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June - 2015 Vol . III | No. 9

LIABILITY IN SPECIAL CASES

Direct Taxes

Other Laws

International Taxation

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CA Parag Ved addressing the delegates. Seen from L to R : CA Vipul Choksi, Chairman, CA Paras K. Savla, President, CA Hitesh R. Shah, Hon. Treasurer and CA Sujal Shah, Past President.

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Editorial

The Finance Ministry on 31st May, 2015, came out with a press release, in connection with Forms of Return of Income for A.Y. 2015-16. The new Forms ITR 2 and ITR 2A will have only three pages and other details in schedules, if applicable. It is also proposed to do away with mandatory disclosure of foreign trips and dormant bank accounts and it is also **proposed to extend the last date of filing to August 31, 2015 instead of July 31, 2015.**

Instead of disclosing foreign trips and expenditure on such trips, the return will now require Passport number of the assessee and other steps which will ease filing of return of income. However, while the changes in simplifying the Return Forms are welcome, the noteworthy point is intimating about extension in the date of filing of return of income for A.Y. 2015-16 from July 31 to August 31. The announcement of such a nature and that too well in advance puts this announcement amongst few unprecedented. Hope this turns out to be not a one off case, but marks the beginning of the new approach on the part of tax administration. One is tempted to write this, as memories are quite fresh about last year's experience on making representation about extending the date for filing returns having obligation of tax audit. The representations not having worked, tax payer community had to resort to filing writ petition in various High Courts to have extension of date from October 31, 2014 to November 30, 2014.

While there is great degree of momentum for 'ease of doing business in India', at policy level, the same needs to be reflected in implementation. And it can come only if there is change in psyche of the person implementing as he has an option of creating an environment **of Trust and friendly approach without diluting the contours of taxation law.**

The Special Story of present issue of The Chamber's Journal is on 'Liability in special cases'. The articles on this topic bring out the issues which are important and one does not find much material on the same. Hence this issue will surely have longer shelf value. Prominent authors have contributed articles for this issue. I must place on record my appreciation of keen interest taken by CA C.N. Vaze in designing this issue. I thank all the contributors of this issue for sparing their valuable time for The Chamber's Journal.

K. Gopal
Editor

From the President

Monetising of the yellow metal was announced in the budget. Government believes that Gold Monetising Scheme could be a game changer. Recently, draft Gold Monetising Scheme was kept open for public opinion. Learning from the experience of 1999 scheme, it seems some tinkering viz. size of deposit, period of deposit etc. has been done in the current scheme. Scheme also provides incentive to banks i.e. such deposits can be held as CRR/SLR requirements, third party purity assessment etc. We also need to learn from the international experience from countries like Turkey. Turkey nationals also have craze for the yellow metal. Successful implementation of such scheme gave huge boost to the Turkish economy. In India, success of Gold Monetising Scheme would depend upon rate of interest on such deposits. It needs **to be decent and attractive**.

During 2015 India's ranking on ease of doing business index dropped by two notches to 142 out of 189 economies. On formation of the new Government, DIPP initiated several steps to improve India's rank. DIPP officials have also started demonstrating the efforts taken in this regard. New Companies Act, 2013 has recently undergone various amendments with the objective of ease of doing business in India. Under the new Companies Act, private companies has been virtually, brought on par with public companies. Private Companies are required to comply with various procedures in line with those of Public Companies. In this regard, the Chamber has made representations and has also met Parliamentarians. Recently the MCA has issued much awaited circular, which provided partial relief to Private Companies. However, many issues still persist. Let's look positively for the report of Review Committee set up in this regards and its time bound implementation.

Much is happening at the Chamber during the month of June 2015. Residential Conference on International Taxes which is scheduled at Goa, has received overwhelming response and enrolment has been closed. IT is playing important role in our practice. In order to understand Smart and best practices committee has organised workshop 'Scale-up the Tax Practises-An IT Way". CFO Roundtable Meet has been organised. At the meet Hon'ble Union Minister of Railways has agreed to be Chief Guest and he shall deliver Keynote address.

July 4, 2014 was the day my journey to lead this 88 years old organisation of tax professionals, began. I have been communicating with all of you for last 11

months and now I pen down this last one. Early next month, I would be moving away from this office of President. The year that passed was exhilarating. As I bid adieu, I feel overwhelmed by the love and affection showered on me. During the year, my endeavour always was to lead the Chamber to next level for the cause of the profession. I tried to make my tenure a worth reading chapter in the history of the Chamber. In the process, I have been too demanding, pedant and perfectionist. But the committed Team Chamber always has been encouraging, co-operative and supportive to deliver the desired results. List of events, achievements etc. has been published in 88th Annual Report. Report has been hosted on the Chamber's website and physical copy is also available at the Chamber's office on demand.

My journey in this office, has been rewarding it would not have been so without the support of illustrious and assiduous Past Presidents, conscientious Council members, dedicated and staunch office bearers: Avinash Lalwani, Vice-President, Hinesh Doshi and Ajay Singh, Hon. Joint Secretaries and Hitesh Shah, Treasurer and unflinching committed committee members. At this juncture I also wish to compliment each and every staff member of the Chamber viz. Hitesh Shah, Manager and other team members Aarti, Manisha, Anand, Yogita, Bhagyashree, Rajan, Rajesh, Suresh and Jaideep. It was delightful to see how each one's eyes lit up when they were on any project or event. They worked with enthusiasm and put in extra hours for the success of every job they did. I humbly thank all the persons who have guided and supported me during the tenure. I am also thankful to my parents, wife Priti and son Kevin for understanding and supporting me throughout my tenure. Without their support and encouragement my journey would not have been so fruitful. My special thanks to Shri Patil Saheb, in of his unwell health, his heart was always with the Chamber. My communication wouldn't be complete, if I do not thank all members, who have motivated me to work for the cause of the professionals.

On the personal front my tenure has brought vivid and cheering experiences. My journey at the Chamber has led to a transformation in me. It was truly a learning experience. I learnt various principles of management. It also taught me how to view things from different angles.

I wish best of luck to the President-elect Shri Avinash Lalwani and his team. I look forward to the Chamber, achieving greater heights during his term.

In the end, I would like to say Good Bye! But, I also believe Goodbyes are not forever. Goodbyes are not the end. They simply mean I'll miss you until we meet again. Looking forward to connect with one and all of you again, in a different role.

Paras Savla
President

Chairman's Communication

Dear Esteemed Readers,

The vacation period is silently ending and we are all eager for the monsoon as well as upcoming busy season of audit and tax filing. The uncertainty over monsoon though has cast some sort of gloom over the prospect of economic growth.

The Finance Act, 2015 has been passed by both Houses of Parliament and also received accent of the President and there are number of changes made in Income-tax Act from what was proposed at the bill stage. Recently there have been quite a few circulars issued by the CBDT in form of instructions on granting credit on TDS, disposal of rectification petitions, refunds in Wealth-tax cases and some others. We hope same are implemented at the earliest and lead to resolving of many pending small matters.

The Income-tax Act, 1961 has a separate Chapter to deal with assessment and enforcement of demands in certain peculiar situations which may arise on account of succession, restructuring, relationships of parties etc. These provisions get triggered very sparingly but when they get triggered the ramifications can be manifold. This month's Special Story covers some of the important aspects arising on account of application of Chapter on Liabilities in Special Cases. I am thankful to the authors of the articles for these Special Story, viz. Shri Devendra Jain, Bhadresh Doshi, Rajesh P. Shah, Manoj C. Shah, Neelam Jadhav, Nishit Gandhi, Shailesh Bandi and Krish Desai. I am thankful to the Co-Chairman of the Committee Shri C. N. Vaze for designing the structure of this month's Special Story. I am sure readers shall be immensely benefited by the same.

Friends, this is my last communication to you all as the Chairman of Journal Committee for the year 2014-15. It was pleasure interacting with you all through the medium of this prestigious mouth-piece of the Chamber. It was our sincere endeavour to provide the readers with Special Stories on varied topics, which I hope were of benefit to you all. In this journey of last one year as Chairman of the Journal Committee, I have been guided by the esteemed Editorial Board, the ever enthusiastic and able Editor Shri K. Gopal, all the Office Bearers led by Shri Paras K. Savla and was duly assisted by Co-Chairman Shri C. N. Vaze and all the Convenors. Any shortcomings are on my account alone.

I would also like to place on record the contributions made by the authors of the regular features in updating our knowledge. I wish the new incoming Journal Committee team members all the very best.

Wishing you all a very happy reading and continued professional growth.

CA. Sanjeev Lalan
Chairman – Journal Committee

CA Devendra H. Jain & CA Bhadresh K. Doshi

Concept of Representative Assessee and its Taxation

1. Need for representative assessee

Generally, under the Income-tax Act, 1961 (the Act) a person is chargeable to tax only in respect of his own income. In some cases, the Act provides for clubbing of some other person's income in the total income of a person. However, under certain special cases, the Act makes a person liable to tax independently in respect of income of some other person, without clubbing such income in his total income. Such cases are provided for in Chapter XV of the Act titled "Liability in Special Cases".

Part B of Chapter XV provides various situations of "representative assessees". In simple terms, these are situations wherein a person is made responsible to pay the tax and also comply with various other provisions of the Act in respect of the income which he is entitled to receive on behalf of some other person though he does not have any sort of beneficial interest in such income. In many cases, it poses administrative difficulties in recovering tax from certain persons and also in ensuring various procedural compliances under the Act like filing of return etc. by them for several reasons like their unavailability in India or their incapability or immunity granted to them under some other applicable law etc. In order to make sure that there is no loss of revenue in such cases, the concept of a "representative assessee" has been made applicable whereby the person who is representing them is liable under the Act as if he has earned that income which beneficially belongs to some other person.

2. Instances of representative assessee

Section 160(1) of the Act defines representative assessee. This definition is exhaustive in nature meaning thereby that only the persons specified in S. 160(1) will have "representative assessee". Following table gives details of the different persons (hereinafter referred to as the "principal assessee") and their "representative assessee" as envisaged by S. 160(1):

	Principal Assessee	Representative Assessee
1	Non-resident	Agent of a non-resident including a person treated as agent u/s. 163
2	Minor, lunatic or idiot	Guardian or Manager
3	Any person in respect of whom Court of Wards, Administrative-General, Official Trustees or any receiver or manager is appointed by the Court	Such Court of Wards, Administrative-General, Official Trustees or any receiver or manager
4	Beneficiaries of a trust (whether oral or declared by a duly executed instrument in writing)	Trustee appointed under such trust

It can be noticed that in all the above cases, the persons who are regarded as representative assessees, function (either legally or factually) for the persons whom they are representing. They are merely entitled to receive the income on behalf of the persons whom they are representing and hence they are also made liable to pay tax for no other reason than the convenience of assessment and collection.

There is no need of any formal order to be passed by the Income-tax authority treating the concerned person as a representative assessee except in a case where the person is treated as an agent of a non-resident under the provisions of S. 163. S. 163(2) provides that an opportunity of being heard be given before treating any person as an agent of the non-resident. Further, any such order passed treating the person as an agent of the non-resident is appealable under the provisions of S. 246A.

Generally, there can be only one representative assessee for a particular principal assessee except in the case of a non-resident wherein there can be more than one representative assessee of the same non-resident principal assessee. This concept is discussed in a separate article dealing with liability of an agent of a non-resident.

Further, a representative assessee need not be a natural person in all cases and even a legal person like company etc. can also be considered as a representative assessee. Such a representative assessee can be a non-resident in India.

2.1 Agent of Non-Resident

Apart from the person who is factually acting as an agent of the non-resident, as per S. 163 any of the following persons may also be statutorily treated as an agent of non-resident:

(i) One who is employed by or on behalf of the non-resident; or

(ii) One who has any business connection with the non-resident; or

(iii) One, from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or

(iv) One who is the trustee of the non-resident; or

(v) One, whether a resident or non-resident, who has acquired by means of a transfer, a capital asset in India.

In the first four cases, it is further necessary that the person sought to be assessed as an agent should be in India, whereas this conditions is not necessary in the fifth case.

A separate article deals with the provisions of S. 163 and the issues involved in it.

2.2 Guardian or manager of a minor, lunatic etc.

S. 64(1A) of the Act provides for the clubbing of income of a minor child in the income of his parent. However, if the child is suffering from any disability of the nature specified in S. 80U, then the clubbing provisions do not apply. Further, as per the proviso to S. 64(1A), the following incomes cannot be clubbed in the income of the parents:

- Income as arises or accrues to the minor child on account of any manual work done by him; or
- Income as arises or accrues to the minor child on account of activity involving application of his skill, talent or specialised knowledge and experience.

Therefore in these situations, the minor child himself is liable to be assessed for his income. There can also be a situation where both the parents of the minor child have expired and hence the clubbing provision fails. Therefore, the assessment has to be made on "representative assessee" for income of the minor in such scenarios. Further, in case of a lunatic or idiot also, the guardian or manager of the lunatic or idiot is treated as representative assessee.

2.3 Official receiver etc.

In certain situation, the Courts appoint the management of property or estate of a person to some authorities created by statute. E.g.

- Court of Wards appointed under the Bombay Court of Wards Act, 1905.
- The Administrator-General appointed under the Administrators General Act, 1963.
- The Official Trustee appointed under The Official Trustees Act, 1913.
- Receiver or manager appointed under Bankruptcy Laws.

In such situations, the persons appointed as receivers etc. are treated as representative assessee for the compliances under the income tax laws. However, a receiver cannot be treated as a representative assessee within the meaning of section 161 in respect of the income derived or derivable for the period prior to his appointment as receiver. – *M.L. John vs. ITO (1983) 139 ITR 972 (All.)*

2.4 Trustee of a trust

Any person who is appointed as a trustee under a trust who acts in a fiduciary capacity for managing the properties held under the trust for the benefits of the beneficiaries is regarded as a representative assessee. Such trust can be a private trust or a public trust. A separate article deals with this concept of trustee exhaustively.

3. Liability to tax

S. 161(1) provides that every representative assessee shall be liable to assessment in his own name in respect of the income in respect of which he is considered to be a representative assessee. Further, it has been provided that tax shall be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the principal assessee.

3.1 Scope of income taxable in the hands of a representative assessee

Though by virtue of the provisions of S. 161, a substantive liability has been imposed upon a representative assessee, it is expressly confined to "the income in respect of which he is a representative assessee". Every representative assessee is defined by S. 160 only in relation to certain incomes; it is only in respect of income specified in that section that any person may be held to be a representative assessee.

Excluding S. 160(1)(i) dealing with the case of an agent of non-resident, in all other cases, a person is regarded as a representative assessee only when he receives or is entitled to receive the income on behalf of the other person (principal assessee). As a result of the combined reading of Sections 160 & 161, it transpires that the representative assessee is liable for assessment and payment of tax only in respect of the income which he has received or is entitled to receive on behalf of the principal assessee. Any other income of the principal assessee is not assessable in the hands of the representative assessee. For example, in case of a trust, the trustee is liable as a representative assessee only in respect of the incomes accruing to the beneficiaries through the trust and not in respect of any other income of such beneficiaries accruing to them from sources other than the trust.

In respect of the agent of non-resident, though S. 160(1)(i) does not specifically make a reference to any specific income of the non-resident [except as specified in S. 9(1)] in respect of which the agent has been considered as a representative assessee, it has been interpreted by the Courts that agent must have some connection with the income of non-resident principal which is sought to be assessed in his hands in the capacity of a representative assessee. Merely because a person has been considered to be an agent of the non-resident, the entire taxable income of such non-resident principal cannot be assessed in the hands of such agent. Thus, there can be more than one representative assessee for one

non-resident principal assessee in respect of different sources of income. It may be noted that the scope of a representative assessee in relation to a non-resident principal assessee has been made limited only to the income specified in S. 9(1) and no other income can be assessed in the hands of such a representative assessee because of the express restriction provided in S.160(1)(i).

3.2 "Assessment in either hands"

The provisions enabling the assessment of income in the hands of representative assessee do not discharge the principal assessee from its own liability in that regard. It is still primarily the liability of the principal assessee but has been shifted on the representative assessee for the administrative convenience. Therefore, S. 166 makes it clear that direct assessment can be made of the principal assessee or tax can also be recovered from him after having made the assessment in the hands of the representative assessee. Therefore, the assessment can either be made in the hands of the principal assessee or in the hands of the representative assessee. But once the option has been exercised and the assessment has been made in the hands of one of them, thereafter the same income cannot be assessed in the hands of the other.

However, it is open for the Revenue to make multiple assessments partially in the hands of each of the two assessees i.e. principal assessee and representative assessee. The income for which the representative assessee is not liable can be assessed only in the hands of the principal assessee and therefore there can be such multiple assessments. Further, the fact that the assessment has already been made against one of them does not operate as a bar in making the assessment in the hands of another but not for the same income. The Supreme Court in the case of *Claggett Brachi Co. Ltd. vs. CIT (177 ITR 409)* held that a reassessment u/s. 147 may be made directly on a non-resident even where the original assessment was made on his statutory agent. In a converse case also Kerala High Court in the case of *CIT vs. Fertilisers & Chemicals (Travancore) Ltd. (166 ITR 823)* took a view that the fact that a non-resident is directly assessed in respect of some income does not debar the department from assessing the agent in respect of other income. However, a contrary view has been taken by Calcutta High Court in the case of *CIT vs. Alfred Herbert (India) Pvt. Ltd. (159 ITR 583).*

The time limit for making an assessment of the income in the hands of a representative assessee is same as the time limit available for making any other normal assessment.

3.3 Personal liability of a representative assessee

The liability of the representative assessee u/s. 161 is personal and not conditional upon his having any funds or properties of the principal assessee under his possession. In case of a legal representative (of the deceased person as provided in S. 159), there is an express provision under S. 159(6) limiting his liability to the extent to which the estate of the deceased is capable of meeting the liability. There is no such restriction provided in the case of a representative assessee although there is a mechanism provided for recovery of the sum paid by him from the principal assessee.

Therefore, the representative assessee cannot escape the liability u/s. 161 to pay the tax on the concerned income of the principal assessee on the ground that he does not hold any funds or properties of such principal assessee out of which such liability can be discharged. Moreover, the Supreme Court in the case of *CIT vs. Abdullabhai Abdulkadar (41 ITR 545)* has held that if the representative assessee is unable to recover from the principal assessee, the amount of tax which he has paid on his behalf, he cannot claim it as a bad debt or as a business loss. Therefore, one needs to be very cautious with a situation wherein he can be regarded as a

representative assessee especially in the context of the non-resident principals.

The only case wherein the liability of a representative assessee can be made limited is by securing a certificate from the Assessing Officer about his estimated liability which is discussed in more details later in this article.

As explained above, the assessment can either be made in the hands of the principal assessee directly (S. 166) or in the hands of representative assessee (S. 161). In a case where the assessment has been made in the hands of the representative assessee, he becomes personally liable in respect of the same. In such a case, there is an express provision enabling the recovery of tax from the principal assessee as provided in S. 166. However, if the assessment has been made in the hands of the principal assessee directly then the tax cannot be recovered from the representative assessee from his personal properties. S. 167 provides for the recovery of tax only from the properties vested in or under the control or management of the representative assessee. Therefore, though the liability of representative assessee is personal and unlimited as such, it is limited to the properties of principal assessee available with him in a case where the assessment has been made directly in the hands of principal assessee.

3.4 In like manner and to the same extent

S. 161(1) provides that levy of tax upon the representative assessee has to be in like manner and to the same extent as it would be levied upon the principal assessee. The Supreme Court in the case of *CWT vs. Trustees of H.E.H. Nizam's Family (Remainder Wealth) Trust (108 ITR 555)* held that the words "in the like manner and to the same extent" in the context of trust have three consequences:

i. There would have to be as many assessments on the trustee as there are beneficiaries with determinate and known shares, though, for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the wealth of each beneficiary.

ii. The assessment of the trustee would have to be made in the same status as that of the beneficiary whose interest is sought to be taxed in the hands of the trustee.

iii. The amount of tax payable by the trustee would be the same as that payable by each beneficiary in respect of his beneficial interest, if he were assessed directly.

Therefore, while computing the tax payable by the representative assessee, all the benefits of exemptions, deductions and allowances which otherwise are available to the principal assessee shall be granted. The representative assessee shall also be entitled to claim a refund on behalf of the principal assessee if it is justified otherwise.

The rate of tax as applicable to the principal assessee shall be applicable while computing such tax payable by the representative assessee except where a special rate of tax is provided at some places especially in case of discretionary or business trusts. There are divergent views on how to determine the rate of tax as applicable to the principal assessee. In the case of *Ganesh Chhababhai Vallabhai Patel vs. CIT (258 ITR 193),* Gujarat High Court has taken a view that the total income of the beneficiary, i.e., the share of income of the trust receivable by such beneficiary under the deed as well as the other income of the beneficiary which would make up his total income, was required to be taken into account for the purpose of ascertaining the rate at which the total income of such beneficiary was to be taxed. However, in *ITO vs. Eastern Scales (P.) Ltd. (115 ITR 323),* Calcutta High Court has held that when representative assessee of non-resident is assessed in respect of income of non-resident, rate at which tax is to be computed

is rate applicable to income of representative assessee received by him on behalf of non-resident and not rate that is applicable to total income received by non-resident.

4. Other duties, responsibilities and liabilities

S. 161(1) not only provides that the representative assessee is liable to assessment in his own name in respect of the concerned income but it also provides that he shall be subject to the same duties, responsibilities and liabilities as if the concerned income were income received by or accruing to or in favour of him beneficially. The scope of such duties, responsibilities and liabilities of the representative assessee is discussed in more details in the following paragraphs.

4.1 Obtaining Permanent Account Number

S. 139A provides for obtaining a PAN mandatorily by every person if his total income exceeds the maximum amount which is not chargeable to income-tax. The representative assessee is also required to obtain a PAN if the income of the principal assessee in respect of which he is assessable exceeds the maximum amount which is not chargeable to income-tax. This is because of the express provisions of S.139A which refers to "his total income or the total income of any other person in respect of which he is assessable". 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. The form of application for obtaining PAN i.e. Forms 49A & 49AA also provide for the details of the representative assessee required to be filled up if applicable.

4.2 Payment of advance tax

S. 208 provides for payment of advance tax by the assessee in a case where the amount of tax payable by that assessee is at least ` 10,000. It has been held by the Supreme Court in the case of *Premier Automobiles Ltd. vs. ITO (76 ITR 1)* that provision requiring payment of advance tax applies to every assessee whether the tax is liable to be paid by him on his own total income, or on the income assessed in his hands as a representative assessee.

However, in the context of an agent of non-resident, where an assessee is treated as representative assessee after the financial year is over, he could not retrospectively be saddled with liability to pay any advance tax for any past financial year as held by the Calcutta High Court in the case of *CIT vs. T.I.& M.Sales Ltd. (114 ITR 59).*

4.3 Consequential liability to pay interest u/s. 234B or 234C

Wherever the representative assessee is liable to pay advance tax, as discussed above, the failure in doing so will of course make him liable to pay interest u/s. 234B or 234C. There can be an argument that since the provisions of S. 161 refers only to "tax" which does not include any other payment like interest etc., the representative assessee cannot be called upon to pay such interest. However, such an argument yields to the broad interpretation of the words "duties, responsibilities and liabilities" used in the same Section. Therefore, failure on the part of the representative assessee to discharge the duties, responsibilities and obligations casted upon him will naturally follow its consequences.

4.4 Furnishing of return of income

S. 139 provides specifically for furnishing of return of income by the representative assessee if the total income in respect of which he is assessable exceeds the maximum amount which is not chargeable to tax. Though, a representative assessee is liable to file a return on behalf of the principal assessee, he should file this return only in the name of the principal assessee. He needs to mention the address and PAN also of the principal assessee only. Additionally,

the forms of return contain columns for name, address and PAN of the representative assessee separately. However, in the verification column of the return, personal PAN of the representative assessee is to be mentioned.

There are many practical difficulties which are faced while furnishing of returns by the representative assessee. In a case where the return is required to be furnished only electronically, the representative assessees are unable to do so in the absence of access given to them to the account of the principal assessee. CBDT issued a Circular No. 8/2008 dated 22-9-2008 exempting agents of non-residents from electronic furnishing of return of income but only for A.Y. 2008-09. Further, practically there can be multiple returns of one non-resident assessee where in his case more than one person can be regarded as his agent. Since returns are to be filed only in the name of the principal non-resident assessees, there would be genuine difficulties in filing of returns by agents in such a scenario. Further, the representative assessee may not be in a position to provide for various other particulars related to the principal assessee which are required to be furnished in the return form like details of bank accounts etc.

4.5 Complying with the notices issued by the Income-tax authorities

The concept of representative assessee has been basically introduced for the convenience of assessment and collection of tax. The expression "subject to the same duties, responsibilities and liabilities" in S. 161(1) is wide enough to make the representative assessee liable to comply with various notices issued by the Income-tax authorities. Therefore, notice for assessment of income of the principal assessee can be issued directly to the representative assessee and the relevant details also can be called from him.

4.6 Exposure to penalties

If there is any default by the representative assessee attracting penalty under any provisions of Chapter XXI, penalty can be imposed upon the representative assessee e.g. penalty u/s. 271F for non-furnishing of return within one year from the end of the assessment year. There can be an argument that representative assessee is liable only with reference to the tax liability of the principal assessee and no penalty can be imposed on him because S. 161(1) provides that tax shall be levied upon and recovered from him in like manner and to the same extent and the word tax does not include penalty. However, S. 161(1) also provides that representative assessee shall be subject to the same duties, responsibilities and liabilities as if the concerned income were income received by or accruing to or in favour of him beneficially. The word "liabilities" should be interpreted in a wide sense so as to include penalties also. Even penalty u/s. 271(1)(c) for concealment of particulars of income or furnishing inaccurate particulars of income can be levied on representative assessee as held in *CIT vs. Master Sunil R. Kalro (292 ITR 86 Karnataka).*

However, in case where a person is regarded as an agent u/s. 163 by passing an order much subsequent to the time available for filing of return, an argument can possibly be made that he cannot be charged with the penalty for concealment on the ground that he did not submit the return and hence evaded the tax. This is because of the legal position that for appointing an agent u/s. 163 a specific order needs to be passed by the AO. Therefore, before any such order is passed, there cannot be any liability on the part of the agent.

4.7 Other miscellaneous obligations

As discussed earlier, a representative assessee is subject to the same duties, responsibilities and liabilities as if the concerned income were income received by or accruing to or in favour of him beneficially. Therefore, representative assessee shall be responsible for other miscellaneous obligations like maintenance of books of account, getting the books of account audited etc.

5. Rights of representative assessee

The representative assessee is not only saddled with the responsibilities but also privileged with various rights either expressly or impliedly which are discussed in the following paragraphs.

5.1 Right to recover tax paid

S. 162 of the Act provides for the rights of the representative assessee. Broadly the right is to recover the amounts already paid on behalf of the principal assessee and to with held the amounts likely to be paid in future on behalf of the principal assessee.

S. 162(1) provides that every representative assessee who, as such, pays any sum under this Act, shall be entitled to recover the sum so paid from the person on whose behalf it is paid, or to retain out of any moneys that may be in his possession or may come to him in his representative capacity, an amount equal to the sum so paid. E.g. a trustee can recover the amount of taxes paid by him on behalf of the beneficiaries of the trust. Thus, since there is a vicarious liability on representative assessee to pay taxes and other sums on behalf of the principal assessee, the Act confers a right on representative assessee to recover such amounts from the principal assessee. Though title of the section refers only to the recovery of "tax" paid, the provisions refer to the recovery of "any sum" paid for and on behalf of the principal assessee.

S. 162(2) provides that any representative assessee, or any person who apprehends that he may be assessed as a representative assessee, may retain out of any money payable by him to the principal assessee, a sum equal to his estimated liability under Chapter XV. Further if there is any disagreement between the principal and such representative assessee or person as to the amount to be so retained, such representative assessee or person may secure from the Assessing Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount. The amount recoverable from such representative assessee or person at the time of final settlement shall not exceed the amount specified in such certificate, except to the extent to which such representative assessee or person may at such time have in his hands additional assets of the principal assessee.

5.2 Right to file an appeal

Since a vicarious liability is cast on the representative assessee in respect of income of the principal assessee, it goes without saying that representative assessee has the right to file an appeal against the assessment or other order referred to in S. 246A. Further the order treating a person as an agent u/s. 163 is also appealable u/s. 246A. It should be noted that even the principal assessee has a right to file an appeal against the order passed on representative assessee. E.g. appeal can be filed by the non-resident directly in respect of income assessed in the hands of his agent if he disputes such assessment. Similarly a beneficiary may be aggrieved by an order made on the trust and hence he can also file an appeal [Refer *CGT vs. A.C. Mahesh (2001) 252 ITR 440 (Mad)].*

6. Conclusion

Though theoretically the concept of representative assessee appears to be very simple, it has many complications while applying it practically especially in cases of agents of a non-resident and trustees. An attempt has been made in this article to give an overview of the concept of representative assessee, its taxation and its rights and obligations. Subsequent articles in this Journal deal with the specific cases of representative assessee in more detail.

CA. Rajesh P. Shah

Trustee and his responsibility and liability

Trustee is a very powerful word as it denotes a person or firm that holds or administers property or assets for the benefit of a third party. A trustee may be appointed for a wide variety of purposes, such as in the case of bankruptcy, for a charity, a trust fund or for certain types of retirement plans or pensions. Trustee denotes Trust.

The most important aspect of a trustee's duties is its fiduciary character. A trustee is legally and morally bound to manage the trust property in a responsible and productive manner, and is under an absolute obligation to act solely for the benefit of the trust's beneficiaries. His or her duties, in general, include to (1) become fully acquainted with the terms of the trust, (2) ensure that the trust property is vested according to the terms of the trust, (3) act without charging any fee except where expressly allowed, (4) never allow his or her funds to be commingled with those of the trust, (5) never enter into any transaction with the trust, (6) never delegate his or her duties, (7) act impartially and solely in the interestof all beneficiaries, and (8) manage the trust property in a prudent and businesslike manner. The requirements for prudence may be waived if the trust's beneficiaries (of legal age and sound mind) indemnify the trustee from doing something that may disturb the terms of the trust but which all beneficiaries endorse.

The trustee act as a protector for the beneficiaries. They also have to comply with statutory requirement under various laws including Income Tax, Public Trust Act, and Foreign Exchange Management Act. They are treated as a representative assessee on behalf of the trust.

Income Tax Act 1961 defines Representative assessee means

(i) in respect of the income of a non-resident specified in sub-section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent under section 163;

(ii) in respect of the income of a minor, lunatic or idiot, the guardian or manager who is entitled to receive or is in receipt of such income on behalf of such minor, lunatic or idiot;

(iii) in respect of income which the Court of Wards, the Administrator-General, the Official Trustee or any receiver or manager (including any person, whatever his designation, who in fact manages property on behalf of another) appointed by or under any order of a court, receives or is entitled

to receive, on behalf or for the benefit of any person, such Court of Wards, Administrator-General, Official Trustee, receiver or manager;

(iv) in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise [including any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913),] receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees;

[(v) in respect of income which a trustee appointed under an oral trust receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees.

The Income Tax Act specifically includes a trust which is not declared by a duly executed instrument in writing [including any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913),] which shall be deemed, for the purposes of clause (iv), to be a trust declared by a duly executed instrument in writing if a statement in writing, signed by the trustee or trustees, setting out the purpose or purposes of the trust, particulars as to the trustee or trustees, the beneficiary or beneficiaries and the trust property, is forwarded to the [Assessing] Officer,

(i) where the trust has been declared before the 1st day of June, 1981, within a period of three months from that day; and

(ii) in any other case, within three months from the date of declaration of the trust.

For the purposes of clause (v), "oral trust" means a trust which is not declared by a duly executed instrument in writing [including any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913),] and which is not deemed under Explanation 1 to be a trust declared by a duly executed instrument in writing.]

The liability of the Trustee under Income tax arises from the above section of 160 as they are recognised as a representative assessee.

Section 161 of the Income Tax Act defines liability of representative assessee as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.

The Trusts are divided into two types of trusts in India: private trusts and public trusts. The Indian Trusts Act, 1882 governs the private trusts.

Public trusts are classified into Charitable and Religious trusts. Furthermore, trusts can also be used as pooling vehicles for investments, such as mutual funds and venture capital funds.

These trusts are governed by a separate set of regulations, the Securities and Exchange Board of India (Mutual Funds) Regulations and Securities and Exchange Board of India (Venture Capital Funds) Regulations.

Charitable Trust

The arrangement by which real or personal property given by one person is held by another to beused for the benefit of a class of persons or the general public.

The law favors charitable trusts, sometimes called public trusts, by according them certain privileges, such as an advantageous tax status.

In order to be valid, a charitable trust must fulfill certain requirements. The settlor must intend tocreate this type of trust. There must be a trustee to administer the trust.

The charitable purpose must be expressly designated. A definite class of persons comprised of indefinite beneficiaries within it must actually receive the benefit.

A charitable purpose is one designed to benefit, ameliorate, or uplift mankind mentally, morally, orphysically. The relief of poverty, the improvement of government, and the advancement of religion, education, and health are some examples of charitable purposes. Trusts to prevent cruelty toanimals, to erect a monument in honor of a famous historical figure, and to beautify a designatedvillage are charitable purposes aimed, respectively, at fostering kindness to animals, patriotism, and community well-being.

Charitable Trusts are exempt from taxation provided they comply with the guidelines provided in Section 11 to 13 of the Income Tax Act 1961.

Under Section 11, exemption of income has been provided for in respect of the following: (i) Income "applied to" charitable/religious purposes in India: Section 11(1)(a) permits exemption of income derived from property held under trust wholly18 for charitable or religious purposes to the extent it is actually applied to such purposes during the financial year. Courts have held that the word "applied" means "to put to use", "to turn to use" or "to make use" or "to put to practical use." The Madras High Court in Kannika Parameswari Devasthanam & Charities held that if the expenditure is on capital account on object(s) contained in the object clause, the expenditure will amount to application of income. Where the assessee had constructed a building out of accumulated and borrowed funds and the building was later rented out and a part of the rent was used for repayment of loan, the Karnataka High Court held that such repayment of loan was application of income. Courts have also held that donation by one charitable trust to another would also amount to application of income by the donor trust.

Private Trusts are divided and under the Income Tax Act provisions, it recognize two types of Trust viz. Discretionary and Non Discretionary from the taxation perspective.

Discretionary Trust

In a discretionary trust the beneficiaries do not have a fixed entitlement or interest in the trust funds. The trustee has the discretion to determine which of the beneficiaries are to receive the capital and income of the trust and how much each beneficiary is to receive.

In its decision in *Commissioner of Wealth Tax, Rajkot vs. Estate of Late HMM Vikramsinhji of Gondal,* the Supreme Court has reiterated the primary basis for difference in taxation of discretionary trusts versus determinate (or specific) trusts.

Non Discretionary Trust / Definite Trust / Specific Trust

In a Non discretionary trust the beneficiaries have a fixed entitlement or interest in the trust funds. The trustee has to act according to the specific instructions as per deed as to which of the beneficiaries are to receive the capital and income of the trust in what proportion.

As per the Income Tax Act, 1961, the income of a discretionary trust is taxed in the hands of the trustee while the income of a determinate trust may be taxed either in the hands of the

beneficiary or of the trustee in his capacity as the representative assesse. If it is the latter, the taxation in the hands of a trustee must be in the same manner and to the same extent that it would have been levied on the beneficiary. That is, the trustee would generally be able to avail all the benefits/deductions, etc. available to the beneficiary with respect to that beneficiary's share of income

Section 164 is the charging section whereby Charge of tax where share of beneficiaries unknown.

164. (1) Subject to the provisions of sub-sections (2) and (3), where any income in respect of which the persons mentioned in clauses (iii) and (iv) of sub-section (1) of section 160 are liable as representative assessee or any part thereof is not specifically receivable on behalf or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown (such income, such part of the income and such persons being hereafter in this section referred to as "relevant income", "part of relevant income" and "beneficiaries", respectively), tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate.

Provided that in a case where —

[(i) none of the beneficiaries has any other income chargeable under this Act exceeding the maximum amount not chargeable to tax in the case of an65[association of persons] or is a beneficiary under any other trust; or]

(ii) the relevant income or part of relevant income is receivable under 66[a trust declared by any person by will and such trust is the only trust so declared by him]; or

(iii) the relevant income or part of relevant income is receivable under a trust created before the 1st day of March, 1970, by a non-testamentary instrument and the [Assessing] Officer is satisfied, having regard to all the circumstances existing at the relevant time, that the trust was created bonafide exclusively for the benefit of the relatives of the settlor, or where the settlor is a Hindu undivided family, exclusively for the benefit of the members of such family, in circumstances where such relatives or members were mainly dependent on the settlor for their support and maintenance; or

(iv) the relevant income is receivable by the trustees on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other fund created bona fide by a person carrying on a business or profession exclusively for the benefit of persons employed in such business or profession, tax shall be charged [on the relevant income or part of relevant income as if it] were the total income of an [association of persons] :

The Income Tax Act has enacted provisions whereby transfer of assets which are revocable shall be taxed in hands of the Settlor.

Revocable Transfer of Assets

All income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income.

62 – Transfer irrevocable for a specified period

(1) The provisions of section 61 shall not apply to any income arising to any person by virtue of a transfer

(i) By way of trust which is not revocable during the lifetime of the beneficiary,

and, in the case of any other transfer, which is not revocable during the life time of the transferee; or

(ii) Made before the day of April, 1961, which is not revocable for a period exceeding six years :

Provided that the transferor derives no direct or indirect benefit from such income in either case.

(2) Notwithstanding anything contained in sub-section (1), all income arising to any person by virtue of any such transfer shall be chargeable to income-tax as the income of the transferor as and when the power to revoke the transfer arises, and shall then be included in his total income.

