

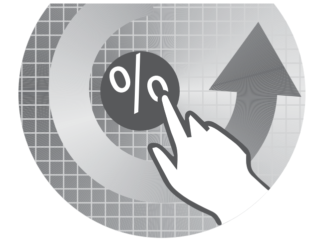
Decision

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

1. As far as Accentia Technologies Ltd., Aeropetal Technologies Ltd., Coral Hubs Ltd., Crossdomain Solutions Ltd., Eclerx Services Ltd., Infosys BPO Ltd., Mold-Tek Technologies Ltd. & Wipro Ltd. are concerned, it is seen that the co-ordinate Bench of the Tribunal in the cases of Symphony Marketing Solutions Ltd. and Global Business Operations P. Ltd., has ordered for exclusion of the aforesaid 8 comparables. The Tribunal therein has held that:

> "as regards Accentia Technologies Ltd., it is seen that during the previous year there were extraordinary events that took place in this company which warrants exclusion of this company as a comparable....as regards Aeropetal Technologies Ltd., the segmental revenues show that its major source of income is from providing engineering design services and information technology services which are knowledge process outsourcing services (KPO) and not BPO/ ITES low-end BPO services, like those performed by the assessee in the case on hand....As regards Coral Hubs Ltd., it is seen that this company has outsourced most of its work, whereas the assessee in the case on hand is carrying out the work by itself. Further, this company has entered into an area of business known as new vertical digital library and print on demand whereas it is seen that the assessee in the case on hand provides ITES / BPO back-end support services only. As regards Crossdomain Solutions Ltd., it is seen that this company was providing high-end KPO services, and development of product suites etc. rendering it functionally different from assessee's providing low end ITES / BPO Support Services.... as regards Eclerx Services Ltd., it is seen that this company cannot be taken as a comparable both for the reasons that it was having supernormal profit and it is engaged in providing KPO services, which is distinct from the nature of services provided by the assessee.... as regards Mold-Tek Technologies Ltd., it is seen that this company is providing KPO services and a host of engineering services like plant engineering, mechanical product designs, civil and structural engineering services, etc and therefore not comparable to assessee's providing ITES / BPO low end support services....As regards Wipro BPO Ltd., it is seen that this company owns substantial intellectual property on software products. This company cannot therefore be regarded as a comparable. For the reasons given while disregarding Infosys BPO Ltd. as a comparable, this company is also directed to be excluded from the list of comparables...."

2. Therefore, following the above cited decision of the Co-ordinate Bench in the case of Symphony Marketing Solutions India Pvt. Ltd. for A.Y. 2008-09, we are of the view that in the case on hand also, where the assessee is only providing low-end ITES/BPO support services, these companies are directed to be excluded from the list of comparables.



CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

Valuation

Sterling Tools Ltd. vs. Commissioner of C. Ex. & S.T. Faridabad – [2015 (325) E.L.T. 367 (Tri.–Del)

Facts in this case were as follows

The appellants were manufacturers of fasteners i.e., nuts, bolts and screws for automobile. The goods manufactured by the appellant were chargeable to Central Excise duty. The automobile component and accessories falling under any chapter of Central Excise Tariff are to be charged duty on assessable value determined under Section 4A of the Central Excise Act, 1944. The period of dispute in this case is 1-6-2006 to 31-12-2008 and from 1-1-2009 to 31-9-2010. During the impugned period, the appellant company was clearing automobile parts in the following manner.

(a) Automobile manufacturers as original equipment parts in loose condition on which duty was being paid on transaction value under Section 4 of the Central Excise Act, 1944.

(b) Spare parts division of automobile manufacturers in packings containing 1 to 10 pieces and on which as per the instruction of manufacturers labels mentioning the MRP and other particulars like manufacturer name, part no. etc were being affixed and duty on the same has been paid on the value determined under Section 4A of the Act; and

(c) To wholesale dealers of goods which were being sold in boxes of 100 pieces each and on which duty was paid on transaction value of Section 4 of the Central Excise Act, 1944.

There is no dispute about the clearance made under categories (a) and (b) herein above. The only dispute with regard to the goods sold to the wholesale dealer in boxes of 100 pieces each on which duty was paid and transaction value as per Section 4 of the Act. The show cause notices were issued to the appellant by invoking extended period of limitation for the period 1-6-2006 to 31-12-2008 on 7-5-2010 and for the period January 2009 to October 2010 on 7-1-2011 to demand duty on the clearances made to the wholesale dealer to whom the goods were being sold in boxes of 100 pieces each, as per the value to be determined under Section 4A of the Act. The show cause notices were adjudicated. Demand of duty was confirmed along with interest and penalties on both the appellants were imposed.

Aggrieved from the said order, the appellants preferred an appeal before Hon'ble CESTAT.

The appellants submitted that the adjudicating authority proceeded with the finding that the appellants are clearing their goods as multi-piece packaging which is beyond the show cause notices as there is no allegation as such in the show cause notice. It was further submitted that the packing in which the appellant is clearing the goods are wholesale packing and no MRP is required to be declared and the valuation is to be done as per Section 4 of the Act. Further submission is that the Rules governing multi-piece packing were

omitted from the statute book w.e.f. 13-1-2007 *vide* Notification No G.S/425(E) dated 17-7-2006. Therefore, the demand post 12-1-2007 is not sustainable. For the period up to 12-1-2007 the demand is also not sustainable as there was no saving clause in the Rules and it is settled law that proceedings cannot be initiated under a rule, after it has ceased to exist. To support his contention reliance was placed on the decision of the Apex Court in the case of *Rayala Corporation Pvt Ltd. vs. Director of Enforcement, New Delhi* reported in 1969 (2) *SCC 412 and Kolhapur Cane Sugar Works Ltd vs. UOI 2000 (119) E.L.T. 257 (S.C.).*

On merits, it was submitted that goods in question cannot be considered as multi-piece packages contemplates individually packed and labelled pieces of same commodity intended for retail sale. In fact, in the present case the nut, bolts, screws are not individually packed or labelled. On the contrary, they are packed in bulk in loose form in a polythene bag inside a carton containing 10 to 200 pieces. Individual pieces are sold to ultimate consumer without any packaging. Therefore, the wholesale package cannot be considered to be multi-piece package. He further submits that fasteners packed in loose form in bulk sold to intermediaries/distributors for the further distribution in smaller quantities are wholesale packages in terms of Rule 2(x) (ii) – SMW (PC) Rules and are governed by the provision of Rule 29 of SMW (PC) Rules in Chapter III. The goods are sold to ultimate consumer in loose condition and therefore, there is no requirement to affix MRP and provisions of Section 4A are not applicable. To support this contention reliance was placed on the following decisions.

(a) *Sarvotham Care Ltd. – 2012 (286) E.L.T. 357 (Tri. BLR)*

(b) *Swan Sweets Pvt. Ltd. 2006 (198) E.L.T 565 (Tri. Bombay)*

(c) *Central Arecanut & Cocoa Marketing & Processing Co-op. Ltd. – 2008 (226) E.L.T. 369 (Tri. Madras)*

(d) *Roy Industries – 2006 (201) E.L.T 609 Tri. Bang.)*

(e) *Makson Confectionery Pvt. Ltd. 2010 (259) E.L.T. 5 (SC)*

(f) *Sampre Nutrition Ltd. vs. CCE, Hyderabad – 2013 (290) E.L.T. 291 (BLR).*

On behalf of the Department it was submitted that the appellants are clearing goods to their spare parts division and doing valuation as per Section 4A of the Act. Therefore, these clearances to dealer/distributors are also liable to be assessed as per the value determined under Section 4A of the Act.

After hearing submissions the Hon'ble CESTAT observed as follows –

In this case the sole issue before us for determination is that whether the goods supplied to the distributor in wholesale packages are liable to be assessed under Section 4A of the Central Excise Act, 1944 or not?

It was noted that Standards of Weights and Measures (Packaged Commodities) Rules 1977 as per Rule 2(x) of the said Rules defines wholesale packages as under:

"Wholesale Package" means a package containing –

(i) A number of retail packages, where such first-mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer, or

(ii) A commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer quantities: or

(iii) Package containing ten or more than ten retail packs provided that retail packages are labelled as required under the rules".

Rule 2(j) Defines multi-piece packages as under.

"Multi-piece package" means a package containing two or more individual packaged or labelled pieces of the same commodities of identical quantity, intended for retail sale, either in individual pieces or the package as a whole".

The Rule 29 of the said rules requires the declaration to be made on the wholesale packages as under:

Every wholesale package shall bear thereon a legible, definite, plain and conspicuous declaration as to –

(a) The name and address of the manufacturer or where the manufacturer is not the packer, of the packer;

(b) The identity of the commodity contained in the package; and

(c) the total number of retail packages contained in such wholesale package or the net quantity in terms of standard unit of weights, measures or number of the commodity contained in wholesale packages.

On the basis of the above said provisions, it was found that multi-piece packages means a package containing individually packed pieces of the same commodity of identical quantity for retail sale either in individual pieces or the package as a whole. As per the above definition of multi-piece packages and the definition of wholesale packages, it was found that sub-clause 2(x) is applicable to the facts of this case, as the fasteners are sold by the appellant to wholesaler in bulk enabling the wholesaler to sell distribute or deliver such fastener to the consumer in smaller quantity. As the fasteners cleared by the appellant to the wholesaler in bulk, the Hon'ble CESTAT was of the considered view that the appellant are clearing their goods in wholesale packages, after analysing the definition of wholesale package as defined under Rule 2(x) of the Standards of Weights and Measures (Packaged Commodities) Rules 1977. It was also observed that Rule 29 *(ibid)* specifies that on wholesale packages the declaration to be made by the assessee as per the said Rule there is no requirement to declare retail sale price. Therefore, it was held that appellants are not required to declare retail sale price on wholesale packages. In these circumstances, the Hon'ble CESTAT was of the view that on merits, the appellants are having a case that they are clearing their goods as wholesale packages to the distributors/intermediaries to sell the goods in question to the consumer in smaller quantities.

With regard to valuation under Section 4A of the Central Excise Act, 1944, the Hon'ble CESTAT referred to the decision of the Hon'ble Apex Court in the case of *Jayanti Food Processing (P) Ltd. vs. CCE – 2007 (215) E.L.T. 327 (SC)* wherein the Hon'ble Apex Court has laid down the following guidelines for valuation of the goods under Section 4A of the Act-

"Even at cost repetition the following would be factors to include the foods in Section 4A (1) & (2) of the Act-

(i) The goods should be excisable goods;

(ii) They should be such as are sold in the packages;

(iii) There should be requirement in the SWM Act or the Rules made thereunder or any other law to declare the price of such goods relating to their retail price of the package;

(iv) The Central Government must have specified such goods by notification in the Official Gazette.

(v) The valuation of such goods would be as per declared retail sale price of the packages less the amount of abatement.

If all these factors are applicable to any goods, then alone the valuation of the goods and the assessment of duty would be under section 4A of the Act."

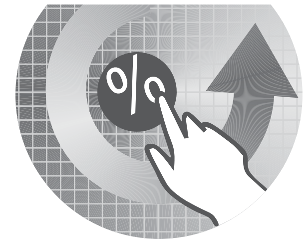
It was further observed that as stated in the preceding paras, that as per Rule 29 of the said Rules the appellants were not required to affix MRP on the product which were cleared as wholesale packages, therefore, the provisions of the SWM (PC) Rules are not applicable to the facts of this case which is squarely covered by the guidelines issued by the Hon'ble Apex Court in the case of *Jayanti Food Processing (P) Ltd. (Supra).*

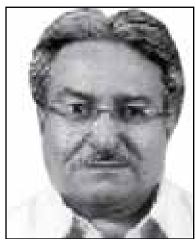
In these circumstances, we held that appellants have correctly valued their goods sold to the wholesale packages as per Section 4 of the Central Excise Act, 1944 i.e., transaction value.

Accordingly the impugned order was set aside and the appeal allowed with consequential relief, without going into the issue of limitation.

19. The appeals are allowed in the above terms.

(Dictated and pronounced in the open court.)





CA Janak Vaghani

INDIRECT TAXES
VAT Update

1) Amendment to MVAT Rules, 2002

Notification No. VAT.1515/CR-81/Taxation-1 dated 5-11-2015

Change in Rate of Interest Payable u/s. 30
The Government of Maharashtra has amended Rule 88 of MVAT Rules, 2002 by above notification w.e.f. 1st December, 2015 providing for change in rate of interest payable u/ss. 30(1), (2) and (3) as under:

Sr. No.	Period, liable for interest	Rate of interest
(1)	(2)	(3)
1.	Up to one month	One and a quarter per cent of the amount of such tax, for the month or for part thereof.
2.	Up to three months	One and a quarter per cent of the amount of such tax, for the month or for part thereof for the first month of delay and one and a half per cent of the amount of such tax, for each month or for part thereof for delay beyond one month up to three months.
3.	More than three months	One and a quarter per cent of the amount of such tax, for each month or for part thereof for the first month of delay, one and a half per cent of the amount of such tax, for each month or for part thereof for delay beyond one month up to three months and two per cent of the amount of such tax, for each month or for part thereof for the period of delay beyond three months.

The Commissioner of Sales tax issued Circular No 18T of 2015 dated 20-11-2015 explaining the effect of change in rate of interest.

2) Trade Circular

i) Trade Circular No. 15T of 2015, dated 29-10-2015

Draft Circular for issue of bill, cash memo, tax invoices on Thermal Paper
The Commissioner of sales tax has issued above draft circular inviting suggestions from trade relating to Issue of bill, cash memo, tax invoices on Thermal Paper. The suggestions or comments may be e-mailed at jcsthg1mumbai@gmail.com or sent to the office of The Joint Commissioner of Sales Tax, (HQ) 1, 9th Floor, Old Building, Vikrikar Bhavan, Mazgaon, Mumbai – 400 010. It was further clarified in the circular that suggestions or comments received on or before 1st December 2015 will be taken into consideration.

ii) Trade Circular No. 16T of 2015, dated 4-11-2015

Revision in Rate of Tax
The Commissioner of Sales Tax has issued above circular to inform change in rate of tax on sale of certain goods by Notifications, No. VAT.1515/C.R. 128A/Taxation-1, dated 30-9-2015 and No. VAT.1515/C.R. 128B/Taxation-1, dated 30-9-2015 from 1st October, 2015 as under:

Sch. Entry	Name of the Commodity	Rate of tax before 1st October 2015	Rate of tax w.e.f. 1st October 2015
B-1	Article made of precious metals of fineness not less than fifty per cent, whether or not containing precious stones, semi-precious stones, diamonds or pearls whether real or cultured and to which Entry 105 in Schedule "C" does not apply but excluding industrial goods and industrial tools to which Entry 53A of Schedule "C" applied.	1%	1.2%
B-2	Precious metals that is to say Gold, Silver, Platinum, Osmium, Palladium, Rhodium, Ruthenium and alloys of any of them. *Explanation.*- For the purposes of this entry, an alloy of precious metal means a precious metal of fineness of not less than fifty per cent.	1%	1.2%
B-3	Precious stones including diamonds, semi-precious stones and pearls whether real or cultured. [Schedule Entries B-3 and B-3A have been clubbed together and single Entry B-3 has been inserted with some technical changes.	1%	1.2%
B-4	Hairpins, imitation jewellery, beads of glass, plastics or of any metal other than precious metals and parts and components thereof.	1%	1.2%
D-1	Foreign liquor as defined, from time-to-time, in Rule (3)(6)(1) of the Bombay Foreign Liquor Rules, 1953, excluding wine.	50%	60%

