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The Chamber's Journal

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TAX ISSUES IN LOGISTICS AND SCM

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PRESIDENT 2015-16

Shri Avinash B. Lalwani, President, addressing the members at 88th Annual General Meeting

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RELEASE OF PUBLICATIONS AT 88TH ANNUAL GENERAL MEETING HELD ON 3RD JULY, 2015

Shri Kishor Vanjara, Past President, releasing the publication "Monograph Series on FEMA 1999 – Introduction to the Import and Export Regulations"

Shri Keshav B. Bhujle, Past President, releasing the publication "Monograph Series on Companies Act, 2013 – Provisions Pertaining to Accountants, Audit & related Matters)

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The Chamber of Tax Consultants
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The Chamber's Journal

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Editorial

The Hon'ble Bombay High Court's interim Order banning erection of pandals and mandaps in public places for celebration of certain festivals has brought cheer to most of us who have faced the 'aural aggression' and chaotic state of traffic for decades and yet suffered in silence. The Hon'ble Court, in recognition of the fact that the general public suffered this in silence because of muscle power and political connection that the Organisers of these public festivals flaunt, has put in place, an effective mechanism of toll free number for lodging complaints against truant Organisers who blatantly violate the noise violation norms and also that pandals and mandaps cannot be put up in public places unless the place has some religious significance.

Despite an order by the Hon'ble Supreme Court which had been reiterated by the Hon'ble High Court of Bombay, the political establishment and even the current dispensation manning the Government seems busy trying to indulge in their old ways, for promoting their vested interests. I am quite appalled at the irresponsibility and brazenness of these institutions, especially they being the functionaries of the democracy and donning position of leadership. It is downright hypocrisy when these Organisers cite favourable public sentiment as the factor fuelling the setting up of these pandals. I would like to raise a question on this platform – We all know that a large section of our citizens would not like to pay their taxes, if given a chance – and just because it is the prevailing sentiment of the public, can political parties and governments encourage that? Persons in public leadership positions are supposed to lead the public opinion and bring about a change, leaders playing to the gallery is a sad state of affairs. Democratic institutions are functional primarily because of the reverence attached to them by the people, at large. Any erosion in such reverence would pull them down. Hence, the political establishment by blatantly challenging and indulging in contemptuous acts towards orders from such highly valuable institutions are contributing towards erosion of democratic values and democratic institutions.

This month, the Chamber's Journal is on 'Tax Issues in Logistics and SCM'. The web of laws created both by the Central Government and various State Governments in this connection is complex and the technology infused commerce – i.e. e-commerce has added new dimensions to this complexity. This issue is an attempt to unravel this complexity. I hope that it would help the members in their professional work.

I thank all the contributors for giving their valuable time.

K. GOPAL
Editor

From the President

Dear Readers

Namaskar!

I will start with a quote which has inspired me greatly:-

"Once JRD Tata, ex-Chairman of the Tata Group of companies was asked "Do you want India to be an economic superpower?"

Came his landmark answer, "No, I want India to be a happy country!"

On similar lines, our wish is "We want the Chamber to be a **Happy Chamber**". Our aim is complete happiness for the members through Quality Education, Fellowship & Bonding, Leadership and above all Spiritual Happiness, the real goal of person's life".

With the blessing of The Almighty, My Parents, Past Presidents of The Chamber, Seniors and Members, I have accepted the post of President in the 89th year of this Premier organisation - The Chamber of Tax Consultants "The Chamber". I am exhilarated to be a part of such an organisation which has a glorious past and indisputably a glorious future. I am hereby writing my first communication as a President.

I accept this coveted post with a feeling of great honour, respect & commitment to work for the Chamber to the best of my ability. I am conscious that the President carries great responsibility but it shall be a pleasure working with the Supportive & enthusiastic team. I look forward to lead this august organisation to newer heights.

The Chamber's Managing Council Members for the year 2015-16 consist of 14 elected members including myself and 8 Co-opted members. I feel proud to have such good team members in our Managing Council. I am sure that with their contribution, the Chamber will certainly become a **Dream Chamber**. We have already elected officer bearers of the Chamber and also appointed Chairmen for the various committees. This year we have formed 12 committees in various areas. Each of the committees are geared up for various activities at the Chamber. We have already planned a lecture meeting on filing of Income Tax Returns by SC & SG Committee, 2nd Football cup by Students and IT Connect jointly with Membership and Public Relations Committee, GST Study Circle Meeting by Indirect Tax Committee, Outstation Joint programme on company law by Membership committee, AAR Seminar by International Taxation Committee and Lecture on company law by Allied Laws Committee. All the members are requested to take the benefit of the various programmes organised by the Chamber. I extend my thanks to all Council members and Core Committee members for the year 2014-2015 for their support towards the growth of the Chamber. New Core Committee members of 2015-16 of the Chamber are talented, dedicated and committed towards the Chamber's activities. I accept wholehearted support from our new Core Committee team.

The new term at the Chamber will see many new initiatives. As a strong foundation is the key for any successful organisation. - we have already prepared an Action plan for the Chamber for the year 2015-2016 keeping in mind our Vision, Commitment and Purpose for the growth of the Chamber. Our Action plan activities are planned in such a way that it shall benefit all and fit the needs of all the members.

We will try to increase our membership in Mumbai and in other cities of Maharashtra, Gujarat and Goa by appointing District Convenors and Dy. District Convenors. Our Delhi Chapter is working very well. It helps us making representations to various Government authorities. In the interest of the society and members, we are planning to have quick representations on any existing laws, amendments or new laws. We will be placing a column for "Members Suggestions for Representation" on our website, so members can give their suggestions of any laws.

Every year we have growth in education hours. For the year 2015-16, our team wishes to organise quality programmes for the same. This is our objective and we are moving in that direction. As far as development of members is concerned, we will give more E-services to members like webinar, user friendly website, etc. Our target is to increase fellowship and build leadership qualities in our members. When we talk about growth, the issue of infrastructure surely crops in. We will create a Chamber building fund, to buy a hall to organise seminars or office to serve members more efficiently. We will try to organise training programmes for CTC staff, so that they can serve members more efficiently.

In the past Chamber members have taken active participation in the Chamber's Social Responsibility solely or jointly with other professional associations. We will keep the same road map for the current year. We are proposing to create a Trust "Chamber Foundation Trust" for social work.

In the past, we have been organising **Joint Programmes with other associations,** we are doing it now and we shall continue the same in the future.. This year I am proposing to form a "Joint Co-ordination Committee with all other Associations".

The summation of the Action plan is that, friends, all these things are possible only if we have the support of all the members of our Chamber. We can overcome all the difficulties that come in our path and I am very optimistic. If I show someone a glass having half-water, some would say half is full and others would say half is empty. I have a third mind set. I would say it is half-filled with water, half-filled with air so the glass is full. This is the change we want to bring.

The mission statement for current year is **"Change and Innovation"**. **"Change"** is the status quo here. Organisations world over realise that success depends on their ability to respond to new opportunities and threats, as they emerge and to keep rethinking their strategies, structures and tactics to gain ephemeral competitive advantages. "**Innovation"** is crucial to the continuing success of any organisation."

On July 3, 2015,The Ministry of Finance Revenue Department has notified the Black money rules and Compliance window under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. International Taxation Committee is planning to hold a half day seminar on Black Money rules and voluntary compliance scheme. On July 6, 2015, CBEC has issued notification regarding the use of digital signature, invoices and preservation of records for 5 years and has also issued another circular on July 8, 2015 for Manual scrutiny of service tax return w.e.f. 1-8.2015. The reported move of the Devendra Fadnavis Government to amend the more glaring rigidities in the Maharashtra Rent Control Act (MCRA)1999, is a welcome albeit belated move that would bring stability in the housing stock and also modernise the rental market, particularly for commercial property.

Special Story of this issue of The Chamber's Journal is on Logistics Management. It includes various important issues concerning indirect taxes in the logistics and SCM sector. This is designed by Vishal Lahoti and Ravi Kumar Yanamandra. and they deserve all the compliments for the comprehensive coverage on logistics management.

My best wishes to the new team of Journal Committee. I am sure that under the able guidance of Chairman Haresh Kenia, Journal Committee team will be coming out with various issues that are relevant for the knowledge enhancement among the members. I am thankful to outgoing Chairman Sanjeev Lalan and his team for the successful completion of the year 2014-15.

I would like to thank all the outgoing members of Editorial Board for the support and advice given in the year 2014-2015 and extend my warm thanks to the New team of the Editorial Board for accepting our invitation to be part of Editorial Board for 2015-16.

For readers' benefits, I would like to narrate a small story on **"Ethics – Do not compromise on this".**

During the devastating earthquake in Kobe, Japan, an American newscaster saw a Japanese woman selling flashlights and batteries in a small makeshift shop, which was made up of wooden boxes. There was a great demand for batteries and flashlight torches as there was no electricity. The newscaster went to the lady and asked why she was not selling the essential items for more than the regular price. The woman answered "Why would I want to earn profit from someone else's suffering?" These are the ethical values of citizens of a great country like Japan.

Character Ethics has nine dimensions as suggested by Behavioural Scientists. In the initial years, character ethics were considered the foundation of success. The important issues were:

1. Integrity: The Oxford Dictionary defines it as honesty, the oneness of honest approach, which cannot be disintegrated.
2. Humility: Person having a low opinion of one's importance, less proud.
3. Fidelity: The faithfulness and loyalty of a person.
4. Temperance: It is the quality of self-restraint.
5. Courage: It is the ability to control fear when facing danger or pain.
6 .Justice: It is quality of a person of being fair or reasonable.
7. Patience: It is the ability of calm tolerance.
8. Simplicity: It is the quality of of a man who is not showy,proud or extravagant.
9. Modesty: Not behaving boastfully and avoiding indecency.

Covey has said that character ethics teach that there are basic principles of effective living and that people can only experience true success and enduring happiness as they learn and integrate these principles into their character. People like Covey, Gandhiji and Lincoln are examples of strong followers of character ethics.

I would like to conclude with the words of Dr. A.P.J .Abdul Kalam. " In the past, leadership style was about competition. Today it is about collaboration."

Friends come together, collaborate and think win-win and make our Chamber a "Dream Chamber" .

Avinash Lalwani
President

Chairman's Communication

Dear Readers,

At the outset I thank the president CA. Avinash Lalwani and the Council for having reposed confidence in me to lead this very important committee of the Chamber. My whole hearted endeavour shall be to live up to exacting standards set in respect of very valuable publication of The Chamber's Journal.

This is my first communication to all as Chairman of Journal Committee for the year 2015-16. Friends, it's the Chamber's endeavour to provide to the members and readers, through the medium of this Journal, the intricacy of the various issues that are relevant for the knowledge enhancement among the members. We always look forward to your critical feedback and constructive suggestion for improving the standard of Journal.

Logistics management is increasingly becoming a topic of interest among academicians and practitioners since it leads to reduced operational costs, improved delivery performance and increased customer satisfaction levels. The logistics industry is facing number of issues that service providers have to address, such as pricing pressures, high cost of operations and low returns on investments, hiring and retaining talent, pressure from clients to broaden the range of service offerings and internationalise operations, demand for customised solutions and more value-added services, besides infrastructural bottlenecks and Government regulations. The taxation issues relating to the various activities of Logistics and Supply Chain Management (SCM) will be a topic of interest to our members. There are numerous issues in areas of direct and indirect taxes concerning logistics and SCM industry. This industry issue is planned to be covered in two months. This month's special story is an attempt to address some of the important issues concerning indirect taxes concerning Logistics and SCM sector.

I thank the authors for the special story for their articles in time not only delivered in shortest possible time but also provided in-depth analysis for the benefit of the members, to understand the finer points on the various peculiar industry issues relating to taxation. I am thankful to the authors of the articles S/Shri R. K. Sreedhar, Vishal Lahoti, Koshal Agarwal, Girish Raman, Santosh Maurya, Guruprasad & Srinath, Rahul Chakraborty, Ms. Ami Majumdar, and Ms. Smita Bhandari. I am thankful to Shri Vishal Lahoti and Shri Ravikumar Yanamandra for designing the structure of the special story.

Looking forward to being in touch with you all, through this Journal.

CA. HARESH KENIA
Chairman – Journal Committee

CA. R. K. Sreedhar

Overview of the Logistics Sector in India

The significance and scenario of Logistics industry

The significance, rather the criticality of the logistics sector in India had been ignored for long, thereby ensuring it remained a highly under-invested sector in the country. While logistics forms the backbone of the economy by connecting the production centres with consumption markets, inefficiencies in managing it could lead to severe disruption in the entire supply chain network, thus leading to colossal losses during transportation, distribution and storage of goods.

Let's start with a bird's eye view of India in the global context: World Bank's International Logistics Performance Index Global Ranking, ranks India 46th among 155 countries; India has the potential to become the second largest economy in the world by 2050 in PPP terms (third in MER Terms, although this requires a sustain, programme of structural reforms).[1]

The Indian logistics industry was valued at an estimated US$ 130 billion in 2012-13 and has been growing at a CAGR of over 12.97 per cent over last few years. It's pegged to be around US$ 385 billion in 2015[2]. The potential, no doubt, is immense. Broadly the industry comprises the following main segments in India:

- Transportation : Sea (Ports), Surface (Road & Rail), Inland waterways, Air and Multimodal
- Inland Services: Container Freight Stations, Inland Container Depots, Empty Depots
- Warehousing and cold chain
- Integrated Allied Services: Freight forwarding

Here are some facts that call for attention:

– Logistics spend of developed countries is 7-8% of GDP vs. India's logistics spend as 13% of GDP[3] - a huge gap that needs to be addressed. Plus, India's logistics sector grows at 1.5 to 2 times the GDP.

– With 60% of containers flowing to the west coast of India, 4 out of top 6 operators functioning at 100% utilisation, containers accounting to just 28% of railway freight traffic[4(i)], EXIM constituting more than 80% of container freight, less than 1% traffic contributing through inland waterways[4(ii)] – the imbalance is stark.

The economic growth in India has increased the demand for practically all transport services. While one can't deny that the logistics

sector in India is evolving rapidly, we need to understand that the growth has been dominated by the interplay of infrastructure, technology and new types of service providers that will determine whether the industry is able to help its customers to reduce logistics costs and provide effective services. The components of the Make in India campaign will provide the required impetus to the sector.

Existing & operating Constraints

The constraints that the industry is currently operating in include a variety of aspects, but the key is robust and modern infrastructure and service flow. The challenges include heavily concentrated flow of logistics, excessive reliance of transport on roads, existing inefficiencies of logistics sector leading to huge losses on account of poor infrastructure – leading to increased costs, hidden cost factors like theft, damage, facilitation and transaction. According to McKinsey & Co., these losses in India could treble to US$140 billion annually in the next one decade from US$45 billion in 2007 if increased usage of rail and optimal utilisation of waterways is not achieved[5].

With a fast growing economy, exponential growth in freight traffic over the years further pressuring the over-burdened modes is an obvious outcome and dealing with the same calls for some serious work. Some other challenges that exist in the industry apart from its unorganised nature today include lack of specialised and skilled manpower coupled with training institutions (especially in third party logistics sector), non-tapping of information technology driven systems to serve the business, non-mechanisation, multiple trade policies and regulations across the geographical landscape and last but one of the most critical is poor quality of operations and services in the storage and warehousing sector. Impact that can be delivered through research and development in the field are not visible. Insufficient distribution channels/ infrastructure bottlenecks also restrict the scope to reach consumers of products nationwide.

And where does all this lead us to? Operational inefficiencies, higher environment pollution, rising costs of doing business, slower growth and negative impact on all dependent industries for logistics.

Modes of Transport: Plenty but marked by imbalanced utilisation

- **Road:** We have one of the largest road networks of approximately 42.36 lakh kms with 60% of total freight being carried by road. And road traffic is expected to grow at 8-10% per year.

  In general, the infrastructure and network of the Indian roads are not in good condition. About 1.4 million kms. of total route length surfaced and more than 1 million km is covered with gravel, crushed stone or earth[6(i)].

  But things are set to change. As a result of Public Private Partnerships, the private sector has emerged as a key player in the development of road infrastructure. With the new Government, the value of roadways and bridge infrastructure in India is expected to grow at a CAGR of 17.4% between 2012-17, to reach USD 10 billion[6(ii)]. Some new developments include allowance of 100% FDI under the automatic route in this sector subject to rules and regulations, 100% tax exemption to companies in road projects for 5 years followed by 30% relief for the next 5 years.

- **Rail :** Indian Railways is the world's 4th largest rail freight carrier in the world[7]. The current scenario is that

only 31%[8] of containers handled at ports represent rail share and the freight transportation costs by rail are much higher than in most countries – the reason being freight tariffs in India have been kept high to subsidise passenger traffic. In a proposal to open up cash-strapped railways to foreign investment by allowing 100 per cent FDI in areas such as high-speed train systems, suburban corridors and dedicated freight line projects implemented in PPP mode has been passed.

However, FDI will not be allowed in train operations and safety. According to estimates, the sector is facing a cash crunch of around ` 29,000 crore[9] and allowing of FDI will drastically help gather resources. The FDI liberalisation in the sector is expected to help in modernisation and expansion of the railways.

High expectations are set from the upcoming Dedicated Freight Corridors. The Eastern Corridor from Ludhiana in Punjab to Dankuni in West Bengal and the Western Corridor from Jawaharlal Nehru Port, in Mumbai, Maharashtra to Tughlakabad, Delhi/Dadri along with inter-linking of two corridors at Khurja in Uttar Pradesh. These are estimated to span a route length of 3300 kilometers and expected to be completed by 2017. These are expected to free up 70% of Railways' carrying capacity[10].

– **Inland waterways:** Despite India having numerous canals, rivers, creeks, lakes with the potential to be developed as inland waterways, so far only 5 have been declared as national waterways. They comprise less than 1% of the transport sector in India and are an old and perennially ignored part of India's infrastructure. What's important to remember is that Inland waterways offer a more efficient mode of transport than rail or road — a single barge has the dry-cargo capacity of 50 trucks or 15 railcars.[11]

To address the choked road and rail networks and the urgent need for a solution, it's critical to develop waterways as an alternative mode of transport. Some of the key projects like the Integrated National Waterways Transportation grid covering at least 3 of the national waterways have the potential to radically transform the economy and increase the competitiveness of Indian companies. It is expected to cover 70 terminals across 15 states.[12]

– **Ports**

The long coastline of India forms one of the biggest piece of land into a body of water. The Indian ports and shipping industry plays a vital role in sustaining growth in the country's trade and commerce. India currently ranks 16th among maritime countries, with a coastline of about 7,517 km. Cargo traffic, which was 976 million metric tonnes (MMT) in 2012 is expected to reach 1,758 MMT by 2017. [13(i)]

India has 12 major ports and about 60 operational non-major ports. There has been an unprecedented increase in cargo handling capacity – 800 Mn metric tons in February 2015 from 575

MMT in 2009 [13(ii)]

90% of country's trade by volume and 70% by value is moved through maritime transport. Cargo handled at major port constitutes of 44% bulk cargo (iron ore, coal, fertilizer) 33% liquid (petrol, oil, lubricants) and balance containers.[14]

100% FDI is allowed under the automatic route for projects related to the construction and maintenance of ports and harbours subject to applicable rules and regulations.

With 60% of containers flowing to the west coast of India, 4 out of top 6 operators functioning at 100% utilisation[15]. For ages, the port terminals have played the critical role of gateways to progress in India and need to be further strengthened with state of the art infrastructure providing services of global standards delivering safety and efficiencies of the highest order.

– **Air**

Air Cargo Logistics play a vital role in the economic development of a nation. The key players in the entire Air cargo supply chain constitute Airlines, Air Cargo terminal operators, Ground Handling service providers, Integrated Express Service Providers, Forwarders, Domestic Cargo Transport service providers and Custom House Agents; thereby culminating into a supply chain with multiple service providers acting in tandem to move goods across locations while ensuring faster and efficient delivery. These business entities in Air Cargo logistics industry need to interact with a number of cross-border regulatory agencies – the most important one being the Customs body.

India's international Air Trade to GDP ratio has doubled from 4% to 8% in the last twenty years[16] and its growing merchandise export has created enterprising shippers of various high-yield items, pharmaceuticals and perishable items.

What ails the industry is also what ails other industries. Gaps in Key facility infrastructure at Cargo terminals in Gateway airports, Absence of off-site facility such as Air Freight Station (AFS) for cargo processing and lack of trained manpower among other factors.

Greenfield airports at Navi Mumbai, Mopa (Goa) and some brownfield airports of Airports Authortiy of India and 50 airports under the low cost model are expected to be developed including under the PPP model. While 100% FDI is permitted for Greenfield projects under the automatic route, FDI ranging from upto 49% - 100% is permitted in ground handling services.

The Promise of Multimodal

If India is expected to stand up to the challenges of rapidly expanding trade, untapped transport solutions need to be developed. An integrated multimodal transport network is the most critical factor for companies to successfully execute their supply chain processes both domestically and internationally. With the manufacturing hubs in India located deep in the hinterland, multimodal logistics will help reduce transit times, logistics costs and address the congestion especially on roads – the overburdened transport mode. Then, there's no doubt the logistics industry would undergo a major positive transformation in India.

Simultaneously, it is not as easy as it sounds. The challenges with the development of multi modal logistics in India are many. Right from poor infrastructure – roads, networks and connectivity – to rising freight costs, from the existing quality of evacuation network – to – sub optimal of current modes of transport, from lack of reliability and trackability of cargo and rail - to- high turnaround time of vessels, from poor hinterland connectivity and high logistics costs– to –delays due to stoppage of vehicles at State border check-posts, from navigation channel restrictions

not allowing bigger vessels to be berthed to absence of stringent requirements for setting up trucking business. What is essential is that an effort is made to address these and a partnership between the Government and trade.

Inland Services: Container Freight Stations (CFSs), Inland Container Depots, Empty Depots

Inland is where the action is today in India. Increasing containerisation of cargo and introduction of new policies will provide further impetus to growth here.

That's where a CFS comes into picture. CFSs are customs bonded facilities set-up near the port for handling of in-transit containers, examination and assessment of cargo by regulatory agencies like Customs for the Exim trade of the country. ICDs on the other hand are positioned away from the ports (more closer to manufacturing hubs) – in cases where there is no port nearby but provide connectivity to port by rail or road. They are both a critical part of the logistics chain in relation to the movement of containerized cargo. All the ports (major and minor) across the country have CFS facilities.

With hinterland development, operating efficiencies at optimum costs and enhanced services - the CFS business will witness a transformation. A hub and spoke model for container transportation closer to facilities is expected to develop. While the industry is in drastic need for mechanisation, infrastructure and trained manpower, there are very select global players today who offer state of the art infrastructure and services matching global standards.

Regulatory Policies

The most prominent and critical policies in the Indian scenario are currently related to Tariff Authority for Major Ports (TAMP) and Cabotage. TAMP is a multi-member statutory body with a mandate to fix tariffs levied by major port trusts under the control of Union Government and private terminals therein. It is mandated not only to fix the rates but also the conditionalities governing application of the rates.

The TAMP was started under the chairmanship of S. Sathyam, putting in place a set of rules, regulations and guidelines as to how the authority should work and introduced the "cost-plus model" in fixing port tariff with a 15 per cent return for investors in the port sector.

Recently, it was decided to move private cargo handlers operating under a tariff guideline framed in 2005 to a new market-linked tariff regime announced in July 2013 for new projects. The Government issued policy guidelines to set rates for services provided by the Government-owned port trusts, which had thus far been governed by the 2005 guidelines in an attempt to ensure a level playing field for major and minor ports.

What's worth noting here is that the minor ports which started out in small numbers today get over 40% of the share and the balance goes to major ports[17]. Major ports thus are facing keen competition from minor ports that are progressing at an exponential rate. Presently, minor ports, which are completely focused on handling higher volume of traffic with greater speed and efficiency, are at liberty to fix their own tariff. They also come under the State Governments.

Cabotage

Cabotage refers to the transport of goods or passengers between two points in one country by a ship or aircraft registered in another country. With its focus on alleviating the maritime industry in the country, the Government intends to promote trans-shipment. A critical focus is as India is losing

out on this front to neighbouring ports of Colombo, Dubai and Singapore.

Over 27.4% of India's export import cargo is trans-shipped at foreign ports[18]. East coast has a much larger mix of trans-shipment cargo - up to 60%[18]. Therefore, relaxing cabotage norms at least in those locations would benefit the industry more by reducing our dependence on foreign ports. It seems the government was considering relaxing the coastal movement norms for EXIM cargo at all the ports but has revised its proposal after opposition from the Indian shipping companies.

Integrated allied services and the players in the Industry

Warehouses: The size of the Indian warehousing industry (across commodities and modes) is pegged at about INR 560 billion (excluding inventory carrying costs, which amount to another ~INR4,340 billion). The industry is growing at over 10% annually.[19] Multiple business models exist within the warehousing industry. The key segments can be represented as:

- Industrial/Retail warehousing: accounts for ~55% of the total market
- CFS/ICD: ~14% share
- Agri-warehousing: 15% share
- Cold stores: ~16% share[20]

The warehousing industry is dominated by unorganised players, accounting for ~85% of the market. Modern warehousing (organized players) accounts for only 15% share; nevertheless, this segment is growing at a CAGR of 25%–30%, and it is expected to account for a 30% share by 2015. The share of organised warehousing is set to increase from 62 million sq. ft. in FY10 to 178 million sq. ft. in FY15.[21]

What needs to be remembered is that warehousing does not just provide conventional storing services as may be commonly understood. It plays a much wider role through provision of value-added services like consolidation and breaking up of cargo, packaging, labelling, bar coding and reverse logistics etc. These together account for approximately 20% of total logistics industry and as per KPMG, a much larger warehousing space would be needed to meet demand gap in storage space.

NOVONOUS estimates that the warehouse market in India is expected to grow at a CAGR of 10% whereas freight forwarding market is expected to grow at a CAGR of 12% till 2020. Warehousing will see a lot of investment in the coming years.[22]

Freight Forwarding

India is expected to witness considerable growth in freight market, but with a caveat – provided the freight companies take proactive steps to diversify further into other logistic segments. An improved and robust freight network is the need of the hour as warehousing infrastructure and growth in containerised cargo is growing by leaps. Amongst the segments, air and sea freight together contribute maximum to the market in terms of value, however volume-wise they carry the minimum freight.

Customs House Agents

In India, a customs house agent (CHA) is licensed to act as an agent for transaction of any business relating to the entry or departure of conveyances or the import or export of goods at a customs station. CHAs maintain detailed, itemised and up-to-date accounts. Today a CHA does nearly all the functions of a freight forwarder and the operations in the custom house hardly represent 2% of his total activities.

What can drive growth?

There is a huge untapped potential in consumption of different modes of transport on a standalone level as well as on an integrated level. With increase in trade and rapid pace of development inland, multi-modal transport will become a critical component to serve the customers and trade. In pursuit of reduced costs and higher efficiencies, there will be a growing demand for optimum solutions offered by multi-modal transport and containerised cargo. Infrastructure development – right from set up of non major ports, dedicated freight corridors, road infrastructure, expansion of rail network and development of new cargo centers will drive maximum growth in multi modal logistics. In addition to the above, the sector needs a major impetus from the Government in forms like friendly policies, speedy execution of infrastructure projects, and grant of subsidies on inland waterways, simplifying entry into rail networks for private players and ensuring they are a profitable proposition.

The Government is slowly opening up opportunities and speed is the key here. There will come a point where the network will need to consolidate and the developed infrastructure for multi modal transport would be the backbone of the logistics sector. It will be at least a few years before we can start experiencing the advantages of the same.

Recognition of logistics management as a strategic tool will bring about a difference to the approach. Mechanisation and automation, infrastructure development, infusion of funds, development of talent pool, dedicated research in the field, integration across sub-sectors and focused efforts on development are some of the critical aspects, I believe that need serious attention and action to help logistics catapult India to high growth and contribution to the national economy.

About APM Terminals India Pvt. Ltd.

APM Terminals India Pvt. Ltd. is a part of the APM Terminals – a Global Port, Terminals and Inland Services operator comprising of 63 ocean ports and terminals in 39 countries, along with 165 inland services locations in 45 countries and staffed by 20,300 employees in 66 countries. APM Terminals India Pvt. Ltd. comprises of Container Freight Stations with a total bonded yard area of about 2.6 million sq. ft., empty depots in multiple locations with state-of-the-art dry and reefer repair workshops and is backed by a strong trucking fleet to manage shunts and primary transportation. South Asia cluster is powered by a dedicated team of over 300 accomplished professionals who focus on providing best in class integrated solutions in the field of inland container logistics. APM Terminals India Pvt. Ltd. has world-class CFS facilities at Nhava Sheva, Chennai, Dadri and Cochin.

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Issues faced by shipping companies

Lease accounting

There are various types of chartering activities in sea logistics such as voyage charter, time charter, bareboat charter, contract of affreightment etc. In case of voyage charter, the vessel along with the crew is hired for carrying cargo from load port to discharge port, whereas in case of time charter, the vessel is taken on hire for a fixed period and the vessel is managed by the owner with the help of vessel master and crew.

Bareboat charter is hiring of the vessel without the administrative or technical assistant from the ship owner. The charterer obtains the possession and full control over the vessel, deploys own crew and incurs all the operating costs such as bunker, port charges etc. In this, the arrangement may last for many years and may include a clause whereby the vessel may be purchased by the charterer at the end of the charter. In substance, this arrangement takes the nature of hire purchase. In case of contract of affreightment, the ship-owner agrees to carry goods for the charterer in the ship, or to give the charterer the use of the whole or part of the ship's cargo-carrying space for the carriage of goods on a specified voyage.

The typical issue we face with regard to these varied types of charters is to determine if the arrangement is operating lease or finance lease. Distinguishing between a finance and operating lease involves significant judgment as various factors need to be considered such as whether the ownership of the vessel is getting transferred at the end of charter period, whether the charterer has the purchase option, whether the charter is for the major economic life etc. Considering that it is common to have long-term charter arrangements involving majority of the economic life with or without option to purchase the vessel, this assessment is essential.

This issue is also more commonly experienced in the facility usage arrangements in case of surface logistics. The arrangement is such where the entire port and logistics facilities are owned by a company and the same is designed considering the specific needs of the client. The client uses these facilities either for a lease or a service charge for a term which may vary from a year to long term. In some cases, the arrangement may not be termed as a lease arrangement but may contain a service charge or series of related transactions and payments for the right to use these facilities.

Considering the facts of the case where the facility owner provides services in addition to the usage of the facility, there is significant judgment required to determine if the same is in the nature of lease or service arrangement.

IFRS provides detailed guidance for the same in IFRIC 4 – Determining whether an Arrangement Contains a Lease for determination of lease vs. service arrangements. Some of the aspects that need consideration are whether fulfilment of the

arrangement depends upon a specific asset, as also whether the arrangement conveys a right to control the use of the underlying asset. No such guidance is available under Indian GAAP currently. This results in significant GAAP variance in cases where under Indian GAAP these arrangements are scoped out of lease arrangement. However, going forward once Ind-AS is applicable, these provisions will be harmonised since Ind-AS 17 - Leases specifically has guidance for evaluating the substance of transactions involving lease.

Freight/ Revenue Recognition

Freight is a more commonly used terminology in the shipping industry for the revenue earned by the ship owner for carrying cargo (chartering activity). Generally, freight rates are determined on the basis of demand & supply of capacity available in the local and global markets and therefore seasonal and highly volatile.

In case of time charter and bareboat charter the revenue is generally recognised over the term of charter evenly. Whereas in case of voyage charter and contract of affreightment, the revenue is recognised over the period of voyage.

Accounting Standard 9 – Revenue Recognition permits recognition of revenue from service transactions either as per completed service contract method or proportionate completion method. In case of completed service contract method since the entire revenue and related costs are recognised on completion of the contract, there is no significant estimation involved. However, in case of proportionate completion method, estimation of percentage of completion and cost to complete the voyage is a challenge. There are varied practices with regard to the determination of stage of completion of the voyage, since the voyage could mean a complete round trip or reaching the nearest port. Further, the proportionate revenue and cost could be determined on the basis of actual voyage days or standard voyage days.

This issue further gets complicated, in case of a multiple element contract where the contract is for providing end-to-end integrated logistics solution, where the service activities may include multiple services such as cargo transportation, freight forwarding, custom clearing solutions, etc. Estimating completion of each of these services in order to decide timing of revenue recognition is very important. Achieving certain milestone is relevant only for customer billing but not necessarily linked to fulfilment of revenue recognition criteria which requires recognition of revenue only when the services are performed.

Grossing up or netting of the revenue and related costs: It is common practice for the ship owner to make certain payments on behalf of the charterer such as port charges, duties, taxes etc. Since these payments are made by the ship owner in the capacity of the agent, it is inappropriate to record the revenue and expenses, on a grossed up basis for these payments.

Escalation clauses in the charter hire: Considering the volatility in currency and bunker prices, it is common for a charter contracts to include escalation clause for movement in currency or bunker prices. Under Indian GAAP currently, these arrangement are accounted based on the revenue earned during the year, including revenue on account of escalation. However, under Ind-AS 109 – Financial Instruments, such contracts could be treated as an embedded derivative[1]. Ind-AS 109 requires such embedded derivative to be separated from the host contract and accounted for as a derivative if certain prescribed conditions are met.