Section 63 – "Transfer" and "Revocable Transfer" defined.

For the purposes of sections 60, 61 and 62 and of this section, –

(a) A transfer shall be deemed to be revocable if –

  (i) It contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

  (ii) It, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(b) "Transfer" includes any settlement, trust, covenant, agreement or arrangement.

Family Trust: Trust involves transferring one's estate to a Trustee for the benefit of certain beneficiaries. Trust provides for the Management of the estate during one's lifetime and also provides for distribution and management of one's wealth post demise.

- Foreign Trust: - These trusts are well-known as offshore trust settled and registered outside India. The trustees monitor the functioning of the corpus. The various purpose for opening of such trust are:-

- Settling of any source of revenue in a Trust

- Act as a vehicle to invest into India

- Act as a holding structure

Assessment of Trust

Section 10 of the Income Tax Act from sub section 23D to 23FD gives exemption to various types of trust including Mutual funds, Securitisation fund, Venture Funds, Real Estate Funds and so on.

Certain trust file their return as an Individual whereas certain trust file their Income Tax returns as Association of person (Trust), whereas for Charitable Trust, it has a specific category as Trust.

Trustee is liable for all the compliance under various laws applicable. Specific to Income Tax Act, they are suppose to get the trust accounts audited and file the Income Tax Returns by paying proper Income tax in the capacity of representative assessee.

In nutshell Trust is an effective way of structuring various matters onshore as well as offshore. Person acting as a Trustee is the man of high repute and the society sees with high regards. It is attached with responsibility and high degree of selfless work.

CA Manoj C. Shah

Liability of an Agent of a Non-Resident

Background

Chapter XV of the Income-tax Act, 1961 (the Act) contains provisions for assessment and recovery of tax through or from persons other than assessee himself. These provisions are broadly divided into two categories (1) Legal Representative and (2) Representative assessee. The concept of Legal Representative (Sec. 159) takes effect in case of death of an assessee whereas concept of Representative Assessee (Sec. 160) takes effect where a person has been authorised expreselyby an assessee to represent himself/itself or statutorily treating someone as Representative Assessee under the Act (Sec. 163). The Act, envisages situations for RA in cases of Non-Resident, minor or lunatic or Trust. Representative Assessee in these situations is designated as Agent (in case of Non-Resident), Guardian or Manager (in case of minor or lunatic), Trustees (in case of Trust).

This article deals with one of such situations of a RA in the form of an Agent of a Non-Resident, the provisions whereof are covered in Sec. 160(1)(i) and Sec. 163. Sec. 160(1)(i) deals with situations where Agent is expressedly authorised by his Non-Resident Principal to attend to the Principal's income tax affairs. In respect of Sec. 9(1) incomes, the assessment is normally made on the agent in India. The assessee is the agent himself, and he is made substantively liable to the tax. The principal does not come into the picture vis-a-vis the Assessing Officer. It is for the agent who is so assessed and pays the tax to settle his accounts with his principal. Such agent is called ounder he Act 'Representative Assessee' under Sec. 160(1)(i). In respect of income falling in Sec. 5(2)(a) and (b) first part, i.e. income actually accruing or arising the assessment should be made on non resident directly. It would be a case where Non Resident is having a place of business (office, branch etc) in India and income has accrued to such place of business in India.

Whereas Sec. 163 is akin to deeming provisions, as it gives powers to Assessing Officer (AO) to treat certain persons as Agent of NR, though he may not in fact be an agent as understood in normal commercial parlance. The intention of the legislature here is to overcome difficulty in having access to Non-Resident. The powers under this Section are quite wide and a person may be treated as Agent of a Non Resident even though there may be validly constituted agent in India [Nandlal Bhandari Mills Ltd. (1939) 7 ITR 452 (Allahabad)].

Analysing Sec. 163 – Categories of Agent

Sec. 163 prescribes five categories of Agent i.e. persons who would be treated as Agent.

1. One who is employed by or on behalf of the Non-Resident
2. One who has any business connection with the Non-Resident
3. One, from or through whom the Non Resident is in receipt of any income whether directly or indirectly.
4. One who is the trustee of the Non-Resident

5. One, whether a Resident or Non Resident, who has acquired by means of a transfer, a capital asset in India.

It is for the A.O. to select a particular person who is connected with particular income as enumerated in Sec. 9(1) and treat him as Agent. The principle is that the person who helps the NR to make income in India should be saddled with the responsibility of payment of the tax due by the NR in respect of that income.

1. Employed by or on behalf of the NR- the meaning of the term 'employed' is not to be equated with Master-Servant relationship. But the term would include brokers, commission agents etc. There need not be a written authority for the agent to act as an agent.

2. Business Connection with NR – It would be necessary for tax department to have clear finding regarding existence of business connection before Sec. 163 can be applied. 'Element of continuity' is a must to establish business connection. Single or isolated transaction not regarded as business connection. Unlike, Sec. 9(1)(i) which looks at business connection in India' Sec. 163(1)(b) merely looks at 'business connection with the Non Resident' and hence such business connection may be outside India.

3. From or through whom the NR is in receipt of any income, whether directly or indirectly- This clause has very wide application and would include even a person who makes a remittance of income and such person would be treated as Agent of NR. The word 'through' denotes the other kind of person who pass on monies as agent being merely used as a channel for payment. In a case where, under the instructions of client, a Solicitor remitted monies to NR, the Solicitor would be treated as Agent of the NR even though the monies belonged to the client. It has been held in the case of *Birla Sunlife AMC Ltd. vs. ITO (TDS) (2010) 38 SOT 523 (Mumbai Tribunal)* that, where Birla Sunlife remitted sale proceeds upon redemption of units of a debt scheme without deduction of tax at source. ITO held Birla Sunlife to be agent of NR investors under Sec. 163. It was held that since payments were made through assessee to Non Residents, in terms of Sec. 163(1)(c), Birla Sunlife was to be treated as an agent of said NR so that assessment proceedings could be taken against Birla Sunlife. The Tribunal observed that provisions of Secs. 160, 163 and 195 are part and parcel of same integral scheme of taxation of non resident.

4. Trustee of NR – If the income in question arises to the NR by virtue of a Trust, such trustee would have to be regarded as an Agent.

5. Acquisition of a Capital Asset in India of a NR- In this case, transferee of a capital asset whether resident or non resident shall be treated as agent as he would be paying sale proceeds (comprising of capital gains) to non resident transferor.

Sec. 163 does not state that the person to be treated as an Agent should be resident in India. What is required is that, person to be treated as Agent should be a person in India i.e. subject to the jurisdiction of the Income-tax Act. The person is described in unqualified manner with a deliberate intention that person to be treated as Agent could be Non-Resident. It is entirely for the department to decide which person they would treat as an agent. A NR can be appointed, under section 163(1), as an Agent of another NR [(1954) *A.P. Damodara Shenoy vs. CIT 26 ITR 650 (Bom)].*

It is worthwhile to note that in respect of item (5) above i.e. capital gains, there is a clarity that person to be treated as agent may be resident or non resident whereas such explicit interpretation is not possible because of use of words 'person in India' in respect of (1) to (4). Accordingly, in the case of *Maersk Co. Ltd. vs. ACIT, Dehradun [(2009) 9 Taxmann.com 1010 (Delhi Tribunal)],* Delhi Tribunal's decision leads to conflicting view as it held that in view of the use of the words 'person in India', a NR cannot be appointed as Agent of another NR. In the facts of the case, Maersk (MCL) had provided platform vessel to ONGC and had

agreed to provide for crew members from its associate concern RederietAP Moller (RAPM). Crew members were employees of RAPM and had a contract of employment with RAPM. Assessing Officer& CIT (Appeals) treated MCL to be the Agent of crew members (expatriate employees). The Tribunal, however, observed that MCL was not paying salary to expatriate but salary was paid by RAPM. Further, there was a choice available with AO to treat ONGC as Agent. It is however, respectfully submitted that, the decision of the Tribunal needs reconsideration, specially on the observations that a NR cannot be appointed as agent of another NR. The meaning of the term 'person resident in India' as expressed in A.P. Shenoy (supra) should prevail and it justifies the intention of the legislature in not qualifying residential status so as to recover tax from any person who is in a position to ultimately adjust from NR the tax which he might pay to Indian tax authorities.

Before a person can be treated as an Agent, that person must have a connection or concern with the source of income he is sought to be taxed for. The intention is that the person so treated as an agent should be in a position to ultimately adjust with his NR principal the payments which he makes to the revenue on behalf of the NR.Therefore, there may be as many Agents as many are the streams of income of a NR.

At the same time, fact that while making payment to principal, agent has deducted tax at source under section 195 would not be a bar to proceed and pass an order against it under section 163. *[40 SOT 34 (2010) Mumbai Tribunal- Hindalco Indusries Ltd. vs. DCIT)*

There is a proviso to Sec. 163(1) carving out exception to the above categories of Agent of NR in a case where Resident broker is not dealing directly with NR principal but is dealing with NR broker and both such brokers (Resident as well as NR) are dealing in their ordinary course of business.

It is worthwhile to note that, there can be more than one agent of a NR and each will be assessed separately on income in respect of which he is agent. Similarly, a person may be agent for more than one NR, but assessment will be separate.

Circumstances where treatment as Agent is not possible

1. A.O. will have to establish that there is liability on the part of NR to pay tax. In the absence of such a finding, the person sought to be treated as Agent can challenge the appointment as improper. *[Abdullabhai Abdul Kadar vs. CIT 22 ITR 241 (1952)]. [(2014) 49 Taxmann.com 400 High Court of Calcutta]*

2. For the income taxable in the hands of NR in terms of Secs. 5(2)(a) & (b) first part (i.e income actually arising or accruing in India), assessment has to be made on NR directly. The treatment as Agent and in turn as representative assessment is possible only on income deemed to accrue or arise in India under Sec. 9(1).

   It has been held in the case of *ITO vs. Sidhharth S. Patel [(2012) 25 Taxmann.com 420* Ahmedabad Tribunal], where assessee had purchased plot of land from a Resident. The Resident seller had executed General PoA in favour of seller and upon her demise, her legal heirs who were all NR, also executed General PoA in favour of assessee. The assessee was treated as representative assessee of legal representatives of late 'S' and assessment was made accordingly. On appeal, the Commissioner (Appeals) cancelled the assessment holding that power of attorney given by legal heirs of late 'S' was also in consequence of the original transaction entered into by the assessee late 'S' and, therefore, the assessee could not be made legal representative/agent of the non-resident, i.e., legal heirs of late 'S'. The Tribunal observed that admittedly, late 'S' was not a non-resident. Considering the totality of the above facts, neither section 160(1) nor section 163(1) was applicable. Therefore, the order of the Commissioner was to be sustained.

3. Representative Assessee treatment is possible only in respect of NR- if during the accounting period under reference, recipient of income was Resident and later on such person became NR, provisions of Sec 163

cannot be invoked for the period when recipient of income was having status of Resident and Ordinary Resident. *[(2014) 48 Taxmann.com 1 High Court of Delhi, Comverse Network Systems (I) Pvt. Ltd. vs. CIT]*

Agent's liability as a RA

In terms of Sec. 161(1), RA shall be subject to same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially. Therefore all the compliances of filing return of income, responding to notices, assessment proceedings, furnishing of accounts, documents asked by AO etc., will have to be undertaken by Agent and failure to such compliance or deliberate attempt to furnishing inaccurate particulars of the income, would make such Agent liable for penalty under section 271.

Prior notice by AO to the proposed Agent

It is necessary for the AO, in terms of Sec. 163(2), to offer an opportunity to be heard to the proposed Agent by issuing Notice to him. *[CIT vs. Sambandam & Co. (S.G.) (2000) 242 ITR 708 (Madras)]*. Also in the case of *Suez Tractbel S.A vs. DDIT (Intl Taxation) Bengaluru*, it was held by Bangalore Tribunal [(2013) 35 Taxmann.com 419] that where before treating Indian company as agent of foreign company under section 163, neither any opportunity of being heard was given to enable filing of objections, nor any order was passed under section 163, Indian company could not be assessed as an agent of foreign company as per section 163.

Unless one is appointed statutory agent, no liability as 'Agent' can be fastened upon him. The agent so appointed shall have liability as representative assessee only for the assessment year under reference. However, in the case of *HCL Ltd. vs. CIT (1993) 199 ITR 291 (Delhi),* it has been held that as the assessee itself has filed a return in response to a notice under Sec. 148, which was issued without following the procedure laid down in Sec. 163(2), in the capacity of a representative assessee of the NR, the point as to the validity of the reassessment notice did not arise.

Direct Assessment or Recovery Not barred

In terms of Sec. 166, direct assessment or the recovery of tax from NR is not barred. However, revenue cannot proceed simultaneously against NR and against his RA simultaneously. While, no reassessment proceedings can be initiated against RA if an income has been assessed in the hands of a *NR [(1986) 159 ITR 583 (Cal) CIT vs. Alfred Herbert (I) Pvt. Ltd.* But, the Supreme Court, in the case of *Claggett Brachi Co. Ltd. vs. CIT [(1989) 177 ITR 409]* held that a reassessment can be made on NR even where original assessment has been made on RA.

Time limit for issue of Notice of Reassessment

In terms of Sec. 149(3), no notice under Sec. 148 can be served on a person treated as agent of NR as per Sec. 163, after the expiry of a period of six years from the end of the relevant assessment year.

Right of Appeal of an Agent

Sec. 246(1)(d) provides for appeal against order passed under Sec. 163 treating assessee as the agent of NR. It would be advisable in the case of a refund to get assessed as agent under Sec. 163 instead of Sec. 195 and expect speedier refund.

Conclusion

The Act provides wide power to tax department to treat certain persons as Agent of NR so as to overcome difficulty in accessing NR to tax him and make recovery. The basic ingredients however for treating a person as Agent (RA) of NR are, the person/assessee must be NR (& not Resident or Resident but not ordinarily resident) in respect of whom a person is to be treated as Agent, such NR's income should comprise income of the nature prescribed in Sec. 9(1), the person so treated as Agent should be in a position to adjust from payments to be made to such NR the dues in the form of Income tax, and before treating a person as Agent, opportunity of being heard is a must.

Neelam C. Jadhav, Advocate

Liability after death of Assessee – Legal Representative/Executor

Introduction

In general and in broadest sense, the person one who stands in place of, and represents the interests of another, who oversees the legal affairs of another. e.g. the executor or administrator of an estate and a court appointed guardian of a minor or incompetent person is known as Legal Representative. The term is almost always held to be synonymous with the term personal representative.

In Legal term, a personal representative having legal status:

i. One that represents another (as a deceased): one that succeeds to the interest in property of a person living or corporate — compares administrator, assignee, curator, executor, guardian, heir, legatee, receiver, trustee in bankruptcy, distribution.

ii. An agent having legal status; especially : one acting under a power of attorney

Before discussing the said provision of Legal Representative, it is useful to mention that the definition of the word legal heir/legal representative as per section 2(29) of the Act is adopted from clause (11) of section 2 of the Code of Civil Procedure, 1908. Section 2(11) of the Civil Procedure Code runs 'Legal Representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

As Income-tax Act is concerned, the legislative history of the term "Legal Representative" was corresponds to section 24B of the Income-tax Act, 1922, which was follows :

> "24B : Tax of deceased person payable by representative – 1. Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge of tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died.

The said section 24B has remained unamended since its enactment in 1961. The language of section 24B was found unsatisfactory in many respects. It made the legal representative liable only for the tax assessed on, or payable by,

deceased and cast no personal liabilities on the legal representatives.

The Law Commission recommending the changes with remarked that languages of the section 24B did not deal steps by steps with the various stages at which the proceedings might stand at the time of death. The Income-tax Act, 1961 has made certain changes. It has split up the charge of tax on the legal representative of the deceased assessee into two, one dealt with by Section 159 and other by Section 168. Chapter XV of the Income Tax Act, 1961 deals with the issue of Liability in Special Cases, wherein section 159 defines the term Legal representatives and Section 168 defines the term Executors. Section 168 and 169 were newly inserted by supplement provision of section 159. Section 159 and 168 are redrafted provisions relating to the assessment of Legal Representative of the deceased persons contained in section 24B of 1922.

Object and scope of section 159 and section 168

Section 159 is enable an assessment being made and tax recovered in respect of income of the natural person who was alive during a previous year but died before the proceedings for assessment were set in motion or completed. Death of a person who is liable to pay tax under the Act would not get extinguished on account of his death. If he dies, his legal representative shall be liable to pay any tax which would have been liable to be paid by such person if he had not died. The position is clear that for the purpose of assessment, reassessment or recomputation under s. 147, any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of death of the deceased.

The scope of liability of the estate different from the personal liability of the legal representative. The legal representative is liable to pay out of the estate any sum which the deceased would have been liable to pay. The liability is thus not confined to the amount of tax only. It extendsto liability in respect of penalties, interest, annuity deposits or any other sum. That would have been payable under the Act.

Separate assessments must be made under section 168 on the total income of each completed previous year or part thereof included in the period commencing from the date of death of the deceased to the date of complete distribution of the estate to the beneficiaries thereof according to their several interests. Explanation to section 168 further provides that the term 'executor' for this purpose, must be taken to include an administrator or other person administering the estate of a deceased person.

The Supreme Court was dealing with section 24B of the Income-tax Act, 1922 which is in *pari materia* with s. 159 in *CIT vs. Amarchand N. Shroff (1963) 48 ITR 59 (SC).* The personality of the deceased assessee was extended for the duration of the entire previous year in the course of which he died. Therefore, the income received by his legal representatives after his death but in that previous year also becomes taxable affirming the Bombay High Court. The same view had taken by the Madras High Court in the case of *CIT vs. Administrator to the estate of L.D. Miller (1965) 57 ITR 478 (Mad) (HC)*

The income accruing to the estate of the deceased could be taxed in the hands of the executor under section 168 till the administration of the estate is complete. An executor comes into the picture only where there is a will. An administrator is appointed by the Court. If none of these conditions is fulfilled section 168 will not be applicable.

Liability of the Legal Representative

a. Relating to filing of Income Tax Return of Deceased Person

Filing of Income Tax Return and liability to pay taxes on income of deceased is same as alive person. The only difference in two is that in case of alive assessee himself files Income Tax Return whereas in case of deceased assessee liability to file return and pay taxes is on legal representative. The legal representative of the deceased shall, for the purposes of this Act, be deemed to be an assessee. Legal representatives would be personally liable to the extent of the assets to which they come into possession, because there is an automatic charge on such property left by the deceased. This position of law relates only to his individual income.

Income of the deceased prior to his death is taxable in the hands of legal heirs of the deceased as a legal representative and not in the individual capacity. *CIT vs. Maharaja RanaInderjeet (2003) 185 CTR 65 (Raj.)(HC).* Once it was clarified that the assessment is made on the assessee not in his 'individual capacity' but as a legal heir of the deceased, income of deceased prior to his death could not be excluded from the said assessment.

The legal fiction under section 159 is only restricted for the purpose of completing the assessment proceedings for that year. Any income which was received before the death of the original assessee and which was paid subsequent to his death and received by his heirs and legal representatives but paid in the same year, should be treated as income of the assessee and the legal representatives will be assessed on behalf of the original assessee.

b. Return after the date of death

Section 168(3) deals with the legal representative of the deceased is liable for a separate return is required to be filed from the date of death of the deceased assessee to the last day of the financial year. Liability to pay taxes on income and to file return up to the date till he does not distribute property of the deceased among legal heir(s) and beneficiaries or up to the date till income on property of deceased stops to arise. It must be required to file from 1st day of financial year to the date of death.

The income received or accruing to, the deceased person till the date of his death can, indisputably, be taxed in the hands of legal representative of the deceased person by invoking the provison of section 24B of the the Income-tax Act, 1922 or of section 159 of the Income-tax Act, 1961. In the case deceased had died intestate, the estate left by him is to devolve, as per the law of succession. In such a case whatever income accrues or received from the estates belongs to the respective legal heirs and same is assessable in the hands of the legal heirs.

In case of one or more legal heir: If there is only one legal heir of the deceased then return should be filed as "Estate of Deceased" in individual capacity, but in case of more than one legal heir then as per the provisions of Income-tax Act return is required to be filed in capacity of AOP or BOI.

Set off of Carry Forward Losses: If income of deceased is having Income from Capital Gain and also contains loss under Capital Gain then it can be set-off as per the provisions.

Joint Bank Account of Deceased: If taxpayers have joint account and one of the A/c holder dies then account can be continued as it was operated before by the survivor.

c. Notice issued by ITO

The duty of the legal representative of the deceased assessee is to intimate about death of a person to his concern ITO. If the ITO is known about the death of the assessee he cannot issue notice in name of deceased, and if he does so and makes assessment on the dead

person then such assessment will be void *ab initio.*

The process of making assessments on the legal representatives had been an area of controversy and the Revenue invariably wanted to proceed against one of the many legal representatives and frame an assessment or reassessment by issuing notice to him and thereafter claim that the service of notice of one of the legal representatives and that it is not essential to serve separate notices on each one of the legal representatives in order to make a valid assessment or reassessment but tax-payers have been contending that service of notice on one of the legal representatives is not adequate and that it is obligatory for the Revenue to make service of notice on each of the legal representatives failing which the action for assessment or reassessment would be invalid and void *ab initio.*

The old provision of Income-tax Act, that is applicability of sec. 24B inserted w.e.f. 11th Sept., 1933 it does not apply retrospectively. Therefore, assessment on legal representatives cannot be made under s. 24B in case death of assessee occurred prior to coming into force of that section. In the case of *CIT vs. D. N. Mehta (1935)3 ITR 147 (Bom.)(HC),* on 20th April, 1932, a notice was served under s. 22(2), IT Act, requiring to make a return in respect of income for the year 1932-33. Assessee died on 6th May, 1932, before any return had been made, and the question which arises is whether her estate is liable for the tax in respect of the year 1932-33 under the provisions of the Amendment Act, she having died before the Act was passed. The Hon'ble High Court held that if the legislature had intended that the new section should have a retrospective operation, it would have taken care to indicate such intention in express terms. Therefore, the section has no retrospective effect, and the provisions of s. 24B apply to those cases in which the person, the liability of whose executor, administrator or other legal representative is in question, has died when s. 24B came into operation or at any time thereafter. Sec. 24B has no retrospective operation.

The judgment of *Maharaja of Patiala vs. CIT (1943) 11 ITR 202 (Bom.)(HC)* the late Maharaja of Patiala had income from property and business in British India, He died on 23-3-1938. On 23-11-1938 the ITO sent two notices under sections 22(2) and 38 of the Indian Income-tax Act, 1922 addressed to the Maharaja of Patiala requiring him to make a return of his income. They were served upon the successor Maharaja, Returns were filed, signed by the Foreign Minister of Patiala. The succeeding Maharaja appealed against the assessment orders contending that inasmuch as the notices were sent in the name of Maharaja of Patiala and not to him as the legal representative of the Maharaja of Patiala, the assessments made were illegal. The contention was that the notices were really addressed to the late Maharaja, who was not alive when the said notices were issued and that they were wrongly served upon him. As the present Maharaja (who raised the contention of nullity) was the legal representative of the late Maharaja of Patiala and because the return of the Late Maharaja's income was made by the Foreign Minister on his behalf and because he knew perfectly well that what was being assessed was the income of his predecessor, the assessment made, though not complying strictly with section 24B (corresponding to section 159 of the present Act), is yet valid.

Notice for reassessment issued on the person known to the Department to be dead is invalid as held by the Madhya Pradesh High Court in the case of *Shaikh Abdul Kadar vs. ITO (1958) 34 ITR 451 (MP)*

CIT vs. Jayprakash Singh (1996) 219 ITR 737 (SC) quashed the reassessment where notice u/s

148 was not served on all the legal heirs of deceased assessee.

d. Assessment

– Any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased.

– Any proceeding which could have been taken against the deceased if he had survived, may be taken against the legal representative; and

A legal representative is an assessee for the purpose of assessment and for the purpose of recovery of taxes as well, for the fiction of treating a legal representative as an assessee does not come to an end on the completion of assessment.

If the legal representative, who was proceeded against under s. 24B(2), must be deemed to be an assessee for the purpose of assessment, levy and collection of tax, the provisions of ss. 45, 46(1) and also 46(2) must apply to him. The fiction of treating the legal representatives as assessee in sub-s. (2) of s. 24B does not come to an end when the assessment proceedings are over, but logically extends to the collection of the tax from the legal representatives of the assessee. First *Additional Income Tax Officer & Anr. vs. T. M. K. Abdul Kassim (1962) 46 ITR 149 (SC).*

Assessment cannot be framed on the dead person, where the assessee had already died, and search was conducted thereafter section 159(2) was not attract and no assessment could be framed on dead person. The view has been taken by the Indore bench in the case of *Late Laxmibai Karanpuria vs. ACIT (2011) 130 ITD 40* in terms of provision of section 159, proceedings can be continued against legal representative of deceased assessee only if same have already been started during lifetime of assessee. where search proceedings were initiated after death of assessee, it was not justified in framing assessments on basis of said proceedings.

CIT vs. Dalumal Shyanumal (2005) 276 ITR 62 (MP)(HC) If the A. O. passed the assessment order after the death of the assessee without notice to any of the legal representative then the said assessment is considered to be the null and void in the eyes of law.

e. Reassessment

In the case of reassessment of the deceased person, the reassessment notice must be issued to the executor who have been appointed under the will left by the deceased or legal representative. In case of deceased dies intestate and the administrators in his capacity as a legal representative. Reassessment relates to income which is alleged to have been received by the deceased during his lifetime before his death as alleged to have escaped assessment. Therefore, said legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died in the like manner and to the same extent as the deceased. Sub-s. (2) of s. 159 is the section which deals with the manner in which the said assessment for recovery could be made. Clause (a) of sub-s. (2) enjoins any proceeding taken against the assessee before his death shall be taken against the legal representative. Any proceeding which could have been taken against the deceased if he had survived may be taken against the legal representative.

In the case of *ITO & Anr. vs. Maramreddy Sulochanamma (1971) 79 ITR 1 (SC)* notices for reassessment sent to all the daughters of deceased but not to his mother or to the trustees. Assessing Officer has not made a proper enquiries before treating the daughters as legal representatives, said notices of reassessment is held to be ineffective.

*Trustees & Executors of The Late Shri Shamji **Kheta vs. Income Tax Officer (1982) 148 ITR 2199(Bom.)(HC)*** the said judgment held that reassessment of income of the deceased for years prior to the year in which he dies could not be made in the hands of the legal representative u/s. 24B of the Act, 1922.

The Madhya Pradesh High Court has taken view regarding the notice of reassessment u/s. 148. Notices issued on the dead person are purposeless and defective, no valid reassessment can be made on such notices. *Shaikh Abdul Kadar vs. Income Tax Officer (1958)* ***34 ITR 451 (MP)(HC)***

The Jodhpur Tribunal has taken view in the case of *ACIT vs. Late Mangi Lal Through L/H Badri Prasad Bhatia (2004) 4 SOT 130 (Jd.)(Trib.)* by affirming the *CIT vs. Jayprakash Singh (1996) 219 ITR 737 (SC)* that reassessment was null and void where notice u/s 148 was not served on all the legal heirs of deceased assessee.

If the A.O. had issued the notice u/s. 148 in the name of the assessee who is already expired, then proceeding initiated u/s. 147 is bad in law. And the legal representative will not affect the same.

f. Hindu Undivided Family(HUF)

HUF by every name and nature is a legal entity but not being a natural person or living person cannot die and cannot, therefore be regarded as deceased person. Section 168 applies only contemplates necessarily a natural person living and dying. An artificial person having a legal entity like HUF or Company, etc. cannot have a natural death or natural life and therefore in case the properties held by such legal entities, there can be no question of death nor any question of assessment under section 168.

The Madras High Court in the case of *CIT vs. P. Vilasakshi & Anr. (1996) 217 ITR 282(Mad) (HC),* property had not appreciated that total inapplicability of Sec. 168 to the death of the Karta of HUF because on death of the Karta, it cannot said that family also died nor it be said that Karta could be leave a will in respect of joint family property for the purpose of determining who should be legal owner/ heir to succeed such property. The surviving members of the family have right under Hindu Law and their rights of succession.

g. Demand

Where a notice u/s. 148 in pursuance of the which assessment was framed was issued in the name of deceased assessee. A no notice was in the name of the legal representative. The demand and penalty u/s. 221(1) was not correct and will levied on the legal representative.

h. Refund in case of deceased

The legal representative of the deceased assessee is liable to receive the refund of the deceased same as he liable for an assessment. It is a duty of the Legal representative to have claimed a refund amount of the deceased assessee. And the same is taxable in the hands of legal representative.

Refund was availed only when it was ordered and it could be received only subsequently. The fiction could not be extended beyond what it was intended. It was submitted that on the basis of equity, this interest should have been treated as income of the deceased. As it is well-known, tax and equity are strangers. Hence, income received by the petitioners as interest on refund of the amount deposited by the father, the original assessee, was to be treated as income of the legal representative.

If refund has been claimed or to be claimed then it can be issued by appropriate name to Legal Representative Estate. In the case of *Kerala High Court P.V. Chandran vs. CIT (2001) 248 ITR 761,* held that Interest on the refund accrued and received after the death of the assessee by the representative same is taxable in the hands of legal heirs. The petitioners

were sons and legal heirs of 'P', who was a partner in a firm. When the assessment of the firm was revised as per the appellate order, assessment of 'P' for earlier years was also revised and the legal heirs got refunds which included interest under section 244(1A).

i. Penalty

Penalty proceedings pending against the deceased may be continued against the legal representative. The word "any sum" has been substituted in sec.159 (1) in place of "any tax" which occurred in old section 24B(1) so as to cover not only tax payable by the assessee but also any penalty or interest. In consequence section 159(2)(a) if penalty proceedings are pending against the deceased, the same should be continued against the legal representative.

Penalty orders were passed not against the deceased, but against the petitioner, who was very much alive. Accordingly, the orders could not be said to have been passed against a dead person.

In the case of an assessee under section 24-B, the liability is not merely to assessment but also to enforcement of that liability under the relevant provisions of the Act including liability to penalty under section 46(1) and to enforcement of liability under section 46(2). Furthermore, the default, by reason of which a penalty was imposed under section 46(1) on the petitioner was not the default of the deceased in the payment of income-tax dues, but it was the default of the legal representative himself. Therefore, there was nothing illogical or illegal in a penalty for such default being imposed on the person whose default it was.

A penalty can be properly imposed under sub-section (1) of section 46 on a legal representative where the tax due under an assessment made on his deceased predecessor or under an assessment made against him under section 24B(2) is not paid and the default is committed by the legal representative in regard to the payment of such tax.

In the case of *Tapati Pal vs. CIT (2004) 241 ITR 468 (Cal.)* found that there is no prohibition on in law against the levy of penalty on legal representatives. Since assessee was liable to pay tax and be treated as deemed assessee after death of her father, under provisions of section 159 there was nothing wrong in initiating penalty proceedings against assessee after death of her father.

No Penalty Proceedings can be initiated against deceased assessee. The Hon'ble Appellate Tribunal, Delhi in the case of *ITO vs. V. P. Sharma (Delhi) [2006] 154 Taxman 34 (Delhi)* held that the purpose of assessment of the deceased assessee and not for penalty purposes, that any proceedings which could have been taken against the deceased, had he survived, may be taken against the legal representation [as has been provided in section 159(2)(b)].

j. Recovery

Recovery proceedings is already pending against the deceased at the time of the death, the recovery can be continued in the hands of legal representative *vide* rule 85 of schedule II of the Income-tax Act, 1961

In the case of *S. P. Adampariya vs. ITO* the view taken that Tax Recovery Officer is empowered to continue recovery proceedings against legal representative of defaulter from stage at which it was left on death of defaulter and in said proceedings all provisions of Second Schedule would apply as if legal representative is defaulter.

k. Prosecution

The provision of section 159 does not provide launching prosecutions against legal representative for offence committed by deceased. The prosecution for any offence like tax evasion would abate with the death of the deceased. The sections 159(6), 189(3) and 189(5)

make it clear that they relate to the penalty imposable by the authorities of income-tax falling under Chapter XXI from section 271 and do not relate to the prosecution and offences falling under Chapter XXII from section 275A.

Section 305 of the Criminal Procedure Code is applicable only to corporations or registered societies. It is not applicable to a firm.

l. Liabilities related to Wealth Tax

U/s. 19 of Wealth Tax Act, liability to pay wealth tax on property of deceased is on legal representative. However, Income Tax Officer (ITO) cannot impose any penalty on legal representative.

m. Executors

The income that the income accruing to the estate of the deceased could be taxed in the hands of the executor under sec. 168 till the administration of the estate is complete. An executor comes into the picture only where there is a Will. An administrator is appointed by the Court. If none of these conditions is fulfilled sec. 168 will not be applicable.

The issue whether the executor is assessable or the assessment should be made on the trustee as representative assessee is an intricate question of law for which there can be no generalised answer and, therefore, in each case, the facts and circumstances of the respective case must be gone into to reach a decision not only having regard to the provisions of the Income-tax Act but also the relevant provisions of the Indian Succession Act and the law relating to trusts applicable.

The status of an executor continues till the administration of the estate of the deceased comes to an end and only after the estate is completely distributed and nothing further remains for administration thereof, the executor can claim to be not liable to income-tax under the Income-tax Act in respect of the income of the estate of the deceased administered by him as per the Will of the testator.

The executor cannot claim to be a trustee and on that score, disclaim his liability to tax for the reason that the beneficiaries can be assessed directly and so long as the beneficiaries file their returns and pay the taxes, the trustee cannot be held liable as representative assessee in respect of the income of the trust distributed to the beneficiary thereof. The fact that the deceased executed Will under which the persons named therein are appointed as executors and trustees would not by itself justify the claim of the executors that they are not functioning or answerable in the status of executors nor can they justify their claim of status as trustees. The legal status of an executor as trustee and *vice-versa* would, therefore, be material for consideration for arriving at a decision as to the status of the person to be assessed and depending upon the status, the relevant provisions of the Act to the invoked and the corresponding rights and obligations to be identified for enforcement thereof.

The Supreme Court has pointed out in the case of *K.R. Patel (1999)239 ITR 738(SC)* Examination of the provisions of law and decisions does not lead to lay down any rule of law as to when an executor sheds his character as an executor and when he wears the robes of a trustee. It all depends on the construction of the Will as to when the testator desired the trust to come into being. When the functions of the executor administering the estate of the testator came to an end. U/s. 302 of the Indian Succession Act, 1925, when probate in respect of any estate has been granted, the High Court may, on application made to it, give to the executor any general or special directions in regard to the estate or in regard to the administration thereof. Section 317 of that Act imposes various duties on the executors.

Even if the executor under a Will is the sole beneficiary it does not necessarily follow that the income is received by him in the status of beneficiary and, hence, not taxable as executor. The executor in law retains his dual capacity and would, therefore, be chargeable to income-tax in respect of the income derived by him from the estate of the deceased. Until the administration of the estate is completed, the status of executor would continue and liability to income-tax would run simultaneously u/s. 168 as held by the Punjab & Haryana High Court in *CIT vs. Bakshi Sampuran Singh (1982) 133 ITR 650 (P&H).*

The liability of the executor will continue till such time the estate of the deceased is fully administered and completed. In the year of death of the deceased, there would be two assessments – one on the legal heirs under section 159 up to the date of death and the other on the executor from the date of death to the end of the accounting year or even till the complete distribution of the estate of the deceased as per the terms of the Will.

The imposition of tax on the executor and assessment being made for the purpose is mandatory u/s. 168 and the same cannot be regarded as optional for the executor to choose as and when he wanted as can be seen from *CIT vs. Mrs. Usha D. Shah (1981) 127 ITR 850 (Bom)(HC).*

The Supreme Court in *Navneet Lal Sakarlal vs. CIT (1992) 193 ITR 16 (SC)* has also held that the executor would continue to be chargeable to income-tax u/s. 168 until the estate of the deceased is distributed completely to the beneficiaries thereof in accordance with the terms of the Will.

The legal position as to the status of an executor coming to an end and that of a trustee commencing would be worthwhile to examine in each case in the light of the terms and conditions of the Will and also the factual and legal position in regard to the administration of the estate of the deceased including the stage of its completion, and only thereafter it would be possible for one to reach a decision whether the executor named as such in the Will is chargeable to tax under section 168 or he would be liable to be assessed as a trustee or representative assessee under sections 160 and 161.

n. Right of executor to recover tax paid

The provisions of section 162 shall, so far as may be, apply in the case of an executor in respect of tax paid or payable by him as they apply in the case of a representative assessee.

Section 168 of the Income-tax Act contains special provisions for the purpose of making assessment on executors by laying down that the income of the estate of a deceased person shall be chargeable to income-tax in the hands of the executor. If there is only one executor, he would be assessable as if he were an individual. If there are more executors than one, they would be assessable as an association of persons. The residential status of the executor/s shall be the same as that of the deceased person during the previous year in which he died. The assessment on an executor under section 168 shall be made separately from and over and above the assessment that may be made on him in respect of his own income and, thus, the executor will have more than one assessment and may have different residential status for different assessments.

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Liability in case of firms and AOP/BOI

In this Special Issue of the journal on "Liability in Special Cases" this article deals with certain important aspects concerning liability in case of firms and other entities like Association of Persons (AOP) or Body of Individuals (BOI) covering sections 167A to 167C, section 177 & Chapter XVI of the Income-tax Act, 1961 ["the Act"]. This article though not exhaustive, I believe, will be helpful in serving as a guide towards ascertainment of liability in case of Partners & Firms and that in the case of AOP/BOI. For the sake of convenience I have divided the article in broadly two parts, one dealing with provisions pertaining to assessment and liability in case of firms and the other dealing with provisions pertaining to liability in case of AOP / BOI.