Sch. Entry	Name of the Commodity	Rate of tax before 1st October 2015	Rate of tax w.e.f. 1st October 2015
D-2	Country liquor as defined in the Maharashtra Country Liquor Rules, 1973	50%	60%
D-3	Liquor, imported from any place outside the territory of India as defined, from time-to-time, in Rule 3(4) of the Maharashtra Foreign Liquor (Import and Export) Rules, 1963, excluding wine.	50%	60%
D-5	High Speed Diesel Oil		
	(a) When delivered,-		
	(i) To a retail trader for trading from a place of business situated within the geographical limits of the Municipal Corporations of the Brihan Mumbai, Thane, Navi Mumbai and within such other areas for such period as may be notified by the State Government in the Official Gazette and	24%	24% + Two rupees per litre
	(ii) To a person other than the retail trader having place of business situated within the geographical limits of Municipal Corporation of the Brihan Mumbai, Thane, Navi Mumbai and within such other areas for such period as may be notified by the State Government in the Official Gazette.	24%	24% + Two rupees per litre
	(b) In circumstances other than those mentioned in clause (a) above.	21%	21% + Two rupees per litre
D-10	Any other kind of Motor Spirit,		
	(a) When delivered, –		
	(i) to a retail trader for trading from a place of business situated within the geographical limits of Municipal Corporations of the Brihan Mumbai, Thane, Navi Mumbai and within such other areas for such period as may be notified by the State Government in the Official Gazette; and	26% + One rupee per litre	26% + Three rupees per litre
	(ii) To a person other than the retail trader having place of business situated within the geographical limits of the Municipal Corporations of the Brihan Mumbai, Thane, Navi Mumbai and within such other areas for such period as may be notified by the State Government in the Official Gazette.	26% + One rupee per litre	26% + Three rupees per litre
	(b) When delivered in circumstances other than those mentioned in clause (a) above.	25% + One rupee per litre	25% + Three rupees per litre

Sch. Entry	Name of the Commodity	Rate of tax before 1st October 2015	Rate of tax w.e.f. 1st October 2015
D-13	Aerated and Carbonated non-alcoholic beverage whether or not containing sugar or other sweetening matter or flavour or any other additives.	20%	25%
D-14	Cigar and cigarettes	25%	35%

Further, in the said circular the change in taxation of liquor w.e.f. 1-10-2015 made by amending notification issued under section 41(5) of the act vide Notification No. VAT.1515/CR 128B/ Taxation-1, dated 30-9-2015. It is also clarified that there is no change in rate of tax on sale or service of liquor when purchased from registered dealer in the State.

iii) Trade Circular No. 17T of 2015, dated 7-11-2015

Physical submissions of Statement of Submission and acknowledgement of VAT Audit Report in Form 704 for the year 2014-15

The Commissioner of Sales tax has issued above circular to inform the procedure for Physical submissions of Statement of Submission and acknowledgement of VAT Audit Report in Form 704 for the year 2014-15 as under:

i) The due date for furnishing of report in form 704 is 15th January, 2016.

ii) The due date for physical submission of Statement of Submission and Acknowledgement of VAT Audit Report in Form 704 is 25th January, 2016.

iii) It is not necessary to submit proof of filing of revised return and/or proof of payment of amounts advised by the VAT auditor along with Physical submission.

iv) The aforesaid documents are to be submitted:

   a) If the dealer is LTU dealer to the concerned LTU officer.

   b) In any other case in Mumbai to The Joint Commissioner of Sales Tax, 704 cell.

   c) In case of other dealers to the Location in Charge Officer e.g. the Joint Commissioner of Sales Tax, VAT (Adm.) or the Deputy Commissioner of Sales Tax, (VAT Adm.) or the Assistant Commissioner of Sales Tax, (VAT-Adm)

iv) Trade Circular No. 18T of 2015, dated 20-11-2015

Change in Rate of Interest Payable u/s. 30, Rule 88

The Commissioner of Sales tax by above referred trade circular has clarified the effect of change in rate of interest provided in Rule 88 by the Maharashtra Notification No. VAT. 1515/CR-81/ Taxation-1 dated 5-11-2015 and explained the effect of change with examples as under:

A) Dealers liable to pay interest under section 30(1):

The interest under this section is payable by a dealer or person who has failed to apply for registration or has failed to apply for registration within prescribed time.

Illustration (1)	
Date on which dealer is liable for registration (crossed T.O. limit)	20-6-2015
Date of application for registration	20-1-2015
Effective date of R.C.	20-10-2015
Date of payment of tax	20-11-2015
Interest payable as per Rule 88(1)	
1-4-2015 to 20-11-2015	@1.25% per month or part thereof on such payment of tax (As the amendment is effective from 1-12-2015)
Illustration (2)	
Date on which dealer is liable for registration	20-6-2015
Date of application for registration	20-10-2015
Effective date of R.C.	20-10-2015
Date of payment of tax	20-12-2015
Interest payable as per Rule 88(1)	
1-4-2015 to 30-11-2015	@1.25% per month or part thereof on such payment of tax
1-12-2015 to 20-12-2015	@1.25% per month or part thereof on such payment of tax (1st month of delay in payment of tax after amendment)
Illustration (3)	
Date on which dealer is liable for registration	30-12-2015
Date of application for registration	20-3-2016
Effective date of R.C.	20-3-2016
Date of payment of tax (unpaid tax for URD period)	31-3-2016
Interest payable as per rule 88(1)	
1-4-2015 to 30-11-2015	@ 1.25% per month
1-12-2015 to 31-12-2015	@ 1.25% per month
1-1-2016 to 29-2-2016	@ 1.50% per month
1-3-2016 to 31-3-2016	@ 2% per month

B. Dealers liable to pay interest under Section 30(2) :

The interest under this section is payable by the registered dealer who has failed to pay tax within prescribed time under the Maharashtra Value Added Tax Act, 2002.

Illustration (1)	
Periodicity	Monthly
Period of return	April 2015
Due date of payment	21-5-2015
Paid on	30-11-2015
Interest payable as per rule 88(1)	

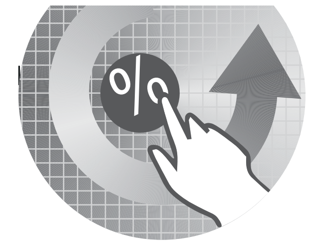
22-5-2015 to 30-11-2015	@ 1.25% per month or part thereof
Illustration (2)	
Periodicity	Monthly
Period of return	April 2015
Due date of payment	21-5-2015
Paid on	31-3-2016
Interest payable as per Rule 88(1)	
22-5-2015 to 30-11-2015	@ 1.25% per month
1-12-2015 to 31-12-2015	@ 1.25% per month
1-1-2016 to 29-2-2016	@ 1.5% per month
1-3-2016 to 31-3-2016	@ 2% per month
The same analogy will be applicable for the dealers having quarterly and six monthly periodicity. For the purpose of second proviso to clause (a), (b) and (c) of sub-section (2) of section 30 of MVAT Act, 2002, the interest is to be computed from 1st October of the year, to which the annual revised return relates. The rate of interest is to be calculated as under:	
Illustration (3)	
Type of return	Annual revised return filed in time
R.C. effective on	30-6-2014
Annual revised return for the year	2014-15
Return filed and payment made	14-2-2016
Due date of annual revised return u/s 20(4)(b)	14-2-2016
Interest payable as per rule 88(1)	
(1) 1-10-2014 to 30-11-2015	@ 1.25%
(2) 1-12-2015 to 31-12-2015	@ 1.25%
(3) 1-1-2016 to 14-2-2016	@ 1.5%
Illustration (4) -	
Type of return	Annual revised return filed late
R.C. effective on	30-6-2014
Annual revised return for the year	2014-15
Return filed and payment made	15-3-2016
Due date of annual revised return u/s 20(4)(b)	14-2-2016
Interest payable as per rule 88(1)	
(1) 1-10-2014 to 30-11-2015	@ 1.25%
(2) 1-12-2015 to 31-12-2015	@ 1.25%
(3) 1-1-2016 to 29-2-2016	@ 1.5%
(4) 1-3-2016 to 15-3-2016	@ 2%

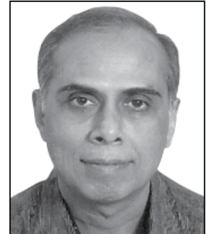
For the purpose of second proviso to clause (d) and (e) of sub-section (2) of section 30 of MVAT Act, 2002.	
Illustration (5)	
Type of return	Annual revised return
R.C. effective from	1-11-2015
Annual revised return for the year	2015-16
Return filed and payment made	15-2-2017
Due date of annual revised return u/s. 20(4)(b)-	14-2-2017
Interest payable as per Rule 88(1)	
(1) 1-11-2015 to 30-11-2015	@ 1.25%
(2) 1-12.2015 to 31-12-2015	@ 1.25%
(3) 1-1-2015 to 29-2-2016	@ 1.5%
(4) 1-3-2015 to 15-2-2017	@2%
Illustration (6) —	
Type of return	Annual revised return
R.C. cancelled on	1-9-2015
Annual revised return for the year	2015-16
Return filed and payment made	15-3-2017
Due date of annual revised return u/s 20(4)(b)-	14-2-2017
Interest payable as per rule 88(1)	
(1) 1-9-2015 to 30-11-2015	@ 1.25%
(2) 1-12-2015 to 31-12-2015	@ 1.25%
(5) 1-1-2015 to 29-2-2016	@ 1.5%
(4) 1-3-2016 to 15-3-2017	@ 2%

C) Dealers liable to pay interest under Section 30 (3) :

The interest under this section is payable by the dealer who is liable to pay interest on any tax other than tax on which interest is leviable under sub-section (2) of section 30 i.e. interest is payable on Assessment Dues.

Illustration (1)	
Assessment period	2012-13
A.O. passed on	30-11-2015
Interest payable as per rule 88(1)	
1-4-2013 to 30-11-2015	@ 1.25% per month
Illustration (2)	
Assessment period	2012-13
A.O. passed on	31-3-2016
Interest payable as per rule 88(1)	
(1) 1-4-2013 to 30-11.2015	@ 1.25% per month
(2) 1-12-2015 to 31-12.2015	@ 1.25% per month
(3) 1-1-2015 to 29-2-2016	@ 1.5% per month
(4) 1-3-2015 to 31-3-2016	@ 2% per month





CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES

Service Tax – Statute Update

1. Swachh Bharat Cess ('SBC') levy made effective 15-11-2015

Section 119 inserted by Finance Act, 2015 w.e.f 14-5-2015 wherein Government assumed power to levy SBC at 2% on value of all or specified taxable services from the date to be notified. Further, that the provisions of Chapter V of the Finance Act, 1994 and the rules made there under, including those relating to refunds and exemptions from tax, interest and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Swachh Bharat Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994 or the rules made thereunder, as the case may be.

2. Accordingly, SBC levy is notified with effect from 15-11-2015 @ rate of 0.5% on value of all taxable services provided on or after 15-11-2015 including abated value of taxable service as prescribed under Notification No. 26/2012. The valuation of service shall be as determined under the Valuation Rules, i.e. Service Tax (Determination of Value) Rules, 2006. Further, SBC shall be payable by service recipient under Reverse Charge Mechanism ('RCM') under Notification No. 30/2012-ST dated 20-6-2012 in accordance with Section 68(2) of the Finance Act, 1994

[Notification No. 21/2015 – ST, 22/2015 – ST dated 6-11-2015 & Notification No.23/2015 - ST & 24/2015 – ST dated 12-11-2015].

3. SBC levy on services liable to service tax at alternate rate u/r 6(7) to Rule 6(7C) of Service Tax Rules, 1994 ('STR'):

- Service Tax Rules provide for alternate rate of tax on following services:

Rule	Service
6(7)	Air travel Agent Service
6(7A)	Life Insurance Service
6(7B)	Money Changing Service
6(7C)	Lottery Selling Service

- Sub-rule (7D) to Rule 6 inserted to provide that the person opting to pay service tax under above referred Rules is liable to pay SBC on proportionate basis viz., Service tax liability [calculated as per sub-rules (7), (7A), (7B) or (7C)] X 0.5%/14%.

[Notification No. 25/2015 Service tax dated 12-11-2015]

4. Accounting Code for SBC payment

- Accounting Codes for SBC and allied payments are as under:

Swachh Bharat Cess (Minor Head)	Tax Collection	Other Receipts (Interest)	Penalties	Deduct Refunds
0044-00-506	00441493	00441494	00441496	00441495

[Circular No.188/7/2015-ST dated 16-11-2015].

5. Frequently Asked Questions (FAQ) on SBC

The Central Government has issued Press Release on Frequently Asked Questions (FAQs) on 12-11-2015. The same can be accessed on CBEC website – www.cbec.gov.in.

6. Accounting Code for Swachh Bharat Cess

Swachh Bharat Cess (Minor Head)	Tax Collection	Other Receipts (Interest)	Penalties	Deduct Refunds
0044-00-506	00441493	00441494	0441496	00441495

7. Speedy disbursal of pending refund claims of exporters of services u/r 5 of CENVAT Credit Rules, 2004 ('CCR')

- A scheme has been drawn up to fast track sanction of refund of accumulated CENVAT credit to exporters of services. This scheme is not a substitute for various notifications but is meant to complement them and is aimed at enabling ease of doing business.
- This scheme is applicable to exporters of services who have filed refund application u/r 5 of CCR on or before 31-3-2015 and not disposed of as on the date of issue of circular.
- The phrase 'disposed of' in this context refers to either sanction of refund or denial either in whole or in part, by way of an adjudication order.
- Refunds which have been finalised earlier by issuance of adjudication order but have been remanded back to the original sanction authority will not be covered in this scheme as re-examination of such claims will have to be strictly in terms of remand order of the Commissioner (Appeals)/ CESTAT/ High Court.
- Following are additional documents to be submitted (in addition to documents required for filing claim) to avail benefit of this fast track scheme:
  - A certificate from the statutory auditor in case of companies and a chartered accountant in case of other assessees in format given in 'Annexure–1' of the Circular.
  - An undertaking from the claimant in the format given in 'Annexure–2' of the Circular.
- Operation of the scheme:
  - On receipt of documents stated above, the Jurisdictional Deputy/ Assistant Commissioner will give a dated acknowledgment to the claimant and make a provisional payment of 80% of the amount claimed as refund within five working days of the receipt of the documents. This payment shall be purely provisional and without departments right to check the correctness of the claim.
  - Decision to grant provisional payment would be an administrative order and not a quasi judicial order. Such orders are subject to review.
  - After provisional payment, the jurisdictional Deputy/Assistant Commissioner shall undertake checking the correctness of the claim in terms of relevant notification.
  - Claimant may be intimated about the inadmissible amount so that he has an opportunity to avail provisions of Section 73(3) of the Act.

  - A Show Cause Notice should be issued to show cause why the inadmissible amount should not be denied or the wherever relevant, the amount provisionally paid should not be recovered. A speaking appealable order to be passed with respect to SCN. This order will be reviewed by jurisdictional Commissioner.
  - During review, if any further amount is found inadmissible; the claimant will be intimated for availing the provisions of Section 73(3) of the Act. An SCN to be issued for the additional amount in addition to filing an appeal for setting aside or modifying relevant portion of order.
- Monitoring and reporting
  - An MIS report in the format Specified in 'Annexure 4' of the Circular to be sent by e-mail to commr.st-cbec@nic.in on 10th of every month.
  - Principal Commissioner/ Commissioners should ensure that the provisional payments of refunds are done strictly.

[Circular No. 187/6/2015-ST dated 10-11-2015]

8. Clarification on leviability of service tax in respect of seed testing with effect from 1-7-2012

- It has come to the notice of the Board that certain field formations have taken a view that all activities incidental to seed testing are assessable to service tax and only the activity in so far it relates to actual testing has been exempted in the negative list.
- The word 'seed' was deleted from 'testing' in agricultural operations so as to broaden the scope of coverage of the negative list entry and to cover any testing in agricultural operations in negative list, which are directly linked to production of agriculture produce and not to limit its scope only to seeds.