Onerous charter arrangement

An onerous contract is a contract in which the unavoidable costs of meeting the obligations under the contract exceed the economic benefits therefrom. The unavoidable costs under a contract reflect the least net cost of exiting from the contract, which is the lower of the cost of fulfilling it and

1. An embedded derivative is a component of hybrid contract that includes a non-derivative host contract with the effect that some of the cash flows under the contract vary in a manner similar to a stand-alone derivative instruments.

any compensation or penalties arising from failure to fulfil it. These issues arise sometimes if the cost of 'charter in' is higher than the income from the 'charter out'.

Considering that the shipping industry is highly seasonal in nature, in down market in case of long-term arrangements there could be cases where the hire charges for vessel taken on hire are higher than the current market price resulting into onerous arrangements. However, while identifying such contracts one should be aware of the fine difference between an onerous contract and a loss making contract.

Useful life and depreciation

For shipping companies, after the direct cost, depreciation is the next biggest material item in the statement of profit and loss. This is obvious considering the significant cost of the vessels. Depreciation charge is dependent on useful life and residual value and determination of both involve significant judgment. In case of useful life, though the engineering life of engine and hull is generally high, other factors such as uncertainties in spot market, surplus capacity in the market resulting into underutilisation of vessel, constant technology changes, high amount of repair cost, etc., play very important role in determination of useful life of the vessel. The residual value of the vessel may also fluctuate significantly as the scrap value of steel could be high and steel price itself being subject to high volatility.

Further this estimation exercise may not be done just at the time of acquisition of vessel, but a constant reassessment needs to be done considering that the vessel is exposed to constant erosion and accidents.

Componentisation including dry docking costs

As per Accounting Standard 10 – Fixed Assets, in certain circumstances, the accounting for an item of fixed asset may be improved if the total expenditure thereon is allocable to its component parts, provided they are in practice separable, and estimates can also be made of the individual useful lives of these components.

Note in the Schedule II to the Companies Act, 2013 states that useful life specified in this Schedule is for whole of the asset. Where cost of a part of the asset is significant to the total cost of the asset and useful life of that part is different from the useful life of the remaining asset, the useful life of that significant part shall be determined separately.

Considering this, if we were to assess the components of a vessel separately, they would broadly comprise hull, propeller, engine, the superstructure, navigation system and other equipment. If we examine the current practice followed by the Shipping Industry it would be observed that generally companies do not componentize the vessel on the assumption that the major parts such as hull, propeller and engine have the same useful life. Further, while in most cases, the companies acquire the vessel for a composite price, the component wise break up is not available. Also, considering that the vessels have a huge second sale market the value of the vessel is assessed in its entirety.

Additional issue that arises is with regard to dry docking cost. Dry docking is a term used for major repairs or inspection of the vessel. For this the vessel is taken to the service yard and the ship is fully inspected on the dry land. This helps inspection of the otherwise submerged portion of the ship. The dry docking is generally done at periodic internals such as once in three years and twice in a block of five years. This major inspection is regulated by the regulator and mandatory for the companies to follow. Dry docking expenditure is one of the major expenditure for the companies.

Applying this principle of componentization strictly, the dry docking cost may also qualify to be a separate component. Accordingly, when a new vessel is acquired, an estimate for dry docking cost for the similar asset will be made and such cost would be treated as a separate component to be

amortised over the period up to next dry docking. The balance would be the acquisition cost of the vessel.

However, this is still not a common practice in India due to inadequate guidance and also as the componentisation has been deferred by one year under Companies Act, 2013. Currently, some companies segregate the expenditure incurred on dry docking between capital and revenue based on nature of expenditure. This is on the basis of principle laid down in AS 10 which states that expenditure which increases the future benefits from the existing asset beyond its previously assessed standard of performance can be included in the gross book value.

As an alternate accounting, some companies estimate the cost of next dry docking and accrue it on a systematic basis up to the next dry docking period. The actual dry docking costs incurred is then charged against the provision created in the books. The difference in the actual and estimate is taken to the statement of profit and loss in the year in which such dry docking is done as a change in estimate.

Pool arrangements

Pool arrangements are very common in the shipping industry. They provide a risk sharing mechanism wherein various contributed vessels are operated as a single, cohesive fleet and the net earnings are distributed among the participants under a pre-arranged points weighting system.

It is essential to examine the specific facts as well as the terms and conditions of these Pool Arrangements as their classification would affect the accounting outcome. Generally, three types of pool arrangements are prevalent in this Industry

(i) One company controls the pool where pool is consolidated by this company,

(ii) The company is a joint operator of the pool where each company recognises only its share of revenue, cost, assets and liabilities, and

(iii) The company is chartering the vessel into a pool operation where the company recognises the net income from this charter arrangement.

Under current Accounting Standard 21 – The Effects of Changes in Foreign Exchange Rates, determination of control is not difficult since the same is on the basis of either ownership of voting power or composition of Board. However, the concept of control under Ind-AS 110 – Consolidated Financial Statements is a much broader and substance based approach.

Ind-AS 110 introduced a new definition of control according to which an investor controls an investee when it is exposed, or has rights, to variable returns from its involvement with the investee and has the ability to affect those returns through its power over the investee. Returns are not just restricted to ownership benefits like dividend, but also include other benefits like fees, tax benefits, cost savings etc. Further, Ind-AS 110 explicitly includes the concept of *de facto* control which can cause consolidation of entities with lower than majority of the voting rights.

The assessment of control also entails analysis of the status of Operator or Pool Manager. If the Operator or Pool Manager are only responsible for the daily management activities and has no right to direct the activities of the pool for its own benefit, it is unlikely that Operator or Pool Manager will have control over the pool. In these cases, the Operator or Pool Manager are not exposed to and have no right to returns beyond their participating share. Hence, they can be regarded only as agents under such situations.

Considering the fundamental difference in the definition of control before and after, the existing pool arrangements need to be re-examined so as to determine whether the company is having *de facto* control over any such pools and whether the same needs to be consolidated.

Global crises

The Shipping industry in all its three major segments that is dry bulk carriers, tankers and

containerships has been widely impacted due to global economic recession that began in 2008. Since the demand for ships/ vessels is a derived demand of commodities, the recession has affected the demand for ships / vessels during this period. This has been evident from the movement of Baltic Dry Index (BDI), which provides assessment of price of moving raw materials by sea, and is one of the leading global economic indicators. BDI measures the demand to move dry bulk cargo mainly raw materials such as iron ore, coal, and grains worldwide and therefore, reflects the freight cost for chartering the giant ships that transport iron ore, coal and grain.

This index has hit an all-time low currently even lower than shipping rates during the last financial crises. This issue is further aggravated due to oversupply of vessels resulting in disproportionate increase in supply. Consequently, vessel earnings have significantly reduced leading to significant reduction in the earning capacity of the vessel. Post 2011, internationally many companies have filed for Chapter 11 bankruptcy protection. Considering the current situation, where the market does not show signs of recovery in a short period the shipping industry is finding it difficult to service the debt and manage working capital requirements. This is giving rise to a material uncertainty as to whether the companies would be able to reschedule its debt servicing obligations based on discussion with the lenders and would be in a position to honour the creditor payments. Due to these material uncertainties, the management of these companies are compelled to assess if these companies have any going concern issue that needs to be brought to the attention of various stakeholders.

Impairment

Accounting Standard 28 – Impairment of Assets, require companies to review for impairment whenever events or change in circumstances like downturn in economy, depressed freight rates, overcapacity etc. indicate that the carrying amount of an asset may not be recoverable. Recoverability of an asset is determined by comparing its carrying amount to the higher of value in use and fair value less cost to sell. Considering the financial crises and reduction in the vessel earning capacity, the issue of impairment has become pervasive for the shipping industry and the impairment assessment would be more frequent.

This assessment of impairment involve various estimates and assumptions which require the exercise of considerable judgments. Some of the significant estimates/assumptions involve are as follows: -

a) Determination of the Cash Generating Unit (CGU) that is the level at which impairment analysis needs to be carried out. This involves assessing whether the CGU should be identified as an individual vessel or the entire fleet (where individual vessels are inter-changeable in accordance with the terms of the contract of affreightment);

b) Estimating the current market rates for selling the assets. Since every vessel is unique in terms of capacity and functionality, availability of transaction price is a challenge. Hence, it is important to understand the judgments involved in such price determination and, if necessary, obtain another independent valuation.

c) Determination of expected cash flow from the vessels – The determination of the expected cash flow involves estimate of the revenue inflows from the vessel and its operating cost over the useful life of the vessel, the discount rate to be applied to the projected cash flow etc. The revenue estimate is subject to significant volatility due to its dependence on general economic conditions. The determination of discount rate pose significant challenge as it is generally rare that asset-specific rate will be directly available from the market. In such cases, the most common method is to start with a company's weighted average cost of capital ("WACC") rate and to adjust it to

reflect the specific risks associated with the projected cash flows such as currency risk, price risk, country risk, cash flow risk etc.

Service concession arrangements

In case of public service infrastructure, it is very common to have private sector participation for providing of public sector services. The infrastructure may already exist, or may be constructed during the period of the service arrangement. A typical arrangement of this nature involves a private sector company (an operator) constructing the infrastructure to provide the public service or upgrading it (for example, by increasing its capacity) and operating and maintaining that infrastructure for a specified period of time. The operator is paid for its services over the period of the arrangement. The arrangement is governed by a contract that sets out performance standards, mechanisms for adjusting prices, and arrangements for arbitrating disputes. Such an arrangement is often described as a 'build-operate-transfer', a 'rehabilitate-operate-transfer' or a 'public-to-private' service concession arrangement.

Currently, we do not have any specific guidance with regard to accounting of such arrangement under Indian GAAP unlike IFRS or Ind-AS. The accounting for Service Concession Arrangement is complex and once Ind-AS is implemented it would result into recognition of financial asset or intangible asset based on the nature of consideration received from government.

Segment

The objective of segment reporting is to establish principles for reporting financial information, about the different types of products and services an enterprise produces and the different geographical areas in which it operates. The critical factor in determination of segment information is to assess if these segments are subject to different risks and returns. Since varied practices are prevailing in the industry, the risk of identification of fewer segments is common. Further, the practice of considering geographical segments based on location of customers also needs to be assessed for appropriateness since merely location of customer in different economic environment may not be subject to different risks and returns.

Foreign exchange fluctuation

Shipping companies primarily carry out their business in the international market which exposes them to significant currency exchange risk. The majority of the components of financial statement such as acquisition of the vessels, borrowings, charter agreements, operating cost including bunker and port charges are incurred in foreign currency.

Fuel cost is the most significant component of the operating expense of the shipping companies and to ensure uninterrupted supply and reduce volatility in the fuel prices, they often enter into long-term fixed price contracts with the suppliers. Since these contracts are generally denominated in foreign currencies these contracts expose these companies to significant exchange fluctuation risk. Accordingly, the use of the derivatives like Forward Freight Agreements (FFA), Currency Forwards, Commodity Futures (Bunkers) are very common in this industry for hedging exchange risks.

Since these companies are exposed to a wide variety of foreign currency transactions in their regular operations, going forward it becomes crucial to determine their functional currency for accounting purposes under Ind-AS reporting scenario, which may not be the same as their reporting/presentation currency under existing Indian GAAP. Functional currency is the currency of the primary economic environment in which the company operates that is one in which it primarily generates and expends cash. Presentation/reporting currency is the currency in which financial statements are presented. This determination of functional currency involves significant management judgment along with the evaluations of the factors laid down in Ind-AS.

CA. Koshal Agarwal

Logistics Services: Overview of services including the warehousing, logistics and support services

What is 'logistics'? Logistics is the management of the flow of things between the point of origin and the point of consumption. This may include physical items, such as food, materials, equipment, animals, and liquids, as well as abstract items, such as time, information, particles, and energy. The recent increase in electronic commerce market add an another feather to this industry as the same brings lot of activities in this space.

The logistics of physical items usually involves the integration of information flow, material handling, production, packaging, inventory, transportation, warehousing, and often security. The complexity of logistics can be modelled, analysed, visualised, and optimised by dedicated simulation software. The minimisation of the use of resources is a common motivation in logistics for import and export.

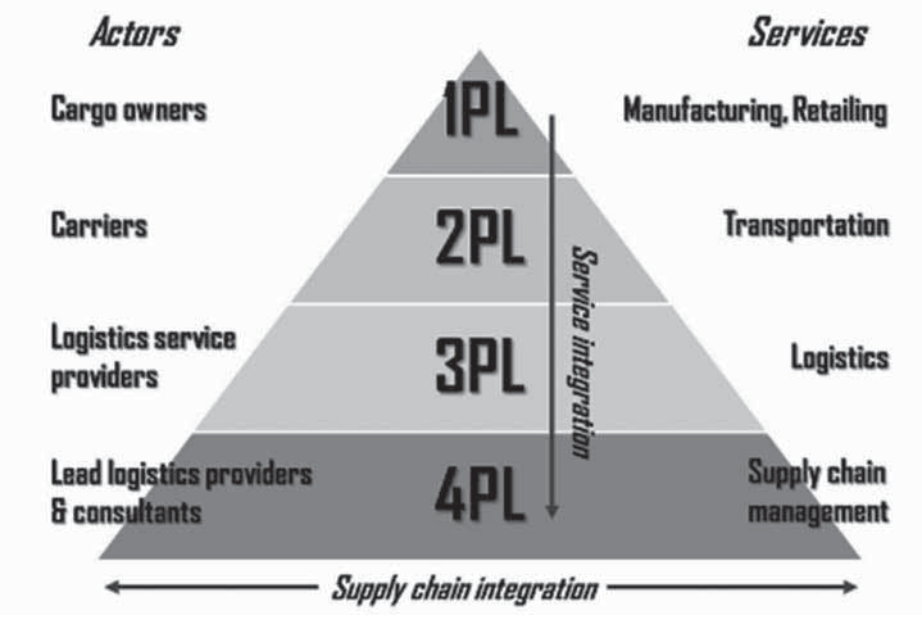
Indian Logistics Industry Insight (2007) reports Indian logistics costs 13 per cent of its GDP, while the same is less than 10% in developed countries. As per a survey, logistics costs is around 21% on a product cost whereas in case of developed countries, the same is around 5% – 6%. Six cost components are identified in the report: transportation (35% of total costs), inventories (25%), losses (14%), packaging (11%), handling and warehousing (9%) and customers' shopping (6%). Thus, there are lot of opportunities for improvement in logistics sector.

The logistics space can be divided in various segments based on the nature of activities:

- **Procurement logistics** consists of activities such as requirements planning, make-or-buy decisions, supplier management, ordering, and order controlling. The targets in procurement logistics might be contradictory: maximising efficiency by concentrating on core competences, outsourcing while maintaining the autonomy of the company, or minimising procurement costs while maximising security within the supply process.
- **Distribution logistics** has, as main tasks, the delivery of the finished products to the customer. It consists of order processing, warehousing, and transportation. Distribution logistics is necessary because the time, place, and quantity of production differs with the time, place, and quantity of consumption.
- **Disposal logistics** has as its main function to reduce logistics cost(s) and enhance service(s) related to the disposal of waste produced during the operation of a business.

- **Reverse logistics** denotes all those operations related to the reuse of products and materials. The reverse logistics process includes the management and the sale of surpluses, as well as products being returned to vendors from buyers. Reverse logistics stands for all operations related to the reuse of products and materials. The opposite of reverse logistics is forward logistics.
- **Green logistics** describes all attempts to measure and minimise the ecological impact of logistics activities. This includes all activities of the forward and reverse flows. This can be achieved through intermodal freight transport, path optimisation, vehicle saturation and city logistics.
- **Asset Control Logistics:** Companies in the retail channels, both organised retailers and suppliers, often deploy assets required for the display, preservation, promotion of their products. Some examples are refrigerators, stands, display monitors, seasonal equipment, poster stands & frames.
- **Warehousing:** The warehousing logistic provides a unique advantage to the Company wherein the warehouse service provider manages warehouse of the Company. Warehouse keeper receives goods from Company and distributes goods as per the instruction of the Company.

The logistics activities are generally known in the market by various players for their role performed in the industry. A typical chart showing 1PL, 2PL, 3PL and 4PL is given below:



The concept of logistics has moved from 3PL to 4Pl wherein the entire supply chain management is undertaken by the 4PL to provide 4PL services to ensure that the logistics cost are reduced and efficiencies are maximised.

In summary, in India, the logistics sector has a spectrum of opportunities and can reduce a substantial logistics costs, which will be win-win for everyone.

CA. Koshal Agarwal

Taxability of Logistics Sector

The logistics sector is full of complexities and these complexities are further multiplied by the taxation system prevailing in India. The logistics services essentially comprises of three activites:

- International Freight (Basic International Ocean Freight)
- Handling activities at origin
- Handling activities at destination

The logistics activites are in the nature of services, thus, are subject to service tax in India. The provisions regarding applicability of service tax are contained under the Finance Act as amended from time to time.

Term 'service' has been defined under section 65(B)(44) to mean any activity carried out by one person for another for a consideration. Accordingly, logistic services falls under the sweep of service tax. The current rate of service tax in India is 14%.

In addition to this, the services specified under the Negative list of services, exemption notification and the services for which place of provision of services is outside India, are not subject to service tax.

The applicability of service tax on provision of logistics services and the various nuances associated thereto are discussed under the following paragraphs:

International Freight (Basic Ocean Freight)

The basic international ocean freight should not be subject to service tax as per the international convention signed by various countries. In spite of this, the Indian tax authorities have been bold enough to bring basic international ocean freight within the ambit of service tax. However, this attempt of the Indian tax authorities was later on quashed by the court of law.

Considering this, the amendments brought about by the Finance Act, 2012 have clearly stated that basic international ocean freight shall not be subject to service tax. Basic international ocean freight services may be bifurcated into two types:-

i) **Inbound basic international ocean freight services:** Basic international ocean freight services in relation to import consignment destined to India.

ii) **Outbound basic international ocean freight services:** Basic international ocean freight services in relation to goods exported from India.

Taxability of inbound basic international ocean freight services

The introduction of the Negative List based taxation regime witnessed the introduction of Section 66D – Negative List of Services. As the nomenclature suggests, this section contains a list of services which have been specifically excluded from the applicability of service tax.

Clause (p) to section 66D deals with the inbound basic international ocean freight services and the said clause is reproduced hereunder:-

> *66D NEGATIVE LIST OF SERVICES*
>
> *p) services by way of transportation of goods by an aircraft or a vessel from a place outside India to the customs station of clearance in India*

The above section categorically includes the international transportation of goods by an aircraft or a vessel from outside India up to customs station of clearance in India which means that the inbound international ocean freight services will not be subject to service tax at all by virtue of their inclusion under the negative list of services. Accordingly, all services rendered up to customs clearance of goods is not subject to service tax.

Taxability of inbound basic international ocean freight services

As specified in the earlier paragraphs, service tax is applicable on a particular service only if the said service has been performed in taxable territory.

The term 'taxable territory' has been defined to mean the whole of India excluding Jammu and Kashmir.

Section 66C of the Finance Act read with the Place of Provision of Services Rules, 2012 contains the mechanism to determine as to whether or not a particular service has been performed within taxable territory or not.

These rules deal with the determination of the place of provision of services with respect to specific transactions or scenarios.

Rule 10 of these rules deals with the determination of place of provision of services in respect of 'Goods Transportation Services' and the said rule states as under:

> *10. PLACE OF PROVISION OF GOODS TRANSPORTATION SERVICES.-*
>
> *The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods*

By virtue of the above provision, the place of provision of the services in relation to the outbound basic international transportation of goods shall be the destination of goods i.e. outside India and hence such services shall not be taxable at all.

Accordingly, in summary, inbound basic ocean freight is not subject to service tax because it is covered under the negative list of services whereas outbound basic ocean freight is not subject to service tax because the service is deemed to be provided outside India.

Handling charges in India

Ordinarily, handling charges in India shall be subject to service tax.

However, under Section 66F of the Finance Act, the service tax law contains provisions for 'bundling of services' which provides that in the event various elements of any service are naturally bundled together, this shall be treated as provision of the single service which gives the bundle its essential character.

This provision raises a new question: Whether the various handling services (terminal handling services etc.) performed in India are to be bundled along with ocean freight or are handling services to be treated as performance

of separate services, distinct from basic international ocean freight services?

If the handling activities are construed to be bundled with basic international ocean freight, they shall form a part and parcel of basic international ocean freight only. Since basic international ocean freight is not subject to service tax, the said handling charges shall also not be subject to service tax.

On the other hand, if the handling services are construed as provision of separate services, distinct from basic international ocean freight, they may be subject to service tax as provision of separate services, provided other conditions are satisfied.

At a macro level, various countries provide exemption/zero rating to such handling services. The various handling charges up to the customs clearance are also included in the valuation of goods, and thus, these charges are anyway subjected to customs duty. The levy of service tax on these handling charges increases the handling/logistics costs and also results in double taxation.

The logistics service providers are also dependent on the tax position taken by the shipping lines as logistics service providers purchase services from the shipping lines. Thus, the tax position adopted by the entire specturm of the industry should be in sync to avoid any ambiguity and litigation in this area.

Handling charges incurred outside India

Whether these charges should be subject to service tax or not as the activities are performed outside India?

Generally, if the services in relation to goods are performed outside India, such services are not subject to service tax in India.

The Indian service tax law has a specific provision which states that in case, service provider and recipient of services, both are located in India, the transaction will be subject to service tax. However, the services covered under the Negative List of services and services for which place of provision of services is outside India, are not subject to service tax.

Thus, the question arises: whether the logistics services performed outside India, would really be subject to servie tax or not ?

Discount/Commissions/Referral Bonus

The logistics industry receives a discount/ commission/referral on account of the booking from airline/shipping line for booking of the cargo space with that particular airline/ shipping line.

This method is adopted by the airlines/ shipping lines to incentivise the logistics sector to book the cargo space with that particular airline/shipping line. The question arises is whether the above discount/commission/ referral bonus is really a discount or in nature of commission. There are various rulings on this issue which state that the above amount should be subject to TDS and thus, service tax authority also takes a similar view and collects service tax on the same.

Profit share

Another question still remains, as to whether the profit share/purchase – sale of freight would be subject to service tax or not ?

The profit share essentily comprises sharing of profit on basic international ocean freight transactions between the two network entities. Accordingly, the same should form part of the basic international ocean freight and should not be subject to service tax. However, the Indian tax authorities are giving this

transaction a colour of commission/other services and are seeking to levy service tax on the above transaction.

Trading in Ocean Freight

In case of trading in ocean freight, a Company purchases/books slots with the airline/ shipping line at the start of the month and then sells the same to its own customers during the month. The price at which freight is sold, could be either higher or lesser than the purchase price of the freight booked at the start of the month with the shipping line or airline. This, essentialy triggers the question as to whether the above difference is commission or whether the same is income part and parcel of basic international ocean freight services only.

It should be noted that in case where, the service provider issues own bill of lading, this should not be subject to service tax as the service provider is only providing ocean freight services and thus, the same should not be subject to service tax. All those cases wherein the service provider does not issue its own bill of lading, really needs to be examined as to whether this transaction should be subject to tax or not ?

Transportation of Goods by Road Services

The transportation of goods by road plays a vital role in this Industry. The above sector mostly operates in unorganised sector and this adds lot of complexities. Genearlly, the trucks which are owned by the truck owner are leased to a transport company. The transport company provides services to logistics company and logistics company provides service to the end customer. The transport of goods by road services are subject to a concessional rate of service tax @ 4.2%, in case the consignment note is issued by the goods transporter.

However, a practical difficulty arises given the fact that the consignment note is only issued by transport company and not by the other subsequent parties and thus, the question which arises is: whether the various subsequent chain of activities will be subject to service tax @ 14% or 4.2%?

Reversal of proportionate CENVAT Credit

The provisions of Rule 6(3) of the CENVAT Credit Rules, 2004 are applicable to all service providers who provide taxable as well as exempted services and provides that CENVAT Credit attributable to quantum of exempted turnover should be reversed.

Since the logistics service providers provide taxable as well as exempted services, the provisions of Rule 6(3) above become squarely applicable and the service provider is required to reverse CENVAT Credit (tax credit) availed on various input services received from vendors in proportion to the turnover of exempted services.

Summary

In summary, the taxation system is complex and this complexity is further aggravated by the views taken by various stakeholders. Although, the taxation law signifies that the transaction should not be subject to tax but with an abundant caution and not to burn figure, the industry charges service tax on all activities except on basic international ocean freight services.

CA. Ami Majumdar

Cargo Handling Activities : An Overview

Cargo handling activities form an important part of the overall logistics chain. Cargo Handling consists of a plethora of activities that are performed in relation to goods that are imported into or to be exported out of India. The Cargo Handling activities are normally performed at a Customs Freight Station or at an Inland Container Depot, which is a facility connected to the Port and set up specifically for undertaking the cargo handling activities.

Import Cargo Handling Activities would normally comprise Unloading/De-stuffing of containers from vessel, unpacking the unloaded cargo, Stacking, Handling and Storage of cargo at the port, Maintenance of documentation etc.

Export Cargo Handling Activities would normally comprise Receipt of cargo from exporter, Inspection and packing of cargo, Stuffing of cargo into containers, Loading the containers onto vessels etc.

The above also includes in its sweep packers and movers who handle domestic movement of cargo.

90% of the country's trade by volume and 70% by value is moved through maritime transport. In recent years, India has witnessed tremendous growth in inbound and outbound container traffic which has resulted in development of India's capabilities for handling cargo.

From the above, it must be appreciated that the sector has huge growth potential serves as an attractive investment opportunity which may be explored.

Cargo handling facility: Setting up

Setting up of a cargo handling facility is a highly capital intensive exercise requiring a major capital expenditure including the expenditure on land. Cargo handling facilities must be able to handle the heavy container traffic and accordingly it is important that the land at the facility should be properly paved. In addition to this, for construction of the Cargo Handling facility, one has to spend a good amount on infrastructure.

Furthermore, non recoverability of the various input taxes (VAT/service tax) paid on procurement of goods/services further increases the capital cost. Hitherto, the Central Government has extended exemption from service tax to various port construction activities, which was also withdrawn in recent Budget 2015.

The handling of loaded or empty containers requires sophisticated machinery (fork lifts, reach stackers etc.). The import of these

goods into India is subject to customs duty and around 50% of the customs duty (basic customs duty and special additional duty) is not tax creditable.

Tax incentives/concessions for exports

Considering the fact that this industry substantially contributes to and plays a pivotal role in export of goods, the Government of India has extended tax concessions/incentives to service providers engaged in exporting cargo handling services. Accordingly, goods can be imported under any of the following beneficial schemes:

- Under Export Promotion Capital Goods Scheme (EPCG):

  Under EPCG, capital goods are allowed to be imported at NIL customs duty subject to achievement of an export obligation of six times the amount of duty saved in next six years.

- Service Export from India:

  Under the SEI Scheme, exporters of cargo handling services are entitled to duty credit scrips of 5% of export value after deducting expenses in foreign currency. The scrips may be utilised for payment of service tax, excise duty and customs duty on procurement of inputs and input services and capital goods from India/ abroad.

  Furthermore, the scrips are freely tradeable in the open market.

- Project import

  Under the PIS, goods are allowed to be imported at a concessional rate of Basic Customs Duty (5%) for initial set up or substantial expansion of a Port Development Project. Further, all goods imported under the PIS shall be assessed under one CTH and thus doing away with the cumbersome task of classification and assessment of individual products under different headings.

Thus, proper planning and opting for the best scheme, will reduce the tax incidence and provide a relief to the business by maintenance of an optimum cash flow.

Cargo handling activities: Service tax

- **Provision of services**

The provisions regarding applicability of service tax are contained under the Finance Act as amended from time to time.

Section 66B of the Finance Act deals with the levy of service tax and provides as follows:-

'There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.'

Further, the term 'service' has been defined under section 65(B)(44) to mean any activity carried out by one person for another for a consideration.

Hence, currently in India, service tax @ 14% is applicable on provision of any service, provided that such service has been performed in taxable territory and is not included under the Negative List of services or otherwise exempted.

Since Cargo Handling Activities are neither covered under negative list nor covered under exemption notification, the said activities shall be subject to service tax @ 14% as long as the same are undertaken in taxable territory.

- **Tax credits**

Taxes paid for inputs, input services and capital goods procured for the setting up of the cargo handling facility shall be eligible as tax credits and may be utilized for payment of output service tax liability.

However, the credit of taxes paid for procurement of input services for any construction related activities at the facility shall not be eligible as tax credit as the same is specifically excluded from the definition of 'input services' under the CENVAT Credit Rules, 2004.

Auction Income – Whether subject to Customs Duty/VAT/Service Tax or all?

In certain cases, cargo handling activities are faced with the peculiar situation wherein the importer of the goods (on behalf of whom the cargo handling activities are performed) does not turn up to collect delivery of the goods.

In such circumstances, such goods are auctioned off by the cargo handling facility to the highest bidder and the auction proceeds are retained by the cargo handling facility. Hence, in the case of auction income, the question that arises is: whether this auction amount should be subject to Cusotms Duty, VAT or Service Tax or all these taxes?

The Customs department justifies the levy of customs duty on the ground that since the goods are imported into India, the customs duty would be applicable to the goods. Furthermore, the deeming fiction under the State VAT law states that sale of abandoned / unclaimed cargo will be construed as sale of goods and VAT would be applicable on the above income generated by way of auction of goods.

Now, over and above these two taxes, the service tax department has also resorted to levy service tax on surplus arising from sale of abandoned cargo by way of auction.

However, it should be noted that one of the important ingredients for a transaction to be subject to service tax is that there should be two parties to the transaction i.e. a service provider and a recipient of services. In the case of sale of abandoned cargo, there is no recipient of services and thus, the cargo is auctioned off. In absence of a service recipient in the case of auction of unclaimed or abandoned cargo, the service tax should not be applicable at all.

Reversal of proportionate CENVAT Credit

Section 66D of the Finance Act specifically includes 'storage or warehousing of agricultural produce' and hence storage and warehousing of agricultural produce is by the cargo handling facility amounts to provisions of an exempt service.

Rule 6(6) of CENVAT Credit Rules states that goods cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002 would not be subject to reversal provision of Rule 6 of CENVAT Credit Rules. Does this mean that in case of storage and warehouse services provided for export cargo, a service provider is not required to reverse CENVAT credit on corresponding input services?

Summary

In summary, a detailed assessment of various tax benefits provides a good tax saving to the Company and the Company should properly analyse the tax position on its input and output services.

CA. Girish Raman

History of Goods Transport Agency ("GTA") Services from Service tax perspective and Current Status

1. Introduction

1.1 The service tax on the service of transportation of goods by road was first introduced w.e.f. 16/11/1997 but was exempted from 02.06.1998. During the period, the tax was kept alive, the term 'taxable service' in Chapter V of the Finance Act,1994 ("Act") in this context was defined to mean any service provided to a *customer*, by a **goods transport operator** in relation to carriage of goods by road in a 'goods carriage' [Section 65(41)(m)] and the term 'goods transport operator' was defined to mean 'any commercial concern engaged in the transportation of goods but does not include a courier agency' [Section 65(17)]. The erstwhile Rule 2(1)(d)(xvii) of the Service Tax Rules, 1994 notified that the 'person responsible for collecting the service tax' in relation to services provided by a goods transport operator, shall mean every person who *pays or is liable to pay the freight either himself or through his agent* for the transportation of goods by road in a goods carriage. Thus, it is to be noted that the service tax was payable by the person who avails the services of a Goods Transport Operator and pays the transport/freight charges whereas normally it is the service provider who charges and pays service tax and he is the 'assessee' and 'the person responsible for collection of service tax'.

1.2 The Supreme Court in a landmark judgment in the case of *Laghu Udyog Bharati vs. Union of India (1999) 112 ELT 365 (SC)*, held, that *"the provisions of Rules 2(d)(xii) and (xvii), insofar as it makes persons other than the clearing and forwarding agents or the persons other than the goods transport operator as being responsible for collecting the service tax, are* ultra vires *the Act itself. The said sub-rules are accordingly quashed. By rules which are framed, the person who is receiving the services cannot be made responsible for filing the return and paying the tax. Such a position is certainly not contemplated by the Act." The Supreme Court further directed that, "Any tax which has been paid by customers or clients of the clearing and forwarding agents or of the goods transport operators shall be refunded within twelve weeks on their making a demand for refund."*

1.3 However, sections 116 and 117 of the Finance Act, 2000 and section 158 & 160 of the Finance Act, 2003 retrospectively validated the levy and collection of service tax on services rendered by goods transport operators from the users of such services by appropriately amending the sections pointed by the Supreme Court retrospectively for the period 16.11.1997 – 01.06.1998. The sections also sought to deny refund of service tax to the users of such services to overcome the Supreme Court judgement

and for recovery of refunds already granted consequent thereto. These validation provisions were upheld in *Gujarat Ambuja Cements Ltd. vs. Union of India (2006) 3 STR 608 (SC.)*

1.4 Pursuant to the validation provisions, show cause notices u/s 73 as it stood then were issued to customers of Goods Transport Operators for recovery of service tax or refunds erroneously granted invoking the extended period of limitation to recover/demand the service tax for the period 16/11/1997 to 01/06/1998. The Tribunal in *L.H.Sugar Factories Ltd. vs. CCE (2006) 3 STR 230 (Tri.-Del.)* held that show cause notices u/s 73 takes only the case of assessees who are liable to file return u/s 70 but not service recipients of Goods Transport Operators who were to file a return only u/s 71A. Hence the SCN for those demands were not maintainable. This Tribunal decision was upheld by the Supreme Court in *CCE vs. L.H.Sugar Factories Ltd (2006) 3 STR 715 (SC)*. Subsequently, the provisions relating to the levy of service tax on services provided by '*Goods Transport Operators*' were omitted w.e.f 16/10/1998 by the Finance (No.2) Act 1998.