1. Provisions pertaining to Assessment and Liability of firms

The provisions pertaining to assessment of firms are contained in Chapter XVI of the Act. Section 184 of the Act states as follows:

"Assessment as a firm.
184. (1) A firm shall be assessed as a firm for the purposes of this Act, if —

(i) The partnership is evidenced by an instrument 61; and

(ii) The individual shares of the partners are specified 62 in that instrument 61.

(2) A certified copy of the instrument of partnership referred to in sub-section (1) shall accompany the return of income of the firm of the previous year relevant to the assessment year commencing on or after the 1st day of April, 1993 in respect of which assessment as a firm is first sought.

Explanation.—For the purposes of this sub-section, the copy of the instrument of partnership shall be certified in writing by all the partners (not being minors) or, where the return is made after the dissolution of the firm, by all persons (not being minors) who were partners in the firm immediately before its dissolution and by the legal representative of any such partner who is deceased.

(3) Where a firm is assessed as such for any assessment year, it shall be assessed in the same capacity for every subsequent year if there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the assessment as a firm was first sought.

…"

As per the above section a partnership firm is assessed as such only if it fulfils the two conditions stipulated therein viz., it is evidenced by a deed / instrument and the shares of all the partners therein are known. At the same time section 185 provides for assessment of a firm which does not fulfil the conditions stipulated in section 184. The basic question which therefore arises is in what status is a firm assessed which does not comply

with section 184. Though the status of a firm does not get altered for the purpose of Partnership Act or any other Act merely because the conditions stipulated in section 184 are not fulfilled, in order to overcome an anomalous situation and an apparent conflict with the Partnership Act section 185 was amended in 2003 by Finance Act, 2003. Till this amendment section 185 provided that a firm not fulfilling conditions laid down in section 184 would be assessed as an AOP. However after the amendment of the said section it is now provided that a firm not fulfilling conditions stipulated in section 184 would be assessed as such except that it will not be allowed any deduction of salary / interest / remuneration etc. paid to its partners. Once this aspect is clear let us further see as to how the assessment of a firm is to be conducted under the Act and how is the liability arising therefrom to be dealt with.

Section 187 of the Act provides for assessment to be made in case of change in constitution of a firm while section 188 provides for the same on its succession and section 189 provides for ascertaining the liability in case of a firm which is dissolved or which discontinues business. As per section 187 an assessment is to be made on the firm with the constitution it has at the time of making its assessment meaning thereby that those persons who are the partners of the firm at the time of assessment are collectively assessed as a firm even though they may not have been involved in the activity of the firm when the income was earned. Let us see some situations based on which the liability of the firm as also that of the partners can be analysed.

- **Situation 1:** The liability in case of firm with the same constitution during the previous year when the income is earned as well as at the time of making an assessment. In the first instance the firm is liable for its tax dues and if it cannot be so recovered from the firm then the same is to be recovered from the partners. As far as this aspect is concerned there is no ambiguity and the partners who earned income are liable to pay tax on the same which is determined after the assessment is completed and the liability cannot be recovered from the firm. This position is clear even as per the Partnership Act according to which the liability of partners is unlimited and hence they will be liable jointly and severally in respect of tax dues of the firm and on the death of any of the partners his legal representative shall be liable to the extent of estate of the deceased. We know that a Limited Liability Partnership ["LLP"] is given the same tax treatment as that of a firm (Ref. Circular No. 5/2010 dated 3-6-2010) except with certain modifications as contained in the Circular. We therefore do not need any further deliberation on this except for the fact that as far as the liability of partners of an LLP is concerned the same is dealt with a little differently by virtue of section 167C. As per section 167C the tax dues of a firm are not paid by the firm the same are liable to be recovered from the partners of an LLP jointly and severally except in a situation where a partner is able to prove that the non-recovery is not attributable to any gross negligence or misfeasance or breach of duty on his part. To this extent the partners of an ordinary firm have no such option or opportunity to prove that non-recovery cannot be attributed to them. The law on this aspect of the matter in the above situation is therefore much clearer than those we are about to deal in the ensuing paragraphs.

- **Situation 2:** Liability of the firm as well as the partners in case of change in constitution of the firm after the relevant previous year i.e. a situation where the partners were different during the previous year than those during the course of assessment. Section 187 of the Act deals with such situations which is reproduced as follows:

"187. (1) Where at the time of making an assessment under section 143 or section 144

it is found that a change has occurred in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment.

(2) For the purposes of this section, there is a change in the constitution of the firm—

(a) If one or more of the partners cease to be partners 68 or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change continue as partner or partners after the change ; or 68

(b) Where all the partners continue with a change in their respective shares or in the shares of some of them :

Provided that nothing contained in clause (a) shall apply to a case where the firm is dissolved on the death of any of its partners."

As can be seen from the above, as per section 187 of the Act in case of a change in the constitution of the firm at the time of making an assessment, the assessment is to be framed on the firm so constituted at the time of assessment. As far as the erstwhile/ retired partners are concerned the Hon'ble Supreme Court has categorically held in the case of *Third ITO vs. Arunagiri Chettiar – [1996] 220 ITR 232* that even where a partner retired from the firm, his liability to pay the tax levied on the firm in respect of periods while he was a partner subsists and that arrears of such tax of the firm can be recovered from the erstwhile partner, though the assessment was framed on the firm as it existed after the retirement of the partner. Further even as per section 25 of the Partnership Act every partner is liable jointly and severally with all the other partners for all acts of the firm done while he is a partner. However as far as the new partners of the re-constituted firm are concerned this provision poses a serious issue. It may even appear unjust to the new partners since on the failure of the firm to pay the tax the same would be recovered from them as well. This may result in a situation where the actual persons who earned the income may not be partners any more and those who did not enjoy the said income but are partners at the time of making the assessment are made liable to pay tax on the income earned by the erstwhile partners and it is because of the operation of section 187 that the new partners on whom the assessment is made also become liable. This appears to be unfair to the new partners. In fact the Hon'ble Kerala High Court in the case of *Excel Productions vs. CIT – [1971] 80 ITR 356 (Ker.)* has held that where there is a change in the constitution of a firm during the previous year, separate assessments under section 188 are ruled out and that assessment had to be made on the firm as constituted at the time of making the assessment. It is therefore clear that even the new partners will be liable for the deeds and acts of the old ones resulting in tax liability. In fact the Full bench of the Hon'ble Allahabad High Court in the case of *Dahi Laxmi Dal Factory vs. CIT – (1976) 103 ITR 517 (All) (FB)]* has held that *"As the liability to pay the tax of a firm is joint and several of all the partners, the new partners who are introduced will become liable to the payment of tax on profits in which they had no share. In a way this provision casts a vicarious liability upon a person who, in fact, is not liable to pay the tax."* Further the Hon'ble ITAT has concurred with this view in the case of *Mamatha Motels vs. ACIT – [2003] 84 ITD 582 (Kochi)* which held that even if the firm that is assessed comprises of totally new partners than those who were partners during the relevant previous year, assessment could still be made on the firm so constituted and the new partners would be liable in case there is a failure on the part of the firm. The Hon'ble ITAT after holding that since the identity of the firm had continued throughout the

block period and so a single assessment on the firm for the entire block period was eminently warranted even without recourse to the provisions of section 187 went on to observe as follows *"10(a). Section 187 makes the present partners answerable for the actions of the firm when they were not partners. This may look unfair towards the present partners. That is a difficulty inherent in the section and, to our mind, cannot be avoided, whether the assessment is made under section 143(3) of section 148 of section 158BC or section 158BD read with section 158BC. The position remains the same under all these sections or situations."*. In fact in the above case the Hon'ble ITAT even negated the plea that it was a case of succession of the firm covered by section 188 even though the firm assessed comprised partners totally different from those who actually comprised the firm during the previous year(s) when the income was earned. Unfortunately in the absence of any enabling provision to recover tax only from the partners who were so during the relevant previous year, it appears that the new partners will be liable if the firm continues and they are the partners thereof at the time of assessment.

- **Situation 3:** A situation where the firm comprises only two partners and out of two one partner dies at the time of assessment and after his death a new partner is admitted to the partnership carrying on the same business with the same assets and liabilities. In such a situation can it be called a reconstitution or succession or a totally new firm comes into existence. In my humble understanding as per the Partnership Act if one out of two partners dies the firm automatically gets dissolved and even though the same business is carried on by admitting a new partner in the eyes of law a new firm comes into existence. As a result two separate assessments are required to be made one on the firm comprising the original partner and the legal representative of the deceased partner and the other on the firm comprising the original partner and the new partner (Ref. Section 189). The said view also finds favour in the following Judgments *Dahi Laxmi Dal Factory vs. CIT - (1976) 103 ITR 517 (All) (FB)] & CIT vs. Palakunnathu Traders - (2004) 269 ITR 322 (Ker).*

- **Situation 4:** Succession of one firm by another as covered by section 188. As far as this aspect of the matter is concerned the law itself is very clear that there have to be two separate assessments since there are two separate taxable entities. As such even the liability of the firm as well as the partners are based on the said separate assessments.

2. Provisions pertaining to Assessment and Liability of AOP / BOI

In dealing with the liability in case of AOP / BOI the first step in my understanding is to decide as to whether the assessee is actually an AOP or BOI considering the amount of litigation on this very aspect of the matter. In this context while dealing with the various aspects of liability in case of an AOP the following observations of the Hon'ble Supreme Court in the case of *ITO vs. Ch. Atchaiah – (1996) 218 ITR 239 (SC)* are very relevant wherein the Hon'ble Apex court held that even if the members of the AOP were individually taxed in respect of their shares in the AOP the revenue is empowered to assess the AOP if the income belonged to the AOP, *"…If it is the income of the AOP in law, the AOP alone has to be taxed; the members of the AOP cannot be taxed individually in respect of the income of the AOP. Consideration of the interest of revenue has no place in this scheme. When section 4(1) speaks of levy of income tax on the total income of every person, it necessarily means the person who is liable to pay income-tax in respect of that total income according to law."* Going further let us discuss as to how the liability in case of an AOP or BOI is determined with reference to the provisions dealing with the liability in case of AOP / BOI. The basic provisions

are contained in section 167B and section 177 of the Act, of course apart from the other sections which are being dealt with in the other parts of this issue of the Journal. As per section 167B of the Act the tax to be charged in case of an AOP or BOI primarily depends upon the shares of the members. Accordingly the two situations as provided by section 167B are being discussed in the following paragraphs:

(i) Where the shares of the members are indeterminate or unknown:

Sub-section (1) of section 167B provides that where the shares of the members are unknown or indeterminate the same is taxable at Maximum Marginal Rate ["MMR"] and in case the rate of tax applicable to any member exceeds the same, the AOP shall be taxed at such higher rate.

(ii) Where the share of members are determinate or known

Sub-section (2) of section 167B provides that where the shares of the members of the AOP / BOI are known or determinate and that the total income of any member excluding his share of income from AOP/BOI exceeds the maximum amount not chargeable to tax, then the said AOP is liable to tax at MMR and where any member is chargeable to tax at a rate higher than MMR, then his share shall be chargeable to tax at such higher rate and the balance income of the AOP shall be taxable at MMR.

From the above it is clear that generally the tax is chargeable on an AOP / BOI at the MMR except a case where none of the members have income above the basic exemption limit. However for the purpose of determining the liability of the AOP it is imperative to understand the meaning of shares being unknown or indeterminate. In this regard it is pertinent to refer to the following observations of the Hon'ble ITAT in the case of *DCIT vs. India Advantage Fund VII – ITA No. 178 / Bang / 2012* has held that, *"…The persons as well as the shares must be capable of being definitely pin-pointed and ascertained on the date of the trust deed itself without leaving these to be decided upon at a future date by a person other than the author either at his discretion or in a manner not envisaged in the trust deed. Even if the Trust deed authorises addition of further contributors to the trust at different points of time, in addition to initial contributors, than the same would not make the beneficiaries unknown or their share indeterminate. Even if the scheme of computation of income of beneficiaries is complicated, it is not possible to say that the share income of the beneficiaries cannot be determined or known from the trust deed…".*

The relevant provisions as far as the discontinuance of business or dissolution of AOP is concerned are contained in section 177. It is pertinent to note that the said section only applies to AOP and not BOI and accordingly liability in case of discontinued business or dissolution of BOI would be governed by section 174A or 176 as the case may be. As far as section 177 is concerned the language as well as the wordings of the said section is very similar to those contained in section 189 of the Act as applicable to members of a firm. The said section provides that in case of dissolution or discontinued business the Assessing Officer shall make an assessment on the AOP as if no such discontinuance had actually taken place and every person who was a member at the time of such discontinuance or dissolution and the legal representative in the case of a deceased member shall be jointly & severally liable for the amount of tax, penalty or any other sum payable under the Act by the AOP. However the liability of the legal representative shall be limited to the estate of the deceased.

With this I conclude my article on the liability in case of firms and AOP / BOI. I hope my professional colleagues will find the above useful.

CA. Shailesh Bandi

Liabilities of Companies in Special Cases

Introduction

As Such the Right to recover Tax from the companies is restrictive in nature and taxes can be recovered from companies itself. However, Company being an artificial juridical person, exceptions have been provided, specifically in 2 sections of the Income Tax Act so as to not to deprive the Income Tax department of its Revenue:

Section 178 – for company in liquidation; and

Section 179 – liability of Directors of Pvt. Companies in liquidation.

A. Section 178 – Company in liquidation

Background

- This section was introduced under Income Tax Act, 1961 and there was no provision in the 1922 Act corresponding to that of section 178 of the Act. The said section was introduced on the recommendation of the Direct Taxes Administration Enquiry Committee's Report.
- The major legislative amendment to the said section was made by the Finance Act, 1965 by making changes to sub-section (3) & (4).

Scope

- Section 178 is attracted when an order for winding up a company has been made or the company is otherwise to be wound up and a liquidator has been appointed for the purpose.
- Specifically Section 178 deals with the duties and liabilities of liquidators. It ensures that the Government's rights and priorities for tax arrears are not defeated by the liquidator upon realizing and distributing the assets that come to his hands upon liquidation.

Duties and liabilities of the liquidator

- As per subsection (1), every liquidator appointed for the company to be wound up is under an obligation to notify his appointment to the Assessing Officer within a period of 30 days.
- As per subsection (2), the Assessing Officer upon receipt of the information of liquidator being appointed shall notify to the liquidator, after making such enquiries and calling for such information as he may deem fit, the estimated amount which may be set aside for payment of taxes which are either already payable or is likely to be payable by the company. The A.O. is under an obligation to

notify the said amount to the liquidator within a period of 3 months from the day of receipt of the information under subsection (1).

- Subsection (3) ensures that during the intervening period of 3 months referred to in subsection (2) the liquidator shall not without the leave of the Principle Chief commissioner or Chief Commissioner or Principle commissioner or Commissioner part with any of the Assets of the company for any purpose other than payment of tax arrears and even after the expiry of the said period of 3 months shall not similarly part with any of the assets except without setting aside such amount as has been notified to him by the Assessing Officer.

  Thus subsection (3) requires that if the liquidator has to part with the assets of the company or has to sell its properties in his hands, then he can do so before the receipt of the estimated tax liability of the company with the leave of the authorities stated above. However, after the estimated the tax liability is notified by the Assessing Officer to the liquidator, thereafter the liquidator is duty bound to set aside the amount equal to the amounts so notified to him and not to part with that amount or the assets of the company in his hands.

  An exception has been provided to this subsection that the liquidator has the liberty to part with the assets or the properties of the company for making any payment to secured creditors whose debts are entitled under the law to get priority over debts due to the Government on the date of liquidation or for meeting such costs & expenses that may be reasonably necessary for winding up of the company in the opinion of the Income Tax Authorities stated above.

- The consequences for the failure of liquidator failing to comply with the mandate of law contained in subsection(1) or subsection (3) has been spelled out in subsection (4) by making him personally liable for the payment of taxes which the company would be liable to pay. However, such personal liability in the hands of the liquidator cannot exceed the amounts notified under subsection(2).

- Upon failure of the liquidator to act in accordance with subsection (1) or subsection (3) or the liquidator parts with any of the assets of the company or properties in his hands, then as per section 276A the same shall be treated as contravening the provisions of subsection(1) & (3) and accordingly Liquidator shall also be liable for punishment with rigorous imprisonment for a term which may extend to 2 years.

- Thus the legislature with a view to ensure the payment of the legitimate dues of the Income Tax Dept. and the liquidator may not by his maneuvering deprive the revenue of its dues by disposing of the assets of the company in liquidation has provided the safeguard by way of subsection(4) and section 276A of the Act.

- In case of more than one liquidator has been appointed, then the obligations and liabilities attached to the liquidator as jointly and severally of all the liquidators.

- The overriding nature & effect of the provisions of section 178 to any other law for the time being in force has been provided by way of subsection (6).

Objectives

- Upon reading of the duties & responsibilities, the object of section 178 seems to be of reserving sufficient assets of the company in liquidation for paying Income Tax dues and not giving any right

of priority of any other dues over the Income Tax dues.

Controversies

- Section 178 (3) compels the liquidator to set aside the amounts notified under subsection(2) by the Assessing Officer before parting with any of the assets of the company in his hands.
- The word 'to set aside' has been dealt in detail by the full bench of the Kerala High Court in official liquidator, *India Traders Bank Ltd. vs. ITO, A.S. No. 224 of 1968* wherein they have relied on the Corpus Juries Secundum Dictionary Volume 80 Page-1 and accordingly has stated that 'to set aside' or 'to set apart' means no more than 'to designate' and means 'to separate to a particular use'. It further held that the shades of meaning attached to the expression 'set aside' convey the idea of an appropriation or an allocation of the Income Tax dues, with the result that, it stand outside the proceedings for winding up by the company Court.
- That in the case of companies the overriding preferential payments is governed by section 529A & 530 of the companies' Act, 1956 vis-a-vis section 326 & 327 of the Companies' Act, 2013.
- Thus, the Controversy !!!!!
- Whether the Assessing Officer gets the right of priority to receive the amounts to be set aside over the preferential payment rights Governed by section 529A & 530 of the companies' Act, 1956 vis-a-vis section 326 & 327 of the Companies' Act, 2013?
  - One view of the matter is that there is nothing in section of the Income Tax Act regarding priority or payments. The priority of payments has been provided for in the companies' Act and not in the Income Tax Act. The non obstante clause in section 178 (6) does not interfere any manner with the order of priorities laid down in companies' Act. *[Baroda Board & Paper Mills Ltd. vs. ITO 102 ITR 153 (Guj)., ITO vs. Official liquidator 63 ITR 810, ITO vs. official liquidator, National conduits (P.) Ltd. 128 ITR 228 (Del)].*
  - The other view on this issue is that the amounts set aside u/s. 178 is the outside scheme of winding up and the Income Tax due is in the same category of the secured creditors and gets a first charge on the amount. In case of any conflict between the provision of section 178 of the Income Tax Act or section 530 of the companies' Act the provisions of section 178 shall prevail *[Refer Imperial Chits Fund Ltd. vs. IT Dept. 116 ITR 176].*

The above controversy came up before the Hon'ble Supreme Court in the Imperial Chit Fund case in 219 ITR 498 wherein the Hon'ble Court has observed as under :-

"Due importance must be given to the legislative history and background that led to the enactment of section 178 of the Income tax Act, 1961 and the crucial words occurring in sections 178(3) and 178(4) of the Income tax Act to the effect that the official liquidator "shall set aside" the amount notified by the Income tax Officer and that if it is not so done, the official liquidator shall personally be liable to pay the amount of tax Act occurs in Chapter XV of the Act. The object sought to be achieved by the provision in Chapter XV is "to fasten liability to pay the tax" on the income received and to catch the income at the earliest point of

time and tax the same where it is found, instead of waiting for long. The scope of section 530(1)(a) of the Companies Act, 1956, is different from that of section 178 of the Income Tax Act, Under section 530(1)(a) of the Companies Act, all taxes which have "become due and payable" alone are entitled to preferential payment. The amount should have crystallized into a liability. Under section 178(2) read with section 178(3) of the Income tax Act, provisions should be made for any tax which is then or is likely thereafter to become payable. Even the amounts which have not crystallized into a liability, but which are "likely to become due thereafter" should be taken note of. Moreover, there is a non obstante clause in section 178(6). On a total view of the relevant statutory provisions, the Income tax Department is treated as a "secured creditor".

- That in the said case the Hon'ble Supreme Court has referred to the provision of section 530 of the company's Act, 1956. Thus the Hon'ble Court has not dealt with section 529A of the company's Act, 1956, which was inserted by Act 35 of 1985, which precedes section 530 of the company's Act, 1956.

  – The similar issue also came for consideration before the Hon'ble Bombay High Court in the case of S*yndicate Bank and others vs. Official Liquidator, Wester Works Engineers* ***Ltd. & others 242 ITR 281*** wherein it held

"The English common law doctrine which has been recognized in India is that in a winding up, the claims of the Crown prevail over the claims of unsecured creditors and not over secured creditors, ***Imperial Chit Funds(P)Ltd. vs. IOT (1996) 219 ITR 498 (SC)*** is, therefore, an authority for the proposition that between unsecured creditors, the claim of tax dues under section 178 of the Income tax Act, 1961, would have preference over all other claims of unsecured creditors. The question whether the claims of income tax dues have preference over claims of secured creditors was not in issue.

If section 529A of the Companies Act, 1956, is considered it is clear that it has overriding effect, section 529A was brought in by an amendment and was inserted in the Companies Act by the Act of 1985. The section makes it clear that notwithstanding anything contained in other provisions of the Act or any other law for the time being in force dues of workers and debts due to the secured creditors to the extent such debts rank under clause (c) of the provisions of Sub-section (1) of section 529 pari passu with such dues shall be paid in priority over all other debts. The Income tax Act was brought in 1961. Both are central legislations. Therefore, looking at the literal language of the two sections it would be clear that the rights of the secured creditors would prevail over the rights of all other creditors. Therefore, both under the general law as well under the provisions of the Companies Act read with the provisions of the Income Tax Act the rights of secured creditors and workers as set out under section 529A of the Companies Act would override the claims of the income tax authorities in respect of an order made under section 178 of the Income tax Act."

- In a peculiar case under company's Act in workmen of Rohtas Industries Ltd. vs. Rohtas Industries Ltd. (1987) 62 com cases 872 the Hon'ble Supreme Court on the Ground of a General Concern for the interest of workers without any reference to statutory provisions vouchsafed by the following statement. 'the subsistence

and living of the workers is of paramount importance and has to rank with highest priority. Their wages and emoluments upto the date of closure of the company will rank in priority over the secured creditors'.

- The Hon'ble Supreme Court Imperia Chits Fund Case also laid to Rest the Controversy of between the Intra-department of the Government by observing as under:-

  "The interpretation placed on section 178 of the Income tax Act, should govern cases arising under section 17 of the Central Sales Tax Act, 1956 as well, But, a situation may arise where the authorities under both the Acts (Income tax Act as well as the Central Sales Act) send similar orders to the official liquidator, in which case the question of precedence may arise. In such cases, the priority shall be with respect to the date of receipt to the date of receipt of the orders by the official liquidator".

Conclusion

However to conclude, the case of Rohtas has been an exception to the rule that the workmen dues are Paripasu to the secured creditors which inter-alia includes the amount of Tax determined to be payable u/s. 178 of the Income Tax Act, 1956. But the Hon'ble Bombay High court has left the Issue once again open as after Considering the Judgement of the Hon'ble Supreme Court of Imperial Chit Funds, in which it has restricted the Operation of section 178 wherein it held that the rights of secured creditors and workers as set out under section 529A of the Companies Act would override the claims of the income tax authorities in respect of an order made under section 178 of the Income tax Act, thus treating the Tax Dues as not secured Creditors for the purpose of section 529A.

One may have to Ponder whether the Judgement of the Bombay High Court shall require the Re-Consideration as the Judgement in the Imperial Chit Funds case have been Very Categorical and further the Judgement in the Rohtas Case by the Supreme Court was only to protect the Interest of workers.

Note:

The Provisions of Section 529A and 530 of the companies act 1956 are much similar to that of the provisions of section 326 and 327 of the Companies Act 2013 and therefore the Judgments under the old act of 1956 shall hold Good ratio even under the New Act of 2013.

B. Section 179 - Liability of Directors of Pvt. Co. in liquidation.

Background

- This section was introduced under Income Tax Act, 1961 and there was no provision in the 1922 Act corresponding to that of section 179 of the Act. The said section was also introduced on the recommendation of the Direct Taxes Administration Enquiry Committee's Report.
- The major legislative amendment to the said section was made by The Taxation Laws (Amendment) Act, 1975, prior to which the said section had its application only to Pvt. Companies which had gone into liquidation, but upon the amendment made by The Taxation Laws (Amendment) Act, 1975 the application of said section is extended to all the Pvt. Companies whether into liquidation or not and also to companies converted into public companies in respect of the period during which they were Pvt. Companies.
- Recently an explanation has also been added to the said section by Finance Act, 2013 so as to include penalty, interest or any other sum payable under the Act

to bring them within the ambit of the expression 'Tax due'.

Marginal Note

- The marginal note of the said section 179 still reads as 'liability of Directors of Private Company in liquidation' , which has not been amended by The Taxation Laws (Amendment) Act, 1975, but the language of the man provision has been widened by the 1975 amendment Act so as to make them applicable to all Private Companies whether in liquidation or not.
- The failure to amend the marginal note cannot affect or restrict the scope of the substantive provision as the marginal note cannot control the interpretation of the words of the section particularly when the language of the section is clear and unambiguous, though it prima facie furnished some clue as to the meaning and purpose of the section.
  - The Allahabad High Court in *Roop Chandra Sharma vs. DCIT reported in 229 ITR 570* held that 'Notwithstanding' the misleading heading of section 179, the Directors of Private Company though not under liquidation, may be liable for the dues outstanding against the company as per the provisions of section 179(1) as amended with effect from 01-10-1975.
  - Similar view has also been taken by the Hon'ble Calcutta High Court in Company cases in the case of *Gurudas Hazra vs. P.K. Choudhary 109 Comp cases 530*.

Scope

- The section, though opposed to the basic concept of the company is designed to provide certain safeguards for due realization of Tax.
- The Directors in the company are in a relationship in the nature of Agent and Principal. The Directors are the agents of the company in transactions they enter into on behalf of the company, though they are not agents for individual shareholders or members. The Director may be agent by way of an employee or Trusteeship, though not a Trustee in the strict sense in respect of the company's properties and Funds.
- The Directors are bound to use the fair and reasonable diligence in discharging the duties and to Act honestly which such care as is reasonably expected from him by way of contractual liabilities.
- The liability fixed on the directors u/s. 179 imposes a vicarious liability on a Director and its specifically overrides the provisions of Company's Act, 1956 or Companies Act,. 2013 as the case may be.
- Under the company law a Director of a company is not personally liable for the company's debts unless a Court of Competent jurisdiction finds in guilty of misfeasance

Operation of Section 179

- The provisions of section 179(1) are attracted where
  - any Tax due from any private company cannot be recovered then
  - Every person who was a director of the company at any time during the relevant previous year
  - Shall be jointly and severally liable
  - For the payment of such tax

Unless he proves that the non-recovery of the tax cannot be attributed to any gross

neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

- The provisions of section 179(2) has extended the Operations of Sub-section (1) so as to include the Private companies converted to Public companies and the Tax due in respect to such companies prior to its conversion, the directors of such private limited company prior to its conversion shall be attracted with the rigour's of Sub-section (1)
- The director of the company can be made liable to pay arrears of Tax relating to the period when he was a director of the company, even though he has tendered his resignation from the directorship of the company as the resignation from the directorship does not absolve the liability of the director arising for a period for which he was a director of a company. *[Refer Darshan Kumar vs. CIT 222 ITR 608 (Punj)].*
- A bare perusal of section 179 shows that before recovery in respect of dues from a private company can be initiated against the directors, to make them jointly and severally liable for such dues, it is necessary for the revenue to establish that such recovery cannot be made from the company and then alone it can reach the directors who were responsible for the conduct of business during the previous year in relation to which such liability exists.
- Thus for invoking the provisions of section 179(1) i.e. for thrusting the director with the vicarious liability, the AO must record of finding that the tax due from company cannot be recovered from the company, in absence of which the AO shall have no jurisdiction to invoke the provision of section 179(1). Reference may be made for following cases for the set of provisions:-

  (a) Indubhai T. Vasav vs. ITO 282 ITR 120 (Guj).

  (b) Arvindkumar Gupta vs. TRO 276 ITR 373 (All)

  (c) Bhagwandas J. Patel vs. DCIT 238 ITR 127 (Guj)

  (d) Alex Cherian vs. CIT 320 ITR 49 (Ker)

Safeguards

- Section 179 also provides the safeguards to the directors as well where the directors have acted honestly and used a fair and reasonable diligence in discharging their duties. In other words the director has acted in a way in which a man of affairs dealing with his own affairs with reasonable care and circumspection could reasonably be expected to act. As a corollary the director is able to prove that the recovery cannot be attributed towards his negligence or misfeasance or breach of duty on his part in relation to the affairs of the company, then in such a case the tax liability cannot be recovered from him.
- The section lays emphasis on the words 'negligence' or 'misfeasance' or 'breach of duty'. These words have not been defined under the Act, but have been understood in legal parlance or one has to rely on the dictionary meanings.
  - The word 'Negligence' is generally understood as 'been acting carelessly'. Whether an act is an act of negligence is sometimes a question of law or fact or a mixed question of fact and law, depending entirely upon the nature of duty, which the person charged with negligence has failed to comply with or perform in particular

circumstances of each case. For the purpose of section 179 the act of negligence committed must be reckless or with want of proper diligence. Such neglect must be more than the omission to take all possible care. It must be in a business sense, culpable or gross.

– The word 'Misfeasance' may be understood as 'the improper performance of some lawful act or the doing of a lawful act in an improper manner'. Misfeasance shall also include a breach of duty by an officer of the company that prove a misapplication or wrongful retention of the company's funds. The ingredients of misfeasance are: (i) an act in the nature of breach of trust; and (ii) an act which results in actual loss to the company *[Refer official liquidator v. Dr. Shailendra Nath Sinha, (1973) 43 Com. Cas. 107; K. Madhava Nayak v. Popular Bank Ltd. AIR 1970 Ker 131].*

– The Expression 'Breach of duty' may be understood as non-performance of a duty cast on a person by law. The expression 'breach of duty' is wide enough to comprehend the cause of section for negligence *(Refer H. Ebrahim vs. DCIT 332 ITR 122 (kar) & Sanjay Ghai vs. ACIT 352 ITR 468.*

- The onus of proving that the directors have acted honestly, fairly & diligently in discharging the duties is cast upon the directors in a negative manner under the said section i.e. for proving the non-existence of any acts of misfeasance gross negligence or breach of trust. Once this onus is discharged then the same shifts to the department to adduce the evidence that there is an existence of these offending Acts. It may be noted that it is not necessary that all the 3 ingredients i.e. 'negligence' ,'misfeasance' , 'breach of duty' are required to be satisfied for invoking the provisions of section 179. If it is held that any one of these ingredient was present while carrying out the activity of the company by the director/s then it will be sufficient for invoking the provisions of section 179.

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 amendment made by 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.

Conclusion

The provisions of section 179 brings out the following conditions to be satisfied cumulatively:-

(1) The Assessing Officer has to conclude that it is no longer possible to recover the Tax from the company which is a private limited company; and

(2) The directors against whom the recovery proceedings are proposed u/s. 179 must have failed to show that the non-recovery of Tax demand from the company was not attributable or due to any misfeasance of gross neglect of breach of trust committed by such directors with regard to the affairs to the company.

CA. Krish B. Desai

Liability in case of Succession to Business or Profession

A. Section 170: Succession to business otherwise than on death

Section 170 of the Income-tax Act, 1961 **("the Act")** provides for:

i) Assessment in the hands of predecessor and successor in the case of succession of business or profession;

ii) Assessment in the hands of successor when predecessor cannot be found; and

iii) Remedy for recovery of tax from the successor when the same cannot be recovered from the predecessor.

Sub-section (1) of section 170 of the Act provides that when the person carrying on any business or profession has been succeeded therein by any other person then, in that case, the predecessor should be assessed in respect of the income of the previous year up to the date of succession and the successor shall be assessed in respect of the income of the previous year after the date of succession. Thus, it provides for computation of income under the head business or profession for the two broken periods and there would be two assessments on two persons viz. the predecessor and the successor.

In order to invoke section 170 of the Act, there must be "succession":

What is "succession"?

The expression "succession" is neither defined u/s. 170 of the Act nor defined anywhere in the Statute. In the following decisions Courts have held that words which are not specifically defined must be taken in their legal sense, or their dictionary meaning or their popular or commercial sense as distinct from their scientific or technical meaning:

- *CIT vs. Taj Mahal Hotel (82 ITR 44) (SC);*
- *Nawn vs. CIT (106 ITR 45, 49) (SC);*
- *CIT vs. Mahindra (144 ITR 225, 240) (SC);*
- *CIT vs. Venkateshwara Hatcheries (237 ITR 174, 178) (SC);*
- *CIT vs. Benoykumar (32 ITR 466) (SC);*
- *State of Orissa vs. Titaghar Paper Mills Company Ltd. [(1985) Tax L R 2948] (SC);*
- *Special Commissioner vs. Pernsel (3 TC 53, 94) (HL);*
- *John Hudson vs. Kirkness (36 TC 28) (HL);*
- *Eduard vs. Clinch (50 63C367, 409-10) (HL);*
- *CIT vs. Gaekwar Foam (35 ITR 662) (Bom.);*
- *Ramachandra vs. CIT (27 ITR 667) (Orissa);*
- *Surajratan Damani vs. CIT (106 ITR 576, 583) (Bom.)*
- *CIT vs. Patel Brothers & Co. Ltd. (106 ITR 424, 432) (Guj.); and*
- *CIT vs. G.R. Karthikeyan (124 ITR 85, 91) (Mad.).*

Based on the settled legal position referred to above, the meaning of the word "succession" is to be interpreted accordingly.

The Madras High Court in its early decision in *Mettur Sandalwood Oil Co. vs. CIT (47 ITR 781)* while dealing with the question of allowability of bad debt on partition of Hindu Undivided Family **("HUF")**, which allotted business to some of its members who continued the business of HUF as a firm, dealt with the expression "succession" as under:

> "The continuance of business, without its integrity or identity being lost despite the change of ownership is a frequent and common occurrence. Succession means a change of ownership in the business keeping it intact. Change of ownership may be brought about by transfer inter vivos or be the result of operation of law."

The Gujarat High Court in *Premji Khimraj Shah vs. ITO (118 ITR 216)* while dealing with the expression "succession" held as under:

> "The term "succession in business" has a recognised connotation. It involves changes of ownership in the sense of the successor taking over the whole or substantially the whole business of the predecessor and continuing the same notwithstanding the retention by the predecessor of some assets and liabilities, not with a view to run the business but to enable the successor to carry on his succeeding business activities unhampered."

The Supreme Court in its early decision in *CIT vs. K. H. Chambers (55 ITR 674)* while dealing with the question as to whether transfer of business by father to his son would be regarded as "succession" within the meaning of section 25(4) of the 1922 Act, which provided for relief in the case of succession, which is corresponding to section 170 of the Act which precluded any relief corresponding to section 25(4) of the 1922 Act, held as under:

> "Succession involves change of ownership: that is, the transferor goes out and the transferee comes in; it connotes that the whole business is transferred; it also implies that substantially the identity and the continuity of the business are preserved. If there is a transfer of a business, any arrangement between the transferor and the transferee in respect of some of the assets and liabilities not with a view to enable the transferor to run a part of the business transferred but to enable the transferee to run the business unhampered by the load of debts or for any other appropriate collateral purpose cannot detract from the totality of the succession."

The Apex Court further held as under with respect to the expression "succession":

> *"The expression "succession" has acquired a somewhat artificial meaning. The tests of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person "succeeded" to the business of another."*

Analysis of elements of "succession"

I. Analysis as to element of "Ownership"

A change in ownership takes place where the existing owner transfers his title to another person. In the following decisions courts have held that the transfer may be formal or otherwise and if the overall business effect of the transaction is that a new entity carries on the business carried on by another entity, there being a substantial identity and continuity of the business carried on, it can be said that there is "succession":

- *Ramdas Khmiji Brothers vs. CIT (97 ITR 361) (Bom); and*
- *Oriental Fire and Insurance Co. Ltd. vs. CIT (244 ITR 631) (Del.).*

Whether legal ownership or beneficial ownership

The Supreme Court in Executors of the *Estate of J. K. Dubash vs. CIT (19 ITR 182)* while dealing with the question as to whether the succession took place when executors under the Will carried on the business of testator as a going concern held that the transfer for the purposes of succession consist of legal owner as distinct from beneficial owner.

The specific finding of the Apex Court reads as under:

> "Held, that on the day of the death of the testator the estate including the business got vested in the executors and they carried on the business within the meaning of section 3 read with section 10 of the Act and as such became personally liable as assessees. Thus, there was a change in the assessee and, therefore, on 9th April, 1942, "a succession in such capacity" took place within the meaning of section 25(4)."

Based on the ratio laid down by the Courts including the Apex Court it can be said that there should be change in the legal ownership of business in order to characterise the transaction as "succession".

II. Analysis as to element of "Integrity"

The Supreme Court in Nagjee vs. CIT (51 ITR 849) held that succession necessarily implies devolution of the business as a whole: there can be no succession unless the business retains its integrity despite the change of ownership. Page CJ said in *CIT vs. N N Firm (2 ITR 85, 87-88) (Rangoon),* "in order that a person should be held to have 'succeeded' to another person in carrying on a business, profession or vocation, it is necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole."