  This intent was clarified by the Joint Secretary (Tax Research Unit) *vide* Budget D.O.F. No. 334/3/2013-TRU, New Delhi, dated February 28, 2012, in para 1 (iii) of the letter.
- Thus, all testing and ancillary activities to testing such as seed certification, technical inspection, technical testing, analysis, tagging of seeds, rendered during testing of seeds, are covered within the meaning of 'testing' as mentioned in Section 66D(i) of the Act. Such services are not liable to Service tax.

[Circular No. 189/8/2015-Service tax dated 26-11-2015]

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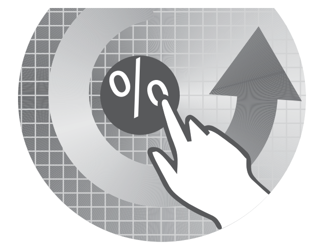


CA Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Consulting Engineers Service

1.1 Shipping Corporation of India Ltd. vs. CCE, Mumbai 2015 (40) STR 468 (Tri.-Mumbai)

The Tribunal in this case held that activities of finalising vessels/ships for movement of men and material from island to mainland, overseeing progress of construction of vessel and conducting tests on various machinery parts of ship are not covered under Consulting Engineers Service.

Business Auxiliary Service

1.2 Ideal Road Builders P. Ltd. vs. CST, Mumbai 2015 (40) STR 480 (Tri.-Mumbai)

The appellant in this case collecting toll on behalf of NHAI and retaining as commission a portion of the amounted collected as toll for services rendered of toll collection or get paid by NHAI by a fixed amount. The department sought to tax commission under BAS. The Tribunal held that, appellant is neither promoting nor marketing services provided by the client, in as much as that NHAI is a statutory body for development, maintenance and management of national highway and other highway power which were to be exercised by Government of India. The appellant is not rendering any service which is incidental or auxiliary on behalf of NHAI and therefore not covered under BAS.

1.3 Lalit Dongre vs. CCE, Nashik 2015 (40) STR 486 (Tri.-Mumbai)

The appellant distributors of binary network company appointed further distributors to create chain of distributors and as per agreement distributors and sub-distributors under compulsion to buy products from shopping section of company. The department sought to tax them on the ground that, appellant is not independent trader but commission agent under BAS. The Tribunal held that, appellant is in receipt of commission/facilitation for sales derived on the basis of purchase made by distributors appointed and further down line. The issue is squarely covered by judgment in Surendra Singh Rathore and Smt. Chanda Bohra 2014 (34) STR 147 (T) and the appellant is liable under BAS.

1.4 Chaddha Paper Mills Ltd. vs. CCE, Meerut-II 2015 (40) STR 812 (Tri.-Del.)

The Tribunal in this case held that, activity of supervision of loading and dispatches of molasses and arranging information of molasses lifted is not liable to service tax under BAS.

Health and Fitness Service

1.5 Malabar Hill Citizen Forum vs. CCE, Mumbai 2015 (40) STR 480 (Tri.-Mumbai)

The Tribunal in this case held that, amount collected for conducting aerobics and yoga classes is liable to service tax under Health and Fitness Service in view of decision in *Osho International Foundation vs. CCE 2015 (40) STR 530 (T).*

Banking and Other Financial Service

1.6 Mega Enterprises vs. CCE&C, Nashik 2015 (40) STR 528 (Tri.-Mumbai)

The department sought to tax consideration received for collection of octroi on behalf

of Municipal Corporation under BFS service. The Tribunal held that, appellant is only collecting octroi on vehicle transporting goods into municipal limits and remitting same to Municipal Corporation. The said activity is not a 'cash management activity' for classifying under impugned service and cash management involves much more than mere collection of cash. Further the appellant is neither a banking company nor financial institution and the term 'any other person' appearing in definition of impugned service is to be read *'ejusdem generis'* with preceding words as clarified by CBEC Circular No. 83/1/2006-ST dated 4-7-2006.

Market Research Agency Service

1.7 Metal Development Co. vs. CCE&ST, Mumbai 2015 (40) STR 545 (Tri.-Mumbai)

The Tribunal in this case held that, consultancy and professional services rendered by IIT Engineer for metal development cannot be made liable to service tax under Market Research Agency Service.

Renting of Immovable Property Service

1.8 Ashok Enterprises vs. CCEC&ST, Belgaum 2015 (40) STR 584 (Tri.-Bang.)

The Tribunal in this case held that, appellant is not liable to pay service tax on renting of building for running hotel as the definition specifically excludes buildings used for accommodation, including hotels.

Construction of Residential Complex Service

1.9 Nithesh Estates Ltd. vs. CCE, ST&C, Bangalore-II 2015 (40) STR 815 (Tri.-Bang.)

The appellant in this case constructed residential complex for ITC Ltd., which was intended to provide accommodation to their own employees. The Tribunal held that, said activity is covered by the definition of 'personal use' hence excluded from the definition. Further, tax required to be paid has been paid by sub-contractors hence no liability on main contractor as per CBEC circular issued at relevant time.

Outdoor Catering Service

1.10 Ambedkar Institute of Hotel Management vs. CCE, Chandigarh 2015 (40) STR 823 (Tri-Del.)

The Tribunal in this case held that, activity of preparation of meals as per fixed menu and supply thereof for serving in various schools of Chandigarh Administration under Mid Day Meal Scheme of the Government is not liable to service tax under Outdoor Caterer service.

2. Interest/Penalties/Others

2.1 Sahara Power Products vs. CCE(Appeals-II), Bangalore 2015 (40) STR 536 (Tri.-Bang.)

In this case appellant claimed service tax paid under jurisdiction of Bangalore Commissionerate whereas the service was provided within Mangalore Commissionerate. The department rejected the refund citing the ground of lack of jurisdiction. The Tribunal held that, the appellant to approach Mangalore Commissionerate and the date of filing refund before Bangalore Commissionerate to be taken as date of filing.

2.2 The Design Consortium vs. CCE, Delhi-II 2015 (40) STR 734 (Tri.-Del.)

The Tribunal in this case held that, in case of refund claim limitation period is to be counted from the date of refund claim electronically filed and not from physical submission of documents.

2.3 Affinity Express India Pvt. Ltd. vs. CCE, Pune-I 2015 (40) STR 808 (Tri.-Mumbai.)

The Tribunal in this case held that, assessee is not becoming entitled to refund merely upon accumulation but required to first attempt to utilise impugned credit for payment of service tax/excise duty. The assessee qualifies for refund only after assessee satisfies condition of accumulation on account of export nature of services and inability to utilise same for domestic business and therefore ascribing any particular date as relevant date to compute period of limitation as envisaged under section 11B of CEA, 1944 is difficult. Hence there is no time limit to apply for refund claim under Rule 5 of CCR, 2004 and also prior to date of crystallization of right to refund, limitation cannot start.

3. CENVAT Credit

3.1 Vodafone India Ltd. vs. CCE, Mumbai-II 2015 (40) STR 422 (Bom.)

The appellant availed CENVAT credit of duty paid on telecommunication towers (in CKD/SKD form), part thereof, shelters/pre-fabricated buildings used for providing telecommunication service. The High Court held that, towers and shelters were immovable property and the appellant is not entitled to credit of duty paid on them.

3.2 India Cement Ltd. vs. CCE, Tirunelveli 2015 (40) STR 497 (Tri.-Chennai)

In this case the distribution of credit is done by Regional Offices instead of Head Office. The Tribunal held that, definition of ISD using term "an office" in Rule 2(m) of CCR, 2004 is not limited to physical boundary only but to be interpreted to include offices which distribute credit. In absence of any finding regarding violation of condition prescribed under Rule 7, denial of input service credit distributed by Regional Offices is not sustainable.

3.3 Ultratech Cement Ltd. vs. CCE, Jaipur-I 2015 (40) STR 523 (Tri.-Del.)

The Tribunal in this case held that, printing for distribution of calendars, greeting cards, diaries being an activity of sales promotion, is integral part of business activity. Further, organising functions for giving rewards to persons providing innovative marketing ideas is also a part of business activity.

3.4 Goodyear India Ltd. vs. CCE, Delhi-IV 2015 (40) STR 546 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on car parking availed at Head Office for parking cars of management as the same is directly related to the business of manufacturing.

3.5 Adecco Flexione Workforce Solution P. Ltd. vs. CCE&ST, Bangalore-LTU 2015 (40) STR 564 (Tri.-Bang.)

In this case the document/invoice mentioned by service provider wrongly mentioned service as IT service instead of Management Consultancy Service for which he was registered. The department sought to deny the credit. The Tribunal held that, there is no dispute on deposit of service tax in exchequer by service provider on payment of service tax by appellant to service provider and denial of credit to recipient of service, not justifiable for incorrect mention on input service in invoice.

It is further held that, CENVAT credit of service tax paid on fees paid to auditor for filing tax returns is admissible as the same has direct nexus with running business and therefore covered in the definition of input service.

3.6 Mahanagar Gas Ltd. vs. CCE, Mumbai-II 2015 (40) STR 586 (Tri.-Mumbai)

The appellant in this case availed CENVAT credit of service tax paid on inspection of safety fitness of CNG cylinders in vehicles at Regional Office located away from factory. The Tribunal held that since it is mandated that CNG can be filled only in those cylinders which are certified to be fit for filing CNG in conformity with provisions of Explosive Act, testing of cylinders is integrally connected with business of sale of CNG and also required from safety angle.

3.7 Essar Telecom Infrastructure Pvt. Ltd. vs. CST, Mumbai-I 2015 (40) STR 591 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of duty/service tax paid on inputs, capital goods and input services used for construction/erection of towers for use by telecom companies in view of Tribunal decision in *Reliance Infratel Ltd. 2015 (38) STR 984 (T)* and *GTL Infrastructure Ltd. 2015 (37) STR 577.*

3.8 Vako Seals Pvt. Ltd. vs. CCE, Mumbai-V 2015 (40) STR 594 (Tri.-Mumbai)

The Tribunal in the present case allowed CENVAT credit of service tax paid on rent of storage premises situated outside factory as the said premises used in relation to business activity and services not being tangible unlike inputs or capital goods not liable to be confined to forewalls of factory premises. It is further held that delayed inclusion of said premises in registration certificate is irrelevant so long as it was used in business activity of assessee.

3.9 ISMT Ltd. vs. CC&CE, Aurangabad 2015 (40) STR 596 (Tri.-Mumbai)

In this case Tribunal allowed CENVAT credit of service tax paid on security services provided at

nearby guest house used for lodging of employees, outside auditors while performing their services to appellant and there is nothing on record to show use of guest house for any other purpose.

3.10 Dorling Kindersley (I) Pvt. Ltd. vs. CCE&ST, Noida 2015 (40) STR 598 (Tri.-Del.)

In this case, department rejected refund claim under Rule 5 of CCR, 2004 on the ground of non-registration of appellant. The Tribunal held that, registration with department is not a pre-requisite for claiming refund and there is no stipulation or embargo in Rule 5 to deny refund of CENVAT credit in absence of registration of claimant for refund.

3.11 J. K. Lakshmi Cement Ltd. vs. CCE&ST Jaipur-II 2015 (40) STR 618 (Tri.-Del.)

The appellant in this case paid service tax on output transportation service twice once in cash and another by utilizing CENVAT credit account and subsequently taken *suo motu* credit of double utilisation. The Tribunal held that, appellant is rightly/correctly taken *suo motu* credit.

3.12 HCL Comnet System & Services Ltd. vs. CCE, Noida 2015 (40) STR 621 (Tri.-Del.)

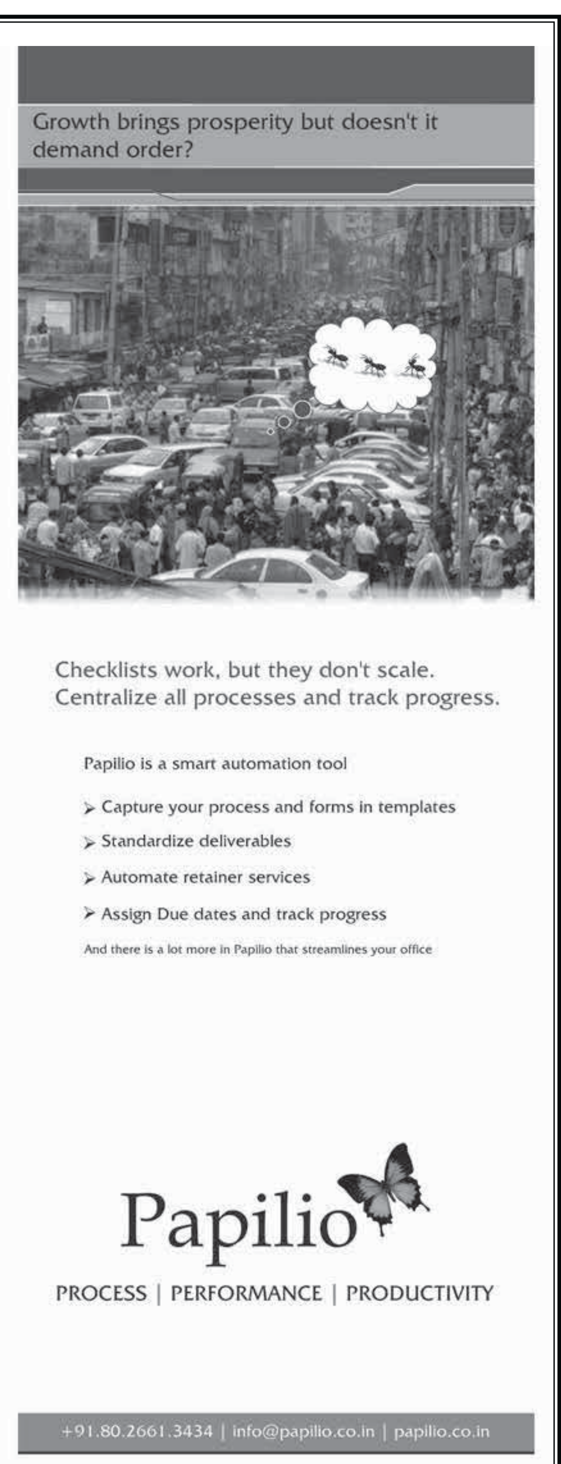
The Tribunal in this case allowed refund of service tax paid on legal services obtained in relation to filing of State tax returns of a branch office of appellant in USA.

3.13 CCE, Delhi-III vs. S. K. H. Metals Ltd. 2015 (40) STR 690 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on freight inward, telecommunication, security service, insurance, consultancy and courier services as the said services are used in manufacture excisable goods in course of business.

3.14 CCE, Chennai-II vs. Lucas TVS Ltd. 2015 (40) STR 741 (Tri.-Chennai)

The Tribunal in this case allowed CENVAT credit of service tax paid on manpower supply to canteen and pest control services as both are input services.



Janak C. Pandya, Company Secretary

CORPORATE LAWS
Company Law Update

[2015] 193 Comp Cas 25 (Bom.)
[In the Bombay High Court]
Indian Seamless Enterprises Ltd., In re

A Scheme of compromise and / or arrangement must not violate any provisions of law. Thus, gifting of shares through the Scheme of Arrangement and consequent reduction of capital is nothing but payment of dividend in kind and tantamounts to violation of Section 123 of the Companies Act, 2013.

Brief Facts

The petitioner has filed for a Scheme of Arrangement ("Scheme") under Sections 391 to 394 read with Sections 100 to 104 of the Companies Act, 1956 ("Act"). Under the Scheme, the petitioner seeks to obtain Court approval for the following:.

a. To make a gift of the shares held by the petitioner company in another company to its shareholders. The shares will be gifted in the ratio of one fully paid up equity share of that another company for one fully paid up equity share of the petitioner company.

b. To make a gift of one fully paid up equity share of that another company for every two partly paid up equity shares of the petitioner company.

c. To reduce the balance lying in its securities premium account by the book value of its investment in that another company's shares.