1.5 The Finance (No.2) Act, 2004 thereafter sought to tax the transportation of goods by road provided by a '*Goods Transport Agency*' w.e.f. 10/09/2004. Further, necessary notifications were also issued so as to make the levy effective from 01/01/2005. The Finance Minister in his budget speech on 08.07.2004 had stated as follows, '59 services have been brought under the net so far. I propose to add some more this year. These are business exhibition services, airport services, *services provided by* ***transport booking agents*** and exploration services,…. *I may clarify that there is no intention to levy service tax on truck owners or truck operators*'. The provisions from 10.9.2004 to 30.6.2012 are more or less the same as that of the provisions post the negative list regime which came into effect from 1.7.2012 and hence the cases are dealt with while dealing with the current status post 30.6.2012.

2. Current Status

2.1 Post 01.07.2012, under what is called the 'Negative List regime', all taxable services are liable for service tax unless they are covered under the negative list or are provided outside India or are specifically exempted.

2.2 Section 66D of the Act which enumerates the negative list of services provides that

"The negative list shall comprise of the following services, namely :—

(a) to (o)….

(p) **services by way of transportation of goods—**

(i) by road except the services of—

(A) a goods transportation agency; or

(B) a courier agency;

……..

(q) ….."

Thus, services of 'transportation of goods' provided by a 'goods transport agency' ['GTA'] is excluded from the negative list of services

2.3 Section 65B(26) of the Act defines a "goods transport agency" as follows-

> "(26) "goods transport agency" means any person who provides service in relation to transport of goods by road and issues **consignment note**, by whatever name called."

This definition is the nerve of the entire levy and is the same as was for the period 10.9.2004 – 30.6.2012. Two conditions are required to fall within the term "goods transport agency" –

a) The service must be in relation to transportation of goods by road; and

b) The person must issue a "consignment note".

Is there a 'transportation' service?

2.4 The CBEC in Circular No. 104/7/2008 dated 06.08.2008 dealt with an issue namely loading, unloading, packing, transhipment etc., performed by a Goods transport agency in relation to transport of goods by road in a goods carriage. The CBEC concluded that such services are not separate services but are part of single transportation service. The issue and clarification are reproduced below:

"3.***Issue***: GTA provides service to a person in relation to transportation of goods by road in a goods carriage. The service provided is a single composite service which may include various intermediary and ancillary services such as loading/unloading, packing/unpacking, transhipment, temporary warehousing. For the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of intermediary and ancillary services. In such a case, whether the intermediary or ancillary activities is to be treated as part of GTA service and the abatement should be extended to the charges for such intermediary or ancillary service?

Clarification: GTA provides a service in relation to transportation of goods by road which is a single composite service. GTA also issues consignment note. The composite service may include various intermediate and ancillary services provided in relation to the principal service of the road transport of goods. Such intermediate and ancillary services may include services like loading/unloading, packing/unpacking, transhipment, temporary warehousing etc., which are provided in the course of transportation by road. These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road. The contention that a single composite service should not be broken into its components and classified as separate services is a well-accepted principle of classification. As clarified earlier vide F.No. 334/4/2006-TRU, dated 28-2-2006 (para 3.2 and 3.3) [2006 (4) S.T.R. C30] and F. No. 334/1/2008-TRU, dated 29-2-2008 (para 3.2 and 3.3) [2008 (9) S.T.R. C61], a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of invoicing does not alter the single composite nature of the service and classification in such cases is based on essential character by applying the principle of classification enumerated in section 65A. Thus, if any ancillary/ intermediate service is provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it."

Thus, the CBEC circular clearly clarifies that where a person provides the service of transport of goods by road and issues the consignment note and in the course of providing transportation service also performs various intermediary and ancillary activities such as loading, unloading, packing etc., such services are not provided as independent activities but are a means for successful provision of the principal service, namely, the transportation of goods by road and would form part of transportation services.

2.5 Customers who have received goods directly from their suppliers, who have themselves undertaken the deliveries of the goods to the customers' door-step, cannot be said to be recipient of transporters' services and the payment of transport charges to the suppliers will not attract service tax. *[Kesoram Spun Pipes & Foundries vs. CCE (2002) 146 ELT 475 (Tri. – Kolkata)]*. Similarly, where the appellants imported yarn from Nepalese suppliers who

charged the appellant in two invoices – one, for the cost of goods and transport up to Nepal border; and another, for the transport from Indo-Nepal border to the appellant's factory, the Tribunal held that the appellant's contract with the Nepalese suppliers was a contract for supply of goods and the arrangement of transportation is merely incidental to the supply of goods and not a provision of service. Since the appellants did not engage a transporter nor was there any evidence that the suppliers engaged transporters as agents of the appellant, the appellant is not liable to pay service tax on the transportation charges reimbursed to the suppliers under GTA services. *[Sumangalam Suitings (P) Ltd. vs. CCE (2010) 19 STR 809 (Tri- Del.)]*

2.6 Where on facts it was found that the assessee had 'hired' vehicles from its vendors and they were not responsible for transporting the goods and no consignment note was issued by them, the Tribunal held that no 'Goods Transport Agency Services' was provided to the assessee and hence the assessee was not liable to pay service tax as a payer of freight *[Birla Ready Mix vs. CCE (2013) 30 STR 99 (Tri. – Del.)].*

Whether GTA – when consignment note is not issued?

2.7 Rule 4B of the Service Tax Rules, 1994 mandates all Goods Transport Agencies to issue a "Consignment note" to a customer except where the services are wholly exempt from Service Tax. A "Consignment note" is defined as a document issued by a Goods Transport Agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage which contains the following information:

(i) Serial number.

(ii) Name of the Consignor and Consignee.

(iii) Registration number of the Goods Carriage.

(iv) Details of goods transported.

(v) Details of place of origin and destination.

(vi) Person liable to pay Service Tax viz., whether Consignor or Consignee or Goods Transport Agency.

The invoice, bill or challan or consignment note may be authenticated by a digital signature.

2.8 There is a divergence in the view of Tribunal, it appears on the question whether a person can be called a GTA if he transports goods but does not issue a consignment note. Where the appellant claimed refund of tax paid by them on goods transport agency services availed from private trucks owners/operators on the ground that the private trucks owners/ operators did not issue consignment notes to them, it was inter alia held that the refund is not admissible since the appellant would still be liable to pay service tax though the provider has defaulted on issuance of a consignment note. *[Coromandel Agro Products & Oils Ltd. vs. CCE 2014 (33) S.T.R. 660 (Tri. - Bang.)].* Similar is the decision in *Annam Traders vs. CCE (2010) 20 STR 226 (Tri.-Bang.)* where the refund was denied. In this case, the Tribunal distinguished its earlier decisions in *CCE&C vs. Kanaka Durga Agro Oil Products Pvt. Ltd. (2009) 15 STR 399 (Tri-Bang.)* and *Lakshminarayana Mining Co. vs. CST (2009) 16 STR 691 (Tri-Bang.)* which had held to the contrary.

2.9 However, where the appellants (sugar manufacturers) had availed services of transportation of sugarcane from its collection centre to its factory from individual truck owners who did not issue any consignment note (as prescribed u/r 4B of Service Tax Rules), goods received note, billties etc. but only issued fortnightly bills to the appellants and the revenue demanded service tax from the appellant on the grounds that it had availed goods transport agency (GTA) services, the Tribunal held that –

(i) In respect of GTA services provided in relation to transportation of goods

the agency not only undertakes the service of transportation of goods but also undertakes delivery of goods to the consignee and temporary storage of goods till its delivery to the consignee.

(ii) Fortnightly bills are not consignment notes and in absence of issuance of consignment note by GTA in terms of rule 4B of Service Tax Rules, 1994, representing the liability to transport the consignment handed over to it as a GTA, the truck owners cannot be considered as goods transport agency. It has merely provided services of transportation of goods in a motor vehicle.

Accordingly, it held that no service tax is payable by the appellants as a recipient of goods transport agency services *[Nandganj Sihori Sugar Co. Ltd vs. CCE (2014) 34 STR 850 (Tri-Del)]*.

3. Onus of payment of tax

3.1 The person liable for service tax in relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, **where the person liable to pay freight** is,—

(I) Any factory registered under or governed by the Factories Act, 1948 (63 of 1948);

(II) Any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;

(III) Any co-operative society established by or under any law;

(IV) Any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;

(V) Any body corporate established, by or under any law; or

(VI) Any partnership firm whether registered or not under any law including association of persons;

Any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage

Provided that when such person is located in a non-taxable territory, Goods Transport Agency shall be liable to pay service tax [section 68(2) read with Rule 2(1)(d)(B) of Service Tax Rules and Notification No.30/2012 dated 20.06.2012].

3.2 Where the consignment agent paid the freight charges as well as service tax payable thereon as a payer of freight and deducted the same from the sale proceeds payable to the appellant manufacturer the Tribunal held that the appellant is not liable to pay service tax on freight charges deducted by the consignment agents since it is the consignment agent who is liable to pay service tax on the goods transport agency services as it is he who pays the freight charges [Rajalakshmi Paper Mills Pvt. Ltd. vs. CCE (2011) 22 STR 635 (Tri. – Che.)].

3.3 Where the service tax on GTA services was paid by the transporters, the Tribunal held that tax in respect of the same services cannot be demanded again from the service recipient. *[Navyug Alloys Pvt. Ltd. vs. CCE (2009) 13 STR 421 (Tri-Ahmd.)*; See also *Mandev Tubes vs. CCE (2009) 16 STR 724 (Tri. – Ahmd.); CST vs. Geeta Industries P. Ltd. (2011) 22 STR 293 (Tri.-Del.)]*. However, these decisions are based on 'equity'.

3.4 It may also be noted that if one GTA [GTA-1] provides services to another [GTA-2] who in turn provides it to the client, then the client would be liable to pay service tax as a payer of freight and GTA-2 would also be liable to pay service tax as a payer of freight to GTA-1. Hence there is a snap in the credit chain which appears to be inequitable. If we compare GTA

services with advocate services [where also reverse charge mechanism applies], services provided by one advocate to another is exempt from service tax. So in the above example, the services of GTA-1 to GTA-2 would have been exempt had such exemption been conferred by the Government so that there is no snap in the credit chain.

However, if GTA-1 had merely given his vehicle on hire to GTA-2 as explained in para 5.2, services provided by GTA-1 to GTA-2 would be exempt.

4. Value/Abatement

4.1 Notification No.26/2012 dated 20.06.2012 an abatement of 75% of the value of taxable service up to 31.03.2005 and w.e.f.01.04.2015, it was reduced to 70%. However, the abatement is subject to the condition that no CENVAT credit on inputs, capital goods and input services, used for providing the taxable service has been taken by the GTA.

5. Exemptions related to GTA services

5.1 In respect of services provided by a goods transport agency by way of transport of the following in a goods carriage of the person who pays freight need not pay service tax

(a) Agricultural produce

(b) Goods where gross amount charged for transportation of all such goods on a consignment transported in a single carriage does not exceed one thousand five hundred rupees

(c) Goods, where gross amount charged for transportation of all such goods for a single consignee does not exceed rupees seven hundred and fifty

(d) Milk, salt and food grain including flours, pulses and rice

(e) Chemical fertilizer, organic manure and oil cakes

(f) Newspaper or magazines registered with the Registrar of Newspapers;

(g) Relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap

(h) Sefence or military equipments

(i) Cotton, ginned or baled

[Entry 21 of the Notification No.25/2012]

5.2 Services by way of giving on hire -

(a) ……

(b) To a goods transport agency, a means of transportation of goods is exempt from tax [Entry 22 of the Notification No.25/2012]

6. Place of provision of services of a goods transportation agency (GTA) shall be the location of the 'person liable to pay tax' [rule 10 of the Place of Provision of Service Rules, 1012- proviso]

6.1 The place of provision of service in case of GTA services shall be location of the person liable to pay tax. In terms of rule 2(1)(d)(i)(B) of the Service Tax Rules, 1994, for services of goods transportation agency services in case of specified categories of persons (see para 3.1) liable to pay the freight, such persons liable to pay freight would be the person liable to pay service tax and if such person is located in a non-taxable territory it is the GTA who would be liable to pay service tax.

CA. Santosh Maurya

Different models of E-Commerce Business and Service tax / VAT Concerns

Introduction to E-Commerce Business

E-commerce or Internet transactions refers to the transactions conducted electronically which is popularly known as 'internet'. Generally E-commerce users can be categorised into two baskets i.e. users for the purposes of buying goods and/or for availing services like Telecommunication, Entertainment, Travel, payment of Statutory Taxes, Government dues, School Fees, Stamp Duty, License fees, Tender fees, Donations, etc.

Importance of E-Commerce industry in India and contribution made thus far

With the rapid increase in Internet users, India is becoming one of the fastest growing e-commerce markets in the world. The introduction of E-commerce and its contribution made thus far has squeezed the way business is carried globally. As per the Goldman Sachs report[1], it is estimated that Indian e-commerce market will account for 2.5 per cent of GDP by 2030. Further, as per the report of Morgan Stanley, size of the Indian internet market which was valued at only $11 billion in 2013 could potentially rise to $137 billion by 2020 and market capitalization of these internet businesses could touch $160-200 billion from the $4 billion at present[2]. Further, Morgan Stanley expects India's e-commerce market (revenues) to grow from $2.9 bn in 2013 to over $100 bn by 2020, making it the fastest growing e-commerce market in the world[3].

The Government is also making an attempts to curb the impact (and availability) of black-market money by encouraging people to spend through cards so that the expenditure can be monitored. In this regard, the Finance Ministry has recently announced to provide tax breaks for both consumers and merchants on frequency of electronic transactions and a waiver of charges and convenience fees for using cards to pay at the pump or for utilities. This is indeed a welcome step in order to protect the interest of the nation.

1. Reference - Report published in PTI dated May 6, 2015
2. Reference - http://www.morganstanley.com/ideas/rise-of-internet-in-india/
3. Reference - http://www.business-standard.com/article/companies/india-set-to-become-world-s-fastest-growing-e-commerce-market-115020601227_1.html

From the above, it is clear that substantial growth can be witnessed in this segment and potentially impetus to Domestic Companies /MNC's to cross the multi-billion dollar businesses mark.

E-commerce models and Indirect Tax implications

No-doubt its contribution made to the society as well to the economy so far, is remarkable as it offers variety of products / services at competitive pricing, creates awareness, reaching out to the number of people at large etc.

Having understood the importance of e-commerce transaction let's understand the various E-commerce business models that are in perseverance and its indirect tax implications on the transactions executed by them.

A. BUSINESS-TO-BUSINESS MODEL

Under this business model which is popularly known as B2B model, the manufacturer using digital platform sells the goods directly to the wholesaler / distributor, who in turn sell the goods to the ultimate Customers. The way this operates is that a wholesaler places an order on the Company's website and after receiving the consignment, sells the end product to final customer at wholesaler's retail outlet (for example D-mart, Hypercity, Shoppers Stop etc).

The Manufacturer levies appropriate VAT on sale of goods in case of intra-state movement of goods and CST in case of inter-state movement of goods from one state to another. In case, any service fee for handling or delivery of goods etc is charged, the provisions of Service tax is applicable on such services.

B. SUPPLY OF GOODS / MERCHANDISE DIRECTLY BY SELLER TO THE CUSTOMER

This is a part of Business-to-Consumer (B2C) model wherein the Sellers have their own product catalogue showcased on the website for hooking business and don't rely on the readymade platform created by some of the giants like Flipkart, Amazon, Snapdeal, for listing of goods. This model is simple and easy to operate but the Sellers have to undertake the responsibility of marketing and branding their products, transportation and robust infrastructure to manage the transactions effectively.

For supply of goods, VAT is charged by the Seller for intrastate movement and CST in case of interstate movement of goods from one State to another. In case any service is provided and a separate consideration is received like delivery, transportation, special packing etc, Service tax is payable. However, it is noticed that the VAT Authorities are seeking to encroach their jurisdiction and seeking to levy VAT even on such transaction on the rationale that the consideration received relates to 'sale of goods'.

C. SUPPLY OF GOODS / MERCHANDISE FROM SELLER TO THE CUSTOMER VIA ONLINE INTERMEDIARY

Yet another part of B2C model wherein the Sellers enter into an arrangement with likes of Flipkart, Amazon, Snapdeal ('Online Retailers') who operates websites showcasing the product catalogues, prices and features of the product, comparative analysis of the products, so on and so forth etc. The way this business model operates is that after receiving an order, the Online Retailers places back to back order on the Seller for delivery of the goods. This business model is very much popular now a days and the

advantage is twofold viz. the seller don't have to spend money on distribution / marketing network as a result substantial saving is passed on to the customer by offering the products at discounted rates.

In addition, these Online Retailers also offers scheme to frequent shoppers / privileged customers, wherein best deals on the products are first offered to select customers who pays onetime fee or renewal annual fees in the form of enrolment fees etc. In addition, loyalty point redemption option is also available to the Customers, which is redeemed against the goods sold.

For supply of goods, VAT implication as stated above would be applicable. The Service income received by the Online Retailers like Commission, Service Charges, Client Management Fees, Fees for providing access to Online Platform, Advertisement, Revenue Share etc., the provisions of Service tax will be applicable. However, it has been the practice of the VAT Authorities to allege that the Online Retailers are also carrying out the business / assisting the other Companies in selling goods, hence, qualifies as 'dealer' under the VAT Legislations. On strict interpretation, to my mind the argument would not sail through before the Higher VAT Authorities and/or High Courts, since the role of Online Retailers are only to bring the Seller and the Buyer together through its technology platform and are not involved in sale of goods, therefore, the allegation that they qualify as 'dealer' and liable to pay tax, may not sustained.

D. CONSUMER TO CONSUMER MODEL

This type of E-commerce is a modern version of buying and selling goods, wherein the goods are directly sold between the Customers. Under this model, it is essential that both the seller and the buyer are registered with the online platform like ebay, Olx, Quicker etc, which acts as an interface between the seller and the buyer. This platform is typically used to buy / sell the products like residential property, cars, two wheelers, rent a room / office, mobile phones, computers etc by publishing their information on the website. The Online Platform who operates the website may or may not charge the consumer for its services.

The liability to pay VAT under this model is primarily on the seller, if he is into the business of buying / selling and qualifies as a 'dealer' under the Value Added Tax Act. However, under certain circumstances as specified in the Value Added Tax Legislations, the liability may be indentured on the buyer in the form of purchase tax.

E. CONSUMER TO BUSINESS MODEL

In this model, a consumer approaches website owner showing multiple business organizations for a particular service. For example, the website providing job-search where a consumer can post his/her bio-data for services that he/she can offer. Business organization that fulfils the consumer's requirement within specified budget approaches the consumer and avail their services.

Generally in this type of model, the website owner charges service fee or fixed fee for the services provided to the business organization, on which provisions of Service tax is applicable. As there is no sale of goods involved, no VAT is payable.

Clarity expected with respect to some of the transactions

Some of the complex transactions discussed below needs detailed analysis as no straight

jacket formula can be applied to conclude on the taxability of these transactions:

- In E-commerce Industry, it has been the practice of supply goods in combo pack. For example, the Online Retailer has received an order for supply of mobile phone and as per the prevailing combo scheme; some accessories (like mobile cover, storage device or scratch guard card etc) are also supplied at a discounted price and needs to be packed together before it is ultimately sold to the Customer. In the event the Seller has does not have enough stocks of these accessories and procures the same from its own branch situated at neighbouring State(s) and subsequent sale of the same to the Customer in the same state, does it become liable to tax in the originating state(s) as CST or liable to local VAT or would this be treated as a stock transfer?

- In case of 'cash-on-delivery' model, whether the tax authorities are right in demanding VAT from Online Retailer Companies in situations where they merely collects cash and remit back to the original seller situated in other State(s), after retaining its margin in the form of Commission? Does it not constitute as 'interstate sale' in light of the provisions of the Central Sales Tax Act, 1956.

- In case where mobile companies provide software updates and add-ons with / without any consideration, sale of apps / software, books, music on 'play store' etc using digital platform, does it liable to VAT or Service tax?

- Another challenge that E-commerce Industry brushes is getting the road permits / waybills for brining the goods into the State(s). Some of the State(s) denies it on the presumption that this will exhilarate black marketing post importation and hence, denied granting road permits / waybills.

- Compliances which the E-commerce Industry ought to be followed are unmanageable given different State(s) / Union Territory legislations, provisions, forms etc.

Conclusion

Before we part, it is imperative to strategise the logistics effectively, as taxes play a major role in deciding the way E-commerce Industry functions. Another important aspect is delineating mother warehouse where goods will be stored and kept for online distribution, studying the market conditions, demand and supply etc. It would be interesting to watch the developments under the proposed GST regime, where the taxable event is 'supply / distribution of goods' vis-a-vis 'sale of goods or provision of services' under the current regime. Unless proper legislations are in place under GST regime and the concerns if not addressed persuasively, the sword of uncertainty continues to hang over the E-commerce Industry and against the very objective of having a simple GST in India and ease of doing business in India.

(Views expressed are personal. The Author is an Associate member of the Institute of Chartered Accountants of India and a member of the Sales Tax Practitioners Association of Maharashtra. He is a Senior Associate with Economic Laws Practice, Advocates and Solicitors, Mumbai and can be contacted at santoshmaurya@elp-in.com)


CA. Guruprasad and CA. S. Srinath

E-Commerce: Value Added Tax Glitches

Introduction

India experienced IT revolution during late 1990's which gave an economic boost and made the global superpowers to extend progressive trade relations with the country. Consequently, technological know-how started to make inroads into India and has percolated into various business sectors. One such business sector which had recently begun with baby steps, but with technological developments and angel support, is suddenly on nimble footing is E-Commerce. It would not be wrong to say that E-Commerce, in India, is a child or subset of the IT revolution. Having reaped the benefits of IT revolution thus far, it is expected that E-Commerce sector would play a pivotal role in our economic development in the years to come. However the nascent E-Commerce sector is not free from the glitches, not only operational, but also from those infused by the Value Added Tax departments of various States. The critical ones are discussed in the forthcoming paragraphs.

Business Model of e-Commerce for merchandise

Typically, an E-Commerce entity operates *vide* two models. One being, the company acts in capacity of the Seller ('Trader/Dealer') and offers its products on web based platform for sale. In this model the entity owns the title to the goods on offer for sale and upon fructification of sales order issues invoice for sales made to the local or inter-state buyer.

Another model is termed as a 'Marketplace' model. In such model the E-Commerce company manages an online platform (website) to facilitate the sellers to list their products on such platform for sale. An interested buyer visits the website and expresses his consent by placing an order for the product of his like. Once the customer places the order, the respective seller is informed of the same by the E-Commerce entity for dispatching the goods to the buyer. Alternatively the E-Commerce entity, through its own logistics team or with outsourced logistics provider, arranges to pick the goods from the seller's premises and deliver at the customer address.

Another variant of the delivery leg in the Marketplace model is that the E-Commerce entity operates warehouses at various strategic locations where the sellers are provided space to store their merchandise in advance (i.e., before any order is placed by the buyer). All the sellers who have their goods stored in such warehouse would include the address of the warehouse as 'Additional Place of Business' in their respective VAT registration certificates. In such arrangement the title to the goods remains with the seller, however storage and warehousing operations are carried out by the E-Commerce managed logistics entity. Such an arrangement is done to facilitate quality control of the merchandise offered, quick delivery with the intent to increase customer satisfaction and consequently achieve increase in Gross Merchandise Value (GMV) for the E-Commerce entity. However it is worthy to note that since the title to the goods remains with the seller, while physically the goods lie in the warehouse managed by the E-Commerce

entity, upon effecting a sale the invoice is raised by the seller on the customer and the E-Commerce entity gets remunerated in the form of service fee for such facilitation.

Value Added Tax ('VAT') Glitches

Whether E-Commerce entities with Marketplace model are liable to pay VAT?

Under any taxing statute the levy is imposed upon occurrence of a 'taxable event'. Under the VAT laws the taxable event is 'Sale of goods'. VAT laws of all the States define the term sale on identical terms with minor modifications. By virtue of the definition of the term sale under various State VAT laws the term sale is generally understood as 'every transfer of property in goods (other than by way of mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration'. From such a definition of the term sale it is discernible that unless there is transfer of property (i.e., title of goods transfers from one person to another) in goods from seller to buyer for a consideration there would be no sale. i.e., no taxable event occurs.

Applying the afore-stated definition to the marketplace model it can be seen that the E-Commerce entity, at first place, does not possess the title to the goods lying in their warehouse for transferring the same to another person. Accordingly the question which pops up at this juncture is whether a person, who himself does not have title to the goods, can transfer the title to another person? It is well settled principle under the law of contracts that if an unlawful owner transfers the title to the goods to a third person then such third person would get no better title to the goods than that of the person who has transferred such goods, i.e., in the instant case the transferee also may be become an unlawful owner of the goods. However in the marketplace model nowhere the E-Commerce entity holds itself as owner of the goods rather the owner/seller's name is clearly disclosed on its webpage for each of the products on offer for sale. Further the buyer is also aware of the same before he places the order for any product and also has the option to view the reviews about the seller on the same platform. The invoice for the sale is raised by the seller directly and not by the E-Commerce entity. In other words the parties to the transaction (i.e., buyer, seller, E-Commerce entity) are absolutely aware of each other's role and intention in the entire transaction which binds them into a valid contract. In such scenario whether VAT can be demanded from the E-Commerce entities has become anybody's guess.

Views of the State VAT authorities on market Place E-Commerce Entities

The increased sale/purchase of goods in the States through E-Commerce websites has of late caught the eyes of the VAT officials especially with belief that marketplaces are dealers liable to pay VAT on sales made through their web platform. There has been strong views expressed by the VAT authorities that marketplaces are dealers under VAT as they act in capacity as an 'Agent' for the sellers and accordingly are liable to disclose the turnover in the statutory returns and pay tax on the same. Accordingly various business threatening measures has been initiated by the VAT authorities on ongoing basis. One of them was in the State of Karnataka where the registration licence of dealers who stored the goods in warehouse of one of major E-Commerce entity were threatened to be cancelled. Another coercive measure was in the State of Kerala where the Cash On Delivery ('CoD') supplies were banned followed by issuance of demand notices on a slew of E-Commerce entities alleging evasion of tax. Further in the recent past Maharashtra Government also had moved to freeze the bank account of an E-Commerce entity to recover the tax dues. There also has been various enquiries conducted by other state government authorities in their respective states on the E-Commerce entities. With contagious endorsements by the State VAT officials that E-Commerce entities are liable to pay VAT, it would not be a surprise to see further coercive measures being imposed on E-Commerce entities which are struggling to even breakeven amid severe operational glitches.

One of the reasons for the department to feel that there is tax evasion could be due the apprehension that some of the E-Commerce portals do not carry out due diligence while enrolling the dealers. This apprehension is from the experience of the customers getting not invoices with the shipment or in many cases invoices not containing even the address, VAT/CST registration numbers. This could have resulted in the department painting all the E-Commerce companies with the same brush.

The treatment of the E-Commerce companies as 'Agent' may be difficult to establish in cases where the E-Commerce companies act as facilitators for storage, warehousing and logistics, where the invoice is raised by the seller directly. Even if the E-commerce companies are treated as 'Agent', most of the VAT laws provide an exemption from payment of tax to the 'Agent' where the principle (seller) has discharged the payment of tax and documentation to this effect is produced before the VAT authorities.

In any case, it will not be possible to tax the same transaction twice, once in the hands of the seller and again in the hands of the E-Commerce company.

Expressions by the Market place E-Commerce entities

The E-Commerce entities are battling with the rigorous enquiries from the State VAT authorities on alleged categorisation of them as 'Dealers' under VAT, especially when the transactions are said to happen between the listed seller and buyer on principal to principal basis. The concern of the entities has now been that whether at all they can be termed as 'Dealer' under the existing VAT laws in present form. Further in case they are asked to pay VAT on behalf of the seller then how can the mechanism work as they would not have any input tax credit to set off which would make them to pay whole of the tax by cash. Then it is also worth to note that if at all such scenario is contemplated then what would happen to the input tax credit lying in the books of the seller, will there be a refund scenario at seller's end and who should report the turnover in the statutory returns etc. There is an immediate need from the VAT lawmakers to address all such concerns and throw absolute clarity on E-Commerce transactions by suitably amending the VAT law.

One of the recent announcements on legislative progress is heard of from the Delhi VAT Commissioner who stated that a notification is expected to provide that E-Commerce entities file a quarterly return disclosing the details of dealers and merchandise traded through the web portal of the E-Commerce entities. Similarly it is expected that, instead of keeping the E-Commerce entities uncertain on tax matters, the VAT authorities of all the States bring out measures to regulate the E-Commerce transactions and instill confidence in the key sector which has the potential to become significant contributor to Indian economy.

One solution could be bring in legislation for laying guidelines for registration of vendors, mandatory filing of information by the E-Commerce companies on the transactions done by dealers through them etc. As this information would be authentic, the department could take suitable action against dealers directly in cases of suspected evasion.

Conclusion

In the recently held giant customer conference by Cisco in San Diego, its outgoing CEO John Chambers in his keynote speech imparting vision had remarked that more than one-third of the business today would not survive the next 10 years. The only ones that will survive will turn their companies into digital, techie versions of themselves, and many of will fail trying. This remark goes to fortify that E-Commerce companies are the future of business world. Accordingly, instead of being a dampener, it is expected that the archaic laws are amended to keep pace with the technological advancements and throw clarity on the taxation aspects of various business models of E-Commerce entities. With India gearing up itself for historical indirect tax reform, it is expected that Goods and Services Tax (GST), for E-Commerce entities, would come as a silver lining in the controversial cloud of Value Added Taxes.

CA. Smita Bhandari & CA. Rahul Chakraborty

GST and Logistics: A transformation in the making

Introduction

Goods and Service Tax ('GST') is a "massive change in the indirect tax regime mandating a business transformation that will touch almost all aspects of business operations both internal and external". While these statements sound somewhat clichéd; however, for most businesses, these statements are true. Having said this, for the logistics sector, even these seemingly over the top assessments seem understated.

The present article seeks to discuss the key impact of GST on the logistics sector and the factors that logistics businesses are considering or should consider while handling and assessing the impact of this reform.

GST in the Indian context

Conceptually, GST in India envisages a uniform value added taxation system replacing multiple taxes imposed as on date by Central and State Governments in a country.

The introduction of GST marks the transition from the present (partially) origin-based taxation regime in India to a destination based regime. The primary drivers of the tax reform are – unifying a single Indian market and removal of cascading impact of taxation thereby commencing the long journey of making Indian made goods and services more competitive.

Further, the said tax has been customised to the quasi-federal nature of our country and a dual GST has been proposed whereby a Central and State GST will be imposed and collected by both the Central and State Governments on every supply of goods and service.

The present regime and challenges

Multiplicity of taxes and its cascading impact

At present, the Indian indirect tax regime, entails plethora of taxes being imposed at the Union and State level with a number of these taxes not being fungible or set offable. This regime results in a material cascading impact and also results in manufacturing locations and supply chain designs not being inherently optimised and aligned to logistical efficiencies but more tuned towards mitigating this cascading tax impact.

The key elements of the Indian indirect tax regime having an impact on logistics in the country are –

- Non-fungibility of Central Excise duties and service taxes against State value added taxes and purchase taxes
- Applicability of a Central Sales Tax (CST) of 2 per cent on inter-State sale. This is an origin based tax and cannot be setoff against the subsequent output taxes imposed in the supply chain.

- Retention or denial of VAT credits related to inputs used in the manufacture of goods that are stock transferred to another state (from the State of manufacture)
- Entry taxes imposed on goods entering the State and local bodies for use, consumption or sale therein.

The above, specifically leads to

- Setting up of manufacturing locations in areas where excise tax exemptions are granted or
- Establishment of (either own or that of other intermediaries) warehouses in more States than purely dictated by logistics efficiencies in order to mitigate the impact of Central Sales Tax (CST) of 2% or higher (payable for inter-State sales),. This results in high level of investments in assets and inventory holding costs,
- Disparate and resultant archaic logistical infrastructure which cannot reap benefits of economies of scale and
- smaller transportation loads leading to usage of sub-optimal transportation modes increasing transportation costs.

Further, levy of multiple indirect taxes by Union Government, State Governments and other local bodies create credit blockages, thereby increasing cost. Currently a trader in goods who currently has only VAT liability on the sale of goods is currently not entitled to avail input tax credit in respect of Union levies like Excise duty or Service tax incurred of their procurements. This changes procurement patterns immensely.

Inter-State check post compliances

Another aspect that drives down a significant amount of efficiencies are the check posts network disrupting inter-State border movements. There are currently an estimated 650 check-posts that need to be crossed., An estimated 25 per cent of the journey time is spent on handling compliances in check post, State borders, city entrances and other regulatory stoppages[1]. This clearly increases again inventory holding, leads to significant higher transportation costs especially related to road transportation that constitutes for 60% of all freight movement in India[2].

The World Bank has estimated that logistics costs in India are currently about 2-3 times higher than international standards. The cost of logistics varies from 10% to 14% of net sales, as against best practice international bench mark of 3% to 4%[3]. This translates into tens of billions of dollars being lost only on account of inefficiencies.