In the following decisions courts have held that where the person succeeding retains some of the assets or liabilities of the business or the person succeeding does not take vendor's selling organisation and book debts or one of the branches of the business or, that new capital is brought in by the person succeeding, would not necessarily destroy or impair the integrity of business so as to negative the idea of succession.

- *CIT vs.Chambers (55 ITR 674) (SC);*
- *Hassan Kasssam vs.CIT (16 ITR 19, 33-34) (Patna);*
- *Kaniram Ganpatrai vs.CIT (23 ITR 314) (Patna);*
- *Krishna Hydraulic Press vs. CIT (11 ITR 504) (Cal.);*
- *CIT vs. Naraindas & Co. (7 ITR 305);*
- *Reynolds vs. Ogston (15 TC 501,524);*
- *CIT vs. Basu (76 ITR 291)(Cal.);*
- *Malayalam vs. Clark (19 TC 314) and;*
- *Jittanram vs. CIT (23 ITR 288)(Pat.).*

Thus, from the above it can be seen that the "integrity" of business should remain when whole of business devolve upon successor.

III. Analysis as to element of "Identity" and "Continuity"

Element of Identity

In order to decide as to whether there is element of identity and continuity in succession, the following circumstances needs to be considered:

Whether a similar business had been carried on after the transfer, whether goodwill and other intangible assets are included in the transfer, whether the staff has been taken over, whether the stock and debts have been taken over, whether the business has been continued without interregnum or after an interval, etc. are some of the questions to be considered in this context.

If the two businesses are not identical no question of succession can arise. But even if two businesses are identical another factor has also got to be taken into consideration and that is the factor of the continuity of the two businesses. In other words, the successor's business must be the continuation of the original business. If the original business has come to an end or has been discontinued, then the subsequent business even though it may be identical with the first business, cannot be looked upon as its successor because a successor must not only do the same business but also must continue the business to which it has succeeded.

Thus, element of identity can be ascertained by looking at the previous history of the particular trade and whether what was bought was a continuing business with all its prospects, connections and with all those things which result in a profit, or whether what was bought was only some portion of the assets of the business.

Element of "Continuity"

This element has two facets viz., one from the angle of predecessor and another from the angle of the successor. If the predecessor had discontinued the business before the transfer then there is no continuity. Similarly, there should be continuity of business of predecessor by successor. If after the business being succeeded by the successor the same has been closed down or discontinuance for any reason then, in that case, it would not be a case of continuity. Thus, there should be continuity of a business by the predecessor at the time of transfer as also by the successor subsequent to succession.

If all the above elements viz., ownership, integrity, identity and continuity were present in transfer of a business or profession then, such transfer be treated as "succession' within the meaning of section 170 of the Act.

Liability in case of succession

Liabilities of predecessor and successor respectively

In the case of succession, the predecessor is under obligation to maintain books of account up to the date till which he carries on business and the successor from the date when he takes over the business. Thus, there would be two broken period and there would be two assessments on two persons for two broken period. The predecessor shall be assessed in respect of income of previous year up to the date of succession and the successor shall be assessed in respect of income of previous year after the date of succession.

However, if for some reason the accounts are consolidated for the whole period i.e. for entire previous year without breaking them into two broken period, the income of predecessor as also the successor may be computed proportionately i.e. number of days in the previous year for which each of the predecessor and successor has respectively carried on the business. This method of computation of income may not reflect correct income in certain cases for various reasons like turnover may be higher in one of the broken period as compared to the other, fluctuation of price of goods between two periods, etc.

Liability when predecessor "cannot be found"

Sub-section (2) of section 170 of the Act provides that when the predecessor 'cannot be found', the assessment of income of the previous year in which the succession took place up to the date of succession and, of the previous year preceding that year shall be made on the successor in the like manner and to the same extent as it would have been made on the predecessor and all the provisions of the Act shall apply accordingly.

The expression predecessor "cannot be found" has not been defined either under section 170 of the Act or anywhere in the Statute and therefore, its legal meaning as laid down by various authorities can be seen.

Where the predecessor is an individual the expression "cannot be found" means that he must be dead or must be disappeared. It is to be noted that when the Legislature intends to exclude succession on an inheritance, it has specifically stated so in section 78(2) of the Act but, no so in the case of section 170.

Where the predecessor is a company the expression "cannot be found" means that company is wound up and its name is struck off from the register of companies under the Companies Act.

The Hon'ble Supreme Court in *Saraswati Industrial Syndicate Ltd. vs. CIT (186 ITR 278 at 279)* held as under:

> "When two companies merge or so joined as to form a third company or one is absorbed into the other or blended with another, the amalgamating company losses its identity."

Again the Supreme Court in *Narendra Bahadur Tondon vs. Shankar Lal (52 Company Cases 62)* held that once a company is dissolved, it ceased to exist and, thereafter, a liquidator cannot represent the company.

With respect to 'dissolution' the Learned Author expressed as under at page no. 1901 of A. Ramaiya's Commentary on the 1956 Act (12th

Edition) by Hon'ble Justice Y. V. Chandrachud (former Chief Justice of India) which shows the following extract from Halsbury's Laws of England, 4th Editiion, Volume 7, paragraph 1448, page 809 under the heading "Effect of dissolution":

"The dissolution puts an end to the existence of the company. Unless and until it has been set aside, it prevents any proceedings being taken against promoters, directors or officers of the company to recover money or property due or belonging to it or to prove a debt due from it. When the company is dissolved, the liquidator's statutory duty towards the creditors and contributories is gone; but if he has committed a breach of his duty to any creditor by distributing the assets without complying with the requirements of the Companies Act, 1948, he is liable in damages to him".

The learned author has dealt with the expression "succession" at page no. 1300 of the celebrated Treaties of Kanga and Palkhivala's Law of Income Tax, Eighth Edition, Volume I, the relevant extracts of which reads as under:

It would be incorrect to say that a firm which has been dissolved "cannot be found" when its partners are alive and their whereabouts are known. But a company which has ceased to exist and is struck off the register of companies is one which "cannot be found".

The Madras High Court in *CIT vs. Express News Paper Limited (40 ITR 38, 59)* held that when the predecessor company ceased to exist and is struck off the register of companies, is one which "cannot be found". This decision of the Madras High Court, on further appeal by the Revenue, has been affirmed by the Supreme Court in *CIT vs. Express Newspapers Ltd. (53 ITR 250).*

Similarly, in the following decisions courts have held that on dissolution, merger, amalgamation, predecessor company ceased to exist and be treated as "cannot be found":

- *Birla Cotton Spg. & Wvg. Mills Ltd. vs. CIT (123 ITR 354) (Del.);*
- *Modi Sugar Mills Ltd. vs. Union of India (144 ITR 29) (All.);*
- *CIT vs. Nuthern P. Ltd.(284 ITR 396) (Guj.);*
- *Impsat (P) Ltd. vs. ITO (92 TTJ 552) (Del.);*
- *Modi Corp. Ltd. vs. JCIT (105 TTJ 303) (Del.);*
- *Hewlett Packard India Pvt.Ltd. (ITA No.4016 / Del./ 05);*
- *Slocum Investment (Pvt.) Ltd. vs. DCIT (106 ITD 1) (Del.); and*
- *Better Investment Ltd. (since amalgamated with M Corp. Global) vs. DCIT in ITA No.301/ Del./2005*

From the above settled legal position it can be concluded that when the predecessor company merges or amalgamates with the successor company, it would be a case of predecessor 'cannot be found' as a consequence, provision of section 170(2) would apply.

As per provisions of section 170(2) of the Act it is a successor company which shall be assessable for the income of the predecessor company and that too for the previous year in which the succession took place up to the date of succession and for the previous year immediately preceding the year of succession. In this case, the assessing officer is required to pass an order holding the predecessor as cannot be found such an order can be part of the order made on successor. However, successor shall be entitled to all deduction and allowances which are available to the predecessor. Further, the rate of tax would be the rate as applicable to predecessor on his total income.

Recovery of tax from successor

Sub-section (3) of section 170 of the Act provides that where the predecessor has been assessed but the tax levied on him cannot be recovered from him then, in that case, the assessing officer can recover the same from the successor provided he should have recorded finding to the effect that sum payable by predecessor cannot be recovered from him. The assessing officer cannot recover tax liability of predecessor from successor for more than two periods viz. broken period ending up to the date of succession and for the period of one accounting year immediately preceding the broken year.

Quantum of liability

Where the tax cannot be recovered from the predecessor, the liability of the successor to pay tax is limited to such sum as is related to the income from the business or profession to which there has been a succession. Where the predecessor's only source of income from business has been succeeded to, the entire tax levied on the predecessor from the commencement of the accounting year up to the date of the succession and for one whole year preceding that year may be collected from the successor. On the other hand, where the predecessor has other income or other businesses to which there has been no succession, the successor's liability would be restricted to that proportion of the total tax assessed on the predecessor as his income from the business to which there has been a succession bears to his total income. The liability shall include not only tax but also interest and penalty. This is based on the language of sub-section (3) of section 170 of the Act which uses the words "any sum assessed on the predecessor". On the other hand, if, one reads sub-section (3) of section 170 of the Act which uses the words "any sum payable under this section in respect of the income ....assessed on the predecessor" implies that only tax and not penalty and interest levied on the predecessor would be payable by successor. As a result of contrary interpretation as above, a clarification is required on the subject.

A. Section 176 – Discontinued business

This section provides for tax liability where business has been discontinued, the assessment year in which it is subject to tax, the rate at which it is subject to tax, taxability of sum received subsequent to discontinuance of business and profession and procedure to be followed, by assessee about intimation of discontinuance of business and, by assessing officer for taxing the income of such business by way of assessment on a person in relation to discontinued business.

The expression "discontinued" is neither defined under section 176 of the Act nor anywhere in the Statute, hence, the above expression must be taken in its legal sense or dictionary meaning or its popular or commercial sense based on the ratio laid down by the courts in the preceding paragraph of this Article.

What is discontinuance ?

Discontinuance connotes a complete closing down of business or profession and cessor of all operations immediately.

At page 482 of the Law Lexicon by P. Ramanatha Aiyar's, Third Edition 2012 published by Lexis Nexis, the meaning of the expression "discontinue" is provided as under:

> "**Discontinue**. To cause to cease; to put a stop to."

At page 188 of Cambridge Leaner's Dictionary published by Cambridge University press, the expression "**discontinue**" is defined as under:

> "discontinue verb [T] discontinuing, past discontinued to stop producing or providing something such as a product or service [often passive] I'm afraid this model has been discontinued."

The above dictionary meaning refers to closing down of an activity.

The Madras High Court in *Meyyappa Chettiar vs. CIT (11 ITR 247)* held that the expression "discontinuance" means "cessation of business" and not merely change of ownership. The aforesaid statement has been approved by the Privy Council which is reported in *CIT vs. P. E. Polson (13 ITR 343).*

Similar view is taken by Courts in following decisions:

- *Ghanshyam Das Gangadhar vs. CIT (19 ITR 349)(Pat.);*
- *J. G. Ingram & Son Ltd. vs. Callagham(74 ITR 382)(CA); and*
- *CIT vs. S. K. Basu (76 ITR 291) (Cal.).*

The Andhra Pradesh High Court in *V. Parthasarathy (103 ITR 508)* while dealing with the expression "discontinuance" as occurring in section 176(1) of the Act held as under:

> "To come within the mischief of section 176(4), discontinuance of the profession or business need not necessarily be of permanent character. It may be for a short or long duration. All that the word "discontinuance" indicates is factum stoppage. Length of time for which it was stopped is not one of the elements that enters into the concept of discontinuance. Hence, the expressions "discontinuance" and "cessation" in the context in which they are employed, take in both temporary and permanent discontinuance. Whether the discontinuance is voluntary or involuntary has no bearing on the applicability of section 176(4)."

From the above it can be concluded that when there is stoppage of activity or rendering of service, irrespective of the length of time and whether such stoppage is voluntary or involuntary, it can be said that discontinuance has taken place. However, it cannot be said that business is discontinued merely because there are no operations since some time during the period for instance, due to fire, accident, or cyclone or there is no business in spite of attempts to secure business.

Distinction between discontinuance and succession

The expression discontinuance refers to complete cessation of business whereas succession refers to a mere change in ownership with presence of element of integrity, identity and continuity. The conception of succession excludes conception of discontinuance. The above proposition is supported by following decisions:

- *CIT vs. P. E. Polson (13 ITR 384, 388) (PC);*
- *Meyyappa Chettiar vs. CIT (11 ITR 247,254) (Mad.);*
- *Kaniram Ganpatrai vs. CIT (23 ITR 314,325) (Pat.);*
- *B. M. Desai vs. CIT (34 ITR 409, 411-12)(Bom); and*
- *Sharma & Co. vs. CIT (57 ITR 372)(All.).*

Liability in the case of "discontinuance"

Sub-section (1) of section 176 of the Act provides that where business or profession is discontinued in any assessment year then, income of such business or profession from April 1 of the assessment year to the date of discontinuance is taxable in assessment year in which the same has been discontinued. The said sub-section also provides that such income of discontinued business is taxable, at the discretion of the assessing officer, in the assessment year in which the business is discontinued or, may be taxable in the normal assessment year i.e. assessment year immediately following the previous year in which business is discontinued.

Sub-section (2) of section 176 of the Act provides that the income of discontinued business should be chargeable to tax at the rate in force in the assessment year in which the business is discontinued. It further provides that there would be two separate assessments, one with reference to complete assessment year in which business is discontinued and other with reference to broken period. This can be explained with help of following illustration:

Illustration:

Let us say, Mr. A was carrying on business during the previous year 2014-15 relevant to assessment year 2015-16 and he discontinued this business, let us say, on May 31, 2015 then, in that case, Mr. A's income for the previous year 2014-15 as also for previous year April 1, 2015 to May 31, 2015 would be taxable in the assessment year 2015-16. The latter would be taxable at the discretion of assessing officer, which may be brought to tax in assessment year 2016-17. In this case, the rate of tax applicable for the broken period would be the rate provided by Finance Act, 2015. Further, there would be two separate assessments, one for the previous year 2014-15 relevant to assessment year 2015-16 and other for the previous year expired on May 31, 2015 relevant to assessment year 2016-17.

Liability in case of receipt subsequent to discontinuance

Sub-section (4) of section 176 of the Act provides that where any profession is discontinued in any

year on account of cessation of profession by or retirement or on death of, the person carrying on the profession, then, in that case, any sum received by such person after discontinuance shall be deemed to be treated as income of the previous year in which such sum would be received by him and would be taxed accordingly. There was no similar provision with respect to taxability of receipt of discontinued business till insertion of sub-section (3A) by the Taxation Laws (Amendment) Act, 1975. As a consequence of insertion of sub-section (3A), the receipt of business which was discontinued would be subject to tax in the year in which the sum would be received. It is to be noted that if any expenditure is incurred in relation to receipt of any income subsequent to discontinuance of business or profession, then, in that case, such expenditure shall be allowed as deduction and only excess of receipt over such expenditure would be subject to tax in the year of receipt. The proposition is supported by following decisions:

- *CIT vs. Foresole Ltd. (153 ITR 349)(Raj.);*
- *Y. V. Subba Rao vs. CIT (236 ITR 932) (AP); and*
- *United Construction Contracts vs. CIT (208 ITR 914)(Kar.).*

A question arises as to under which head of income the income of discontinued business or profession shall be subject to tax as neither sub-section (3A) nor sub-section (4) provides the head under which such receipt be taxable under the Act. In the following decisions courts have held that a strict construction of the statutory provisions would render such receipts liable to tax under the residuary head of income:

- *CIT vs. Vishwantha Sastri (Estate of late AV) (121 ITR 270)(Mad.); and*
- *Roma Bose vs. ITO (95 ITR 299)(Cal.).*

However, the Calcutta High Court in its early decision in *CIT vs. Justice R. M. Datta (180 ITR 86)* held that the profits and gains of a profession received in subsequent year after the discontinuance of profession cannot be taxed under any of the sections i.e. under section 28, section 56 or section 176(4) of the Act. While coming to this conclusion the High Court held that section 176(4) of the Income-tax Act, 1961, created two fictions. The first fiction is that any sum received after discontinuance of the profession shall be deemed to be income of the recipient. The second fiction is that the said income shall be charged to tax in the year of receipt if such sum could have been included in total income of the person had it been received before such discontinuance. The legislative intention indicated by the express language of section 176(4) of the Act does not warrant any assumptions of a further fiction treating the receipts as income chargeable under the head "Profits and gains of business, profession or vocation". Wherever Parliament had the intention to treat a certain amount to be profits and gains of business or profession and chargeable to tax as the income of the relevant previous year, Parliament has specifically created a fiction for such a specific purpose. It specifically said so in section 10(5A) of the Indian Income-tax Act, 1922 and in sections 41(1) and 41(2) of the Income-tax Act, 1961. Income has to be brought under one of the heads falling under section 14 of the Act and can be charged to tax only if it is so chargeable under the computation section corresponding to that head. In the absence of a legislative provision, if receipts chargeable as "profits and gains of business, profession or vocation" cannot be treated as income falling under the head "Profits and gains of business, profession or vocation" carried on by the assessee during the relevant year, such receipts cannot be brought to tax under section 56 of the Act as "income from other sources." Hence, the profits and gains of a profession received in a subsequent year after the discontinuance of the profession cannot be taxed under section 176(4).

The above aspect needs statutory clarification because the ambiguity arises due to introduction in the procedural section 176 of the Act of charging provisions which may really find a place either in section 28 or section 41 of the Act.

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HOT SPOT

Finance Act, 2015 – Enactment stage amendments to Finance Bill 2015 and amendments effective from 1st June 2015

Finance minister (FM) had presented Finance Bill, 2015 (FB 2015), as part of the Union Budget 2015-16, to parliament on 28 February 2015. FB 2015 contained a number of proposals to amend the Income Tax Act, 1961 (ITA) which were discussed in Chamber's March 2015 journal.

The Finance Act, 2015 (FA 2015) became law on 14th May 2015 after receiving the President's assent.

In the present article, we have discussed amendments carried out at enactment stage to the original version of the FB 2015. The article also tabulates amendments made by FA 2015 which are effective from 1 June 2015.

Part A – Key direct tax amendments to the original version of FB 2015

1. Amendments in order to align ITA with Income Computation & Disclosure Standards (ICDS)

- As we all are aware, Central Government (CG) notified[1] ICDS on 31 March 2015. Broad principles which guided the Committee[2] while formulating ICDS were (a) Reduction of litigation; (b) Minimization of alternatives as provided in Accounting Standard issued by ICAI (AS); and (c) certainty to issues.
- As per the notification[3] all taxpayers following mercantile method of accounting will have to comply with ICDS while computing income under the heads "Profits and gains of business or profession" or "Income from other sources". ICDS are effective from 1st April 2015 (i.e. previous year 2015-16).
- As certain provisions of ICDS did not align with provisions of the ITA, FA 2015 amends the ITA to provide as follows:-

1.1. Government Grants (ICDS VII)

- ICDS VII relating to Government grants deals with treatment of government grants. It provides for recognition of such grants either by way of reduction from cost of depreciable asset or as income over

1 Notification No.33/2015; F. No. 134/48/2010-TPL

2 CG had constituted a Committee in December 2010 to study harmonization of ICAI AS with the ITA and suggest ICDS

3 Readers are requested to refer Chamber's May 2015 Journal under 'Special story' section for articles by several eminent authors on each of the ICDS

the periods necessary to match the related costs.

- Doubts had arisen whether it is permissible as per the ITA to recognize a grant which is related to non-depreciable asset of capital nature, as taxpayer's income.
- FA 2015 amends the definition of 'income' by inserting new clause (xviii) under s.2(24) of ITA (clause (xviii))to provide that assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the CG or a State Government or any authority or body or agency[4], in cash or kind, to the taxpayer, shall be taxable as its income. However, subsidy/grant/reimbursement which is taken into account for determination of 'actual cost' of depreciable assets in accordance with the provisions of Explanation 10 to s.43(1) shall not be treated as income.
- Prior to amendment, law was settled on distinction between subsidy of capital nature and subsidy of revenue nature by application of 'motive' or 'purpose' test.[5] Revenue subsidies were taxable as income. Capital subsidy was not taxable – subject, however, to reduction from 'actual cost' of asset if covered within the scope of Explanation 10 to s.43(1). Post amendment, any such distinction is rendered academic. All types of subsidies are taxable as income with the exception of subsidies covered by Explanation 10 to s.43(1) which are required to be reduced from 'actual cost' of capital asset.
- The subsidy, if related to business, will be taxable as business income and in any other case, as income from other sources.
- Having regard to SC ruling in Liberty India (317 ITR 218), it looks unlikely that subsidy may qualify for any profit-linked tax holiday deduction. It is unlikely to be considered as income 'derived from' the undertaking.
- If a view is that the amendment covers assistance from Government only, following receipts/benefits will arguably be not covered within the scope of newly inserted clause (xviii) and will not be impacted by the amendment:-
  - Loans waivers granted by non-government entities like banks & financial institutions
  - Subvention receipt from parent company
  - Carbon credit receipts from non-government entities
- The wide scope of new clause (xviii) raises several issues for individual taxpayers who may receive different types of subsidies from Government like LPG subsidy. In this regard, MOF Press Release[6] dated 5 May 2015 has clarified that the amendment will not affect LPG subsidy and other welfare subsidies received by individuals. While there may be some doubts on technical soundness of the reasoning provided in the Press Release for non-applicability of clause (xviii) to LPG and other welfare subsidies, it is possible that there may be some statutory amendment in next year's Budget to clarify this position. Till such time, taxpayers may rely on the Press Release.

4 Applying ejusdem generis principle, authority or body or agency should arguably be a Government authority, body or agency.

5 Refer, illustratively, SC ruling Ponni Sugar & Chemicals Ltd (306 ITR 392) and Sahney Steel & Press Works Ltd (228 ITR 253)

6 The press release had also clarified that amendment to definition of 'income' u/s .2(24) (xviiii) was made to align ITA with ICDS.

- An interesting issue may arise that whether waiver of indirect tax liabilities like excise duty, sales tax, etc which are not allowed as deduction u/s. 43B (since they are not actually paid) can, nevertheless, be taxed by virtue of newly inserted clause (xviii) even though the same may not be taxed in terms of s. 41(1).

1.2. Borrowing costs (ICDS IX)

- ICDS provides for capitalisation of borrowing costs in respect of qualifying assets viz. tangible/intangible assets and inventories[7]. S.36(1)(iii) of ITA provides for deduction in respect of all borrowing costs except when they are incurred for acquisition of an asset 'for extension of existing business or profession'. The condition of acquisition of asset 'for extension of existing business or profession' for disallowance of borrowing costs under proviso to s.36(1)(iii) (proviso) was in conflict with ICDS since ICDS does not have this condition.

- FA 2015 amends the proviso to omit the condition of asset acquisition 'for extension of existing business or profession' and thereby aligns the provisions of ITA with ICDS.

- There could be a debate whether the proviso is a disallowance provision and impact thereof is that interest cost covered by the proviso can neither be capitalised nor be allowed as revenue deduction. The amendment intensifies the debate and brings true scope of the proviso in sharper focus. This is because the proviso stops at disallowing interest expense for acquisition of an 'asset' and is silent on whether such interest can be capitalised despite neither commercial accounting concept nor ICDS permitting addition to cost for non-qualifying assets. Also, s.37 is unlikely to apply in relation to revenue expense dealt by s.36(1)(iii).

1.3. Revenue recognition (ICDS IV) and Contingent assets (ICDS X)

- There is an apprehension that application of certain ICDS like Revenue Recognition or Provisions, Contingent Liabilities and Contingent assets may result in accelerated recognition of income for tax purposes though the same may not be recorded in books of account as per applicable AS. It is possible that such income may eventually be found to be irrecoverable. While the ITA provides bad debt deduction u/s 36(1)(vii) for debts which are written off as irrecoverable in accounts, it would be difficult to claim bad debt deduction for income, recognised as per ICDS, which is irrecoverable but until now not recognized in the books.

- In order to remove this anomaly, FA 2015 inserts second proviso to s.36(1)(vii) (second proviso) to provide that such debt which is taxed as per ICDS but not recognized in the books shall be allowed as bad debt in the previous year in which it 'becomes irrecoverable' and it shall be deemed as if such debt has been written off as irrecoverable in the accounts of taxpayer for this purpose.

- However, once a debt is recognised in books, bad debt deduction will not be admissible unless it is written off in books. This situation is not impacted by the second proviso.

- Arguably, the newly inserted second proviso has no impact on either main provisions of s.36(1)(vii) or hitherto existing first proviso dealing with banks and financial institutions which are allowed deduction in respect of provision for doubtful debts u/s. 36(1)(viia).

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7 Inventory that require a period of 12 months or more to bring them to a saleable condition

- Having regard to language of the second proviso which grants deduction in the year in which 'such debt or part thereof becomes irrecoverable', there could be debate (a) whether taxpayer is required to establish that debt has 'become irrecoverable' to perfect his claim for deduction under the second proviso; or (b) whether taxpayer's commercial judgement of irrecoverability while putting up claim is sufficient to entitle him to deduction.
- An interesting issue may arise if income is taxed as per ICDS in Year 1, bad debt is allowed under second proviso in Year 2 (without income getting recorded in books) but such income is subsequently recorded in books in Year 5 and actually realised in Year 7, issue may arise whether such income will be taxable in Year 5 on recording in books or in Year 7 as per mandate of s.41(4) which taxes bad debt recovery in year of 'subsequent recovery'.

2. Mandatory tax return filing by resident in respect of foreign asset holding

- Generation of black money and its stashing abroad in tax havens and offshore financial centres have dominated discussion and debate in public fora in recent past. Indian Government, Supreme Court of India and public at large have unequivocally expressed concerns on issue.
- To address the above issue, amongst other, Government had introduced requirement of mandatory reporting of foreign assets held abroad by residents in tax return forms from assessment year 2012-13 and onwards. Further, fourth proviso to s.139(1) mandates a resident and ordinarily resident to furnish tax return even if his total income does not exceed the maximum amount not chargeable to tax if, at any time during the relevant previous year, he had any asset including financial interest in any entity located outside India (Foreign asset) or he had signing authority in any account located outside India. However, there was no specific provision or guidance under the ITA on the scope coverage of reporting by the resident taxpayer. The prescribed return form, together with instructions thereto, however, provided broad guidelines on categories of resident persons who are obliged to comply.
- FA 2015 substitutes fourth proviso to s.139(1) to explicitly specify the coverage of taxpayer by mandating the furnishing of tax return by every resident taxpayer who, at any time during the tax year
  - He holds, as a beneficial owner or otherwise, any asset (including any financial interest in any entity) located outside India or has signing authority in any account located outside India; or
  - He is a beneficiary of any asset (including any financial interest in any entity) located outside India.
- The provisions of amendment align with provisions relating to penalty and prosecution in the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.
- In order to avoid duplicated furnishing of tax return in respect of reporting the same foreign asset by legal as well as beneficial owner, FA 2015 inserts fifth proviso to s.139(1) to exclude beneficiary of foreign assets from obligation of disclosure in or furnishing of details in tax return if income from such assets is includible in hands of legal owner of such asset in accordance with provisions of the ITA.
- The expressions 'beneficial owner' and 'beneficiary' are now defined under newly inserted explanation 4 and 5 by FA 2015

"Explanation 4.- For the purposes of this section "beneficial owner" in respect of an asset means an individual who has provided, directly or indirectly, consideration for the asset for the immediate or future benefit, direct or indirect, of himself or any other person.

Explanation 5.- For the purposes of this section "beneficiary" in respect of an asset means an individual who derives benefit from the asset during the previous year and the consideration for such asset has been provided by any person other than such beneficiary."

- The provisions are effective from 1 April 2016 and will therefore apply from previous year 2015-16.

3. Amendments impacting foreign companies

3.1. Change in residence test for foreign corporates rationalised[8]

- Prior to amendment by FB 2015, S.6(3) of the ITA provided that a foreign company becomes a resident of India if, during the year, its control and management is situated wholly in India.

- The FB 2015 had amended s.6(3) by providing a subjective test that a foreign company will be treated as a resident of India if its place of effective management (POEM) is in India "at any time" in that year.

- There were concerns from various stakeholders on the use of the phrase "at any time" as it could cover even one-off instances, like a board meeting, or negotiation of a contract with a client, etc., being conducted in India to trigger residency test. It was clarified by officials of Central Board of Direct Taxes (CBDT) that the above amendments w.r.t POEM have been primarily made with an intention to focus only on those companies in India who hold meetings/AGMs abroad to evade tax residency rules. The term 'any time during the year' should not be interpreted in a narrow sense. However in absence of specific provision in ITA, concerns of stakeholders persisted.

- With a view to allay the fears of stakeholders, FA 2015 removes the words "at any time". Consequently, post amendment, POEM is defined to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made. Thus POEM is to be applied taking the relevant previous year as a whole into consideration. This change is an important step in bringing the corporate residence test in line with global standards.

3.2. MAT for foreign companies[9]

- Earlier, Foreign Companies (including Foreign Institutional Investors (FIIs)) have been taking a stand that MAT provisions should not be applicable in their case in circumstances where they do not have a business presence in India and in cases where the tax liability is protected by virtue of treaty provisions[10]. Perhaps, the same has been a subject matter of litigation and currently pending before the Supreme Court in the case of Castleton Investment Limited. Additionally writ petitions have been filed by certain foreign companies with Bombay High Court in relation to similar matter.

8 For detailed discussion on the amendment made by FB 2015 refer discussion at page 47 to 48 in Chamber's March 2015 Journal.

9 For detailed discussion on the amendment made by FB 2015 refer discussion at page 37 to 42 in Chamber's March 2015 Journal.

10 Also refer CBDT Instruction No. F No 500/36/2015-FTD.I dated 24 April 2015 which provides that all decisions wherein FIIs are claiming treaty benefits should be expedited and decided within one month from the date of claim made.

- With a view to mitigate the rigour in case of foreign companies, FB 2015 had proposed to provide relief to Foreign Institutional Investors (FIIs), but effective from previous year 2015-16, by excluding certain categories of capital gains from the purview of MAT for FIIs. FB 2015 proposed to, inter alia, exclude capital gains [other than short-term capital gains not subject to levy of securities transaction tax (STT)] earned by FIIs on sale of Indian securities and corresponding expenditure, if any, to be added back in computing the book profit for MAT purposes.

- While the above proposal addressed the controversy on applicability of MAT to FIIs for the future, it raised concerns over MAT becoming applicable, by inference, to foreign companies (other than FIIs) as also income of FIIs from sources other than capital gains, especially given the conflicting judicial rulings on the matter. With a view to clarify the tax position as applicable to foreign companies, FA 2015 inserted clause (fb) of Explanation 1 to s.115JB(2) to provide that, in the following cases, the specified income of foreign companies will be excluded from the purview of MAT from previous year 2015-16. Consequently, corresponding expenses shall also be excluded while computing MAT (refer clause (iid) of Explanation 1 to s.115JB(2)).

  – The capital gains income (whether long term or short term) arising on transactions in securities[11], if such income is credited to Profit and Loss account and tax payable on such capital gains income under normal provisions is less than the MAT rate of 18.5%.

  – Interest, royalty or fees for technical services chargeable to tax, if such income is credited to Profit and Loss account and tax payable on such incomes under the normal provisions is less than the MAT rate of 18.5%

- The way amendment is worded; foreign companies are not given complete exemption from the provisions of MAT like in case of life insurance companies. The amendment provides relief by way of adjustment to book profits. The exclusion is only with regard to specified streams of income. If there be any other stream of income, there is no relaxation. Further, the FM also clarified in the Parliament that assessments for past years will be concluded as per the outcome of judicial process.

4. Deferment of MAT applicability to Real Estate Investment Trust (ReIT) / Infrastructure Investment Trust (InvIT) (Business Trust)[12]

- Finance Act 2014 as proposed to be amended by FB 2015 provides for special tax regime on transfer of shares by sponsor of Special Purpose Vehicle (SPV) to a Business Trust (ReIT) in exchange of units allotted by said trust to the sponsor and subsequent transfer of units of Business Trust by the sponsor.

- While, as per FA 2014, at the stage of exchange of shares of SPV by the sponsor against units of Business Trust, sponsor could enjoy full exemption from capital gains under the normal provisions of the ITA and could enjoy preferential tax treatment at par with tax treatment

11 Definition of 'securities' is borrowed from Securities Contract Regulation Act, 1956 (SCRA). Presently there is a debate whether shares of a private company can be considered as 'securities' under SCRA.

12 For detailed discussion on the amendment made by FB 2015 refer discussion at page 24 to 26 in Chamber's March 2015 Journal.

applicable to the listed securities under the ITA at the time of subsequent transfer of units of Business Trust.

- Concerns were, however, raised by sponsor (being company) on prospects of levy of MAT applicability at the stage of exchange of shares of SPV against the units allotted by the Business Trust. The concern was all the more valid considering that it would impact cash flow of the sponsor without realization of gain at the stage of exchange.
- Addressing the concerns, the FA 2015 now provides for deferment of MAT applicability in a fairly novel manner. FA 2015 introduces certain new clauses to Explanation 1 to S.115JB to provide for MAT treatment at different stages.
- The scheme proposed by the FA 2015 provides as under:
  - There will be no MAT levy, at the stage of transfer of shares of SPV to Business Trust, on gain from transfer of shares of SPV in exchange of units allotted by the trust referred to s. 47(xvii). Such gain is considered by the amendment to be notional gain. [Clause (iie) (A) to Explanation 1 to S. 115JB]
  - There will be no MAT levy on gain from any change in carrying amount of units in the books of sponsor as a result of restatement of values. [Clause (iie)(B) to Explanation 1 to S. 115JB]
  - The actual gain on transfer of units of Business Trust referred to in s. 47(xvii) which may have been recorded by the sponsor in his books by reckoning the carrying value of units in his books will also be ignored for the purpose of computation. [Clause (iie) (C) to Explanation 1 to S. 115JB]
  - Similar adjustment is provided in MAT computation, on principles, if there is any loss incurred at the stage of exchange of shares, or as a result of restatement of value, or at the stage of transfer of units. [Clause (fc) to Explanation 1 to S. 115JB]
  - However, the book profit subject to MAT will be computed in the hands of the sponsor in the year in which there is transfer of units by the sponsor. In terms of clause (k) of Explanation 1 to S.115JB, there will be MAT levy on amount of gain, at the stage of transfer of units, such that the gain (chargeable book profit) is computed:
    - o On the basis of difference between the sale price of units and original cost of shares of SPV (as were exchanged with the units of Business Trust)

      OR
    - o Being the difference between sale price of units and carrying amount of shares in the books of sponsor at the time of exchange of such shares against units, if such shares were carried at a value other than the cost.
  - Similarly, the loss which is found to have been incurred by the sponsor when transfer price of units is compared with the cost of original shares, such loss is considered as deductible loss in the computation of book profit for levy of MAT. [Clause (iif) to Explanation 1 to S. 115JB]
- The provisions may be explained by illustrating the following fact pattern as applicable to a sponsor

– Year 1: Sponsor transfers shares of SPV whose cost was ` 100 to ReIT in exchange of units worth ` 1000

– Year 3: The units are restated at ` 800 due to fall in value

– Year 6: The units are sold for ` 1500

Year	Corporate Books	Normal tax liability	Book profit for MAT (2015 amendment)
1	Profit of ` 900at the stage of exchange of shares against units credited to P/L account	Exempt u/s. 47(xvii)	No MAT at this stage. Gain is considered to be notional gain for MAT purpose
3	Restatement of value of units; impairment loss of ` 200 debited to P/L account	Book entry; there is no transfer of asset; loss inadmissible	Restatement in value is ignored for MAT purposes by excluding it in computation of MAT liability
6	Profits of ` 700 (being sale value of units, 1500 and carrying amount of units, 800)	STT paid long term capital gain is exempt u/s. 10(38)	MAT payable on profit of ` 1400 (being sale price of units, 1500) less (original cost of erstwhile shares, ` 100). ` 700 as credited to P/L account is reduced from book profit and ` 1400 is separately added to book profit

- To recollect, S.47(xvii) exempts capital gains arising to sponsor on exchange of shares in SPV for units in ReIT. The said exemption will not apply to other modes of settlement to ReIT viz. where SPV transfers real estate to ReIT in terms of regulatory provision. The amended MAT provisions are restricted in application to transaction referred to in S.47(xvii), i.e. to say, to transaction of tax compliant exchange of shares against units of ReIT and subsequent disposal of units referred to in that section.
- The above special regime applies only to sponsors and does not apply to those companies who deal in units. Thus, a company which makes investment in ReIT units as an investor will pay MAT as per normal scheme of MAT i.e. basis income/loss as actually recognized in P/L account.
- An interesting issue may arise on applicability of MAT provisions in a case where Sponsor Company gets amalgamated or demerged post contribution to REIT and Successor Company disposes of part of units.

5. Global Depository Receipts (GDRs)

Treatment under the applicable scheme

- Earlier, GDRs were governed by "Issue of Foreign Currency Convertible Bonds and Ordinary shares (through depository receipts mechanism) Scheme, 1993" (1993 Scheme). The 1993 scheme was limited to issue of Depository Receipts (DRs) based on the underlying shares or foreign currency convertible bonds of a listed Indian company.
- The 1993 Scheme also provided tax treatment on GDRs, as per which, amongst others, (a) Cost of acquisition post redemption of GDR into shares will be the price prevailing on the recognized stock exchange on the date of advice

of redemption; (b) Period of holding post redemption of GDR into shares will be reckoned from the date of advice of redemption.

- With a view to liberalize, the CG notified a new Depository Receipts Scheme, 2014 (2014 scheme) (replacing the 1993 Scheme on GDRs). Under the 2014 scheme, GDRs can be issued against securities of listed, unlisted or private or public companies against underlying securities. However, the 2014 Scheme is silent on the aspect of tax treatment.