The company has complied with the Court direction and held the meeting of its equity share holders and unsecured creditors. There were no secured creditors. The Scheme was unanimously approved by the equity share holders as well as unsecured creditors. The company also complied with other Court directions and also served a notice of petition to the Regional Director ("RD"), Registrar of Companies ("RoC") and Income tax department ("IT").

The observations and comments of the RD were as follows which also include the observations from the Income Tax department.

1. The Scheme violates the provisions of Section 205 of the Act and Section 123 of the Companies Act, 2013 ("CA 2013") since by gifting the shares to its shareholders, which in effect is giving dividend in kind, which is prohibited.

2. It also violates Section 281 of the Income Tax Act, 1961 as various demands and proceedings are pending against the petitioner company. Thus, the proposed gift of the shares of another company would be void as against any claim in respect of any tax.

In support of the above, the RD provided the following arguments:

a. As analysis of the provisions of Section 123 and the definition of dividend under Section 2(35) of the CA 2013 was undertaken. As per Section 123, the payment of dividend, otherwise in cash, is prohibited.

b. In ordinary sense, the dividend also includes the distribution of any property in kind. The apex court judgment in case of *Kantilal Manilal vs. CIT [1961] 41 ITR 275 (SC)* and in case of *CIT vs. Central India Industries Ltd [1971] 82 ITR 555 (SC); [1972] 3 SCC 311* was referred.

c. The market value of shares to be gifted is much higher than the book value. Thus, the petitioner company is distributing the revenue or profit that would have earned from sale of such shares.

d. Once, above gift is termed as dividend, then the same is in violation of Section 123 of the CA 2013 and is therefore illegal.

From the petitioner's side, the following submissions were made:

a. Sections 391 to 394 of the Act are a complete code and that the petitioner company is conferred with wide powers to undertake any kind of scheme of compromise or arrangements with its shareholders and creditors.

b. The above powers cannot be taken away by other sections.

c. The petitioner company has opted for the procedure under Sections 391 to 394 read with Sections 100 to 104 of the Act and thus there is no violation of Section 205 and Section 123.

d. The following judgments of this Court and Apex Court were also referred:

    i. *Securities and Exchange Board of India vs. Sterlite Industries (India) Ltd. [2003] 113 Comp Cas 273 (Bom); [2003] 45 SCL 475 (Bom)* and

    ii. *PMP Auto Industries Ltd., In re [1994] 80 Comp Cas 289 (Bom.); [1995] 5 Comp LJ 598 (Bom.)* were referred.

    iii. Unreported judgments in case of *Tatanet Services Ltd dated March 3, 2006 in company petitions Nos. 785 and 759 of 2005* and

    iv. Decision of Hon. Apex Court in *Miheer H. Mafatlal vs. Mafatlal Industries Ltd. [1996] 87 Comp Cas 792 (SC)* was also referred.

e. Upon reliance placed by the RD on two judgments, it is submitted that both the cases are under the I.T. Act. Under the I.T. Act, there is a specific definition of "dividend" which is different then that of under the Act and CA 2013. Thus, the said decisions of Aapex Court has no relevance with the present case.

f. The decision of the Apex Court in above two cases was related to the taxability of dividend in the hands of shareholders and not the company.

g. Under the Companies Act distribution of dividend should be considered from company's perspective and not from shareholders' perspective.

h. Various judgments of the Apex Court were referred such as (1) *CIT vs. Nalin Behari Turf Club Ltd. vs. Regional Director, Employees State insurance Corporation [2009] 15 SCC 33, (2) Whirlpool Corporation vs. Registrar of Trade Marks [1998] 8 SCC 1, (3) Union of India vs. R.C. Jain [1981] 2 SCC 308 etc.*

i. The order dated September 27, 2005 of this Court in the case of KEC Infrastructure Ltd was also referred wherein the Court has sanctioned the scheme involving the distribution of shares by KEC International Ltd.

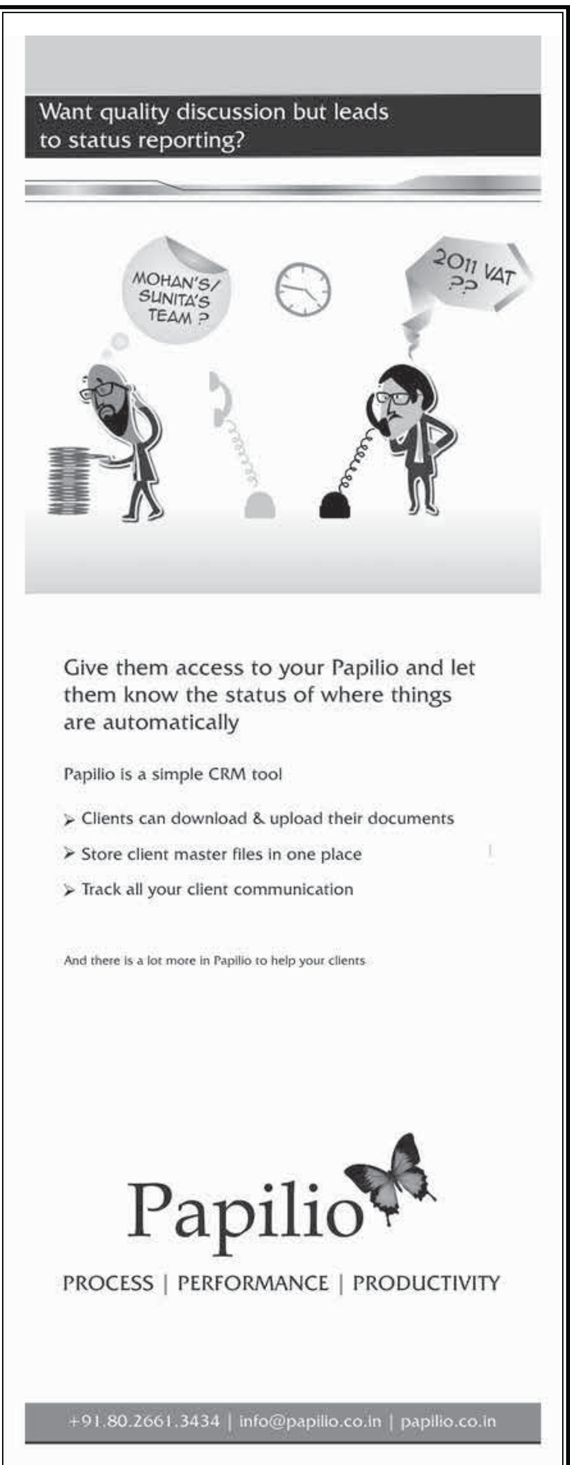
Judgments and Reasoning

The Court rejected the petition and viewed that the Scheme is illegal and contrary to law.

The Court relied on the following arguments from the RD and analysis of certain facts. First of all on various judgments relied upon by the petitioner, the RD had not raised the objection that scheme in question violated any other provisions of the Act. In the present case, the RD's objection is that the gifting of shares violates the provisions of Section 123 of the CA 2013. The Court also observed that none of the judgments cited by the petitioner deal with the similar situation. With reference to Miheer H. Mafatlal case, the Court observed that it has categorically held that a scheme of compromise and/or arrangement must not violate any provisions of law. The Court also looked into the definition of dividend under Section 2(35) of the CA 2013. The Court viewed that the inclusive of the definition of dividend will not exclude the meaning in its ordinary sense. Thus, the Court accepted the RD's reliance placed on two judgments and concluded that the ratios of these two judgments will be applicable and relevant in the context of the Companies Act, the inclusive definition of dividend under Section 2(6A) of the Income Tax Act, 1961 should mean dividend as ordinarily understood.

On the question of whether gifting of shares is in violation of Section 123 of the CA 2013, the Court observed that Section 123(5) prohibits the payment of dividend, other than in cash. Further, the gift of shares is already concluded as payment of dividend. Thus, the Court is of view that this is payment of dividend in kind which is expressly prohibited.

On submission that the petitioner company can distribute its assets under the provisions of Section 100 to 104 of the Act, the Court observed that the same is merely accounting entries as mentioned in Clause 5 of the Scheme. Further, the reduction is a consequence of gifting of shares.



CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Circulars, Notifications issued by RBI and & Press Notes issued by DIPP.

A. Circulars issued by RBI

1. Switching from barter trade to normal trade at the Indo-Myanmar Border

Hitherto, *vide* A.D. (G.P. Series) Circular No.8 dated May 17, 1997 read with A.P.(DIR Series) Circular No. 17 dated October 16, 2000 and notified under Regulations 3 and 5 of the Notification No. FEMA 14-Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 it has been stipulated that the border trade between Myanmar and India may be settled through barter system apart from settlement in any permitted currency in addition to the Asian Clearing Union mechanism to facilitate exchange of locally produced commodities along the Indo-Myanmar border. As such, these transactions were not captured in the banking system or reflected in the trade statistics.

However, over a period of time the banking presence is in place to support normal trade with Myanmar. Accordingly, it has now been provided that all trade transactions with Myanmar, including those at the Indo-Myanmar border with effect from December 1, 2015 would be settled in any permitted currency in addition to the Asian Clearing Union mechanism.

A. P. (DIR Series) Circular No. 26 dated 5th November, 2015)

(Comment: This move by RBI is in line with the trade requirements. It will help in capturing the transactions in the banking system and also obtain the trade statistics.)

2. Software Export – Filing of bulk SOFTEX – further liberalisation

Currently, in terms of A.P. (DIR Series) Circular No. 80 dated February 15, 2012, A.P. (DIR Series) Circular No. 66 dated January 1, 2013 and A.P. (DIR Series) Circular No. 43 dated September 13, 2013, a software exporter, whose annual turnover is at least ` 1000 crore or who files at least 600 SOFTEX forms annually on an all India basis, is eligible to declare all the off-site software exports in bulk in the form of a statement in excel format, to the competent authority for certification on monthly basis.

This benefit has now been extended to all software exporters and they can now file single as well as bulk SOFTEX form in excel format to the competent authority for certification. Since the SOFTEX data from STPI/SEZ is being transmitted in electronic format to RBI, the exporters are required to submit the SOFTEX form in duplicate as per the revised procedure. STPI/SEZ will retain one copy and handover

the duplicate copy to the exporters after due certification.

The software exporters can generate SOFTEX form number (single as well as bulk) for use in off-site software exports from the website www.rbi.org.in.

(A.P. (DIR Series) Circular No. 27 dated 5th November, 2015)

(Comment: This is a welcome move by RBI which will reduce the procedural burden and enhance the ease of doing business for software exporters.)

3. Risk Management & Inter-Bank Dealings: Relaxation of facilities for residents for hedging of foreign currency borrowings

Under the existing guidelines contained in the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 dated May 3, 2000 (Notification No. FEMA/25/RB-2000 dated May 3, 2000) as amended from time-to-time and A.P. (DIR Series) Circular No. 32 dated December 28, 2010 containing Comprehensive Guidelines on Over The Counter (OTC) Foreign Exchange Derivatives and Overseas Hedging of Commodity Price and Freight Risks, residents having long term foreign currency liability in terms of Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, (FEMA 3/2000-RB, dated May 3, 2000,) are permitted to hedge exchange rate and/or interest rate risk exposure thereof by undertaking a Foreign currency-Indian Currency swap to move from a foreign currency liability to a rupee liability with an Authorised Dealer Cat-I bank subject to the operational guidelines, terms and conditions as mentioned .

The resident investors are now permitted to enter into a Foreign Currency-Indian Currency (FYC-INR) swaps with Multilateral or International Financial Institutions (MFI/IFI) in which Government of India is a shareholder subject to the following terms and conditions:

(i) Such swap transactions shall be undertaken by the MFI / IFI concerned on a back-to-back basis with an AD Category-I bank in India.

(ii) AD Category-I banks shall face, for the purpose of the swap, only those Multilateral Financial Institutions (MFIs) and International Financial Institutions (IFIs) in which Government of India is a shareholding member.

(iii) The FCY-INR swaps shall have a minimum tenor of three years. All other operational guidelines, terms and conditions relating to FCY-INR swaps as laid down in A.P. (DIR Series) Circular No. 32 dated December 28, 2010, as amended from time to time, shall apply, *mutatis mutandis*.

(iv) In the event of a default by the resident borrower on its swap obligations, the MFI / IFI concerned shall bring in foreign currency funds to meet its corresponding liabilities to the counterparty AD Cat-I bank in India.

(v) Authorised Dealers Category-I bank shall report the FCY-INR swaps transactions entered into with the MFIs / IFIs on a back-to-back basis to CCIL reporting platform, including details of the foreign currency borrower, in terms of Reserve Bank Circular No. FMD.MSRG.No. 94/02.05.002/2013-14 dated December 4, 2013 on the reporting platform for OTC Foreign Exchange and Interest Rate Derivatives.

(A.P. (DIR Series) Circular No. 28 dated 5th November, 2015)

(Comment: This is a welcome move by RBI with a view to facilitate hedging of long term foreign currency borrowings by residents by providing an alternative mode. This will also help in increasing the depth of forex hedging market in India)

4. Import of Goods into India – Evidence of Import

Currently, as per para A.10.1 of A.P. (DIR Series) Circular No. 106 dated June 19, 2003, an importer has to submit (a) The exchange control copy of the Bill of Entry for home consumption; (b) The exchange control copy of the Bill of Entry for warehousing, in the case of 100% Export Oriented Units (EOUs); or (c) Customs Assessment Certificate or Postal Appraisal Form as declared by the importer to the Customs Authorities as evidence of imports.

With the establishment of Free Trade Warehousing Zones / SEZ Unit warehouses, imported goods can be stored therein, for re-export / re-selling purposes for which Customs Authorities issue Ex-Bond Bill of Entry. the Bill of Entry issued by Customs Authorities named as Ex-Bond Bill of Entry or by any other similar nomenclature, shall be considered as evidence for physical import of goods.

Similarly, in cases where goods have been imported through couriers, the Courier Bill of Entry, as declared by the courier companies to the Customs Authorities, shall also be considered as evidence of import of goods.

(A.P. (DIR Series) Circular No. 29 dated 26th November, 2015)

(Comment: This is a step in the right direction by the RBI which will enhance the ease doing business in India and reduce the procedural compliance.)

5. Advance Remittance for Import of aircrafts /helicopters / other aviation related purchases

Currently, in terms of clause 3(f) of A. P. (DIR Series) Circular No.77 dated June 29, 2007, AD Category I banks can allow advance remittance, without bank guarantee or an unconditional, irrevocable standby letter of credit up to USD 50 million, in the case of import of aircrafts/ helicopters/ other aviation related purchases by scheduled air transport operators permitted by the Director General of Civil Aviation (DGCA), after obtaining the requisite approval of the Ministry of Civil Aviation (MoCA)/ DGCA / other agencies in terms of the extant Foreign Trade Policy for importing the aircraft.

Subsequently, *vide* Notification No. 24/2015-2020 dated October 9, 2015, the Director General of Foreign Trade has announced amendment in Policy condition 1 of Chapter 88 of ITC (HS), 2012-Schedule – 1 (Import Policy).

Accordingly, AD Category – I banks may, while allowing advance remittance without bank guarantee or an unconditional, irrevocable standby letter of credit up to USD 50 million are required to ensure that only the requisite approval of DGCA for import of aircrafts/ helicopters in terms of the extant Foreign Trade Policy has been obtained by the company for operating Scheduled or Non-Scheduled Air Transport Services (including Air Taxi Services). In other words, the approval from MoCA will not be required.