Indirect tax regime on logistics services

The indirect tax regime on logistics services at present is also marred by the following aspects:

- Differentiation in the treatment for different kinds of transportation activities even within the Indian jurisdiction for example a road transportation gets abatement as also tax is payable on a reverse charge basis, however on the other hand, an express courier service which by and large also substantially entails road transportation is liable to tax at a full rate of tax.
- Logistics services primarily taxed based on performance. This has materially resulted in significant export of taxes and impacted india's ability and aspiration to be the global hub for international logistics.

Further differential treatments based on valuation/ abatement rules determining situs of supply etc. for different integral aspects of logistics service has created tax uncertainties and resulted in large bouts of litigation.

1 JPS Associates, Study on Economic Cost of Inter-State Barrier in Goods Traffic
2 World Bank, India Development Update, October 2014
3 Ibid., World Bank, India Development Update, October 2014

Proposed GST framework

The 122nd Constitutional Amendment Bill ('Bill') introducing GST was tabled before the Lower House of Parliament (i.e. Lok Sabha) in December 2014 and has been ratified by the Lok Sabha in May 2015. The Upper House (i.e. Rajya Sabha) has referred the Bill to a Select Committee.

The key elements relevant to the logistics sector, are outlined below:

- The Bill seeks to impose a dual GST (as mentioned above) on every supply of goods and services with inter-State supplies to be imposed by an Integrated GST (IGST). The principles for imposition of IGST are to be framed by the Central Government upon recommendation of the GST Council.
- Imports are to be made liable to an Basic customs duties and a customs duties (as of now) equivalent to an IGST to countervail the local taxes applicable taxes in India for the same product.
- The Bill seeks to subsume key indirect tax levies like Excise Duty, Service Tax, Additional Customs Duty (CVD) and Special Additional Duty of Customs (SAD), CST, Surcharges and Cesses.
- Entry 52 of the State List under which State level entry taxes and municipal local body entry taxes such as octroi duties are imposed is proposed to be abolished.
- The Bill proposes a levy of a 1% additional tax to be imposed on any inter-State supply of goods. This additional tax is proposed for an initial period of two years and the levy could be extended if recommended by the GST Council. Based on initial reactions, it is apparent that the additional tax will be sought to be imposed on even inter-State self-supplies i.e. stock transfers.
- Petroleum products though conceptually subsumed within GST, the Central and State Governments are proposing to retain the rights to respectively impose excise duties and sales taxes on the manufacturing and sale. It is expected therefore at least in the initial years the petroleum products will be kept outside the GST net. Evidently, the excise duties and sales taxes charged on petroleum products will not be fungible with GST and vice versa.

Further to the above, the Government has undertaken the creation of a Goods and Services Tax Network (GSTN). The GSTN *inter alia* will seek to be the Government's IT platform to allow tax credits and transfer credits from one State to another. The establishment of the IT platform, reflects the trend of the Government to materially employ IT governance in almost every aspect of revenue administration.

Impact of GST on Logistics on manufacturing and trading sector

It is evident that the entire indirect tax regime for taxation of goods is being overhauled. The key drivers were the following cascading taxes namely:

- Non-fungibility between Central Taxes - Excise duties and Service taxes and State value added taxes
- CST of 2 per cent or higher when bought primarily by service providers except network assets for telecom services)
- Entry taxes and octroi duties etc.

The GST proposes to remove cascading impact of these taxes (the Government's intention of imposing an interim cascading additional tax is of course a bit of a dampener). Given this, most manufacturers will need to reconsider their supply chain design. Some clarity is still required before one envisages the more definitive impact on logistics – and lets understand the aspects that will drive the impact on the logistics sector.

Aspect no 1 – Is the Additional tax going to be imposed?

The Bill proposes an additional tax of 1 per cent – however with the opposition in Rajya Sabha is opposing the imposition of the said tax. One doesn't know the fate of the said levy.

Aspect N. 2 – If imposed – what is the ambit of the said additional tax

Evidently, the additional tax has been proposed to be imposed to offset the loss of Central Sales Taxes especially for the states that were primarily net exporting States. However the Additional tax appears to have been given a far wider ambit than the CST. The additional tax (as mentioned above) is proposed to be imposed on self supplies or stock transfers also. If imposed without any restriction, the additional tax would end up being charged on every movement of goods – thereby potentially resulting in a material increase in cascading tax. The Finance Minister has promised a mechanism that ensures mitigation of this cascading impact.

A restrained additional tax of 1 per cent imposed on only value addition in a state (and not on the every inter-State sale or stock transfer in a supply chain) will go a long way in driving logistical efficiencies. The nature, ambit and mechanism of additional tax will be a key driving factor in designing supply chain.

In this context, it is also important to appreciate that even today there is not only a 2 percent CST (against Form C) applicable on interstate sales but also in case of stock transfers almost all States require retention of input taxes charged of almost 4-5 per cent of goods purchased within the State. The overall cascading tax cost for a number of manufacturers therefore at present is more than 1 per cent of the cost regardless of whether the product is sold or stock transferred inter-State. The cascading tax costs may actually reduce for most, even in the event an additional tax is imposed on value addition alone. Further in case this truncated additional tax is imposed on both stock transfers or sales (i.e. regardless of the nature of transaction) then the supply chain decisions will be primarily by logistical efficiencies.

Aspect No. 3 – Treatment of imports

How would imports be treated? Would they have an additional tax imposed separately? Would the imports be made liable to customs duties including an IGST and which IGST will be charged? What would be eligibility criteria for an importer to claim the input tax credits and what is the restriction imposed on collating and utilising/setting off credits? These are the questions that could trigger procurement and supply chain and network optimisation decisions.

Aspect No. 4 – Place of supply rules

GST will mandate ascertainment of place of supply for each supply. It will mean that each procurement of goods and services will also have a defined place of supply and taxes will get imposed as per the place of supply. The supply chain design will need to aligned with the Place of Supply rules prescribed so as to ensure that the credits are not blocked or availed in locations where they cant be set off.

Aspect No. 5 - Transfer of credits from one state to another

This is related to aspect No. 4. As on date (based on the understanding that we have on the GST design) it is quite apparent an entity will need to have registration in every State that it carries on its business. It will also mean that taxes will get charged and can get allocated in one State while the output taxes will get triggered in another State. The ability to move unutilised credits between States will also determine supply chain and logistics designs.

It is evident that the overall variables for each industry and even within an industry sector individual industry players will be different. The answer for supply chain and logistics design therefore will be unique for each entity and will need to be evaluated.

Impact on Logistics Service Providers (LSPs)

While the kind of logistics set up and design will be based on unique factors impacting each entity, there are certain trends that can be picked up by LSPs –

– Every entity will reconsider its supply chain design – an opportunity to establishing long-term partnerships

It is apparent that every entity will need to carry out a network optimisation exercise and there is an early opportunity to set up long term partnerships with customers by being a part of the strategy.

– Trend towards consolidation

There is several factors that will drive a trend towards consolidation of logistics needs. Some of them are – the higher need for IT interface in compliance and the larger IT governance. Increasingly companies will need to start working more closely and integrate their IT systems with their LSPs to even ensure basic compliances.

Further, people who can deliver economies of scale will be able to disrupt markets and gain market share. This will dictate huge investments in physical hard and soft infrastructure both in real assets and also movable assets such as trucks etc.

– Movement towards organised play

Organised sector will clearly have a better edge as against unorganised sector given the ability to handle compliances, making investments, handle large contracts etc

– Newer and globalised business models

At present the logistics industry is fairly fragmented and the sheer complexity and discretionary nature of compliances related to the movement and transportation of goods, the fragmented logistics infrastructure etc. makes India one of the most expensive and inefficient logistics sector. Unifying Indian market should kick start the entire path of transformation for the logistics industry and in case the right policies mitigating cascading taxes, promoting transparency and ease in compliances get introduced the industry will be forced to mature fast. Newer business models both in 3PL and 4PL service providers will quickly get introduced. The LSPs need to be alive to this need.

Conclusion

Logistics in India is at this point extremely inefficient and the logistics costs by some estimates are in double digit percentage costs of net sales. This is a criminal waste at one level and at another level condemns Indian manufacturers to be globally uncompetitive – evidently the disadvantage is just too high to overcome. It is important therefore that some effort is made to implement a near flawless GST.

Having said this, even a reasonable GST, will no doubt trigger a revolution in the logistics sector. There is an urgent need to engage with the Government to ensure a policies and procedures that promote efficiencies are prescribed.

It is equally important to appreciate that the clichéd statements that GST is a transformational change (not a mere tax change) and a hazardous threat and a disruptive opportunity at the same time is true.

Vignesh Viswanathan

Judicial Activism in India

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1. A brief history on the legal system in India

The Legal system in India has evolved from religious scriptures to the current constitutional and the legal system that we have today. India has a recorded legal history starting from the Vedic ages and there are evidences of some sort of civil law system established during the Bronze Age and the Indus Valley civilization. Manu Smriti which was written and compiled around 200 CE is regarded as the foundational work of Hindu law in the ancient Indian society. Law as a matter of religious prescriptions and philosophical discourse has an illustrious history in India. Law during the Vedic period was based on the Dharmasastra and dharma which was traditionally laid down by learned people or scholars of the Vedas. Originating from the Vedas, the Upanishads and other religious texts, it was a field enriched by practitioners from different Hindu philosophical schools and later by Jains and Buddhists. During the Vedic period, Hindu law was diverse in practice, varying between locations, social groups, and castes. Thus, the common source of Hindu law was the community and, therefore, laws on the whole was highly decentralized and diverse. The laws were dictated by various social groups such as merchant leaders, heads of caste, and kings, and because of the diverse leadership and customs, these laws were particular to a set place. Kings were responsible for the administration of punishment and the worldly Hindu system.

The Court systems for civil and criminal matters were essential features of many ruling dynasties of ancient India. Excellent secular court systems existed under the Mauryas (321-185 BCE) and the Mughals (16th – 19th centuries) with the latter giving way to the current common law system. The Mauryan Empire which flourished during the period 321-185 BCE had spread throughout the Indian subcontinent. It was during this time that a commonised law was established throughout India. Chanakya, who is said to be the driving force in establishment of the Mauryan Empire is said to have compiled the *Arthashastra* – a treaty on the economic and legal aspect of the state.[1] Thus, through the *Arthashastra*, a common legal system was established in whole of India for the first time. After the fall of the Mauryan Empire, the legal system in India went through various changes with the change in the various ruling empires until the rise of the British East India Company which brought in the centralized legal system in India under the British rule.

2. The Constitutional system in India

After India attained freedom, the biggest challenge before the founding fathers was to evolve a system of governance which would best serve the nation with diverse languages, culture religion, coming out of foreign domination for close to two centuries. The visionaries, who were entrusted with the drafting of the Constitution of free India, crafted a unique scheme of governance in which Parliamentary Democracy was cemented as the corner – stone of our constitutional edifice in preference to the Presidential System. Thus, India was founded as a democratic welfare State which would allow equal opportunity to one and all, irrespective of caste, creed, colour, sex or any other form of discrimination; a State where everyone would have equal opportunity for personal growth and for contributing to the cause of the nation[2]. Democracy has been defined as "a Governmentby the people, of the people and for the people"[3]. The edifice of any democratic government rests on three pillars – the executive, the legislature and the judiciary. These three pillars constitute the three organs of the government machinery. The powers and functions of these organs are

1 Kautilay's Arthashastra: Its Contemporary Relevance, Hinduja Foundation
2 Judicial Activism in India: A Festschrift in honour of Justice Krishna Iyer, LokendraMalik
3 Abrahm Lincoln

defined in the constitution. The constitution of the country is the paramount law of the land which constitutes the supreme law of a democratic government. It does not state rules for passing hour, but enumerates principles for expanding future. Under the constitution, the primary function of the legislature is to make law, that of the executive is to execute law and that of the judiciary is to enforce the law- both between private persons, and between private persons and the state. In the enforcement of law, the constitution assigns three roles to the highest judiciary –

(1) *Firstly*, as an interpreter of the Constitution to solve any ambiguity in the language of any provision of the Constitution;

(2) *Secondly*, as the protector of fundamental rights which are guaranteed by the constitution to its people; and

(3) *Thirdly*, to resolve the disputes which have come by way of appeals from the lower Judiciary.

James Medison, one of the founding fathers of American Constitution has described Judiciary as, "*truly the only defensive armor of the country and its Constitution and laws*". In playing its assigned roles, the judiciary reviews the actions of the legislature and the executive to check whether they have exceeded the power given by the constitution. This is where judicial activism comes into play[4].

As an amateur writer it is my humble submissions that judicial activism becomes necessary when respect for law and morality of human beings touches a low ebb. There was no concept of judicial activism in the early period of civilization. There is an instance when King Manu Needhi Chozhan (Chola dynasty) punishes his own son under the wheel of the chariot for the reason that his son overran a young calf. Such was the justice carried out by the kings in the early period. Hence it can be concluded that there was no need for judicial activism.

3. Meaning of the term Judicial Activism

The Black's Law Dictionary[5] defines judicial activism in the following words:

"Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate Judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters".

The word activism implies being active. Thus, judicial activism means the active role played by the judiciary in performing its duties. Judicial activism is the use of judicial power to articulate as to what is beneficial for the society. It refers to the court's decision that goes beyond reading, interpreting and applying the law. At times it may also lead to changing or creating laws and may also go beyond legal precedents. The concept is contrary to the traditional concept where the judiciary had to act like an umpire. Traditionally before the start of judicial activism, judicial review worked as a check against the government and promoted constitutionalism in the country. Judicial review implies the revision of the decree or sentence of an inferior court by a superior court.

Judicial activism portrays the role of judge as an active catalyst in the judiciary rather than a mere interpreter of the law. In this sense every judge should be an activist. According to Justice Krishna Iyer, who promoted the concept of judicial activism in India, "*Every Judge is an activist either in the forward gear or on the reverse*". Judicial activism involves creativity. It involves transition from literal to liberal approach i.e.

4 Judicial Activism in post – emergency era, Dr. Deka Swapna Manindranath
5 Blacks Law Dictionary, 6th Edition, WEST

decision should be passed based on the temper and tempo of time and should not be merely based on interpretation of law but should also involve substantial level of creativity on part of the judges. Judicial activism is the judicial tendency- conscious and unconscious – to achieve the proper balance between conflicting social values (like individual rights against the needs of the collective; the liberty of one person against another; the authority of one branch of government against another) through changes in the existing law (invalidating an unconstitutional statute; invalidating secondary legislation that conflicts with a statute; reversing a judicial precedent) or through creating new law that previously did not exist (through interpreting the Constitution of legislation, through developing the common law)[6]. An activist judge does not hesitate to go against a legal policy created by other branches of government in past or by Judges who preceded him. An act of Judiciary is termed as 'Judicial Activism' when court goes beyond the black letter of the law and gives ruling which safeguards the basic rights of the individuals. Judicial Activism can be classified into two types, positive and negative. "A court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist."[7]

4. The Basic Structure Doctrine

The doctrine of separation of powers is a model for the governance of democratic state. As per the Indian Constitution, none of the above organ can assume absolute power i.e. all the three organs of the state are bound by and subject to the constitution and none of them have power above it. The framers of the constitution also laid down the principle of separation of power. As per the system of checks and balances, each of the three branches would find itself controlled by other two if it abused its power while all three of them would be controlled by an alert, vigilant and assertive, sovereign from whom all power is derived in the last resort, that is, the people who constitute the great Indian nation. The Judiciary should not enter into the fields constitutionally earmarked for the Legislature and the Executive. Judges cannot be legislators, as they have neither the mandate of the people nor the practical wisdom to understand the needs of different sections of the society. They are forbidden from assuming the role of administrators; government machinery cannot be run by judges as that is not the intention of our Constitution makers.

The basic features of the Constitution have not been explicitly defined by the Judiciary. Few features have been described as "basic" or "essential" by the Courts in numerous cases, and have been incorporated in the basic structure. Some of the features of the Constitution termed as "basic" are listed below:

1. Supremacy of the Constitution
2. Rule of law
3. The principle of Separation of Powers
4. The objectives specified in the Preamble to the Constitution
5. Judicial Review
6. Articles 32 and 226
7. Federalism
8. Secularism
9. The Sovereign, Democratic, Republican structure
10. Freedom and dignity of the individual
11. Unity and integrity of the Nation
12. The principle of equality, not every feature of equality, but the quintessence of equal justice;

6 Lokendra Malik, Judicial Activism in India : A Festschrift in honour of Justice V. R. Krishna Iyer, p.193
7 S.P.Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits, Second Edition, Oxford University Press, p.5

13. The "essence" of other Fundamental Rights in Part III
14. The concept of social and economic justice — to build a Welfare State
15. The balance between Fundamental Rights and Directive Principles

The significance of the doctrine of separation of power lies in the fact that it seeks to preserve the human liberty by avoiding concentration of powers in person or body of persons. The necessity of non-concentration of powers has been emphasized by Lord Acton in the following words: "Power corrupts and absolute power corrupts absolutely".[8]

The three organs of the government- Legislature, Executive and Judiciary have played a significant role in ensuring justice in the form of – social, economic, and political to the poor, downtrodden, women, children, the scheduled caste, scheduled tribe etc. Each organ has its unique role and responsibility which go hand in hand. If any one of them fails to fulfill its responsibility, it will disturb the equilibrium and cause difficulty to the society. If either the Legislature or the Executive fails to fulfill its responsibility, the Judiciary comes in picture to fill the vaccum. The responsibility, will naturally fall on the Judiciary to come to the rescue of aggrieved citizens, for the Supreme Court is the protector of the fundamental rights, and therefore, it cannot watch the situation as a mute spectator.[9] The Executive and the Legislature may call it as Judicial Activism. In a country like India, where there is widespread violation of fundamental rights by the police, the security forces, the state, and politicians, judicial activism is necessary to safeguard public welfare. Judicial activism is, therefore, the result of the virtual abdication of their roles by the Executive and the Legislature. It is true that with changing times, the declaratory theory which requires the judges to declare law and not to make law has become outdated in modern times.[10]

5. The early cases of Judicial Activism

Judicial Activism in India, in its truest sense, dates back to the commencement of the Constitution. Hence the study of judicial activism in India from the historical perspective is confined from the period 1950 to 1977, the period 1978 onwards being the post- emergency era or the present perspective. To make the historical study convenient, judicial activism in India is explained under three headings –

A. Pre-emergency era (1950 to 1974) - The discussion under the pre-emergency era is further classified into two phases-
   1. Nehruvian era (1950-1964); and
   2. Post- Nehru era (1965- 1974)

B. Emergency era (1975-1977)

C. Post – emergency era (1978 onwards)

A. Pre-emergency era

1. Nehruvian era (1950-1964)

The pre-emergency Nehruvian era was the period when India reborn as a Sovereign Democratic Republic was setting its goals to achieve a 'Welfare State' securing to its citizens justice - social, economic and political. In doing so Pandit Jawaharlal Nehru believed that neither the Supreme Court nor any other court could stand in the way of the welfare legislation. In his words, "No Supreme Court and no Judiciary can stand in judgment over the sovereign will of the Parliament representing the will of the entire community. If we go wrong here and there, it can point it out but in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way."[11]

8 Dr. Deka Swapna Manindranath Judicial Activism in Post-emergency Era,
9 Lokendra Malik, Judicial Activism in India : A Festschrift in honour of Justice V. R. Krishna Iyer,
10 Dr. Deka Swapna Manindranath, Judicial Activism in post – emergency era,
11 Dr. Deka Swapna Manindranath,Judicial Activism in Post-emergency Era, p.63

During the Nehruvian era, not only the politicians but also the courts seemed to be under the sway of Parliamentary supremacy. Such judicial passivism was mainly due to three reasons -

1. *Firstly*, the Nehruvian era judges of the Supreme Court were drawn from amongst the judges of the Federal Court and various High Court of India appointed during the colonial government. These judges firmly believed in the supremacy of the Imperial Parliament which acted as the ultimate authority of the colonial government in India.

2. *Secondly*, the Nehruvian era courts believed that law was what was declared by the Parliament and it was the duty of the courts to interpret the law as it is and uphold it. In the words of Justice Chief Justice P.N. Bhagwati, "Law is existing and eminent; the judge merely finds it. He merely reflects what the legislature has said. This is the photographic theory of judicial function."[12]

3. *Thirdly*, the Nehruvian era parliamentarians were statesman and men of unity and integrity. They were politicians who had participated in the national movement and therefore carried the halo of sacrifice. Between the politicians and the judges, the politicians enjoyed much greater prestige. The Nehruvian era politicians not only commanded respect from the people but also from the courts. During this period, the Indian Parliament acted as a sovereign Parliament. It acted as a sovereign law-making body whose law-making power could not be questioned by anybody including the courts. The courts, therefore, exercised judicial restraint in invalidating the legislations passed by the Parliament. Thus during the pre-emergency Nehruvian era we find judicial activism in India being influenced by a towering personality Pandit Jawaharlal Nehru.

During the Nehruvian era , the predominant approach of the Indian Judiciary was positivist. The court interpreted the constitutional text literally by applying the same restrictive canons of interpretation as applied to ordinary statutes. Adopting a literal interpretation of the Constitution the courts refused to look beyond the words provided in the Constitution as an aid to interpreting the Constitution. Though the courts assumed the role of the literal interpreter, the Nehruvian era saw rudimentary phase of judicial activism in India. The Supreme Court of India started off as a technocratic court in the 1950's but slowly starting acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible. During this era, the interpretation of fundamental rights underwent a slow but gradual change from literal to progressive interpretation. This was particularly true in respect fundamental rights like freedom of press, personal liberty and protective discrimination for backward classes.

2. Post-Nehru era (1965-1974)

Historically, the Nehruvian era ended with the death of Pandit Jawaharlal Nehru as the first Prime Minister of India in 1964. But it was death of his successor, Lal Bahadur Shastri in 1966 which actually ended Nehruvian era for Shastri while being his own man as the Prime Minister had led the country in Nehru tradition. The assumption of the Prime Minister's office by Nehru's daughter, Mrs. Indira Gandhi saw the beginning of a new era that was marked by confrontation over institutional and personal power. Consequently, the post-Nehruvian period saw a tug of war between the Executive and the Parliament on one side and the Judiciary on the other side. During this period there was active judicial activism relating to property rights

12 Dr. Deka Swapna Manindranath,Judicial Activism in Post-emergency Era,

as an activist Supreme Court of India struck down constitutional amendments passed for implementing land reforms of the Government.

Another feature of judicial activism during the post-Nehruvian period is the gradual transformation of the Supreme Court from a positivist court to an activist court. During the post-Nehruvian period judicial activism gradually began to acquire a permanent form. The court gradually began to shed off its technocratic cloak and began to play a more activist role as it entered into the territory of law making. The post-Nehruvian era saw the beginning of an era when judges began to openly acknowledge their law making roles. Consequently, the Supreme Court entered into confrontation with the Government as can been seen in *Golak Nath's* case, the *Bank Nationalization* case, the *Privy Purses* case and the landmark *Kesavananda Bharti* case.

(a) Golak Nath's case

In *I.C. Golaknath v. State of Punjab*[13] case, Golak Nath and other heirs challenged the Punjab Security of Land Tenures Act, 1953 which took their surplus land of their five hundred acres farmland at Jalandhar. The Act was challenged on the ground that it denied them their constitutional rights to acquire and hold property. The Supreme Court while dealing with the constitutional validity of the 17th Amendment of the Constitution evolved the concept of "prospective overruling" i.e. its past decisions on the same subject remained unaffected by prospective change in law, and held that Parliament had no power to pass any amendment that would have the effect of abridging or taking away any of the fundamental rights guaranteed by the Constitution.

Golak Nath case was a landmark case of the post-Nehruvian period where the Supreme Court for the first time questioned the supremacy of the Indian Parliament by questioning its amending power. Whether it is a constituent power or an ordinary power? If it is a constituent power then the Indian Parliament could make or unmake the Constitution, it could even repeal or replace the Constitution. The main issue involved was whether the Parliament was above the Constitution or the Constitution was above the Parliament?

(b) Bank Nationalization case

Even after the 'Golak Nath' case, property rights was still the issue of confrontation between the Parliament and the Judiciary when two Supreme Court decisions – the *Banks Nationalisation*[14] case, and the *Privy Purse*[15] case challenged the government even more sharply. In the words of Granville Austin, "Nationalizing banks and ending the privy purses of rulers of the former princely states were populist tools in Indira Gandhi's policy for dominance and in young Congress activist's scramble for influence". The advocacy for bank nationalization became more vigorous during the post-Nehruvian period and an ordinance was passed to nationalize the banks. The ordinance was challenged by Rustom Cavasjee Cooper and others who had filed petition in the Supreme Court challenging the President's competence to promulgate the ordinance. Even though the above was a policy decision not subject to judicial scrutiny, the courts passed an interim order restraining the Government from passing any directions under the Banking Companies Act,1968. Inspite of the Court's interim order, the Parliament passed a law nationalizing the banks, replacing the ordinance. The court struck down the Act as unconstitutional and questioned the policy-making of the executive and the legislative judgment of the Parliament in laying down the principles for determining compensation for government acquisition of property. However, immediately an Act incorporating the changes based on the courts order was passed nationalizing the fourteen banks.

13 (1967) 2 SCR 762, AIR 1967 SC 1643
14 Rustom Cavasjee Cooper v. Union Of India, AIR 1970 SC 564, 1970 2 SCA 37
15 Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85, AIR 1971 SC 530

(c) Privy Purses case

The Banks Nationalisation case was soon followed by the Privy Purses case[16]. Mrs. Indira Gandhi attempted to introduce progressive socialistic measures in order to implement her favorite slogan "garibi hatao" (remove poverty) by abolishing Privy Purses and privileges given to erstwhile Rajas and princes of the princely states of pre-independent India for surrendering their ruling powers and joining the Indian Federation. The Privy Purses case was another instance where the Parliament's unlimited power of amendment came into conflict with the judiciary's review. When a bill to abolish the privy purses could not be passed the government made a move to abolish privy purse through a Presidential order. The Presidential order was challenged by Madhav Rao Scindia and other princes. The broad question in this case was whether the President rightly exercised his powers in de-recognizing the princes. The Supreme Court struck down the Presidential order de-recognizing the princes and abolishing their privy purses. It held that the executive power of Union vested in the President must be exercised in "accordance with law". That power was intended to be exercised in aid of, not to destroy, the Constitution. An order merely "de-recognising" a ruler without providing for the continuation of the institution of his rule – an integral part of the constitutional scheme – was therefore plainly illegal.

Praising the Supreme Court's decision, C. Rajagopalachari wrote, "The Supreme Court has justified the people's confidence in it as impregnable bulwark for safeguarding justice and democracy against authoritarianism."[17]

(d) Kesavananda Bharti case

In the fundamental rights case[18] *(Kesavananda Bharti v. State of Kerala)*, the Supreme Court rendered a judgment that can be regarded as an important milestone in the Indian constitutional jurisprudence. While dealing with the question as to the extent of the amending power conferred by article 368 of the Constitution, the Court evolved the theory of "basic structure". A bench of 13 Judges held by a majority of 7:6 that the Parliament had wide powers to amend the Constitution extending to all articles of the Constitution, but this power could not be used in an unlimited way to abridge, abrogate or destroy the "basic structure" or the "basic framework" of the Constitution. *Kesavananda Bharti's* case was revolutionary decision and belied all the theoretical assumptions held till then.

B. Emergency era (1975-1977)

The period between 1975 to 1977 popularly known as the emergency period was the darkest hour of the Indian democracy. The brief period of twenty one month saw two emergencies running parallel to each other. The first emergency was proclaimed under Article 352 on the grounds of external aggression when India fought with Pakistan in 1971 for liberation of Bangladesh. The second emergency was proclaimed during June, 1975 again under Article 352 but on the grounds of 'internal disturbance'. During this time, the judiciary lost it power as it was controlled by Mrs. Indira Gandhi. As said in Mahabharata,

"Janami Dharmam Nechame Pravirti:
Janami Adharmam Nechaame Nivirthi:
Kenapi Devena Hridhisthitena,
Yatha Niyouktosmi Tathakaromi"

The gist of the above sloka in practice was seen during that period when Judiciary had to stand by the Prime Minister in all her wrong doings. The judges acted as mere puppets.

It was during this period that Justice Jagmohanlal Sinha of the Allahabad High Court found the prime minister guilty on the charge of misuse of government machinery for her election campaign. Though not to be called judicial activism, he passed an order against the prime minister who was all powerful at that time

16 Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85, AIR 1971 SC 530
17 Nani A.Palkhivala- A Life, M.V.Kamat, Hay House p.165
18 (1973) 4 SCC 225, AIR 1973 SC 1461

and controlling the judiciary and declared her election null and void and unseated her from her sear in the Lok Sabha.

The emergency ended with the announcement of 1977 Parliamentary elections. The end of the emergency inaugurated a new political era in the Indian political scene, putting an end to the hegemonic Congress domination and opening up opportunities for alternative political forces to make their presence felt at the centre of power in New Delhi. In the 1977 parliamentary elections Indira Gandhi suffered a massive defeat. The Janata party led by Morarji Desai came to power at the centre. During the post-emergency era, the principal tasks undertaken by the Morarji Desai's government were to repeal the legislation damaging the fundamental rights and to restore a democratic constitution through a comprehensive amendment. Under a favourable political scenario, the Supreme Court again embarked on judicial activism to shed aside its negative image created during the emergency.

C. Post – emergency era

The post – emergency period of 1977-78 is (in fact) known as the period of judicial activism because it was during this period that the Court's jurisprudence blossomed with doctrinal creativity as well as processual innovations. The post emergency judicial activism was probably inspired by the court's realization that its elitist social image would not make it strong enough to withstand the future onslaught of a powerful political establishment. Therefore, consciously or unconsciously, the Court moved closer to people. Playing an activist role the Supreme Court had made a tremendous contribution to the establishment of rule of law society in India and enhanced the quality of life of the people especially those belonging to the weaker sections of our society to whom even after decades of independence justice – social, economic and political was merely a teasing illusion. In relative terms, however, the court became much more accessible and its doctrinal law became much more people oriented. For it adopted two strategies:

i. It reinterpreted the provisions of the fundamental rights more liberally so as to maximize the rights of the people and particularly the disadvantaged sections of society; and
ii. It facilitated access to the courts by relaxing its technical rules of locus standi, entertaining letter petitions or acting suo moto and developing a public law, proactive technology for the enforcement of human rights.

Through such doctrinal activism the Indian Supreme Court promoted the principles of rule of law which forms an essential feature of all constitution of world, written or unwritten.

6. Public Interest Litigation

Another area of judicial activism during the post-emergency period was the emergence of "Public Interest Litigation" (PIL) in India. From 1978 onwards, the Supreme Court assumed a new role which included not only the guarding of civil-political liberties but also enforcing socio-economic rights of citizens, particularly of the have - not's and the downtrodden against the tyranny of the bureaucracy and the unscrupulous politicians. In India PIL is the product of judicial statesmanship and craftsmanship. Judicial activism earned a humane face in India with the liberalizing of access to justice and granting relief to disadvantaged groups and the have-nots through Public Interest Litigation. A postal letter or even a postcard addressed to the court is accepted for the purpose of initiating prerogative writs, with courts disregarding the technicalities. The 'PIL' has been described as a strategic arm of the legal aid movement which aims to bringing justice within the ambit of the disabled and poor masses who constitute the low visibility area of humanity.

"Public Interest Litigation distinguishes from the classical model of adjudication which is represented as a private dispute marked by individual participation and the imposition of retrospective belief involving a tight fit between

right and remedy"[19]. In case of Public Interest Litigations, the court refuses to be bound by the traditional paradigm of adversarial judicial process. In cases of Public Interest Litigation (PIL), the two parties may not be adversary to each other since the party raising the claim may be representing the poor, indigent and deprived sections of the society. As such the third party intervention is not covered by the strict rule of locus standi. Thus PIL's make departure of the rule that only aggrieved can approach the court.

7. Present Perspective

In India, during the recent past, there has been instances of the judiciary crossing the *lakshman-rekha* through the monitoring of 2G scam, Swiss Bank account etc. The Indian Supreme Court has defended its activism on the ground that "lakshman-rekha is notsacrosanct. Lakshman-rekha is for a limited purpose. *Had Sita not crossed lakshman- rekha*, *Ravan would not have been killed.*"[20] The Indian Supreme Court has defended judicial activism as a necessity in view of emerging corruption in high places to check the widespread malaise of corruption. In this process, if the judiciary has stepped into the shoes of the executive it was meant for doing justice in a refashion tradition.

Judicial activism is accepted as long as it protects the public from the despotism of the Executive. It must not lead to governance by the judiciary. It must be borne in mind that there is only a wafer thin line dividing judicial activism and judicial overreach and that judicial activism should not turn into 'judicial adventurism'. The justification of judicial activism is the unwillingness of the Legislature to take prompt measures to solve pressing problems and the apathy of the Executive to enforce the law. Despite the criticism, there can be no denial of the fact that the decision have made a far reaching impact and some of them have been a watershed in the area of human rights, protection of ecology, and rights of victims of crime. These judgments are a landmark in public law and have served the objectives of welfare state within the safeguards and checks that the Judiciary itself has built in. This is not to say however, that the practice of judicial activism is without any shortfalls. Many eminent Supreme Court Judges have warned against 'judicial overreach'.