Treatment under the ITA

- S. 115AC of the ITA provides for a concessional tax rate of 10% for non-residents (NRs) on income earned by way of dividends on, and by way of capital gains from transfer of, GDRs purchased in foreign currency. Further, s.47(viia) exempts capital gains on transfer of GDR from one NR to another NR outside India.
- Earlier, GDRs was defined under S. 115ACA to mean
  - Any instrument in the form of a depository receipt (DR) or certificate (by whatever name called);
  - Created by the Overseas Depository Bank outside India; and
  - Issued to NR investors against the issue of ordinary shares or foreign currency convertible bonds of issuing company.
- However, vide FB 2015, the definition of GDR has been was amended with effect from FY 2015-2016, to mean:
  - Any instrument in the form of a DR or certificate (by whatever name called);
  - Created by the Overseas Depository Bank outside India and issued to investors against the issue of:
    - o ordinary shares of issuing company, being a company listed on a recognised stock exchange in India; or
    - o foreign currency convertible bonds of issuing company
- Hence, with effect from FY 2015-16, the tax treatment in terms of S. 115AC and S. 47(viia) would be available only to GDRs (issued against primary issue) of listed companies.
- In order to clarify the tax implications on redemption of GDR into shares of a listed company, and thereby, to codify the tax treatment as provided in 1993 Scheme, FA 2015 provides as under:
  - The period of holding of shares will be reckoned from the date on which a request for redemption is made [S. 2(42A)]; and
  - The cost of acquisition of shares will be the price of such shares prevailing on any recognised stock exchange in India on the date on which a request for redemption is made [S. 49(2ABB)].

The amendment is limited in its implications to redemption of GDRs issued by listed company.

- However, as one would observe, on account of change in the definition of GDR under the ITA (in terms of S.115ACA), the amendment is limited in its implications to GDRs issued against primary issue of listed company. Hence, the tax treatment of other GDRs (i.e. unlisted companies, GDRs issued against underlying securities not being ordinary shares) has not been covered by the amendment, and would therefore; need to be determined based on the facts, and circumstances of each case.

6. Tax incentive benefits extended to states of Bihar and West Bengal

- FB 2015 provided benefit of enhanced additional depreciation u/s 32(1)(iia) from 20% to 35% in respect of new plant and machinery acquired and installed during 1 April 2015 but before 1 April 2020 (specified period) for setting up manufacturing units in the notified backward areas of State of Andhra Pradesh or State of Telangana.

- FB 2015 also provided the benefit of investment allowance u/s 32AD @15% of the amount of investment in new plant or machinery acquired and installed during specified period for setting up manufacturing units in the notified backward areas of State of Andhra Pradesh or State of Telangana subject to certain conditions.

- FA 2015 extends the aforesaid benefit of enhanced additional depreciation and investment allowance also to such units set up in notified backward areas of the State of Bihar and State of West Bengal.

7. Personal taxation – Individual taxpayers[13]

7.1. New Pension Scheme (S.80CCD)

- S. 80CCD provides deduction to specified taxpayers[14] in respect of contribution to notified New Pension Scheme (NPS) of CG. Sub-section (1A) provided threshold on deductible amount subject to maximum deduction of ` 1 lakh.

- Further s.80CCE provides overall threshold of ` 1.5 lakh for aggregate investments/ contributions covered by s.80C, 80CCC, 80CCD(1).

- FB 2015 had inserted s.80CCD(1B) to provide additional deduction of ` 50,000 in respect of investments made by individual taxpayers in NPS. Further, threshold of maximum deduction u/s 80CCD(1) upto ` 1 lakh was removed. Consequently, taxpayer could avail deduction u/s 80CCD maximum upto Rs 2 lakh (viz., 1.5 lakhs in s.80CCD(1) r.w. s.80CCE and ` 50,000 u/s 80CCD(1B))

- However there were doubts whether the proposed benefit can operate only if taxpayers made full investment of ` 2 lakhs in NPS.

- FA 2015 amends s.80CCD(1B) to clarify that if taxpayer makes investment of, say – ` 50,000 in NPS and say, ` 1.50 lakhs in investments qualifying under other provisions (say s.80C), benefit of increased limit of ` 2 lakhs can still be availed.

7.2. Medical insurance/expense deduction (s.80D) –

- FM in his budget announcement had proposed to increase limits for deduction for payment of medical insurance premium for self and family members from existing limits of ` 15,000/` 20,000 to ` 25,000/` 30,000. The text of FB 2015, however, did not contain specific amendment to that effect.

- FA 2015 removes this anomaly and introduces amendment in s.80D consistent with the Budget announcement.

8. Safe harbour provisions for certain offshore sovereign funds (S.9A)

- Income of a NR is taxable in India if it arises, amongst other, through a business connection in India

13 For detailed discussion on the amendment made by FB 2015 refer discussion at page 30 to 33 in Chamber's March 2015 Journal.

14 Specified taxpayers are (a) an individual, employed by the CG on or after 1-1-2004 or (b) an individual employed by any other employer or (c) any other individual.

- Presence of a fund manager in India may create a business connection/taxable presence in India for the overseas fund and lead to income of the fund being taxable in India. Such presence may also trigger exposure of creating residency of the fund in India on the basis of its control and management or POEM in India.
- In order to facilitate location of offshore fund managers in India, a specific regime was provided in the FB 2015. The specific regime provides that:
  - In the case of an "eligible investment fund", the fund management activity carried out through an "eligible fund manager" acting on behalf of such fund will not constitute business connection in India.
  - An eligible investment fund will not be a resident in India merely because the eligible fund manager undertakes fund management activities in India.
- Offshore fund and the fund manager are required to satisfy certain conditions to be eligible for the specific regime. Some of the conditions to be satisfied by the offshore fund were:
  - The fund has a minimum of 25 members who are, directly or indirectly, not connected persons;
  - Any member of the fund along with the connected persons shall not have participation interest, directly or indirectly, in the fund exceeding 10%;
  - Aggregate participation interest, directly or indirectly, of ten or less members along with their connected persons in the fund, shall be less than 50%.
- As per the FA 2015, the above three conditions will not apply in case of investment funds set up by the Government of foreign state or the Central Bank of a foreign State or a sovereign fund and such other funds as may be notified by CG and subject to fulfilment of conditions as may be specified.
- Additionally, it has been provided that the special regime shall be applied in accordance with guidelines and in such manner as the CBDT may prescribe.

Part B - List of amendments effective from 1 June 2015

This part of the article merely recapitulates in tabulated form list of amendments which are effective from 1 June 2015 for quick reference purpose. For detailed discussion on amendment made by Finance Bill 2015 refer page no. 9 to 98 in Chamber's March 2015 Journal.

Caption	Section	Particulars
Settlement commission	132B	With a view to facilitate taxpayer, section amended to provided adjustment of asset seized u/s. 132 or requisitioned u/s. 132A at the request of taxpayer against the tax and interest liability arising based on the application made before the Settlement Commission u/s. 245C (1).
Approval process for sanction	151	Substituted s.151 provides for a simplified approval regime for sanction for issue of reassessment notice as follows

Caption	Section	Particulars	
for issue of reassessment notice		Particulars	Approval
		Re-assessment initiated within 4 years	JCIT[15]
		Re-assessment initiated after 4 years	PCCIT/ CCIT/ PCIT/ CIT[16]
Assessment of a person other than the person in whose case search is initiated	153C	In case, during a search, if the assessing officer (AO) is satisfied that • any money, bullion, jewellery or other valuable article or thing are found which 'belong to' another person or • any books of accounts or documents are found which 'pertain to' or any information therein 'relates to' another person then the jurisdictional AO of such other person may undertake proceedings against such another person	
Appeal by revenue when identical question of law pending before SC	158AA	PCIT/CIT, subject to acceptance by taxpayer, may direct AO to make an application before ITAT within 60 days from date of receipt of CIT(A) order stating that identical question of law is pending before SC and thus appeal for identical question of law for Year 2 may be filed once the decision on question of law becomes final for Year 1	
Forms for investment declarations for salary TDS	192	Section requires employer to obtain 'evidence or proof or particulars of prescribed claims (including claim for set-off of loss)' in form and manner to be prescribed by Rules	
Simplification of TDS mechanism for statutory PF	192A	Simplified Tax Deducted at Source (TDS) regime for taxable withdrawal from statutory provident fund: • Applicable TDS rate is 10% except in case when PAN is not furnished, in such case, applicable rate is maximum marginal rate • Threshold of aggregate payments for not attracting TDS is ₹ 30,000	
Rationalizing provisions of S.194A	194A	• TDS is applicable to interest on bank 'recurring deposits' • Threshold limit of ₹ 10,000 for non-applicability of TDS provision is now applicable at 'entity level' instead of 'branch level' where a banking company or co-operative bank or public company has adopted core banking solutions	

15 Joint Commissioner

16 Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner

Caption	Section	Particulars
		• TDS exemption on interest payment by a co-operative society restricted only for payments made to other co-operative society and co-operative housing society. Consequently, Payment to other members by a co-operative society is no longer exempted from TDS.
Rationalizing provisions of S.194A	194A	TDS on interest paid on compensation awarded by Motor Accident Claim Tribunal on payment basis from the erstwhile trigger point of payment or credit, whichever is earlier.[17]
No TDS in case of payments to small transporters	194C	Facility of non-deduction of TDS payments to transporters upon furnishing of PAN in restricted only to contractors owning ten or less goods carriages at any time during the previous year
Rental income of REIT	194I and 194LBA	• No TDS u/s 194I on rental income credited or paid to Real estate investment trust (REIT), in respect of directly owned real estate asset referred to in s.10(23FCA)[18] • TDS u/s 194LBA on distributions to unitholders of amount comprising of rental incomes earned by REIT will be at the rate of 10% if paid to a resident, and as per the rates in force if paid to a non-resident.
Alternative investment funds (AIF)	194LBB	TDS @10% at the time of credit or payment whichever is earlier will be deductible on income, other than business income, payable to a unit holder by an AIF
Extended window period	194LD	Window period of concessional tax rate of 5% on gross basis on interest payable to FII[19] or QFI[20] on rupee denominated bonds of Indian company or Government security extended from 31 May 2015 to 30 June 2017
Reporting requirements extended to cover non-chargeable incomes and non-compliance penalty	195(6), 271-I and 273B	• Person responsible for paying any sum whether chargeable to tax or not, to a non-resident is required to furnish the information in such form and manner as may be prescribed[21] • Penalty of ` 1 lakh is prescribed u/s 271-I for default in furnishing of information or furnishing of incorrect information u/s 195(6) unless taxpayer proves reasonable cause for the failure.

17 Amendment in the line with s.56(viii) r.w.s.145A(b) which provides for taxability of such interest on receipt basis in the hands of recipient

18 Rental income earned by REIT exempted u/s 10(23FCA) w.e.f 1 April 2016

19 Foreign Institutional Investor

20 Qualified Foreign Investor

21 Rule 37BB governs compliance u/s 195(6) and it prescribes Form 15CA, 15CB for reporting the information required. It may be noted that Rule 37BB has not been amended (as on 7 June 2015) though amended S.195 (6) has already come into force. Existing Rule 37BB (1) is based on S. 195(6) as existed prior to amendment by FA 2015 which continues to require compliance where the payment is 'chargeable to tax' creating disconnect with amended S. 195(6).

Caption	Section	Particulars
Facility of form 15G/15H extended to s.194DA	197A	• Finance Act 2014 had introduced TDS u/s 194DA @ 2% on non-qualifying life insurance payments to residents. • FA 2015 amends s.197A to provide option to resident payee to furnish Form 15G/15H to avoid TDS u/s 194DA if his tax on estimated total income will be nil.
Processing of TDS statement	200A	Section amended to permit levy of fees u/s 234E while processing TDS statement
Requirement of obtaining TAN No.	203A	Section amended to provide that requirement of obtaining and quoting TAN u/s 203A shall not apply to such deductors or collectors as notified by CG
Government deductors to furnish monthly TDS/ TCS statements	200(2A), 206C(3A), 272A	• FA 2015 introduces specific provision under the ITA to cast statutory obligation on Government deductors to furnish monthly TDS/ TCS statement • Penalty u/s 272A of Rs 100 per day of default restricted to tax deductible/ collectible in case of non-compliance.

Processing of TCS statements	206CB r.w 154, 156, 206C(7), 220(2), 246A	FA 2015 introduces provisions for processing quarterly Tax collected at source (TCS) statements in the lines of processing of TDS statements as follows
		• Processing of TCS statements after making adjustments for prima facie errors/ incorrect claims
		• Intimation for demand/ refund, if any, generated after processing shall be:
		    • subject to rectification u/s 154;
		    • appealable u/s 246A; and
		    • deemed as notice of demand u/s 156 triggering interest for delay in payment u/s 220(2)
		• No duplicate levy of interest u/s 206C(7) and 220(2) for same period for default in TCS payment
		• Correction statements can be filed for correcting/rectifying errors in TCS statements

Interest levy u/s 234B	234B	• Interest u/s 234B in cases of reassessment will be leviable @1% on tax on incremental income from 1st day of the assessment year (hitherto date of regular assessment was considered) till the date of reassessment order.

Caption	Section	Particulars
		• Interest u/s 234B will be leviable @1% on tax on additional income declared in application before settlement commission u/s 245C(1) from the period commencing from first day of assessment year till the date of application u/s 245C(1)
Scope coverage of Set Comm.	245A	The scope coverage of cases that can be taken to Settlement Commission (Set Comm.) has been expanded to cover certain categories of reassessment cases.
Time limit for rectifying order	245D(6B)	This section is amended to provide period for rectification of order as under: Set Comm. may rectify its own order on an application made by the Principal Commissioner or Commissioner or applicant at any time within a period of six months from the end of the month in which application for rectification is made subject however to that application was made for rectification before the expiry of 6 months from the date of Sett Comm. order
Power to grant immunity from prosecution	245H	Set Comm. required to record reasons in writing while granting immunity to the taxpayer from prosecution
Abatement of proceedings before Set Comm.	245HA	Section amended to provide that where in respect of any application made u/s 245C, an order u/s. 245D(4) has been passed without providing for the terms of settlement then, the proceedings before the Set Comm. shall abate on the day of an order u/s. 245D(4).
Bar on subsequent application	245K	• Applicant or 'related person of such applicant' cannot approach Set Comm. once again under circumstances specified u/s 245K(1) • The expression 'related person' has been specifically defined under explanation to section.
Certain appealable order to ITAT	253	Right to appeal is provided to taxpayer against the order passed by the prescribed authority refusing to grant approval to educational or medical institutions covered by S.10(23C)(vi)/(via)
Increase in monetary limit	255	Single member bench of ITAT can dispose of a case where the total income as computed by the AO does not exceed fifteen lakh rupees.

Caption	Section	Particulars
Revisional orders u/s 263	263	Explanation 2 to s.263 clarifies that an order passed by the AO shall be deemed to be erroneous and prejudicial to the interest of revenue, if: • the order is passed without making inquiries or verification which should have been made; • the order is passed allowing any relief without inquiring into the claim; • the order has not been made in accordance with any order, direction or instruction issued by CBDT • the order has not been passed in accordance with any decision which is prejudicial to the taxpayer, rendered by the jurisdictional HC or SC
Real estate transactions covered	269SS, 269T, 271D and 271 E	• Provisions of s.269SS and s.269T widened to cover dealings in cash in relation to immovable property transactions so as to prohibit any person to take or accept from any other person any loan or deposit or any specified sum, of ` 20,000 or more, otherwise than by an account payee cheque or account payee
		bank draft or use of electronic clearing system through a bank account. • Consequential amendment made in penalty provisions u/s 271D and 271E

Definition of accountant	288	• 'Accountant' defined to mean Chartered Accountant holding valid Certificate of Practise.
		• The amendment provides further disqualifications as under
		  • Person who is not eligible to be appointed as an auditor of a company as per Companies Act, 2013, would be ineligible for carrying out any audit or furnish any certificate under ITA in respect of that company.
		  • For other taxpayers, multiple criteria have been introduced prescribing disqualification of a person to be appointed as 'accountant'.
		• Disqualification not applicable for Chartered Accountant acting as Authorised Representative

FTC rules	295	CBDT empowered to make rules for manner of grant of Foreign Tax Credit against income tax payable in India

B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Income chargeable under the head Income from House Property or Income from Business or Profession.
Civil Appeal No. 4494 of 2004 – M/s. Chennai Properties & Investments Ltd., Chennai ... Appellant versus Commissioner of Income Tax Central III, Tamil Nadu ...Respondent Dated 9th April, 2015.

The appellant-assessee is a company incorporated under the Indian Companies Act. Its main objective, as stated in the Memorandum of Association, is to acquire the properties in the city of Madras (now Chennai) and to let out those properties. The assessee had rented out such properties and the rental income received therefrom was shown as income from business in the return filed by the assessee. The assessing officer, however, refused to tax the same as business income. According to the assessing officer, since the income was received from letting out of the properties, it was in the nature of rental income. He, thus, held that it would be treated as income from house property and taxed the same accordingly under that head.

The assessee filed the appeal before the Commissioner of Income-tax (Appeals) who allowed the same by his orders dated 06.04.1989 holding it to be income from business and directed that it should be treated as such and taxed accordingly. Aggrieved by that order, the Department filed appeal before the Income Tax Appellate Tribunal which declined to interfere with the order of the Commissioner of Income Tax (Appeals) and dismissed the appeal. The Department approached the High Court. This appeal of the Department has been allowed by the High Court vide its order dated 05.09.2002 holding that the income derived by letting out of the properties would not be income from business but could be assessed only income from house property.

With this background, the Supreme Court first referred to its judgment in East India Housing and Land Development Trust Ltd.'s case which was relied upon by the High Court. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question arose for consideration was: whether the rental income received was to be treated as income from the house property or the income from the business. This court

while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties.

Before referring to the judgment of the Constitution Bench in the case of Sultan Brothers (P) Ltd., the Supreme Court discussed the law laid down authoritatively and succinctly by it in *Karanpura Development Co. Ltd. vs. Commissioner of Income Tax, West Bengal [44 ITR 362 (SC)].* That was also a case where the company, which was the assessee, was formed with the object, inter alia, of acquiring and disposing of the underground coal mining rights in certain coal fields and it had restricted its activities to acquiring coal mining leases over large areas, developing them as coal fields and then sub-leasing them to collieries and other companies. Thus, in the said case, the leasing out of the coal fields to the collieries and other companies was the business of the assessee. The income which was received from letting out of those mining leases was shown as business income. Department took the position that it is to be treated as income from the house property. It would be thus, clear that in similar circumstances, identical issue arose before the Supreme Court which first discussed the scheme of the Income-tax Act and particularly six heads under which income can be categorised / classified. It was pointed out that before income, profits or gains can be brought to computation, they have to be assigned to one or the other head. These heads are in a sense exclusive of one another and income which falls within one head cannot be assigned to, or taxed under, another head. Thereafter, the Court pointed out that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was highlighted and stressed that the objects of the company must also be kept in view to interpret the activities. In support of the aforesaid proposition, number of judgments of other jurisdictions, i.e. Privy Council, House of Lords in England and US Courts were taken note of. The position in law, ultimately, is summed up in the following words: -

> "As has been already pointed out in connection with the other two cases where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of a trading operation. The diving line is difficult to find; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned."

The Supreme Court had also taken into consideration the following observations in Sultan Brothers (P) Ltd.'s case:

> "We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly

> carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature."

The Supreme Court in the case of Chennai Properties and Investments Ltd. held as under:

> " ..... We are of the opinion that the aforesaid judgment in Karanpura Development Co. Ltd.'s case squarely applies to the facts of the present case."

> "We are conscious of the aforesaid dicta laid down in the Constitution Bench judgment. It is for this reason, we have, at the beginning of this judgment, stated the circumstances of the present case from which we arrive at irresistible conclusion that in this case, letting of the properties is in fact is the business of the assessee. The assessee therefore, rightly disclosed the income under the Head Income from Business. It cannot be treated as 'income from the house property'."

S. 32: The assessee has the right to disclaim depreciation in its entirety. However, it cannot claim depreciation for the current year and disclaim unabsorbed depreciation

M/s. Seshasayee Paper & Boards Limited vs. Dcita – [Civil Appeal Nos. 1812-1813 of 2005, dated 15th March, 2015]

The assessee claimed the depreciation allowance insofar as it pertained to the current year. At the same time, it did not want to claim the set off of the unabsorbed depreciation allowance of the previous years. The Supreme Court was called upon to consider: whether it is open to the assessee to invoke the provisions of section 32 of the Act by claiming depreciation of the current year, but at the same time choose not to make a claim of set off of unabsorbed depreciation allowance of the previous years?

The Supreme Court rejecting the plea held that once the unabsorbed carried forward depreciation has become a part of the depreciation of the current year, it is not open to the assessee to bifurcate the two again and exercising its choice to claim the depreciation of the current year under Section 32(1) of the Act and take a position that since unabsorbed depreciation of the previous years is not claimed, it cannot be thrusted upon the assessee. The position would have been different if the assessee had not claimed any depreciation at all. However, once the depreciation is claimed and while giving deductions the depreciation is to be set off against the profits of the current year prior to the unabsorbed carried forward investment allowance, it is the entire depreciation, namely, the depreciation of the current year as well as the unabsorbed carried forward depreciation, which is to be taken into account as by virtue of the fiction created under section 32(2) of the Act, carried forward depreciation also partakes the character of depreciation of the current year. This scrambled egg cannot be unscrambled now. Otherwise, it would amount to negating the legal fiction that is created by the said provision, even to the limited extent. In fact, the case falls within the ambit of the said limited extent of legal fiction and gets covered by it *Commissioner of Income-Tax, Kanpur v. Mother India Refrigeration Industries P. Ltd. (1985) 155 ITR 711* referred)

S. 43B: "Vend fee" paid by the assessee to the Government, even if of the nature of "privilege fee" falls within the expression "fee by whatever name called"

Commissioner of Income Tax, Kerala vs. M/s. Travancore Sugars & Chemicals Ltd. – [Civil Appeal No. 2558 of 2005, dated, 7th May, 2015]

(i) A reading of section 43B after it was substituted by the Finance Act, 1988 with effect from 01.04.1989 shows that sub clause (a) in section 43B has been considerably widened by the amendment by the addition of the words "by whatever name called". It is clear, therefore, that to attract this section any sum that is payable whether it is called tax, duty, cess or fee or called by some other name, becomes a deduction allowable under the said Section provided that in the previous year, relevant to the assessment year, such sum should be actually paid by the assessee.

(ii) Even if the vend fee that is paid by the respondent to the State does not directly fall within the expression 'fee' contained in section 43B(a), it would be a 'fee' by 'whatever name called', that is even if the vend fee is called a 'privilege' as has been held by the High Court in the judgment under appeal.

S. 80-IB(10): Restriction on extent of commercial area in "housing project" imposed w.e.f. 1.4.2005 does not apply to housing projects approved before 1.4.2005 even though completed after 1.4.2005

Commissioner of Income Tax-19, Mumbai. vs. M/s. Sarkar Builders – Civil Appeal No. 4476 of 2015 (arising out of SLP (c) No. 24330 of 2011, dated 15th May, 2015)

The definition of "housing project" was amended w.e.f. 1.4.2005 to provide that the benefit of section 80IB(10) would not be admissible to these assessees/developers in case the area utilised for shops and commercial establishment exceeded 5% of the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less. The Bombay High Court held in *CIT vs. M/s Brahma Associates 333 ITR 289 (Bom)* that as this amendment is prospective and has come into effect from 01.04.2005, this condition would not apply to those housing projects which had been sanctioned and started earlier even if they finished after 01.04.2005. On appeal by the Department to the Supreme Court, the question for consideration was "Whether section 80IB(10)(d) of the Income-tax Act, 1961 applies to a housing project approved before 31.03.2005 but completed on or after 01.04.2005?"

The Supreme Court dismissing the appeal of the Department held:

(i) Before 01.04.2005, the legal position was that once the project is sanctioned by the local authority as 'housing project', the extent of area sanctioned for shops and commercial establishments in the said housing project was immaterial and had no bearing. Thus, irrespective of the said of area where shops and commercial establishments were permitted by the local authority in a housing project, it was still treated as housing project and further that while granting 100% deductions, the area covered by shops and commercial establishments was also includible. This position has changed with the insertion of clause (d) to sub-section (10). As per the amendment carried out and made effective from 01.04.2005, even if the local authority had sanctioned larger area for shops and commercial establishment, the benefit of section 80IB(10) would not be admissible to these assessees/developers in case the area utilised for shops and commercial establishment exceeded 5% of the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less.

(ii) What follows is that prior to 01.04.2005, these developers/assessees who had

got their projects sanctioned from the local authorities as 'housing projects', even with commercial user, though limited to the extent permitted under the DC Rules, were convinced that they would be getting the benefit of 100% deduction of their income from such projects under section 80IB of the Act. Their projects were sanctioned much before 01.04.2005. As per the permissible commercial user on which the project was sanctioned, they started the projects and the date of commencing such projects is also before 01.04.2005. All these assessees were made known of the provision by which these projects are to be completed as those dates have been specified from time to time by successive Finance Acts in the same provision section 80IB. In these cases, completion dates were after 01.04.2005. Once they arrange their affairs in this manner, the Revenue cannot deny the benefit of this section applying the principle of retroactivity even when the provision has no retrospectivity. Take for example, a case where under the extant DC Rules, for shops and commercial activity construction permitted was, say, 10% and the project was also sanctioned allowing a particular assessee to construct 10% of the area for commercial purposes. The said developer started with its project much prior to 01.04.2005 with the aforesaid permissible use and the construction was at a very advanced stage as on 01.04.2005. Can it be argued by that Revenue that he is to demolish the extra coverage meant for commercial purpose and bring the same within the limits prescribed by the new provision if he wanted to avail the benefit of deduction under Section 80IB(10) of the Act, only because of the reason that the project was not complete as on 01.04.2005? As in such a case he filed his return for an assessment year after 01.04.2005 and for the purpose of assessment of the said return, law prevailing as on that date would be applicable? Answer has to be in the negative on the principle that with the aforesaid planning as per the law prevailing prior to 01.04.2005, these assessees acted and acquired vested right thereby which cannot be taken away. It is ludicrous on the part of the Revenue authorities to expect the assessees to do something which is almost impossible;

(iii) Can it be said that in order to avail the benefit in the assessment years after 1.4.2005, balconies should be removed though these were permitted earlier? Holding so would lead to absurd results as one cannot expect an assessee to comply with a condition that was not a part of the statute when the housing project was approved. We, thus, find that the only way to resolve the issue would be to hold that clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities. *(Reliance Jute and Industries Ltd. vs. CIT, (1980) 1 SCC 139 & Commissioner of Income Tax, U.P. vs. M/s. Shah Sadiq and Sons (1987) 166 ITR 102 (SC) referred).*

Ashok Patil, Mandar Vaidya & Priti Shukla
Advocates

DIRECT TAXES
High Court

1. Sec. 37(1) – Business expenditure – expenditure incurred on abandoned new facility – allowable as business expenditure

Binani Cement Ltd. vs. CIT (2015) 118 DTR (Cal) 61

The assessee incurred expenditure made for construction/acquisition of new facility subsequently abandoned at the work in progress stage was an allowable deduction in the year of write off as incurred wholly and exclusively for the purpose of assessee's business.

2. Sec. 194B – stake money and prize paid to horse owners by race club – provisions of 194B were not attracted even after the amendment

Bangalore Turf Club Ltd. vs. Union of India (2015) 118 DTR (Kar) 361

The department had made an attempt to contend that on account of the words 'or card game or other similar game' introduced by way of insertion to section 194B by the Finance Act, 2001 would encompass the income by way of stake money and thereby an obligation is cast upon the turf clubs to deduct the tax at source on such stake money paid to race horse owners. On a writ, the High Court held that, a conspectus reading of the Act, circulars and the speech of the Finance Minister would indicate that the amendment brought about by the Finance Act, 2001 has no bearing over income derived from owning and maintaining horses, and stake money paid by race clubs to horse owners would not attract the provisions of section 194B.

3. Sec. 80HHC – Terms "Business" "Total Turnover" and "Export Turover"

CIT vs. Itarsi Oil & Flour Mills (2015) 229 Taxmann 537 (Chhattisgarh)

The assessee had two separate units, one conducting domestic and export business and another domestic business only. The assessee claimed deduction u/s 80HHC by taking the profit of the business and total turnover of the business of the solvent unit only, it did not include the flour mill. The AO calculated the deduction by taking the profit of the business and total turnover of all the business of the assesee. CIT(A) and Tribunal allowed assessee's appeal. On Revenue's appeal in HC, HC reversed the findings of the Tribunal and held that S/80HHC does not

confine the word " Business' to the unit that is fully or partly doing export business. Use of the word "total " in S/80HHC(3) signifies that it is not limited to a particular unit but it refers to all the business carried on by the assessee. The word 'export turnover' is also defined in Expl. (ba) . It excludes certain amounts mentioned therein. However, it does not exclude the turnover of the business other than the one doing export business. The word "business" means all the business carried on by the assessee and it is not limited to the export Oriented Unit namely the SE unit and AO was justified in taking profit of business and total turnover of all the business of the assessee.

4. Sec. 37(1) – Keyman Insurance Policy – Allowable business expenditure u/s 37(1) – A.Y. 2005-06

CIT vs. Agarwal Enterprises (2015) 229 Taxmann 525 (Bom)

The assessee was a partnership firm engaged in the business of purchase and sale of securities and investment in capital market. The assessee paid insurance premium which was claimed on the life of two partners' u/s 37(1). The AO disallowed *ad hoc* 20% on the basis that the expenditure was personal in nature of the partners and it was not incurred wholly and solely for the purpose of business of the assessee's firm. CIT(A) and Tribunal held in favour of the assessee and held that where the policy was obtained for the benefit of the firm in as much as the Firm's business would be adversely affected, in the event, one of the partners met with an untimely death. Tribunal's finding that such being the nature of the expenses and the business of the firm being of dealing in securities for protecting it, this policy was obtained. The premium expenses were incurred in the above factual backdrop. There was no basis for making any deduction and disallowance.

5. Sec 40A (3) – Applicability of R.6DD(K) – A. Y : 2009-10

Mrs Roadways vs. CIT (2015) 276 CTR (Ker) 94

Assessee was a partnership firm undertaking the work of transporting contract for transportation of goods for various organizations. During the Assessment years, the assesee has spent ` 4.77 crores towards lorry hire charges of which the assessee had paid certain amount in cash , contrary to the provisions of S/40A(3) of the IT Act. The AO disallowed the said amount. CIT(A) and Tribunal allowed appeal of the assessee. On further appeal in HC, HC upheld the findings of lower authorities and held that appellate authorities found that the assessee was engaging lorries on hire from the market through brokers. Assesee was not paying any amount to the concerned lorry owners. Even, according to the assessee, lorry freights are finalized with the lorry owners. Lorry drivers cannot be considered as the agents of the asseessee. Both CIT(A) and Tribunal found that claim of the fall within exception under proviso to S/40A(3) was not justifiable , no substantial question of law arose.

6. Sec 194H – Commissison for maketing Mutual Fund Schemes – A. Y. 2007-08

CIT vs. Tandon & Mahendra (2015) 276 CTR (All) 50

The assessee was a firm of Chartered Accountants. The Firm has earned commission amounting to ` 73,28,868. To earn that said commission, the assessee paid an amount of ` 51,27,815 to Tapasya Projects Ltd (TPL). While paying the commission, assessee did not deduct TDS u/s 194H . The AO made disallowance of Rs 51,27,815 which was commission paid to TPL and ordered it for adding it back on income. On appeal CIT(A) allowed assessee's appeal and held that commission paid in relation to a transaction

relating to the securities and was hence excluded from the purview of S/194H by the term of Explanation. On appeal in Tribunal, Tribunal confirmed order of CIT(A) following the decision of *ITO vs. Mittal Investment & Co.* On appeal in HC, HC dismissed Revenues appeal and held that it cannot be questioned those mutual funds consititute securities. They are expressly brought within the purview of the expression securities by S/2(h)(id) of the Securities Contracts (Regulation) Act, 1956. Consequently, when service were rendered in relation to any transaction relating to securities, they fall outside the purview of Explanation to S/194H. Once the Parliament has legislated by specifically incorporating that the expression "securities" would have the same meaning as in S/2(h) of the Securities contract (Regulation) Act, 1956, the plain effect cannot be diluted by the court by reading down the statutory provision.

7. Section 4 – Income – Concept of Mutuality – Guest Charges

CIT vs. Junagadh Gymkhana (2015) 230 Taxman 460 (Guj)

Amount(s) received by a club, in the nature of guest charges from its own members, is not taxable being covered by the principle of mutuality. The decision of the Hon'ble Apex Court in Bangalore Club 350 ITR 509 (SC) was distinguished on the ground that in that case the member banks placed the amounts at the disposal of third parties.

8. Sec. 43(5) r/ws. 73 – Speculative Business Transactions – Jobbing & Arbitrage

CIT vs. First Securities P. Ltd. (2015) 230 Taxman 463 (Kar.).

The assessee was a broker, engaged in the business of trading in shares on behalf of his clients. The assessee incurred a loss in its business and claimed the same as a deduction. The issue was whether section 73 was attracted so as to disallow the loss. In other words, whether the loss incurred by the assessee would be a case of a speculative loss. It was held that since the assessee is broker and not a dealer, the loss would not amount to a speculative loss and hence the loss was allowable as a business loss. It was held that proviso (c) to section 43(5) was applicable, under which, jobbing & arbitrage was not treated as speculative.

9. Section 115BB – Computation of Income – Set off of losses – Whether flat rate to be applied on gross receipts

CIT vs. Dr. M.A.M. Ramaswamy (2015) 230 Taxman 494 (Mad.).

The facts were that the assessee was a breeder and owner of race horses. For the assessment year 1998-99, the assessee filed return of income declaring a total income of ` 28,01,55,597/. The assessee had shown betting income of ` 31,24,28,980/- and while computing the total income, the assessee has adjusted the losses suffered under the head "business", against the income earned under other heads, including betting income, and after setting off such losses, betting income of ` 28,52,18,347/- was brought to tax by the assessee at the flat rate of 40% as prescribed under Section 115BB of the Act, as against the total betting income of ` 31,24,28,980/-. According to the AO, the total winnings are to be taxed under Section 115BB of the Act and losses cannot be set off against such income. Accordingly, the total winnings from betting were brought to tax at the rate of 40% as envisaged under Section 115BB of the Act, by the AO. The issue was whether the loss sustained in business can be set off against betting and gambling income, and only the net income is to be taxed under Section 115BB of the Income Tax Act. The Ld. CIT(A) and the Hon'ble Tribunal held

in favour of the assessee by holding only the net income of betting receipts viz. after adjustment thereof against the business loss, can be subjected to tax at the rate of 40% as contemplated under Section 115BB of the Act and accordingly, directed the Assessing Officer to charge tax at the rate of 40% on the net betting receipts. On appeal by Revenue to the High Court, the Hon'ble High Court reversed the view of the Tribunal and held in favour of the Revenue. It was observed that the intent of the legislature, as a measure of rationalization, was to reduce the rate of tax on such winnings from 40% to 30%, with effect from 1.4.2002. Even though the said amendment is not applicable to the case in hand, aid of the said amendment was taken to deduce the fact that the higher rate of tax as applicable to winnings from betting, etc. has been brought down to 30%, on a par, with the rate applicable for other incomes as a measure of rationalization. Therefore, it was held, that the intent of the legislature to levy tax at the rate of 40% for the relevant assessment year on the winnings from betting, etc. is apparent as otherwise, the very existence of the said provision in the Act would be meaningless. In view of the specific provision contained in Section 115BB of the Act under Chapter XII of the Act, which provides for determination of tax in certain special cases, the special rate of tax is applicable for the entire income of winnings from horse racing and should be subject to tax at the special rate provided therein. It was also held that the income being brought to tax was NOT earned from owning and maintaining the horses and hence the provisions of Section 58(4) of the Act (which does not put any bar on allowing expenditures) will not be applicable.

10. Section 194J – Deduction of Tax at Source – Commission paid by the assessee to stockists

CIT (TDS) vs. Piramal HealthCare Ltd. (2015) 230 Taxman 505 (Bom.)

The assessee received the sale price for its products from its stockists, at the rate fixed under the agreement with such stockists. The price was received on sale to the stockists and there was no payment from the assessee to the stockists; the stockists were charged at a price less than the maximum sale price and the difference between the maximum price and the price charged was the commission of the stockists which was released on sale of the products by the stockists. The issue was whether the relationship between the assessee and the super stockist is in the nature of principle to principle relationship and not that of appointment of manager by the assessee, so as to make section 194J inapplicable- section 194J would be applicable only if there exists a principal-agent relationship between the deductor and the deductee. The contention of the Revenue was that the stockists was actually a manager appointed by the assessee and the whole design of making discounted payment by the stockist to the assessee was a device to circumvent the provisions of deduction of tax at source. It was held that there was a sale by the assessee to the stockist and where the assessee has received the amount of sale price, the question of the assessee deducting tax at source under Section 194J of the Act does not arise, because the assessee is not making any payment to the stockist.

CA Sunil K. Jain

DIRECT TAXES

Statutes, Circulars & Notifications

NOTIFICATIONS

Section 35(1)(ii) of the Income-tax Act, 1961 – Scientific Research Expenditure – Approved Scientific Research Associations/Institutions

The organisation Pandit Deendayal Petroleum University, Raisan Gandhi Nagar Gujarat, (PAN-AABTP3856A) has been approved by the Central Government for the purpose of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 from assessment year 2014-15 and onwards under the category of "University College or other Institution", engaged in scientific research activities subject to the conditions, enumerated in the notification.