(A.P. (DIR Series) Circular No. 30 dated 26th November, 2015)

6. Investment by Foreign Portfolio Investors (FPI) in Corporate Bonds

Currently, as per Schedule 5 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 notified *vide* Notification No. FEMA.20/2000-RB dated May 3, 2000, as amended from time-to-time and in terms of A.P. (DIR Series) Circular No. 71 dated February 3, 2015 and A. P. (DIR Series) Circular No.73 dated February 6, 2015, all future investments by Foreign Portfolio Investors (FPI) in NCDs/ bonds are required to be made in securities with a minimum residual maturity of three years

It has now been decided to permit FPI to acquire NCDs/bonds which have defaulted either fully or partly in the repayment of principal on

maturity of bond or in repayment of principal installment in case of amortising bond.

The revised maturity period of such NCDs/ bonds, restructured based on negotiations with the issuing Indian company, should be three years or more.

The FPI which propose to acquire such NCDs/ bonds under default should disclose to the Debenture Trustees the terms of their offer to the existing debenture holders / beneficial owners from whom they are acquiring.

Such investment shall be within the overall limit prescribed for corporate debt from time to time (currently ` 2443.23 billion).

(A.P. (DIR Series) Circular No. 31 dated 26th November, 2015)

(Comment: This circular seems to have been issued in the background of recent default by Amtek Auto whereby JP Morgan mutual fund had stopped redemptions of its mutual funds which had invested in their bonds. This circular could allow easy exit to bondholders of defaulting companies and at the same time deepen the market for stressed bonds.)

7. External Commercial Borrowings (ECB) Policy – Revised framework

The basic framework under which eligible resident entities are allowed to raise External Commercial Borrowings (ECB) is contained in A.P. (DIR Series) Circular No. 5 dated August 1, 2005 changed from time-to-time.

To bring the ECB framework in line with current financing eco-system, RBI has issued this circular outlining the new framework for ECBs to replace the previous ECB framework.

The RBI has laid down revised ECB framework based on:

– A more liberal approach, with fewer restrictions on end uses, higher all-in-cost ceiling, etc. for long term foreign currency borrowings as the extended term makes repayments more sustainable and also minimizes roll-over risks for the borrower;

– A more liberal regime for INR denominated ECBs where the currency risk is borne by the lender;

–- Expansion of the list of overseas lenders to include long-term lenders, such as, Insurance Companies, Pension Funds, Sovereign Wealth Funds;

– Only a small negative list of end-use restrictions applicable in case of long-term ECB and INR denominated ECB;

– Alignment of the list of infrastructure entities eligible for ECB with the Harmonised List of the Government of India.

The revised ECB framework would comprise the following three tracks:

Track I	:	Medium term foreign currency denominated ECB with Minimum Average Maturity (MAM) of 3/5 years.
Track II	:	Long term foreign currency denominated ECB with MAM of 10 years.
Track III	:	Indian Rupee denominated ECB with MAM of 3/5 years.

Entities raising ECB under extant framework could raise them by March 31, 2016 provided the agreement in respect of the loan is already signed by the date the new framework comes into effect. For raising of ECB under the following carve-outs, the borrowers would, however, have time up to March 31, 2016 to sign the loan agreement and obtain the Loan Registration Number (LRN) from the Reserve Bank by this date:

o ECB facility for working capital by airlines companies;

- o ECB facility for consistent foreign exchange earners under the USD 10 billion Scheme; and
- o ECB facility for low cost affordable housing projects (low cost affordable housing projects as defined in the extant Foreign Direct Investment policy).

The new ECB framework would come into force from the date of publication, in the Official Gazette, of the relative Regulations issued under FEMA. These Regulations are being issued separately.

The detailed guidelines as contained in the Annex will be discussed in detail in the next issue of The Chamber's Journal.

(A.P. (DIR Series) Circular No. 32 dated 30th November, 2015)

B. Notifications issued by RBI

1. Foreign Exchange Management (Permissible Capital Account Transactions) (Fourth Amendment) Regulations, 2015

RBI, in consultation with the Government has made amendments in the Notification No. FEMA 1 – Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 (Notification No. FEMA.1/2000-RB dated 3rd May 2000), through amendment in Regulation 4, and hence in sub-regulation (b), the existing Explanation (i) shall be substituted by the following:

> "For the purpose of this regulation, "real estate business" shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014"

(Notification No FEMA. 345/2015-RB dated 16th November, 2015)

(Comment: This change in definition of 'permissible capital account transaction' is consequential to amendment in FEMA Notification 20/2000 whereby foreign investment has now been allowed in REIT.)

2. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Eleventh Amendment) Regulations, 2015

RBI, through amendments in Notification No. 20- the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, has notified new Schedule -11 titled "Investment by a person resident outside India in an Investment Vehicle" through amendments in Regulations 2, 5, 9 & 12 to promote inbound investments in an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and to include Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvIts) governed by the SEBI (InvIts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012, subject to certain terms and conditions contained in new Schedule–11.

Accordingly, a person resident outside India (other than an individual who is citizen of or any other entity which is registered / incorporated in Pakistan or Bangladesh), including an Registered Foreign Portfolio Investor (RFPI) or a non-resident Indian (NRI) can acquire, purchase, hold, sell or transfer units of an Investment Vehicle, in the manner and subject to the terms and conditions specified in Schedule–11

RBI has also specified that any person who is a non-resident and holds units of an Investment Vehicle may pledge such units to secure credit facilities being extended to the non-resident investor.

A new Schedule–11 to FEMA Notification No. 20 in this regard which is reproduced hereunder:

1. A person resident outside India including an RFPI and an NRI may invest in units of Investment Vehicles subject to the conditions laid down in this Schedule.

2. The payment for the units of an Investment Vehicle acquired by a person resident or registered/incorporated outside India shall be made by an inward remittance through the normal banking channel including by debit to an NRE or an FCNR account.

3. A person resident outside India who has acquired or purchased units in accordance with this Schedule may sell or transfer in any manner or redeem the units as per regulations framed by SEBI or directions issued by RBI.

4. Downstream investment by an Investment Vehicle shall be regarded as foreign investment if neither the Sponsor nor the Manager nor the Investment Manager is Indian 'owned and controlled' as defined in Regulation 14 of the principal Regulations.

   Provided that for sponsors or managers or investment managers organised in a form other than companies, SEBI shall determine whether the sponsor or manager or investment manager is foreign owned and controlled.

   Explanation 1: Ownership and control is clearly determined as per the extant FDI policy. AIF is a pooled investment vehicle. 'Control' of the AIF should be in the hands of 'sponsors' and 'mangers/investment managers', with the general exclusion of others. In case the 'sponsors' and 'managers/investment managers' of the AIF are individuals, for the treatment of downstream investment by such AIF as domestic, 'sponsors' and 'managers/investment managers' should be resident Indian citizens. As ownership and control cannot be determined in LLP under the extant FDI policy, a LLP shall not act as sponsor or manager/investment manager.

   Explanation 2: The extent of foreign investment in the corpus of the Investment Vehicle will not be a factor to determine as to whether downstream investment of the Investment Vehicle concerned is foreign investment or not.

5. Downstream investment by an Investment Vehicle that is reckoned as foreign investment shall have to conform to the sectoral caps and conditions / restrictions, if any, as applicable to the company in which the downstream investment is made as per the FDI Policy or Schedule 1 of the principal Regulations.

6. Downstream investment in an LLP by an Investment Vehicle that is reckoned as foreign investment has to conform to the provisions of Schedule 9 of the principal Regulations as well as the extant FDI policy for foreign investment in LLPs.

7. An Alternative Investment Fund Category–III with foreign investment shall make portfolio investment in only those securities or instruments in which a Registered Foreign Portfolio Investor is allowed to invest under the principal Regulations.

8. The Investment Vehicle receiving foreign investment shall be required to make such report and in such format to Reserve Bank of India or to SEBI as may be prescribed by them from time-to-time.

(Notification No. FEMA. 355/2015-RB dated 16th November, 2015)

(Comment: Hitherto, foreign investments in AIFs were subject to approval by FIPB and in some cases, they were not logically pursued due

to sectoral limits being breached in accordance with the definition of downstream investments. The relaxed definition of downstream investments would now lead to an increase in foreign investments in AIFs. It is however to be noted that the preferential treatment to resident individual sponsors and managers/investment managers could create a disparity vis-à-vis non individual sponsors and managers/investment managers.)

C. Press Notes issued by DIPP

Modified Foreign Direct Investment policy

1. Introduction

Press Note No. 12 (2015 series) dated 24th November, 2015 issued by Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India, has amended the existing Consolidated FDI policy. The Government of India, under the dynamic leadership of Shri Narendra Modi has time and again emphasised on bringing out laws and regulations that will enable the ease of doing business in India. Further India's improved ranking on the 'ease of doing business' front has improved from 142 to 130. Also, the PM Modi led Government has set a very ambitious target of making through the list of top 50 countries on the ease of doing business front by the year 2017. In this backdrop, it is worthwhile to consider the following amendments in the existing FDI policy.

2. Make in India

2.1 'Make in India' is one of the strategic movements undertaken by the Government of India. This initiative taken by PM Narendra Modi is an endeavour to make India, 'A Global Manufacturing Hub'. In order to make India a business hub, it is very essential for India to have inflow of funds from countries across the globe. In order to attract investments, various amendments have been introduced.

3. Amendments in FDI Policy

In order to appreciate the difference in the amendments made in the FDI policy by the Government of India, a table is provided which explains the existing Consolidated FDI policy and explains the implications of the revised policy.

3.1 Manufacturing sector

Under paragraph 2.1.25, 'Limited Liability Partnership' is defined. However, as per the revised press note, the term 'Manufacture' has been added to the definition provided under the said paragraph.

Definition of Manufacture

"Manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing –

(a) Resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or

(b) Bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

3.1.1 The FDI policy, except for certain specific sectors allows 100% FDI under the automatic route. However, various conditions have been imposed in the specified sectors for FDI. One such sector is the manufacturing sector. Under this sector, there are certain items which have been reserved for the Micro and Small enterprises. In order to enable the MSEs to expand their business presence, it has been provided that business can be transacted through e-commerce as well. The following paragraph inserted clearly provides for the same.

*"Subject to the provisions of the FDI policy, foreign investment in 'manufacturing' sector is under automatic route. Further, **a manufacturer is permitted to sell its products manufactured in India** through wholesale and/or retail, **including through e-commerce** without Government approval".*

3.2 FDI in LLPs

So far, [FDI in LLPs][1] was allowed only through Government Route. However, in order to boost economic growth in India, the Government has revised the FDI policy ***qua*** investment in LLP.

Current Position	Revised Position
(a) **FDI – Allowed – Govt. Approval route only in following:** - i. Sectors/activities – 100% FDI Allowed through automatic route ii. No FDI-linked performance conditions2 (b) LLPs with FDI cannot operate in agricultural/plantation activity, print media or real estate business. (c) Company with FDI – (investment in LLP)[3] – Only if – Company and LLP operate where 100% FDI (automatic route) is allowed – and there are no FDI-linked performance conditions. (d) LLPs with FDI – Not eligible to make any downstream investments. (e) Investment by Foreign Portfolio Investors (FPIs) and Foreign Venture Capital Investors (FVCIs) will not be permitted. LLPs will also not be permitted to avail External Commercial Borrowings (ECBs). (f) LLP with FDI – body corporate – a company registered in India under Companies Act may be a designated partner or it may also nominate an individual to act as a designated partner in accordance with the provisions of the LLP Act. No other body, such as an LLP or a trust may act as a designated partner. For such LLPs, the designated partner shall satisfy the test of residency in India under both, the LLP Act, 2008 and under Foreign Exchange Management Act, 1999. (h) The designated partners – responsible for compliance with all the above conditions. Also liable for all penalties imposed on the LLP for their contravention, if any (i) Company with FDI - Conversion into LLP – allowed only if conditions stipulated[4] under the FDI policy are met and with the prior approval of FIPB/Government.	(a) FDI – permitted under Automatic route in LLPs operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI linked Performance conditions. (b) Company or LLP – Having FDI – permitted – Downstream investment in another company or LLP. This is only permitted in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions. (c) FDI in LLP is subject to the compliance of the conditions of LLP Act, 2008.

From the above, it appears that various conditions which were very strict in relation to FDI in LLP have now been done away with. However, in the absence of clarity on the matter, it will be interesting to see if the other conditions provided continue to prevail or not under the new FDI regime.

1. Foreign Capital participation in LLPs – allowed only by way of cash consideration, received by inward remittance, through normal banking channels or by debit to NRE/FCNR account of the person concerned, maintained with an authorised dealer/ authorised bank.
2. Example - 'Non Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects' etc.
3. Investment in FDI by such Company which is having FDI
4. (Except clause 3.2.5(e) which would be optional in case of a company)

3.3 Definition of Control

As discussed above, chapter 2 defines various expressions in the FDI policy to provide clarity in the matters relating to FDI in India. Paragraph 2.1.7 defines the expression 'Control'.

The definition provides that 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements.

Clarificatory definition *qua* 'control' for FDI in LLP

*For the purposes of Limited Liability Partnership, 'control' will mean **right to appoint majority of the designated partners,** where such designated partners, with specific exclusion to others, **have control over all the policies of the LLP. (Emphasis supplied)***

3.4 Definition of 'Owned'

Previously, the expression 'owned' was defined only in relation to the Company. However, since 100% FDI under Automatic route in LLPs as well has been allowed, it has been clarified that: -

"A Limited Liability Partnership will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/or entities which are ultimately 'owned and controlled by resident Indian citizens' and such resident Indian citizens and entities have majority of the Profit share".

3.5 Conditions pertaining to Downstream Investments

In the erstwhile Consolidated FDI policy, it was only a Company who was allowed to make downstream investments. However, sice LLPs have been allowed to make downstream investments, the same has been clarified as under: -

Current Position	Revised Position
*"Downstream investments by **Indian companies** will be subject to the following conditions: - ...."*	*"Downstream investments by Indian companies / **LLPs** will be subject to the following conditions: - ...."*

3.6 Infusion of foreign investment in certain companies

Current Position	Revised Position
Infusion (FDI) – Government / FIPB approval – Indian company – No operations – No downstream investments – **Approval would be required, regardless of the amount or extent of foreign investment.** Business(s) commenced or Downstream investment made – Comply with all relevant provisions. Note:- Foreign investment into other Indian companies would be in accordance/ compliance with the relevant sectoral conditions on entry route, conditionality's and caps.	Infusion (FDI) – 100% FDI – Automatic route – Indian company – No operations –No downstream investments – **automatic route only if it is without FDI linked performance conditions.** Government approval – For companies for FDI provided the activities undertaken are under Government route[5]. Business(s) commenced or Downstream investment made - Comply with all relevant provisions.

5. Regardless of the amount or extent of foreign investment

3.7 Investment by Swap of Shares

In case of sectors where FDI is allowed under automatic route, there was no clarification in relation to approval process, reporting requirements, etc. However, the revised FDI policy has clarified that Govt. approval will not be required in case of investment in sectors where FDI is allowed under the automatic route.

3.8 Companies owned/ controlled by non-resident Indians

The revised FDI policy has now provided that a company, trust and partnership firm incorporated outside India which is owned and controlled by non-resident Indians can invest in India with the special dispensation as available to non-resident Indians under the FDI policy.

3.9 Control on established or newly established Indian Company/(ies) by non-resident entities, in sectors under Government approval route

Paragraphs (vi) and (vii) have been newly inserted. It has been provided that: -

(vi) ***"Investment by NRIs** under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident outside India) Regulations **will be deemed to be domestic investment at par with the investment made by residents".***

*(vii) "A company, trust and partnership firm incorporated outside India and owned and controlled by non-resident Indians will be eligible for investments under Schedule 4 of FEMA (Transfer or issue of Security by Persons Resident outside India) Regulations **and such investment will also be deemed domestic investment at par with the investment made by residents".***

3.10 Enhancement of limit by FIPB

The Finance Minister, under the erstwhile scheme is eligible to approve the FDI proposals in relation to the foreign equity inflow up to ` 2,000 crores. The limit of ` 2,000 crores has now been enhanced from ` 2,000 crores to ` 5,000 crores.