8. Conclusion

One of the most important principles of just democratic governance is the presence of constitutional limits on the extent of government power. Such limits include periodic elections, guarantees of civil rights, and an independent Judiciary, which allows citizens to seek protection of their rights and redress against government actions. These limits help to make branches of government accountable to each other and to the people. An independent Judiciary is important for preserving the rule of law and is, therefore, the most important facet of good governance. Judiciary in India enjoys a very significant position since it has been made the guardian and custodian of the Constitution. It is the watchdog against the violation of fundamental rights, of every single Indian guaranteed under the Constitution.

Thus, from the above discussion it is clear that the origin of the judicial activism in India dates back to the commencement of the Constitution. From 1950 to 1977 judicial activism India underwent two phases of transformation – first during the pre-emergency period from 1950 to 1977, second the post-emergency period after 1978 . During these two phases the Supreme Court transformed itself from a literal interpreter to a liberal interpreter during the pre-emergency era, literal interpreter during the emergency era, and then again to as a liberal interpreter post the emergency period. As the savior of people's rights the Court also indulged in a new role of law making. The Supreme court's new role was however, not acknowledged and there were occasions of confrontation between the Court and the Parliament. This was particular during the post- Nehruvian period of the pre-emergency era when the judiciary invalidated the land reforms of the government.

19 Dr. Deka Swapna Manindranath Judicial Activism in Post-emergency Era, p.156
20 Judicial Activism in Post-emergency Era, Dr. Deka Swapna Manindranath, p.220

(i) Criticism against Activism

Judicial activism has flourished in India and acquired enormous legitimacy with the Indian public. However, the activist nature of judiciary is often subjected to criticism. It is argued that the judiciary has usurped the role of Legislature and the Executive. However, it is notable that in most cases the courts have directed the authorities to perform certain acts, the acts were such that the authorities were duty bound under law to perform them anyway. Another criticism faced by the courts is that they enter into areas where they have no expertise or competence. Here, it must be pointed out that in such cases the courts have taken the precaution of consulting the experts of the field. It is also argued that the courts are already over-burdened and PILs have only added to the burden and led to judicial delay. However, statistics shows that the number of cases where the courts have assumed an 'activist role' is miniscule as compared to the total number of cases and they have not affected the regular functioning of the courts in any significant way.

(ii) The need for Judicial Activism

Judicial activism may not be necessary in nations that have a proper administrative system and where the rule of law is implemented successfully. Unfortunately this is not the case in India where the judiciary is looked upon as the only hope for delivering justice in a country and where the executive and the legislature often fail to uphold the interests of the public. Judicial activism based on rule of law, is thus, justified. According to Soli J. Sorabjee, former Solicitor General of India, "The Rule of Law runs like a golden thread in our Constitution which in several articles emphasizes the necessity of law." The Supreme Court of India through its several activist judgments has given effect to the doctrine of the rule of law embodied in these articles.

It is submitted that judicial activism has become a necessity when criminals are getting into the legislature and law breakers are becoming law-makers under the present system.

But judicial activism should not be the Brahmastra of the judiciary to solve every problem faced by the society. Judicial activism derives its legitimacy from its loyalty towards justice. But judicial activism can never be abandoned. It should not be viewed with suspicion. In this regard, Justice Krishna Iyer rightly said, "To distrust the judiciary marks the beginning of the end of the society". The judiciary is a reflection of a society, government and nation. The judges, therefore, have a huge responsibility to make the justice delivery system smooth and fair. Hence judicial activism is inevitable in the present society.

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DIRECT TAXES
Supreme Court

S. 24-AA Surtax Act: Principles of interpretation of a law conferring an exemption or concession explained

Oil & Natural Gas Corporation Limited vs. Commissioner of Income Tax & Anr. [Civil Appeal No. 730 of 2007, dated 1st July, 2015]

The Supreme Court had to consider the scope of Notification bearing No. GSR 307(E) dated 31-3-1983 issued under Section 24AA of the Surtax Act by which exemption was granted in respect of surtax in favour of foreign companies with whom the Central Government has entered into agreements for association or participation of that Government or any authorised person in the business of prospecting or extraction or production of mineral oils. ONGC was notified as the "authorised person". The question was whether the exemption could be extended to agreements entered into by ONGC with different foreign companies for services or facilities or for supply of ship, aircraft, machinery and plant, as may be, all of which were to be used in connection with the prospecting or extraction or production of mineral oils. Such agreements did not contemplate a direct association or participation of ONGC in the prospecting or extraction or production of mineral oils but involved the taking of services and facilities or use of plant or machinery which is connected with the business of prospecting or extraction or production of mineral oils.

Dismissing the appeals the Supreme Court held as under:

(i) The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption *(Commissioner of Income Tax-III vs. Calcutta Knitwears, Ludhiana (2014)*

6 SCC 444 & Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal and Others (2011) 1 SCC 236 followed);

(ii) Section 24-AA of the Surtax Act was brought into the statute book by Act 16 of 1981 i.e. Finance Act, 1981 with effect from 1-4-1981. The explanatory notes on the provisions of Finance Act [Paragraphs 11(4) and 26(1)] clearly goes to show that the legislative intent behind inclusion of Section 24-AA is to encourage foreign companies to enter into participating contracts with the Union Government in the business of oil exploration or production. The further legislative intent was to seek greater participation of foreign companies in the matter of providing services including supply of ships, aircraft, machinery or plant in connection with business of extraction or production of mineral oils. The aforesaid legislative intent which is two-fold is manifested by the two limbs of sub-section 2 of Section 24AA of the Surtax Act to which the power of exemption was intended to operate i.e. sub-sections 2(a) and 2(b) of Section 24AA. If out of the two limbs where the power of exemption was intended to operate, the repository of the power i.e. Central Government, had consciously chosen to grant exemption in one particular field i.e. foreign companies covered by sub-section 2(a) of Section 24-AA, the scope of the grant cannot be enhanced or expanded by a judicial pronouncement which is what the arguments made on behalf of the appellants intend to achieve. Any such interpretation must, therefore, be avoided. Consequently, we see no reason to depart from the basic principles of interpretation, as already noticed, that should govern the present issue. We, accordingly, do not find any merit in any of the appeals under consideration.

S. 44BB vs. 9(1)(vii)/44D: The "pith and substance" test has to be applied to determine the dominant purpose of each agreement. If the dominant purpose is mining, the income is assessable only u/s 44BB and not as "fees for technical services" u/ss. 9(1)(vii) & 44D

Oil & Natural Gas Corporation Limited vs. Commissioner of Income Tax & Anr. [Civil Appeal No. 731 of 2007, dated 1st July, 2015]

The Supreme Court had to consider the following question: "Whether the amounts paid by the ONGC to the non-resident assessees /foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil is chargeable to tax as "Fees for technical services" under Section 44D read with Explanation 2 to Section 9(1)(vii) of the Income-tax Act or will such payments be taxable on a presumptive basis under Section 44BB of the Act"?

Allowing the appeal the Supreme Court held as under:

(i) The Income-tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act, 1948. While construing the somewhat *pari materia* expressions appearing in the Mines and Minerals (Development and Regulation) Act, 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in Section 3(a) of the 1957

Act. Regard must also be had to the fact that mineral oils is separately defined in Section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation i.e. Oil Fields (Regulation and Development) Act, 1948. Reading Sections 2(j) and 2(jj) of the Mines Act, 1952 which define mines and minerals and the provisions of the Oil Fields (Regulation and Development) Act, 1948 specifically relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D of the Act.

(ii) The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22-10-1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/ foreign company would be chargeable to tax under the provisions of Section 44BB and not Section 44D of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the appellants and placed before the Court is correct.

(iii) The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act (Circular No. 1862 dated 22-10-1990 referred).


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DIRECT TAXES
Tribunal

REPORTED

1. Business expenditure – section 37(1) of the Income-tax Act, 1961 – Expenditure incurred on rented premises for efficiently carrying out business activity – Allowable as business expenditure

Urban Infrastructure Venture Capital Ltd vs. Dy. CIT (2015) 119 DTR (Mumbai) (Trib.) 322

The assessee during the relevant assessment year taken a new premise on rent and incurred certain expenditure on repair and renovation. The A.O. during the course of assessment proceedings asked the assessee to show cause as to why the office renovation expenses should not be capitalised. The assessee explained to the A.O. that the expenses were incurred on tiling, plumbing, false ceiling, etc. which could not be reused on vacation of the premises. However, the A.O. treated the said expenses as capital in nature and allowed depreciation on the same. On appeal the first Appellate Authority upheld the action of the A.O. The appellant being aggrieved by the assessment order preferred an appeal before the Hon'ble Mumbai Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee and held that expenditure incurred by the assessee on the premises taken on rent was revenue in nature since no new asset has been created and the changes were made for efficiently carrying on the business of the assessee and the items on which expenditure was incurred could not be reused on vacation of the premises.

2. Revision – section 263 of the Income-tax Act, 1961 – It is the satisfaction of the A.O. who made the enquiry which is the touchstone of assessment order passed – CIT cannot substitute his view in place of the findings of the A.O. until and unless the view taken by the A.O. is unsustainable in law

Dr. William Britto vs. CIT (2015) 120 DTR (Panaji) (Trib.) 289

The learned CIT on perusal of the assessment records of the assessee noted that the assessee has received an amount of ` 6 crore which has not been offered by the assessee for taxation. The learned CIT therefore issued notice under section 263 of the Act by observing that the action of the A.O. in not considering the receipt of ` 6 crore while passing the assessment order is erroneous as well as prejudicial to the interest of the Revenue. The assessee replied to the show cause notice and explained that

the A.O. after satisfying himself about the genuineness of the loan amounting to Rs. 6 crores received did not treat the said loan as income. The assessee further explained that the same A.O. has added the said sum in the hand of M/s. Britto Amusements (P) Ltd in which he is a director. The learned CIT however passed the order under section 263 of the Act and set aside the assessment order treating the same as erroneous as well as prejudicial to the interest of the Revenue and directed the A.O. to consider the above sum of ` 6 crore deposited in the bank account in accordance with law after providing the assessee reasonable opportunity of being heard. The assessee being aggrieved by the above order preferred an appeal before Hon'ble Panaji Bench of the Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee and held that A.O. having duly enquired about the amount of ` 6 crores which was credited into the bank account of the assessee and then taken a conscious decision that the said amount has to be added in the hands of the company in which the assessee is a director and made no addition in the hands of the assessee, it cannot be said that the order passed by the A.O. is erroneous and prejudicial to the interest of the revenue.

3. Tax Deduction at source – Section 201 of the Income-tax Act, 1961 – Property purchased from a Non-Resident Indian - At the time of execution of agreement assessee was made aware by the vendor that the capital gain would be eligible for exemption under section 54 of the Act – Payment of sale consideration to the vendor was thus made without deducting tax at source – Held assessee cannot be treated as "assessee in default" under section 201 of the Act for non-deduction of tax at source. A.Y.: 2012-13

A. Mohiuddin vs. Addl. DIT (I.T.) – (2015) 119 DTR (Bang.) (Trib.) 76

The assessee purchased property from a non-resident Indian lady. While making payment to the vendor the assessee did not deduct tax at source, as at the time of execution of sale deed and payment of consideration, it was represented by the vendor that she had purchased a house property within the prescribed period of one year prior to the date of sale deed and as she had made investment in the new residential house which was eligible for exemption under section 54 of the Act thus, there was no income in her hand on which tax was leviable. Accordingly, assessee did not deduct the tax at source while making payment to vendors.

The A.O. was of the opinion that as the property was purchased from a non-resident so, before making payment to the vendor, TDS under section 195(1) of the Act ought to have been deducted by the assessee. As the assessee failed to deduct the TDS, the A.O. treated the assessee as "assessee in default" under section 201 of the Act and levied interest under section 201(1A) of the Act.

On appeal the Tribunal held that as the assessee while making payment to the vendor was well-aware that the vendor had purchased a residential house within the prescribed period as such, the capital gain in her hands would be eligible for exemption under section 54 of the Act. Thus, the assessee cannot be treated as "assessee in default" under section 201 of the Act for not deducting tax at source under section 195 of the Act while making payment to the vendor and consequently on interest under section 201 (1A) of the was also leviable.

UNREPORTED

4. Reassessment – Section 147 of the Income-tax Act, 1961 – Service of notice under section 148, not a mere procedural requirement – It is

a condition precedent to initiation of proceedings for reassessment. A.Ys.: 1991-92, 1993-94, 1994-95, 1998-99 & 1999-2000

Smt. Chapala Kalita vs. ITO – [I.T.A. Nos.: 340 to 344 / Gau / 2013; Order dated: 29-1-2015; Guwahati Bench]

The assessee was an individual. Proceedings under section 147 of the Act were initiated in the assessee's case. During the course of reassessment proceedings several opportunities were given to the assessee but there was no compliance on the part of the assessee. The Assessing Officer thus, passed the reassessment orders for all the years under section 144 read with 147 making certain additions/ disallowances.

On appeal before the Tribunal the assessee contended that the assessment orders passed by the A.O. were illegal and without jurisdiction as no notices under section 148 were served on the assessee.

The Tribunal noted that there was no evidence to prove that notices under section 148, were sent by Registered Post to the assessee nor was there any evidence to prove that the notice was served upon the assessee. On these facts the Tribunal held that for a proceeding under section 147 of the Act, to be valid, it is mandatory that service of notice under section 148 of the Act should be effected upon the assessee, as the A.O. derives his jurisdiction to initiate the proceedings under section 147 of the Act on the basis of service of notice under section 148 of the Act. Thus, in the absence of proof of service of the reassessment notice, reassessment was held to be invalid.

Note: The Hon'ble Gujarat High Court in the case of, *Kanubhai M. Patel vs. Hiren Bhatt or his Successors to Office & Ors. – {(2011) 334 ITR 25 (Guj.)}* held that the expression, "shall be issued" as used in section 149 of the Act in the context of issuance of notice, has to be attributed the meaning, 'to send out' or to place in the hands of the proper officer for service. Thus, the date of issue would be the date on which the same were handed over for service to the proper officer.

5. Capital loss – Section 70(3) of the Income-tax Act, 1961 – Long-term capital loss of sale of equity shares attracting Security Transaction Tax (STT) – Can be set-off against long term capital gain on sale of land. A.Y.: 2007-08

Raptakos Brett & Co. Ltd. vs. Dy. CIT– [I.T.A. No.: 3217 / Mum / 2009; Order dated: 10-6-2015; Mumbai Bench]

For the year the assessee declared long term capital loss on sale of shares and mutual funds units. The said Long term capital loss was set off against the long term capital gain arising from sale of land by the assessee.

The Assessing Officer during the assessment proceedings held that the set-off of losses as claimed by the assessee cannot be allowed as:

- The income from long term capital gain on sale of shares and mutual funds is exempt u/s. 10(38); and
- The long term capital loss in respect of shares where securities transaction tax has been deducted, would have been exempt from long term capital gain had there been profits, therefore, long term capital loss from sale of shares cannot be set-off against the long term capital gain arising out of the sale of land.

On appeal the Tribunal held that section 10(38) of the Act excludes only the income arising from transfer of long term capital asset being equity share or equity fund which is chargeable to STT and not entire source of income from capital gains arising from transfer of shares. Thus, long term capital loss on sale of shares would be allowed to be set-off against long term capital gain on sale of land in accordance with section 70(3) of the Act.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

NOTIFICATIONS

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 – Denmark

The Central Government directed that all the provisions of the Protocol between the Government of the Republic of India and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital, and the Protocol on provisions on clarification of the Convention which were signed at Copenhagen in March, 1989, as set out in the Annexure of the said notification, shall be given effect to in the Union of India with effect from the first day of February, 2015.

(Notification No. 45/2015 dated 22-5-2015)

Section 35AC read with Explanation (B) thereto, of the Income-tax Act, 1961 – Eligible Projects or Schemes, Expenditure on – Notified Eligible Projects or Schemes

The Central Government, on the recommendation of the National Committee for Promotion of Social and Economic Welfare, notified the institutions approved by the said National Committee, and approved the eligible projects or schemes specified to be carried on by the said institutions, the estimated cost thereof, and the maximum amount of such cost which may be allowed as deduction under the section 35AC for the period of approval, are as mentioned in the said notification.

(Notification No. 124/2015 dated 26-5-2015)

Section 10(6C) of the Income-tax Act, 1961 – Exemptions – Income arising to foreign company by way of royalty of fees for technical services – Notified company

The Central Government declared that any income arising to M/s. Dassault Aviation S.A, by way of royalty or fees for technical services received in pursuance of the agreement *vide* General Contract No. Air HQ /96102/2/ASR-DA, dated 29th July, 2011 entered into between M/s Dassault Aviation and Thales Systems Airports and the Government of India for undertaking retrofitting of fifty-one defence aircraft connected with security of India, shall not be included in computing the total income of a previous year of the said company under the said Act.

(Notification No. 46/2015 dated 17-6-2015)

Section 10(46) of the Income-tax Act, 1961 – Exemptions – Statutory Body/Authority/Board/Commission – Notified

The Central Government notified for the financial years 2011-12 to 2015-16:

"Punjab State AIDS Control Society", a body constituted by the Government of Punjab, in respect of the following specified income arising to that body, (a) amount received in form of grants-in-aid from the Government of India; and (b) interest earned on grants-in-aid from the Government of India

"West Bengal Electricity Regulatory Commission", a Commission constituted under the Electricity Regulatory Commission Act, 1978 of West Bengal in respect of the following specified income arising to that Commission, (a) income from the fund maintained in accordance with the provisions of the West Bengal Electricity Regulatory Commission (Manner of Application of Fund) Rules, 2006; and (b) income from the fees collected in accordance with the provisions of the West Bengal Electricity (Fees for application for grant of licence) Rules, 2005, notified by the Government of West Bengal.

Provided the notification shall be effective subject to the conditions that these institutions (a) do not engage in any commercial activity; (b) their activities and the nature of the specified income remain unchanged throughout the financial years; and (c) they file return of income in accordance with the provisions of section 139(4C)(g) of the Income-tax Act, 1961.

(Notification Nos. 47/2015 and 48/2015 dated 18-6-2015)

Income-tax (Eighth Amendment) Rules, 2015 – Amendment in Rule 12, Subsitution of Forms Sahaj (ITR-1), ITR-2, and Sugam (ITR-4S) and insertion of Form ITR-2A

The Central Board of Direct Taxes amended the Income-tax Rules, 1962 to be called the Income-tax (8th Amendment) Rules, 2015 to come into force with effect from the 1st day of April, 2015. In rule 12, sub-rule (1) in clause (a) and (ca), in the proviso, for clauses (III), "(III) has agricultural income, exceeding five thousand rupees;"; shall be substituted, and after clause (b) the following clause shall be inserted, '(ba) in the case of a person being an individual not being an individual to whom clause (a) applies or a Hindu undivided family where the total income does not include any income chargeable to income-tax under the heads "Profits or gains of business or profession" and "Capital gains" and to whom the provisions of clause (I) and clause (II) of the proviso to clause (a) does not apply, be in Form No. ITR-2A and be verified in the manner indicated therein;' In Rule 12, sub-rule (4), for the words, brackets, letters and figures "in the manners specified in clauses (i), (iii) and (iv) of sub-rule (3)", the words, brackets, letters and figures "in the manners (other than the paper form) specified in column (iv) of the Table in sub-rule (3)" shall be substituted.

In Appendix-II, for "Forms SAHAJ (ITR-1), ITR-2 and SUGAM (ITR-4S)" the "Forms SAHAJ (ITR-1), ITR-2, ITR-2A and SUGAM (ITR-4S)" have been substituted.

(Notification No. 49/2015 dated 22-6-2015)

Section 197 of the Income-tax Act, 1961 – Deduction of Tax at Source – No deduction in certain cases – Specified payment under section 197A(1F)

In exercise of the powers conferred by sub-section (1F) of the section 197A of the Income-tax Act, 1961, the Central Government notified that no deduction of tax under Chapter XVII of the said Act shall be made on the payment of the nature specified in the clause (23FBA) of the Section 10 of the said Act received by any investment fund as defined in clause (a)

of the Explanation 1 of the Section 115UB of the said Act.

(Notification No. 51/2015 dated 24-6-2015)

CIRCULARS

Section 154 of the Income-tax Act, 1961 – Rectification of Mistake – Apparent from records – Expeditious disposal of applications for rectification under section 154 during Financial Year 2015-16

Expeditious redressal of taxpayers' grievances was identified as a key result area in the current years Action Plan. In the recently held Annual Conference of PCCsIT/PDGsIT/CCsIT/DGsIT at New Delhi, the Union Finance Minister in his key-note address has also exhorted the Income-tax Department to be prompt in redressing the grievances of taxpayers. It had been a matter of concern that the rectification applications u/s. 154 filed by the taxpayers before the field officers are not being dealt with promptly. The Citizen's Charter of the Department requires that applications for rectification are to be disposed of within two months from the end of the month in which application is received.

As per the Interim Action Plan for the first quarter of F.Y. 2015-16, all rectification applications that were received up to 31st March, 2015, were required to be disposed by 15th May, 2015. In this regard, a feedback report on the achievement of the targets for disposal of rectification applications may be forwarded to the respective Zonal Members, under intimation to Member (IT), on or before 20th June, 2015.

The CBDT directed that the timeline pertaining to this area of work as mentioned above must be strictly adhered to. The supervisory authorities are requested to ensure that the Rectification Registers are properly maintained by the AOs as per the standard operating procedure (SOP) prescribed *vide* Instruction No. 3/2015 dated 5-7-2013 and disposal of applications for rectification is regularly monitored.

It may also be noted that CBDT *vide* Circular No. 8/2015 dated 14-5-2015 has brought out an SOP for verification and correction of demand. The procedure prescribed therein would lead to correction of disputed demands and shall help in mitigating the grievances to a large extent.

(Letter [F.No. 225/148/2015-ITA-II], dated 5-6-2015)

Principles laid down by Supreme Court in judgment in Civil Appeal No. 1912 of 2015 in the case of *Shri Ajay Kumar Choudhary vs. Union of India [2015] 58 taxmann.com 231 (SC)*

The CBDT drew attention to the principles laid down by Hon'ble Supreme Court in the judgment in Civil Appeal No. 1912 of 2015 in the case of *Shri Ajay Kumar Choudhary vs. Union of India*. Hon'ble Apex Court has laid down the following principles in Para 14 of the judgment: (a) The direction of the Central Vigilance Commission that pending a criminal investigation, departmental proceedings are to be held in abeyance, is now superseded; (b) The currency of a Suspension Order should not extend beyond three months if within this period the Memorandum of Charges/Charge sheet is not served on the delinquent officer/employee; (c) If the Memorandum of Charges/Charge sheet is served, a reasoned order must be passed for the extension of the suspension; (d) The Government is free to transfer the concerned person to any Department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him; (e) The Government may also prohibit him from contacting any

person, or handling records and documents till the stage, he is required to prepare his defence.

(Letter F.No. DGIT (VIG.)/HQ/MISC./2015-16/1285, dated 5-6-2015)

Section 119 of the Income-tax Act, 1961 – Income-tax Authorities – Instructions to Subordinate Authorities – Condonation of Delay in filing refund claim and claim of carry forward losses under section 119(2)(b)

In supersession of all earlier Instructions/ Circulars/Guidelines issued by the Central Board of Direct Taxes from time to time to deal with the applications for condonation of delay in filing returns claiming refund and returns claiming carry forward of loss and set-off thereof under section 119(2)(b) of the Income-tax Act, (the Act) the CBDT issued a containing comprehensive guidelines on the conditions for condonation and the procedure to be followed for deciding such matters.

The Principal Commissioners of Income-tax/ Commissioners of Income-tax (Pr.CsIT/CsIT) shall be vested with the powers of acceptance/ rejection of such applications/claims if the amount of such claims is not more than ` 10 lakhs for any one assessment year. The Principal Chief Commissioners of Income-tax/Chief Commissioners of Income-tax (Pr. CCsIT/CCsIT) shall be vested with the powers of acceptance/rejection of such applications/ claims if the amount of such claims exceeds ` 10 lakhs but is not more than ` 50 lakhs for any one assessment year. The applications/ claims for amount exceeding ` 50 lakhs shall be considered by the Board.

No condonation application for claim of refund/loss shall be entertained beyond six years from the end of the assessment year for which such application/claim is made. This limit of six years shall be applicable to all authorities having powers to condone the delay as per the above prescribed monetary limits, including the Board. A condonation application should be disposed of within six months from the end of the month in which the application is received by the competent authority, as far as possible.

In a case where refund claim has arisen consequent to a Court order, the period for which any such proceedings were pending before any Court of Law shall be ignored while calculating the said period of six years, provided such condonation application is filed within six months from the end of the month in which the Court order was issued or the end of financial year whichever is later.

The powers of acceptance/rejection of the application within the monetary limits delegated to the Pr.CCsIT/CCsIT/Pr.CsIT/ CsIT in case of such claims will be subject to following conditions: (a) At the time of considering the case under Section 119(2)(b), it shall be ensured that the income/loss declared and/or refund claimed is correct and genuine and also that the case is of genuine hardship on merit; (b) The Pr.CCIT/CCIT/Pr.CIT/CIT dealing with the case shall be empowered to direct the jurisdictional assessing officer to make necessary inquiries or scrutinize the case in accordance with the provisions of the Act to ascertain the correctness of the claim

A belated application for supplementary claim of refund (claim of additional amount of refund after completion of assessment for the same year) can be admitted for condonation provided other conditions as referred above are fulfilled. The powers of acceptance/ rejection within the monetary limits delegated to the Pr.CCsIT/CCsIT/Pr.CsJT/CsIT in case of returns claiming refund and supplementary claim of refund would be subject to the following further conditions: (i) The income of the assessee is not assessable in the hands of any other person under any of the provisions of the Act; (ii) No interest will be admissible on belated claim of refunds. (iii) The refund

has arisen as a result of excess tax deducted/collected at source and/or excess advance tax payment and/or excess payment of self-assessment tax as per the provisions of the Act.

In the case of an applicant who has made investment in 8% Savings (Taxable) Bonds, 2003 issued by Government of India opting for scheme of cumulative interest on maturity but has accounted interest earned on mercantile basis and the intermediary bank at the time of maturity has deducted tax at source on the entire amount of interest paid without apportioning the accrued interest/TDS, over various financial years involved, the time limit of six years for making such refund claims will not be applicable.

The circular will cover all such applications/claims for condonation of delay under section 119(2xb) which are pending as on the date of issue of the Circular.

(Circular 9/2015 [F.No. 312/22/2015-OT], dated 9-6-2015)

Section 92CC of the Income-tax Act, 1961 – Transfer Pricing – Advance Pricing Agreement (APA) – Clarifications on rollback provisions of Advance Pricing Agreement Scheme

The Advance Pricing Agreement provisions were introduced in 2012 through insertion of sections 92CC and 92CD in the Income-tax Act, 1961 by the Finance Act, 2012. Subsequently, the Advance Pricing Agreement Scheme was notified on 30-8-2012, thereby inserting Rules 10F to 10T and Rule 44GA in the Income-tax Rules, 1962.

Rollback provisions in the APA Scheme were introduced through sub-section (9A) inserted in section 92CC by the Finance (No. 2) Act, 2014. Subsequent to the notification of the rules, requests for clarification regarding certain issues have been received by the Central Board of Direct Taxes. In order to clarify such issues, the Board has decided to adopt a Question and Answer format and the clarifications to the same have been provided in the circular.

(Circular No.10/2015 [F.No. 500/7/2015-APA-II], dated 10-6-2015)

Extension of due date of filing return of income for Assessment Year 2015-16

The Central Board of Direct Taxes extended the 'due-date' for filing Returns of Income, in terms of clause (c) of Explanation 2 to sub-section (1) of section 139 of the Income-tax Act, 1961, for Assessment Year 2015-16 from 31st July, 2015 to 31st August, 2015 in respect of income tax assessees concerned.

(Order [F.No.225/154/2015/ITA.II], dated 10-6-2015)

Section 251 of the Income-tax Act, 1961 – Commissioner (Appeals) – Powers of – Issue of appellate order within 15 days of last hearing – Strict compliance thereof

CBDT noticed that terms of Instruction No. 20/2013, dated 23-12-2003 on the subject mentioned above are not being adhered to. It requested all the officers concerned to ensure strict compliance of the above. The operative part of the Instruction is reproduced below for ready reference:

"2. The Board desires that appellate orders by Commissioner of Income Tax (Appeals) should be issued within 15 days of the last hearing. Any lapse on this account shall be viewed adversely."

"3. This shall be applicable to orders passed by the CIT (Administration)/CCIT as regards matters within their purview under varied Section of Income-tax Act such as Sections 80G, 264, 263 or Orders under Rule 86 of

Second Schedule and under other allied direct taxes."

(Instruction [F.No. 279/MISC/53/2003-ITJ], dated 19-6-2015)

Section 10 of the Wealth-tax Act, 1957 – Wealth-tax authorities – Instructions to subordinate authorities – Clarifications on amendment brought out by Finance Act, 2013, w.r.e.f. 1-4-1993 in Wealth-tax Act for purpose of claiming refund of wealth-tax paid on agricultural land as per provisions of said Act prior to Finance Act, 2013

Prior to amendment by Finance Act, 2013, sub-clause (b) of Explanation 1 to clause (ea) of section 2 of the Wealth-tax Act, 1957 (Act) provided that an urban land shall be chargeable to wealth-tax. This *inter alia* included land situated in any area which is comprised within the jurisdiction of a municipality or a cantonment board and which has population of not less than ten thousand according to the last preceding census; or land situated in any area within such distance not being more than eight kilometres from the local limits of any municipality or cantonment board as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations specify in this behalf by notification in the Official Gazette. Subsequently, by Finance Act, 2013 the said sub-clause (b) of Explanation 1 to clause (ea) was amended to provide that the term "urban land" would not include land classified as agricultural land in the records of the Government and used for agricultural purposes. Accordingly, such land stands exempt from wealth-tax. This amendment was done with retrospective effect from 1-4-1993.

Various representations in this regard were received in the Central Board of Direct Taxes (the Board) that assessees had paid wealth-tax on such agricultural land as per the provisions of the Act as they existed prior to Finance Act, 2013. In view of the amendment brought by the Finance Act, 2013 w.r.e.f. 1-4-1993, the wealth-tax paid in respect of such land is required to be refunded. However, the time-limit for filing revised return or application for rectification for the purpose of claiming refund has expired in several cases.

With a view to avoid genuine hardship and in exercise of the powers conferred under section 10(2) (b) of the Wealth-tax Act, the Board authorised Principal Commissioners/ Commissioners of Wealth-tax to admit application for revision under section 25 of the Act from assessees seeking refund arising due to the aforesaid amendment, after the expiry of the period specified under the said section and to deal with it on merits as per law.

The Principal Commissioner/ Commissioner of Wealth-tax shall dispose of such applications within one year from the end of the financial year in which the application is received. However, the Principal Commissioner/ Commissioner shall not set aside any order. While disposing the application, the Principal Commissioner/Commissioner may for deciding the matter call for a report from the Assessing Officer and seek relevant information from the assessee. In case such order results in refund, the assessee shall be entitled to interest on such refund at the rate specified in the Act in this behalf. The application for such claim shall be made by the assessee within one year from the date of issue of this order. After expiry of the said period, no such claim shall be admitted.

(Circular No. 11/2015 [F.No.325/02/2014-WT], dated 11-6-2015)

Implementation of the CIT(A) module in the new Income Tax Business Application (ITBA)

The income Tax Business Application (ITBA) is planned to be launched shortly and the

CIT(A) module is amongst the first module to be rolled out. This would enable the office of CIT(A] to work on the ITBA system. The CIT(A) module is expected to enhance the efficiency of the CsIT (A) in terms of the ease in handling the appeal workload and its disposal and the automatic generation of MIS for reporting and for control of work.

In order to ensure that the pending appeals can also be processed and orders issued on ITBA, data pertaining to all pending appeals are required to be uploaded in the CIT(A) module. This would be a one-time exercise and thereafter, all relevant MIS would be available in the module. To facilitate this, an Appeal Excel Utility was made and uploaded in irsofficersonline.gov.in and in i-taxnet.

In this regard Directorate of Systems had addressed a letter *vide* F. No. Systems/ITBA/CIT Appeals Module/11-12/37 dated 22-4-2015 to all Pr.CsCIT (CCA), requesting them to issue necessary instructions to all CsIT (A) under their charge to upload the relevant data in the Appeal Excel Utility. This process was to be completed by 4-5-2015. Suitable instructions are to be issued to all CsIT(A) to complete this exercise so that the data of pending appeals can be uploaded on the system, once the CIT(A) module in the ITBA becomes operational.