(Notification No. 43/2015 dated 24-4-2015)

Section 80-IA, sub-clause (iii) of sub-section (4) of the Income-tax Act, 1961 – Deductions – Profits and Gains from industrial undertakings, or enterprises engaged in infrastructure development, etc. – Notified undertaking

The Central Government by clause (iii) of sub-section (4) of section 80-IA of the Income-tax Act, 1961) had framed and notified a scheme for Industrial Park, by the Notification No. S.O. 1605 (E), dated 2nd July, 2008 and *vide* Notification S.O. No. 1210(E), dated 21-5-2010. M/s Dosti Corporation (Pinnacle) having its registered office at Mumbai is developing an Industrial Park named "Dosti Pinnacle" placed at Thane (West), Maharashtra. Now, the Central Government notified the undertaking from the date of commencement i.e. 29-3-2011, being developed and being maintained and operated by M/s Dosti Corporation (Pinnacle), as an undertaking and the project named "Dosti Pinnacle" subject to the terms and conditions mentioned in the annexure of the said notification.

(Notification No. 44/2015 dated 8-5-2015)

CIRCULARS

Section 143 of the Income-tax Act, 1961 – Assessment – Procedure for response to arrear demand by taxpayer and verification and correction of demand by AOs

The CBDT *vide* instruction No.4 of 2014 dated 7th April, 2014, *inter alia*, prescribed Standard Operating Procedure for Verification and Correction of Demand available or uploaded by AOs in CPC Demand Portal. Now a facility has been made available to taxpayers on the E-filing website (www.incometaxindiaefiling.gov.in) to provide online responses to such demands. The actions required to be performed by the taxpayer and the AO are consolidated in the said circular regarding, actions to be performed by taxpayers; Actions on the part of the Department and; Handling Different Scenarios during Verification and Confirmation of Demand.

(Circular No. 8/2015 – dated 14-5-2015)

PRESS RELEASE

Finance Bill, 2015 – Clarification as to applicability of official amendment moved in Finance Bill, 2015 with respect to definition of income – Provisions in Finance Bill, 2015 will not affect LPG

subsidy and other welfare subsidies received by individuals

Certain doubts were raised in the media about the applicability of the official amendment moved in the Finance Bill, 2015 with respect to definition of 'income'. Sub-section (2) of section 145 provides that the Central Government may notify Income Computation and Disclosure Standards (ICDS) for any class of assessees or for any class of income. The CBDT notified Income Computation and Disclosure Standards (ICDS) on 31-3-2015 *vide* Notification No. S.O. 892 (E) which is applicable to persons having income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" and following Mercantile System of Accounting. It is not applicable to individuals not having any income chargeable under the head "Profits and gains of business or profession" and receiving LPG subsidy or any other subsidy which is for the welfare of the individual. The Finance Bill, 2015 proposes to align the definition of Income with that provided in ICDS for this purpose. To restate the position, the provision in the Finance Bill, 2015, will not affect the LPG subsidy and other welfare subsidies received by individuals.

(Press Release, dated 5-5-2015)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Revised agreement between India and Republic of Korea

The Union Cabinet had given its approval for revising the Double Taxation Avoidance Convention (DTAC) which was signed in 1985, between India and the Republic of Korea, for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income. The revised Double Taxation Avoidance Agreement (DTAA) will provide tax stability to the residents of India and Korea and facilitate mutual economic co-operation as well as stimulate the flow of investment, technology and services between the two countries.

The revised DTAA provides for source based taxation of capital gains, provisions for making adjustments to profits of associated enterprises on the basis of arm's length principle, provides for residence based taxation of shipping income, provisions for service of permanent establishment, rationalises tax rates in the Articles on Dividends, Interest and Royalties and Fees for Technical Services.

The Agreement further incorporates provisions for effective exchange of information and assistance in collection of taxes between tax authorities and also incorporates limitation of benefits provisions, to ensure that the benefits of the Agreement are availed of by genuine residents of both countries.

(Press Release, dated 6-5-2015)

INSTRUCTIONS

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – India-UK Convention for Avoidance of Double Taxation and Prevention of Fiscal Evasion – Suspension of collection of taxes during Mutual Agreement Procedure (MAP)

Article 27 of the India-UK DTAC provides for a Mutual Agreement Procedure (MAP) for avoidance of double taxation. Paragraph 4 of Article 27 authorises the Competent Authorities to develop appropriate bilateral procedures, conditions, methods and techniques for implementation of MAP provided for in the Article. Accordingly, with a view to avoid unintended hardship to the taxpayers, as well as for the efficient management of collection of revenue, the Competent Authorities of India and UK had entered into a Memorandum of Understanding (MoU) regarding suspension of collection of taxes during the pendency of MAP.

(Instruction No. 3/2015 - dated 10-4-2015)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Claim of treaty benefits by FIIs under provisions of Double Taxation Avoidance Agreements

The CBDT noted that several Foreign Institutional Investors receiving income from transactions in securities claim such income as exempt from tax under the Income-tax Act, 1961, by availing benefit provided in the Double Taxation Avoidance Agreements ('DTAAs') signed between India and their respective countries of residence. Accordingly, it decided that in all cases of Foreign Institutional Investors seeking treaty benefits under the provisions of respective DTAAs, decision may be taken on such claims within one month from the date such claim is filed.

(Instruction – dated 24-4-2015)

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT JUDGMENTS

I. For the purposes of determining the arm's length price of international transactions the functional profile, assets employed and risk assumed ought to be considered and therefore the Non-AE transactions under the trading business segment cannot be used as a benchmark for AE transactions under the commission business segment

Commissioner of Income-tax vs. Sumitomo Corporation India Pvt. Ltd. (Delhi High Court) – ITA No. 83 / 2015 – A.Y 2009-10

Facts

1. The assessee, Sumitomo Corporation India Pvt. Ltd. was engaged in facilitating the import and export activities, both directly and indirectly, on behalf its domestic as well as its overseas customers. The activities carried on by the assessee were bifurcated into two distinct segments – a) commission business – wherein the commission is derived on the FOB value of the goods purchased / sold by its customers and b) trading business. In both the segments, the assessee had undertaken transactions with its associated enterprises ('AEs') as well as Non-AEs.

2. During the course of assessment proceedings for the year under review, i.e. A.Y. 2009-10, the Transfer Pricing Officer ('TPO') directed an adjustment amounting to ` 88.40 crores due to the following reasons:

a. The TPO did not accept the assessee's report clubbing both transactions for the purpose of determining the Arm's Length Price ('ALP') of the international transactions;

b. The TPO rejected the Transactional Net Margin Method ('TNMM') as the most appropriate method for determination of ALP; and

c. The TPO proceeded to compute the ALP of the transactions undertaken by the assesse with its AEs falling under the commission business segment based on the margin of profit of the Non-AE transactions falling under the trading segment.

3. Against the order of the TPO, the assessee preferred an appeal before the ITAT contending that the order of the Assessing Officer ('AO') was inconsistent with the view adopted by the Revenue authorities for past years whereby TNMM was accepted as the most appropriate method. Further, the assessee contended that the comparison of the commission business segment with the trading business segment was not valid

as the two were facially incomparable and that the TPO as well as the AO were erroneous in not accepting the clubbing of transactions.

4. The ITAT, considering the orders in the case of the assessee for previous assessment years, recorded its disapproval at the approach adopted by the AO in disturbing the consistent application of the TNMM method and in adopting the profit of the trading segment to determine the arm's length price of a dissimilar segment i.e. the commission segment. The ITAT relied on the orders issued by it in the case of the assessee for the previous two assessment years and the facts and circumstances of the case for the relevant year were similar. The ITAT held that the trading business and the commission business were different in terms of functional differences, assets employed and risks assumed and therefore the commission percentage from AE transactions should be benchmarked on the basis of commission rate from non-AE transactions under the 'Indenting business' and remitted the file to the AO to determine the commission rates.

5. Aggrieved by the order of Tribunal, the Revenue preferred an appeal before the Delhi High Court and contended that 'Berry ratio' which was suggested by the assessee, was alien to Indian law. Further, the Revenue also contended that the application of the TNMM method was a matter of debate pending consideration by the High Court.

Judgment

1. The Hon'ble High Court, while dismissing the appeal preferred by the Revenue, upheld the directions issued by the ITAT which in the view of the Court cured the anomaly and directed the AO to consider the margin of commission in each segment while determining ALP. The Hon'ble High Court further clarified that the AO was to comply with the principles contained in Rule 10(B) of the Income-tax Rules, 1962 while determining the ALP.

II. Issuance of a corporate guarantee differs from the issuance of a bank guarantee and therefore the rate of guarantee commission charged by banks while providing a bank guarantee cannot be equated to the rate of guarantee commission charged in a corporate guarantee

Commissioner of Income-tax vs. M/s Everest Kento Cylinders Ltd. (Bombay High Court) ITA No. 1165 of 2013 – A.Y. 2007-08

Facts

1. The assessee was engaged in the manufacture of high-pressure gas cylinders and compressed natural gas cylinders. The assessee had a subsidiary company situated in Dubai. During the year under review, the assessee had provided its AE a corporate guarantee for a loan taken by the AE situated in Dubai for the purchase of fixed assets and inventories and for its working capital requirements as a condition precedent to the loan. The corporate guarantee guaranteed repayment of borrowings made by the AE for which the asessee charged guarantee commission at 0.5 per cent.

2. During the course of the scrutiny proceedings, the AO concluded that the arm's length price of the guarantee commission exceeded the amount charged by the assessee by an amount of ` 28.50 lakhs and accordingly made an upward adjustment.

3. Corporate guarantee was found to be an international transaction within the definition contained in section 92B of the Act. The TPO concluded that since the Dubai subsidiary was newly incorporated and had low credit rating, it wouldn't have been able to raise funds without the provision of the corporate guarantee. Based on the case of *General Electronic Capital Canada Inc vs. Her Majesty, the Queen and Another* case involving RABO India Finance Pvt Ltd, the TPO came to the conclusion that the arm's length price of corporate guarantee charged should be

3 per cent as opposed to the 0.5 per cent charged by the assessee.

4. The CIT(A) upheld the order of the AO and held that the rate of corporate guarantee arrived at by the AO was justified.

5. When the assessee approached the ITAT, the ITAT deleted the adjustment made to the corporate guarantee charged pursuant to which the Revenue filed an appeal before the High Court.

6. The Revenue relied on inquiries made by the TPO from various banks in relation to the rate of guarantee charged by them and contended that the arm's length price of bank guarantee was 3 per cent.

Judgment

1. Considering the contentions placed before it, the Hon'ble High Court held that the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. Further the Court held that the consideration which apply for the issuance of a corporate guarantee are distinct and separate from that of bank guarantee and accordingly held that the commission charged cannot be called into question in the manner in which the TPO had done.

III. Amounts paid by Indian entities, as a 'share of cost' for utilisation of automated telecommunications system is not assessable as 'fees for technical services' if there is no profit element or human element in rendering of the services.

Director of Income-tax (IT) – I vs. AP Moller Maersk A/S C/o Maersk Line India Pvt. Ltd. (Bombay High Court) – ITA No. 1306 of 2013 – A.Y. 2001-02

Facts

1. The assessee, a Danish company and a tax resident of Denmark, was engaged in the business of operations of ships. M/s. A.P. Moller Maersk A/S, a partnership firm existing under the laws of Denmark, was designated as the managing owner of the company as well as another Denmark resident shipping company. Since M/s AP Moller Maersk A/S was the managing owner of the company, the income from the shipping business was taxable in the hands of the two above-mentioned shipping companies as per the provisions of the DTAA.

2. The assessee had three agents working for it, namely Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL) and Safmarine India (Pvt.) Limited (SIPL), who would book cargo and act as clearing agents for the assessee. In order to assist them with the business, the assessee had procured and maintained a global telecommunication facility called MaerskNet, a vertically integrated communication system. The agents would incur *pro rata* costs for using the said system and the share of costs would be recovered from them. As per the assessee, the payment was in the nature of mere reimbursement of expenses.

3. The Assessing Officer did not accept this contention and held that the amounts paid by these three agents to the assessee was consideration/fees for technical services rendered by the assessee and accordingly held them to be taxable in India under Article 13(4) of the DTAA and assessed tax at 20 per cent under section 115A of the Income-tax Act, 1961. On appeal, the Commissioner of Income Tax also confirmed the Assessing Officer's stand and dismissed the assessee's appeal.

4. Aggrieved by the order of the CIT(A), the assessee appealed before the ITAT wherein the appeal of the assessee was allowed following the decisions of the *Madras High Court Skycell Communications Limited 251 ITR 53 (Mad.)* and the Delhi High Court in *Commissioner of Income Tax vs. Bharati Cellular Ltd. 319 ITR 139 (Del).*

Judgment

1. Based on the submissions, the Hon'ble High Court held that no technical services as contemplated by the Act were being rendered in the case at hand thereby affirming the contention of the assessee i.e. that no technical service was being rendered by the assessee and the communication system was an automated system without usage of any human element involved in terms of "rendering of services" as contained in Article 13(4).

2. Further the Hon'ble High Court held that there was no finding given by the AO or CIT(A) proving that there was any profit element involved in the payments made by the agents.

3. Additionally, the Hon'ble High Court relied on the decision in the case of *Director of Income Tax (International Taxation) vs. Safmarine Container Lines NV (2014) 209 ITR 366,* wherein it was held that income derived from the operation of ships was to be exclusively covered under the provisions of Article 8 of the DTAA and imported the same reasoning to the communication system charges stating that their taxability would be governed using the same principles.

4. Further reliance was placed on the decision in the case of *Commissioner of Income-tax vs. Siemens Aktiongeselleschaft reported in [2009] 310 ITR 320 (Bom.),* wherein the Court had held that once there is a treaty between two sovereign nations, though it is open to a sovereign Legislature to amend its laws, a DTAA entered into by the Government, in exercise of the powers conferred by section 90(1) of the Act must be honoured and it is not possible for the revenue to unilaterally decide contrary to the provisions of the DTAA, therefore implying that the benefit of the DTAA was to be granted to the assessee.

IV. Advertisement collection agent in India does not constitute a permanent establishment under the India-Mauritius DTAA if the agent does not have the authority to conclude contracts. The agent in India deriving merely 4.6 per cent of its revenue from its affiliate in Mauritius could not be construed as a dependent agent. Further, arm's length compensation to agent extinguishes further attribution of taxable profits.

Director of Income-tax (IT)–II vs. M/s B4U International Holdings Ltd (Bombay High Court) – ITA No. 1274 of 2013 – A.Y. 2001-02, 2004-05 and 2005-06

Facts

1. The assessee was a Mauritius based company engaged in the business of telecasting TV channels such as B4U Music, MCM etc. and had filed its tax residency certificate. The income of the assessee consisted of collections from time slots given to advertisers situated in India through its agents. The RBI had permitted the agents of the assessee to act as advertisement collection agents. In its income-tax return, the assessee claimed that it did not have a permanent establishment in India and therefore no consequential tax liability arose in India.

2. The AO did not accept the stand of the assessee and was of the view that the affiliates were an extension in India and constituted a permanent establishment as per the definition contained in the DTAA between India and Mauritius ('the DTAA') and therefore sought to tax the profits attributable to the alleged permanent establishment. The AO was of the view that the agents were dependent agents of the assessee. Further, the assessee had made a payment to a US based company on account of transponder charges. The AO contended that the payments were subject to deduction of tax at source as it was covered by the term process contained in section 9 of the Act and since the assessee had failed to deduct tax at source the

said payment was to be disallowed under section 40(a)(i).

3. On appeal, the CIT(A) held that the entity in India could not be considered as independent agent of the assessee. However, that being said, the CIT(A) further held that if the agent were to be considered as a dependent agent any payment made to it at arm's length price could be subject to further tax in India.

4. Aggrieved by the order of the CIT(A), the Revenue approached the ITAT who dismissed the appeal. Consequently, the Revenue preferred further appeal to the High Court.

Judgment

1. With regards to the ground relating to the status of the agent as a dependent agent, the Hon'ble High Court upheld the findings of the ITAT, which stated that the agent could not be considered a dependent agent as Article 5(5) of the DTAA indicated that an enterprise of a contracting state shall not be deemed to have a permanent establishment in the other contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of independent status, where such persons are acting in the ordinary course of their business.

The ITAT noted that the assessee situated in Maurtius carried out all the activities and concluded all the contracts and that the activities performed by the agent were incidental or auxiliary in nature and were carried out in a routine manner as per the directions from the assessee company without application of mind of the agent based on which the said agent could not be considered as a dependent agent. The ITAT also noted that only 4.69 per cent of the total income of the agent was derived from the assessee which further substantiated the fact that the agent could not be classified as a dependent agent.

2. With regards to the alternate argument raised by the assessee stating that even if the agent were to be considered as a dependent agent, the payment made to the agent would not be subject to further tax in India if it was at arm's length price, the Hon'ble High Court held that the Supreme Court case in the case of Morgan Stanley & Co. would apply. The Hon'ble High Court dismissed the contention of the Revenue which stated that the transaction had not been subjected to transfer pricing analysis and therefore the payment could not be deemed to be at arm's length price and held that the Tribunal had correctly relied on Circular Number 742 wherein 15 per cent was deemed to be considered as the arm's length price of such transactions as it was the norm for advertising agencies.

3. Addressing the additional grounds raised by the revenue relating to the taxability of the transponder charges, the Hon'ble High Court upheld the decision of the Tribunal, which stated that the additional grounds were not relevant once it was established that there was no permanent establishment in India.

V. Companies that were functionally similar constitute valid comparables notwithstanding the fact that they have earned high profit margins, provided that material differences on account of high profit margins could be eliminated.

Chryscapital Investment Advisors (India) Pvt. Ltd. vs. Deputy Commissioner of Income-tax (Delhi High Court) – ITA No 417 of 2014 – A.Y. 2008-09

Facts

1. The assessee, a private limited company was engaged in providing investment advisory services. During the year under review, the assessee entered into international transactions relating to advisory services and reimbursement of expenses incurred on behalf of its AEs amounting to ` 56,61,99,829/- and ` 4,49,72,912/- respectively.

2. For the purposes of determination of ALP, the assessee used the TNMM. The

assessee treated the transactions relating to reimbursement received by it from its associated enterprises on actual basis (i.e. without mark-up) at ALP as such since no value addition was done by it in relation to the said expenses. The assessee identified four comparable companies that were engaged broadly in the same economic activities as in its case with an average operating profit margin of 4.04 per cent.

3. In arriving at the operating profit margin of its comparable companies the assessee used multiple year data to adjust for the fluctuations in the margins of the comparable companies and remove the effect of aberrations. The assessee earned an operating profit margin of 27.05 per cent and therefore concluded that its transactions with its AEs were at arm's length price.

4. The TPO contended that the multiple year data could not be used to arrive at operating margin of comparable companies. Further, the TPO proceeded to consider three additional entities namely, Brescon, Keynote and Khandwala as comparable companies that had been excluded as comparable companies by the assessee due to the high operating margin earned by the said companies.

5. Aggrieved by the order of the AO, the assessee appealed before the ITAT. Considering the arguments placed before it the ITAT upheld the findings of the TPO and held that current year data should be used in the absence of abnormal or exceptional facts/circumstances in existence that could have an influence on the results as well as the determination of the transfer prices for the year under consideration. Further, the ITAT held that Rule 10B does not provide any basis to exclude an entity or eliminate it from the list of companies solely on the basis of high profitability.

Judgment

1. The Hon'ble High Court dismissed the appeal of the assessee and held that the assessee was incorrect considering multiple year data for the computation of operating profit margin as well as excluding the three companies as comparable merely based on the fact that they earned high operating margins. The High Court held that uncontrolled transaction selected in terms of rule 10B(2) 'shall be comparable to an international transaction' if none of the differences, if any, between the compared transactions, or between enterprises entering into such transactions are likely to materially affect the price or cost charged or paid or the profit arising from such transaction in the open market or reasonably accurate adjustment can be made to eliminate the effects of such difference.

2. The High Court held that the multiple year data could only be considered if it had an influence on the determination of price, and in such instances, the onus lies upon the assessee to establish the relevance of such data. The assessee's justification for relying on such data is the volatility in the comparable companies profit margins and the consequent inability to transact at a consistent ALP, which was not warranted herein. The court noted that taking the arithmetical mean of all comparable companies would offset wide fluctuations in the profit margin of a single comparable company. Further, assigning equal weight to the data for each of the three years was against the mandate of rule 10B(4).

3. With regards to Brescon and Khandwala Securities, the court noted that they were eliminated based only on their exceptionally high profit margins for the assessment year in question and not on the grounds of functional dissimilarities. The assessee sought to highlight differences in the risk profiles of the assessee and Brescon in the appeal before the High Court however the Court held that such contentions could not be raised for the first time at this stage and accordingly held Brescon and Khandwala Securities to be functionally similar and remitted the matter to the DRP for examination. In the event that the material differences arising out of the extremely high profits cannot be eliminated

as per rule 10B(3), the said entities would have to be discarded as comparable.

4. With regards to Keynote, the Hon'ble High Court held that the assessee company and Keynote performed different services not comparable to each other and therefore, given such functional differences and the mandate of rule 10B(2)(b), noted that there could be merit in the argument that Keynote cannot be considered a comparable for determining the ALP. Further the court held that the fact that the assessee had included it in the previous assessment years does not have any bearing on inclusion for the subject assessment year.

B. TRIBUNAL JUDGMENTS

VI. Transfer Pricing – Inter corporate Loans and Guarantees to an overseas subsidiary – Benchmarking Rate of Interest and Guarantee Fees – Whether share application money cannot be treated as loan amount merely because there was delay in issuance of shares by subsidiary in name of assessee, particularly when cause for delay was duly explained by assessee – Held, yes

Foreign subsidiary of assessee had availed a loan from a bank, for which, assessee-company had given a corporate guarantee – Whether in view of decision of Tribunal in various cases, TPO should adopt 0.5 per cent as arm's length guarantee's commission charges in respect of corporate guarantee provided by assessee – Held, yes

Whether, LIBOR + 2 per cent was a reasonable arm's length interest rate to be adopted in respect of loan provided by assessee to its AE for acquisition of another company – Held, yes

Aditya Birla Minacs Worldwide Ltd. vs DCIT [2015] 56 taxmann.com 317 (Mumbai - Trib.) A.Y. 2007-08

Facts

A) Re: Treatment of Share Application Money as Loan

1. The assessee had advanced a certain sum of to its foreign subsidiary, in the form of share application money.

2. The TPO was of the view that this amount was actually in the nature of loan as the shares were not allotted till two subsequent years and AE continued to use these funds. Accordingly, the TPO determined the arm's length interest rate on the said transaction at LIBOR + 4.45%.

3. The Commissioner (Appeals) confirmed the ALP adopted by the TPO.

4. Before the Tribunal, the assessee submitted that the delay was due to obtaining necessary approval from the Securities and Exchange Commission, Philipines and finally, the shares were issued as per the share certificate, which had been produced by the assessee as additional evidence.

B) Re: Corporate Guarantee – Benchmarking

1. The subsidiary company (AVTL) of the assessee had availed a loan from a bank for which the assessee had given a corporate guarantee. In the TP study, the assessee had not classified this transaction as international transaction.

2. The TPO took the difference between the PLR rate and bank rate as arm's length price of the corporate guarantee given by the assessee at the rate of 3.25 per cent as arm's length guarantee charges in respect of corporate guarantee and made TP adjustment accordingly. The Commissioner (Appeals) confirmed the adjustment/addition made by Assessing Officer/TPO.

3. Before the Tribunal, the assessee has submitted that the arm's length guaranteed charges may be taken at 0.5% as held by this Tribunal in number of decisions.

C) Re: Benchmarking Interest Rate on Intercorporate Loan to a Subsidiary

1. The assessee had advanced a loan to its foreign subsidiary (AVTL) in order to accomplish the acquisition of a company and benchmarked the said transaction by using internal CUP of' LIBOR + 1 per cent charged in respect of loan availed by assessee from a bank.

2. TPO adopted the ALP rate of interest at LIBOR + 4.45% and, accordingly, made TP adjustment. The Commissioner (Appeals) had determined the ALP rate of interest as 6 months LIBOR + 200 basis point and thereby, reduced the adjustment.

Judgment

A) Re: Treatment of Share Application Money as Loan

1. Though there was delay in issuing the shares against the share application money given by the assessee to its AE, however, the assessee has duly explained the cause of delay and it was not a deliberate delay for using the money by subsidiary in the garb of share application money or by providing the fund by the assessee in the garb of share application money.

2. Since the document of issuance of equity shares in the name of the assessee by the subsidiary/AE *vide* share certificate were not before the authorities below, to the extent of limited purpose of considering the said document, this issue was remanded to the record of Assessing Officer/TPO to consider the same. As far as the re-characterisation of the share application money as loan, High Court in the case of *DIT, International Taxation vs. Besix Kier Dabhol S.A. [2012] 26 taxmann.com 169/210 Taxman 151 (Mag.) (Bom.)* has considered an identical issue and held that there were at the relevant time and even today no thin capitalisation rules in force to consider debt as an equity.

3. Accordingly, subject to verification of the share certificate by the Assessing Officer, the share application money cannot be treated as loan amount merely because there is a delay in issuance of shares by the subsidiary in the name of the assessee, which was duly explained by the assessee.

B) Re: Corporate Guarantee – Benchmarking

1. The assessee's alternative plea is to be agreed. The Tribunal in a number of decisions has held that the arm's length guarantee commission charges can be considered at the rate of 0.5 per cent. Following the said decisions, the Assessing Officer /TPO was directed to adopt 0.5 per cent as arm's length guarantee commission charges in respect of the guarantee provided by the assessee for obtaining the loan by the AE.

C) Re: Benchmarking Interest Rate on Intercorporate Loan to a Subsidiary

1. This issue of arm's length interest in respect of the loan provided by the assessee to its AE has been considered by the Tribunal in the case of *Everest Kanto Cylinder Ltd. vs. Asstt. CIT (LTU) [2014] 52 taxmann.com 395 (Mum.)* and he held that the rate to be used should be LIBOR and not the average yield rates and the LIBOR rate for March 2008 was 2.6798%. Following the order of this Tribunal, the order of Commissioner (Appeals) was to be confirmed.

Cases followed:

A) Re: Treatment of Share Application Money as Loan

1. *DIT, International Taxation vs. Besix Kier Dabhol S.A. [2012] 26 taxmann.com 169/210 Taxman 151 (Mag) (Bom.)*

B) Re: Corporate Guarantee – Benchmarking

1. *Everest Kanto Cylinder Ltd. vs. Asstt. CIT (LTU) [2014] 52 taxmann.com 395 (Mum.);*

2. *Everest Kanto Cylinder Ltd. vs. Dy. CIT (LTU) [2013] 34 taxmann.com 19 (Mum.);*

3. *Glenmark Pharmaceuticals Ltd. vs. Addl. CIT [2014] 43 taxmann.com 191/62 SOT 79 (URO) (Mum.);*

4. *Godrej Household Products Ltd. vs. Addl. CIT [2014] 41 taxmann.com 386 (Mum.);*

5. *Asstt. CIT vs. Nimbus Communication Ltd. [2013] 34 taxmann.com 298/145 ITD 552 (Mum.);*

6. *Reliance Industries Ltd. vs. Addl. CIT [IT Appeal No.4475 (Mum.) of 2011, dated 13-9-2013] and*

7. *Prolifics Corpn. Ltd. vs. Dy. CIT [2015] 55 taxmann.com 226 (Hyd.)*

C) Re: Benchmarking Interest Rate on Intercorporate Loan to a Subsidiary

1. *Everest Kanto Cylinder Ltd. vs. Asstt. CIT [2014] 52 taxmann.com 395 (Mum.)*

VII. Transfer Pricing – Adjustment for Location Savings – The Mumbai Tribunal placing reliance on OECD Guidance on Transfer Pricing Aspects of Intangibles [issued under Action item 8 of the Base Erosion and Profit Shifting (BEPS) project], held that where the operating margin earned by a taxpayer is at arm's length based on local market comparables operating in similar economic circumstances as the taxpayer; and the taxpayer as well as AEs operate in perfect competitive business environment, further return for Location Savings is not warranted.

Watson Pharma (P.) Ltd. vs. DCIT [2015] 54 taxmann.com 88 (Mumbai - Trib.) A.Y. 2009-10

Facts

1. The taxpayer was engaged in provision of contract manufacturing and contract Research and Development (R&D) services to its Associated Enterprises (AEs). The taxpayer adopted Transactional Net Margin Method (TNMM) and selected Indian comparable companies for benchmarking its international transactions with its AEs to substantiate the arm's length nature of these transactions.

2. The Transfer Pricing Officer (TPO) deleted/ added certain comparables in the comparables set submitted by the taxpayer and arrived at a higher arm's length margin. Accordingly, the TPO proposed an adjustment for the shortfall in the taxpayer's actual operating margin vis-à-vis the alleged arm's length margin.

3. Additionally, the TPO contended that the taxpayer's AEs enjoyed locational advantage on account of lower costs in India by shifting contract manufacturing and contract R&D activities to the taxpayer in India vis-à-vis undertaking the same in the US. Further, relying on research paper/articles, the TPO held that there is approximately 40% and 50% cost reduction in India to the AEs on contract manufacturing and contract R&D activities respectively. Based on this analysis, the TPO computed the overall cost savings to AEs from these activities in India and attributed 50% of such savings to the taxpayer on the ground that such arrangement was mutually beneficial for the AEs and the taxpayer.

4. Accordingly, the TPO proposed an adjustment for location savings in respect of both these activities. The Dispute Resolution Panel (DRP) confirmed the adjustment made by the TPO. Consequently, the taxpayer filed an appeal before the Tribunal.

Issues

1. Whether the revenue authorities were justified in making an adjustment for location Savings in determining the Arm's Length Price (ALP) of the international transactions of the taxpayer?

2. Whether a separable adjustment on account of Location savings is justified when TNMM is adopted as the most appropriate method and benchmarking is done using local comparables?

3. Whether the comparables set used by the TPO for determining arm's length margin was appropriate ?

Judgment

The Tribunal held in favour of the assessee as under:

1. The Tribunal upheld the assessee's contention that the assessee's group operated in a perfectly competitive market and did not have exclusive access to the factors providing location specific advantage resulting in super profits in the supply chain as compared limits competitors. If there would have existed any location savings, it would have been passed on to the customers of AEs. Hence, no specific adjustment was required.

2. The Tribunal also relied on the OECD Guidelines on Intangibles and observed that location savings is not regarded as an intangible asset unless specific advantages are capable of being owned or controlled by an individual enterprise. Therefore, in the instant case, location savings could not be regarded as intangible assets. Further, the profit split method can be applied only in case of transfer of unique intangibles or where the international transactions are so interrelated that they cannot be evaluated separately.

3. Placing reliance on OECD Guidance on intangibles and Delhi Tribunal Ruling in case of *GAP International Sourcing India Pvt. Ltd. vs. ACIT (2012) 149 TTJ 437 (Del. ITAT)*, the Tribunal held that when local Indian comparables which are operating in similar economic circumstances as that of the taxpayer are considered for benchmarking, any benefit (if at all) on account of location savings would have already got embedded in the operating margins of the comparable companies. Since the taxpayer's operating margin is higher than the arm's length margin based on such local comparables, specific adjustment for location savings is not required. While holding this position, the Tribunal also observed that G20 countries have given their consensus to the above view in OECD Guidance on Intangibles and India is part of G20 countries.

4. The Tribunal further observed that once TNMM has been accepted as the most appropriate method and the taxpayer is considered as a tested party, then benefit/advantage accruing to AE is irrelevant once the profit margin earned by the taxpayer is at arm's length based on the margins earned by comparable companies.

5. The Tribunal disregarded the contention of the TPO that in the absence of the various details regarding AEs (such as cost of manufacturing in the US and ultimate selling price by them to the distributors), it could be assumed that location savings arise to the AEs. The Tribunal held that the financial results of the AEs are not relevant for determining the arm's length margin of the taxpayer.

6. The Tribunal also observed that the reliance placed by the TPO on research papers for computation of location savings is *ad hoc*, based on assumptions and cannot be accepted. The Tribunal observed that the research papers were only web based articles and were not accepted by any forum.

7. The Tribunal disagreed the revenue's reliance on India Chapter in United Nations' (UN) TP manual which advocates the use of profit split method for allocation of location specific advantage on the ground that the views expressed therein are the views of the tax administration and not of the Indian Government and hence is not binding on Indian Appellate authorities.

8. The Tribunal thus directed deletion of the adjustment on account of location savings. In respect to selection of comparables, the Tribunal

upheld that selection based on broad functional comparability reigns over product comparability in application of TNMM. The Tribunal placing reliance on various rulings of the co-ordinate benches, rejected the modification to the comparables set proposed by the TPO for determining higher arm's length margin and accordingly deleted the adjustment on that accounts as well.

VIII. BEPS – Whether the benefit of presumptive basis of taxation under the Indian Tax laws (ITL) as is applicable to income earned by a non-resident (NR) can be denied on the ground that it leads to Base Erosion and Profit Shifting (BEPS) in India. The Tribunal held that BEPS is a matter of tax policy consideration, not relevant for the process of judicial decision making. A benefit cannot be denied where the law otherwise provides for such benefit.

Addl. DIT vs. Baker Hughes Singapore Pte. Ltd. [TS-214-ITAT-2015(DEL)] A.Y.: 2004-05

Facts

1. The Income-tax Act provides for taxable income to be presumed at 10% of specified receipts for an NR, engaged in certain "qualifying business" such as provision of services in connection with or supply of plant and machinery for prospecting or extraction or production of mineral oil. The Act also provides for net basis taxation with respect to income in the nature of royalty or fees for technical services (FTS) earned by NR, where such income is effectively connected with the permanent establishment (PE) of the NR in India.

2. The assessee, an NR company was engaged in the business of hiring of equipment and rendering of services to entities/contractors engaged in oil exploration work (i.e. qualifying business). The assessee offered its income to tax, on presumptive basis for tax year 2003-04. It may be noted that Finance Act, 2010 amended the ITL to provide that the provisions of presumptive taxation will not apply in respect of royalty or FTS income effectively connected with a PE, with effect from tax year 2010-11. However, for the year under consideration the presumptive taxation provisions were applicable.

3. The Tax Officer contended that the taxpayer has a PE in India and, hence, income from services rendered through a PE is taxable as royalty or FTS on net basis without considering provisions for taxation on presumptive basis.

4. On appeal, the CIT (Appeals) relied on the decision of the co-ordinate bench in the case of CGG Veritas (ITA No. 4653/Del/2010) and accepted the contentions of the Act and permitted presumptive taxation.

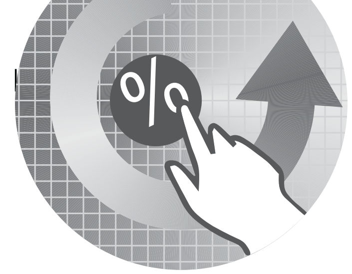
5. In response, the Tax Department contended that allowing the benefit of presumptive taxation to the taxpayer would amount to base erosion and profit shifting from India.

Judgment

1. The Tax Department contention that the benefit of presumptive taxation cannot be extended to the taxpayer, as it would lead to BEPS from India, is not acceptable. BEPS is a tax policy consideration relevant only for the process of law making and not in the process of judicial decision making as it would infringe the neutrality of judicial process. The judicial neutrality must not only be neutral vis-à-vis the party but also vis-à-vis competing ideologies.

2. The law has to be interpreted as it exists at the relevant point in time and not how the law ought to be in light of competing ideologies.

3. The issue being directly covered by the decisions of the co-ordinate benches, there is no reason to take any other view of the matter.



CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES

Service Tax – Statute Update

1. Amendment in Abatement Notification 26/2012-ST dated 20-6-2012

Definition of 'Chit' given in clause 2(a) of Abatement notification is deleted w.e.f. 19.05.2015. This is a consequential amendment on withdrawal of abatement of services provided in relation to chit fund.

[Notification No. 13/2015 – ST dated 19-5-2015]

2. Following amendments in Finance Act, 2015 are made effective from 1-6-2015

- Definition of 'Amusement Facility' u/s. 65B(9) is deleted.
- Definition of 'Entertainment Event' u/s. 65B(24) is deleted.
- Manufacture of alcoholic liquors for human consumption is excluded from definition of 'process amounting to manufacture' u/s. 65B(40).
- Section 66B is amended to enhance Rate of Service Tax from 12% to 14%, subsuming the Education Cess and Secondary Higher Education Cess.
- Negative list entry u/s. 66D(f) amended to exclude 'any process for production or manufacture of alcoholic liquor for human consumption. This makes job work / processing in relation to manufacture of alcoholic liquor for human consumption liable to service tax w.e.f. 1-6-2015.
- Explanation to section 66D(i) has been included to clarify that "betting, gambling or lottery" shall not include the activity carried out by a lottery distributor or selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner. It has been clarified that the tax is not on lottery ticket but service provided by the distributors and selling agents
- Negative list entry u/s 66D(j) "entertainment event or access to amusement facility' is been omitted. However, limited exemption has been provided under Entry 47 of Notification No. 25/2012 – ST as mentioned in para 4 below.
- Education cess and secondary and higher education cess is deleted w.e.f. 1-6-2015.
- No provision or clarification for utilization of cenvat credit balance as on 31-5-2015 of Education Cess & Secondary Higher Education Cess.