The recommendations of FIPB on proposals with total foreign equity inflow of more than ` 5,000 crore would be placed for consideration of Cabinet Committee on Economic Affairs (CCEA).

3.11 FDI under Tea Plantation Sector

In the consolidated FDI policy issued in May, 2015, 100% FDI in Tea Plantation sector was allowed subject to the Government approval route. **However, under the revised FDI policy, 100% FDI in Tea Plantation sector has been allowed under the Automatic Route.** Further, the other condition being prior approval of the State Government concerned is still required in case of any future land use change.

3.12 FDI policy in defence sector

Defence sector has remained one of the most important sectors in India. The Government, in the defence sector has provided for various conditions. However, under the revised policy, the following conditions are provided: -

Sr. No.	Particulars	Current Position	Revised Position
1.	Route of investment	49% – Government route	49% – Automatic Route
		Above 49% to Cabinet Committee on Security (CCS) on case to case basis, wherever it is likely to result in access to modern and 'state-of-art' technology in the country.	Above 49% under Government route on case to case basis wherever it is likely to result in access to modern and 'state-of-art' technology in the country.

Other conditions: - Under the revised FDI policy, the following are the only requirements for investment in defence sector: -

(i) Govt. approval – Fresh FDI within permitted automatic level or Transfer of stake to new foreign investor.

(ii) Licence application will be considered and licences given by DIPP, M/o Commerce and Industry in consultation with M/o Defence and M/o External Affairs.

(iii) Subject to guidelines provided by M/o Defense.

(iv) Investee co – self-sufficient – manufacturer – along with manufacturing facility – maintenance and life cycle support facility.

3.13. FDI policy in Broadcasting

Sr. No.	Particulars	Current Position	Revised Position
1.	a. Teleports (setting up of up-linking HUBs / Teleports) b. Direct to Home (DTH) c. Cable Networks (Multi System Operators (MSOs) operating at National or State or District level and undertaking up gradation of networks towards digitalization and addressability) d. Mobile TV e. Headend-in-the Sky broadcasting service (HITS)	74% - Automatic route up to 49%. Investment exceeding 49%, Government route.	100% - Automatic route up to 49%. Government route beyond 49% to 100%.
2.	Cable Networks (Other MSOs not undertaking up gradation of networks towards digitalisation and addressability and Local Cable Operators (LCOs))	49% - Automatic	100% - Automatic up to 49%. Government route beyond 49%.
3.	Terrestrial Broadcasting FM (FM Radio), subject to such terms and conditions, as specified from time-to-time, by Ministry of Information & Broadcasting, for grant of permission for setting up of FM Radio stations	26% - Government route	49% - Government route
4.	Uplinking of 'News & Current Affairs' TV Channels	26% - Government route	49% - Government route
5.	Uplinking of Non-'News & Current Affairs' TV Channels/ Downlinking of TV Channels	100% - Government route	100% - Automatic route

3.14 FDI in Civil Aviation

Sr. No.	Particulars	Current Position	Revised Position
1.	a. Scheduled Air Transport Service/ Domestic Scheduled Passenger Airline b. Regional Air transport service	Automatic - 49% FDI. 100% for NRIs.	Automatic - 49% FDI. 100% for NRIs.
		N.A.	Automatic - 49% FDI. 100% for NRIs.
2.	Non-Scheduled Air Transport Service	74% FDI (100% for NRIs) – Automatic up to 49%	100% Automatic
3.	Helicopter services/seaplane services requiring DGCA approval	100% Automatic	100% Automatic

3.15 Other services in Civil Aviation sector

Sr. No.	Particulars	Current Position	Revised Position
1.	Ground Handling Services subject to sectoral regulations and security clearance	74% - Automatic up to 49%. 100% for NRIs	100% Automatic
2.	Maintenance and Repair organisations; flying training institutes; and technical training institutions	100% Automatic	100% Automatic

3.16 Satellites – Establishment and operation

Sr. No.	Particulars	Current Position	Revised Position
1.	Satellites- establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO	74% Government route	100% Government route

3.17 FDI in Credit Information Companies

Sr. No.	Particulars	Current Position	Revised Position
1.	Credit information Companies	74% (FDI+FII / FPI)	100% Automatic

Other Conditions:

Current Condition	Revised Condition
Investment by a registered FII/FPI under the Portfolio Investment Scheme would be permitted up to 24% only in the CICs listed at the Stock Exchanges, within the overall limit of 74% for foreign investment.	This clause has now been deleted. This therefore, implies that the limit provided of 24% has now been removed. 100% FDI can be made by FII / FPI, etc.

3.18 Introduction of FDI in Duty Free Shops

Under the Automatic route, 100% FDI is allowed in Duty Free shops subject to following conditions: -

(i) Duty Free Shops would mean shops set up in custom bonded area at International Airports/ International Seaports and Land Custom Stations where there is transit of international passengers.

(ii) Foreign investment in Duty Free Shops is subject to compliance of conditions stipulated under the Customs Act, 1962 and other laws, rules and regulations.

(iii) Duty Free Shops entity shall not engage into any retail trading activity in the Domestic Tariff Area of the country.

3.19 FDI in Banking Sector

FDI in the Banking sector so far was allowed up to 74%. This limit of 74% included investment by FIIs and FPIs. After the revised the revised FDI policy, the situation has changed.

Current Position	Revised Position
(i) In the case of FIIs/FPIs, as hitherto, individual FII/FPI holding is restricted to below 10 per cent of the total paid-up capital, aggregate limit for all FIIs/FPIs/QFIs cannot exceed 24 per cent of the total paid-up capital, **which can be raised to 49 per cent** of the total paid-up capital by the bank concerned through a resolution by its Board of Directors followed by a special resolution to that effect by its General Body.	(i) In the case of FIIs/FPIs, as hitherto, individual FII/FPI holding is restricted to below 10 per cent of the total paid-up capital, aggregate limit for all FIIs/FPIs/QFIs cannot exceed 24 per cent of the total paid-up capital, **which can be raised up to sectoral limit of 74 per cent** of the total paid-up capital by the bank concerned through a resolution by its Board of Directors followed by a special resolution to that effect by its General Body.

3.20 FDI in real estate

Although, 100% FDI in real estate is allowed under the automatic route, the same is subject to various conditions. The following table elaborates the differences in the conditions that are required to be satisfied, both as per the current policy and as per the revised policy

Current Position	Revised Position
(A) Minimum area to be developed under each project (i) Serviced plots - NIL (ii) Construction - development projects - minimum floor area of 20,000 sq. meters. (B) Investee - Minimum FDI - US$ 5 million within six months of commencement of the project. Project Commencement date - Date of approval of the building plan/lay out plan by the relevant statutory authority. Subsequent tranches of FDI can be brought till the period of ten years from the commencement of the project	Each phase of the construction development project would be considered as a separate project for the purposes of FDI policy. Investment will be subject to the following conditions: - (A) (i) Investor may exit on completion of project or after development of trunk infrastructure.

Current Position	Revised Position
or before the completion of project, whichever expires earlier[6]. (C) (i) The investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage. (ii) The Government may, in view of facts and circumstances of a case, permit repatriation of FDI or transfer of stake by one non-resident investor to another non-resident investor, before the completion of project. These proposals will be considered by FIPB on case-to-case basis ***inter-alia*** with specific reference to Note (i). (D) The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/ Municipal/Local Body concerned. (E) The Indian investee company will be permitted to sell only developed plots. For the purposes of this policy "developed plots" will mean plots where trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available. (F) The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the building/ layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/Municipal/Local Body concerned. (G) The State Government/Municipal/Local Body concerned, which approves the building/ development plans, will monitor compliance of the above conditions by the developer.	(ii) Investor may also exit and repatriate foreign investment before completion of project subject to minimum lock-in period of three[7] years. (B) The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/ Municipal/Local Body concerned. (C) The Indian investee company will be permitted to sell only developed plots. For the purposes of this policy "developed plots" will mean plots where trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available. (D) The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the building/ layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules bye-laws/regulations of the State Government/Municipal/Local Body concerned. (E) The State Government / Municipal/ Local Body concerned which approves the building/ development plans, will monitor compliance of the above conditions by the developer.

6. Conditions (A) and (B) have now been removed. Therefore, it means that 100% FDI in Construction is allowed without the conditions (A) and (B) as provided under the current consolidated FDI policy
7. This period of three years shall be calculated with reference to each tranche of foreign investment completion

3.21 FDI in Single brand product retailing

Various conditions are provided for the purpose of FDI. Clause 2(e) of paragraph 6.2.16.3 of the FDI policy has been amended. The following table highlights the differences in the conditions under the current and revised policy:

Current Position	Revised Position
(e) …………….. This procurement requirement would have to be met, in the first instance, as an average of five years' total value of the goods purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of FDI for the purpose of carrying out single-brand product retail trading (f) Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of single-brand retail trading.	(e) ………………… This procurement Requirement would have to be met annually from the commencement of the business i.e. opening of the first store. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of Foreign Investment for the purpose of carrying out single-brand product retail trading. (f) Subject to the conditions mentioned in this Para, a single brand retail trading entity operating through brick and mortar stores is permitted to undertake retail trading through e-commerce.

4. Conclusion

The amendments in the FDI policy in relation to the modified FDI limits, allowing FDI through automatic route, relaxation of various stringent conditions is a welcome measure as this is expected to boost investments in India. It is expected that the entry of foreign investors will help to solve the unemployment issues. This will also encourage start-up ventures, Foreign Technical Collaborations in various sectors, better infrastructure etc. The foreign investors in return will also benefit since they will be in a position to expand their business operations. All in all, it is a win-win situation for India and the foreign investors.

> The less passion there is, the better we work. The calmer we are the better for us and the more the amount of work we can do. When we let loose our feelings, we waste so much energy, shatter our nerves, disturb our minds, and accomplish very little work.
>
> The more you think of yourself as shining immortal spirit, the more eager you will be to be absolutely free of matter, body, and senses. This is the intense desire to be free.
>
> — *Swami Vivekananda*

Ajay Singh, *Advocate* & CA Namrata Bhandarkar

BEST OF THE REST

1. Sale deed – Execution – Seller stating payment of consideration amount of more than ` 100/-. Sale deed was not registered – No title or interest can be conferred on basis of oral sale. Transfer of Property Act, 1882 – S. 54

Mutation entries- Neither creates nor extinguishes any right nor confers title. Evidence Act 1872, S.35

The father of the Plaintiffs namely Rajendra Deka and Gajia alias Gaji were brothers. Gaji was untraced for 30/35 years. The plaintiff's father was possessing the entire land (under dispute) in Village-Narayanpur as Gaji was untraced. Defendant has his land near the said plots of land in a different dag and patta. Father of the plaintiffs dies about 4 years back from the date of filing of the suit. After demise of the father, plaintiff No. 2 was taking care of the suit land and while depositing land revenue, he came to know that defendant got his name mutated in place of plaintiff's father and the name of the father was also mutated in place of Gaji by right of inheritance. It is averred that defendant had mutated his name in place of the father of plaintiffs by right of purchase. The father of the plaintiffs had never sought for any mutation in respect of 'Kha' Schedule in place of Gaji. On being protested by the plaintiffs, defendant acknowledged that he had mutated his name and denounced the title of plaintiffs. Accordingly plaintiff, filed the suit.

In the written statement filed, defendant pleaded that Gaji went missing about 45-46, years back and not 30/35 years back as stated by the plaintiffs. It was admitted that share of Gaji was enjoyed by Rajendra. It was pleaded that as Gaji was not seen for more than 7 years, father of the plaintiffs became the owner in respect of share of Gaji and he sold land and delivered possession to him. The vendor also stated that he would have no objection if he got his name mutated and consequently by disclaiming the right title and interest of Rajendra, he was in possession of the said land openly and without any interruption for more than 12 years as his own land and he had continued to remain in possession of the same. It is admitted that no sale deed was executed by Rajendra but he had signed in the chitha. Rajendra had not made any objection in his lifetime in respect of the mutation and such mutation was effected long time before Rajendra had died.

The Hon'ble Gauhati High Court observed that in the written statement filed by the defendant the consideration amount was not specified. It was only indicated that reasonable consideration amount was paid. In cross examination, he had indicated that on 16-10-1964, he had paid ` 100/150 rupees and thereafter, he had made payment of further amounts towards consideration amount. Therefore, it will appear that consideration amount was more than ` 100 and no sale could have been effected in accordance with law without a registered instrument. Both the courts below had come to the conclusion that no

effective sale has taken place to confer, right, title and interest upon the defendant on the basis of alleged oral sale. It also appears from the evidence that in mutation case, no notice was issued to Rajendra , the defendant does not remember who was present with him when Rajendra had put his thumb impression in the chitha. He had also stated that at the time of mutation, he had not taken the signature of any witness. The Court further observed that no further discussion with regard to mutation is necessary as at any rate mutation entries neither create nor extinguish any right. Mutation entries, it is an established proposition of law, do not confer title.

The High Court further observed that it is for the defendant to prove the plea of adverse possession. On the face of this evidence, statutory period of 12 years was not completed to enable the defendant to plea adverse possession, witnesses also deposed that they had seen Rajendra being in possession of the suit land during his lifetime. The defendant miserably failed to prove the plea regarding adverse possession.

Jyotika Deka and others vs. Gajendra Deka (demise) and other AIR 2015 Gauhati 142.

2. Hindu Female – Right to property – Female Hindu who had a pre-existing right receives a bequest of property by a will – The bequest so made would partake the nature of an absolute estate, conferring absolute estate and right to alienate property – Hindu Succession Act 1956, Ss. 14(1) & 14(2)

Sher Singh owner of the land in dispute passed away in 1957 and executed a registered Will bequeathing a life interest in his estate to his widow Smt. Kishan Kaur. Kishan Kaur executed a sale deed dated 7-6-1974 alienating the land in dispute in favour of the appellant, Bhagat Singh. The respondents filed a suit pleading that will conferred a limited estate upon the widow and that she had no right to alienate the land in dispute and prayed for decree of joint possession. Appellant filed a written statement denying the Will and pleaded that the Widow was the absolute owner of the land by inheriting the same as natural heir and in alternative Appellant pleaded that if Will is proved the widow become absolute owner and is competent to alienate the land. The Trial Court held that respondents have succeeded in proving the execution of the Will and on perusal of the Will reveals that widow was conferred a limited estate enabling her to enjoy income from the land during her lifetime, she was debarred from alienating the land in dispute.

The substantial question of law before the Hon'ble Punjab and Haryana Court, was that whether recitals in Will conferred a limited estate upon the Widow thereby prohibiting her from alienating the property in dispute?

The Hon'ble Punjab and Haryana High Court observed that the legal nuance that flows from secs.14(1) and 14(2) of the Act is that if a limited estate is conferred upon a female Hindu in lieu of a pre-existing right of maintenance etc., the recipient of such a bequest would receive the bequest as an absolute owner of the property in which she is conferred a limited estate. In all other situations the devolution would be of a limited estate.

Sub-section(2) of section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognize pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and sec.14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and female's limited interest would automatically be enlarged into an absolute one by force of sec.14(1) and the restrictions place, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument s taken out of the ambit of sub section (2) and would be governed by sec.

14(1) despite any restriction place on the powers of the transferee.

Sec.14(2) of the Act would come into operation only where a female Hindu is conferred an interest in the property without a pre-existing right.