(Letter D.O. No. 279/MISE/93/2015-SO (IT), dated 16-6-2015)

PRESS RELEASE

Section 139 of the Income-tax Act, 1961 – Return of Income – Income-tax return Forms ITR 1, 2 and 4S simplified for convenience of taxpayers and introduction of a new Form ITR-2A

Forms ITR 1, 2 and 4S for Assessment Year 2015-16 were notified on 15th April, 2015 (15-4-2015). In view of various representations, it was announced that these ITR forms will be reviewed. Having considered the responses received from various stakeholders, these forms are proposed to be simplified in the following manner for the convenience of the taxpayers: (a) Individuals having exempt income without any ceiling (other than agricultural income exceeding ` 5,000) can now file Form ITR 1 (Sahaj). Similar simplification is also proposed for individuals/HUF in respect of Form ITR 4S (Sugam). (b) At present individuals/HUFs having income from more than one house property and capital gains are required to file Form ITR 2. It is, however, noticed that majority of individuals/HUFs who file Form ITR 2 do not have capital gains. With a view to provide for a simplified form for these individuals/HUFs, a new Form ITR 2A is proposed which can be filed by an individual or HUF who does not have capital gains, income from business/profession or foreign asset/foreign income. (c) In lieu of foreign travel details, it is now proposed that only Passport Number, if available, would be required to be given in Forms ITR 2 and ITR 2A. Details of foreign trips or expenditure thereon are not required to be furnished. (d) As regards bank account details in all these forms, only the IFS code, account number of all the current/savings account which is held at any time during the previous year will be required to be filled-up. The balance in accounts will not be required to be furnished. Details of dormant accounts which are not operational during the last three years are not required to be furnished. (e) An individual who is not an Indian citizen and is in India on a business, employment or student visa (expatriate), would not mandatorily be required to report the foreign assets acquired by him during the previous years in which he was non-resident if no income is derived from such assets during the relevant previous year. (f) As a measure of simplification, it has been endeavoured to ensure that in Form ITR 2 and the new Form ITR 2A, the main form will not contain more than 3 pages, and other

information will be captured in the Schedules which will be required to be filled only if applicable.

As the software for these forms is under preparation, they are likely to be available for e-filing by 3rd week of June, 2015. Accordingly, the time limit for filing these returns is also extended up to 31st August, 2015

(Press Release, dated 31-5-2015)

Section 285BA of the Income-tax Act, 1961 – Obligation to furnish Annual Information Return – India joined Multilateral Competent Authority Agreement (MCAA) on Automatic Exchange of Information (AEOI)

India joined the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information in June, 2015, in Paris, France, along with Australia, Canada, Costa Rica, Indonesia and New Zealand. With six countries joining the MCAA, the total number of countries/jurisdictions agreeing to exchange information automatically in accordance with MCAA has gone to sixty.

Ninety-four countries have committed to exchange information on an automatic basis from 2017 onwards as per the new global standards on automatic exchange of information, known as Common Reporting Standards (CRS) on Automatic Exchange of Information (AEOI).

For implementation of these standards in India and with a view to provide information to other countries, necessary legislative changes have been made through Finance (No. 2) Act, 2014, by amending section 285BA of the Income-tax Act, 1961. Necessary rules and guidelines are being formulated in consultation with financial institutions.

AEOI based on CRS, when fully implemented, would enable India to receive information from almost every country in the world including offshore financial centres and would be the key to prevent international tax evasion and avoidance and would be instrumental in getting information about assets of Indians held abroad including entities in which Indians are beneficial owners. This will help the Government to curb tax evasion and deal with the problem of black money.

(Press Release dated 3-6-2015)

Section 276C, read with Section 276D, of the Income-tax Act, 1961 – Offences and Prosecution – Wilful attempt to evade tax, etc. – Clarification on prosecution of tax evaders

CBDT noticed that the certain sections of media have referred to the Discussion Paper, circulated during the All India Conference of Chief Commissioners and Director Generals of Income Tax held on 25th-26th May, 2015, out of context and stated that the CBDT has told its officers to go beyond raids and searches to target tax evaders. CBDT clarified that this is factually not correct. The need of the hour is to provide effective deterrence since the soft action in extreme and big cases of tax evasion affects the behaviour of the compliant taxpayers which has been brought out in the latest study conducted by NIPFP. This is the very aspect that was covered by CBDT in the discussion during the All India Annual Conference of senior officers. Effective and stringent action only in known and big cases of tax evasion would go a long way in demonstrating to the large number of compliant taxpayers that the tax laws are just and fair and also encourage voluntary tax compliance.

The issues for discussion during the All India Conference of Chief Commissioners and Director Generals of Income Tax were 'Lack of Credible Deterrence through Penalty and Prosecution – Causes and Ways to Improve'. The discussion was within the limited context of cases where action under Section 132 of the IT Act, 1961 for search and seizure had been undertaken by the Investigation Division of the

Department. These are exceptional cases which are selected for intrusive action after detailed intelligence gathering and due diligence on the basis of credible evidence and are not the norm for routine cases. It may be noted that only 537 searches were conducted in Financial Year 2014-15 in which admitted undisclosed income was to the tune of ` 10288.05 crore.

In such cases where after intensive fact assessment, the Department undertakes search and seizure action as permissible under the law, mere tax collection does not have deterrence value and these need to be taken to their logical conclusion in terms of levy of penalty and launching of prosecution as per the provisions of the Income-tax Act.

(Press Release dated 8-6-2015)

INSTRUCTIONS

Section 199 of the Income-tax Act, 1961 – Deduction of Tax at Source – Credit for tax deducted – Non-deposit of Tax Deducted at Source

As per Section 199 of the Act credit of Tax Deducted at Source is given to the person only if it is paid to the Central Government Account. However, as per section 205 of the Act the assessee shall not be called upon to pay the tax to the extent tax has been deducted from his income where the tax is deductible at source under the provisions of Chapter XVII. Thus the Act puts a bar on direct demand against the assessee in tax credit mismatch cases and the CBDT instructed that the demand in such cases cannot be enforced coercively.

(Instruction No. 275/29/2014-IT-(B), dated 1-6-2015)

Section 143, read with Section 142 of the Income-tax Act, 1961 – Assessment – Scope of enquiry in cases selected for scrutiny – Further steps towards a non-adversarial tax regime

OM dated, 7-11-2014 mandates that in stations having more than one CCIT, the decision to file an appeal before the High Court will be taken by two CCsIT including the CCIT in whose jurisdiction the matter lies. The Principal CCIT concerned may issue directions for pairing of CCsIT for this purpose. In case of disagreement between the two CCsIT, the matter will be referred to the Principal CCIT. For references in the jurisdiction of the Principal CCIT, in case of disagreement, the matter will be referred to the CCIT-II. A question was raised as to whether such cases where decision to "not file" has been proposed/taken by the jurisdictional CCIT would also be subject to aforementioned procedure.

The CBDT decided that such cases, where decision to "not file" appeal before High Court/s has been proposed/taken by the CCIT concerned, will not be referred to the panel of CCsIT.

(Letter [F.No.279/MISC 52/2014-(ITJ)], dated 17-6-2015)

Guidelines for engagements of standing counsels to represent income-tax department before High Courts and other judicial forums; revision of their schedule of fees and other related matters

The CBDT received representation from various quarters including the Standing Counsel requesting for provision of clerk age on drafting fees also. Accordingly, the CBDT amended the Para 5 of Annexure-II of Instruction No. 3/2012 dated 11-4-2012, being Schedule of Fees and Allowances and Terms of Payment, as follows:– "Clerk age at the rate of ten per cent of the appearance and drafting fee shall be payable to the Counsel, subject to a maximum of ` 4,375/-, in a case or a batch of cases."

(Insturction No. 5/2015 [F.No.279/Misc./M-75/2011-I] dated 23-6-2015)


CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A] HIGH COURT JUDGMENTS

1. Payment to a non-resident – Section 9(i)(vii) liaison and solicitation services not to be classified as fees for technical services even if it is called consultancy fees. In the absence of PF as well as any article dealing with FTS in India – UAE, DTAA payment not taxable in India.

Commissioner of Income-tax vs. Grup Ism P. Ltd. (Delhi High Court) – ITA No. 325 of 2014 – A.Y. 2004-05

Facts

i. The assessee was a consultant for project management of marble works wherein it was required to organise the procurement of marble from India and supervise the processing at Abu Dhabi. The assessee made payments aggregating to ` 94.31 lakhs to two UAE concerns, namely CGS International and Marble Arts & Crafts LLC without deducting any taxes at source on the said payments as it was in the nature of commission and the two UAE concerns neither had any business in India nor filed returns in India. The assessee relying on the stipulation contained in Article 14 (Independent Personal Services) of the Double Tax Avoidance Agreement between India and UAE, did not deduct tax on the said payment as the same was not taxable in India.

ii. The Assessing Officer ('AO') disallowed the aforesaid payments under section 40(a)(i) of the Income-tax Act, 1961 ('the Act'). The AO had classified the said payments made to the UAE concerns as consultancy charges since the assessee had debited the payment under the head "Consultancy charges" and the accounts of the UAE concerns revealed that the said payment was made on account of consultancy charges and also that CGS International had confirmed that it had received "consultancy charges". The AO also rejected the contention of the assessee with regards to the applicability of Article 14 of the DTAA on the ground that the UAE concerns being companies did not fall under the definition of "person" to whom the DTAA were applicable.

iii. Before the Commissioner of Income Tax (Appeals) ['CIT(A)'], the assessee contended that the said payments made were not consultancy fees. The assessee submitted that Marble Arts & Crafts LLC merely assisted in documentation, provided guidance about the procedural aspect of obtaining payments and provided liaison services with various

departments in relation to its work in the UAE and accordingly received 5 per cent of the amount received by the assessee from the Works Department in the UAE. On the other hand, CGS International was engaged in soliciting business for the assessee in various parts of the world other than India and was entitled to a fee of 15 per cent of the gross value of the contracts.

iv. Considering the facts of the case, the CIT(A) held that the payment made by the assessee to the UAE concerns would not fall under the provisions of Section 9(1)vii) of the Act. With regard to the applicability of Article 14 of the DTAA, the CIT(A) held that the AO was incorrect in denying the applicability of the Article merely on the premise that the UAE concerns being companies were not "person" to whom the DTAA was applicable. The CIT(A) further held that since the payments were to be taxed in the UAE no tax was to be deducted by the assessee.

Aggrieved by the order of the CIT(A) the revenue preferred an appeal before the Income Tax Appellate Tribunal which affirmed the order of the CIT(A), thereby dismissing the revenue's appeal pursuant to which the revenue filed an appeal before the Delhi High Court.

Judgment

i. With regard to the nature of services provided the High Court relied on the decisions in the case of *Director of Income-tax vs. Panalfa Autoelektrik Ltd (272 CTR 117)* and *GVK Industries Ltd. vs. ITO (371 ITR 453)* and held that consultancy services would mean something akin to advisory services and would not ordinarily involve transactions wherein the non-resident is acting as a link between the resident and another party or cases where the non-resident is directly soliciting business for the resident and generating income out of such solicitation. Further the High Court also observed the relevant extract of Panalfa Autoelektrik wherein the definition of "consultancy", "consultant" and "consult" were discussed which provided that the service of consultancy entails human intervention. It was further held that the mere fact that CGS International confirmed that it had received consultancy charges was not determinative of the actual nature of services provided and therefore ruled in favour of the assessee.

ii. In relation to the applicability of Article 14 of the DTAA, the High Court upheld the order of the CIT(A) and ITAT and stated that Article 14 would apply to the UAE concerns as they fall under the definition of "person" under Article 3(e) of the DTAA and consequently under the definition of "resident of a contracting state". As the DTAA did not contain an Article on the taxability of Technical services, the payment could only be considered under Article 14 (Independent Personal Services) or 22 (Other Income) of the DTAA wherein it is provided that consideration paid to a non-resident was to be taxed in other contracting State i.e. UAE. Accordingly no tax was to be deducted by the assessee.

2. Explanation to Section 9(2) inserted retrospectively does not overrule the exclusion carved out by section 9(1)(vii)(b) of the Act

Director of Income-tax vs. Lufthansa Cargo India (Delhi High Court) – ITA No. 95 of 2005 – A.Ys. 1998-99 to 2000-01

Facts

i. The assessee was engaged in the business of wet leasing of aircrafts to foreign companies i.e. leasing an aircraft along with the crew in flying condition to a charterer, wherein the lessor has the responsibility of maintaining the crew and aircraft and the lessee is free to direct the flight operations. During the year under review, the assessee

wet leased four aircrafts to Lufthansa Cargo AG Germany ('Lufthansa Germany'). The aircraft used by the assessee were not used by any other airline in India and therefore there were no overhaul repair facilities in India. As per the regulatory compulsions, the assessee was to maintain the aircraft in flying conditions to possess a valid airworthiness certificate and therefore entered into an overhaul agreement with Lufthansa Technick Germany ('Technick'), who carried out maintenance repairs without providing technical assistance by way of advisory or managerial services.

ii. The assessee did not deduct any tax on the payments made to Technick on the grounds that Technick carried out normal maintenance repairs and therefore had Technick been a domestic company the payments made to it would have been covered within the purview of section 194C of the Act and not within the ambit of fees for technical services contained in section 194J of the Act. The assessee stated that none of Technick's personnel were ever deputed to India and that it was unaware of the kind of repairs that were carried out by Technick, therefore emphasising that the components were sent to the authorised workshop for carrying out overhauling of components and not for seeking any technical or advisory services. Further, the assessee contended that the payment for repairs were incurred for earning income outside India and therefore would fall under the exclusionary clause of section 9(1)(vii)(b).

iii. The AO contended since the payment was in the nature of fees for technical services, tax should have been deducted on the said sum under section 195 of the Act and noted that the assessee had not deducted any taxes nor had it filed an application under section 195(2) of the Act. The AO also rejected the contention of the assessee with regards to the payment falling under Section 9(1)(vii)(b) of the Act.

iv. The CIT(A) upheld the AO's order and held that the payment made for overhaul repairs required knowledge of sophisticated technology along with trained engineers to carry out the overhaul repairs and accordingly classified the payment as fees for technical services, subject to tax in India.

v. On further appeal, the ITAT, considering the agreement between the assessee and Technick, held that the CIT(A) was erroneous in classifying the payment as fees for technical services merely because the agreement provided for all kinds of services even in case they were not availed by the assessee. It held that the amount received by Technick was a routine business receipt and not technical fee implying that Technick had not rendered any managerial, technical or consultancy service to the assessee. Further, based on the fact that virtually the entire income of the assessee had been earned from outside India, the ITAT held that the payments fall within the purview of the exclusionary clause of Section 9(1)(vii)(b) of the Act and thus even assuming that the payments for maintenance repairs constituted fees for technical services it would not be chargeable to tax in India.

vi. Aggrieved with the order of the ITAT, the revenue preferred an appeal before the High Court.

Judgment

i. With regard to the classification of the payment made by the assessee to Technick, the High Court overruled the order of the ITAT and held that the exclusive nature of the services provided by Technick falls under technical services as defined under section 9(1)(vii) of the Act. The High Court held that aircraft maintenance and repairs were not comparable with contracts such as cleaning and normal machinery repair and that the level of expertise and ability required was specific and the overhaul required servicing

from designated centres exclusively. In the view of the High Court, the exclusivity of the services implied that they were technical services under the Act.

ii. The High Court held that though the payment was to be considered as fees for technical services, it would not be taxable as the payment fell under the exclusionary part of Section 9(1)(vii)(b) of the Act as the assessee's source of income was outside India. It rejected the revenue's reliance on Explanation 2 to Section 9 which had retrospective effect, by stating that retrospective amendments cannot override the effect of the exclusion provided in Section 9(1)(vii)(b) of the Act. The explanation is clarificatory and nothing contained in its wordings overrode the exclusion of payments under section 9(1)(vii)(b) of the Act. Further, the High Court applied the source rule propounded by the Supreme Court in the case of GVK Industries and held that the purpose for incurring overhaul repair expenses was to earn income abroad and therefore the payment was not subject to deduction of taxes at source.

3. Where the rate of referral fees paid in respect of AE transactions was lower than that paid in respect of non-AE transactions, the AO was not justified in disallowing the referral fees in respect of AE transactions

CIT vs. Cushman and Wakefield India Pvt Ltd (Delhi High Court) – ITA No 475 of 2012 – AY 2006-07

Facts

i. The assessee was engaged in the business of rendering services related to acquisition, sale and lease of real estate to clients within and outside India. The assessee entered into international transactions with its associated enterprises, which were referred to the TPO for determination of arm's length price during the assessment proceedings. The assessee had paid a referral fees to its associated enterprise at a fixed percentage of revenue derived from its independent clients as well as reimbursed certain costs to its AEs. The TPO disallowed the reimbursements made by the assessee on the ground that there was no evidence of service provided but allowed the referral fees paid to the AEs.

ii. Based on the order of the TPO, the AO proceeded to disallow the reimbursement made by the assessee. However, the AO also disallowed the referral fees paid under section 37 of the Act on the ground that the assessee did not substantiate the benefit derived commensurate with the payment of referral fees. The DRP concurred with the view of the AO, pursuant to which the assessee preferred an appeal before the ITAT. The ITAT ruled in favour of the assessee and held that both, the reimbursement of costs as well as the referral fees was to be allowed as the assessee had furnished the necessary evidence. Further, in relation to the disallowance of referral fees made by the AO, the ITAT held the AO after having referred the matter to the TPO could not reopen or re-examine the transaction and therefore the disallowance was not warranted.

iii. Pursuant to the order of the ITAT, the revenue preferred an appeal before the High Court, wherein the Court remanded the matter relating to both i.e. the allowability of reimbursement of expenses as well as referral fees to the AO / TPO for a proper ALP assessment *vide* order dated May 23, 2014. Addressing the ruling of the ITAT on the issue of jurisdiction of the AO, the High Court held that the jurisdiction of the TPO under section 92CA of the Act and that of the AO under section 37 of the Act are distinct and that the AO can determine the allowability of expenditure under section 37 of the Act even after referring the matter to the TPO.

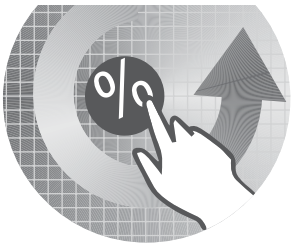
iv. Subsequent to the order dated May 23, 2014, the assessee filed a review petition before the High Court on the ground that the Revenue had given up the ground relating to referral fees and consequently the High Court had no occasion to hear the matter.

v. The Revenue contended that the concession could not be considered as binding as it concerned the interpretation of powers vested with the AO. Before the High Court, the Revenue contended that the AO examined the claim of expenditure on account of referral fee and was of the opinion that the said fee paid to the AEs could not be linked with income received from clients based in India. The assessee contended that all evidence was submitted to the AO, including the referral fee paid to non-AE entities vis-a-vis the corresponding revenue.

Judgment

i. The High Court, *vide* its revised order, observed that there was some merit in the observation of the ITAT with respect to the jurisdiction of the AO with respect to matters referred to the TPO but held that the issue was best left open given its wide ramifications and importance.

ii. The Court then proceeded to decide the issue on merits assuming the AO was entitled to the power to further examine matters referred to the TPO. In doing so, the Court referred to the chart of revenue and corresponding referral fees paid which was earlier considered by the ITAT and held that the AO had adopted a differential standard while considering non-AE transactions wherein the referral fees was 30.97 per cent of revenue as opposed to the AE driven transactions wherein the referral fees was lower at 27.65 per cent. Therefore, the Court upheld the findings of the ITAT and ruled in favour of the assessee.



CA. Janak Vaghani

INDIRECT TAXES
VAT Update

1. Trade Circulars

a) No. 8T of 2015, dated 16-6-2015
Non-acceptance of Correspondence and Letters

The Commissioner of Sales Tax has issued instructions to all officers and authorities by above circular to accept the correspondence and letters including application for cancellation of *ex parte* assessment order u/s. 23(11) marked and addressed to them and any deviation from the above will be dealt strictly and a serious view would be taken of any complaint regarding refusal to accept it. The trade is also instructed to bring to the notice of immediate higher authority any such refusal to accept any correspondence or letter or may be simultaneously brought to notice of the office of the Commissioner.

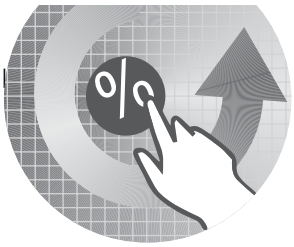
b) No. 9T of 2015, dated, dated 1-7-2015
E-payment facility for payment of Entry Tax under the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2002

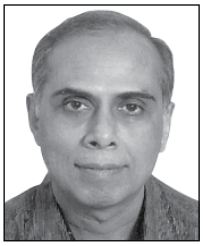
The Commissioner of Sales Tax has issued above circular for providing e-payment facility for payment of tax under The Maharashtra Tax on the Entry of Goods into Local Areas Act, 2002 from 1-7-2015 which is optional at present and soon will be made mandatory.

2. Website update

a) Uploading of scanned documents for online registration
The limit on size of uploading of scanned documents for obtaining new registration is increased from 100KB per page to 200KB per page.

b) Shifting of Office of Returns and Recovery Branch Mazgaon to Bandra
The office of Returns and Recovery Branch situated at Mazgaon, Mumbai is shifted to the Suburban Vikrikar Bhavan, Bandra Kurla Commplex, Bandra East, Mumbai – 400 051.





CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

Detailed manual Scrutiny of Service Tax Returns

The Government has issued detailed guidelines for manual scrutiny of service tax returns. The department carries out preliminary online scrutiny of all returns submitted in ACES and the returns having certain errors are marked for review and correction. The purpose of detailed manual scrutiny is to ensure the correctness of assessment made by the assessee, such as taxability of a service, valuation and effective rate of tax after taking into consideration admissibility of exemption, abatement, exports, ensuring correct availment and utilization of Cenvat credit. For this purpose the assessment related documents like agreements / contracts, invoices are required to be relied upon. It clarifies that detailed financial records should not be called for in a routine manner for detailed manual scrutiny.

A detailed scrutiny program typically supplement the audit program. The scope of audit is to inspect the financial records of an assessee for complete financial year in order to identify non compliance issues and to evaluate the assessee's internal control system.

Selection of returns for detailed scrutiny –

- Focus on the returns that are not being audited
- Total tax (cash & cenvat) paid should be below ` 50 lakhs for F.Y. 2014-15
- Each Commissionerate has to select equal number of assessee from each of total tax paid bands, i.e. 0–10 lakhs, 10-25 lakhs and 25–50 lakhs for F.Y. 2014-15. However the Chief Commissioner may direct detailed manual scrutiny of the return in respect of which total service tax of more than ` 50 lakhs is paid, in specific cases.
- The assessees who have been selected for audit or have been audited recently (in the past three years) should not be taken for detailed scrutiny.
- In no event an assessee be subjected to both audit and detailed manual scrutiny

A Returned Scrutiny Cell to be created in the Commissioner's headquarters. Chief Commissioner of service tax and central excise zone are required to nominate "Zonal Nodal Officer" which should be preferably at the end of the Additional / Joint Commissioner who necessarily should have official email Id. The list of returns should be taken up of detailed scrutiny would be finalized by the Additional / Joint Commissioner in-charge of the Division as per the risk score in conjunction with the total tax paid by the assessee, local risk parameters (including sensitive and evasion prone sectors), past compliance record of the assessee and manpower availability. The list

of assessee's selected will be sent to respective Divisions. It is clarified that all the officers should maintain strict confidentiality regarding the Risk Score data including the original score, further selection by the Commissionerate, etc. Under no circumstances it is to be shared with the assessee or any other authority since this is information available in a fiduciary relationship, pertaining to a third party, and which may entail further investigation.

Methodology

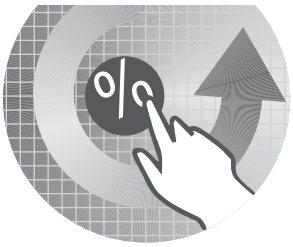
- Detailed scrutiny must be carried out by the Service Tax Range headed by a Superintendent and assisted by inspectors.
- The Divisional DC / Ac shall be responsible for overall supervision.
- Assessee must be given prior intimation of at least 15 days and the purpose must be spelt out in the intimation letter as per given format.
- The return may be obtained from ACES without reference to the assessee.
- Scrutiny must be done for complete financial year by looking at two half yearly returns in conjunction.
- Before scrutinizing, the information available in the Assessee Master should be carefully studied by the Divisional DC / AC and discussed with its officers, much like Desk Review in Audit.
- To begin with return for F.Y. 2013-14 should be taken up for detailed scrutiny.
- The validation exercise would require reconciliation for information furnished in ST – 3 returns with ITR form No. 4,5, 6 & 26AS and any third party information made available.
- A check list has been prepared ,for carrying out detailed manual scrutiny and the checks are categorized as reconciliation for validation of ST – 3 return; taxability; classification and CENVAT credit availment and utilization.
- In case of any additional details required, the same may be obtained from the assessee through requisition rather than through a visit, after approval of jurisdictional DC / AC.
- The scrutiny process of an assessee should be completed in a period within three months.

Documents and Findings

- To ensure transparency and Observation Sheets should be prepared as per the given format which bear one to one correlation with check list and the scrutiny officer must record his finding under each of the subject of check list and the officer should record any action which needs to be taken by the range.
- The findings should clearly outline the process of scrutiny that led to the outcome.
- If any issue has been referred to audit or anti-evasion, that should be noted in the relevant column of the observation sheet.
- In case where the scrutiny results in detection of payment of service tax and where it appears that proviso to S.73(1) is invocable, the ST – 3 return of the past period should also be verified and the result of such verification should be recorded.

The format Of Intimation Letter, Assessee Master Information, Check List, Observation Sheet for Documentation Scrutiny Findings, Scrutiny Report, Observation Sheet for Documenting Scrutiny Findings and Draft Scrutiny Report are issued in Ann. I, Ann. II, Ann. III, Ann. IV, Ann. V, Ann. VI & Ann. VIII respectively. The same are available on the website of ctconline.org.

(Circular No. 113/07/2009-ST dated 23-4-2009)



CA Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Clearing & Forwarding Agent Service

1.1 Coal Handlers Pvt. Ltd. vs. CCE, Range, Kolkata-I 2015 (38) STR 897 (SC)

The appellant in this case engaged in following up allotment of coal rakes by Railways, expediting/ supervising loading and labelling of rail wagons, drawing samples of coal loaded on wagons, complying with formalities relating to payments for freight to Railways and dispatching rail receipts to principal. The Supreme Court held that, services provided by the appellant did not qualify as C&F Agent services as the said service covers activities pertaining to clearing of goods and thereafter forwarding those goods to particular destination, at instance and on directions of principal.

Storage & Warehousing Service

1.2 CC&CE, Bhopal vs. State of MP 2015 (38) STR 954 (MP)

The department in this case sought to demand service tax on supervisory staff appointed by the appellant (State Government) for storage of foreign liquor by contractor in warehouse. The High Court held that, supervisory staff did not provide any service on behalf of Government to contractor or person storing liquor in warehouse and they only kept watch on material stored in warehouse and ensured that manufacturing, exporting, importing or storing the material in warehouse carried out strictly in accordance with applicable laws.

Rent-a-cab Service

1.3 Bangalore Metropolitan Transport Corpn. vs. CST, Bengaluru 2015 (38) STR 976 (Tri.-Bang.)

The Tribunal in this case held that appellant a transport corporation cannot be considered as person engaged in renting of cab service as the activity undertaken by them is to provide bus facility/ transport facility to citizens of city and main activity is running the buses in the city for convenience of citizens and not a Rent-a-cab service operation.

Business Auxiliary Service

1.4 CCE, Nagpur vs. Jain Kalar Samaj 2015 (38) STR 995 (Tri.-Mumbai)

The assessee rendering mandap keeper Services received donation of decoration tender from decorator. The department sought to tax them under BAS as commission received. The Tribunal held that, assessee providing mandap keeper services and decorator providing services of decoration to clients independently and assessee is not acting on behalf of decorator to provide service to his clients, nor acting on behalf of clients to provide service to decorator and therefore activity cannot be termed as commission agent service.

1.5 Shriram Oos Tod Majoor Seva Sangh vs. CCEC&ST, Aurangabad, 2015 (38) STR 1052 (Tri.-Mumbai)

The appellant in this case entered into agreements with sugar factory, wherein sugar factory to provide all equipment, tractors, trucks, bullock carts and cutting labourers and appellant was responsible to cut sugarcane and deliver to the factory gate. The sugar factory was also responsible for payment of wages to sugarcane cutting labourers and drivers. The appellant has paid service tax under BAS on consideration received for supervisor charges. The

department sought to tax them under Manpower supply service. The Tribunal held that, appellant has not supplied any labour to sugar factory but only facilitated between farmers and sugar factory and activity undertaken by them is one of procuring or processing of goods belonging to client liable to tax under BAS.

1.6 CST, Mumbai-II vs. Bayer Material Science P. Ltd. 2015 (38) STR 1206 (Tri.-Mumbai)

The Tribunal held that the appellant provided marketing services of products of principal located outside India is covered under BAS and qualifies as export of service.

Authorised Service Station Service

1.7 Safeways Motors vs. CCE, Nagpur 2015 (38) STR 1005 (Tri.-Mumbai)

The Tribunal in this case held that, appellant has paid VAT for defective auto parts replaced and raised services invoices for auto parts sold/used and for service charges for service tax paid hence, value of parts sold/used not includible in value of taxable service. Further, auto repair services by authorised service station for cars other than that of company are not liable to service tax under this category of service.

1.8 Automotive Manufactures P. Ltd. vs. CCE&C, Nagpur 2015 (38) STR 1191 (Tri.-Mumbai)

The department in this case sought to levy tax on handling charges collected as part of value of goods in composite activity of sale and service. The Tribunal observed that, such charges collected whenever parts are sold either independently or part of service and repair of automobiles and VAT/Sales tax has been paid on value inclusive of such charges. Therefore, the said amounts form part of value of goods sold and therefore not liable to service tax.

Commercial or Industrial Construction Service

1.9 Kala Sagar vs. CST, Mumbai-II 2015 (38) STR 1017 (Tri.-Mumbai)

The Tribunal in this case held that completion and finishing services, repair, alternation or renovation and restoration or similar services provided whether in respect of a new building or an old building including each and every storey/floor of multi storied building would attract service tax as the expression 'in relation to' is wide enough to cover the activity undertaken in respect of part of building also.

Management Consultancy Service

1.10 Enpro Oil (P) Ltd. vs. CCE, Noida 2015 (38) STR 1038 (Tri.-Del.)

The appellant in this case engaged in providing advice related to conceptualising, devising, development, modification, rectification, or up-gradation of working system of companies and also in relation to commercial aspect, current development, import and export policy of India, potential problems and solutions, marketing strategies, alerting clients about potential misuse of their IPRs, economic and political scenario etc. The appellant contended that they are liable under BSS. The Tribunal held that, the services provided qualifies for status of Management Consultant and BSS cover essentially executory services in nature.

Renting of Immovable Property Service

1.11 Greater Noida Indl. Development Authority vs. CCE&ST, Noida 2015 (38) STR 1062 (Tri.-Del.)

The Tribunal in this case held as under;

- Vacant land leased or rented out for construction of building or a temporary structure later to be used for furtherance of business or commerce is liable to service tax w.e.f. 1-7-2010.
- The term 'lease' covers the lease for any period including lease in perpetuity.
- One time premium is price paid for obtaining lease of an immovable property, while rent is payment made for use and occupation of immovable property leased. One time premium or salami paid for transfer of interest in property from lessor to lessee is not liable under Renting of Immovable Property Service.
- Processing charges for application for land allotment on lease basis for business or commerce is liable under Renting of Immovable Property Service.
- Services like processing and approval of building plan, map revision, malba charges connected with building or structures on allotted land and restoration charges or penalty for violation of allotment conditions are not liable to service tax.
- Services provided from date on which the same become taxable would attract service tax irrespective of facts that at that time of

entering into an agreement for provision of service, the same was not taxable. Rent received w.e.f. 1-7-2010 taxable even if leases given during period prior to 1-7-2010.

Storage & Warehousing Service

1.12 Gujarat State Fertilizers & Chem. Ltd. vs. CCEC&ST (A) Vadodara-I 2015 (38) STR 1165 (Tri.-Ahmd.)

The appellant in this case received incineration charges for usage of storage tank to store chemicals received from other factories and contended that they have received amount for sharing common expenses and therefore not liable to service tax. The Tribunal held that, the same is liable to service tax under Storage & Warehousing Services.

Works Contract Service

1.13 ABL Infrastructure Pvt. Ltd. vs. CCE, Nashik 2015 (38) STR 1185 (Tri.-Mumbai)

The appellant in this case terminated the contract of construction of city mall under CIC service and entered subsequently into a works contract and started payment of service tax under WCS introduced from 1-6-2007. The Tribunal observed that, number of documents established whole sequence of events taking place in natural way and difference between old and new contracts entered into has been placed by the assessee. The ledger abstract clearly indicated differentiated payments under old and new contracts. Therefore it is held that, old contract terminated on 31-5-2007 and fresh contract executed on 5-6-2007 to be considered as new contract to be classified under WCS. It is further held that, fact of service tax payment at composition rate in returns filed enough indication to show assessee opted for payment under WC composition scheme.

Erection, Commissioning and Installation Service

1.14 Kirloskar Pneumatic Co. Ltd. vs. CCE, Pune-III 2015 (38) STR 1198 (Tri.-Mumbai)

The appellant in this case provided ECI service and claimed reimbursement of travelling expenses on actuals and produced sample invoices to that effect. The Tribunal held that, the issue is covered by decision in *Reliance Industries Ltd. 2008 (12) STR 345 (Tri-Ahmd.)* and held that appropriate service tax liability has been discharged on services, charges billed for rendering ECI service.

2. Interest/Penalties/Others

2.1 Akbar Travels of India (P) Ltd. vs. CCEC & ST, Thiruvananthapuram 2015 (38) STR 957 (Ker.)

The High Court in this case held that, once assessee proves reasonable cause for failure to pay service tax, section 80 of FA, 1994 starts to operate insulating imposition of penalties under sections 76, 77 or 78 and hence, CESTAT order limiting its benefit to section 78 only and not extending to section 76 is liable to be set aside.