[Notification 14/2012-ST dated 19-5-2015]

3. Change in effective alternate tax rates for specified services w.e.f. 1-6-2015

Description	Reference to Rules	Effective Tax Rate
Air Travel Agents		
– Domestic Bookings	Rule 6(7)	0.70%
– International Bookings	Rule 6(7)	1.40%
Life Insurance		
– First Year Premiums	Rule 6(7A)	3.5%
– Subsequent Premiums	Rule 6(7A)	1.75%
Money Changing		
– Up to ` 1 lakh	Rule 6(7B)	0.14% (min. ` 35)
– ` 1 lakh to 10 lakhs	Rule 6(7B)	` 140 + 0.07% of excess over ` 1 lakh
– Above ` 10 lakhs	Rule 6(7B)	` 770 + 0.014% of excess over ` 10 lakhs (Max. 7,000)
Distribution of Lottery Tickets		
– Guaranteed Prize layout less than 80%	Rule 6(7C)	` 8,200 for every ` 10 lakhs
– Guaranteed Prize Layout more than 80%	Rule 6(7C)	` 12,800 for every ` 10 lakhs

[Notification 15/2015-ST dated 19-5-2015]

4. Following amendments in Exemption Notification 25/2012-ST dated 20-6-2012 are made effective from 1-6-2015

- Entry 30(c) of above referred notification is amended to withdraw an exemption in respect of Intermediate production process as job work in relation to alcoholic liquors for human consumption.
- Entry 47 is added to above referred notification to grant exemption to service by way of:
  - admission to entertainment event, namely, exhibition of cinematographic film, circus, dance, theatrical performance including drama and ballet; and
  - recognised sporting event; and
  - Award function, concerts, pageants, musical performance or any sporting event other than recognised sporting event, where consideration for admission is not more than ` 500 per person.
- Definition of 'recognized sporting event' is inserted at clause 2(zab) of above referred notification.

[Notification 16/2015-ST dated 19-5-2015]

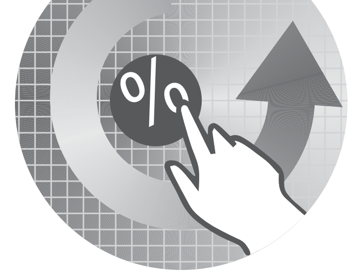
5. Exemption to Power System Development Fund Scheme

A specific exemption is granted for taxable services provided under power System Development Fund Scheme subject to conditions laid down in the notification.

[Notification 17/2015-ST dated 19-5-2015]

6. Tax Research Unit (TRU) of CBEC has issued a Letter clarifying the amendments made by Finance Act, 2015 *vide* its letter D.O.F. No. 334/5/2015-TRU dated 19-5-2015. (Chamber's website may be looked into for this purpose)

[Contd... on page 104]



CA Bharat Shemlani

INDIRECT TAXES

Service Tax – Case Law Update

1. Services

Market Research Service

1.1 Kirloskar Ebara Pumps Ltd. vs. CCE, Kolhapur 2015 (38) STR 488 (Tri.-Mumbai)

The Tribunal in this case held that, market research services provided to companies abroad is to be treated as export of service. In respect of refund claimed of amount paid through debit in CENVAT credit account it is held that, the question of unjust enrichment does not arise in case of export of service.

Sponsorhip Service

1.2 Coca Cola India Pvt. Ltd. vs. CST, Delhi-III 2015 (38) STR 497 (Tri.-Del.)

The Tribunal in this case held that, sponsorship of Cricket is not covered by Sponsorship Service. Further, service tax on same transactions has already been deposited by sponsored team under BAS and demand of service tax in respect of same transaction on ground that deposit of service tax under different category of service is not justified.

Also refer to *Citibank NA vs. CST, Mumbai-I 2015 (38) STR 520 (Tri-Mumbai)*

Banking & Other Financial Service

1.3 Punjab Naitonal Bank vs. CCE&ST, Jaipur-II 2015 (38) STR 498 (Tri.-Del.)

The appellant in this case imposed commitment charges on the clients who decide not to draw the amount of loan that has been at their disposal. It is contended that these charges are basically for the loss of interest that the bank would have earned if the customer had drawn money from loan account. The Tribunal observed that, commitment charges are integrally connected with the lending which is taxable service and same cannot be separated from lending service, hence liable to service tax.

Business Auxiliary Service

1.4 Indian Oil Corporation Ltd. vs. CCE, Goa 2015 (38) STR 501 (Tri.-Mumbai)

The department in this case sought to demand service tax on additional handling charges and facilitation charges on import of goods paid by importer/seller under BAS. The Tribunal held that, appellant is importing impugned goods in own name and selling them on principal to principal basis to buyer cannot be held as service provider and expense incurred before transfer of goods forms part of sale price and cannot form part of any service tax liability.

Club or Association Service

1.5 Federation of Indian Chambers of Commerce & Industry vs. CST, Delhi 2015 (38) STR 529 (Tri.-Del.)

The Tribunal in this case held as under;

- FICCI and ECSEPC are charitable organisations having objective and

dominantly pursuing activities of general public utility and therefore fall outside the purview of Club or Association Service.

- Service provided to non-members prior to 1-5-2011 falls the outside the ambit of Club or Association Service.
- ECSEPC being body established or constituted under a law namely Foreign Trade (Development & Regulation) Act, 1992 read with Foreign Trade Policy and therefore specifically excluded from the definition of taxable service.

Construction Service

1.6 R. B. Chy Ruchi Ram Khattar & Sons vs. CST, New Delhi 2015 (38) STR 583 (Tri-Del.)

The Department in this case sought to tax the appellant a sub-contractor engaged for building residential complex for Delhi Police under works contract with main contractor. The Tribunal held that, intention of Government is not to levy service tax on services received by Government of India through contractor/ sub-contractor. Service Tax is directed to be paid by sub-contractor for services ultimately to be utilised by Delhi Police on basis of technicality for not directly rendering service to a Government department it will ipso facto take away exemption granted to Government of India. Further, sub-contractor cannot be directed to pay service when said construction of project is non-commercial in nature and not taxable.

Business Support Service

1.7 Mettur Thermal Power Station vs. CCE(ST) Salem 2015 (38) STR 606 (Tri.-Chennai)

The department in this case sought to demand service tax on services charges collected from cement and asbestos sheet companies for disposal of fly ash on the ground that said services charges are for providing infrastructure, water, lighting, road maintenance etc. The Tribunal held that, activity of collection and removal of fly ash as per rate of Tamil Nadu Government does not constitute infrastructural support service under BSS. The consideration is received for sale of fly ash and not for any services provided notwithstanding name under which it is collected.

Management Consultancy Service

1.8 Jubiliant Enpro (P) Ltd. vs. CCE, Noida 2015 (38) STR 625 (Tri.-Del.)

The appellant in this case provided advices relating to conceptualising, devising, development, modification, rectification or upgradation of working system of companies and also on commercial aspects, current developments, import and export policy of India, potential problems and solutions, marketing strategies, alter about potential misuse of IPRs, economic and political scenarios. The Tribunal held that, these services are predominantly advisory and executory and directly connected with and useful for management of companies, hence liable to service tax as Management Consultancy Service.

Share Transfer Agent and Registrar to an Issue Service

1.9 Link Intime India Pvt. Ltd. vs. CCE, Thane-I 2015 (38) STR 705 (Tri.-Mumbai)

The Tribunal in this case held that, Share Transfer Agent Service and Registrar to an Issue service are liable to service tax w.e.f. 1-5-2006 and reimbursement of expenditure for the period prior to 1-5-2006 is not liable to tax at all. It is further held that, postage is in nature of duty/ tax as per section 2(f) of Indian Post Office Act, 1898 and service tax cannot be levied on amount charged as tax. Also when postage/stationery recovered from service receiver on actual basis by service provider, service provider acts as a pure agent therefore, reimbursement made to pure agent is not includible in value of taxable service rendered.

2. Interest/Penalties/Others

2.1 CCE&C, Nagpur vs. Noble Grains India Pvt. Ltd. 2015 (38) STR 525 (Tri.-Mumbai)

The Tribunal in this case held that, jurisdiction for claiming refund is from where the consignments are exported and services are received and not where the registered office is situated.

2.2 Greenply Industries Ltd. vs. CCE, Jaipur-I 2015 (38) STR 605 (Tri-Del.)

The department in this case sought to demand service tax on amount charged by foreign banker from assessee's banker, recovered from assessee. The Tribunal held that, there is no document showing foreign banker charging any amount directly from assessee and therefore assessee cannot be treated as a service recipient. Further no appeal has been filed against Commissioner (Appeals) order setting aside similar order passed in assessee's own case for previous period.

2.3 CST, Mumbai vs. Greater Pacific Capital Pvt. Ltd. 2015 (38) STR 656 (Tri.-Del.)

The assessee in this case provided investment advisory services to a customer located outside India having no office in India and received payment in convertible foreign exchange. The Tribunal held that it is a case of export of service and therefore assessee is entitled for refund claim.

3. CENVAT Credit

3.1 CCE, Delhi-III vs. Maruti Suzuki India Ltd. 2015 (38) STR 503 (Tri.-Del.)

The Tribunal in this case held that, services of cleaning, maintenance of garden, plantation etc. to control industrial pollution is necessary to ensure healthy surroundings and working conditions for employees and is in relation to manufacturing activity, therefore credit is admissible.

It is further held that, the burden of proof is on manufacturer to establish that the service availed has nexus with manufacture of final products.

3.2 CCE,C&ST, Visakhapatnam-I vs. GMR Industries Ltd. 2015 (38) STR 509 (Tri.-Bang.)

The Tribunal in this case held that, banking and other financial services utilised for sale of shares to raise finance for carrying out manufacturing operations is having nexus with manufacturing activity and therefore input service.

3.3 Globe Ground India Pvt. Ltd. vs. CCE&ST, Delhi-IV 2015 (38) STR 510 (Tri.-Del.)

The Tribunal in this case held as under;

- Maintenance service at Managing Directors residence is not having nexus with output service hence credit is not admissible;
- Water carts and toilet cards converted on vehicle chassis but not registered under Motor Vehicles Act are capital goods and hence credit is admissible.

3.4 Indswift Laboratories Ltd. vs. CCE&ST, Chandigarh-I 2015 (38) STR 522 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of service tax paid on travel agent services used for promotion and marketing of goods or meeting input suppliers for procurement of inputs and service tax paid in relation to technical know-how used for production of two products.

3.5 CCE&ST, Raipur vs. Dayalal Meghji & Co. 2015 (38) STR 557 (Tri.-Del.)

The department in this case sought to deny the CENVAT credit on the ground that invoice issued is not in the name of assessee but in the name of assessee's head office. The Tribunal held that, when there is no dispute regarding consumption of service and service tax has been duly paid thereon, the assessee is entitled to take Cenvat credit although the invoice is in the name of head office.

3.6 CCE&ST, Chandigarh-I vs. Punjab National Bank 2015 (38) STR 586 (Tri.-Del.)

The Tribunal in this case held that, since zonal office of the appellant was not registered as ISD at the material time, it is not eligible to pass on credit to their respective branch.

Also refer to *Pricol Ltd vs. CCE, Coimbatore 2015 (38) STR 668 (Tri.-Chennai)* wherein credit

is allowed even though not registered as ISD during relevant period.

3.7 Cargill India P. Ltd. vs. CCE,C&ST, Bengaluru-I 2015 (38) STR 587 (Tri-Bang.)

The Tribunal in this case allowed CENVAT credit of service tax paid on garden maintenance, outdoor catering and repair and maintenance of factory.

3.8 S. S. Engineers vs. CCE, Pune-I 2015 (38) STR 614 (Tri.-Mumbai.)

The Tribunal held that, CENVAT credit on input services can be utilised for payment of excise duty on goods manufactured by assessee. Rule 3 of CCR, 2004 does not stipulate maintenance of separate accounts as a manufacturer and as a service provider and restriction imposed in third proviso to rules 3(4) and 7(b) do not cover cross utilisation of credit of excise and service tax. Further, format of ER-1return and ST-3 return also indicate intention to permit cross utilisation of credit of excise duty and service tax.

3.9 Prerna Fine Chem Pvt. Ltd. vs. CCE, Thane-I 2015 (38) STR 693 (Tri-Mumbai.)

The Tribunal in this case held that, appellant being a job worker is entitled to claim credit of input services availed and used for goods manufactured and cleared to principal manufacturer without payment of duty.

3.10 SAR Ispat Pvt. Ltd. vs. CCE, Puducherry 2015 (38) STR 829 (Tri-Chennai.)

The Tribunal in this case allowed CENVAT credit of service tax paid on security services for factory and sales commission paid as the same are having inextricable nexus with manufacturing activity.

[Contd... from page 100]

7. Amendment in Rule 6(3)(i) of CENVAT Credit Rules, 2004:

Service provider providing taxable as well as exempt services and manufacturer of excisable and exempt goods who are not maintaining separate books of account can avail full CENVAT credit on payment of:

- 6% of value of exempted goods; and
- 7% of value of exempted services (previously 6%)

[Notification No. 14/2015-Central Excise (N.T.) dated 19-5-2015]

8. Amendment in Rule 5B of Cenvat Credit Rules, 2004:

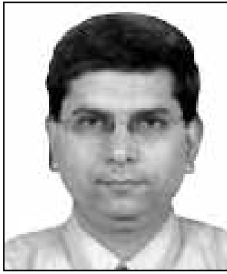
Provider of 'Manpower Supply services' and 'security services' was entitled to refund of accumulated CENVAT balance u/r 5B of CCR r.w. notification No. 12/2014-CE(NT) dated 3-3-2014. W.e.f 1-4-2015, these services are covered under full reverse charge. Hence such services are not an 'output service' as defined U/r 2(p) of CCR and consequentially not entitled to cenvat w.e.f 1-4-2015.These services are now excluded from Rule 5B of CCR and notification No. 12/2014 – CE (NT) and will not be entitled to claim refund of accumulated cenvat balance.

[Notification No. 15/2015 – C.E(NT) dated 19-5-2015]

9. Effective rate of service tax for air conditioned Restaurants, eating joints and mess

Rule 2C of Service Tax (determination of value) Rules, 2006 prescribes the value of services provided by air conditioned restaurants, eating joints and mess to be 40% of total amount charged. There has been no change in valuation Rule. W.e.f. 1-6-2015 tax rate is 14% and hence effective tax rate for such service would be 14% of 40% of total amount charged to customers. Hence, effective rate of service tax on services provided by air conditioned restaurants, eating joints and mess would be 5.60% w.e.f. 1-6-2015.

[Circular No. 184/3/2015 – ST dated 3-6-2015]



Janak C. Pandya, Company Secretary

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2015] 189 Comp Cas 667 (Guj.) – [In the Gujarat High Court] – Omkar Textile Mills P. Ltd.

In a Scheme of amalgamation, there is no legal bar as to what should be the "Appointed date." Further, Accounting Standard AS-14 does not applicable to a Scheme of Demerger and as provided in the Accounting Standard as well as section 211(3B) of the Companies Act, 1956, any deviation from Accounting Standard, company is required to provide disclosure, treatment and its effect with suitable explanation in immediate financial statement post amalgamation.

Brief Facts

The Petitioner and other group companies have filed the petition under sections 391 to 394 of the Companies Act, 1956 ("Act") read with section 100 to 103 of the Act. The Scheme of arrangement is for the demerger and transfer of demerged undertaking of Omkar Textile Mills P. Ltd to another two group companies. All the companies are private and closely held companies.

The Court took note of procedural compliances as provided under the Act and Rules there to. The said scheme was approved by equity shareholders, secured creditors and unsecured trade creditors. For another group companies, the meetings of equity shareholders were dispensed with.

The counsel for petitioners has submitted the detailed reasoning of the Scheme.

On behalf of the Central Government, the Regional Director ("RD") has submitted the following objections to the Scheme.

1. The consideration for demerger is payable to the demerged company and not to its shareholders;

2. Accounting entries as per Accounting Standard AS-14 not carried out;

3. The details of assets and liabilities of the demerged company to be transferred to resulting companies not provided;

4. The appointed date is not starting from April 1 but starts from June 1.

5. For change of name, compliance under the Companies Act, 2013 should be carried out.

The petitioner companies also submitted counter affidavit giving the reasoning of each of RD's objection.

Judgments and reasoning

The Court has sanctioned the scheme with following observations.

1. On consideration being paid to demerged company, the Court noted that said sale is being carried out as slum sale and hence consideration has to pay to demerged company. Further, the intrinsic value of shares held by shareholders in either case remains the same and same is being considered in valuation report.

2. The accounting treatment is as per the accounting principle and permissible in law. The accounting standard is not applicable for scheme of demerger. Also, as per Accounting Standards, if there is any deviation in accounting entries, than disclosure to that effect has to be made in first financial statements following amalgamation related to treatment, deviation and its effects. Also this is in line with the provisions of section 211(3B) of the Act, which also requires disclosure in case of any deviation from Accounting Standard.

3. The details of assets and liabilities unit wise as on May 31, 2013 already provided and same are in record.

4. On appointed date of June 1 and not from April 1 even though last audited accounts submitted is of March 31, Court has accepted the submission that there is no legal bar on the selection of appointed date. The board of directors has to decide and their respective shareholders have to approve the same which have been complied with. Further, being a closely held companies and same family group, interests of any shareholders are not likely to affect.

5. For change in name, the petitioner company has agreed to comply with the requirement under the Companies Act, 2013.

Case Law No. 2

[2015] 190 Comp Cas 133 (Mad.) – [In the Madras High Court – Madurai Bench] – Laxmi Selvaraaj Tex. P. Ltd vs. Inspector General of Registration and Others.

A document other than a Will shall be accepted for registration within four months from the date of its execution. However, in case of copy of decree or order, if appealable, then same be presented within four months from the disposal of such appeal and it is final.

Brief Facts

The petitioner has filed this writ petition. The writ is to seeking issuance of a writ of mandamus to the Inspector General of Registration and others ("Respondents") to register the copy of the Court order dated April 8, 2011 of Scheme for demerger.

The petitioner company and another family company namely M/s. Selvaaraj Tex. P. Ltd (Demerge Company") had proposed the Scheme of demerger ("Scheme"). As per the Scheme of demerger, some of the assets of demerge company were to transfer to petitioner company.

The said Scheme was approved by the court in 2011. Due to some dispute on the implementing the Scheme between the demerge company and petitioner, applications were filed to court and then to division bench to resolve the same. The Division Bench has passed final order on April 4, 2014.

After division bench order, the petitioner has approached for registration authorities with necessary registration charges for registration of order. As per petitioner, they are entitled to benefit of the remission notification issued by the Government. Further as per section 23 of the Registration Act, 1908 ("RA"), the order has been presented in time. The respondents had refused to register the order on the ground of expiry of time limit from the date of order.

The respondent has filed a counter affidavit giving the reasoning under sections 23 and 32 of the RA as to why the Court order dated April 2011 not registered. The other objections raised are as follows.

1. Petitioner did not submit the copy of the Court order but based on Scheme had requested for mutation of ownership in the office records for one of the properties of partnership to a private company. As per respondent, RA does not have any such provision as to mutation of entries.

2. The judgment passed in 2014, is not a judgment against the appeal of order dated April 2011 and no appeal was preferred against the said order. Thus submission of order dated April 2011 is after the prescribed time limit as per sections 23 and 25 of RA.

Judgments and reasoning

Court has allowed the writ petition and directed the 3rd respondent to register the order upon petitioner complying with other requirements.

The Court has analysed the provisions of section 23 and 25 of the RA. Section 23 provides for four months as a time for presentation of documents for registration. Further, in case of appealable order, same can be presented within four months from the date when it becomes final. Section 25 provides that if there is delay in presentation due to unavoidable situation, then it provides for registration subject to additional fine.

The court has also refer the previous judgment of Hon Division Bench in the case of *A.K.Gnanasankar vs. Joint II Sub-Registrar, Cuddalore-2, W.A. No. 2395 of 2003.* The proviso of section 23 of RA, which provides for registration within four months from appealable order also referred and has accepted the submission of petitioner.

With regards to submission of the Division Bench judgment is not a judgment, Court after reviewing the sequence of all events as to disputes. The Court has observed that very scheme of demerger was subject matter of issue before the Hon. Division Bench. Thus, interpretation of Limitation Act provided by the respondent is not tenable. Court also observed that entire controversy was put to rest only after the dismissal of appeal by Hon. Division Bench. Thus as per section 25 of RA the submission of order from the date of such dismissal of petition is within the time and required to be allowed.

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Circulars & Notifications & through Consolidated FDI Policy:-

A. RBI Circulars/Notifications:

1. Foreign Currency (Non-Resident) Account (Banks) (FCNR (B)) Scheme

It was being observed that many Authorized Dealer Banks have been insisting on different requirements for closing of FCNR (B) deposits and subsequent remittance of funds. The requirements are as follows:-

a) Submission of Form A2

b) Insisting on physical presence of account holder

c) Asking for purpose of remittance

RBI has clarified that A2 form is to be filled at the time of purchase of foreign exchange using rupee funds and hence is not applicable while remitting FCNR (B) Funds. Further, banks are advised to devise better alternatives/ methods for ensuring bonafides of the transaction rather than insisting on physical presence of the account holder so as to ensure hassle free remittance of funds to the account holder.

(A.P. (DIR Series) Circular No. 98 dated 14th May, 2015)

(For remittance of FCNR(B) funds, it is liability of remitting bank to re-purchase surrendered foreign exchange, yet many banks insisted submission of A2 forms resulting in delays and hardships for non-resident depositors. In the present scenario of technology and online banking, insistence for physical presence is out of place as it is possible for the bank to verify *KYC online. Swift copy also has narrative field* ***which mentions purpose of remittance***

The clarification will reduce unwanted hardship ***for the non-resident depositors on all the three counts mentioned in the circular and also result into reduction of paperwork for the banks.)***

2. Export of Goods and Services- Declaration of Exports of Goods/ Software

Under extant provisions contained under existing Regulation 6 of Notification No. FEMA 23/2000-RB dated May 3, 2000 Export of Goods and Services Regulations, 2000 every exporter of goods / software has to file declaration in the prescribed format stated under the regulation.

In a measure of further liberalization/ simplification of the procedure, RBI has

dispensed with the requirements of declaring the export of Goods / Software in the Software Declaration Form (SDF) in case of exports taking place through Electronic Data Interchange (EDI) ports as the mandatory statutory requirements contained in the SDF have been subsumed in Shipping Bill format.

(A.P. (DIR Series) Circular No. 101 dated 14th May, 2015)

(This is a welcome move which would be result in less paper work resulting into ease of doing business)

3. Rupee Drawing Arrangement - Increase in trade related remittance limit

RBI has increased the limit for permitted transactions under Rupee Drawing Arrangements (RDAs) from ` 5,00,000/- to ` 15,00,000/- per transaction. Further AD banks are authorised to regularise payments exceeding the prescribed limit under RDA provided that they are satisfied with the bonafide of the transaction. The additional steps to be taken by AD Banks to permit the same are as follows: -

1. AD banks must ensure the remittances received under RDA are from FATF compliant countries.
2. KYC/AML/CFT and other due diligence concerns should be taken care of by AD banks.
3. Individual Exchange Houses which are frequently sending large value trade related remittances must be reviewed and reported to the Reserve Bank of India.
4. AD banks must contact their correspondents that maintain accounts for, or facilitate transactions on behalf of Exchange Houses in order to request additional information regarding high value trade related transactions and the parties involved. The collected details should be kept on record and it may be made available for scrutiny.
5. AD banks must ensure that the proceeds of export payment through RDA is applied to the outstanding export finance if any, availed by the exporter from any bank for the concerned export transaction and obtain a declaration to that effect from the exporter.

(A.P. (DIR Series) Circular No. 102 dated 21st May, 2015)

(This is a welcome step which will reduce transaction cost and facilitate speedy remittance of funds)

4. External Commercial Borrowings (ECB) denominated in Indian Rupees (INR) – Mobilization of INR

Presently, under extant guidelines, recognized non-resident ECB lenders have been permitted to extend loans in Indian Rupees subject to the lender mobilizing Indian Rupees through a swap undertaken with an AD Cat-I bank in India.

To facilitate ECB lending in INR by overseas lenders, RBI has permitted such lenders to enter into swap transactions with their overseas bank which shall, in turn, enter into a back-to-back swap transaction with any AD Cat-I bank in India as per the procedure given: -

1. The recognised non-resident lender approaches his overseas bank with appropriate documentation as evidence of an underlying ECB denominated in INR with a request for a swap rate for mobilising INR for onward lending to the Indian borrower.
2. The overseas bank, in turn, approaches an AD Cat-I bank for a swap rate along with documentation furnished by the customer that will enable the AD bank in India to satisfy itself that there is an underlying ECB in INR (scanned copies would be acceptable).

3. A KYC certification on the end client shall also be taken by the AD bank in India as a one-time document from the overseas bank.

4. Based on the documents received from the overseas bank, the AD bank in India should satisfy itself about the existence of the underlying ECB in INR and offer an indicative swap rate to the overseas bank which, in turn, will offer the same to the non-resident lender on a back-to-back basis.

5. The continuation of the swap shall be subject to the existence of the underlying ECB at all times.

6. On the due date, settlement may be done through the Vostro account of the overseas bank maintained with its correspondent bank in India.

7. The concerned AD Cat-I bank shall keep on record all related documentation for verification by Reserve Bank.

(A.P. (DIR Series) Circular No. 103 dated 21st May, 2015/ GOI Notification No. 426E dated 26-5-2015/ RBI Notification No. 341/2015 dated 26-5-2015)

(This is a welcome move which will result in reduction of costs and increase in comfort levels for overseas lenders who will now be in better position to bargain with their overseas bankers for swap rates. There being no forex risk, this measure could also result in increased borrowings in rupee denominated ECBs resulting into wider acceptability of rupee in the international market in the long run)

5. Rationalisation under Liberalized Remittance Scheme (LRS) for Current and Capital Account Transactions for individuals alongwith increase in the limit from USD 125,000 to USD 250,000

The GOI/ RBI have made important changes in Current Account Regulations by subsuming several remittances alongwith increased ceiling for remittances under LRS to USD 250,000 in the backdrop of key announcements made by RBI at the time of Sixth Bi-Monthly Monetary Policy of 2014-15 dated 3rd February 2015 as follows-

Limits and Facilities under LRS

1) In order to facilitate ease of doing transactions, all the facilities (including private/business visits) for release of exchange/remittances for current account transactions available to resident individuals under Para 1 of Schedule III to the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time, shall now be subsumed under the overall limit of USD 250,000.

2) Resident individual will now be allowed to remit up to USD 250,000 per financial year for permitted current or capital account transaction or a combination of both except remittances for the purpose mentioned at Sl. Nos. (iv)[emigration], (vii)[expenses in connection with medical treatment abroad] and (viii)[studies abroad] in Para 1 of Schedule III provided at Annex 1, individuals may avail of exchange facility for an amount in excess of the overall limit prescribed under the LRS, if it is so required by a country of emigration, medical institute offering treatment or the university respectively. Gift in Indian Rupees by resident individuals to NRI relatives as defined in the Companies Act, 2013 shall also be subsumed under the LRS limit. Any remittance already made by the individual under the LRS would be reduced from the present limit of USD 250,000.

3) The said Scheme cannot be used for making remittances for any prohibited or illegal activities such as margin trading, lottery, etc.

4) The permissible capital account transactions by an individual under LRS are: i) opening of foreign currency account abroad with a bank; ii) purchase of property abroad; iii) making investments abroad; iv) setting up Wholly owned subsidiaries and Joint Ventures abroad; v) extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

5) a person who is resident but not permanently resident in India and

   a) is a citizen of a foreign State other than Pakistan; or

   b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

   may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Current Account Transactions- Facilities for persons other than individuals:-

The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

(i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-

   (a) creation of Chairs in reputed educational institutes,

   (b) contribution to funds (not being an investment fund) promoted by educational institutes; and

   (c) contribution to a technical institution or body or association in the field of activity of the donor Company.

(ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent. of the inward remittance whichever is more.

(iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

   Explanation:—For the purposes of this sub-paragraph, the expression "infrastructure' shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated the May 3, 2000.

(iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

The following table provides a bird's eye view of the position under old and new LRS schemes-

Sr. No.	Particulars of Change	Previous Limit/Rule	New Limit/Rule
1.	LRS Limit Increased	Permissible without approval of RBI up to USD 1,25,000	Permissible without approval of RBI up to USD 2,50,000.
2.	Facilities under Schedule III subsumed under the LRS Limit for remittance for Individuals	Only remittances for gift and donation were subsumed under the limit available under the LRS. The following remittances were allowed over and above LRS ceiling of USD 125,000 under Schedule III – Current Account Transaction:-	All remittances for the following purposes are subsumed under the LRS Limit:- – Private visits to any country (except Nepal and Bhutan). – Gift or donation. – Going abroad for employment. – Emigration.

Sr. No.	Particulars of Change	Previous Limit/Rule	New Limit/Rule
		– USD 10,000 for Private visits to any country (except Nepal and Bhutan). – USD 1,00,000 for individuals going abroad for employment – USD 1,00,000 for Emigration Purpose – USD 1,00,000 per recipient for maintenance of close relatives abroad – USD 25,000 for Business Travel or Conference or Medical Expenses or Check up abroad – USD 1,00,000 for Studies abroad Provided that for the purposes emigration, Studies abroad & Medical, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme if it is so required by a country of emigration, medical institute offering treatment or the university.	– Maintenance of close relatives abroad. – Travel for business, or attending a conference or specialized training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up. – Expenses in connection with medical treatment abroad. – Studies abroad. – Any other current account transaction: Provided that for the purposes emigration, Studies abroad & Medical, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme if it is so required by a country of emigration, medical institute offering treatment or the university.
3.	LRS Ceiling for Non - Individuals	There was no reference under Current Account Transactions under Schedule III for ceiling under LRS Scheme for persons other than individuals.	Current Account Transactions now stipulates LRS limits for remittances by persons other than individuals for the transactions under new rule (i) to (ix) listed in the Schedule III for individuals. Separate ceilings are provided for other category of transactions for persons other than individuals.
4.	Overall ceiling for Current Account Transactions	There were ceilings for certain individual items but there was no overall ceiling.	Now there is overall ceiling of USD 2,50,000 for all Current Account transactions alongwith permissible Capital Account Transactions under LRS for individuals.

(A.P. (DIR Series) Circular No. 106 dated 1st June, 2015)

(While subsuming Current Account Transactions with LRS ceiling to USD 2,50,000 for individuals, the amendment will provide flexibility in utilization of the available forex facility. It appears that use of international credit card transactions while on visit outside India are not covered by the overall ceiling.

However, subsuming has reduced the availability foreign exchange for current account transactions if one were to compare the individual limits prescribed earlier. The inclusion of "any other current account transaction" within the overall limit of LRS may result in some interpretational issues as normally it is understood that remittances on current account such as dividends, interests, profits etc. are allowed without any limits. One may interpret that LRS would restrict remittance of expenses on current account and not any current account transaction per se. So any trade transaction many not be covered by LRS)

A. DIPP Press Notes/Press Releases by Press Information Bureau, GOI:-

Press Release Issued on 21st May 2015 on Review of Foreign Direct Investment (FDI) Policy on Investments by Non Resident Indians (NRIs), Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs)

The Union Cabinet has approved amendment to the definition of NRIs to include OCI & PIO Card Holders for the purpose of FDI

Following are the amendments approved by the Cabinet to are proposed to be incorporated in the FDI policy:

(i) By amending relevant para, definition of NRI will be as under:

'Non Resident Indian' (NRI) means an individual resident outside India who is citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955. 'Persons of Indian Origin' cardholders registered as such under Notification No. 26011/4/98 F.I. dated 19.8.2002 issued by the Central Government are deemed to be "Overseas Citizen of India' cardholders".

(ii) To provide that investment by NRIs on non repatriable basis is domestic. Following new para is approved to be added:

'Investment by NRIs under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations will be deemed to be domestic investment at par with the investment made by residents.'

The decision that NRI includes OCI cardholders as well as PIO cardholders is meant to align the FDI policy with the stated policy of the Government to provide PIOs and OCIs parity with Non Resident Indians (NRIs) in respect of economic, financial and educational fields. Further the decision that NRIs investment under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident outside India) Regulations will be deemed to be domestic investment made by residents, is meant to provide clarity in the FDI policy as such investment is not included in the category of foreign investment.

(Comments:- The amendment brings the definition of 'NRIs' (from the perspective of exchange control regulations governing FDI) in line with the definition under Citizenship Act, 1955 and will cover non-residents who are either Indian citizens or OCI cardholders. Individuals who have registered as a PIO cardholders under the erstwhile Issuance of PIO Card Scheme, 2002 are also deemed to be OCI cardholders.

The proposed change is expected to apply to transaction by NRIs covered only under Schedule 4 of Notification No. 20 on non-repatriation basis. It is not clear whether restrictions contained in Para 1 of Schedule 4 will continue to apply. It is also not clear

whether the amendment will cover other capital account transactions by NRIs such as lending to** Indian companies in INR and acquisition of immovable property in India. Further clarification in **this regard may be necessary.

*The measure is expected to result in increased investments across sectors and greater inflow of **foreign exchange remittance leading to economic growth of the country).***

B. CONSOLIDATED FDI POLICY THROUGH DIPP CIRCULAR NO. 1 OF 2015

Department of Industrial Policy and Promotion (DIPP) (which comes under Ministry of Commerce and Industry) have published 'Consolidated FDI Policy' vide Circular 1 of 2015 which takes effect from 12th May 2015.

Certain important changes introduced vide Consolidated FDI Policy of 2015 are summarized as below:

Sector	Amendments	Press Note Reference, if any
Industrial Parks- New & Existing	– Sectrol Cp increased from 26% to 49% under GOI Route – FDI> 49% Approval of CCS	PN 7 of 2014
Railway Infrastructure	Definition of Infrastructure & Common facilities revised.	PN 8 of 2014
Construction Development, Housing, Built Up Infrastrucure	Amendments in conditions related to minimum area, minimum capitalization, etc.	PN 10 of 2014
Pharmaceuticals	100% FDI permitted in Companies engaged in manufacturing of medical devises under Automatic Route	PN 2 of 2015
Insurance	Sectrol Cap increased from 26% to 49% with FDI> 26% <= 49% under GOI Route subject to conditions	
Issue of Foreign Currency Convertible Bonds (FCCBs) and Depository Receipts (DRs)	Provisions of Depository Receipts Scheme 2014 incorporated	
Transfer of shares and convertible debentures -	No GOI approval required for transfer of shares in the investee company from one non-resident to another non-resident in sectors which are under automatic route. GOI approval required for transfer of stake from one non-resident to another non-resident in sectors which are under Government route. However, in cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the investee company would have to file form FC-TRS with the AD Category-I bank.	

Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1) Agreement to sell – Time whether essence of contract: Contract Act, sec. 55

The plaintiff had filed the suit for direction to the defendants to execute the deed of conveyance regarding the suit property as per the agreement of sale dated 23-2-1993 within a specified time. The case of the plaintiff is that the defendants 1 and 2 had jointly agreed to sell the suit property, which is a house site. An agreement of sale was entered on 23-2-1993 for a sum of ` 32,000/-. It is stated that at the time of agreement, the plaintiff paid a sum of ` 5,000/- towards advance for sale consideration. The agreement was reduced to writing fixing the time for performance of the agreement as six months.

It is further alleged that the defendants had not taken any steps to repay the amount and take back possession. In the meanwhile, after agreeing to sell the property to the plaintiff, the defendants had with an intention to defraud the plaintiff, wanted to sell the suit property in favour of the third defendant. Therefore, the plaintiff was constrained to give a representation to the Sub-Registrar, not to register any sale deed with respect to the suit property. The further allegation of the plaintiff is that in spite of his several attempts calling upon the defendants 1 and 2 to execute the sale deed in his favour, they had not heeded to his request and that though he was ready and willing to perform his part of the agreement, the defendants were evading the same.

According to the defendants, the sale agreement specifically mentions that time is the essence of the contract and as they were in dire need of money, they agreed to sell the property to the plaintiff and fixed the time of six months to receive the balance of sale consideration. It was also agreed in the agreement that if the plaintiff failed to pay the balance of amount and get the sale executed, the advance amount would be forfeited.

The Hon'ble Court observed that on reading of the recital, it is clear that the defendants 1 and 2 have been in dire need of money and the intention of the defendants can also be gathered that time is the essence of contract. It has further specified that in the event of the defendants not coming forth with the execution, it was open to the plaintiff to deposit the balance of sale consideration into the Court and get the sale executed through Court.

The words clearly show an intention of the parties to make time as the essence of contract

with reference to payment and hence, time will be held to be the essence of contract. In view of the above, it was held that time is the essence of contract in so far as the sale price is concerned if not for the execution of the sale deed.

Further, on the issue of specific performance, the Court observed that the relief being an equitable relief, it is the discretion of the Court in the light of the facts and circumstances of the case either to refuse or grant the relief of specific performance. At the same time, it could not be lost sight of that the discretion exercised by the Court should not be arbitrary but should be based on sound judicial principles coupled with the intention of the parties.

In the instant case, the plaintiff has taken unfair advantage of his position to compel the defendants 1 and 2 to sell the suit property to him. When time is the essence of agreement in so far as the sale price is concerned as held above, the delay on the part of the plaintiff in not performing his part of the contract and taking advantage of his own wrong cannot be permitted. The plaintiff, who comes to the Court for the grant of equitable relief of specific performance, has to establish his readiness and willingness throughout from the date of agreement till the date of filing of the suit. The plaintiff also had not taken steps to deposit the remaining sale consideration in to Court at the time of filing of the suit. In these circumstances, the Court concluded that the plaintiff had not established his case that he was ready and willing to perform his part of contract even on the date of suit. The plaintiff cannot be entitled to a decree of specific performance.

Nanjachary vs. P. Chennaveerachari and Ors. AIR 2015 Mad. 73

2) Jurisdiction of National Commission – Appeal against order of State commission exercising appellate jurisdiction – Consumer Protection Act sec. 21

A petition was filed primarily, contending that under Section 21 of the Consumer Protection Act, 1986 the appellate jurisdiction of the National Commission is provided only against orders of the State Commissioner in the original proceedings and not against the orders in appellate jurisdiction of the State Commission.