The Court further observed that, it is clear that where a female Hindu who had a pre-existing right receives a bequest of property by a Will, hedged in by caveats indicating a limited estate, the bequest so made would partake the nature of an absolute estate and consequently a right to alienate the property. The widow, Smt Kishan Kaur, was governed by Hindu law and has a pre-existing right of maintenance. Smt Kishan Kaur would therefore take the property bequeathed under the will as absolute owner with an inherent right to alienate the property. Consequently, the appeal was allowed and the orders of the Courts below were set aside.

Bhagat Singh vs. Smt Nihal Kaur & others. AIR 2015 Punjab and Haryana 169

3. Right to Information – Exemption Relating to personal information- Income tax returns of a Member of Legislative Assembly – Records maintained by Income tax department in respect of individual assessee cannot be said to be public record – Such records are exempted from disclosure – No ground of public interest involved – Right to Information Act, Sec. 8(1)(j)

Section 125A of Representation of the People Act, which has been introduced by the amendment of year 2002, provides for prosecution if the candidate fails to furnish the information specified in section 33A of the Act or gives false information which he knows or has reason to believe to be false. Hence a reading of the aforesaid provisions disclose that to have free and fair elections and to bring purity in the electoral process in the country and to bring probity in public life that certain electoral reforms were introduced which are now reflected in the framing of section 33A and section 125A of the Representation of the People Act. Hence the Parliament has provided for disclosure of information relating to the candidate to the extent mentioned in section 33A.

In the instant case, the petitioner has sought information to cross check the information furnished by the candidate at the time of filing of his nomination with his Income Tax Returns.

The Hon'ble Bombay High Court observed that the above reason can be hardly said to satisfy the test of the same being in public interest. The information sought also has no connection with any public activity of the candidate. The petitioner possibly being aware of the said position has therefore sought to contend that filing of the Income Tax Return is a public activity. Said contention is thoroughly misconceived as filing of Income Tax Returns can by no stretch of imagination be said to be a public activity, but is an obligation which a citizen owes to the State viz,. to pay his taxes and since the said information is held by the Income Tax Department in a fiduciary capacity, the same cannot be directed to be revealed unless the prerequisites for the same are satisfied.

Shailesh Gandhi vs. Central Information Commission, New Delhi and Ors . AIR 2015(NOC) 1138 (Bom.)

4. Cross Objections – Are maintainable even though there is no specific provision in the Act about applicability of provisions – Motor Vehicles Act, 1988 S. 173 & Civil Procedure Code O.41, R.22

The main contention of second respondent insurance company is that in absence of any specific provision in the Motor Vehicles Act which is special law, the cross objections are not maintainable. However, the same is refuted by the learned counsel for the cross-objector contending that even in the absence of any provision in Motor Vehicles Act, the provisions of CPC permits to file cross objections. Section 173 of Motor Vehicles Act provides an appeal to the High Court against the award passed by the Motor Accident Claims Tribunal which is equivalent to sec. 96 of CPC.

Sec.96 of CPC is totally silent about the cross objections but Order 41, Rule 22 of CPC provides a right to file cross objections. Whenever an appeal is filed by one party either questioning the adverse findings recorded against the cross objector or to support the findings of the Trial Court. Order 41, Rule 22 of CPC gives two distinct rights to the respondents in appeal. The first is the right of upholding the decree of court of first instance or any of the grounds on which the court decided against them and the second right is that of taking any cross-objection to the decree which the respondents might have taken by way of appeal. In the first case, second respondent the insurance company supports the decree and in the second case he attacks the decree. The explanation to Order 41, Rule.22 of CPC empowering the respondents to file cross objections in respect of finding adverse to them notwithstanding that the ultimate decision is wholly or partly in their favour. Thus there is sufficient remedy provided under Order 41, Rule.22 of CPC to file cross-objections by the correspondents in the Appeal, but Motor Vehicles and rules framed there under are totally silent regarding the right to file the cross objections either to support the decree or to challenge the adverse findings.

The Andhra Pradesh High Court observed that if the Tribunals strictly adhered to Rule 473, the tribunals cannot receive the documents or even the Tribunals are not competent to permit the parties to amend their pleadings, implead legal heirs under Order 22 or third parties under Order 1, Rule 10 of CPC and parties can be permitted to amend pleadings under Order 6, Rule 17 of CPC etc. therefore we feel that strict adherence of Rule 473 A.P.Motor Vehicles Rules would not serve the purpose of benovelent or welfare legislation. On the other hand, it amounts to driving the parties from pillar to post for redressal of grievance under the Motor Vehicles Act spending both their time and money, which ultimately defeats the very object of benevolent and welfare legislation and providing speedy redressal. While interpreting the provisions of benevolent act where two views are possible, the view favourable to the persons for whose benefit the act is expected, has to be taken into consideration to achieve the real object. Nevertheless, in view of the judgment of apex court, even in the absence of any specific provisions permitting cross objections, cross objections can be entertained and be decided by Courts.

According to the undisputed settled law even in the absence of any appeal, the Courts are competent to award just and reasonable compensation directing the parties to pay deficit Court fees on the enhanced compensation also. When such liberties is given to the Tribunals and Appellate Courts under Motor Vehicles Act entertaining cross-objections would not amount in deviating any procedure. Accordingly, it was held that the cross-objections are maintainable.

Panuganti Satyanarayana vs. Ashikulla Khan & another. AIR 2015 (NOC) 963 (A.P)

5. Unregistered agreement with tenant to convert tenancy rights into ownership rights – Tenancy thus had limited right only in respect of unit/gala – They had no other right in respect of other part of plot of plaintiff – Owner seeking to develop property – Tenant was never given any right in available balance FSI which was to utilised by owner for development of her property – Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, S.4

Muktaben Sanghavi had executed a conveyance of her entire property in favour of one Mehta and Kanakiya. Mehta and Kanakiya have conveyed the suit property to the plaintiff. The entire property consisted of a plot of land with two structures thereon being Shed-I and Shed-II and an open space in between and surrounding the two sheds surrounded by a compound wall. Part of the property has gone in road widening from where the compound wall has been demolished. Part of Shed-I has also gone in road widening. Shed-I consisted of about 12 galas which are tenanted to different persons.

The suit is concerned with unit /gala No. 1C.The defendant was tenant of Muktaben Sanghavi in respect of unit No. 1C executed an unregistered agreement with D3 to convert the tenancy rights of D3 into ownership rights in respect of unit/gala No. 1C. D3 became the owner of unit/gala No. 1C. D3 created a tenancy in favour of defendant No. 1 & 2. D3 entered into an unregistered agreement with D1 & 2 to convert that tenancy of unit 1C in favour of D1 & D2. D1 & D2 unilaterally executed a confirmation deed to register that unregistered agreement. The aforesaid transfer of the entire plot of land of Muktaben Sanghavi and of one of the tenants in one of the sheds of Muktaben Sanghavi in favour of the plaintiff on one hand and in favour of D1 & D2 on the other .

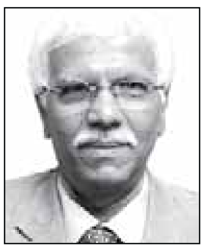
Both parties, therefore, claim their respective rights from one common owner, Muktaben Sanghavi. The plaintiff claims ownership rights of the entire plot of land of Muktaben under registered conveyance. D1 & D2 also claim ownership rights to the entire plot of land of Muktaben under an unregistered agreement having been given actually ownership rights only in respect of the unit No. 1C. The plaintiff has sued for a declaration that D1 & 2 have no right, title and interest to remain in use and occupation of unit/gala No.1C and for recovery of possession of the said unit from them as also for removal of certain unauthorised construction by them and for the relief of various injunctions restraining them from entering upon the larger property or parking their vehicles thereon or preventing the plaintiff free access to the open space on the suit plot of land, interfering with their construction of compound wall, 2 galas/units and a security cabin for certain damages, access etc.

The Hon'ble Bombay High Court made the following observation from the agreement produced. Muktaben did not agree to grant, sell or assign to D3 the entire property. D3 had no right to construct anything in the entire property described in the schedule to the agreement except the right to construct the toilet in his unit/gala and repair it as per the plans of the BMC. Right upon D3 would be a member of the society in respect of unit no.1C in which his tenancy right was converted into ownership right. Muktaben would continue to have ownership rights over the entire property other than the unit No.1C. It was right of Muktaben to use the available FSI which was not given to D3 under the agreement. D3 had no right to construct.

The Hon'ble High Court further observed that it is trite that none can transfer a better title than what he has, D3 had title only to unit/gala No. 1C upon conversion of his tenancy into ownership rights. D3 could therefore, transfer only unit gala No.1C to D1 & 2 as tenants and/or as purchasers. D3 was never given any right in the available balance FSI which was to be utilized by Muktaben for development of her property and which can be done only upon plans sanctioned by the BMC. Consequently D3 and later D1 & 2 are not flat purchasers as contemplated under MOFA. They are only owners of unit/gala No.1C. They would have no right in respect of any other portion of the property of Muktaben. They however would be entitled to all rights that the tenant would have in respect of his tenanted premises. That would be the right of having access to the tenanted premises from the land appurtenant to the tenanted premises. Such right would be conferred upon the tenant becoming a owner of the tenanted premises. This would mean and include the right to have access from the road to the tenanted premises and to park the vehicles of the tenant/owner on the land appurtenant to the tenanted premises.

The Hon'ble Bombay High Court while granting injunction in relation to the said property held that Defendant No.1 & 2 shall not sell, alienate, encumber, part with possession or create any third party rights in any unit pending suit. They shall be entitled to use occupy and enjoy Gala No.1C and shall also be entitled to park their car outside unit no.1C in the space appurtenant to unit Gala No. 1C in the space appurtenant to unit No. 1C so as to leave free access to all other unit holders as also plaintiff and persons claiming through the plaintiff. Defendants Nos. 1 & 2 are refrained from entering upon the larger property seen to be belonging to Muktaben and later to Plaintiff.

Parwan Construction Pvt Ltd. vs. Ranjitsingh Linga and other AIR 2015 (NOC) 951 (Bom.)



Kishor Vanjara, *Tax Consultant*

TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxmann, Current Tax Report (CTR), The Tax Referencer (TTR), Income Tax Report (ITR Tribunal), Sales Tax Review(S.T Review),The Bombay Chartered Accountant Journal (BCAJ), Company Cases,The Chamber's Journal (CJ),The Chartered Accountant Journal (CAJ), All India Federation of Tax Practitioners Journal (AIFTPJ), Times of India and Economic Times for the Period August 2015 to November 2015 has been arranged and indexed topic-wise.

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CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

FED – THE GAME CHANGER

On an overall basis, the month of November was positive for the world economy. The US economy continued its improvement and unemployment reduced further to the lowest level achieved in last number of years. The growth rate inched up and consumer sentiment remained buoyant. At the end of the month, the economy of the world appears to be in better shape than earlier; in spite of the possibility of an increase in interest rate by FED which is likely to have complicated repercussions on many economies across the world. Though in the beginning of the month, a majority of the analysts were of the opinion that the FED will not increase the benchmark interest rate in the current calendar year; the picture changed towards the end of the month. Now majority is of the opinion that the FED will increase the interest rate, though nominally to begin with. If the rate is increased, the US deposits will start earning better returns and the price of the US bonds may ease. However, the move will increase cost of borrowings for US businesses and its consumers, thereby having an impact on the demand. The FED interest rate hike is long awaited and the world markets have remained volatile, due to uncertainty of the event. Many countries are prepared and some of them even want it to happen so that at least the uncertainty is reduced.

There were no hiccups from China during the month and the economy remained on track as expected. The stock markets in the country also improved indicating strength in the economy, which albeit maybe temporary. The data from the country remained positive and as the immediate expectations were not great, it gave stability to the region. The Chinese Government started making efforts to keep the economy on track and as of now it has succeeded to an extent. The expected slowdown in the country, if it happens, is likely to happen gradually. No sudden surprises may erupt, at least for the next few months, which can give stability to the world economy.

The data emanating from Europe was slightly positive. Europe overall remains on a steady course though economies of some of its constituent countries are likely to face recessionary conditions in the near future. A major problem which Europe may face is the influx of refugees from the region occupied by fundamentalists adjacent to Eastern Europe. These refugees are getting inside Europe and trying to make inroads in many countries. This situation may have a long term political and economical impact on the region. The conflict in the region is targeting innocent citizens to attract the attention of the world, which is a very negative development. In the process,

uncertainty and instability has not only increased in the European region but also other parts of the world. The problem is not easy to solve and its solution can only emerge over a period. Currently, the acts of all the concerned parties are likely to create more retaliation, which may increase tension, loss of human life and burdening of the economies. The developments are unfortunate for Europe, which is already suffering from economic stagnation. The religious influences on people can cause long term damage to the economies. The only hope is that fairness will prevail over the concerned people and innocent people are spared.

Unfortunately, the Japanese economy has again started showing possibilities of weakness. The structural imbalance of the economy is deep rooted, which is holding back the economic growth in spite of continuous efforts by the Japanese Government. As Japan generates a fair amount of global GDP, slowing growth can affect the growth rate of the world. Nobody is expecting the Japanese economy to start growing well in the immediate future but it should be prevented from slipping further.

Conditions of emerging economies, other than China and India, are vulnerable. In recent years, these economies have benefitted due to inflow of funds from the US and European regions as a result of quantitative easing. The US Interest rates have never been raised since 2006 and it is expected that after this long gap, they will be raised again step-by-step. As US markets will become attractive, funds may start flowing back to them from most of the economies, including those of emerging markets. Such a situation will strengthen the US Dollar and it may weaken the currencies from which the exodus of funds will start. This flow of funds may cause turmoil for many currencies and destabilise impex equilibrium of many countries, affecting global growth.

India has comparatively been in a sweet spot based on the expectations of investors from India and across the world. The Prime Minister has created confidence in the minds of global investors about the great potential of investment in India. He is also pursuing manufacturing in India aggressively. Though, over the period of one and half years since he has assumed power, no great changes are visible to investors in terms of business environment and ease of doing business, a lot is being done at the ground level which will take some more time to yield results. The Government is serious about the reforms process and is trying to overcome the hurdles, which are being created by the opposition. The over enthusiastic comments of some of the members of the ruling party and its associates have created a bit of uncertainty and unhappiness but it is expected that the Government will be able to diffuse the situation. These instances, due to elaborate media coverage have serious repercussions. It affects the image of the country, especially in respect of communal and religious harmony. India can be a great place for investment and doing business for foreign nationals as there is tremendous demand. The GDP is growing well and the growth can sustain momentum. It can increase foreign investments as investors and many developed countries are suffering low returns in their economies. India needs to grab this opportunity.

The current economic activities in India are below expectations and that has caused some disenchantment in the minds of businesses as well as investors. They were expecting substantial improvements very quickly and that was too much to expect. Fortunately, India still remains a better place for investments as it is growing better than most of the other countries and has long term potential. Therefore, investors should not get bogged down with the events of recent months and the fact that economic numbers are not meeting expectations. They may keep an eye on the long term performance of the economy and start investing.

During the last month, the Indian stock markets yielded to the pressure of sales by Foreign Institutional Investors (FIIs) though substantial

purchases were made by Indian domestic institutions, mainly Mutual Funds. The FIIs sold shares worth a billion dollars and that resulted in the Indian Stock market falling over 2.65%. The global markets were relatively better off during the period but India could not get advantage of the improved sentiments. The quarterly results declared for many Indian companies for the quarter ended 31st September 2015 were not up to the expectations. This pulled down the markets and the negative sentiment may continue for a while. The required improvement in the economy may not happen in the current financial year but the next financial year is likely to look better. The current times may not be great for aggressive investments in equity but prudent investors should stick to their normal asset allocation to equity. Next few months can be a testing time for investors and they should refrain from taking aggressive stand.