2.2 Chandrakant G. Dhere vs. CCE, Pune-III 2015 (38) STR 1008 (Tri.-Mumbai)

The appellant in this case claimed refund of security deposit wrongly collected by builder from flat buyers towards contingent liability of service tax on the basis of circular issued by Dept. The Tribunal held that rejection of refund claim merely on the basis of non-submission of NOC from builder, is bad in law having no legal basis. It is further held that, interest is admissible from date of collection of impugned amount from builder by Revenue till date of actual disbursement of refund at rate notified as per law.

2.3 Deepak & Co. vs. CCE, New Delhi 2015 (38) STR 1010 (Tri.-Del.)

The Commissioner (Appeals) in this case confirmed demand under BAS, whereas the SCN was issued for demand of service tax under BSS. The Tribunal after relying on Apex Court judgment in *Ballarpur Industries Ltd. 2007 (215) ELT 489 (SC)* and *Brindavan Beverages Ltd. 2007 (213) ELT 487 (SC)* held that Order in Appeal travelled beyond scope of SCN therefore, unsustainable and liable to be set aside.

2.4 Ram Singh Kanda & Sons vs. CCE, Ludhiana 2015 (38) STR 1047 (Tri.-Del.)

The Tribunal in this case held that, simultaneous penalties under sections 76 and 78 cannot be imposed. It is further held that, some credence could be given to appellants contention that they have no intention to indulge in suppression/wilful misstatement to evade service tax if the magnitude of service rendered was modest. It is also held that bona fide belief cannot be claimed without demonstrating that appellant took reasonable steps to ascertain taxability of such services they provided.

2.5 Alar Infrastructures Pvt. Ltd. vs. CCE, Delhi-I 2015 (38) STR 1087 (Tri.-Del.)

The Tribunal in this case held that, once the service tax has been collected by the department from appellant by treating their services as BAS at the time of considering the claim for rebate of service tax so paid then they cannot question the classification of service. Denial of refund on the ground that in absence of service agreements, the nature and classification is not ascertainable is not sustainable. It is further held that, a transaction of export of service is to be treated as complete only when the service has been provided and payment for the same has been received in convertible foreign exchange.

2.6 Piramal Healthcare Ltd. vs. CCE&ST, Indore 2015 (38) STR 1162 (Tri.-Del.)

The appellant in this case paid service tax and interest under RCM and not contested the same. The department sought to impose penalties. The Tribunal held that, service tax paid available as CENVAT credit and assessee also suffered interest, therefore it is situation of revenue neutrality and hence no penalty under section 76 to be imposed. Further, it is held that, penalty cannot be imposed under section 77 for non-filing of ST-3 returns.

2.7 Netambit Infosource & E-Services Pvt. Ltd. vs. CCCE&ST, Noida 2015 (38) STR 1177 (Tri.-Del.)

The Tribunal in this case held that, CESTAT cannot entertain any appeal filed on or after 6-8-2014 without mandatory pre-deposit as per provisions of section 35F as amended w.e.f. 6-8-2014.

2.8 General Manager, Telecom, BSNL vs. CCE, Raipur 2015 (38) STR 1182 (Tri.-Del.)

In this case, the Commissioner (Appeals) disallowed adjustment of excess service tax paid towards service tax liability arising in subsequent months for failure to follow proper procedure. The Tribunal held that, substantial benefit cannot be denied merely because some aspects of procedure, being not followed. Further, the Adjudicating Authority refrained from imposing any penalty observing assessee acted in *bona fide* manner and *mala fide* cannot be attributed hence, the OIO demanding tax to be set aside.

Also refer to decision in *Jubilant Organosys Ltd. vs. CCE, Meerut-II 2015 (38) STR 1230 (Tri-Del.)*

3. CENVAT Credit

3.1 Bank of India vs. CCE &ST, Indore 2015 (38) STR 982 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on Rent-a-cab service, security service utilised for providing currency chest services under BFS.

3.2 Reliance Infratel Ltd. vs. CST, Mumbai-II 2015 (38) STR 984 (Tri.-Mumbai)

The appellant in this case engaged in providing passive telecom infrastructure by way of telecom towers to various cellular telecom operators and discharged service tax liability under BSS. The have claimed CENVAT credit of duty paid on steel structural viz. brackets, mounting pole, clamps, cables,pre-fabricated buildings etc. used in erection of telecom towers. The department denied the credit on the ground that, said goods are not covered under the definition of capital goods. The Tribunal held that, there is nexus between the goods purchased and service provided and appellant claiming the credit as inputs and there is no restriction on coverage of inputs except for oil and petrol, hence the appellant is entitled to claim the credit.

3.3 Adobe Systems India Pvt. Ltd. vs. CCE&ST, Noida 2015 (38) STR 998 (Tri.-Del.)

The Tribunal in this case held that appellant is exporter of service and all services availed in activity of export of service and therefore entitled to claim refund of CENVAT credit lying unutilised in accounts.

3.4 Dhampur Sugar Mills Ltd. vs. CCE, Meerut-II 2015 (38) STR 1004 (Tri.-Del.)

The Tribunal in this case allowed Cenvat credit of service tax paid on rent, insurance for sugar stacked at Ludhiana and commission paid for sale of sugar after clearance from factory as integral part of manufacturing and sale activity.

3.5 Deloitte Haskins & Sells vs. CCE, Thane-I 2015 (38) STR 1220 (Tri.-Mumbai)

The Department in this case sought to deny CENVAT credit on technical ground that, invoices addressed to Financial Accounting Office but credit thereof availed in another office. The Tribunal observed that, use of input service in providing output is not disputed. Relying on decisions in *DNH Spinners 2009 (16) STR 418 (T)* and *Modern Petrofils 2010 (20) STR 627*, it is held that, substantive benefit not deniable on procedural grounds.

Janak C. Pandya, Company Secretary

CORPORATE LAWS
Company Law Update

[2015] 190 Comp Cas 44 (Bom.)
[In the Bombay High Court]
Jayanand Jayant Salgaonkar vs. Jayshree Jayant Salgaonkar and Others (and connected person).

A nominee under section 109A of the Companies Act, 1956 read with Bye-Laws under the Depository Act is in fiduciary capacity and none other. They do not displace the law of succession, nor do they open a third line of succession.

Brief facts

This application was filed on question of law. In the said application, the applicant has urged that the judgment of single judge in the case of *Harsha Nitin Kokate vs. Saraswat Co-operative Bank Ltd. [2010] 159 Comp Cas 221 (Bom); [2010] 112 Bom. LR 2014* was per incuriam and not good in law.

The question of law was, whether nomination made for mutual fund investments under regulation 29A of the SEBI (Mutual Fund) Regulations, 1996, for fixed deposit in bank under section 45ZA of the Banking Regulation Act, 1949 and for shares in the company under section 109A of the Companies Act, 1956 and Bye-Law 9-11 under the Depositories Act, 1996 shall prevail upon the Will.

This is related to estate of one Mr. Jayant Shivram Salgaonkar. The Notice of Motion seeks reliefs in respect of his estate wherein for various investments mentioned in the list shows the name of "nominee" in respect of each of such investments. The two defendants have specifically urged that these investments are not part of estate. In their defence, they have invoked regulation 29A of the SEBI (Mutual Fund) Regulations, 1996 and section 45ZA of the Banking Regulation Act, 1949 in case of fixed deposits with banks.

In similar case of *Nanak Ghatalia vs. Swati Ghatalia*, the probate is sought for Will of one Mrs. Urmila S. Ghatalia. In this case also, only contentious issue related to investments details as mentioned in the said Will. It was submitted by one of the sons that he being a nominee in respect of those investments, he was alone entitled to the property notwithstanding anything in the Will. The daughter has opposed to the same.

In case of Harsha's case (supra) the single judge court has considered the provisions of section 109A of the Companies Act, 1956 and Bye-Law 9-11 under the Depositories Act, 1996. The court has ruled that once the nomination is made, the securities in question….. "automatically get transferred in the name of the nominee upon the death of the holder of shares." Further, such nomination carries effect notwithstanding anything contrary in a testamentary disposition or nominations made under any other law dealing with the securities.

Both the parties have cited various judgments and other interpretations in support of their respective submission. Some of them are as follows.

1. Supreme Court decision in *Sarbati Devi vs. Usha Devi [1984] 55 Comp Case 214 (SC); [1984] 1 SCC 424*; *AIR 1984 SC 346* related to decision under section 39 of the Insurance Act was considered, which require a nomination merely for the payment of the amount under the Life Insurance without confirming the ownership rights in nominee.

2. Section 30 of the Maharashtra Co-operative Societies Act, 1960 which allows the society to transfer the shares of the member which will be valid against any demand made against the society.

3. The bye-laws 9-11 of Depositories Act clearly provided that nomination is "for the purpose of dealing with the securities lying to the credit of the deceased nominating person(s) in any manner."

4. The purpose of the provision of section 109A related to nomination under the Companies Act, 1956 is to consolidate the law relating to companies. It is not intended or directed to settle laws of succession or transfer of property. It only ring-fences the liability of companies vis-à-vis the holders of securities. It does not absolve the nominees of those securities from their fiduciary responsibilities to the heirs or legates of the original security holder.

5. The Supreme Court Judgments in *Utkal Contrcators and Joinery P. Ltd. vs. State of Orissa [1987] 3 SCC 279* reiterates the well-settled principles governing the interpretation of statutes as follows:

a. "A statue is best understood if we know the reason for it."

b. "The reason for statute is the safest guide to its interpretation."

c. "The words of a statute take their colour from the reason for it."

d. There are external and internal aids such as statement of objects and reasons when the bill is presented. The reports of committees etc.

e. "Every provision or word must be looked at generally before any provision or word is attempted to be construed."

6. The meaning of word "Nominee" as per Black's Law Dictionary, 8th edition *inter alia* states that ".. a party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.". Thus, it makes clear that nominee is in fiduciary capacity and none other.

7. The interpretation of word "vest" as per Mid-Century Dictionary and in Black's Law Dictionary, 5th editions which gives the meaning as …" to settle, secure, or put in fixed right of possession. Fixed right of present and future enjoyment; to accrue to; to clothe with possession etc."

8. The decision in the case of *Vatticherukuru Village Panchayat vs. Nori Venkatarama Deekshithulu [1991] Supp (2) SCC 228* and in *Fruit and Vegetable Merchants Union vs. Delhi Improvement Trust*, *AIR 1957 SC 344* as to meaning of word "vest".

Judgments and reasoning

The Court accepted that judgment in case of *Harsha Nitin Kokate vs. Saraswat Co- Operative Bank Ltd.* is per incuriam and not good in law. The court has noted that the nomination only provides the company or depository a quittance. The nominee continues to hold the securities in a trust and as a fiduciary for the claimants under succession law. "The nomination under the Companies Act and Depositories Act cannot and do not displace the law of succession, nor do they open a third line of succession." The court referred the Supreme Court Judgments in *Vishin N. Khanchandani vs. Vidya Luchmandas Khanchandani [2000] 102 Comp Case 340 (SC); [2000] 6 SCC 724*, *Shipra Sengupta vs. Mridul Sengupta [2009] 10 SCC 680* and Bombay High Court in *Nozer Gustad Commissariat vs. Central Bank of India [1993] 1 Mah. LJ228* and such other cases. The court also observed that in Harsha's case, court could not have taken a view contrary to those decisions. The court also clarifies that this Judgment is only on question of law and notice of motion in Salgaonkar or application of the same in Ghatalia case will be considerd on their merits.

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

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

1. Subscription to chit funds by Non-Resident Indian on non-repatriation basis

Erstwhile provisions of Notification No. FEMA 1/2000-RB dated 3rd May 2000, prohibited a person resident outside India from making investment in India, in any form, in a company or partnership firm or proprietary concern or any entity, whether incorporated or not, which was engaged or proposes to engage "in the business of chit fund".

Upon review of the guidelines for subscription to the chit funds by RBI in consultation with the Government of India, it has been decided to permit Non-Resident Indians (NRIs) to subscribe to the chit funds, without any limit, on non-repatriation basis subject to the following conditions:

i) The Registrar of Chits or an officer authorised by the State Government in accordance with the provisions of the Chit Fund Act in consultation with the State Government concerned, can permit any chit fund to accept subscription from Non-Resident Indians on non-repatriation basis;

ii) The subscription to the Chit Funds has to be brought in through normal banking channel, including through an account maintained with a bank in India.

(A.P. (DIR Series) Circular No. 107 dated 11th June, 2015)/ (Notification No. FEMA.337/2015-RB dated March 2, 2015 and Notification No. FEMA.338/2015-RB dated March 2, 2015)

2. External Commercial Borrowings (ECB) for low cost affordable housing projects

As per A.P. (DIR Series) Circular No. 113 dated June 24, 2013, eligible borrowers for low cost affordable housing projects were allowed to raise External Commercial Borrowings (ECB) under the approval route for financial years 2013-14 and 2014-15 with a ceiling of USD 1 billion in each of the two years, subject to review thereafter.

Upon review, RBI has decided to continue the scheme of raising ECB for low cost affordable housing projects for the financial year 2015-16 with the same terms and conditions as mentioned in the above A.P. (DIR Series) Circular.

(A.P. (DIR Series) Circular No. 108 dated 11th June, 2015)

(Comments: The extension of time period is in sync with the present Government's ambitious project of building houses for all citizens by 2022 via PPP model.)

3. External Commercial Borrowings (ECB) for Civil Aviation Sector

As per the provisions of A.P. (DIR Series) Circular No. 113 dated April 24, 2012 airline companies were allowed to raise External Commercial Borrowings (ECB) for working capital as a permissible end-use, under the approval route, subject to the conditions stipulated in the said Circular.

The scheme was extended in A.P. (DIR Series) Circular No.116 dated June 25, 2013 and A.P. (DIR Series) Circular No. 113 dated March 26, 2014.

On a review, RBI has decided that to continue the scheme till March 31, 2016 with the same terms and conditions.

(A.P. (DIR Series) Circular No. 109 dated 11th June, 2015)

(Comments: The extension of deadline would provide yet another opportunity to the cash-crunched Civil Aviation sector for raising funds through ECB route. As per the ECB regulations, the overall ECB ceiling for the entire civil aviation sector would be $1 billion and the maximum permissible ECB that can be availed by an individual airline company would be $ 300 million.)

4. New Master Circulars issued by RBI

RBI has issued various Master Circulars on 1st July 2015 updating and consolidating various provisions under FEMA pertaining to following areas:

- Foreign Investment in India
- Miscellaneous Remittances from India – Facilities for Residents
- Remittance Facilities for Non-Resident Indians / Persons of Indian Origin / Foreign Nationals
- Export of Goods and Services
- Import of Goods and Services
- Acquisition and Transfer of Immovable Property in India by NRIs/PIOs/Foreign Nationals of Non-Indian Origin
- Non-Resident Ordinary Rupee (NRO) Account
- Compounding of Contraventions under FEMA, 1999
- Establishment of Liaison / Branch / Project Offices in India by Foreign Entities
- Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad
- External Commercial Borrowings and Trade Credits
- Money Transfer Service Scheme
- Memorandum of Instructions governing money changing activities
- Memorandum of Instructions for Opening and Maintenance of Rupee/Foreign Currency Vostro Accounts of Non-resident Exchange Houses

(Source: RBI website: www.rbi.org.in)


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Right of party to be represented through Power of Attorney: Recording of evidence – Utilisation of video conferencing technology – Family Court Act sec. 10(3)

A Petition was filed praying for issue of direction to respondents 1 and 2 to frame concrete viable rules for appearance of parties through their Power of Attorneys and representation through video conferencing before the Family Courts in Tamil Nadu. There were two issues raised in this Public Interest Litigation *qua* the proceedings under the Family Court Act, 1984:

A. The right of a party to be represented through a Power of Attorney; and

B. Utilising of Video Conferencing Technology, especially where parties are residing abroad and where there is mutual consent for divorce.

The Hon'ble Court observed that the first aspect is no more *res integra*, in view of number of judicial pronouncements including *Nathiya Faru vs. Rojan Roux*, *((2009) 6 MLJ 945)* and *Terance Alex vs. Mary Sowmya Rose*, *(2011-2-LW-84)*. The permission declined by the Family Court to be represented through Power of Attorney was assailed before the High Court and it was observed that there is no legal impediment to grant permission for the party to be represented by a Power of Attorney, especially where parties are residents abroad and having children to look after. Of course, if the Court feels the necessity of counselling in settlement, it can be asked to appear at that stage.

A Division Bench of this Court in *C.T.C. 177*, has held that the Power of Attorney can appear, plead and act on behalf of the party, but cannot become witness on behalf of the party in the capacity of a principal. The Power of Attorney, as agent, would not be able to depose on his personal knowledge, nor can he be cross-examined on those facts which are exclusively to the personal knowledge of the principal and thus, in family matters especially it is not possible for the spouse to engage a Power of Attorney Agent to act on his behalf to give evidence, of which she or he alone has personal knowledge. Thus, though there is no legal impediment under the said Act for a Power of Attorney to appear on behalf of the principal, in case of a petition for divorce by mutual consent, it cannot be presented through a Power of Attorney of a party, but the party should make personal appearance before the Court as and when so stipulated or directed by the Family Court. This is so since the parties have to satisfy the Court that as on the date of presentation of the case, they had not been living together as husband

and wife for more than one year, that they have not been able to live together and that they have mutually agreed for dissolution.

Qua the second issue, the court observed that the facility of recording evidence through Video Conferencing is available to the Courts. In fact, the petitioner herself has annexed certain office memorandums whereby the Registrar General has granted permission to the Family Court to record evidence through Video Conferencing. That appears to have occurred because the specific Court sought permission from the Registrar General.

On verification from the Registrar General, it was informed that there is no circular issued for any prior permission to be obtained from the High Court through Registrar General to record evidence through Video Conferencing by the Family Court. Thus, a discretion is vested with the Family Court itself to record evidence through the process of Video Conferencing. Not only that, under Section 10(3) of the said Act, the Family Court is empowered to lay down its own procedure to arrive at a settlement or to get the truth of the matter.

Sudha Ramalingam vs. Registrar General High Court of Judicature at Madras and Anr. AIR 2015 (NOC) 266 (Mad.)

2. Publication of photograph of defaulter in newspaper – Court order restraining the bank from publishing held proper: Contract Act, sec. 37 and SARFAESI Act 2002 sec. 13

The plaintiff/respondent had availed agricultural loan from the appellants. The loan amount was ` 30 lakh. Thereafter, the plaintiff/ respondent had received a notice from the appellants wherein it was stated that there is an irregularity of ` 2,813.026.00. He was therefore informed to pay the irregular amount and in the event of his inability to regularise the loan, action would be initiated by means of –

1) Publication of his photo in all leading newspapers.
2) SARFAESI Notice will be served for possession of landed properties.
3) Money suit will be filed against him and the guarantor to recover the remaining outstanding.

The present respondent/plaintiff had filed a suit before the learned Civil Judge against the respondent/present appellant for declaration that the appellants/defendant have no right to publish the photograph of the plaintiff/ respondent in all leading newspapers. The ld. Trial court, after taking evidence and hearing the parties had passed the judgment and order dated 21-8-2012 restraining the appellants from publishing the photograph of the plaintiff along with his name in any manner in connection with default of repayment of loan by the plaintiff even if they are to publish the name of the plaintiff for default of repayment of his loan.

The court observed that by publishing the photograph of the borrower/respondent, the same would expose the borrower to irreparable loss and injury more particularly when the publication of the photograph cannot be resorted to in the absence of any express condition under the terms while the loan was given to the borrower. In any case, apart from publishing the name of the borrower, the appellants have other means of securing the assets that has been mortgaged under the SARFAESI Act.

State Bank of India vs. Lalsangbera & Anr. AIR 2015 Guwahati 67

3. Hindu Law – Joint Family Property – Severance – Coparcener can sell his share in immovable property upon coparcener defining their respective shares in the joint family property

The property in dispute belonged to the Garga family. Woodland Investment Private Limited

claims that it purchased undivided shares in respect of such property. Woodland, claims that by an agreement dated September 13, 1973, Shakti and Shankar agreed to sell their undivided 1/4th share in premises to Woodland on various terms and conditions. Woodland claims to have paid Shakti and Shankar a sum of ` 2,500/- by way of earnest money and part consideration on September 13, 1973. According to Shakti and Shankar, Late Deba Prasad Garga, Bhupal Prasad and Hara Prasad Garga along with Shakti and Shankar formed and constituted a Hindu Undivided Family governed by the Mitakshara School of Hindu Law.

The contesting parties in the suits agreed that, the Gargas are governed by the Mitakshara School of Hindu Law. Woodland claims that, the status of the Hindu Undivided Family of the Garga was severed in 1938 and given further effect to in 1955, that is much prior to 1973.

The Hon'ble Court observed that the Gargas are to be presumed to be a joint family until approved otherwise. The onus is, therefore, on Woodland to prove separation. The question required to be answered is whether as on the date of the alleged agreement dated June 11, 1973 was the Garga family a joint Hindu family governed by the School of Mitakshara Hindu Law or not.

That the Gargas are governed by the Mitakshara Hindu Law is an admitted position. Therefore, the status of the joint family of the Gargas remains for consideration.

Shakti and Shankar contend that, the joint family status was never severed. Woodland contends that, there was a division of the immovable properties belonging to the Gargas and that there was a severance in the joint family status of the Gargas. Law requires the jointness of Hindu family governed by the Mitakshara School of Hindu Law to be presumed. However, such presumption is rebuttable. Therefore, it is for Woodland to rebut such presumption.

In support of the contention that, Garga family severed its status as a joint family reliance is placed on various exhibits.

Exhibit 'C' is an agreement in Bengali vernacular between Deba, Shakti, Bhawani, Bhupal and Shakti representing Shankar the minor. By this agreement the respective parties defined their shares in the immovable properties. The Calcutta property in question is mentioned in this agreement.

Exhibit 'D' is a deed of partition dated April 8, 1955. Exhibit 'D' is in Bengali vernacular with the English translation thereof provided.

Exhibit 'E' is an agreement entered into between Deba, Shakti, Bhawani, Bhupal. Shakti representing Shankar the minor. The agreement states that the five parties thereto have defined their individual shares in the immovable properties belonging to the family. It also provides that every co-sharer will allow the properties to be managed jointly by a manager to be appointed by them. In Exhibit 'D' the premises in question is mentioned.

Exhibits 'C' and 'D' taken together, therefore, shows that the coparceners of the joint Hindu family severed the status of a joint family by defining their respective shares in the immovable properties on April 8, 1955. All the coparceners of the Garga family entered into the agreement dated April 8, 1955 being Exhibit 'C' by which their individual shares in the immovable properties were defined. When the coparceners defined their shares it cannot be said that, the family continued to remain as a joint Hindu family thereafter. Exhibit 'D' shows that the coparceners agreed to keep the immovable properties under one management.

Exhibits 'WW' and 'DD' are writ petitions filed before this Court. Exhibit 'WW' is a writ petition filed by Bhupal. Exhibit 'DD' is a writ petition filed by Shakti and Shankar. In the affidavit in reply filed on behalf of Shakti and Shankar in the writ petition Bhupal by an affidavit stated that in

terms of the agreement dated October 17, 1938 being Exhibit 'B' the coparcener of the Garga family executed an agreement for partition on April 12, 1955 being Exhibit 'D' where the coparceners defined the 1/4th shares of every coparcener in the immovable properties on April 8, 1955 being Exhibit 'C'.

Therefore, on reading Exhibits the conclusion is that, the Garga family separated in status on April 8, 1955. Shakti and Shankar cannot be allowed to take a stand contrary to the stand taken by them in their writ petition.

Severance of status of a coparcener can happen orally or by a document. If it happens by way of a document, it does not require registration so long as such document does not purport to divide an immovable property held jointly on that day, by metes and bounds. In the event, the immovable properties held jointly are sought to be divided by metes and bounds, and the value of such immovable properties are in excess of the prescribed limit of Section 17 of the Registration Act, 1908, such document will require registration to be looked into as evidence of title. In absence of registration of such document, the same cannot be looked into for the purpose of establishing partition of the joint immovable properties by metes and bounds.

In view, of the above the Hon'ble Court held that the fact that the Garga family separated in status is established. Once the Garga family separated themselves in status each coparcener became owner of a definite share in the joint family property. There is no bar for such coparcener to deal with his definite share of an immovable property including selling such definite share to any person in view of the ratio of *Hardeo Rai vs. Sakuntala Devi 2008 (7) SCC page 46.*

Woodland Manufacturers Ltd. vs. Shankar Prasad Garga AIR 2015 (NOC) 590 (CAL)

4. Will by Hindu – Property in dispute situated in State of Uttar Pradesh – No Probate is required to be obtained by Hindu in respect of Will made in respect to immovable property situated in Uttar Pardesh : Section 57 read with section 213 of the Indian Succession Act

The plaintiffs filed a suit for partition and claimed shares in the property in dispute on the basis of the Will executed in their favour. One set of the defendant filed another Will claiming shares on the basis of the said Will. Another 2nd set of the defendants filed third Will claiming their share on the basis of the Will allegedly executed in their favour. The defendants moved an application under Order VII, Rule 11, C.P.C. for the return of the plaint on the ground that the claim on the basis of the Will cannot be adjudicated unless the Will is approved by the Competent Court by issuing the probate under section 213 of the Indian Succession Act and, therefore, the plaint is liable to be returned. It was submitted that unless under section 213 of the Act, the probate is sought in respect of the Will, no claim can be made against the Will and, therefore, the claim of partition on the basis of the Will is not sustainable and the plaint is liable to be returned.

The Hon'ble Court held that a probate will not be required to be obtained by a Hindu in respect of a Will made regarding the immovable properties situated in Uttar Pradesh. The same view taken by the Court in the case of *Naubat Ram vs. Gayatri Devi 1968 ALJ 69*. Here in the present case, the parties are Hindu and the property situate in the State of Uttar Pradesh, as such, section 57 read with section 213 of the Indian Succession Act is not at all applicable in the present case.

Sunil Kumar vs. Chaitanya Prakash AIR 2015 (NOC) 674 (ALL).

5. Partnership Firm – Conduct of business – Execution of power of Attorney by one partner in favour of third party to deal with firm property – Without consent of other partners – Not permissible: Sections 18 & 19 of Indian Partnership Act, 1932

In the present matter one of the issues the court had considered was in regards to power of partner to grant power of attorney to third party. The learned counsel for the respondent submitted that Mr. Peter Drego was an acting partner of M/s. Drego Enterprises and had implied authority to represent the firm and to execute the power of attorney in favour of the third party.

The Court held that there is no substance in this submission of the learned counsel. Since there were other partners of the said firm M/s. Drego Enterprises, one partner could not have given any authority to third party on behalf of the firm without consent of the other partners to represent the firm and to settle the dispute if any by filing consent terms.

The court further observed that so far as submission of the learned counsel that the said M/s. Drego Enterprises had become defunct as other partner has already left India for decade and thus Mr. Peter Drego was authorised to execute power of attorney is concerned, learned counsel could not dispute that the said firm M/s. Drego Enterprises was not dissolved and was in existence. The petitioners had produced copy of the certificate issued by the Registrar of Firm showing existence of the said firm M/s. Drego Enterprises. The firm was in existence and that Mr. Kennith Drego, one of the partners who represented the firm in the Miscellaneous Application was an existing partner. The respondent No. 1 also failed to prove on record to show that the said Mr. Peter Drego was authorised to execute such power of attorney on behalf of the firm in favour of one Mr. Shamsuddin Kasamali Qureshi under an express authority of other partners or otherwise.

Therefore the Hon'ble Court held that without the consent of other partners when they had not retired and were available execution of power of attorney not permissible.

Horace Kevin Gonsalves and Ors. vs. Prabha Ganpat Borkar and Ors. AIR 2015 (NOC) 542 (Bom.)

CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

DIP AND REBOUND

The month of June was very eventful and volatile for the Indian economy. During the month, the Reserve Bank of India (RBI) cut the Repo Rate by a quarter per cent, which was a positive move but it was below expectations of many, who were advocating higher rate cuts for boosting of the economy. Certain political developments in the month, which although had a limited effect in the short run, may have the potential of blowing up and destabilize the current Government. This may result in the inability to proceed with the reforms process at the required speed. The developments have created doubts in the minds of many foreign investors and the result was net outflow of Foreign Institutional Investor's (FIIs) funds from the Indian stock markets. However, during the same period Domestic Institutional Investors (DIIs) as well as Domestic Mutual Funds invested substantial amounts in the Indian stock markets thereby recouping the loss which the stock markets suffered during the first fortnight of the month. The Indian stock markets ended flat during the month, though at a particular point in time they were down by more than 5%. The Parliament was not in session during the month and therefore no new laws could be passed. Political turmoil, due to various minor scams, kept on erupting but none were big enough to cause immediate instability. The month of July will have the Monsoon session of Parliament, which is expected to be noisy due to political issues. If the reforms process could not be pushed through then, it may cause uncertainty in the minds of global investors.

The new Government has completed one year in power and there were substantial discussions about its achievements and inabilities. Though the Indian people are expecting lots of things from the Government and it may have great intentions, it is handicapped to an extent. India being a democratic country, the objectives are needed to be achieved within Constitutional and legal framework, which is not an easy task. The Government in power does not have a majority in the Upper House, which can hold back passing of a number of bills and converting them into law. Such a situation can delay the reform process and reduce the attractiveness of India as an investment destination for foreign investors. The Government has been propagating its intentions by making ordinances but such a back door approach cannot continue for long. For smooth passing of legislation, the ruling party will have to muster adequate support in the Upper House, and that can happen only with the support of regional parties at least for one more year. However, the current political climate does not seem to be conducive for getting a number of pending legislations passed and so the risk of delayed reforms is getting

louder, holding back investments. Domestic participation in stock markets is improving on the back of momentum gained during the last year but for its sustenance at a good speed, the reform process has to gear up. Slow reforms are the biggest risk for the Indian economy at the current juncture as expectations are high not only from Indians but also from rest of the world as well.

One positive event in the month of June was the unexpected widespread rainfall in the Indian sub-continent. The Indian Meteorological Department had predicted a below average rainfall for the current year. This prediction had caused a lot of stress amongst the farmers and also substantial concerns for politicians and investors. Fortunately for the country, the rainfall has been good till now and it has cooled down the stress levels of many in the country. This is just the beginning, a good start has given hopes of a better control on inflation and a quicker interest rate cut. The stock markets which had lost major ground in the beginning of the month bounced back and so was the sentiment. If the monsoon remains around its past average with a fair geographical spread, food inflation can come under control, which can result in economic stability, lower imports and a reduction of interest rates in the months to come. As of now, hopes are reasonably high and the Indian economy seems to have started its upward trend. Considering the statistical probability, the momentum will continue for the next few years. The speeding of reforms and interest rate cuts can be the critical factors, which will govern the growth rate in the near future.

Though things are looking positive in India, some dark clouds have started appearing in certain parts of the world. The Euro Zone which was looking positive in the recent months seems to be getting stressed due to the approach taken by the Greek Government regarding the repayment of loans. The country overspent over the last decade and got burdened with substantial debt, which it is not able to repay or even properly service. The only way out for the economy is, to control the debt, adhere to austerity and live within its own means. Such a situation will result in a drastic cut in Government spending, which in turn will affect the economy of the country due to reduced investment and consumption. There has been pressure from the lenders on the Government of that country for observing austerity. Unfortunately, the Greek citizens are not able to digest the economic reality and are not keen to undergo the sacrifice, which is needed for avoiding default. The present Government got elected defeating the ruling party with the assurance that they will not reduce the public spending succumbing to the pressure of the lenders. Many a times election promises live on a different platform than the realities of life and the Government is now faced with the awkward situation to deal with the pressure from lenders on one hand and the citizens on the other. This has created risk, not only for the country but for whole of Euro Zone and the exit of Greece from Euro Zone can create economic turmoil not only in Europe but even on the economies of many other countries.

China is again getting into uncertain zone. During the last year, on the back of Government initiatives, the Chinese stock markets doubled without there being that great a reason for such a bounce back. Lot of liquidity poured in the country and the stock markets zoomed probably causing a bubble. Suddenly, it is realised during the last few days that the economic numbers are not justifying the market valuation; and the future is not looking as great as is needed to sustain the valuation. It has resulted in a sell off in the Chinese market over the last few weeks and the stock markets have collapsed by around 20% creating uncertainties and causing losses. The Chinese Government has reduced interest rates in recent days but that may not be able to curb the impact that can get caused due to damage to investment sentiment in the country. Suddenly, the Chinese economy has become a bit

uncertain and sustainability of its high growth has some concerns.

Fortunately, the US remains in shape and sentiments in the country are quite positive. Though the growth numbers for the first quarter of the calendar year are not satisfactory, the economy is very likely to bounce back. The Central Bank of the country is toying with the idea of increasing the interest rates. Though such a rate increase is likely to be gradual, the first increase of the rate is being looked at as a great economic event not only by US but by rest of the world. The increase in the rate will start the return of investible funds back in the US, which are currently spread across the developing countries in the world. As the rate starts increasing, the disinvestment may start in the developing countries thereby reducing the availability of investible funds in those economies resulting in an economic slowdown. Exodus of foreign investment can jolt domestic currencies of many countries and can impact their balance of trade. Therefore, the concern of a US rate hike is not only restricted to the US economy but can change equations across the world. Other economies are concerned about the event, which is totally out of their control but can pose a major challenge to them.