The court observed that the State Commission exercises powers to entertain 1) original complaints of a specified value, 2) appeal against orders of District Forum within the State and 3) power of revision with respect to any consumer dispute pending before any of the forums within the State. Thus, the jurisdiction exercised by the State Commission comprises of original, appellate and revisional jurisdiction, as provided under Section 17 of the Act. Section 19 of the Act provides for appeals against orders of State Commission to the National Commission with regard to powers exercised by the State Commission under Section 17(a)(i) of the Act viz. original complaints of specified value. Obviously, therefore, the appeals against orders of the State Commission in exercise of its Appellate or Revisional powers are not provided before the National Commission.

Section 21 of the Act, however, provides for jurisdiction of the National Commission, which is again composed of three categories as that of the State Commission viz. (1) original complaints of specified value, (2) appeals against orders of the State Commission and (3) revisional jurisdiction against any consumer dispute decided by the State Commission.

From a reading of S. 17(b) of the Act dealing with the State commission's Revisional power as well as S. 21(b) of the Act dealing with the National Commission's Revisional power it would be noticed that both the said Revisional powers can be exercised by the respective Commissions to satisfy itself of the legality and validity of any orders passed by the District Forum/State Commission be low, as the case may be. It is, therefore, open for the State Commission/National Commission, while exercising revision jurisdiction, to satisfy itself with regard to the jurisdiction exercised by the District Forum/State Commission, as the case may be and also to satisfy itself that such jurisdiction is not exercised illegally or with material irregularity. The said revisional jurisdiction so conferred on the State commission/ National Commission is, therefore, similar to the revisional power vested in the High Court under S. 115 of the Code of Civil Procedure, 1908.

The revisional power is also not hedged with any pre conditions nor is the revisional power exercisable only after complying with onerous conditions so as to diminish its efficacy. The revisional power of the State Commission/ National commission, as the case may be, having not been subjected to any limitation on exercise of such revisional power, it cannot be said to be not an alternative remedy so as to justify the maintainability of the writ petition.

The court declined to entertain the writ petition filed by the petitioner challenging the order of the A.P. State Consumer Dispute Redressal Commission, and the petitioner was relegated to effective alternative remedy of appeal to the National Commission under Section 21 of the Consumer Protection Act, 1986.

The A.P. Co-op. Hsg. Soc. Federation Ltd., Hyderabad vs. The A.P. State Consumer. Disputes Redressal Commission Hyderabad & Ors. AIR 2015 Hyderabad 69

3. Will – Neither involves any transfer – Nor effect any transfer inter-vivos, it is legal expression of wishes and intention of person: Succession Act, 1925; Maintenance and Welfare of Parents and Senior Citizens Act, 2007 sec. 23:

This is a very unfortunate legal battle in which daughter and mother are pitted against each other. The brief facts giving rise to this petition are that while living together in a dwelling house owned by the respondent, a sense of discord persisted between the parties. Feeling disgruntled due to total apathy of the petitioner towards her moral and social obligation, the respondent laid a claim petition under the Maintenance and Welfare of Parents and Senior Citizens Act 2007

In the petition, it was inter-alia averred by the respondent that she is owner of a dwelling house. The respondent performed marriage of the petitioner as per Hindu rites and rituals and offered her requisite dowry. After marriage, on some occasions, when petitioner visited respondent, the respondent informed her that she is unable to maintain herself as there is no source of income for incurring medical expenses and other requirements. As per version of the respondent, petitioner assured her that she will provide maintenance and look-after her if the dwelling house is transferred in her name by executing a testamentary instrument. The respondent has also stated in the petition that petitioner assured her that she will not occupy the dwelling house during her lifetime. On that assurance, the Will was executed on 30th of November 2011, which was registered in the office of Sub Registrar II, Jodhpur. The respondent has made a specific averment in

the complaint that after execution of the Will, petitioner never visited her and no endeavour was made by her to pay maintenance. It is also stated in the petition that petitioner has occupied the dwelling house without there being any authority and being old and infirm respondent was unable to resist her from taking possession of the dwelling house. With these averments, prayer was made for eviction of petitioner from the dwelling house and to grant her any other relief.

The petition laid on behalf of respondent was contested by petitioner and all the allegations were denied. The learned Tribunal heard the arguments and vide impugned order allowed the petition laid by the respondent. By the said order, the learned Tribunal had cancelled Will dated 30th of November 2011, which was executed by respondent in favour of the petitioner, and has also ordered eviction of the petitioner from the house within fifteen days.

The Honourable Court observed that, the enactment of the Act of 2007 is based on traditional norms and values of the Indian society. Laying stress on providing care for elderly persons, the enactment reminds traditional norms and values of the Indian Society. It is noticed that large number of elderly persons, particularly widowed women, are not being looked-after by their families. This sort of situation, at times, forces them to spend their twilight years all alone exposing them to emotional neglect and without any financial support. The Act is intended to succour vows of the parents or the grandparents by providing appropriate mechanism for need based maintenance to the senior citizens besides better medical facilities. The Act is also promulgated with the solemn object for institutionalization of a suitable mechanism for protection of life and liberty of elderly persons and set up of Old-age Homes in every district.

The legislative intent of the Act of 2007 is unquestionable but a crucial question which has cropped up in the instant case is whether Will is a transfer of property within the four corners of Section 23 of the Act of 2007, more particularly when testator is alive?

A bare perusal of definition of "Will" makes it crystal clear that it does not involve any transfer, nor effect any transfer inter-vivos, but is a legal expression of the wishes and intention of a person in regard to his properties which he desires to be carried into effect after his death. Thus, a Will directs the distribution of property in a particular way after death of the testator. It is trite that Wills are ambulatory and are by their nature revocable. A testator during his lifetime is well within his rights to revoke or cancel the Will.

The learned Tribunal has passed the order of eviction against the petitioner as a necessary consequence and corollary of declaring the Will null and void, the said order too cannot be sustained in the eye of law. However, the other legal remedies are left open.

Smt. Rajkanwar vs. Smt. Sita Devi AIR 2015 Rajasthan 61

4. Secondary Evidence – Photo copy of sale deed – No explanation given as to non production of original – Not allowed: Evidence Act 1872 sec. 63 – 65

Before a party is entitled to give other secondary evidence of the contents of the Original, the non production of the original must be satisfactorily accounted for. Therefore, when a party is not in possession of primary evidence and he entitled to produce secondary evidence provided he satisfies the conditions stipulated in sec. 65 of the Act. In order to satisfy the court about the existence of conditions stipulated in section 65, he has to adduce evidence in

the witness box on oath. He has to account for non production of the original, set out evidence laying a foundation to lead secondary evidence and then he has to lead secondary evidence. It is at that stage, the opposite party or the court can object to the production of secondary evidence, if no proper foundation is laid. Where the originals were not produced at any time nor was any foundation laid for giving secondary evidence, certified copies are not admissible. When a party gives evidence, a certified copy without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and will not be allowed at a later stage, for, if the objection had been taken then and there, the party affected could have made it and regularized the proceedings. All these has to be done when the party leading secondary evidence, is in the witness box.

Sri Prakash vs. Doddathayamma and Ors. AIR 2015 (NOC) 329 (Kar.)

5. Lease deed – Effect of non – registration – Not a valid document – But can be read only for collateral purpose

The admitted facts between the parties are that Sardarni Manjir Kaur entered into a lease deed with the landlord Dhan Prakash on 31-3-1998 and the lease commenced w.e.f. 1.4.1998. Tenanted property is a shop. As per the deed, it was settled that the Lessee shall pay the lease rent. The Lessee continues to be in the possession of the shop in question, with an option with the Lessee to determine the lease with 30 days prior notice to the Lessor any time in future. The tenant, thus, continued her tenancy with the consent of the landlord as per the covenants in the deed up to March 2010. However, after March, 2010, the landlord refused to receive such advance and instead issued a notice dated 28-3-2010 terminating the tenancy of the revisionist. It was argued by the learned Counsel of the revisionist that the lease, in question, was in perpetuity as there was no stipulation giving the liberty to the Lessor to terminate the lease.

The Court observed that Section 17(1)(d) of the Registration Act provides that leases of immovable property from year to year, or for any term exceeding one year, or reserving an yearly rent, can be made only by a registered instrument. Similarly, section 107 of the Transfer of Property Act envisages that a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. Meaning thereby that if a lease is made for a term of more than one year, as it happens to be in the instant case, then the instrument ought to have been compulsorily registered by the parties, as envisaged under the Registration Act as well as under the Transfer of Property Act.

Further, Section 49 of the Registration Act provides the effect of non-registration of the document required to be registered and says that no document, required by Section 17 of the Act to be registered, shall affect any immovable property comprised therein, unless it has been registered.

However, such document can be read only for collateral purposes, but so far as its validity is concerned, it can never be accepted as a valid document, and if the document is not valid then it is not admissible in the evidence to establish the covenants/terms and the relationship between the parties. Even though, the fact remains that the revisionist occupied the premises, in question, as a tenant with the consent of the landlord up to 28-3-2010, and is still occupying the same as a tenant at hold. In view of above, the revision petition dismissed.

Sardarni Manjit Kaur vs. Dhan Prakash AIR 2015 Uttarkhand 29

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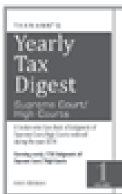

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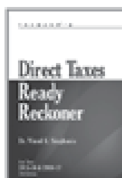

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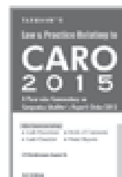

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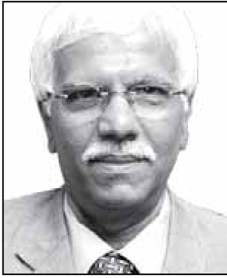

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Articles published in Taxman, Current Tax Report (CTR), The Tax Referencer (TTR), Income Tax Report (ITR Tribunal), Sales Tax Review (S. T. Review), The Bombay Chartered Accountant Journal (BCAJ), The Chamber's Journal (C J), The Chartered Accountant (CAJ), All India Federation of Tax Practitioners Journal (AIFTPJ), Times of India and Economic Times for the period April-2015 To May-2015 has been arranged and indexed topic-wise.

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TDS Obligations vis-à-vis Non-Residents-Amendments Proposed by Finance Bill, 2015	Nisha Bhandari	TTR	142	804
Capital Gains Related Amendments and Finance Bill, 2015	Manoj Gupta	TTR	142	733
Scope of Appeal Widened via Finance Bill, 2015	Arundhati Kulshreshtha	TTR	142	677
Finance Bill, 2015 : Personal taxation	T. C. A. Ramanujam	CTR	275	18
Finance Bill, 2015 : Corporate tax angle	T. C. A. Ramanujam	CTR	275	25
Amendment to s. 263 in Finance Bill, 2015 fails tests – Both of robust drafting and good law	Tilak Chandna	CTR	275	41
International Taxation Sections 6,9,9A,92BA,115A and 195	P.V.S.S. Prasad	AIFTP Journal	18/ No. 1	27
Salient features of the Finance Bill, 2015	S K Tyagi	ITR	373	1
Service Tax on Entertainment, Amusement and Recreational Services-Impact of Finance Act, 2015 Amendments	Pramod Srivastava	TTR	143	78
Amendments incorporated at the time of final discussion in Lok Sabha	Manoj Gupta	TTR	143	102

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The changing law of charities	T. C. A. Sangeetha	CTR	276	26
Finance Bill, 2015 : Indirect transfer redefined	T C A Ramanujam	CTR	276	21
Sailent Features of International Tax Related Proposals	Nihar N Jambusaria	CAJ	63 / No. 10	1431
Impact of Proposed Amendments on Personal Taxation	P N Shah	CAJ	63 / No. 10	1404
Analysis of Amendments in Cenvat Credit Rules, 2004	Sushil Kumar Goyal	CAJ	63 / No. 10	1440
Customs & Excise Proposals in Union Budget 2015-16	Sanjiv Agarwal	CAJ	63 / No. 10	1444
Finance Act, 2015				
Finance Act, 2015 vis-à-vis taxability of services provided by government or local authority	P. Kamalakar	TTR	143	52
Foreign Account Tax Compliance Act				
The Indian Side of Regulations	Sunil Kothare	BCAJ	47-A/Part 2	10
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International Taxation				
Applicability of transfer pricing provisions on issue of shares – The Bombay High Court settles the debate	Ravi Kumar Swamy and Satya	ITR (Tribunal)	38	13
Amendments Relating to Indirect Transfers	Manoj Gupta	TTR	142	616
Evolving Transfer Pricing Jurisprudence in India	Vispi T. Patel & Kejal P. Visharia	BCAJ	47-A/Part 1	10
Some US Tax Issues Concerning NRIs/US Citizens	Mayur Nayak, Tarunkumar Singhal & Anil D. Doshi	BCAJ	47-A/Part 1	47
Some US Tax Issues concerning NRIS/US Citizens Part II	Mayur Nayak, Tarunkumar Singhal & Anil D. Doshi	BCAJ	47-A/Part 2	42
Income Computation and Disclosure Standards				
Overview of the Income Computation and Disclosure Standards	P. N. Shah	C J	III / No. 8	9
Valuation of Inventories : Income Computation and Disclosure Standard II (ICDS II)	Sudhir Soni	C J	III / No. 8	14
ICDS III - Relating to Construction Contracts	Vishal J Shah & Kunal Mehta	C J	III / No. 8	18
ICDS IV - Revenue Recognition	Sanjeev Pandit	C J	III / No. 8	25
Income Computation and Disclosure Standard V-Tangible Fixed Assets	Zubin F Billimoria & Harsha Rawal	C J	III / No. 8	30
Income Computation and Disclosure Standard VII-Government Grants	Zubin F Billimoria & Pooja Balachander	C J	III / No. 8	35
Securities (ICDS VIII) and Effects of Changes in Foreign Exchange Rates (ICDS VI)	Sunil Kothare	C J	III / No. 8	38

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Income Computation and Disclosure Standards (ICDS) IX- Borrowing Cost	Sanjay Khemani	C J	III / No. 8	44
Income Computation and Disclosure Standard X relating to Provisions, Contingent Liabilities and Contingent Assets	Paresh Vakharia	C J	III / No. 8	54
Immovable Property				
Agreement to Sell - Tax Implications	Deepa Khare	BCAJ	47-A/Part 1	21
Cash Transactions in Immovable Properties subjected to Penal Provisions	Tarun Ghia	CAJ	63 / No. 10	1409
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Local Body Tax				
Repeals & Savings	Kishor Lulla	STR	62 / No. 2	20
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MAT on Foreign Institutional Investors : The Great Debate is on	T. C. A. Ramanujam & T. C. A. Sangeetha	ITR	373	41
It's the image that's on the MAT	Sachin Dave & Vinay Pandey	Economic Times	4/22/2015	13
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Net Neutrality Law				
Need for 'Net Neutrality Law	D. H. Joshi	AIFTP Journal	18/ No. 1	17
Non-Resident				
Section 206AA does not apply to non resident payments covered by Tax Treaties	Abhishek Worah	Taxman	230	13
New ITR Forms				
Wish, New ITR Forms had stayed !	Meenakshi Subramaniam	Taxman	230	17
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Service Tax				
New Procedure for Registration Under Service Tax effective from 01-03-2015	Satyadev Purohit	TTR	142	148
Transitional issues : Amendment in Reverse Charge Provisions	Puloma D. Dalal & Bakul Mody	BCAJ	47-A/Part 1	53
Service Tax on "Short Notice Pay"	Pranav Mehta	STR	62 / No. 2	42
Exemption in Respect of Merchandise Exports from India Scheme Duty Scrip	P. Sadanandan	TTR	143	78
Drilling Rigs on Time Charter-A Service of Hiring of Tangible Goods ?	Puloma D. Dalal & Bakul Mody	BCAJ	47-A/Part 2	47

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Securities Laws				
SEBI to Govern Commodity Contracts Too-Implications of This Finance Bill Proposal	Jayant M. Thakur	BCAJ	47-A/Part 1	69
Powers to Arrest-SEBI's Wide Exercise Curtailed by the Bombay High Court	Jayant M. Thakur	BCAJ	47-A/Part 2	61
TDS				
Karneeti-Beware of the side effects of TDS on the Interest of Deposits in Co-op Banks w.e.f. 1st June, 2015	Umesh Sharma	STR	62 / No. 2	39
Payment for live telecast of horse races-Whether liable to tax deduction at source	T. N. Pandey	CTR	276	37
Don't misuse forms 15G, 15H to avoid TDS	Chandralekha Mukherji	Times of India	27/04/2015	18
Amendments Relating to TDS Provisions	Ameet N. Patel	CAJ	63 / No. 10	1422
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Charitable institutions-Constant risk of withdrawal of exemption	Gopal Nathani	ITR	372	8
Validity of Cancellation of Registration of Trusts Under Section 12AA(3)	Rajshree Choudhary	TTR	143	342
Failure to Take Action on Application for Registration of Charitable Trusts within six months does not lead to automatic grant of registration	Manoj Gupta	TTR	143	192
Public charitable institutions to lose income-tax exemption-Delhi High Court ruling impliedly overruled	Gopal Nathani	ITR (Tribunal)	39	1
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Value Added Tax				
Rendering of Services in the Ocean of VAT …. Vanishing Island	P. C. Joshi	STR	62	18
Assessment of Developers under the Maharashtra VAT Act	Deepak K. Bapat	STR	62	28
Refunds under MVAT Act, 2002	G. G. Goyal & C. B. Thakar	BCAJ	47-A/Part 1	59
Lease vis-à-vis Service, Supremacy	G. G. Goyal & C. B. Thakar	BCAJ	47-A/Part 2	50

CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

MUTING OF EXPECTATIONS

May is traditionally considered as a sluggish month for the stock markets. Investors were not expecting the corporate results for the last quarter of the financial year 2014-15 to be good and skepticism had already built in their mindset. In anticipation, the share markets had retreated in the month of April. As negatives were already factored, even though the corporate results were muted, share markets in India suddenly improved towards the end of the month, on the expectation of a rate cut by Reserve Bank of India (RBI) in its policy announcement slated for 2nd June. A rate cut of a quarter per cent is announced by the RBI but it has fallen too short of market expectations; and as a result the share markets have tanked. On the back of sluggish results announced by many companies, the expectation for the near future is not very positive. Investors are taking cautious calls and the concern about the delayed onset of the monsoon is also playing as a spoiler. The concern of the Foreign Institutional Investors (FIIs) due to MAT demands has been put to ease by the Finance Minister to an extent and that is a positive for investments of FIIs in India. Though the FIIs have been net sellers of stocks in the month of May, the sales have been absorbed well by the Indian Institutional as well as retail investors. Increasing participation of retail investors is a great positive for Indian stock markets but as the process of rate cut is likely to remain slow due to risk of inflation; markets may remain range bound, especially if FIIs do not increase their patronage. Expected FED rate hike can be a negative trigger for Indian stock markets, but the concern is not only for India but even for rest of the world. As and when the hike comes, it will affect most of the global markets and more so, emerging economies like India.

The new Central Government has completed one year of its normal tenure. The Government came into power by giving lots of promises to the Indian public and such election promises are not easy to fulfil as many of them are wishes which cannot be fulfilled. Efforts have been made to expedite reforms but the process has not been smooth in absence of a majority in the Upper House for the ruling party. Though there are claims and counter claims about the achievements and failures of the ruling party, it appears that the expectations of the Indian public have run much ahead. As a result, there is some discontent brewing up in the public. Ease of doing business does not seem to have improved much and therefore, new investment is not forthcoming to the desired levels. Economy seems to be improving but the improvement is gradual. It is said that for the last quarter, India has grown faster than China but that need not make Indians complacent as much more can be and needs to be achieved. A lot is being done, but much more is required

to be done as well. If the reforms process is not implemented in the right earnest, the momentum gained due to the hype created over the last one year will not yield the required results. The times are quite opportune but whether the country can benefit from the same remains a big question. Though expectations are high from the Indian stock markets, large wealth can get created therein only if the Government policies are conducive to the businesses and their benefits percolate down adequately to the masses in India.

For the current fiscal year, the Government has planned front loading of its expenditure and a substantial part of it is expected to be capital in nature. The capex cycle in India had slowed down due to excess capacity and low demand. A boost in Government spending can change the story and improve the money supply in the economy. It may also give a fillip to consumption, which has been sagging and may continue to sag, if ensuing monsoon remains weak as predicted. The economic growth in the last quarter has been encouraging in spite of lower agricultural production; and the trend is likely to continue on the back of initiatives taken by the Government. However, the improvement is nowhere near to what was expected a year back. The pain of reality is not only pricking in the minds of the investors but also of the Indian think tank. What was promised was wishful thinking and what was expected was also not less than a miracle. The result is a mismatch of expectations and the relevant dissatisfaction created. Exuberance is over but hopes are not lost. The policies of the Government indicate sincerity, but the efforts may get lost in the maze of politics and the actual results may fail to fulfil the expectations. The Government may be able to improve its performance, if it can trust its subjects as much as it trusts its bureaucracy. Harsh laws are required to rein in the errants but if the laws are made too harsh, they can act as major disincentive to the investors and businessmen who create wealth. The threat of prosecution for commercial offences can be a major deterrent to the Indian businesses and the Government should remain mindful about that for all times to come.

The major stock markets across the globe remained flat during the last month. The positive and negative movements balanced each other and the net result was a small rise. In spite of a positive effect of the European Quantitative Easing, the effect of the uncertainty about FED rate hike looms large on most of the economies of the world resulting in a subdued trend. However, volatility will exist and traders will be able to make money, if they take correct calls. Appreciation of investments may come slowly, but considering the low return on deposits in the developed world, investors have limited options to deploy their savings. Therefore, reduction of asset allocation to equity does not seem to be a suitable option, in the absence of a very suitable asset class.

The global economy had a positive bias during the last month although quite a bit of mixed news came in. The US was positive and so was China on a few counts. However, the Quantitative Easing in Europe is yet to show results. Asia is sluggish and so is South America. The fears of a slowdown in China persist and India has not taken the expected momentum. Therefore, the expectations on the global economy remain muted. The overhang of the rate increase by the US remained a drag and will remain so in the near future. The rate has to go up and the regime of cheap money has to get over but when the event seems to be approaching, the sentiments get low. On the political front, the problem of fundamentalism persists, and in some areas of the world it is getting more critical. Any flare up in the same can cause a negative impact on global economic outlook. The efforts of mitigating the risk are not giving the required results.

Investment in real estate has become unattractive over a period, due to lack of appreciation in property prices in many parts of India. If the interest rate does not move down, the property

market will stagnate or at the most appreciate to the extent of increase in cost of construction. Currently, the demand for property is lower than the supply in most of the areas due to inadequate affordability. A sluggish economy and high cost of interest have kept the demand at bay. The outlook of this asset class may not improve unless the economy improves and interest rates start coming down. Therefore, in the near future, the property prices will inch up gradually and sudden fireworks are not expected. Many of the property developers are in financial stress and are offering discount for down payments. The investors may get reasonably good returns, if they book a property under construction with a smart negotiation and are able to dispose it at the stage of completion or immediately thereafter. Risk of under construction property being higher, the rate of return on such investments in absolute terms is good but risk adjusted returns may not be so great. The rental yields for residential property are quiet low. The rental yields of commercial properties, though reasonably high, are laden with the risk of oversupply which may result in loss of tenant, causing partial vacancy, resulting in lowering the effective yield.

The prices of gold remain range bound and there is no apparent reason for its appreciation, unless the Rupee weakens. The global prospects of gold prices are a bit bearish and therefore Indian investors may get gold at a cheaper price over the next few months. The drop may not be substantial but the appreciation, if any, may remain negligible. Even diamonds and precious stones may have a subdued demand and low appreciation, subject to Dollar movement.

In the month of May, the Rupee has depreciated slightly. Increase in petroleum prices and sluggish Indian exports are detrimental to the Rupee. Unless the exports pick up, the currency may ease over a period against the US Dollar and even against many other major currencies. If the inflation in India remains high, the depreciation will be high. Low inflation can reduce the easing of currency. Exports need to pick up but they are subject to Global demand, which in turn is subject to economic growth in various parts of the world. Indian Government has very limited influence on the same. The expected shortage of rainfall also causes a risk to food grain production in the country for the ensuing season and in an extreme case import of the same may be desirable, which can cause drain on the Foreign Exchange Reserve of the country resulting in weakening of Rupee. The volatility of the Indian currency will continue not only with respect to the US Dollar but with major currencies of the world. The only game changer can be foreign direct or portfolio investment.

Though there is a modest start, the rate cut cycle has begun in India. Though no aggressive cuts are expected, if inflation remains in control, economic activities can improve due to lowering of interest rates. There will be temporary lulls but the prospects of equity looks the best amongst all the asset classes. The volatility in Indian stock markets will continue and investors should either go with Systematic Investment Plan (SIP) or buy only on dips. The fixed deposit rates may start easing and investors need to take appropriate call on booking long term fixed deposits for getting good returns over a longer period. Bond yields may lower and consequently the bond prices may appreciate. This asset class is likely to give better returns than fixed deposits over the next one year. Last but not the least; investors need to keep an eye on the progress of monsoon as it can be a major factor affecting their investments.

CA Hinesh R. Doshi, Ajay Singh, *Advocate*
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th May, 2015 and 8th June, 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 2nd June, 2015.

LIFE MEMBERSHIP

1	Mr. Tambe Akshay Anil	CA	Mumbai
2	Mr. Rathore Yuvraj Singh Hanuman Singh	CA	Mumbai
3	Mr. Trivedi Natwarlal Deenanath	CA	Mumbai
4	Mr. Sharma Hitesh Vasudev	CA	Mumbai
5	Mr. Taparia Narendrakumar Ramjeevan	Advocate	Pali-Marwar (Rajasthan)
6	Mr. Bhatia Mahesh Madhavsinh	CA	Mumbai
7	Mr. Sanghavi Ankit Pankaj	CA	Mumbai
8	Mrs. Mehta Khushboo Jigar	CA	Mumbai
9	Mr. Mehta Jigar Mahesh	CA	Mumbai
10	Mr. Panjuani Janak Bhadrasen	CA	Mumbai
11	Mr. Panjuani Ankit Janak	B.Com	Mumbai
12	Mr. Gala Bhavin Sunil	CA	Mumbai
13	Mr. Mittal Gaurav Ak	CA	Ghaziabad (UP)
14	Mr. Khemka Amitabh Jaiprakash	CA	Mumbai
15	Mr. Hitesh R. Shah (Tr. Ord to Life)	CA	Mumbai

ORDINARY MEMBERSHIP

1	Mr. Salia Jayesh Kalyanji	CA	Mumbai
2	Mr. Rawal Radhakishan Suresh	CA	Mumbai
3	Mrs. Sangoi Kruti Vinit	CA	Mumbai
4	Mr. Shah Siddhant Nitin	CA	Mumbai
5	Mr. G. Jaishankar	CA	New Delhi
6	Mrs. Savla Niyati Satish	CA	Mumbai
7	Mr. Joshi Shyamkant Vasant	CA	Mumbai
8	Mr. Mittal Arvind Omprakash	Advocate	Janjgir-Naila (Chhattisgarh)
9	Mr. Sawale Rajendra Shriram	CA	Mumbai
10	Mr. Agarwal Madangopal	CA	Mumbai
11	Mr. Thakkar Prakah Dhanji	CA	Mumbai
12	Mr. Gopani Elesh Anubhai	CA	Mumbai
13	Mr. Gundewar Atul Ashok	CA	Mumbai
14	Mr. Prajapati Anil Jagjivan	CA	Mumbai
15	Mr. Sikka Ashok RD	Advocate	New Delhi
16	Mr. Shrivastav Rahul Dhirendra	CA	Gurgaon (Haryana)
17	Mr. Fulia Jitendra Damjibhai	ITP	Mumbai
18	Mr. Juthar Ashok Kumar Ratanlal	CA	Mumbai
19	Mr. Sheth Bharat Ishwarlal	CA	Mumbai
20	Mr. Maru Girish Devraj	CA	Mumbai
21	Mr. Bansal Akhil	CA	Mumbai
22	Mr. Mali Kisan Sadashiv	CA	Solapur

ASSOCIATE MEMBERSHIP

1	Nangia & Co.	Noida
2	J C Bhalia & Co.	New Delhi

STUDENT MEMBERSHIP

1	Ms. Kulkarni Nikita Dilip	Mumbai

II. PAST PROGRAMMES

Sr. No.	Committee/Programme Name / Venue	Date / Subjects	Chairman / Speakers
1.	**Allied Laws Committee**		
	Allied Laws Study Circle Meeting Venue : IMC	**8th June, 2015** Subject : Investing and Trading in Financial Markets with Technical Analysis – A Professional Approach	CA Manish Choksi
2.	**Corporate Members Committee**		
A.	**Study Course on Valuation** Venue : Babubhai Chinai Hall, IMC	**5th & 6th June, 2015** **Subject :** • Overview of Valuation Methods and other important points	CA Parag Ved
		• Case Study on Valuation	CA Pinkesh Billimoria
		• (1) Engagement Letter, Management Representation Letter and Valuation Reports	Mr. Tejas Marfatia
		(2) Important Judicial Decisions Concerning Valuation	CA Anup Shah
3.	**Indirect Taxes Committee**		
	The Workshop on MVAT Act, Service Tax & Allied Laws Venue : STPAM Library	**9th May, 2015** Subject: Issues in Branch Transfers, Sales in Transit and High Seas Sales under CST Act.	CA Rajat Talati
4.	**International Taxation Committee**		
A.	**Intensive Study Group on International Taxation** (Only for ISG DT Members) Venue: CTC Conference Room.	**19th May, 2015** Subject : MAT Provisions & Foreign Companies	CA Toral Shah CA Shreyas Shah
B.	**FEMA Study Circle Meeting** Venue : CTC Conference Room	**29th May, 2015** Subject: Foreign Direct Investments – Recent Developments and Issues	CA Darshana Jain

Sr. No.	Committee/Programme Name / Venue	Date / Subjects	Chairman / Speakers
5.	**Study Circle & Study Group Committee**		
	Study Circle Meeting Venue : 2nd Floor, Babubhai Chinai Committee Room, IMC	**12th May, 2015** Subject : ICDS relating to Revenue recognition, Valuation of inventories Construction Contracts	CA Sanjeev Pandit
6.	**Delhi Chapter**		
	Seminar on Structuring Inbound & Outbound Investments Venue : IIC, New Delhi	**9th May, 2015** • Case Studies on Structuring Inbound Investments – Tax, Regulatory and Allied Laws' • Tax litigation – Overseas cases – India perspective • 'Case Studies on Structuring Outbound Investments - Tax, Regulatory and Allied Laws' • Panel Discussion, and Q&A	CA Anup Shah, Mumbai CA V. Santhikumar **Moderator** CA Paras Savla **Panelists** CA A. N. Amithraj, PwC, Bangalore CA C. S. Mathur, Chairman, CTC, Delhi Chapter CA V. Santhikumar

III. FUTURE PROGRAMMES

Sr. No.	Committee/Programme Name/Venue	Date / Subjects	Chairman / Speakers
1.	**Corporate Members Committee**		
	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	Mr. Gautam Mirchandani Director, RBSA Advisor

Sr. No.	*Committee/Programme Name/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• Valedictory Address	CA Ravishu Shah CA Niraj Sanghvi (TCS) Mr. Tehmasp M. Rustamjee
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 43CA, ICDS, etc.) 9. Issues under income tax from the perspective of land owner/flat purchaser/seller (including sections-50C, 194-IA, 56(2), 54, 54F etc.)	Eminent Faculties

Sr. No.	*Committee/Programme Name/Venue*	*Date / Subjects*	*Chairman / Speakers*
B.	**Intensive Study Group on Direct Taxes** **(Only for ISG DT Members)** 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	**Workshop on MVAT Act, Service Tax & Allied Laws** (Jointly with AIFTP (WZ), BCAS, MCTC, STPAM & WIRC of ICAI)	**13th, 20th & 27th June, 2015** **4th & 11th July, 2015** • Issues in Definition of Services, Exempt & Declared Services. Issues in Valuation of Services, Abatement & Reverse Charge Mechanism • Issues in Refunds, Audits, Assessments under MVAT and CST Acts. • Issues in CENVAT Credit Rules under Service Tax • Constitutional amendments & Overview of GST Act Interstate Transactions under GST • Issues in Place of Provision of Service Rules, 2012 Issues in Point of Taxation Rules, 2011.	CA Sunil Gabhawalla CA Ashit Shah Mr. C. B. Thakar, Advocate CA Naresh Sheth Eminent Speaker Eminent Speaker CA Girish Raman CA Rajiv Luthia
B.	**Indirect Tax Study Circle Meeting** (Only for IDT SC Members) Venue: Babubhai Chinai Committee Room, 2nd Floor, IMC, Churchgate.	**15th June, 2015** Subject: Recent Amendments under MVAT, PT & Entry Tax.	Chairman : Mr. Dhaval Talati Group Leader: Mr. Dinesh Tambde, Advocate

Sr. No.	*Committee/Programme Name/Venue*	*Date / Subjects*	*Chairman / Speakers*
C.	**GST Study Group Meeting** (Only for GST SG Members) A. V. Room, Jaihind College, Churchgate	**23rd June, 2015** Subject: Overview of GST	CA Heetesh Veera
4.	**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
5.	**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. **Papers for Presentation** • BEPS and Exchange of Information – Global Developments & Government Initiatives	 CA Himanshu Parekh CA Paresh Parekh CA H. Padamchand Khincha Mr. Akhilesh Ranjan, Joint Secretary (FT & TR-I) & Mr. Rahul Navin, Director (FT & TR-III) **Chairman** – CA Dilip Thakkar

Sr. No.	*Committee/Programme Name/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• 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	**Paper Writer** – CA Bijal Ajinkya Mr. V. Sridharan, Senior Advocate
		Undisclosed foreign income and assets – Proposed legislation and Assessment experience	CA Dilip J. Thakkar
		Panel Discussion • Case studies on International Taxation & Transfer Pricing	**Chairman** – CA T. P. Ostwal **Panellists** – CA Anish Thacker & CA Sanjay Tolia
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;

Sr. No.	*Committee/Programme Name/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• **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.	Mr. Pravin Kumar, Director of Income-tax (International Taxation)-II, Mumbai; Mr Ajay Kumar Shrivastav, Director of Income-tax (International Taxation)-IV, Mumbai; CA. Dinesh Kanabar, Mr. Girish Dave, Advocate, Mr. Kanchun Kaushal and Mr. Sunil Lala, Advocate.
6	**Study Circle & Study Group Committee**		
A.	**Study Circle Meetings** (Only for Study Circle Members) Venue: 2nd Floor, Babubhai Chinai Committee Room, IMC.	**9th June, 2015 & 16th June, 2015** Subject : Income Computation & Disclosure Standards Nos. I & V to X.	CA Ravikant 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. 43CA & Some aspects of Sec. 50C of I. T. Act, 1961.	CA K. K. Chythanya, Advocate
C.	**Study Group Meeting** (Only for Study Group Members) Venue: 2nd Floor, Babubhai Chinai Committee Room, IMC.	**11th June, 2015** Subject : Recent Judgments under Direct Taxes	CA Gautam Nayak

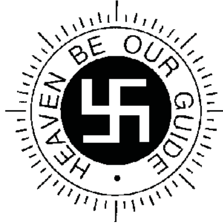
Sr. No.	*Committee/Programme Name/Venue*	*Date / Subjects*	*Chairman / Speakers*
7.	**Delhi Chapter**		
	Seminar on EPC Contracts Venue : Multipurpose Hall, Kamladevi Block, India International Centre, Max Mueller Marg, New Delhi.	**18th July, 2015** Subject : EPC Contracts (Direct Tax, Indirect Tax, Regulatory and other related issues)	Mr. V. Lakshmikumaran, Managing Partner of Lakshmikumaran & Sridharan's Mr. S. P. Singh, Senior Partner, Deloitte
8.	**CFO Roundtable & Networking Meet** Venue : Palladium Hotel, Lower Parel, Mumbai 400013	**26th June, 2015**	Chief Guest Shri Suresh Prabhu, Railway Minister & Eminent Faculties
9.	**88th Annual General Meeting**		
	Venue : Garware Clube House, Wankhede Stadium, D Road, Churchgate, Mumbai.	**3rd July, 2015**	

For Further details of the Future Events, kindly visit our website www.ctconline.org.

Obstacles are things a person sees when he takes his eyes off his goal.

Use all the brains that you have, but also all that you can borrow.

Intelligence without ambition is a bird without wings.



The Chamber of Tax Consultants

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre–eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting held on 12th May, 2015 on the subject "ICDS relating to Revenue recognition, ICDS relating to Valuation of inventories, ICDS relating to Construction contracts" at IMC.

CA Sanjeev Pandit addressing the members. Seen from L to R : CA Haresh Kenia, Member, CA Dilip Sanghvi, Vice Chairman, CA Ashok Sharma, Chairman, CA Paras K. Savla, President, CA Avinash Lalwani, Vice President and CA Dinesh R. Shah, Convenor.

INTERNATIONAL TAXATION COMMITTEE

Intensive Study Group on International Taxation held 19th May, 2015 on the subject "MAT Provisions & Foreign Companies" at CTC office.

CA Toral Shah & CA Shreyas Shah addressing the members.

FEMA Study Circle Meeting held on 29th May, 2015 on the subject "Foreign Direct Investments – Recent Developments and Issues" at CTC Office.

CA Darshana Jain addressing the members.

DELHI CHAPTER

Seminar on Structuring Inbound & Outbound Investments held on 9th May, 2015 at IIC, New Delhi.

CA Anup Shah addressing the delegates. Seen from L to R : CA C. S. Mathur, Chairman, Delhi Chapter, CA Paras K. Savla, President & CA Avinash Lalwani, Vice President.

CA V. Santhikumar addressing the delegates.

CA A. N. Amithraj addressing the delegates.

Section of delegates.

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