As expected, the Reserve Bank of India (RBI) did not change the interest rate in its policy declaration on 2nd December, 2015. The Central Bank is giving more time for inflation to stabilise and go for a cut thereafter. Inflation remains the most important point on its agenda and it is systematically working on it. A small cut may take place around the time of the budget and over the next one year a total cut in the range of 0.75% to 0.5 % is likely. This may lead to reduction of bond yields, lower coupon rates on new issuances, reduction of fixed deposit rates and lesser return on overall investments for investors. The flip side for it is that this development is positive for businesses. Though a breather is given, the fixed return investments will have to get locked in for a long term period to protect its returns over a medium term. The investors in high tax brackets should consider subscribing to tax free bonds of reputed Public Sector Undertakings.

Some property advisors are whispering that the property markets in India have started improving in the recent months but this needs stronger confirmation. On the back of lowering interest rates, property markets maybe getting into nascent recovery phase. It is possible that it may remain in that stage not only for few months but also for a year. The crucial factor which can cause recovery of the sector is reduction of interest rates. Low interest rates will boost housing demands as the ability of investors to invest will increase. Full-fledged recovery will not happen in the immediate future. Recently, the Government has liberalised foreign investment in this sector which is likely to help the sector and so it is the right time to keep a watch on this asset class.

The Indian Rupee eased against the USD in November. Though it was earlier expected to remain steady during the month, the global strength of the dollar made the Indian Rupee yield. It is likely that on the back of the expected FED rate hike, the USD will remain strong in the ensuing month. Regional tensions may also strengthen the US Dollar against many currencies. Indian exports have slipped over the last few months and that along with aggressive sale by FIIs are also a major cause of weakness of the Indian Rupee. Indian investors need to play safe in such a situation.

On an overall basis, the month of November was less opportune for investors. December may not have a greatly different picture. Uncertainty is looming large and the risk reward ratio does not look attractive for many asset classes. In such a situation, it may be advisable to take a wait and watch approach except in the case of fixed income earning opportunities. The current volatility will continue for at least some more time with a slight negative bias.

> Work and worship are necessary to take away the veil, to lift off the bondage and illusion.
>
> — *Swami Vivekananda*

CA Ninad Karpe

The Lighter Side

The NATION must know

If you are an avid TV news watcher, you would have heard this phrase "the Nation must know" several times every day.

It is repeated by one of television's most popular news anchor in a loud, cacophonous and an invariably high decibel level debate, which normally has a minimum of six panellists shouting at the same time.

We have heard of "multi-tasking" in work – we now have "multi-shouting" in debates.

But, what the hell? The news anchor is extremely popular and his programmes have high TRPs -- that is all that matters!

One day, I hope to see six tax experts on this panel shouting at each other. If that happens, I wonder what topic on taxation will be selected which "the nation must know"?

Will it be retrospective amendments?

Will it be the vagaries of tax assessments?

Will it be issues of POEM or transfer pricing?

Will it be the recent taxation of inbound investments as "unexplained cash credits"?

With so much excitement in the tax profession, it is virtually impossible to select one particular tax issue.

Let us assume that the topic for debate on the TV show will be "the glorious uncertainties of taxation".

Tax professionals have been living with this issue for years and this topic can be hotly debated. However, it will be interesting to see who will defend this topic.

There will, probably, always be someone doing just that. After the Vodafone retrospective amendment, I was thrust the inglorious duty to defend it before a belligerent audience of foreign investors. In an inimitable Indian way, I justified the amendment as a "sovereign right".

At the end of the debate, the news anchor is bound to close the debate by saying that "the nation must know". And then, he is likely to mention the famous quote of Benjamin Franklin "there are only two things certain in life: death and taxes".

The nation must really know that!

Ajay Singh, *Advocate*, CA. Ashok M. Manghnani
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th November, 2015 to 8th December, 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 20th November, 2015.

Life Membership

1	Mr. Sudarshan R. Kasturirangan	CA	Tamil Nadu
2	Mr. Jain Gautam Pawan Kumar	Advocate	New Delhi
3	Mr. Bhat Vasant Krishna	CA	Mumbai
4	Mr. Thacker Gautam Shaunak	CA	Mumbai

Ordinary Membership

1	Ms. Jain Riddhi Ashok	CA	Mumbai
2	Mr. Kulapkar Pritam Pandarinath (Oct 15 to Mar 16)	CA	Mumbai
3	Mr. Aggarwal Ankur Sh. Sunil Kumar	CA	New Delhi
4	Mr. Agrawal Rajesh Trilokchand	CA	Mumbai
5	Mr. Parida Pramod Kumar Ravinarayan	Advocate	Mumbai
6	Mrs. Dholu Kavita Rajesh (Oct 15 to Mar 16)	CA	Mumbai
7	Mr. Sanghvi Kapil Nareshkumar (Oct 15 to Mar 16)	CA	Gujarat
8	Mr. Naik Sujay Iccharam (Oct 15 to Mar 16)	Itp	Jalgaon
9	Mr. Bhutada Rajendra Sukhdeoji (Oct 15 to Mar 16)	CA	Wardha
10	Mr. Shah Bhavin Rajendra (Oct 15 to Mar 16)	CA	Jamnagar
11	Mr. Rathod Kamlesh Jayantibhai (Oct 15 to Mar 16)	CA	Jamnagar
12	Mr. Maharishi Dushyant Laxmikant (Oct 15 to Mar 16)	CA	Jamnagar
13	Miss Maharishi Tejaswita Prashant (Oct 15 to Mar 16)	CA	Jamnagar
14	Mr. Gokani Ankit Bhagwandas (Oct 15 to Mar 16)	CA	Gujarat
15	Mr. Baldota Chandrakumar Lalchand	CA	Solapur
16	Mr. Parikh Amish Vipinchandra	CA	Pune
17	Ms. Mehta Rashmin Uttamlal (Oct 15 to Mar 16)	CA	Mumbai
18	Mr. Patel Kiran Naranji (Oct 15 to Mar 16)	CA	Mumbai
19	Mr. Varghese Jacob K.	CA	Mumbai
20	Mr. Bane Vishal Manohar	CA	Mumbai
21	Mr. Jain Pankaj Kiran	CA	Mumbai
22	Mr. Bharath Janarthanan (Oct 15 to Mar 16)	CA	Mumbai
23	Ms. Jain Priyanka Ramesh (Oct 15 to Mar 16)	CA	Mumbai
24	Mr. Chande Hiten Kishor (Oct 15 to Mar 16)	Advocate	Mumbai
25	Mr. Kothari Harsh Rajesh (Oct 15 to Mar 16)	Advocate	Mumbai

Associate Membership

1 Asset Reconstruction Company (India) Ltd. Mumbai

I. FUTURE PROGRAMMES

(For details of the programmes, kindly visit www.ctconline.org or refer The CTC News of December, 2015)

1. ALLIED LAWS COMMITTEE

A. Two Days Interactive Residential Conference with different professionals on Law Applicable to Real Estate and Redevelopment jointly with AIFTP (WZ) & J. B. Nagar CPE Study Circle of WIRC of ICAI will be held on 19th & 20th December, 2015 at Silent Hill Resort, Manor, Palghar. The keynote address will be given by CA Ramesh Prabhu.

B. The Half Day Seminar on Labour Laws jointly with BCAS will be held on 23rd January, 2016 at BCAS, 7, Jolly Bhavan, New Marine Lines.

C. The Student Series on Internal Audit will be held on 4th, 5th, 11th & 12th February, 2016 at CTC office.

2. DIRECT TAXES COMMITTEE

A. The Workshop on Direct Taxes jointly with The Malad Chamber of Tax Consultants will be held on 5th, 6th, 12th, 13th, 19th & 20th December, 2015 at N. L. College, Conference Hall, Malad.

B. The Lecture Meeting on TDS Procedures will be held on 23rd December, 2015 at Walchand Hirachand Hall, IMC, Churchgate. The Representative from TDS wing of Income-tax Department, Representative from TRACES and CA Mahendra Sanghvi will address at the lecture meeting.

C. The full day seminar on Capital Gains will be held on 16th January, 2016 at West End Hotel.

D. The Lecture Meeting on Section 14A – The Unending and Unpredictable Journey will be held on 22nd January, 2016 at Walchand Hirachand Hall, IMC. The Lecture meeting will be addressed by CA Yogesh Thar.

3. INDIRECT TAXES COMMITTEE

A. The Workshop on MVAT Act, Service Tax & Allied Laws jointly with AIFTP (WZ), BCAS, MCTC, STPAM and WIRC of ICAI will be held from 5th December, 2015 to 30th April, 2016 at STPAM Library Hill, Mazgaon.

B. The Seminar on applicable of VAT and Service Tax on IPR and IPR related Transactions (Viz., Trademark, Copyrights, Franchise, etc.) will be held on 12th December, 2015 at West End Hotel.

C. The 4th Residential Refresher Course on Service tax will be held between 29th to 31st January, 2016 at Aamby Valley City, Pune.

4. INTERNATIONAL TAXATION COMMITTEE

The Workshop on Taxation of Foreign Remittances will be held on 22nd & 23rd January, 2016 at West End Hotel.

5. LAW & REPRESENTATION COMMITTEE

A. Suggestions for Simplifying the Provisions of the Income-tax Act, 1961

The CTC is in the process of submitting its representation in this regard. Members are therefore requested to send their suggestion on this topic to the CTC, latest by 31st December, 2015 at email ID – office@ctconline.org.

B. The important announcement in respect to Constitution of Local Committee to deal with Tax Payers Grievances from Highpitched Scrutiny Assessment. We suggest members to take help of this important grievances machinery to redress their genuine grievance and forward the outcome thereof to CTC for further follow up. Alternatively you may forward your grievances to CTC and CTC will take up the matter before the committee.

C. Suggestions for Implementation for ICDS Issues

The CTC is in the process of submitting its representation in this regard. Members are therefore requested to send their suggestions on this topic to the CTC, latest by 14th December, 2015. at E-mail ID – office@ctconline.org

6. MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

A. The full day Seminar on Direct Taxes at "Aurangabad" jointly with Aurangabad Branch of WIRC of ICAI and Aurangabad Tax Practitioners Association will be held on 12th December, 2015 at ICAI Bhavan, Aurangabad.

B. The Half Day Seminar on "Allied Laws" jointly with Vapi Branch of WIRC of ICAI will be held on 28th January, 2016 at Atul Club, Valsad, Gujarat.

7. RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

A. The 39th Residential Refresher Course will be held on 18th to 21st February, 2016 at Mercure Lavasa Accor Group of Hotels, Lavasa & Lavasa International Convention Centre.

Mr. Arvind Sonde, Advocate will have Live talk with Mr. Y. P. Trivedi, Senior Advocate & Past President and Mr. S. E. Dastur, Senior Advocate & Past President. This session will be an anchored talk show where both the luminaries will share their experiences in "Attainment of Excellence" in person with the Anchor and the delegates.

8. STUDENT & IT CONNECT COMMITTEE:

A. The Half Day Workshop on Excellence in Excel will be held on 5th, 12th and 19th December, 2015 on the subject "Advance Excel" by CA Adarsh Madrecha at CTC Office.

B. The Lecture Meeting on "MVAT FORM 704" will be held on 14th December, 2015 on the subject "MVAT Audit – Form 704" and will be addressed by CA Deepali Mehta at Maheshwari Bhavan, Marine Lines.

C. The half day Visit at National Stock Exchange will be held on 8th January, 2016 at National Stock Exchange, BKC.

D. The Understanding Startup Investments will be held on 21st January, 2016 at Kilachand Hall, Churchgate.

9. CONFERENCE COMMITTEE

The TAXCON 2015 – THEME: "Conflicts and Convergence in Tax Laws" will be held on 8th & 9th January, 2016 jointly with AIFTP (WZ), BCAS, STPAM and WIRC of ICAI at Khimji Kunverji Vikamsey Auditorium, Bandra.

10. DELHI CHAPTER

A. The full day Seminar on 'Case Studies on Secondment and Expatriate – Taxation & Regulatory Issues from both Employer's and Employee's Perspective' will be held on 12th December, 2015 at India International Centre, New Delhi.

B. The full day Seminar on Prevailing Industries Issues / Concerns and Case Studies on Companies Act 2013 & we will felicitate our Past President Shri Ved Verma on 16th January, 2016 at India International Centre, New Delhi.

ALLIED LAWS COMMITTEE

Study Circle Meeting on the subject "Issues under Nomination" held on 4th November, 2015 at Kilachand Hall, IMC

Mr. Nirav Jani, Advocate addressing the members.

INTERNATIONAL TAXATION COMMITTEE

Transfer Pricing Study Circle Meeting on the subject "Procedure for TP Compliances & Best Practices for TP documentation" held on 6th November, 2015 at Kilachand Hall, IMC

CA Jigar Saiya addressing the members

DIRECT TAXES COMMITTEE

Intensive Study Group (Direct Taxes) Meeting on the subject "Recent Important Decisions under Direct Taxes" held on 19th November, 2015 at CTC Office

Mr. Rahul Sarda, Advocate addressing the members

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Group Meeting on the subject "Recent Judgments under Direct Taxes (Part II)" held on 6th November, 2015 at Babubhai Chinai Hall, IMC

CA Kishor B. Karia addressing the members

Study Circle Meeting on the subject "Revision Proceedings with Special Reference to Recent Amendments in Sec. 263" held on 1st December, 2015 at Conference Room, Eros Threatre Building, Churchgate

Mr. Vipul B. Joshi, Advocate chaired the session

CA Ketan Vajani, Group Leader addressing the members

INDIRECT TAXES COMMITTEE

Study Circle Meeting on the subject "VAT Issues in Works Contract and Inter-State Works Contract" held on 24th November, 2015 at Babubhai Chinai Hall, IMC

Ms. Sujata Rangnekar, Advocate chairing the session

CA Kiran Garkar, Group Leader addressing the members

ALLIED LAWS COMMITTEE

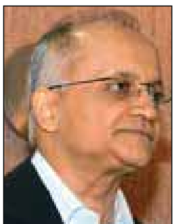
Full Day Seminar on Charitable Trusts organised jointly with BCAS held on 7th November, 2015 at Walchand Hirachand Hall, IMC

Other Faculties addressing the delegates

CA Vipin Batavia

CA Paras K. Savla

CA Shailesh Haribhakti



CA Rajesh Kadakia

Section of delegates

STUDENT AND IT CONNECT COMMITTEE

Half Day Workshop on Excellence in Excel on the subject "Advance Excel" commences from 5th December, 2015 at CTC Conference Room

CA Adarsh Madrecha addressing the delegates

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

The Documentary Film of "Shri Nani A. Palkhivala "Nani – The Crusader" held on 23rd November, 2015 at CTC Conference Room.

CA Hemant Parab welcoming the members. Seen from L to R : S/Shri S. Divakara, Director – General, Forum of Free Enterprise.

CA Parimal Parikh, Past President and Shri Ajay Sigh, Hon. Jt. Secretary offering flowers to Shri S. Divakara, Director - General, Forum of Free Enterprise.

PRE-BUDGET MEMORANDUM MEETING HELD ON 23-11-2015 AT CBDT, NEW DELHI

The Chamber team for Representation of Pre-Budget Memorandum at North Block, New Delhi. Seen from L to R: S/Shri Naresh Ajwani, Chairman, International Taxation Committee, V. P. Verma, Advisor, CTC Delhi Chapter, CA Mahendra Sanghvi, Co-Chairman, Law & Representation Committee, Ms. Anita Kapoor, Chairperson, CBDT, CA Avinash Lalwani, President, Vipul B. Joshi, Chairman, Law & Representation Committee, CA Vijay Gupta, Hon. Jt. Secretary, Delhi Chapter.

VISITED JOINT BANDRA LIBRARY OF CTC, BCAS & WIRC OF ICAI AT INCOME TAX OFFICE, BANDRA

CA Avinash Lalwani, President along with CTC Member Mr. Ishwar Gurnani.

CA Avinash Lalwani, President along with Librarian Mr. Rajesh Patil

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