The major stock markets have remained volatile and have eased in the month of June. A sustainable upward movement seems to be difficult from the current levels. Specific stocks will continue to outperform the markets based on fundamentals of individual stocks and the fundamentals of the industry in which their businesses operate. Even Indian stock markets are likely to rise on stock specific basis and a sustainable upward move in the index can only occur, if the legislature is able to pass the pending bills, which are reformative in nature. Till such time this happens, the Indian stock markets will remain range bound and will inch up due to cyclical improvement in the growth rate. Reduction of interest rate can be one more trigger, which is partially factored in by the stock markets but a sudden announcement of a rate cut can give appreciation to the stock prices. The Indian stock markets are reasonably priced and the stocks of most of the well-managed companies are not cheap, considering their immediate prospects. Investors will have to do good homework to select good stocks to get high appreciation, substantially beating the index.

Currently, Indian investors have a limited choice for investing their funds as the interest rates have started their downward journey. The property market is uncertain and stagnant, partially due to high prices and high interest rates. The precious metals and stones are likely to stagnate due to global demand equation. The price of commodities will remain low in absence of a trigger and low global demand. Therefore, choices for investors remain limited. In the forthcoming era of low interest rates, investors need to reduce their expectations of post tax returns on their investments and should not get unduly disturbed, if they fall below double digit rate. The high rate of returns experienced over the past number of years were on account of high interest rates and inflation. In the regime of emerging low interest rates, the rate of returns are likely to be muted but investors should concentrate on beating inflation post of tax.

Though the expectations of investors are great, uncertainty has increased in India. The micro economic risks are also increasing in many parts of the world due to experimenting of non-traditional economic policies to fight the recession by these countries since the last few years. The policies of some countries have caused risk of side effects in certain other countries, which can affect the overall economic growth of the world. Therefore, a word of caution is required for equity investors. Though equity looks most promising asset class as of now, the ride is not going to be without bumps and it can be even rougher than expected.

LETTER TO THE EDITOR

C.A I. Kama Sastry
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To

The Editor,
The Chamber's Journal,
C/o The Chamber of Tax Consultants,
3, Rewa Chambers, Ground Floor,
31, New Marine Lines,
Mumbai – 400 020

Dear Sir,

Ref: Membership No. 3K 0561 – June 2015 Chamber's Journal

I express my gratitude to the Chamber for publishing Special Stories on important topics under the Direct and Indirect Taxes. This is of immense help to professionals at remote places where the opportunity to interact with experts is very limited. The Special Story is very comprehensive covering various facets of the issue written by different authors.

In June, 2015 Chamber's Journal I have observed the following:

June, 2015 Special Story.

Article by CA Devendra H. Jain and CA Bhadresh K. Doshi

At page 14 of the Journal para No. 4.1 of the article it is mentioned by the learned authors as under:

However, if a PAN is already available with the representative assessee (in his own capacity) then he is not required to obtain a separate PAN only for this purpose.

Can a representative assessee use his own PAN for filing the return of income of the person for whom/it he is a representative assessee and also for the purposes of paying taxes etc. In case taxes are paid with his own PAN then credit will be given to him in his personal capacity but not to the person for whom he is the representative assessee. Similarly when return of income is filed with his own PAN then there will be two returns of income for the same assessment year may be even before two assessing officers depending where the person represented is assessed to tax.

Please clarify.

Article by CA Shailesh Bandi

At page 47 of the Journal it is mentioned by the learned author as under:

Definition of Tax – "Inclusive"

The Word 'Tax' has been defined u/s. 2(43) of the I.T. Act in which the penalty, interest or any other sum payable under the Act are not included.

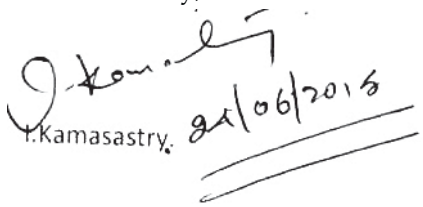
That by virtue of the amendment made by the Finance Act, 2013 by way of an explanation to the said section, the word 'Tax due' shall now also include the penalty, interest or any other sum payable under the I.T. Act.

The definition of tax as per the latest bare Act as amended by the Finance Act, 2015 does not have an explanation to section 2(43). Even when verified on the Income-tax website the situation is the same. Where exactly is this explanation inserted by the Finance Act, 2013. Please clarify.

You may please kindly give your valued reply on the issues mentioned in the above paragraphs.

Thanking you,

Yours faithfully,



Editor's Note:-

The queries arising out of the article were directed to the respective author. Mr. Shailesh Bandi has proposed that the relevant part may read as under:

"That the Finance Act, 2013 inserted an explanation to section 179 to the effect that the expression "Tax Due" for the purposes of section 179 will include penalty, interest or any other sum payable under the Act. This amendment is applicable w.e.f. 1-6-2013"

Mr. Bhadresh Doshi & Mr. Devendra Jain have clarified that

"With regard to your query, we would like to clarify that a representative assessee has to file of the principal assessee in PAN of the principal assessee only. In the relevant columns of ITR, information about the representative assessee viz. Name, address and PAN are to be mentioned. Even tax payments are to be done in the PAN of principal assessee only"


Ajay Singh, *Advocate*, CA. Ashok M. Manghnani
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th June, 2015 and 8th July, 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 29th June, 2015 & 3rd July, 2015.

29th June, 2015

LIFE MEMBERSHIP

1	Mr. Bhostekar Shailendra Shankar	CA Inter	Mumbai
2	Mr. Bhatt Aditya Jayantilal	Advocate	Mumbai
3	Mr. Punjabi Niranjan Thakurdas	CA	Mumbai
4	Mr. Prabhu Ramesh Shankar	CA	Mumbai
5	Mr. Sharma Manmohan Ramchandra	CA	Mumbai
6	Mr. Mehta Atul Tansukkhlal	CA	Mumbai

ORDINARY MEMBERSHIP

1	Mr. Shah Darshak Dhiraj	CA	Mumbai
2	Mr. Sheth Devang Subhash	CA	Mumbai
3	Mr. Mutsaddi Sudhanshu Krishnarao	CA	Mumbai
4	Mr. Gosrani Mayur Jayantilal	CA	Thane
5	Mr. Sumariya Hiral Ashok	CA	Thane
6	Mr. Mundra Amitkumar Ramrai	CA	Mumbai
7	Mr. Palan Bhavesh Suresh	CA	Mumbai
8	Mr. Mehta Anish Balwantri	CA	Mumbai
9	Mr. Desai Lakshit Janakbhai	CA	Mumbai
10	Mr. Mehta Nilay Atul	CA	Mumbai
11	Ms. Mehta Deepali Paresh	CA	Mumbai
12	Mr. Shah Mehul Chandrakant	CA	Mumbai
13	Mr. Shah Bhavin Ketan	CA	Mumbai
14	Mr. Bhate Sachin Chandrashekhar	CA	Thane
15	Mr. Kaunen Ali Ahmed	Advocate	Mumbai

16	Mr. Panchal Lalitchandra Mansukhbhai	CA	Mumbai
17	Mr. Shaikh Mohd. Tabrez Abdul Rauf	B.Com.	Mumbai
18	Mr. Sangharajka MiRal Yashobhadra	CA	Ahmedabad
19	Mr. Sanji Vinay N	CA	Bengaluru
20	Mr. Shenoy Shrikant Sreeniwas	CA	Thane
21	Mr. Gupta Rohit Ramgopal	CA	New Delhi
22	Mr. Shah Ankit Bharat	Advocate	Mumbai
23	Mr. Sawana Ravi Harikishan	CA	Mumbai
24	Ms. Padmanbhan Keerthika M	CA	Mumbai
25	Ms. Jain Swati Anand	CA	New Delhi
26	Mr. Nair Sreekumar Radhakrishna	CA	Mumbai
27	Mr. Tejwani Dinesh Laxmandas	CA	Mumbai
28	Mr. Dave Atul Rashmikant	CA	Pune
29	Mr. Sanghrajka Mital Yashobhadra	CA	Delhi
30	Mr. Jethwa Bharat	CA	Mumbai

ASSOCIATE MEMBERSHIP

1	Jeevan Pathi & Co.	Bengaluru

STUDENT MEMBERSHIP

1	Mr. Mourya Ritesh Shankar	Mumbai
2	Mr. Elston Rodrigues	Mumbai

3rd July, 2015

LIFE MEMBERSHIP

1	Mr. Garg Gaurav J. (Tr. from Ord. to Life)	CA	Delhi

ORDINARY MEMBERSHIP

1	Mr. Gangisetty Venkata Ramajaneyulu	CA	Telangana
2	Mr. Kothari Jayen Yatin	CA	Mumbai
3	Mr. Sakkarshetti Vijaykumar Shantappa	CA	Solapur
4	Mr. Shah Shashank Vinodkumar	CA	Solapur
5	Mr. Sheral Laxminarayan Rajiru	CA	Solapur
6	Mr. Gundeli Shriniwas Ramdas	CA	Solapur
7	Mr. Paraswar Bharat Vishwanath	CA	Solapur

II. Brief Report on 88th Annual General Meeting:

At the 88th Annual General Meeting held on Friday 3rd July, 2015 the following business was transacted:

i) The Annual Report for the year 2014-15 was approved & adopted.

ii) The Accounts for the year ended 31st March, 2015 were adopted.

iii) Mr. J. L. Thakkar, Chartered Accountant, was appointed as Auditor for the year 2015-16 and will hold office upto the next AGM.

iv) Results of the elections for the year 2015-16 were declared as follows :

- Mr. Avinash B. Lalwani was elected as President

- The following thirteen members were elected to the Managing Council

1.	Mr. Ajay Singh	8.	Mr. Ketan Vajani
2.	Mr. Ashok Sharma	9.	Mr. Kamal Dhanuka
3.	Mr. Ashok Manghnani	10	Mr. Naresh Ajwani
4.	Mr. Haresh Kenia	11	Mr. Rahul Hakani
5.	Mr Hemant Parab	12	Mr. Rajiv Luthia
6.	Mr. Hitesh Shah	13	Mr. Shailesh Bandi
7.	Mr. Hinesh Doshi		

THE DASTUR ESSAY COMPETITION

The top ten winners of the Dastur Essay Competitions were felicitated and issued certificates by President Mr. Paras K. Savla, Past Presidents Mr. Kishor Vanjara, Mr. Vipin Batavia, Mr. A. S. Merchant, Mr. Vipul Joshi, Mr. K. Gopal and Mr. Yatin Desai. The winners are (1) Mr. Vignesh Viswanathan, A. R. Krishnan & Co. CA; (2) Mr. Anshul Yadav, Dr. Ram Manohar Lohiya National Law University; (3) Mr. Anand Chandrashekhar Dusane, Joshi & Karandikar, CA; (4) Ms. Divya Subramanian, A. R. Krishnan & Co., CA; (5) Ms. Maya Menon, Bangalore Institute of Legal Studies; (6) Ms. Rashi Shailesh Nemani, Singrodia Goyal & Co., CA; (7) Ms. Lavina Bajaj Institute of Company Secretary of India; (8) Mr. Krunali Shah, Desai Haribhakti, CA; (9) Mr. Anil Kumar Jaiswal, Kamal Dhanuka & Co., CA; (10) Mr. Darshan Rajesh Doshi, T. P. Ostwal & Associates, Chartered Accountant, Mumbai. The first three essays will be published in our monthly Journal.

RELEASE OF MONOGRAPH SERIES

Mr. Kishor Vanjara, Past President, released the publication on "FEMA 1999" and Mr. Keshav Bhujle released the publication on "Companies Act 2013".

THE NEW TEAM FOR 2015-16

i) In the First Managing Council Meeting held on Friday, 3rd July, 2015, the following members were elected as Office Bearers:

	Name	***Designation***
1.	Mr. Hitesh R. Shah	Vice President
2.	Mr. Ajay R. Singh	Hon. Jt. secretary
3.	Mr. Ashok Manghnani	Hon. Jt. Secretary
4.	Mr. Hinesh Doshi	Hon. Treasurer

ii) The following eight members were Co-opted to the Managing Council for the year 2015-16:

1.	Mr. Keshav Bhujle	5.	Mr. Parimal Parikh
2.	Mr. Kishor Vanjara	6.	Mr. Manoj Shah
3.	Mr. Vipul Joshi	7.	Mr. N. C. Hegde
4.	Mr. K. Gopal	8.	Mr. Jayant Gokhale

Mr. Paras K. Savla will be part of Managing Council as Immediate Past President.

iii) EDITOR & EDITORIAL BOARD OF THE CHAMBER'S JOURNAL

Mr. V. H. Patil was appointed as a Chairmen of the Editorial Board, Mr. K. Gopal was appointed as Editor of "The Chamber's Journal" and Mr. Heetesh Veera, Mr. Manoj Shah,

Mr. Paras Savla, Mr. Yatin Vyavaharkar, were appointed as an Asst Editors. The following members were appointed as Editorial Board Members:

1. Mr. A. S. Merchant
2. Mr. Keshav Bhujle
3. Mr. Kishor Vanjara
4. Mr. Pradip Kapasi
5. Mr. Vipul Joshi

iv) COMMITTEES

The following Committees were formed and their Chairmen were appointed:

	Committees	***Chairmen***
1.	Allied Laws	Mr. Kamal Dhanuka
2.	Corporate Members	Mr. Paras K. Savla
3.	Direct Taxes	Mr. Ketan Vajani
4	Indirect Taxes	Mr. Rajiv Luthia
5	International Taxation	Mr. Naresh Ajwani
6	Journal	Mr. Haresh Kenia
7	Law & Representation	Mr. Vipul Joshi
8.	Membership & Public Relations	Mr. Hemant Parab
9.	Research & Publication	Mr. Rahul Hakani
10.	Residential Refresher Course & Skill Development	Mr. Shailesh Bandi
11.	Student & IT Connect	Mr. Parimal Parikh
12.	Study Circle & Study Group	Mr. Ashok Sharma

DELHI CHAPTER:

The following members were appointed as Chairman and Office Bearers of Delhi Chapter:

1.	Mr. R. P. Garg	Chairman
2.	Mr. Suhit Agarwal	Vice Chairman
3.	Mr. Vijay Gupta	Jt. Hon. Secretary
4.	Ms. Sapna Gupta	Jt. Hon. Secretary
5.	Mr. Gaurav Garg	Hon. Treasurer

II. PAST PROGRAMMES

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
1.	**Corporate Members Committee**		
A.	**Study Course on Valuation** Venue: Babubhai Chinai Hall, IMC, Churchgate, Mumbai.	**12th June, 2015 & 13th June, 2015** *Subjects :* • Technical Valuations • Valuation of Intangibles • Valuation Issues in International M & A • Valedictory Address	Mr. Gautam Mirchandani CA Amish Patel CA Ravishu Shah CA Niraj Sanghvi Ms. Kalyani Krishnan Mr. Tehmasp M. Rustomjee

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
B.	**CFO Summit 2015** Theme: Make In India – The Role of the CFO at Palladium Hotel, Mumbai.	**26th June, 2015** Subject : Concerning Indian economy and business.	Mr. Suresh Prabhu, Hon'ble Union Minister of Railways, Government of India
2.	**Direct Taxes Committee**		
	Intensive Study Group on Direct Taxes Venue: CTC Conference Room.	**22nd June, 2015** Subject: Recent Important Decisions under Direct Tax	CA Ashok Sharma CA Dilip Sanghvi
3.	**Indirect Taxes Committee**		
A.	**The Workshop on MVAT Act, Service Tax & Allied Laws** Venue : STPAM Library	**13th, 20th 27th June, 2015** **4th July, 2015** • Issues in Definition of Services, Exempt & Declared Services.	CA Sunil Gabhawalla
		Issues in Valuation of Services, Abatement & Reverse Charge Mechanism	CA Ashit Shah
		• Issues in Refunds, Audits, Assessments under MVAT and CST Acts.	Mr. C. B. Thakar, Advocate
		• Issues in CENVAT Credit Rules under Service Tax	CA Naresh Sheth
		• Constitutional amendments & Overview of GST Act	Mr. P. C. Joshi, Advocate
		Interstate Transactions under GST	Mr. Shailesh P. Sheth, Advocate
B.	**Indirect Tax Study Circle Meeting** Venue: Babubhai Chinai Committee Room, 2nd Floor, IMC.	**15th June, 2015** Subject: Recent Amendments under MVAT, PT & Entry Tax.	Chairman : Mr. Dhaval Talati Group Leader: Mr. Dinesh Tambde, Advocate
C.	**GST Study Group Meeting** Venue : A.V.Room, Jaihind College, Churchgate	**30th June, 2015** Subject: Overview of GST	CA Heetesh Veera

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
4.	**International Taxation Committee**		
A.	**9th Residential Conference on International Taxation, 2015** Venue : Radisson Blu Resort, Goa.	**18th to 21st June, 2015** ***Group Discussion Papers*** • Royal & FTS – Case Studies Analysis of different sectors • Deputation of personnel – Tax issues from an employer's perspective (including PE risks) • Inbound and Outbound Investment structuring – impact of specific anti-avoidance rules including Indirect Transfer and Place of Effective Management Provisions.	 CA Himanshu Parekh CA Paresh Parekh CA H. Padamchand Khincha
		Papers for Presentation • BEPS and Exchange of Information – Global Developments & Government Initiatives • Tax Implications in case of trusts used for estate protection of cross – border assets • Multi dimensional tax issues (Direct & Indirect Taxes)in respect of cross – border Transactions Undisclosed foreign income and assets – Proposed legislation and Assessment experience ***Panel Discussion*** • Case studies on International Taxation & Transfer Pricing	 Mr. Akhilesh Ranjan, Joint Secretary (FT & TR-I) & **Chairman –** CA Dilip Thakkar **Paper Writer –** CA Bijal Ajinkya Mr. V. Sridharan, Senior Advocate CA Dilip J. Thakkar ***Panelists*** **Chairman –** CA T. P. Ostwal **Panelists –** CA Anish Thacker & CA Sanjay Tolia

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
5.	**Information Technology Committee**		
	Scale Up The Practices – An IT Way….. Venue : 2nd Floor, Babubhai Chinai Committee Room, IMC.	**25th June, 2015** Subject : • An IT enthusiast Practitioners and Process consultant • Papilio – Cloud based Practice Management Software for CAs	CA Mitesh Katira Mr. Srinivas Yermal, Founder, and Architect
6.	**Study Circle & Study Group Committee**		
A.	**Study Circle Meeting** Venue: Babubhai Chinai Committee Room, IMC.	**16th June, 2015** Subject : Income Computation & Disclosure Standards Nos. (Part II).	CA Ravikanth Kamath
B.	**Study Circle Meeting** Venue : Banquet Hall, Ground Floor, Dadar Club, Lokmanya Tilak Colony, Lane 3, Dadar (E), Behind Swami Narayan Mandir, Mumbai – 400 014.	**27th June, 2015** Subject: Issues arising in the Context of Sec. 43 CA & Some aspects of Sec. 50C of I. T. Act, 1961.	CA K. K. Chythanya, Advocate
C.	**Study Group Meeting** Venue: Babubhai Chinai Committee Room, IMC.	**11th June, 2015** Subject : Recent Judgments under Direct Taxes	CA Gautam Nayak

III. FUTURE PROGRAMMES

Sr. No.	Programme Name / Committee/Venue	Day & Date	
1.	**Allied Laws Committee**		
A.	**Allied Laws Study Circle Meeting** Venue : Kilachand Conference Room, IMC.	**31st July, 2015** Subject: Audit Report and related Documentation under the Companies Act, 2013.	CA Chandrika Sridhar

Sr. No.	Programme Name / Committee/Venue	Day & Date	
B.	**Lecture Meeting Series on Companies (Amendment) Act, 2015, Exemptions to private Companies & Section 8 companies** Venue : Mayor Hall, All India Local Self Govt. Institute, Juhu, Mumbai.	**28th July, 2015** Subjects: Recent Amendment Under Companies Act- Impact on Private Companies Provisions of Accounts & Audit Under New Companies Act Auditor's Reporting Requirement as per New Companies Act as well Standard of Auditing	Speakers CA Sanjeev Shah CA Nilesh Vikamsey CA Himanshu Kishnadwala
2.	**Direct Taxes Committee**		
A.	**Two Days Seminar on Real Estate Development** (Jointly with AIFTP (WZ) and STPAM) Venue: West End Hotel, New Marine Lines, Mumbai.	**7th & 8th August, 2015** Subject: 1. Basic Concepts of transfer of immovable property (involving Transfer of Property Act, Easements Act, Rent Act), Relevant provisions of MOFA. 2. Concept of FSI, TDR, etc. (involving relevant provisions of BMC Act, DCR, etc.) 3. Legal issues in Redevelopment of Properties, including from the point of view of housing co-operative societies / their members. 4. Relevant provisions of Bombay Stamp Duty Act & Indian Registration Act. 5. Accounting Aspects (including Accounting Standards, Guidance Note, etc.) 6. Issues under VAT 7. Issues under Service Tax 8. Issues under income tax from the perspective of developers/ builders (including section 43 CA, ICDS, etc.)	 Mr. Parimal Shroff, Solicitor Mr. P. A. Jani, Solicitor Mr. Pravin Veera, Solicitor Mr. Pradip Kapadia, Solicitor CA Yogendra Kabra Mr. Vinayak Patkar, Advocate Mr. Bharat Raichandani, Advocate CA Pradip Kapasi

Sr. No.	Programme Name / Committee/Venue	Day & Date	
		9. Issues under income tax from the perspective of land owner/ flat purchaser/seller (including sections-50C, 194-IA, 56(2), 54, 54F etc.)	CA Jagdish Punjabi
B.	**Intensive Study Group on Direct Taxes** Venue: CTC Conference Room.	**29th July, 2015** Subject: Recent Important Decisions under Direct Tax	CA Ashok Sharma
3.	**Indirect Taxes Committee**		
A.	**Workshop on MVAT Act, Service Tax & Allied Laws** (Jointly with AIFTP (WZ), BCAS, MCTC, STPAM & WIRC of ICAI)	**11th July, 2015** Issues in Place of Provision of Service Rules, 2012 Issues in Point of Taxation Rules, 2011.	CA Girish Raman CA Rajiv Luthia
B.	**GST Study Group Meeting** **Venue: A.V. Room, Jaihind College**	27th July, 2015 Subject: Constitution Amendment Bill	Chairman: Mr. P. C. Joshi, Advocate Speaker: CA. Amitabh Khemka
4.	**International Taxation Committee**		
A.	**Programme on Black Money Law and Rules** Venue : to be announced	The programme will discuss real-life issues, implications and consequences under this new law.	Members may mark their diary. Details of the programme including venue, etc. will be announced soon by e-mails and on the website of the Chamber.
B.	**Half Day Seminar on "Law & Procedure Relating to Authority for Advance Rulings & Recent Controversies.** (Jointly with IMC, BCAS and IFA – Indian Branch) Venue: Walchand Hirachand Hall, IMC.	**17th July, 2015** Subject: • Keynote Address • Session I – Panel discussion on Alternative Dispute Resolution – Enhanced role of AAR going forward including specific issues relating to domestic transactions that can be pursued before the AAR. • Session II – Panel discussion on Availability of benefit of tax treaties; limitation of benefits clause; and tax avoidance, etc.	**Hon'ble Mr. Justice V. S. Sirpurkar**, Chairman, Authority for Advance Rulings **Moderators for the Panel discussion sessions:** Mr. Rajan Vora, Mr. Pranav Sayta & Mr. Gautam Nayak. **Panellists :** Mr. V. K. Gupta, Commissioner of Income-tax & Member-DRP, Mumbai; Mr. Pravin Kumar, Director of Income-tax (International Taxation)-II, Mumbai; Mr Ajay Kumar Shrivastav, Director of Income-tax (International Taxation)-IV, Mumbai;

Sr. No.	Programme Name / Committee/Venue	Day & Date	
		• Session III – Panel discussion on Tax issues arising from transfer of shares, business restructuring (including issues related to indirect transfers) and applicability of MAT provisions to foreign companies.	CA. Dinesh Kanabar, Mr. Girish Dave, Advocate, CA. T. P. Ostwal, CA. Kanchun Kaushal and Mr. Sunil Moti Lala, Advocate.
5	**Membership & Public Relations Committee**		
	Half Day Seminar on Company Law, Issues related to Revised Audit Report & Recent Amendment in the Companies Act, 2013 Jointly with Trimbak Study Circle of Nasik Venue : Institution of Engineers Hall PWD Campus, Bharatratna Sir Visvesvarya, Nashik 422 002.	**25th July, 2015** Subject : 1. Company Audit Report incl. CARO, 2015 2. Schedule II, Case Flow and exemption accorded to private Ltd. & other Companies.	CA Hasmukh Dedhia CA Abhay Mehta
6	**Students Committee**		
	Football – The way to Professional Excellence (Jointly with Membership & Public Relations Committee) Venue: Indian Football School, Cooperage Football Ground – Mini Ground, Colaba, Churchgate.	**8th August, 2015**	The enrolment is restricted to 8 teams or 60 individual players on first cum first serve basis. Interested members / students may send their enrolment along with Player's Participation Fee to the Chamber's Office. For more details visit CTC website www.ctconline.org
7	**Study Circle & Study Group Committee**		
A.	**Lecture Meeting on Revised Income Tax Return Forms** Venue: Jai Hind College Auditorium, Mumbai.	**4th August, 2015** Subject : Revised Income Tax Return Forms	CA Ameet Patel

Sr. No.	Programme Name / Committee/Venue	Day & Date	
B.	**Study Group Meeting** (Only for Study Group Members) Venue : Babubhai Chinai Committee Room, IMC.	**27th July, 2015** Subject: Some Important Judgment under Transfer Pricing.	Mr. Sunil Moti Lala, Advocate
8.	**Delhi Chapter**		
	Seminar on EPC Contracts Venue: Multipurpose Hall, Kamladevi Block, India International Centre, Max Mueller Marg, New Delhi.	**18th July, 2015** Subject : 1. Background of various formats & regulatory aspects 2. Direct Tax issue on the EPC Contract 3. Indirect Taxes issues on the EPC Contract.	CA. Nabin Ballodia Mr. Sudipta Bhattacharjee CA. S. P. Singh Mr. V. Lakshmikumaran
9.	**Publications**		
	1. Monograph Series on Foreign Exchange Management Act, 1999	**Topics under FEMA 1999** 1. Introduction to the Import and Export Regulations 2. Investments in Indian by NRIs and FPIs 3. Overseas Investments and Remittances facilities for Indian Residents	Please look for further announcement in relation to availability, price and other details.
	2. Monograph Series on Companies Act, 2013	**Topics under Companies Act, 2013** 1. Corporate Social Responsibilities (CSR) 2. Independent Directors (ID) 3. Additional / Annual Compliance & Responsibilities 4. Raising of Capital / Funds by Private Limited / Unlisted Public Companies 5. Acceptance of Deposits and Investments by Companies 6. Private Limited Companies – Functioning and Compliances including Small Company, Dormant Company and One person Company. 7. Provisions relating to Audit & Accounts. 8. Related Party Transaction – Law & Procedures.	

For Further details of the future events, kindly visit our website www.ctconline.org.

INDIRECT TAXES COMMITTEE

The Indirect Taxes Study Circle Meeting held on 15th June, 2015 on the subject "Recent Amendments under MVAT, PT & Entry Tax" at Babubhai Chinai Hall.

Mr. Dhaval Talati chairing the session.

Mr. Dinesh Tambde, Advocate addressing the members.

The 1st GST Study Group Meeting held on 30th June, 2015 on the subject "Overview of GST" at Jaihind College.

CA Heetesh Veera addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

The Study Circle Meeting held on 16th June, 2015 on the subject "Income Computation & Disclosure Standards Nos. (Part II)" at Babubhai Chinai Hall.

CA Ravikanth Kamath addressing the members.

DIRECT TAXES COMMITTEE

The Intensive Study Group on Direct Taxes held on 22nd June, 2015 on the subject "Recent Important Decisions under Direct Tax" at CTC office.

CA Ashok Sharma addressing the members.

CA Dilip Sanghvi addressing the members

INTERNATIONAL TAXATION COMMITTEE – 2014-15

9th Residential Conference on International Taxation, 2015 held on 18th June, 2015 to 21st June, 2015 at the Radisson Blu Resort, Goa.

CA Paras K. Savla, President (2014-15) welcoming the delegates. Seen from L to R : CA Ganesh Rajgopalan, Convenor, Naresh Ajwani, Chairman, CA Rutvik Sanghvi & CA Jimit Devani, Conference Co-ordinators.

CA Naresh Ajwani, Chairman welcoming the faculties. Seen from L to R : CA Ganesh Rajgopalan, Convenor, Paras K. Savla, President (2014-15), CA Rutvik Sanghvi & CA Jimit Devani, Conference Co-ordinators.

Dignitaries during the inaugural lamp lighting at 9th Residential Conference on International Taxation, 2015. Seen from L to R : CA Dilip Thakkar, Faculty, Ajay Singh, Hon. Jt. Secretary, CA Rutvik Sanghvi & CA Jimit Devani, Conference Co-ordinators, CA Naresh Ajwani, Chairman, CA Paras K. Savla, President (2014-15), CA Anish Thacker, Faculty, CA Bijal Ajinkya, Faculty, CA Avinash Lalwani, Vice President (2014-15) and CA Ganesh Rajgopalan, Convenor.

Faculties

CA Dilip Thakkar addressing the delegates on the subject "Undisclosed foreign income & assets - Proposed legislation and Assessment experience". Seen from L to R : CA D. S. Sharma, CA Tarunkumar Singhal and CA Shreyas Shah, Committee Members.

CA Bijal Ajinkya

CA Paresh Parekh

Mr. Akhilesh Ranjan, Joint Secretary (FT & TR-I)

CA H. Padamchand Khincha

Mr. V. Sridharan, Senior Advocate

CA Himanshu Parekh

CA T. P. Ostwal, Chairman, Panel Discussion

CA Anish Thacker, Panellist

CA Sanjay Tolia, Panellist

INTERNATIONAL TAXATION COMMITTEE – 2014-15

9th Residential Conference on International Taxation, 2015 held on 18th June, 2015 to 21st June, 2015 at the Radisson Blu Resort, Goa.

Group photo of delegates

CORPORATE MEMBERS COMMITTEE

Study Course on Valuation held on 13th & 14th June, 2015 at Babubhai Chinai Hall, IMC.

Mr. Gautam Mirchandani addressing the delegates on the subject "Technical Valuations". Seen from L to R: CA Neha Gada, Convenor, CA Vipul Choksi, Chairman, CA Amish Patel, Faculty and CA Hasmukh Dedhia, Vice Chairman.

CA Amish Patel

CA Ravishu Shah

CA Niraj Sanghvi

Ms. Kalyani Krishnan

Mr. Tehmasp M. Rustomjee

CORPORATE MEMBERS COMMITTE – 2014-15

"CFO Summit 2015 – Theme: Make In India – The Role of the CFO" held on 26th June, 2015 at Palladium Hotel, Mumbai.

CA Nilesh Vikamsey, Members, Corporate Members Committee offering flower bouquet to Chief Guest Shri Suresh Prabhu, Hon'ble Union Minister of Railways, Government of India.

CA Paras K. Savla, President (2014-15) presenting the memento to Chief Guest Shri Suresh Prabhu, Hon'ble Union Minister of Railways, Government of India. Seen from L to R : CA Sujal Shah, Past President, CA Hasmukh Dedhia, Vice Chairman.

Shri Suresh Prabhu, Hon'ble Union Minister of Railways, Government of India addressing the members on the topic "Concerning Indian economy and business". Seen from L to R : CA Sujal Shah, Past President, CA Paras K. Savla, President (2014-15), CA Hasmukh Dedhia, Vice Chairman and CA Neha Gada, Convenor.

Section of delegates.

INFORMATION TECHNOLOGY COMMITTEE

The Scale Up the Tax Practices – An IT Way... held on 25th June, 2015 at Babubhai Chinai Committee Room.

CA Paras K. Savla, President (2014-15) welcoming the delegates. Seen from L to R : CA Parag Ved & CA Parimal Parikh, Managing Council Members (2014-15), Mr. Srinivas Yermal, Faculty and CA Mitesh Katira, Faculty.

Faculties

CA Mitesh Katira addressing the delegates on the subject "An IT Enthusiast Practitioners and Process Consultant".

Mr. Srinivas Yermal addressing the delegates on the subject "Papilio – Cloud based Practice Management Software for CAs".

WINNER OF 4TH THE DASTUR ESSAY COMPETITION 2015

The winner of 4th The Dastur Essay Competition who were present were felicitated by presenting a Trophy, Cash Prize and Certificates by then President Shri Paras K. Savla and Past Presidents S/Shri K. Gopal, Vipin Batavia, Kishor Vanjara, Yatin Desai, Vipul Joshi and A. S. Merchant.

1st Winner – Mr. Vignesh Viswanathan,
A. R. Krishnan & Co., Chartered Accountants, Mumbai

3rd Winner – Anand C. Dusane,
Joshi & Karandikar, Chartered Accountants, Mumbai

4th Rank – Ms. Divya Subramanian,
A. R. Krishnan & Co., Chartered Accountants, Mumbai

6th Rank – Rashi Shailesh Nemani,
Singrodia Goyal & Co., Chartered Accountants, Mumbai

7th Rank – Ms. Lavina Bajaj, Institute of Company Secretary of India

9th Rank – Mr. Anil Kumar Jaiswal, Kamal Dhanuka & Co., Chartered Accountants, Mumbai

10th Rank – Mr. Darshan Rajesh Doshi, T. P. Ostwal & Associates, Chartered Accountant, Mumbai

The winners of SE Dastur Competition along with Office Bearers and Chairmen of Student Committee

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